

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of :)	
)	
Lenfest Broadcasting, LLC)	
)	CSR-6248-M
v.)	
)	
Echostar Communications Corporation)	
)	
Request for Carriage of Station WMCN (TV))	
Atlantic City, New Jersey)	

MEMORANDUM OPINION AND ORDER

Adopted: March 5, 2004

Released: March 9, 2004

By the Chief, Media Bureau:

I. INTRODUCTION

1. Lenfest Broadcasting, LLC, licensee of digital television station WMCN (formerly WWAC), Channel 44, Atlantic City, New Jersey filed the above-captioned complaint against EchoStar Communications Corporation (“EchoStar”), for its refusal to maintain carriage of WMCN on its direct broadcast satellite system.¹ In its complaint, WMCN alleges that EchoStar has failed to meet its carriage obligations under the Commission’s satellite broadcast signal carriage rules.² Echostar filed an opposition to the complaint and WMCN filed a reply. For the reasons discussed below, we dismiss WMCN’s complaint against Echostar.

II. BACKGROUND

2. Section 338 of the Act, adopted as part of the Satellite Home Viewer Improvement Act of 1999 (“SHVIA”),³ requires satellite carriers, beginning January 1, 2002, to carry on request all local television broadcast stations’ signals in local markets in which the satellite carrier carries at least one local television broadcast signal pursuant to the statutory copyright license.⁴ For the initial election cycle,

¹ Lenfest captioned its pleading as a request for emergency relief and expedited action. However, it states that to the extent it is more appropriate to consider this pleading in the context of a carriage complaint it should be treated as such. Lenfest’s pleading will be treated as a carriage complaint.

² Under Section 76.66(m)(3) of the Commission’s rules, a local television broadcast station that disputes a response by a satellite carrier that it is in compliance with its must carry obligations may obtain review of such denial or response by filing a “complaint” with the Commission in accordance with Section 76.7. See 47 C.F.R. § 76.66(m)(3). See also *1998 Biennial Regulatory Review: Part 76 – Cable Television Service Pleading and Complaint Rules*, 14 FCC Rcd 418 (1999).

³ See Pub. L. No. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (Nov. 29, 1999).

⁴ See 47 U.S.C. § 338. See also 47 C.F.R. § 76.66. The U.S. Court of Appeals for the Fourth Circuit upheld the constitutionality of Section 338 of the Act, and Section 76.66 of the Commission’s rules. See *SBCA v. FCC*, 275 F.3d 337, 350 (4th Cir. 2002), cert. denied, 70 U.S.L.W. 3580 (U.S. June 17, 2002) (No. 01-1332).

broadcast stations were required to notify satellite carriers by July 1, 2001, of their mandatory carriage election for carriage to commence by January 1, 2002. A station's market for satellite carriage purposes is its DMA, as defined by Nielsen Media Research.⁵ In November 2000, the Commission adopted rules to implement the analog carriage provisions contained in Section 338.⁶ The Commission has requested comment on, but has not yet adopted, rules for the carriage of digital television signals by satellite carriers.⁷

3. In the *First Report and Order and Further Notice of Proposed Rulemaking* (“*DTV Order and FNPRM*”) the Commission adopted rules resolving a number of the technical and legal matters related to the cable carriage of digital broadcast signals.⁸ Significantly, the *DTV Order* established that a digital-only television station can assert its right to carriage on a cable system and that television stations that return their analog spectrum allocation to the Commission and convert to digital operations must be carried by cable television operators under Section 614(a) of the Act.⁹ The *DTV Order* also resolved a number of technical issues including providing guidelines for material degradation and good signal quality.¹⁰

4. In a companion proceeding, Guenter Marksteiner, licensee of television station WHDT-DT, Stuart, Florida, (Channel 59)(“WHDT-DT”) filed a Petition for Declaratory Ruling asking the Commission to declare that a new digital-only (“DTV”) television station that seeks carriage of a single channel of video programming on a cable system is entitled to mandatory cable carriage under Section 614 of the Act. In the *WHDT-DT Order*, the Commission concluded that, pursuant to Section 614(a), and as indicated in the *DTV Order* rulemaking proceeding, WHDT-DT was entitled to cable carriage of its digital broadcast signal within the West Palm Beach-Ft. Pierce television market.¹¹ In a ruling limited to cable operators, the Commission held that broadcasters initiating DTV-only service were entitled to mandatory carriage for their digital signals consistent with applicable statutory and regulatory

⁵ A DMA is a geographic area that describes each television market exclusive of others, based on measured viewing patterns. See 17 U.S.C. § 122(j)(2)(A)-(C); see also *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues; Retransmission Consent Issues*, 16 FCC Rcd 1918, 1934 (2000)(“*DBS Must Carry Report & Order*”); 47 C.F.R. § 76.66(e)(“A local market in the case of both commercial and noncommercial television broadcast stations is the designated market area in which a station is located, and (i) [i]n the case of a commercial television broadcast station, all commercial television broadcast stations licensed to a community within the same designated market area within the same local market; and (ii) [i]n the case of a noncommercial educational television broadcast station, the market includes any station that is licensed to a community within the same designated market area as the noncommercial educational television broadcast station.”).

⁶ See generally *DBS Must Carry Report & Order*, 16 FCC Rcd 1918. The Commission later affirmed and clarified its satellite carriage rules. See *Implementation of the Satellite Home Viewer Improvement Act of 1999; Broadcast Signal Carriage Issues*, 16 FCC Rcd 16544 (2001) (“*DBS Must Carry Reconsideration Order*”).

⁷ See *Carriage of Digital Television Broadcast Signals, First Report and Order and Further Notice of Proposed Rulemaking*, 16 FCC Rcd 2598, 2658 (2001). See also *DBS Carriage Report & Order*, 16 FCC Rcd at 1971-72 (stating that the Commission will consider digital broadcast signal carriage rules at the same time it considers such rules for cable operators).

⁸ See *Carriage of Digital Television Broadcast Signals, First Report and Order and Further Notice of Proposed Rulemaking*, 16 FCC Rcd 2598 (2001).

⁹ *Id.* at 2599.

¹⁰ *Id.* at 2617, 2627-31.

¹¹ *WHDT-TV-DT, Channel 59, Stuart, Florida: Petition for Declaratory Ruling that Digital Broadcast Stations have Mandatory Carriage Rights*, 16 FCC Rcd 2692 (2001)(“*WHDT-DT Order*”). Section 614(a) provides that “[e]ach cable operator shall carry, on the cable system of that operator, the signals of local commercial television stations ... as provided by this section.” 47 U.S.C. § 534(a).

provisions.¹² The Commission stated that WHDT-DT was entitled to make its cable carriage election in accordance with the provisions of Section 76.64(f)(4) of the Commission's rules. The Commission also held that carriage of digital-only television stations in a converted analog format did not impinge the free speech rights of cable operators. The issue of digital broadcast signal carriage by satellite carriers was not raised, considered, or addressed in the *WHDT-TV Order*.

5. Subsequently, WHDT-DT filed a complaint against EchoStar pursuant to Section 338 of the Act and Section 76.66 of the Commission's rules for EchoStar's refusal to carry the high definition digital television signal of WHDT-DT on its system, stating that it commenced over-the-air digital broadcast service and is entitled to satellite carriage.¹³ The Bureau stated that it was incumbent upon the Commission to implement the substance and scope of the Section 338 requirements and that such issues as material degradation limitations, good signal quality parameters, and the procedures for requesting and obtaining carriage must be decided before the digital signal carriage rights of television broadcast stations with regard to satellite carriers can be enforced.¹⁴ The Bureau therefore concluded that WHDT-DT's complaint was premature given the absence of rules relating to the satellite carriage of digital television signals.¹⁵

III. DISCUSSION

6. Lenfest states that EchoStar has carried WMCN's analog signal as part of its local-into-local service provided in the Philadelphia DMA.¹⁶ WMCN states that on December 13, 2002, it ceased broadcasting an analog signal and commenced broadcasting as a "digital-only" station.¹⁷ However, the station asserts that despite broadcasting in digital, WMCN continued to provide an analog version of its over-the-air signal to EchoStar via an existing analog fiber feed.¹⁸ WMCN maintains that in January 2003, it sent a letter to EchoStar advising that WMCN desired mandatory carriage of the station's signal in the Philadelphia DMA for the remainder of the current mandatory carriage election period ending December 31, 2005.¹⁹ According to WMCN, by letter dated January 15, 2003 to WMCN, EchoStar accepted the station's election for mandatory carriage, but subsequently, by letter dated January 17, 2003, EchoStar revoked its acceptance referencing the Bureau's decision in the *Marksteiner* order.²⁰

7. WMCN asserts that, notwithstanding the revocation, in later discussions, EchoStar indicated its intention to continue carrying WMCN provided the station continued to deliver its signal to EchoStar via the existing analog fiber feed and that EchoStar would provide notice to WMCN if it decided to drop carriage.²¹ WMCN argues that although the station continues to deliver an analog version of its over-the-air signal, EchoStar by letter dated October 8, 2003, notified WMCN of its intention to

¹²*WHDT-DT Order*, 16 FCC Rcd at 2698.

¹³ See *Guenter Marksteiner v. EchoStar Communications Corporation, Request for Carriage of Station, WHDT-DT, Stuart, Florida*, 18 FCC Rcd 396, 398 (MB 2003) ("*Marksteiner*").

¹⁴ *Id.* at 399.

¹⁵ *Id.*

¹⁶ WMCN Complaint at 1. See 17 U.S.C. § 122(a); 47 U.S.C. § 339. A satellite carrier provides "local-into-local" satellite service when it retransmits a local television signal back into the local market of that television station for reception by subscribers. 47 C.F.R. § 76.66(a)(6).

¹⁷ WMCN Complaint at 2.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

cease carriage of WMCN as of November 6, 2003.²² WMCN urged EchoStar to maintain the status quo and continue carriage of WMCN's signal, as to do otherwise would cause viewers in the Philadelphia DMA to lose a local television station upon which they have come to rely.²³ In addition, WMCN asserts that in contrast to the digital-only broadcaster in *Marksteiner*, it seeks only to maintain the existing carriage of WMCN.²⁴

8. In its Opposition, EchoStar argues that WMCN's complaint is untimely because it is filed beyond the 60-day window mandated by Section 76.66(m)(6).²⁵ EchoStar asserts that it informed WMCN on January 17, 2003, that it was denying its election of must carry for digital-only station WMCN and that if WMCN disagreed with EchoStar's rejection, WMCN had 60 days from January 17, 2003 to file the instant complaint.²⁶ In addition, EchoStar argues that the Bureau has not yet promulgated rules requiring carriage of digital-only stations by DBS providers and that the Bureau made this point clear in *Marksteiner*.²⁷ Moreover, EchoStar asserts that the fact that WMCN was previously carried as an analog station is of no consequence because the Commission could have expressly granted such stations digital carriage rights, but it did not do so.²⁸

9. In response to EchoStar's argument that WMCN's complaint is untimely, WMCN states that after receiving EchoStar's January 17, 2003, revocation regarding carriage of WMCN's digital-only signal it was constrained from filing a complaint because it believed that such a complaint would be dismissed as premature in light of the *Marksteiner* decision that digital-only stations lack rules relating to the satellite carriage of digital television signals.²⁹ Moreover, WMCN states that considering it was informed that EchoStar would continue to carry WMCN's analog feed, it had no practical reason to file a complaint.³⁰

10. Once WMCN ceased analog broadcasting and surrendered its license, it commenced operations as a single channel, digital-only television station. Notwithstanding EchoStar's voluntary carriage of WMCN's signal via the existing analog fiber feed, the fundamental fact is that WMCN transitioned to digital operations. The Commission has not yet promulgated rules relating to the satellite carriage of digital television signals. Indeed, WMCN acknowledged that it failed to file a complaint because it anticipated that its pleading would be dismissed as premature, as was the case in *Marksteiner*. Because there are no rules, the Bureau lacks the basis to act on WMCN's carriage complaint. WMCN's complaint is dismissed without prejudice and may be refiled, if necessary, after digital satellite carriage

²² *Id.* at 2-3.

²³ *Id.* at 3.

²⁴ *Id.* at 4.

²⁵ EchoStar Opposition at 3.

²⁶ *Id.*

²⁷ *Id.* at 3-4.

²⁸ *Id.* at 6.

²⁹ WMCN Reply at 2, n. 2.

³⁰ *Id.*

rules are adopted by the Commission. In light of this decision it is unnecessary to rule on EchoStar's argument that WMCN's complaint was untimely.

IV. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED**, that the carriage complaint filed by WMCN, Atlantic City, New Jersey, against EchoStar Communications Corporation, Inc. **IS DISMISSED** without prejudice.

12. This action is taken by the Chief, Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission's rules.³¹

FEDERAL COMMUNICATIONS COMMISSION

W. Kenneth Ferree
Chief, Media Bureau

³¹ 47 C.F.R. § 0.283.