

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

In the Matter of:)	
)	
Gray MidAmerica TV Licensee Corp.)	
v.)	CSR-6256-M
The Cable TV Company)	
)	
Request for Carriage)	

MEMORANDUM OPINION AND ORDER

Adopted: March 18, 2004

Released: March 24, 2004

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Gray MidAmerica TV Licensee Corp., licensee of television broadcast station KLBY (ABC, Ch. 4), Colby, Kansas (“KLBY”), filed the above-captioned complaint against The Cable TV Company (“Cable TV”), for its failure to carry KLBY on its cable system serving Benkelman, Nebraska. An opposition to this complaint was filed on behalf of Cable TV to which KLBY has replied. For the reasons discussed below, we deny the complaint.

II. DISCUSSION

2. Pursuant to Section 614 of the Communications Act and implementing rules adopted by the Commission in *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues (“Must Carry Order”)*, commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station’s market.¹ A station’s market for this purpose is its “designated market area,” or DMA, as defined by Nielsen Media Research.²

¹8 FCC Rcd 2965, 2976-2977 (1993).

²Section 614(h)(1)(C) of the Communications Act, as amended by the Telecommunications Act of 1996, provides that a station’s market shall be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns. *See* 47 U.S.C. § 534(h)(1)(C). Section 76.55(e) of the Commission’s rules requires that a commercial broadcast television station’s market be defined by Nielsen’s Media Research’s DMAs. *See* 47 C.F.R. § 76.55(e).

3. In support of its complaint, KLBY states that, by letter dated September 8, 2003, it requested carriage on Cable TV's system, pursuant to Section 76.61(a)(2) of the Commission's rules.³ KLBY states that Cable TV denied carriage, alleging that it was not required to carry KLBY because, pursuant to Section 76.56(b)(5) of the Commission's rules, another station affiliated with the ABC network is located closer to the cable system's principal headend than KLBY.⁴ KLBY argues that Cable TV's argument is an erroneous application of Section 76.56(b)(5) and its denial of carriage is contrary to law.

4. KLBY states that it is a qualified local commercial television station licensed to Colby, Kansas, which is located in the Wichita-Hutchinson, Kansas DMA as is Benkelman, the community served by Cable TV.⁵ KLBY states that Cable TV contends that because it currently carries ABC-affiliate KWNB-TV, Hayes Center, Nebraska, and it is closer to the cable system's principal headend, it need not carry KLBY.⁶ KLBY asserts that Cable TV's claim is contradicted by the Commission's rules themselves. Section 76.56(b)(5) provides that a cable operator is not required to "carry the signals of more than one local commercial television station affiliated with a particular broadcast network, as defined in Section 76.55(f)."⁷ Section 76.55(c) defines a "local commercial television station" as a full power television station that is located "within the same television market" as the cable system.⁸ KLBY points out that KWNB-TV is assigned to the North Platte, Nebraska DMA and therefore the network nonduplication rule is inapplicable.⁹ KLBY states that in *Nexstar Broadcasting Group, L.P. v. River Valley Cable TV*, the Commission found that, in a similar situation, the cable system in question was required to carry the signal of the local station requesting carriage.¹⁰ KLBY maintains that it is thus entitled to must carry on the Benkelman cable system and it agrees to be responsible for the cost of any equipment necessary to ensure the delivery of a good quality signal to the system's principal headend.¹¹

5. Cable TV argues in opposition that KLBY's complaint is procedurally defective in that it fails to discuss the various timing requirements of Section 76.64(f)(2) of the Commission's rules or KLBY's failure to make an election regarding its carriage by October 1, 2002, as required by the rules.¹² Cable TV states that KLBY's September 8, 2003 demand for carriage letter is untimely filed vis-à-vis the October 1, 2002 deadline and the complaint fails to discuss why KLBY's election was mailed nearly a year late. Even if the complaint were not defective, Cable TV maintains that KLBY does not present a persuasive justification for carriage. Cable TV states that its Benkelman cable system serves two communities – one, Benkelman (located in Dundey County) is where the headend is located and is in the Wichita-Hutchinson, Kansas DMA; the other, Wauneta (located in Chase County) is in the Lincoln-

³Complaint at Exhibit 1; *see also* 47 C.F.R. § 76.61(a)(2).

⁴*Id.* at Exhibit 2; *see also* 47 C.F.R. § 76.56(b)(5).

⁵Complaint at 2.

⁶*Id.* at 2-3.

⁷*Id.* at 3, citing 47 C.F.R. § 76.56(b)(5).

⁸*Id.*, citing 47 C.F.R. § 76.55(c).

⁹*Id.*

¹⁰13 FCC Rcd 1570 (1997) ("*Nexstar I*").

¹¹Complaint at 4.

¹²Opposition at 2; *see also* 47 C.F.R. § 76.64(f)(2).

Kearney, Nebraska DMA.¹³ Cable TV states that it has been carrying KWNB-TV, which is licensed to a community in the Lincoln-Kearney DMA, for approximately 21 years and that it is located closer to the cable system's headend than KLBY.¹⁴ Although KLBY relies on the decision in *Nexstar I* in support of its argument that the "local commercial television station" as defined must be within the same television market, Cable TV points out that KLBY fails to note that on reconsideration the Commission reversed that decision based on new information that demonstrated that the cable system in question covered communities in two markets and that the station carried was the closer of two duplicating network affiliates.¹⁵ Cable TV states that it therefore correctly determined, in full compliance with Section 76.56(b)(5) of the rules and the decision in *Nexstar II*, that it was not required to carry the more distant KLBY.

6. In reply, KLBY states that the election deadline specified in Section 76.64(f)(2) of the Commission's rules merely establishes the time in which a station may, at its option, notify a cable operator of its decision to elect either must carry or retransmission consent status.¹⁶ KLBY states that the decision to demand carriage is a completely separate process under Section 76.61(a) of the Commission's rules and may be made at any time during the election cycle.¹⁷ The only restriction on the filing of a must carry complaint is that it be filed within 60 days of a cable system's denial of carriage and because it did so, KLBY argues that its complaint was timely filed.¹⁸ KLBY argues further that Cable TV's refusal to carry KLBY because the system is in two markets and KWNB-TV is the closer of two ABC affiliates is neither a factually or legally sufficient basis to deny carriage. KLBY points out that in its *Must Carry Order*, the Commission explained that a cable system that straddles two DMAs must treat all stations located in both DMAs as "local" for must carry purposes "if the cable system is not able to alter its channel line-up on a community-by-community basis."¹⁹ KLBY states that although Cable TV claims that its Benkelman headend serves communities in two DMAs, it has not demonstrated that it lacks the technical capability to distribute different channel line-ups in the two communities.²⁰

7. We disagree with the arguments raised by KLBY and deny its complaint. Initially, with regard to procedural issues, we note that Cable TV is in error in its assumption that KLBY's demand for mandatory carriage was untimely filed in relation to the October 1, 2002 election deadline. As KLBY correctly points out, the election process is governed by Section 76.64(f)(2) of the Commission's rules and demands for carriage by Section 76.61(a) of the rules.²¹ Although television stations are required to

¹³Opposition at 2.

¹⁴*Id.* at 2-3. Cable TV states that respective distances for KWNB-TV and KLBY are 42.7 air miles and 52.7 air miles, respectively.

¹⁵*Id.* at 4, citing *Nexstar Broadcasting Group, L.P. v. River Valley Cable TV*, 13 FCC Rcd 18817 (1998) ("*Nexstar II*").

¹⁶Reply at 2, citing 47 C.F.R. § 76.64(f)(2). KLBY states that because it did not send an election letter to Cable TV it is considered to have elected must carry status by default, pursuant to Section 76.64(f)(3). See 47 C.F.R. § 76.64(f)(3).

¹⁷Reply at 2, citing 47 C.F.R. § 76.61(a).

¹⁸*Id.* at 3, citing 47 C.F.R. § 76.61(a)(5)(i).

¹⁹*Id.*, citing 8 FCC Rcd at 2976.

²⁰*Id.*

²¹47 C.F.R. §§ 76.64(f)(2) and 76.61(a).

make their election between must carry and retransmission consent known in writing to cable systems within their market by the required deadline, it should be noted that those stations that fail to do so are deemed to have elected must carry status by default for the relevant three-year period.²² KLBY, therefore, was well within its rights to request carriage on Cable TV's system at any time during the election cycle.

8. In the *Must Carry Order*, the Commission stated that in situations where a cable system serves communities that are located in more than one DMA, the cable operator must carry all of the local commercial television signals in both DMAs, subject to any required limitations on such things as channel capacity, substantial duplication or closest network affiliation.²³ Cable TV's system serves communities located in the Wichita-Hutchinson, Kansas DMA and the Lincoln-Kearney DMA and thus is required to carry stations from both markets. Cable TV has stated that at the time of KLBY's request for carriage it was carrying ABC affiliate, KWNB-TV, and had done so for more than 20 years. Cable TV's denial of KLBY's request was based on the fact that KWNB-TV was the closer of two network affiliates and it maintained that it was not obligated to carry KLBY pursuant to Section 76.56(b)(5) of the Commission's rules.²⁴ It also cited the Bureau's decision in *Nexstar II* in support.²⁵ KLBY argued that Cable TV had no legal basis to deny carriage, particularly as Cable TV did not prove that it lacked "the technical capability to distribute [a] different channel line-up" in that portion of the system serving the Lincoln-Kearney DMA. We disagree. The *Must Carry Order* states that if a cable operator of a system that straddle two markets is capable of segregating the channels provided to each community served, it "may offer different must-carry channel line-ups in different communities based on the locations of the particular communities in the respective [DMAs]."²⁶ Such a cable operator, however, is not required to segregate its system. Moreover, in *Nexstar II*, it was determined that cable systems in dual markets have the same rights as single market systems to choose between the closer of two duplicating network stations.²⁷ We find that that is the situation here and that Cable TV has the right, pursuant to Section 76.56(b)(5) of the Commission's rules, to choose to carry KWNB-TV, the closer of the two network affiliate stations.

²²See 47 C.F.R. § 76.64(f)(3).

²³8 FCC Rcd at 2975.

²⁴47 C.F.R. § 76.56(b)(5).

²⁵13 FCC Rcd 18817 (1998).

²⁶8 FCC Rcd at 2976.

²⁷See 13 FCC Rcd at 18820.

III. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED**, that the must carry complaint filed by Gray MidAmerica TV Licensee Corp. **IS DENIED** pursuant to Section 614(d)(3) of the Communications Act of 1934, as amended, 47 U.S.C. § 534.

10. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules.²⁸

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Deputy Chief, Policy Division
Media Bureau

²⁸47 C.F.R. § 0.283.