

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

In the Matter of:
TV 34, Inc.
Licensee of Television Station KWFT
Eureka Springs, Arkansas
v.
EchoStar Communications Corporation
Request for Mandatory Carriage of
Television Station KWFT(TV) Eureka
Springs, AR
CSR 6502-M

MEMORANDUM OPINION AND ORDER

Adopted: May 2, 2005

Released: May 3, 2005

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. TV 34, Inc., licensee of commercial television station KWFT TV Eureka Springs AR ("KWFT TV"), formerly KWBS TV, filed the above-captioned must carry complaint against EchoStar Communications Corporation (EchoStar), pursuant to Section 338 of the Communications Act of 1934, as amended (the "Act"), and Section 76.66 of the Commission's rules to require EchoStar to carry the station in the Ft. Smith-Fayetteville-Springdale, Rogers, Arkansas designated market area ("Ft. Smith DMA").

1 47 U.S.C. §338; 47 C.F.R. § 76.66; see Public Notice, Special Relief and Show Cause Petitions, Report No. 0130 dated January 10, 2005.

2 See 17 U.S.C. § 122(a); 47 U.S.C. § 338. 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).

3 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. 47 C.F.R. § 76.66(m)(3). Although styled a "complaint," a carriage complaint filed against a satellite carrier is treated by the Commission as a petition for special relief for purposes of the Commission's pleading requirements. See 1998

2. KWFT TV was originally assigned by Nielsen Media Research (Nielsen) to the Springfield, Missouri DMA but in the fall of 2004, Nielsen notified the station that its request to be reassigned to the Ft. Smith DMA had been granted.⁴ Nielsen stated that the reassignment would be effective as of the 2004-2005 television season, in September 2004.⁵ Subsequently on October 6, 2004 and October 19, 2004 the station sent letters to EchoStar electing mandatory carriage in the Ft. Smith DMA.⁶ EchoStar rejected the election and TV 34 filed this complaint. EchoStar filed an opposition and TV 34 filed a reply. For the reasons discussed below, we deny the complaint.

II. DISCUSSION

3. KWFT asserts that it is entitled to carriage by EchoStar because it is a qualified, non-duplicative television station assigned to the Ft. Smith market. EchoStar in response argues that the station's election letters were procedurally defective⁷ and that KWFT has no current carriage rights in the Ft. Smith market because there is no mechanism for an existing station to gain carriage in mid cycle.⁸

4. The issue here is whether or not the Commission's satellite broadcast signal carriage rules allow KWFT to make a carriage election based on a mid cycle change in its DMA assignment.⁹ We find that they do not. Unless a station fits the definition of a "new television station",¹⁰ and KWFT does not, the rules do not allow stations to assert new carriage rights in the middle of an election cycle.¹¹ In enacting the satellite carriage rules, the Commission stated that it would not require satellite carriers to make market changes every year but instead, markets should be updated triennially for each market cycle.¹² In addition, Section 338 does not provide for a market modification procedure for satellite carriers as Section 534 does for cable operators.¹³ Therefore, KWFT's market for purposes of satellite carriage is that to which it was assigned by Nielsen when the first election cycle commenced in 2002. The record shows that the

Biennial Regulatory Review: Part 76 – Cable Television Service Pleading and Complaint Rules, 14 FCC Rcd 418 (1999).

⁴ See Letter dated April 13, 2004, from Nielsen Media Research.

⁵ *Id.*

⁶ Complaint at 2.

⁷ EchoStar notes that the station cited the rule governing carriage by cable systems instead of satellite carriers. Opposition at 2.

⁸ Echo Star asserts that the only way a station can get carriage rights in the middle of an election cycle is to be a new station providing service in the market for the first time. EchoStar argues that KWFT does not fit the definition of a "new television station" set forth in Section 76.66(d)(3)(i) of the Commission's rules.

⁹ 47 C.F.R. §76.66. We do not reach issues raised by EchoStar about other procedural defects in KWFT's two attempts to elect mandatory carriage.

¹⁰ See 47 C.F.R. §76.66(d)(3).

¹¹ We note that stations can elect mandatory carriage in the middle of an election cycle if a satellite carrier launches new local-into-local service in their DMA. This is not the case in this situation as EchoStar began providing local-into-local service in the Ft. Smith DMA in late 2003.

¹² *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues*, 16 FCC Rcd 1918, 1936 (2000).

¹³ *Id.* at 1937; see also 47 U.S.C. §§338 and 534(h).

DMA assignment for KWFT for the first election cycle is Springfield, Missouri.¹⁴ The station's rights are thus for carriage in that DMA and not in the Ft. Smith market. Therefore, KWFT cannot claim a right to carriage in the Ft. Smith DMA during the current election cycle.

5. To the extent that KWFT's filing might be interpreted as a request for waiver, such a request is not appropriate in a complaint proceeding and can not be addressed here. We recognize that the issue of the station's correct market may arise in the next election cycle commencing January 1, 2006. Section 76.66(e)(i)(3) provides that the 2003-2004 Nielsen publications will control DMA designations for purposes of carriage election in this new cycle.¹⁵ Because KWFT's assignment to the Ft. Smith market became effective in September 2004, the 2003-2004 publications list the station in the Springfield, Missouri DMA. The 2004-2005 Nielsen publications list KWFT in the Ft. Smith market. Based on the 2003-2004 designation specified in our rules, the station would not be entitled to demand carriage rights in the Ft. Smith market until 2009. KWFT may elect mandatory carriage in the Springfield, Missouri DMA by requesting carriage no later than October 1, 2005.¹⁶ Alternatively, KWFT could file a waiver request to be considered eligible for mandatory carriage in the Ft. Smith market before KWFT is required to make a carriage election for the next cycle.¹⁷ As provided by the rules, KWFT must make this election by October 1, 2005 and must comply with all other requirements set out in Section 76.66.¹⁸

III. ORDERING CLAUSES

6. Accordingly, **IT IS ORDERED**, pursuant to Section 338 of the Communications Act, as amended, 47 U.S.C. § 338, and Section 76.66(d)(2)(ii) of the Commission's rules, 47 C.F.R. § 76.66(d)(2)(ii), that the carriage complaint filed by TV 34, Inc. on behalf of KWFT TV Eureka Springs, Arkansas **IS DENIED**. This action is taken by the Deputy Chief, Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission's rules, 47 C.F.R. § 0.283.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Media Bureau

¹⁴ Although the record is silent on whether KWFT previously elected carriage in the Springfield DMA, it would have had the right to do so at the time that EchoStar began providing local-into-local service in that DMA, provided it met the other criteria in our rules and followed the appropriate procedures.

¹⁵ 47 C.F.R. §76.66(e)(3).

¹⁶ 47 C.F.R. §76.66(c)(4).

¹⁷ We note that Section 338 (47 U.S.C. §338) does not specify particular editions of the Nielsen publications to be used in defining markets for satellite carriage purposes. See 47 U.S.C. §338(h)(3) (defining "local market" by reference to 17 U.S.C. §122(j)).

¹⁸ 47 C.F.R. §76.66. If KWFT's waiver request is pending at the time it must elect carriage, it may assert carriage rights in the Ft. Smith market, as well as the Springfield market, contingent on the outcome of its request.