

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

In the matter of )
)
KM Television of Jackson, LLC., and )
Commercial Television Broadcast Station ) CSR 6979-M
KBEO(TV), Jackson, Wyoming ) CSR 6980-M
)
Pocatello Channel 15, LLC, )
Permittee of Commercial Television Broadcast )
Station KPIF(TV), Pocatello, Idaho )
)
v. )
)
EchoStar Communications Corporation )
)
Requests for Mandatory Carriage )

MEMORANDUM OPINION AND ORDER

Adopted: May 11, 2006

Released: May 15, 2006

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. KM Television, licensee of commercial television station KBEO(TV), Jackson, WY ("KBEO") and Pocatello Channel 15, licensee of commercial television station KPIF(TV), Pocatello, ID ("KPIF") filed the above-captioned complaints<sup>1</sup> 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 signals of these two stations by satellite in the Idaho Falls-Pocatello, Idaho designated market area ("Pocatello DMA").<sup>2</sup> The stations assert that EchoStar is providing "local-into-local" satellite service pursuant to the statutory copyright license in the Pocatello DMA<sup>3</sup> and that EchoStar has failed to meet its associated mandatory carriage obligations under the Commission's rules in that market.<sup>4</sup> EchoStar has filed separate oppositions to the

<sup>1</sup> See Public Notice, Special Relief and Show Cause Petitions, Report No. 0130, dated January 10, 2005. The Commission has approved the assignment of KBEO's license to the licensee of KPIF, but that assignment has yet to be consummated. To avoid confusion, we refer to the complainants by their station's call letters.

<sup>2</sup> 47 U.S.C. §338; 47 C.F.R. § 76.66.

<sup>3</sup> 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).

<sup>4</sup> 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

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complaints and each station filed a reply. For the reasons discussed below, we grant KPIF's complaint and dismiss KBEO's complaint.

## II. BACKGROUND

### A. Statutory and Regulatory Background

2. Section 338 of the Communications Act, adopted as part of the Satellite Home Viewer Improvement Act of 1999,<sup>5</sup> requires satellite carriers, beginning January 1, 2002, to carry on request all 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.<sup>6</sup> Section 338 incorporates the definition of "local market" set forth in Section 122(j) of the Copyright Act.<sup>7</sup> Under Section 122(j), a "local market" means "the designated market area in which a station is located," and "the term 'designated market area' means a designated market area, as determined by Nielsen Media Research and published in the 1999-2000 Nielsen Station Index Directory and Nielsen Station Index United States Television Household estimates [collectively, 'Nielsen publications'] or any successor publication."<sup>8</sup> The Commission has adopted rules to implement the provisions contained in Section 338.<sup>9</sup>

3. Under the Commission's rules, each satellite carrier providing local-into-local service pursuant to the statutory copyright license is generally obligated to carry any qualified local television station in the particular DMA that made a timely election for mandatory carriage.<sup>10</sup> To determine the DMA in which a station is entitled to carriage during any given mandatory carriage election cycle, the Commission's rules direct satellite carriers to consult specific editions of the Nielsen publications, which define DMAs geographically and associate television stations with particular DMAs.<sup>11</sup> Ordinarily, a television station's DMA is determined by the location of its community-of-license. There are a number of circumstances, however, in which Nielsen assigns a station to a DMA in which its community of license is not physically located. Focusing on the three year carriage cycle at issue in this Petition, Section 76.66(e)(3) states that "[t]he 2003-2004 Nielsen Station Index Directory and Nielsen Station Index United States Television Household Estimates shall be used for the second retransmission consent-mandatory carriage election cycle commencing January 1, 2006 and ending December 31, 2008."<sup>12</sup> A television broadcast station that seeks to dispute the denial of carriage by a satellite carrier must file a complaint no "later than 60 days after [the] satellite carrier, either implicitly or explicitly, denies [the] television station's carriage request."<sup>13</sup>

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petition for special relief for purposes of the Commission's pleading requirements. See *TV 34, Inc. v. EchoStar Communications Corp.*, 20 FCC Rcd 8747 & n.3 (MB 2005).

<sup>5</sup> See Pub. L. No. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (Nov. 29, 1999).

<sup>6</sup> See 47 U.S.C. § 338; 17 U.S.C. § 122.

<sup>7</sup> 47 U.S.C. § 338(k)(3).

<sup>8</sup> 17 U.S.C. § 122(j)(A), (C).

<sup>9</sup> See generally *DBS Must Carry Report & Order*, 16 FCC Rcd at 1918. The Commission later affirmed and clarified its 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").

<sup>10</sup> See 47 C.F.R. § 76.66.

<sup>11</sup> See *id.*

<sup>12</sup> 47 C.F.R. § 76.66(e)(3).

<sup>13</sup> 47 C.F.R. § 76.66(m)(6).

### III. KPIF COMPLAINT

#### A. Factual and Procedural History

4. KPIF is licensed to Pocatello, Idaho, which is located in the Pocatello DMA. It first went on the air under program test authority in March 2004<sup>14</sup> and at present, KPIF is still broadcasting under program test authority. The Commission's Consolidated Database System (CDBS), however, has incorrectly listed the station as "CP Off Air." That listing has been corrected to reflect that the station is broadcasting under program test authority.<sup>15</sup>

5. KPIF first requested carriage rights from EchoStar on September 29, 2004.<sup>16</sup> EchoStar timely denied that carriage request on October 27, 2004, on the ground that the station "is not licensed as a full power analog television station pursuant to FCC rules."<sup>17</sup> KPIF did not file its must-carry complaint until February 25, 2005, well beyond the 60-day deadline set forth in Section 76.66(m)(6) of the Commission's rules.<sup>18</sup> After EchoStar noted in its Opposition that KPIF's must carry complaint was time-barred, KPIF voluntarily dismissed that complaint.<sup>19</sup>

6. A year later, on September 30, 2005, KPIF sent a second request to EchoStar seeking carriage of the station in the Pocatello DMA for the next three year carriage cycle commencing at the beginning of 2006.<sup>20</sup> On October 25, 2005, EchoStar sent a letter to KPIF rejecting the carriage election on the ground that the station was "not listed as a part of the Idaho Falls-Pocatello market in the 2003-2004" Nielsen publications.<sup>21</sup> After receiving EchoStar's rejection of its carriage election, KPIF timely filed the mandatory carriage complaint that is currently before us.

#### B. Discussion

7. EchoStar argues that its denial of KPIF's request for carriage in the Pocatello DMA is justified for two reasons. First, the station's license to cover had remained pending for two years and the station was listed on a Commission website as "CP Off Air."<sup>22</sup> Second, the 2003-2004 Nielsen publications did not list the station in the Pocatello DMA.<sup>23</sup> We find that, in the circumstances of this case, neither reason supports EchoStar's refusal to carry the station.

8. With respect to the status of KPIF's license and broadcast signal, the information that

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<sup>14</sup> KPIF Complaint at 1.

<sup>15</sup> See Consolidated Database System Station Search, available at [http://svartifoss2.fcc.gov/prod/cdb/pubacc/prod/sta\\_sear.htm](http://svartifoss2.fcc.gov/prod/cdb/pubacc/prod/sta_sear.htm) (last visited May 10, 2006).

<sup>16</sup> Unlike EchoStar, DirecTV does not provide local-into-local service in the Pocatello DMA and therefore has no obligation to carry either station in that market. Accordingly, neither KPIF nor KBEO asserted carriage rights against DirecTV.

<sup>17</sup> EchoStar Satellite LLC, Opposition to Carriage Complaint, CSR-6552-M (March 24, 2005) at 2, Exhibit 3 (Letter from Keely Goldberg, Echostar Satellite LLC General Manager, to Kevin Bae, Pocatello Channel 15, LLC Vice President and Secretary (October 27, 2004)).

<sup>18</sup> 47 C.F.R. § 76.66(m)(6).

<sup>19</sup> Request for Dismissal of Mandatory Carriage Complained, filed by KPIF (April 6, 2005).

<sup>20</sup> See KPIF Complaint at 3 & Exhibit B.

<sup>21</sup> KPIF Complaint at 3 & Exhibit C.

<sup>22</sup> Opposition to KPIF Complaint at 4.

<sup>23</sup> *Id.*

EchoStar relied on is incorrect. At all relevant times, KPIF was broadcasting pursuant to its program test authority.<sup>24</sup> As we have noted, stations operating pursuant to program test authority are entitled to exercise their mandatory carriage rights, notwithstanding the fact that the license to cover remains pending.<sup>25</sup> Accordingly, nothing about KPIF's license or broadcast signal entitles EchoStar to deny the station's carriage request. Although the Commission's Consolidated Database System (CDBS) incorrectly listed the station as "CP Off Air," KPIF's September 30, 2005 letter requesting carriage should reasonably have triggered further inquiry as to the status of the station.

9. We also conclude that KPIF's absence from the 2003-2004 Nielsen publications does not pose a barrier to carriage under the rules. Section 76.66(e)(3) states that the 2003-2004 Nielsen publications shall be used for the current carriage cycle.<sup>26</sup> That rule is intended to provide satellite carriers with a measure of certainty when different editions of the Nielsen publications offer conflicting market assignments.<sup>27</sup> Here, however, there is no uncertainty. The 2003-2004 Nielsen publications did not list KPIF in the Pocatello market or indeed in any DMA because KPIF did not go on the air until March, 2004, after the Nielsen publications were printed. KPIF, however, is licensed to Pocatello in the Idaho Falls-Pocatello market, the geographic boundaries of which are set forth in the Nielsen publications and EchoStar had already received direct notice that the station was licensed to Pocatello and in operation there.<sup>28</sup> Moreover, subsequent editions of the Nielsen publications, which were available in September 2005 when the request for carriage was received, assigned KPIF to the Pocatello DMA.<sup>29</sup> That assignment is entirely unsurprising in view of the fact that KPIF's community of license is Pocatello, Idaho.

10. EchoStar proposes a construction of Section 76.66(e)(3) under which KPIF's absence from the 2003-2004 Nielsen publications would bar the station from asserting carriage rights in any DMA until the next election cycle, beginning in 2009. That reading would effectively deny carriage rights to all new stations that failed to appear in the 2003-2004 Nielsen publications, notwithstanding the fact that Section 76.66(d) of our rules allows all new stations to assert carriage rights.<sup>30</sup> We decline to adopt an

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<sup>24</sup> See KPIF Reply at 8 & n.10; see also Application for Television Broadcast Station License, File No. BLCT-20040301AWJ (February 4, 2005) (noting that KPIF went on the air under program test authority on March 1, 2004).

<sup>25</sup> *Horizon Broadcasting Corp. v. Horizon Cable LLP, Request for Carriage*, 12 FCC Rcd 17360, 17362 (MB 1997). Although *Horizon Broadcasting* addressed carriage by cable operators under Section 76.61 of the Commission's rules, no principled reason supports a different result in the context of satellite carriage under Section 76.66. Because the Commission strives for parallel treatment of cable operators and satellite carriers wherever possible, we conclude that *Horizon Broadcasting's* finding with respect to stations broadcasting under program test authority applies with equal force to satellite carriage. See *DBS Must Carry Report and Order*, 16 FCC Rcd at 1935 (discussing the Commission's goal of establishing comparable requirements for satellite carriers and cable operators).

<sup>26</sup> 47 C.F.R. § 76.66(e)(3).

<sup>27</sup> See, e.g., *TV 34, Inc. v. EchoStar Communications Corp.*, 20 FCC Rcd 8747 (MB 2005) (concluding that, in the absence of a waiver, the 2003-2004 Nielsen publications would control a station's market assignment notwithstanding Nielsen later reassignment of the station to a different DMA).

<sup>28</sup> As noted above, KPIF had previously requested carriage on September 29, 2004.

<sup>29</sup> Nielsen Media Research, 2004-2005 Directory of TV Stations at 6; Nielsen Media Research, 2005-2006 Directory of TV Stations at 6.

<sup>30</sup> See 47 C.F.R. § 76.66(d)(3).

interpretation of Section 76.66(e) that would rob Section 76.66(d)(3) of any meaningful effect.<sup>31</sup> Moreover, such a reading of Section 76.66 is inconsistent with the Commission's goal of "providing satellite subscribers with a full complement of local station signals."<sup>32</sup> We also conclude that because carriage of the station is consistent with our rules, no waiver is necessary to establish KPIF's right to carriage in the Pocatello DMA.

#### IV. KBEO COMPLAINT

##### A. Factual and Procedural History

11. KBEO first went on the air in April 2001.<sup>33</sup> The station is licensed to the community of Jackson, Wyoming, which is also located in the Pocatello DMA. However, due to a power supply failure, the station has been off the air since August 28, 2005.<sup>34</sup> After receiving notice that the station had gone off the air, the Commission granted KBEO authority to remain silent until April 28, 2006.<sup>35</sup> On April 28, KBEO filed a second request to extend its special temporary authority to remain silent. That request is still pending.

12. In September 2005, KBEO sent a letter to EchoStar requesting carriage in the Pocatello DMA.<sup>36</sup> EchoStar rejected that request, noting that, as with KPIF, the 2003-2004 Nielsen publication did not list the station in the Pocatello DMA.<sup>37</sup> According to a February 2006 email from Nielsen, KBEO is assigned to the Pocatello DMA, but Nielsen did not list the station in its reference supplements because a Commission website reported the station as "Licensed and Silent."<sup>38</sup> KBEO has never appeared in the Nielsen publications. After receiving notice of EchoStar's rejection of its request for carriage, KBEO timely filed the complaint that is before us.

##### B. Discussion

13. KBEO's current status differs in two significant and related respects from that of KPIF. First, KBEO has been off the air since August 2005 and seeks authorization to remain silent until August 2006. When KBEO filed its reply to EchoStar's Opposition, the station was silent but offered the reassurance that it "fully expects to have the station back on the air before [April 28, 2006]."<sup>39</sup> By April 28, however, KBEO's optimism had waned and the station requested an extension until August 2006 of its special temporary authority to remain silent.<sup>40</sup>

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<sup>31</sup> See *AT&T Corp. v. FCC*, 292 F.3d 808, 812 (D.C. Cir. 2002) (holding that all parts of a statute are to be given effect); *Weinberger v. Hynson, Westcott & Dunning*, 412 U.S. 609, 633 (1973) (same); *Sekula v. FDIC*, 39 F.3d 448, 454-55 (3d Cir. 1994) (applying canon of construction to administrative regulations).

<sup>32</sup> *DBS Must Carry Report and Order*, 16 FCC Rcd at 1935.

<sup>33</sup> KBEO Complaint at 1.

<sup>34</sup> KBEO Reply at 4 & n.3.

<sup>35</sup> Letter from Clay C. Pendarvis, Federal Communications Commission, to KM Television of Jackson, LLC (November 17, 2005) (KBEO Reply, Exhibit C).

<sup>36</sup> KBEO Complaint at 3.

<sup>37</sup> See KBEO Complaint, Exhibit C.

<sup>38</sup> Email from Robbie Cruz, Nielsen, to Jeff Timmons, Counsel for KM Television of Jackson, LLC, February 27, 2006 (Exhibit A, attached to KBEO Reply).

<sup>39</sup> KBEO Reply at 8.

<sup>40</sup> File No. BLESTA-20060428AEQ

14. Second, although KBEO claims that it was broadcasting until August 2005, the station has never appeared in a Nielsen publication. In email correspondence, a Nielsen representative explained to KBEO that the station was “assigned to the Idaho Falls-Pocatello DMA but that the “station is not listed out in our reference supplements . . . because according to the FCC Website, KBEO is ‘licensed and silent.’”<sup>41</sup> Accordingly, it appears that Nielsen will not list the station until it has recommenced broadcasting.

15. We have never concluded that, in all circumstances, absence from the Nielsen publications operates as an absolute bar to carriage. However, as reflected in the structure of the rules and the Commission decisions adopting them, satellite carriers are entitled to a measure of certainty when allocating their satellite resources and arranging for broadcast signal carriage.<sup>42</sup> Here that certainty has been and remains entirely lacking. As KBEO notes, even assuming that the Commission extends the station’s authority to remain silent, KBEO will nonetheless lose its license if it fails to recommence broadcasting by August 28, 2006.<sup>43</sup> Although KBEO anticipates that it will commence broadcasting well before then, the station was equally confident that it would be broadcasting by April 28, 2006 and carriage cannot be ordered or commenced when the station is not operating. In the circumstances, we find that it would be improvident to grant KBEO’s complaint and requiring EchoStar to arrange for carriage of KBEO’s signal until it is settled that KBEO will indeed provide a signal to carry.

## V. ORDERING CLAUSES

16. Accordingly, **IT IS ORDERED**, pursuant to Section 338(f) of the Communications Act, as amended, 47 U.S.C. § 338(f), and Section 76.66(m)(5) of the Commission’s rules, 47 C.F.R. § 76.66(m)(5), that the carriage complaint filed by Pocatello Channel 15, LLC, on behalf of KPIF(TV), **IS GRANTED**. EchoStar shall commence carriage of the KPIF(TV) signal in the Pocatello DMA within 90 days of receiving a good quality signal from KPIF. **IT IS FURTHER ORDERED** that the carriage complaint filed by KM Television of Jackson, LLC, on behalf of KBEO(TV) **IS DISMISSED WITHOUT PREJUDICE**.

17. 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

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<sup>41</sup> KBEO Reply, Exhibit A.

<sup>42</sup> *Family Stations, Inc. v. DirecTV, Inc., Petition for Reconsideration*, 19 FCC Rcd 14777, 14779 (MB 2004).

<sup>43</sup> See File No. BLESTA-20060428AEQ, Exhibit 2.