

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

In the Matter of:)	
)	
Red Lion Broadcasting Company, Inc., licensee of)	
WGCB-TV, Red Lion, Pennsylvania)	CSR-8110-M
)	
v.)	
)	
DirecTV, Inc.)	

MEMORANDUM OPINION AND ORDER

Adopted: February 3, 2010

Released: February 3, 2010

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Red Lion Broadcasting Company, Inc., licensee of WGCB-TV, Red Lion, Pennsylvania (“WGCB”) filed the above captioned carriage complaint¹ against DirecTV, Inc. (“DirecTV”), pursuant to Sections 76.7 and 76.66(m)(3) of the Commission’s rules. WGCB alleged that due to the death of its General Manager, it failed to send a timely carriage election by the October 1, 2008 deadline for the 2009-2011 carriage election cycle. As a consequence of WGCB’s failure to meet this deadline, DirecTV refused to afford the station mandatory carriage on DirecTV’s direct broadcast satellite system serving the Harrisburg-Lancaster-Lebanon-York DMA. WGCB sought an exemption from its untimely election and requested that DirecTV reinstate the station on its satellite system on the basis of mandatory carriage. DirecTV opposed the complaint,² and WGCB has replied to that opposition.³ Because WGCB’s arguments essentially sought a waiver of our carriage election filing deadline, we requested that WGCB make the supplementary showing necessary to complete its waiver request.⁴ WGCB filed a supplement, to which DirecTV has responded and WGCB has replied.⁵ For the reasons stated below, we deny WGCB’s waiver request.

¹ Emergency Signal Carriage Complaint by Red Lion Broadcasting Company, Inc., filed Jan. 5, 2009 (hereinafter “WGCB Complaint”). Although WGCB’s pleading is 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 Biennial Regulatory Review: Part 76 - Cable Television Service Pleading and Complaint Rules*, 14 FCC Rcd 418 (1999).

² Opposition to Emergency Signal Carriage Complaint by DirecTV, Inc., filed Feb. 5, 2009 (“DirecTV Opposition”).

³ Reply to Opposition to Emergency Signal Carriage Complaint by Red Lion Broadcasting Company, Inc., filed Mar. 3, 2009 (“WGCB Reply”).

⁴ May 1, 2009 Letter from Steven Broeckaert, Senior Deputy Chief, Policy Division, Media Bureau, FCC to Christopher Imlay, Counsel to Red Lion Broadcasting Company (“Bureau Letter”).

⁵ Supplement to Emergency Signal Carriage Complaint and Request for Waiver by WGCB, filed May 19, 2009 (“WGCB Supplement”); Response to Supplement and Request for Waiver by DirecTV, filed May 29, 2009 (“DirecTV Response to Supplement”); Reply to Response to Supplement and Request for Waiver by WGCB, filed June 11, 2009 (“WGCB Reply to Response”).

II. BACKGROUND

2. Section 338 of the Communications Act, adopted as part of the Satellite Home Viewer Improvement Act of 1999 (SHVIA),⁶ required 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.⁷ In November 2000, the Commission adopted rules to implement the provisions contained in Section 338.⁸ Pursuant to these rules, television stations must request carriage, as required by SHVIA, by electing either retransmission consent or mandatory carriage with the satellite carrier serving their local market by October 1st of the year preceding each 3-year carriage election cycle. A station failing to make this election defaults to retransmission consent status.⁹ Stations must mail carriage elections in writing, return receipt requested, to a satellite carrier's principal place of business.¹⁰ A station's local market for satellite carriage purposes is its designated market area ("DMA"), assigned annually by Nielsen Media Research ("Nielsen").¹¹

3. Historically, WGCB has sought mandatory carriage on DirecTV's satellite system serving the Harrisburg-Lancaster-Lebanon-York DMA,¹² and was carried during the recent 2006-2008 carriage cycle.¹³ However, WGCB did not make a carriage election with DirecTV by the October 1, 2008

⁶ See Pub. L. No. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (Nov. 29, 1999).

⁷ See 47 U.S.C. § 338; 17 U.S.C. § 122.

⁸ See generally *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues; Retransmission Consent Issues*, 16 FCC Rcd 1918 (2000) ("DBS Must Carry Report & Order"). 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").

⁹ See 47 CFR § 76.66(c)(2) & (4); see also *DBS Must Carry Report & Order*, 16 FCC Rcd at 1929, ¶¶ 20-22 ("After satellite carriers commence carriage on January 1, 2002 ... the second election cycle, and all cycles thereafter, shall be for a period of three years (e.g. January 1, 2006 through December 31, 2008) ... In terms of procedure and timing for the second election cycle and all subsequent cycles, commercial television broadcast stations should make their election by October 1st for the election cycle beginning the following January 1st. Satellite carriers shall have 90 days prior to the new election cycle, beginning October 1st and ending December 31st, to negotiate retransmission consent agreements.... If a commercial television station does not make an election, it defaults to retransmission consent.").

¹⁰ See 47 CFR § 76.66(c)(4) & (d)(2); see also *DBS Must Carry Reconsideration Order*, 16 F.C.C.R. at 16578, ¶ 70 (2001); *Johnson Broadcasting of Dallas, Inc. v. DirecTV*, 17 FCC Rcd 886, 889-90, ¶¶ 10-11 (2002); *Family Stations, Inc. v. DirecTV*, 17 FCC Rcd 2365, 2370, ¶ 11 (2002), *aff'd* 19 FCC Rcd 14777 (2004).

¹¹ 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 *DBS Must Carry Report & Order*, 16 FCC Rcd at 1934; 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]n the case of a commercial television broadcast station, all commercial television broadcast stations licensed to a community within the same designated market area [are] 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.").

¹² Although WGCB was not carried in the 2003-2005 carriage cycle, Clyde Campbell of WGCB had sent a carriage election letter to DirecTV for that cycle as well. See DirecTV Response to Supplement at 3 & n.7 (citing Ex. B, Jul. 16, 2003 Letter from Clyde Campbell, Controller, WGCB, Red Lion Television, to DirecTV (with cc: Chris Imlay)).

¹³ WGCB sent a must-carry election letter to DirecTV on September 26, 2005. WGCB Complaint at 2; see also WGCB Supplement at 4; DirecTV Response to Supplement, Ex. C, Sep. 26, 2005 Letter from Christopher Imlay, Communications Counsel, Red Lion Broadcasting Company, Inc., to DirecTV ("*September 2005 Election Letter*"). WGCB Complaint at 2. In response to WGCB's *September 2005 Election Letter*, DirecTV submitted a letter

(continued...)

election deadline, for the 2009-2011 carriage cycle and consequently defaulted to retransmission consent status on DirecTV's system.¹⁴ DirecTV informed WGCB by letter on November 12, 2008 that it would be terminating carriage of WGCB on its local-into-local service as of January 1, 2009, citing WGCB's failure to submit any carriage election.¹⁵ Therefore, WGCB responded to DirecTV's *November 2008 Notice* on November 14, 2008 seeking reconsideration of DirecTV's position, and with this letter WGCB included an untimely must-carry election letter for the 2009-2011 carriage cycle.¹⁶ In support of its initial carriage complaint, WGCB had admitted that it did not mail a carriage-election letter by the October 1 election deadline, but WGCB argued that its election would have been timely filed but for the short illness and unexpected death of the President and General Manager of Red Lion Broadcasting Company, Inc., John H. Norris, on September 28, 2008.¹⁷ Because WGCB's argument was in the nature of a waiver request, we extended WGCB an additional opportunity to provide us with facts meeting our waiver standard.¹⁸

III. DISCUSSION

4. WGCB asks us to waive Section 76.66(c)(4) of the Commission's rules, which sets the October 1 mailing deadline for satellite carriage elections.¹⁹ In crafting the election deadlines for satellite carriage, the Commission "recognize[d] that carriers need some measure of control in configuring their satellite systems to meet their statutory obligations. Therefore, if an existing television station fails to request carriage by the established deadlines, it is not entitled to mandatory carriage under [Section] 338 [of the Act] for the duration of the election cycle."²⁰ The scarce nature of satellite carriage capacity also underscores the importance of adequate notice to satellite carriers.²¹ While the satellite carriage election

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agreement to WGCB, dated November 23, 2005, by which DirecTV set terms for WGCB's provision of a good quality signal to DirecTV's Local Receive Facility to facilitate commencement of carriage. See WGCB Complaint, Ex. A, Nov. 23, 2005 Letter from DirecTV to Christopher Imlay ("*2005 Signal Quality Agreement*"). This *2005 Signal Quality Agreement* was signed by John Norris as President and Owner. See *id.* DirecTV commenced carriage of WGCB on January 1, 2006.

¹⁴ WGCB Complaint at 3.

¹⁵ *Id.* at 3 & Ex. B, Nov. 12, 2008 Letter from DirecTV to John Norris, President & General Mgr., WGCB ("*November 2008 Notice*"). DirecTV subsequently ceased carriage of WGCB on or about January 1, 2009, and does not presently carry the station. WGCB Complaint at 3-4. In dropping WGCB, DirecTV asserts it was not discriminating against the station but simply managing its very scarce spectrum. DirecTV Opposition at 5-6.

¹⁶ WGCB Complaint at 3 and Ex. C, Nov. 14, 2008 Letter from Christopher Imlay, Communications Counsel, Red Lion Broadcasting Company, Inc. to DirecTV, with attached Nov. 14, 2008 Mandatory Carriage Election Letter by Christopher Imlay, Communications Counsel, Red Lion Broadcasting Company, Inc. to DirecTV (the letter stated it "constitutes notice to DirecTV of the election by our client of mandatory carriage of WGCB-TV's programming on DirecTV's Local-Into-Local service, commencing not later than the beginning of the next election cycle, January 1, 2009."). WGCB asserts DirecTV never responded to its November 14th correspondence and election letter, and subsequent inquiries about it went unanswered. WGCB Complaint at 3.

¹⁷ WGCB Complaint at 3.

¹⁸ See *supra* ¶ 1 & n.4., Bureau Letter.

¹⁹ Unlike a statutory provision, Section 76.64(c)(4) of our rules may be waived. See, e.g., *Family Stations, Inc. v. DirecTV*, 19 FCC Rcd at 14779-80, ¶¶ 6-7 (Media Bureau considered and rejected a request for waiver of Section 76.66(c)(5), which requires that a non-commercial television station must request carriage by July 1, 2001 for the first election cycle). The October 1st election deadline found in 76.66(c)(4) is also set by a Commission adopted rule. See *DBS Must Carry Report & Order*, 16 FCC Rcd at 1929, ¶ 21.

²⁰ *DBS Must Carry Report & Order*, 16 FCC Rcd at 1929, ¶ 22.

²¹ See *School Bd. of Broward Co. v. Echostar Comm. Corp.*, 21 FCC Rcd. 5809, 5815 ¶¶ 19-20 (2006).

deadline may be waived, when analyzing a request for a waiver of Commission rules or policies, agency rules are presumed valid, and “an applicant for waiver faces a high hurdle even at the starting gate.”²² A rule or policy may be waived where the particular facts make strict compliance inconsistent with the public interest.²³

5. We have previously acknowledged that applicants seeking waiver of Commission filing deadlines must demonstrate “unusual or compelling circumstances” which “contemplate[s] a showing that the untimely filing was caused by a calamity of a widespread nature that even the best of planning could not have avoided.”²⁴ The Commission has stated it would consider “clearly unforeseeable circumstances as grounds for waiver – such as a debilitating earthquake or a city-wide power outage which brings transportation to a halt.”²⁵ It no longer considers unusual or compelling, “requests for waiver based upon claims that copying machines, delivery services or even, in most cases, inclement weather or illness, was responsible for the tardy filing.”²⁶ Furthermore, the Commission requires a demonstration that “all reasonable steps were taken after the event which caused the delay to minimize or avoid further delay.”²⁷ In this instance, to qualify, the standard requires a petitioner to show that even with the best of planning, it could not have avoided missing a filing deadline as a result of the sudden illness or death; and second, that all reasonable steps were taken to minimize any delay resulting from these events.

6. WGCB asserts Mr. Norris was in complete and exclusive control of WGCB until his, incapacitating illness and death, and that he was the single person who would have handled the October 1 must carry election.²⁸ As a direct consequence, WGCB posits his death as the direct cause of WGCB’s having failed to meet the carriage election deadline. WGCB states it is a small, independent, locally owned and operated television station.²⁹ It states that Mr. Norris was “quite literally at the helm of the company until his death and was solely responsible for FCC compliance matters and all regulatory issues, with the assistance of [WGCB’s outside counsel] only insofar as he felt it necessary.... [and Mr. Norris] signed all agreements and significant documents himself.”³⁰ WGCB further states that Mr. Norris’ death at the age of 88 followed a short but severe illness that had started in early September, and which “caused him to be unable to attend to business affairs at his office during the middle weeks [of that month].”³¹

²² *WAIT Radio v. FCC*, 418 F.2d 1153, 1158 (D.C. Cir. 1969), *cert denied*, 409 U.S. 1027 (1972); *see also Family Stations*, 19 FCC Rcd at 14780, ¶ 7.

²³ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

²⁴ Public Notice (85-534), 58 RR2d 1706, 1707 (1985). In *Gannon Univ. Broad., Inc.*, the Commission acknowledged the applicability of this waiver standard to late filed election requests in the cable context. *Gannon Univ. Broad., Inc.*, 10 FCC Rcd 8619, 8620 & n.6 (1995). Such standards have equal applicability in the satellite context, because it is a general goal of the Commission to make the satellite carriage rules comparable and parallel to the cable carriage rules. *DBS Must Carry Reconsideration Order*, 16 FCC Rcd at 16578, ¶ 70 & n.223 (citing *Gannon* for the stringent deadline standard in the cable context).

²⁵ Public Notice (85-534), 58 RR2d at 1707.

²⁶ *Id.* The Commission explained that although this latter category of circumstances “may be unexpected, they are reasonably foreseeable and therefore applicants should allow enough time to meet cutoff deadlines to account for such unanticipated delays. In other words, in the future, applicants who wait until the eleventh hour to meet Commission deadlines will be held to assume the risk for almost all events which may occur to prevent timely filing. To minimize the risk, applicants should build into their schedules a reasonable margin of error in anticipation of circumstances which may cause delay.” *Id.*

²⁷ *Id.*

²⁸ WGCB Reply to Response at 2, 3.

²⁹ *See* WGCB Complaint at 4; WGCB Supplement at 3.

³⁰ WGCB Supplement at 3-4.

³¹ *Id.* at 3, 5.

WGCB asserts there was no one else charged with regulatory compliance matters at the station until Mr. Norris' death, at which point his wife, Anna L. Plourde-Norris took over that position with the assistance of the current Operations Manager, Mr. John Peeling.³² However, WGCB states that Mrs. Norris was not aware of the October 1, 2008 carriage election deadline.³³ WGCB also asserts "it was undoubtedly [Mr. Norris'] intention to send a timely must-carry notice to DirecTV as the result of the difficulty he had in getting DirecTV to carry [WGCB] in the first place, and because [he] was of the view that DirecTV did not intend to carry [WGCB] voluntarily. His schedule for the must-carry notice was similar to that in 2005: a few days prior to the October 1, 2008 election deadline."³⁴

7. In response, DirecTV questions the argument that Mr. Norris was indispensable to WGCB's operations and argues that other persons at WGCB were involved in the carriage election process and that between 2003 and the present, it dealt almost exclusively with parties other than Mr. Norris regarding WGCB's carriage issues.³⁵ Given that Mr. Norris became ill in early September, almost a month before a carriage election had to be made, DirecTV argues WGCB could have made arrangements to ensure that its elections were properly filed.³⁶

8. WGCB also argues that it took all reasonable steps after it missed the deadline to minimize or avoid further delay. It asserts that because Mr. Norris' death was unexpected - and its aftermath consumed with his funeral - "it was not possible for anyone associated with [WGCB] to address [the station's] regulatory obligations right away."³⁷

9. DirecTV argues in response that WGCB's conduct evinces it did not take "all reasonable steps" to minimize or avoid further delay.³⁸ It asserts that any number of arrangements could have ensured timely filing of WGCB's 2008 election, yet the station admittedly failed to realize it had missed the filing deadline and did not mail an election notice to DirecTV until November 14, 2008 - over a month after the carriage election deadline had passed and only in response to DirecTV's *November 2008 Notice* informing WGCB that it would not be carried.³⁹

10. We find that the circumstances relied upon by WGCB to excuse its failure to make a timely carriage election do not meet the waiver standard set out by the Commission. That standard indicates that illness or death of a station's principal is the type of circumstance that is reasonably foreseeable. Therefore, to obtain a waiver in such circumstances, a station must demonstrate that even with the best of planning it would have failed to meet the carriage election deadline. WGCB has failed to make this showing. Instead, according to its own declarations, WGCB relied solely on Mr. Norris to manage its election process. And it argues that as a direct result of Mr. Norris' illness and death, WGCB failed to submit an election letter by the Commission's October 1, 2008 deadline. WGCB was required to utilize the best of planning to ensure that this extremely important deadline was met. The station instead chose to rely solely on one person, with no plans or practices to ensure a timely carriage election in the event this one person was incapacitated. Accordingly, we cannot find that WGCB missed this deadline even with the best of planning. Additionally, WGCB has not demonstrated that it took all reasonable

³² *Id.* at 4.

³³ *Id.*

³⁴ *Id.* at 5.

³⁵ DirecTV Response to Supplement at 1, 3 & nn.6 & 7 (citing Ex. A, Declaration of Karen Griet, ¶¶ 2 & 3).

³⁶ DirecTV Response to Supplement at 2.

³⁷ WGCB Supplement at 5.

³⁸ DirecTV Response to Supplement at 4-5.

³⁹ DirecTV Response to Supplement at 2, 4 & n.16 (citing WGCB Supplement at 5).

steps to minimize or avoid further delay after it had missed the deadline. The station admits it failed to realize it had missed its filing deadline until so informed by DirecTV over a month after the deadline.

IV. CONCLUSION

11. We find that WGCB failed to make a timely election on DirecTV's satellite system for the 2009-2011 carriage cycle in the Harrisburg-Lancaster-Lebanon-York DMA, and WGCB has defaulted to retransmission consent with respect to that system. Furthermore, finding no circumstances justifying a waiver of our October 1st carriage election deadline, we cannot reinstate WGCB on DirecTV's satellite system on the basis of mandatory carriage for the duration of the 2009-2011 carriage cycle.⁴⁰

12. Finally, we note that our decision herein does not leave WGCB without recourse to carriage.⁴¹ By failing to timely elect must carry status, WGCB defaults to retransmission consent status.⁴² DirecTV is obligated by our rules to negotiate with WGCB for retransmission consent in good faith.⁴³ If DirecTV fails in its obligations, WGCB can file a good faith retransmission consent complaint with the Commission.⁴⁴

V. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED**, pursuant to Section 338(f) of the Communications Act, as amended, 47 U.S.C. § 338(f), and Section 76.7 of the Commission's rules, 47 C.F.R. § 76.7, that the carriage complaint and request for waiver filed by Red Lion Broadcasting Company, Inc., licensor of WGCB-TV, Red Lion, Pennsylvania, **ARE DENIED**.

14. 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

Steven A. Broecker
Senior Deputy Chief, Policy Division
Media Bureau

⁴⁰ Furthermore, as we noted in our Bureau Letter to WGCB, we found unpersuasive the station's argument that its *September 2005 Election Letter*, along with the terms of the *2005 Signal Quality Agreement*, were expansive enough to cover WGCB's carriage rights for both the 2006-2008 and the 2009-2011 election cycle. We note that WGCB has conceded its *September 2005 Election Letter* – the cause of the *2005 Signal Quality Agreement* – sought carriage only relative to the 2006-2008 carriage cycle. See WGCB Complaint at 2; see also DirecTV Opposition at 2-3. Furthermore, as we stated in our Bureau Letter, our precedent confirms that stations must make elections for each triennial carriage cycle. See *Mountain Broad. Corp. v. DirecTV*, 21 FCC Rcd 5094, 5097, ¶ 7 (2006).

⁴¹ We note that WGCB is carried on the DISH Network in the Harrisburg-Lancaster-Lebanon-York DMA. See Dish Network – Local Channels in Your Area, <http://www.dishnetwork.com/packages/local/default.aspx> (enter zip codes corresponding to areas in Harrisburg, Lancaster, Lebanon, or York, Pennsylvania – e.g., 17101, 17601, 17042, 17415) (last visited Jan. 15, 2010).

⁴² See *supra* n.9.

⁴³ See 47 C.F.R. § 76.65(a).

⁴⁴ See 47 C.F.R. § 76.65(c).