

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

In the Matter of)	
)	
Channel 20 TV Company)	
(KCDO-TV, Sterling, Colorado))	CSR-8238-M
)	
v.)	
)	
Bresnan Communications)	

MEMORANDUM OPINION AND ORDER

Adopted: March 4, 2010

Released: March 5, 2010

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

I. INTRODUCTION

1. Channel 20 TV Company (CTTC), licensee of television broadcast station KCDO-TV, Sterling, Colorado (KCDO),¹ filed the above-captioned complaint against Bresnan Communications (Bresnan). The complaint alleges a failure by Bresnan to meet its channel positioning obligations with regard to KCDO on the Bresnan system serving Sterling, Colorado, and seeks a Commission ruling that KCDO has the right to carriage on channel 3 on any Bresnan station in the Denver DMA to which it can deliver a good quality signal in the future.² No opposition to this petition was filed by Bresnan. An opposition was filed by Multimedia Holdings Corporation (MHC), licensee of television broadcast station KTVD, Denver, Colorado (KTVD).³ KTVD is currently carried on channel 3 on some or all of the Bresnan systems at issue in this case, including the Sterling system.⁴ CTTC has replied to the MHC opposition.⁵ For the reasons discussed below, we grant CTTC’s petition with regard to the Sterling system, and dismiss it without prejudice with regard to the other, unspecified, Bresnan systems.

¹ Sterling is in Logan County, CO, which Nielsen Media Research has placed in the Denver designated market area (DMA). See *infra* note 7.

² CTTC Channel Positioning Complaint, CSR-8238-M (Petition).

³ Opposition of Multimedia Holdings Corporation (Opposition).

⁴ Petition at 4.

⁵ Reply of CTTC (Reply).

II. BACKGROUND

2. Pursuant to Section 614 of the Communications Act, and implementing rules adopted by the Commission, a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market.⁶ A station's market for this purpose is its "designated market area," or DMA, as defined by Nielsen Media Research.⁷

3. The Commission has clarified that "broadcast stations may assert their carriage and channel positioning rights at any time so long as they have not elected retransmission consent."⁸ With respect to the channel number on which stations asserting must carry rights are to be carried, Section 614 of the Act and Section 76.57 of the Commission's rules provide commercial television stations with three statutory options.⁹ Pursuant to Section 76.57(a), a commercial broadcast station may elect to be carried on: (1) the channel number on which the station is broadcast over the air; (2) the channel number on which the station was carried on July 19, 1985; or, (3) the channel number on which the station was carried on January 1, 1992. The Act and the rules also provide that a broadcast station may be carried on any other channel number mutually agreed upon by the station and the cable operator.¹⁰ The Commission has clarified that these rules apply fully in the digital context.¹¹

4. CTTC station KCDO broadcasts on major channel number 3.¹² At one time, CTTC owned both KCDO and the Denver-based KTVD, which KCDO substantially duplicated. Because of the

⁶ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, MM Docket No. 92-259, Report and Order, 8 FCC Rcd 2965, 2976-2977 (1993).

⁷ Section 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 Media Research's DMAs. *See* 47 C.F.R. § 76.55(e).

⁸ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, MM Docket No. 92-259, Clarification Order, 8 FCC Rcd. 4142, 4144 (1993).

⁹ 47 U.S.C. § 534(b)(6); 47 C.F.R. § 76.57(a).

¹⁰ 47 U.S.C. § 534(b)(6); 47 C.F.R. § 76.57(d). A cable system operator must also carry a default must-carry commercial television station on its over-the-air channel number or its historic July 19, 1985 or January 1, 1992 channel number, but "in the event that none of these specified channel positions are available due to a channel positioning request from a commercial television station affirmatively asserting its must-carry rights or such a request from a qualified local noncommercial educational station, the cable operator shall place the signal of such television station on a channel of the cable system's choice, so long as that channel is included on the basic service tier." 47 C.F.R. § 76.57(f).

¹¹ *Carriage of Digital Television Broadcast Signals; Amendments to Part 76 of the Commission's Rules*, CS Docket No. 98-120, Declaratory Order, 23 FCC Rcd 14254 (2008) (*Carriage Election Order*).

¹² Petition at 1. The Program and System Information Protocol ("PSIP") contains metadata about both the program currently being aired and broadcast signal as a whole. One of the most important elements in the PSIP is the Major Channel Number ("MCN"), the channel "location" identified with a given station regardless of its over-the-air broadcast frequency. ATSC receivers (whether a TV set in a home or a receiver at a cable headend) can use this data to determine the information that will be displayed to viewers. Therefore, if the analog signal of a station was broadcast on channel 12, its digital signal will appear on channel 12 when tuned by an over-the-air viewer, even if the signal is being broadcast on a frequency corresponding to, for instance, channel 37. *See Program and System Information Protocol for Terrestrial Broadcast and Cable*, ATSC Document A/65 (Dec. 23, 1997).

substantial duplication, KCDO had no right to carriage, but CTTC had a retransmission agreement with Bresnan that included carriage of the KTVD signal on KCDO's over-the-air channel, 3.¹³ In 2006, however, CTTC sold KTVD to MHC, and KCDO ceased to substantially duplicate the KTVD signal.¹⁴

5. In September of 2008, CTTC sent a letter to the Bresnan corporate office indicating that it was electing must-carry for KCDO on all Bresnan systems in the Denver DMA for the 2009-2011 carriage cycle, and electing to have KCDO carried on its over-the-air channel, 3.¹⁵ Despite the breadth of the CTTC carriage election, the evidence in this case indicates that KCDO is currently only providing a good quality signal to the headend of the Bresnan system in KCDO's community of license, Sterling, CO.¹⁶ This system did begin carriage of KCDO, but on channel 14, rather than channel 3.¹⁷ In August of 2009, CTTC sent a written notification to Bresnan stating that the Sterling system was in violation of its obligation to carry KCDO on its over-the-air channel, and demanding that it be relocated to channel 3.¹⁸ Bresnan responded in September of 2009, declining to relocate KCDO on the grounds that it had a carriage agreement with KTVD which preceded KCDO's channel placement demand.¹⁹ MHC station KTVD currently broadcasts on major channel number 20, and is carried on Bresnan's Sterling system pursuant to a retransmission consent agreement.²⁰ That agreement is not part of the record of this case, but appears to provide for continued carriage of KTVD on channel 3, notwithstanding its major channel number.

6. Subsequent to Bresnan's denial, CTTC filed a timely complaint, asserting its right to have KCDO carried on its over-the-air channel number not only on the Sterling system, but also prospectively on all other Bresnan systems in the Denver DMA to which KCDO ultimately provides a good quality signal.²¹

III. DISCUSSION

7. In its August demand letter, CTTC observed that KTVD was being carried on channel 3 on at least some of the systems in question, but that KTVD was being carried only pursuant to a retransmission consent agreement. CTTC reiterated that KCDO, as a must-carry station, had elected carriage on its major channel number, 3, and cited the Commission's *Carriage Election Order* to explain that KCDO's major channel number constituted its over-the-air channel number for the purposes of Section 76.57.²² CTTC argued that, as a retransmission consent station, KTVD had no statutory right to placement on a specific channel, and could therefore not trump KCDO's exercise of its statutory right to

¹³ Petition at 3.

¹⁴ *Id.* at 4.

¹⁵ *Id.* at Exhibit C.

¹⁶ Reply at note 5. We note that KCDO's permanent tower is under construction. Upon completion, KCDO anticipates serving a much larger portion of the Denver DMA. Reply at 3.

¹⁷ Petition at 4.

¹⁸ *Id.* at Exhibit D.

¹⁹ *Id.* at Exhibit E.

²⁰ *Id.* at Exhibit F.

²¹ *See generally, id.*

²² *Id.* at Exhibit D.

carriage on its over-the-air channel number.²³ CTTC therefore demanded relocation of KCDO to channel 3.

8. Bresnan's September response denied CTTC's channel placement demand. Bresnan stated that CTVD's existing channel positioning agreement entitled it to continued carriage on channel 3, notwithstanding its status as a retransmission consent station. In support of its position, Bresnan cited the Commission's ruling in *Complaint of KX Acquisition, LP*, which stated in part that "a broadcast station which first asserts a valid claim to a channel position has a legal priority over all stations subsequently requesting that same channel position."²⁴

9. CTTC's subsequent Petition to the Commission observed that in both *KX Acquisition* and in *KVMD v. Comcast*, another case cited by Bresnan, the first-in-time station had elected must carry, rather than retransmission consent.²⁵ They argue that this distinction is essential, because stations that elect retransmission consent lose their carriage rights, including their right of channel placement.²⁶ Consequently, these stations lose their ability to make the kind of "valid claim" on a specific channel number that the Bureau contemplated in *KX Acquisition*.²⁷ Therefore, CTTC argues, KTVD has no statutory right to occupy channel 3, and simply being first-in-time to contract for carriage on that channel is insufficient to deprive KCDO of its statutory right to carriage on its over-the-air channel number.

10. In addition to its arguments regarding channel placement on the Sterling system, CTTC also states that once the KCDO facility is complete, it will deliver a good quality signal to other, unspecified, Bresnan systems in the Denver DMA. It states that KTVD has elected retransmission consent and is being carried on channel 3 in these other systems, just as in the Sterling system. In order to "avoid repetitive filings and the waste of Commission resources," CTTC asks the Commission to prospectively apply our ruling in this case to "all other cable systems operated by Bresnan and/or its affiliates within the Denver DMA where KCDO-TV is or becomes qualified for mandatory carriage."²⁸

11. Despite their earlier denial of CTTC's channel placement request, Bresnan did not file an opposition to the CTTC Petition. An opposition was filed by MHC, the operator of KTVD. As CTTC observes, MHC does not directly respond to CTTC's substantive legal arguments, instead focusing on procedural objections to the CTTC Petition.²⁹ First, MHC argues that the KCDO must-carry election letter was deficient because it was mailed to the Bresnan corporate office, rather than to each of the specific systems on which KCDO seeks carriage.³⁰ CTTC replies that Bresnan specifically provided its corporate address for receipt of election letters, and notes that MHC also sent election letters to an out-of-

²³ *Id.*

²⁴ *Id.* at Exhibit E.

²⁵ *Id.* at 7.

²⁶ *Id.* at 6.

²⁷ Reply at 3-4.

²⁸ Petition at 8.

²⁹ Reply at 2. MHC also focuses on the limited resources of KCDO and the efforts MHC has undertaken to publicize KTVD's position at channel 3. While concerns such as these have motivated our preference for the first-in-time station in channel election conflicts between must-carry stations, they are irrelevant where one of the stations in question has no statutory right to placement on a specific channel.

³⁰ Opposition at 4.

state Bresnan address, rather than to the individual systems directly.³¹ CTTC also notes that Bresnan did not object to the form of the notice, and as discussed above has begun carriage of KCDO on the Sterling system.³²

12. Secondly, MHC argues that KCDO does not even claim to deliver a good-quality signal to “the principal headend of any Bresnan system in the Denver DMA.”³³ On the contrary, however, CTTC’s petition states only that, until its full digital facility is constructed, KCDO does not provide a good quality signal to “the headend(s) of *other* Bresnan and Bresnan-affiliated cable systems.”³⁴ In the context of the complaint, it is clear that this refers to Bresnan systems “other” than the Sterling system on which KCDO is already being carried. MHC’s point is undisputed, however, in regard to those “other” Bresnan systems.

13. CTTC is correct that the properly asserted and validly claimed channel placement rights of a must-carry station trump the contractual agreement of a first-in-time retransmission consent station. Section 76.57(f) is explicit in stating that the only time a commercial station can prevent a must-carry station from exercising its channel positioning rights is if that first commercial station is itself “affirmatively asserting its must carry rights.” Not only has KTVD not asserted must carry rights in this case, it affirmatively waived them when electing retransmission consent. Furthermore, MHC has not demonstrated any defect in the mailing address of the KCDO channel placement election letter. And, given the statements of CTTC and the absence of any objection by Bresnan, the actual carriage of the KCDO signal on the Sterling system is ample proof that a good quality signal is being delivered to that system. For these reasons, we find ample cause to grant CTTC’s Petition for carriage on channel 3 in the Sterling system.

14. MHC is correct, however, that KCDO’s carriage rights in the Denver DMA, including its channel positioning rights, extend only so far as its good quality signal. Although CTTC indicates that construction of its digital facilities is proceeding apace, the station has submitted no evidence that KCDO delivers a good quality signal to any other system at this time. Challenges to carriage of KCDO on those systems are therefore not ripe for review. Thus, we dismiss, without prejudice, CTTC’s petition with respect to the other, unspecified, Bresnan or Bresnan-affiliated systems.

15. Although we decline to find that KCDO has a right to be placed on channel 3 on every Bresnan-affiliated system in the sprawling Denver DMA, its statutory channel placement rights as a must-carry station are clear. We anticipate that this added clarity will assist these parties in resolving future channel placement conflicts, thereby reducing the need for Commission action.

³¹ Reply at 5 and note 16.

³² *Id.* at 2, 3.

³³ Opposition at 4-5.

³⁴ Petition at 8 (emphasis added).

IV. ORDERING CLAUSES

16. Accordingly, **IT IS ORDERED** that the petition filed by Channel 20 TV Company, licensee of television broadcast station KCDO-TV, Sterling, Colorado, **IS GRANTED IN PART AND DISMISSED IN PART** pursuant to Section 614(d)(3) of the Communications Act of 1934, as amended, and section 76.57 of the Commission's rules, 47 U.S.C. § 534(d)(3); 47 C.F.R. § 76.57. Bresnan Communications **IS ORDERED** to reposition KCDO on Channel 3, the station's over-the-air channel number, on Bresnan's cable system serving Sterling, Colorado, within 60 days of the release date of this order.

17. These actions are taken pursuant to authority delegated by Section 0.283 of the Commission's rules.³⁵

FEDERAL COMMUNICATIONS COMMISSION

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³⁵47 C.F.R. § 0.283.