

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

In the Matter of	)	
	)	
Gray Television Licensee, LLC	)	CSR-8781-M
Licensee of Station KSNB-TV in Superior,	)	Docket No. 13-106
Nebraska	)	
	)	
v.	)	
	)	
Zito Media, L.P.	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 22, 2013**

**Released: July 23, 2013**

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

**I. INTRODUCTION**

1. Gray Television Licensee, LLC, (“Gray Television”), licensee of commercial broadcast television station KSNB-TV, channel 4, Superior, Nebraska (“KSNB”) filed the above captioned must carry complaint pursuant to Sections 76.7, 76.56, 76.57 and 76.61 of the Commission's rules,<sup>1</sup> seeking to ensure carriage of KSNB on cable systems operated by Zito Media, L.P. (“Zito Media”).<sup>2</sup> Zito Media filed an opposition to this complaint,<sup>3</sup> to which Gray Television filed a reply.<sup>4</sup> For the reasons discussed below, we grant Gray Television's complaint.

**II. BACKGROUND**

2. Pursuant to Section 614 of the Communications Act of 1934, as amended (the “Act”), and the implementing rules adopted by the Commission, commercial television broadcast stations, such as KSNB, are entitled to assert mandatory carriage rights on cable systems located within their market.<sup>5</sup> A station's market for this purpose is its designated market area, or DMA, as defined by the Nielsen Company.<sup>6</sup>

<sup>1</sup> 47 C.F.R. §§ 76.7, 76.56, 76.57 and 76.61(a)(1).

<sup>2</sup> See Complaint for Carriage by Gray Television Licensee, LLC (CSR-8781-M), filed Apr. 12, 2013 (“Complaint”).

<sup>3</sup> See Answer Letter to Complaint for Carriage by Zito Media, L.P. (CSR-8781-M), filed Apr. 20, 2013 (“Answer”).

<sup>4</sup> See Reply to Answer to Complaint for Carriage by Gray Television Licensee, LLC (CSR-8781-M), filed May 1, 2013 (“Reply”).

<sup>5</sup> See *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, 2975-77 ¶¶ 41-46 (1993) (“*Broadcast Signal Carriage Issues*”). The Commission has subsequently extended mandatory carriage rights to digital television stations under Section 614(a) of the Act and has amended its rules accordingly. See *Carriage of Digital Television Broadcast Signals First Report and Order*, CS Docket No. 98-120, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 2598, 2606 ¶¶ 15-16, 2610 ¶ 28 (2001) (“*First Report and Order*”); see also 47 C.F.R. § 76.64(f)(4).

<sup>6</sup> 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)(2) of the Commission's rules specifies that a commercial broadcast television station's market is its Designated Market Area as determined by Nielsen Media Research. 47 C.F.R. § 76.55(e)(2).

Television stations having mandatory carriage rights make their carriage elections at three year intervals for each cable system on which they wish to be carried.<sup>7</sup> A station failing to elect retransmission consent by the October 1st carriage election deadline prior to each three year carriage cycle defaults to must carry status.<sup>8</sup> 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.”<sup>9</sup>

3. Section 614 of the Act and Section 76.57 of the Commission's rules provide commercial television stations with three possible channel positioning options to which they may assert their rights. 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.<sup>10</sup> These options are available to stations that affirmatively assert their must-carry rights, as well as those that default to must carry.<sup>11</sup> In the event of a channel positioning conflict, the station that has made an affirmative election has priority over the station that has defaulted to must carry status.<sup>12</sup> If none of the statutory channel options are available due to another commercial television or noncommercial educational station's affirmative election of must-carry rights, a cable operator must place the signal on a channel of the cable system's choosing, so long as that channel is included on the basic service tier.<sup>13</sup> A broadcast station may also be carried on any other channel number mutually agreed upon by the station and the cable operator.<sup>14</sup>

4. Cable systems must carry the digital broadcast signal of a station entitled to mandatory carriage without downgrading the quality of its signal.<sup>15</sup> Therefore, broadcast channels delivered to cable systems in high definition (“HD”) must be carried in HD.<sup>16</sup> However, operators of small cable systems that have 2,500 or fewer subscribers and are not affiliated with a large cable operator, or have an activated channel capacity of 552 MHz or less are permitted, upon the granting of a waiver, to carry HD broadcast signals in standard definition (“SD”) digital or analog.<sup>17</sup>

<sup>7</sup> See 47 U.S.C. § 534; 47 C.F.R. § 76.56; 47 C.F.R. § 76.64(f)(2).

<sup>8</sup> 47 C.F.R. § 76.64(f)(3).

<sup>9</sup> *Broadcast Signal Carriage Issues*, 8 FCC Rcd at 4144 ¶ 15 (1993).

<sup>10</sup> See 47 C.F.R. § 76.57(a). In its 2008 Declaratory Order concerning the carriage of digital broadcast television signals, the Commission stated that for purposes of digital broadcasting channel positioning, a station's over-the-air broadcast channel number is no longer identified by reference to its over-the-air radio frequency, but instead to its Major Channel Number as carried in its PSIP. See *Carriage of Digital Television Broadcast Signal: Amendment to Part 76 of the Commission's Rules*, CS Docket No. 98-120, Declaratory Order, 23 FCC Rcd. 14254, 14258 ¶¶ 15-16 (2008).

<sup>11</sup> 47 C.F.R. § 76.57(f); *Implementation of the Cable Television Consumer Prot. & Competition Act of 1992*, 9 F.C.C.R. 6723, 6734 (1994) (“clarifying that the choice of statutorily defined position is made by the station, not by the cable system”).

<sup>12</sup> *Broadcast Signal Carriage Issues*, 9 FCC Rcd at 6734 (1994); see also 47 C.F.R. § 76.57(f).

<sup>13</sup> 47 C.F.R. § 76.57(f).

<sup>14</sup> See *id.* at § 76.57(d).

<sup>15</sup> *First Report and Order*, 16 FCC Rcd 2598, 2629-30 (“Consequently, in the context of mandatory carriage of digital broadcast signals, a cable operator may not provide a digital broadcast signal in a lesser format or lower resolution than that afforded to any digital programmer (e.g., non-broadcast cable programming, other broadcast digital program, etc.) carried on the cable system, provided, however, that a broadcast signal delivered in HDTV must be carried in HDTV.”).

<sup>16</sup> *Id.*

<sup>17</sup> *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, CS Docket 98-120, 27 FCC Rcd 6529, 6548 (2012) (“*Fifth Report and Order*”).

5. Pursuant to Section 76.61 of the Commission's rules, if a cable operator denies carriage of a broadcast station based on the failure of the station to deliver a good quality signal at the cable system's principal headend, the operator must provide a list of equipment used to make measurements, the point of measurement and a list and detailed description of the reception and over-the-air signal processing equipment used, including sketches such as block diagrams and a description of the methodology used for processing the signal at issue.<sup>18</sup>

6. Gray Television owns and operates KSNB, a full-power commercial television station licensed to operate on channel 4 in Superior, Nebraska and broadcasting in HD.<sup>19</sup> Nielsen Media Research has assigned the station to the Lincoln-Hastings-Kearney, Nebraska, DMA (the "Lincoln DMA"),<sup>20</sup> which encompasses the communities Zito Media serves.<sup>21</sup> The former licensee of KSNB, Colins Broadcasting Corporation ("Colins Broadcasting") did not elect retransmission consent or must carry for Zito Media cable systems located in the Lincoln DMA by the October 1, 2011 deadline for the current cycle.<sup>22</sup> Thus, under 76.64 of the Commission's rules, KSNB is deemed to have elected must carry for the 2012-2014 carriage cycle.<sup>23</sup> Colins Broadcasting sent a carriage demand to Zito Media on January 15, 2013, to which Zito Media failed to respond.<sup>24</sup> Gray Television, which acquired ownership of KSNB on February 25, 2013, filed a must carry complaint asking the Media Bureau to compel Zito Media to carry KSNB on its cable systems in the Lincoln DMA.<sup>25</sup>

7. In an answer to the Commission dated April 30, 2013, Zito Media denied all claims that it was violating the Commission's must carry rules in choosing not to retransmit KSNB on its cable systems.<sup>26</sup> Although Zito Media concedes that it receives KSNB's secondary multicast channel on several of its systems, the cable operator asserts that it cannot receive the primary KSNB channel's VHF signal at any of its headends.<sup>27</sup> The cable operator has offered to coordinate with Gray Television to test the station's VHF signal strength at each of its headends.<sup>28</sup> However, Zito Media failed to provide any of the technical information required for denying a carriage demand for failing to deliver a good quality signal under Section 76.61(a)(2) of our rules – in fact, it failed to respond at all.<sup>29</sup>

8. Gray Television's reply asserts that it has alternative means to deliver the station's programming, including through the use of translators or another station's multicast channel.<sup>30</sup> Additionally, Gray Television argues that given that its CBS affiliate, KOLN-TV, and its satellite, KGIN-TV, both rebroadcast KSNB's primary stream in HD on their multicast channels, it is almost certain that Zito Media also receives a good quality signal for KSNB. Accordingly, Gray Television requests that Zito Media launch KSNB on each of the cable operator's systems in either SD or analog format on

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<sup>18</sup> 47 C.F.R. § 76.61(a)(2).

<sup>19</sup> Complaint at 3 and n.11.

<sup>20</sup> *Id.* 3 and n.12.

<sup>21</sup> *Id.* at 3.

<sup>22</sup> *Id.* at 1.

<sup>23</sup> *See* 47 C.F.R. § 76.64(f)(3).

<sup>24</sup> Complaint at 2.

<sup>25</sup> *Id.*

<sup>26</sup> Answer at 1.

<sup>27</sup> *Id.* at 2.

<sup>28</sup> *Id.*

<sup>29</sup> *See* 47 C.F.R. § 76.61(a)(2).

<sup>30</sup> Complaint at 4; Reply at 2.

channel 4 and HD format on any system with greater than 2,500 subscribers and greater than 552 MHz capacity.<sup>31</sup>

#### IV. DISCUSSION

9. We grant Gray Television's petition and conclude that Zito Media is required to carry KSNB's programming in the Lincoln DMA, and that it should carry the station's signal in HD unless it qualifies for the exemption for small cable systems. Colins Broadcasting's January 15th letter was a proper must carry demand and this election carried over to Gray Television as the new owner of KSNB.<sup>32</sup> There appears to be no dispute that Gray Television and Zito Media serve the same local market and that Gray Television has default must carry rights with respect to Zito Media's systems. Zito Media failed to submit signal strength studies to support a showing that KSNB does not deliver a good quality signal to Zito Media's cable system headend. Moreover, Gray Television has offered to undertake efforts necessary to deliver a good quality signal, including purchasing and installing new equipment, using translators or delivering the signal via another station's multicast channel.<sup>33</sup>

10. We find that KSNB should be carried in HD on channel 4. Pursuant to Section 614 of the Act and Section 76.57 of the Commission's rules,<sup>34</sup> KSNB is currently broadcast over the air on channel 4, its virtual channel,<sup>35</sup> and it was historically carried on channel 4 on both July 19, 1985 and January 1, 1992.<sup>36</sup> Therefore, although KSNB did not elect to be on channel 4 and is a default must-carry station, no other station could have affirmatively invoked the right to appear on channel 4 under the options provided in Section 76.57(a) of our rules; and, nothing prevents KSNB from asserting its rights to channel 4 at this time.<sup>37</sup> Zito Media is given 45 days from the first date KSNB delivers a signal to its system's principal headend to comply with this mandate.<sup>38</sup>

#### V. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED** that pursuant to Section 614 of the Communications Act of 1934, as amended, 47 U.S.C. § 534, the must carry complaint filed by Gray Television Licensee, LLC, licensee of commercial broadcast television station KSNB, channel 4, Superior, Nebraska, seeking to ensure carriage of this station on cable systems operated by Zito Media, L.P. **IS GRANTED.**

12. **IT IS FURTHER ORDERED** that Zito Media, LLP **MUST COMMENCE CARRIAGE**

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<sup>31</sup> Reply at 3.

<sup>32</sup> In the cable carriage context, the Commission has consistently held that the change of ownership or programming of a station does not change its carriage status. See *Telefutura Fresno LLC v. Echostar Commc'ns Corp.*, 18 FCC Rcd 22940, 22943 ¶ 11 & n.26(MB 2003) (citing cases).

<sup>33</sup> Complaint at 4.

<sup>34</sup> 47 U.S.C. 614(6); 47 C.F.R. § 76.57(a).

<sup>35</sup> Reply at 1.

<sup>36</sup> See 47 C.F.R. § 76.57(a) & (f).

<sup>37</sup> See *Univision P'ship of NJ v. Comcast Cablevision of Danbury, Inc.*, 17 FCC Rcd 18327, 18327-28 ¶ 3 (MB 2002) (even a default must carry station may invoke its right to be carried on its over-the-air channel at any time); see also *Implementation of the Cable Television Consumer Prot. & Competition Act of 1992*, 9 F.C.C.R. 6723, 6734 ¶ 53 (1994) (clarifying that the choice of statutorily defined position is made by the station, not by the cable system).

<sup>38</sup> *Broadcast Signal Carriage Issues*, 8 FCC Rcd at 4144 ¶ 15 (1993). ("[W]e believe that it is appropriate to give cable operators up to 45 days to begin carriage of such station on its requested channel in order to allow the operator time to comply with these notification requirements.")

of KSNB in HD on channel 4 within 45 days of Gray Television Licensee, LLC's delivery of a good quality signal to Zito Media, L.P.'s relevant cable system headend and to Zito Media, L.P.'s subscribers receiving 30 days' notice concerning these service changes.

13. This action is taken under authority delegated by Section 0.283 of the Commission's rules.<sup>39</sup>

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broecker  
Senior Deputy Chief, Policy Division  
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<sup>39</sup> 47 C.F.R. § 0.283.