

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

In the Matter of
Minority Television Project, Inc.
Licensee of Noncommercial Television Station
KMTP, Channel *32
San Francisco, California
v.
DISH Network, L.L.C.
CSR-8946-M
MB Docket No. 17-313

ORDER ON RECONSIDERATION

Adopted: November 4, 2020

Released: November 5, 2020

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

I. INTRODUCTION

1. Minority Television Project, Inc., licensee of non-commercial television station KMTP-TV, Channel *32, San Francisco, California (KMTP) filed a Petition for Reconsideration pursuant to section 1.106 of the Commission's rules, seeking reconsideration of the Media Bureau (Bureau) Memorandum Opinion and Order denying KMTP's must carry complaint (Complaint) against DISH Network L.L.C. (DISH). The denial was based on a finding that KMTP's carriage election notice was improperly filed. DISH filed an Opposition to the Petition to which KMTP filed a Reply. For the reasons set forth below, we dismiss KMTP's Petition as moot.

1 See KMTP Petition for Reconsideration (filed Feb. 5, 2018) (Petition).

2 47 CFR § 1.106.

3 Minority Television Project, Inc. Licensee of Noncommercial Television Station KMTP, Channel *32, Memorandum Opinion and Order, DA 18-63, MB Docket No. 17-313, 33 FCC Rcd 216, 218-19, para. 6 (MB 2018) (Order).

4 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. See 47 CFR §§ 76.66(m)(3), 76.7. 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 Biennial Regulatory Review: Part 76 - Cable Television Service Pleading and Complaint Rules, 14 FCC Rcd 418 (1999).

5 Order, 33 FCC Rcd at 218-19, para. 6.

6 Opposition of DISH Network L.L.C. to Petition for Reconsideration (filed Feb. 15, 2018) (Opposition); Reply of Minority Television Project, Inc. to Opposition of DISH Network L.L.C. to Petition for Reconsideration (filed Feb. 20, 2018) (Reply). In addition, America's Public Television Stations (APTS) filed comments in support of KMTP's Petition. APTS Comments in Support of Petition for Reconsideration (filed Feb. 21, 2018) (APTS Comments).

II. BACKGROUND

2. Section 338 of the Communications Act of 1934, as amended, requires satellite providers upon request, to carry all local television broadcast stations' signals in local markets in which the satellite provider carries at least one local television broadcast signal pursuant to the statutory copyright license.⁷ Pursuant to the Commission's rules, television stations must request carriage by electing either retransmission consent or mandatory carriage with the satellite carrier serving their local market by October 1st of the year preceding each three-year carriage election cycle.⁸ A station failing to properly make this election with its satellite carrier defaults to retransmission consent status.⁹

3. KMTP sent DISH a timely letter electing mandatory carriage for the 2018-20 election cycle.¹⁰ The record established that the letter was sent by Priority Express Mail.¹¹ DISH received the letter but rejected KMTP's carriage election letter, arguing that because section 76.66 requires election notices to be sent by certified mail, return receipt requested, it was not a valid election.¹² KMTP argued that DISH's rejection of its election letter was wrongful because "Certified Mail is a lesser included service to Priority Express Mail," and its election was therefore compliant with section 76.66.¹³ It further pointed out that Priority Express Mail did not exist when section 76.66 was adopted, averring that DISH was "attempting to place form over substance by challenging the use of priority express mail."¹⁴ In response, DISH maintained that, because the explicit rule requirements were not followed, the election was not valid, and it was under no obligation to carry the station.¹⁵

4. The Order concluded that KMTP's letter included all of the information that is required by section 76.66(d)(1) of the Commission's rules.¹⁶ With respect to the type of service, at the time of the Order, section 76.66(d)(1)(ii) provided that "an election request made by a television station must be in writing and sent to the satellite carrier's principal place of business, *by certified mail, return receipt requested.*"¹⁷ Based on this language, the Order held that the Bureau need not decide whether Priority Express Mail is an equivalent or better service, as KMTP suggested.¹⁸ The Order concluded that the rejection was permissible under the Commission's rules because KMTP did not adhere to the Commission's clear and express procedural requirements regarding the manner in which carriage elections must be sent.¹⁹ Because KMTP failed to send its carriage election by the method required under

⁷ See 47 U.S.C. § 338; 17 U.S.C. § 122. This requirement is commonly referred to as "carry one, carry all."

⁸ 47 CFR § 76.66(c)(4).

⁹ See 47 CFR § 76.66(c)(2) & (4).

¹⁰ Letter dated Oct. 9, 2017, from Teresa Cain, DISH Programming Locals Operations, to Booker Wade, KMTP-TV (DISH Letter).

¹¹ Order, 33 FCC Rcd at 217, para. 3.

¹² *Id.* (citing DISH Letter).

¹³ *Id.* at 217-18, para. 3. KMTP also asserted that "Priority Express Mail is not only a functional equivalent of certified mail, it also a superior service in that it provides next day delivery and it is traceable." *Id.* at n.15.

¹⁴ *Id.* at 218, para. 3.

¹⁵ *Id.*

¹⁶ Order, 33 FCC Rcd at 217, para.3.

¹⁷ 47 CFR § 76.66(d)(1)(ii) (emphasis added).

¹⁸ Order at 3.

¹⁹ Order, 33 FCC Rcd at 218, para. 6.

the Commission's rules, KMTP's Complaint was denied.²⁰

5. KMTP's Petition presents four questions for reconsideration, all of which relate to the issue of whether KMTP's carriage election was sent by the method required under the Commission's rules.²¹ KMTP further argues that, because DISH acknowledged that it received KMTP's election, DISH was not prejudiced and should have carried KMTP's programming.²² DISH, in its Opposition, asserts that the Order was properly decided, as "[t]his dispute is not about whether KMTP's chosen mailing method worked this time. It is about the Commission's longstanding requirement that broadcasters use a specific method of mailing, and not any other when electing mandatory carriage."²³ DISH also disputes KMTP's assertion that DISH was not prejudiced by KMTP's use of Priority Mail, return receipt requested, because "if the Order were overturned, it would leave DISH and all other video providers subject to mandatory carriage rules in confusion over the relevant legal requirements."²⁴ In its Reply, KMTP reiterates the same points raised in its petition and protests that the Bureau's Order raises form over reality.²⁵

III. DISCUSSION

6. We dismiss the Petition as moot. First, because the Commission's must-carry and retransmission consent election rules have changed, we need not resolve this issue for future controversies.²⁶ In July 2019, the Commission modernized the carriage election notification process in the *Electronic Delivery of MVPD Communications* proceeding.²⁷ Under the new carriage election framework, broadcast stations are now required to make their carriage elections by uploading those elections to their online public files and, in the case of a changed or new election, also providing a separate electronic notice to any affected cable or satellite providers.²⁸ Such notices must now be sent via e-mail instead of certified mail.²⁹ Thus, the Commission's previous carriage election requirements, which

²⁰ *Id.*

²¹ Specifically, KMTP's Petition requests reconsideration of the following issues: (1) whether the Bureau's decision was based in part on a mistake of fact (*i.e.*, whether there was conclusive evidence in the record that the notice at issue was sent Priority Express Mail, return receipt requested); (2) whether the Bureau erred when it relied on the conclusion that "Section 76.66(d)(1)(ii) provides one specific mailing method for carriage elections: certified mail, return receipt requested"; (3) whether the Bureau erred in not taking into consideration the Commission's *Electronic Delivery of MVPD Communications* NPRM; and (4) whether the decision should be reconsidered and whether Minority Television Project should be granted the requested order for carriage of KMTP. KMTP asserts that each of these questions should be answered in the affirmative. Petition at 2-3.

²² *Id.* at 10-11.

²³ Opposition at 2-4 (asserting further that "KMTP does not dispute that it chose not to use certified mail, return receipt requested, when attempting to elect mandatory carriage with DISH").

²⁴ *Id.* at 5.

²⁵ Reply at 2-5. APTS in its comments argues that the Bureau should reconsider its Order and grant KMTP's complaint and summarizes its comments filed in the *Electronic Delivery Report and Order*. APTS Comments at 2-4.

²⁶ See 47 CFR § 76.66(d)(1)(iii).

²⁷ *Electronic Delivery of MVPD Communications; Modernization of Media Regulation Initiative*, MB Docket Nos. 17-105 and 17-317, Report and Order and Further Notice of Proposed Rulemaking, 34 FCC Rcd 5922 (2019) (*Electronic Delivery Report and Order*).

²⁸ *Id.* at 5927-28, para. 11. See 47 CFR §§ 76.64(k); 76.64(f); 76.66(d).

²⁹ 47 CFR § 76.66(d)(1)(iii) ("A station shall send a notice of its election to a satellite carrier only if changing its election with respect to one or more of the markets served by that carrier. Such notice shall be sent to the email address provided by the satellite carrier and carbon copied to ElectionNotices@FCC.gov.").

were the basis of the Petition, no longer exist under the Commission's new rules.³⁰

7. Second, because the election cycle at issue in this proceeding has now passed, this is no longer a live controversy. Carriage elections and change notices for the current election cycle were due by October 1, 2020 and required the use of the new election procedures adopted in the *Electronic Delivery Report and Order*.³¹ KMTP timely filed its mandatory carriage request under the revised procedures and will be carried by DISH commencing with the new carriage cycle in January 2021.³² Accordingly, we dismiss the Petition as moot.

IV. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED** that the Petition for Reconsideration filed by Minority Television Project, Inc., licensee of non-commercial television station KMTP-TV, Channel *32, San Francisco, California **IS DISMISSED AS MOOT**.

9. This action is taken pursuant to authority delegated by section 0.283 of the Commission's rules.³³

FEDERAL COMMUNICATIONS COMMISSION

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

³⁰ See generally *Electronic Delivery Report and Order*.

³¹ Under the new rules, the Commission "will require each NCE station to make a request for DBS carriage via the placement of a carriage election statement into its public file no later than the next carriage election deadline of October 1, 2020." *Electronic Delivery Report and Order*, 34 FCC Rcd at 5928-29, para. 15-16. "New requests for carriage by NCE stations must be sent to an MVPD's 'carriage election-specific' email address and retained in the station's public file 'for the duration of any period to which the request applies.'" *Id.* at n.70.

³² KMTP uploaded a timely mandatory carriage request to its online public file on Sept. 29, 2020. See <https://publicfiles.fcc.gov/tv-profile/kmtp-tv/must-carry-or-retransmission-consent/ab161198-d412-c0c9-5bc2-7b13c296447b/>.

³³ 47 CFR § 0.283.