

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

In the Matter of:)	
)	
Golden Orange Broadcasting Co. v.)	
AT&T Broadband)	CSR-5844-M
)	
Channel Positioning Complaint)	

MEMORANDUM OPINION AND ORDER

Adopted: March 17, 2003

Released: March 19, 2003

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Golden Orange Broadcasting Co., licensee of Television Broadcast Station KDOC-TV, Anaheim, California (“KDOC”), filed the above-captioned complaint against AT&T Broadband (“AT&T”) for its failure to carry KDOC at channel position 56 or a “mutually-agreeable channel” on AT&T’s cable system serving the communities of Newhall, Santa Clarita, Saugus and Valencia, California (the “Newhall system”).¹ An opposition was filed on behalf of AT&T to which KDOC replied. In response to a Commission request for additional information, AT&T filed a supplement to which KDOC replied.

II. BACKGROUND

2. Pursuant to Section 614 of the Communications Act of 1934 (“Act”), as amended, and implementing rules adopted by the Commission in *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, (“*Must Carry Order*”),² commercial television broadcast stations are entitled to assert mandatory carriage rights, including certain mandatory channel position rights, on cable systems located within the station’s market.

3. With respect to the channel number on which stations asserting must carry rights are to be carried, Section 614(b)(6) of the Act³ and Section 76.57 of the Commission’s rules provide commercial

¹ KDOC filed its complaint against AT&T for mandatory carriage and channel position on the Newhall system. AT&T acknowledges in its opposition that KDOC is entitled to carriage. A May 31, 2002 letter filed by counsel for AT&T confirms that KDOC has been carried on the Newhall system on cable channel 42 since April 30, 2002. Accordingly, this proceeding will address KDOC’s complaint for channel position 56 on the Newhall system.

² 8 FCC Rcd 2965, 2976-2977 (1993).

³ The legislative history of the 1992 Cable Act is replete with references concerning the need for channel positioning requirements. *See, e.g.*, Conf. Rep. No. 102-862, 102d Cong. 2d Sess. (1992) at 75 (“The conferees find that the must carry and channel positioning provisions in the bill are the only means to protect the federal system of
(continued...)”)

television stations with three channel positioning options.⁴ The 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, 1992.⁵ 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.⁶

4. The Commission has found that inconvenience, marketing problems, the need to reconfigure the basic tier, the need to employ additional traps, or the need to make technical changes are not sufficient reasons for denying the channel positioning request of a qualified television station.⁷ Only where placement of a signal on a chosen channel results in interference or degraded signal quality to the television station or an adjacent channel, or causes a substantial technical or signal security problem, did the Commission permit cable operators to carry a broadcast signal on a channel not chosen by the station.⁸ The Commission recognized that most systems were able to configure their basic service tier to fulfill this requirement.⁹ The Commission provided, however, that a cable operator claiming that it cannot meet a channel positioning request for technical reasons would have to provide evidence clearly demonstrating that it cannot meet its obligation.¹⁰

III. DISCUSSION

5. In support of its request, KDOC states that it is entitled to carriage on the Newhall system on its over-the-air channel, Channel 56, but that the station is “willing to work with AT&T...to arrive at a mutually-agreeable channel for carriage.”¹¹ In opposition, AT&T states that KDOC’s request for carriage on cable channel 56 would impose technical difficulties and significant costs upon the system and its subscribers. AT&T contends that a portion of its initial costs and subsequent yearly expenses would result from license fees paid to two providers of cable network programming, and requests that the Commission not reveal the amount of these expenses.¹² KDOC argues that AT&T cannot rely upon

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television allocations, and to promote competition in local markets.”) and H.R. Rep. No. 102-628, 102d Cong. 2d Sess. (1992) at 55 (“Channel position is important in ensuring the success of a signal carried on a cable system.”)

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

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

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

⁷ *Must Carry Order*, 8 FCC Rcd at 2988.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* As part of such a showing, a cable operator must present evidence as to the costs involved in remedying the technical problem. *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd 6723, 6735 (1994) (“*Must Carry Recon.*”); see also *Greater Dayton Public Television*, 10 FCC Rcd 1048 (1995) and *KDTV License Partnership*, 13 FCC Rcd 10331 (1998).

¹¹ Complaint at Attachment 1.

¹² AT&T has filed a redacted version of its complaint, which omits programming license fees. AT&T contends that if channel 56 is made available on the basic service tier by use of the necessary trap, basic cable subscribers will receive channels 55 (CNN) and 57 (Fox Sports Net) without subscribing to the expanded tier. Since programming fees for these services are calculated on a per-subscriber basis, AT&T states that it will be required to pay additional sums on an annual basis due to the increased number of subscribers receiving the services as a result of the
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information not made available to the public in a Commission proceeding that determines where the public interest lies. KDOC contends that such costs are collateral and relate solely to AT&T's contractual commitments and not to the direct costs of placing the station on channel 56. In support, KDOC argues that the Commission has stated that prior contractual commitments, including channel positioning commitments made in cable network affiliation agreements, do not constitute an excuse for noncompliance with a station's channel positioning rights under Section 614(b)(6). We agree. The Commission has stated that provisions of the 1992 Cable Act supercede any contractual commitments entered into between cable operators and programmers with respect to channel positioning.¹³ In addition, expenses incurred by AT&T are relevant to channel positioning only as they relate to curing a technical difficulty.¹⁴ As such, increased programming costs cannot be taken into account in this matter.

6. AT&T states that the least expensive solution to accommodate the station's request for carriage on channel 56 is to replace the system's existing deletion traps so that basic-only subscribers do not receive expanded programming tier service while having the ability to view KDOC on channel 56.¹⁵ AT&T contends that these "window" traps¹⁶ will double the insertion loss of the existing traps, from 2 dB to 4 dB, and will "adversely effect" the system's ability to meet the Commission's requirement that operators have a minimum of 0 dB at the subscriber's terminal.¹⁷ AT&T continues that subscribers with multiple sets "could have" degraded picture quality.¹⁸ AT&T also argues that it is "highly likely" that analog services, high speed data, telephony and DTV products will be "adversely affected."¹⁹ Finally, AT&T contends that KDOC's signal will suffer a 6 dB loss, resulting in a poorly received carrier and reduced carrier to noise in homes with more than one television set.²⁰

7. We are not persuaded by AT&T's contentions regarding signal degradation. Although the new trap might introduce some degradation, AT&T provides us with no specific information regarding the trap in question or the engineering of its system. We therefore cannot determine whether introduction of the "window" traps will cause AT&T to fail to meet the Commission's requirement as set out in Section 76.605(a)(3) of the rules. In addition, AT&T has failed to explain why telephony, high speed data, or DTV products would be affected.²¹ Typically, cable operators design their systems so that

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retrapping. AT&T further states that it cannot recover these costs from affected subscribers that do not request the additional channels. In addition to its arguments above, KDOC contends that AT&T can avoid such additional costs by moving the programming services to different channels.

¹³ See *Must Carry Order*, 8 FCC Rcd at 2988.

¹⁴ See *WXTV License Partnership*, 14 FCC Rcd 6482, 6500 (1999), *aff'd* 15 FCC Rcd 3308 (2000) ("*WXTV*"). See also *Must Carry Recon.*, 9 FCC Rcd at 6735.

¹⁵ AT&T states that its system uses three different deletion traps that attenuate channels 50-73 (S-trap), 44-73(ES-trap), and 45-73 (SC-trap.) Opposition at 4. Accordingly, KDOC's current position on channel 42 does not require the use of traps.

¹⁶ The "window" type filter is two traps made into one unit that will allow channel 56 to pass through to basic-only subscribers, and will replace the three existing filters.

¹⁷ AT&T Opposition, Exhibit A; see 47 C.F.R. § 76.605(a)(3).

¹⁸ AT&T Opposition, Exhibit A.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Normally, cable operators install a separate drop cable when high speed service is provided for reliability and
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each drop cable at the subscriber's home can serve more than one television set. AT&T fails to provide specific information regarding the alleged 6 dB loss to KDOC's signal or how its system is engineered in this regard. Accordingly, we do not believe that AT&T has clearly demonstrated that it cannot meet its channel positioning obligations based on the technical evidence in the record.

8. The Commission requested that AT&T file supplemental information to clarify the record in this matter, particularly with regard to the number of basic-only subscribers and the costs to be incurred by AT&T. AT&T's supplemental filing contains information substantially different from that contained in its opposition. KDOC contends that AT&T has not adequately explained these differences. A protracted discussion of AT&T's earlier figures with its supplemented information, and the rationale for such new information, is not necessary.²² We will analyze whether AT&T has justified its position based on the more current, supplementary information.

9. AT&T states that in order to place KDOC on channel 56²³ for viewing by its basic-only subscribers, it will be necessary to replace current filters or deletion traps with new "window" traps which prevent viewing of expanded service tier channels for those who do not subscribe to that service. According to AT&T, 12,120 homes will require trap replacement, at a cost of \$14.00 per trap plus \$35.00 labor cost per affected home.²⁴ According to AT&T, the total cost of trap replacement will be \$599,880, or \$9.87 per subscriber.²⁵ AT&T argues that although the total costs are less than those found to justify a waiver in *WXTV*, the per-subscriber cost exceeds the standard in that matter.

10. KDOC argues that in seeking a waiver of Section 614(b)(6) of the Communications Act and the Commission's implementing rules, AT&T bears a heavy burden of persuasion. KDOC contends that AT&T has failed to demonstrate the accuracy of its factual claims with clear evidentiary proof. KDOC asserts that AT&T's claims regarding the number of basic-only subscribers are in no way documented and are "preposterous on their face."²⁶ In regard to the labor costs of \$35.00 per affected home, KDOC argues that AT&T's sole support for this figure is the undocumented hearsay statement of an unidentified contractor. KDOC supplies the Commission with a statement from its Chief Engineer,

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ingress concerns.

²² As an example of the supplemented changes, AT&T's original figures showed 22,297 affected homes requiring trap replacement at a total cost of \$1,092,553 or \$17.76 per subscriber. According to AT&T, a "comprehensive audit...aggressive direct sales campaign and restructured tier offering" over a two month period have resulted in a reduction of basic-only subscribers requiring trap replacement. KDOC argues, *inter alia*, that AT&T's supplemented figures of an 80% penetration rate for expanded tier service is well below the 90 to 95% penetration "almost universally achieved by such a tier." KDOC contends that AT&T's explanations for the increase in expanded tier penetration in a two month period, from the "unheard of" penetration rate of only 63.75%, is "utterly astonishing," and would require one upgrade every six minutes. See KDOC Response to Supplemental Filing at 2. The Commission's figures on penetration for the expanded tier reveals an 89% rate. See *Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, 17 FCC Rcd 10470 at footnote 9 (2002).

²³ Channel 56 is in the expanded tier service.

²⁴ AT&T received "a bid from a local contractor" for the trap exchanges for \$35.00 per home. See Declaration of David Su.

²⁵ AT&T includes incidental expenses of obsolete traps and door tags to notify customers that work has been completed.

²⁶ KDOC Response to AT&T Supplemental Filing at 12.

who contends that the correct labor cost should be approximately \$15.00 per home.²⁷ KDOC notes that in *WXTV*, the matter relied upon by AT&T, the stated labor costs for trap replacement was \$15.50 per subscriber,²⁸ and argues that AT&T's unsubstantiated cost of \$35.00 cannot be accepted.

11. The standard that has been established for compliance with the channel positioning rules is one of unreasonability rather than impossibility. The Commission has specifically stated that "a cable operator may present evidence as to the costs involved in remedying the technical problem."²⁹ However, we do not believe that AT&T has adequately documented its labor costs, which comprise 40 per cent of the amount necessary to cure AT&T's technical difficulties in placing KDOC on channel 56. AT&T has therefore failed to adequately establish the costs that would be incurred to replace subscribers' existing traps.³⁰ In addition, AT&T has not provided any information that would help to place any substantiated expenditures in the context of the financial capacity of the system in question. Based on the record in this proceeding, AT&T has failed to provide adequate evidence that the technical and financial obstacles to on channel carriage of KDOC are sufficient to overcome the clear dictates of Section 614(b)(6) of the Act.

IV. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED**, pursuant to Section 614 of the Communications Act of 1934, as amended, 47 U.S.C. §534, that the complaint filed by Golden Orange Broadcasting Co. **IS GRANTED**.

13. **IT IS FURTHER ORDERED**, that AT&T Broadband **SHALL COMMENCE CARRIAGE** of KDOC on cable channel 56, or a mutually agreed upon channel, throughout its system serving the communities of Newhall, Santa Clarita, Saugus, and Valencia, California within 90 days of the release date of this *Order*.

14. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.³¹

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broecker, Deputy Chief
Policy Division
Media Bureau

²⁷ *Id.* at 11.

²⁸ See *WXTV*, 14 FCC Rcd 6482 at 6487.

²⁹ *Must Carry Recon.*, 9 FCC Rcd at 6735.

³⁰ We are not suggesting that AT&T would have met the standard for waiver if they had substantiated the labor costs in this matter.

³¹ 47 C.F.R. §0.283.