

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

In the Matter of: )
Norwell Television, LLC )
v. ) CSR 5866-M
EchoStar Communications Corporation )
Request for Mandatory Carriage of )
Television Station WWDP(TV) )
Norwell, Massachusetts )

MEMORANDUM OPINION AND ORDER

Adopted: July 8, 2002

Released: July 12, 2002

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. Norwell Television LLC ("Norwell"), licensee of commercial television station WWDP(TV), Norwell, Massachusetts ("WWDP"), filed the above-captioned television broadcast signal carriage complaint against EchoStar Communications Corporation, pursuant to Section 338 of the Communications Act of 1934, as amended (the "Act"), and Section 76.66 of the Commission's rules for its refusal to carry the signal of WWDP on its satellite system. Norwell states that EchoStar is providing "local-into-local" satellite service in the Boston, Massachusetts market, which is the designated market area ("DMA") where station WWDP operates, pursuant to the statutory copyright license. In its complaint, Norwell alleges that EchoStar has failed to meet its carriage obligations under the Commission's satellite broadcast signal carriage rules. Norwell requests that the Commission order EchoStar to carry the station's signal on EchoStar's satellite system. EchoStar filed an opposition to the complaint and Norwell filed a reply. Because it was untimely filed, we dismiss Norwell's complaint.

1 47 C.F.R. § 76.66. We note that on December 7, 2001, the U.S. Court of Appeals for the Fourth Circuit unanimously upheld the constitutionality of Section 338 of the Act, and Section 76.66 of the Commission's rules. See SBCA v. FCC, 275 F 3d 337 (4th Cir. 2001), cert. denied, 70 U.S.L.W. 3580 (U.S. June 17, 2002) (No. 01-1332).

2 See Public Notice, Special Relief and Show Cause Petitions, Report No. 0032, dated March 22, 2002.

3 See 17 U.S.C. § 122(a); 47 U.S.C. § 339. A satellite carrier provides "local-into-local" satellite service when it retransmits a local television signal back into the local market of that television station for reception by subscribers. 47 C.F.R. § 76.66(a)(6).

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. 47 C.F.R. § 76.66(m)(3). 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

## II. BACKGROUND

2. Section 338 of the Act, adopted as part of the Satellite Home Viewer Improvement Act of 1999 (“SHVIA”),<sup>5</sup> requires satellite carriers, by 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.<sup>6</sup> For the initial election cycle, broadcast stations were required to notify satellite carriers by July 1, 2001, of their mandatory carriage election for carriage to commence beginning January 1, 2002.<sup>7</sup> A station’s market for satellite carriage purposes is its DMA, as defined by Nielsen Media Research.<sup>8</sup> In November 2000, the Commission adopted rules to implement the provisions contained in Section 338.<sup>9</sup>

3. Under the Commission’s broadcast signal carriage rules, each satellite carrier providing local-into-local service pursuant to the statutory copyright license is generally obligated to carry any qualified local television station in the particular DMA that made a timely election for mandatory carriage, unless the station’s programming is duplicative of the programming of another station carried by the carrier in the DMA.<sup>10</sup> One television station’s programming is generally considered duplicative of another station’s if both stations simultaneously broadcast identical programming for more than 50% of the broadcast week.<sup>11</sup> If the stations’ programming is duplicative, the satellite carrier may choose which duplicating signal it will carry.<sup>12</sup> Furthermore, under the SHVIA, a television station asserting its right to carriage is required to bear the costs associated with delivering a good quality signal to the designated local receive facility of the satellite carrier or to another facility that is acceptable to at least one-half the stations

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*Biennial Regulatory Review: Part 76 – Cable Television Service Pleading and Complaint Rules*, 14 FCC Rcd 418 (1999). Responsive pleadings filed in this context, therefore, must comply with the requirements set forth in Section 76.7(b)(1).

<sup>5</sup> See Pub. L. No. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (Nov. 29, 1999).

<sup>6</sup> See 47 U.S.C. § 338.

<sup>7</sup> See 47 C.F.R. § 76.66(c)(3); see also 76.66(c)(4) (“Except as provided for in paragraphs 76.66(d)(2) and (3), local commercial television broadcast stations shall make their retransmission consent-mandatory carriage election by October 1<sup>st</sup> of the year preceding the new cycle for all election cycles after the first election cycle.”).

<sup>8</sup> 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 *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues; Retransmission Consent Issues*, 16 FCC Rcd 1918, 1934 (2000) (“*DBS Must Carry Report & Order*”); 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) [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 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.”).

<sup>9</sup> See generally *DBS Must Carry Report & Order*, 16 FCC Rcd at 1918 *et seq.* 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*”).

<sup>10</sup> See 47 C.F.R. § 76.66.

<sup>11</sup> See 47 C.F.R. § 76.66(h)(1) (“A satellite carrier shall not be required to carry upon request the signal of any local television broadcast station that substantially duplicates the signal of another local television broadcast station which is secondarily transmitted by the satellite carrier within the same local market, or the signals of more than one local commercial television broadcast station in a single local market that is affiliated with a particular television network unless such stations are licensed to communities in different States.”).

<sup>12</sup> See 47 U.S.C. § 338(b)(1). See also 47 C.F.R. § 76.66(h); *DBS Must Carry Report & Order*, 16 FCC Rcd at 1949-51.

asserting the right to carriage in the local market.<sup>13</sup>

4. To obtain Commission action when needed, as Norwell alleges here, a broadcast station must file a complaint with the Commission within 60 days after the satellite carrier submits a final rejection of the station's carriage request.<sup>14</sup> If a satellite carrier provides no response to a must carry election, the 60 day period to file a complaint commences after the time for responding, as required by the rule, has elapsed.<sup>15</sup>

### III. DISCUSSION

5. The threshold issue presented in this case is whether Norwell filed a timely request for carriage. Under the Commission's satellite television broadcast signal carriage rules, stations such as WWDP were required to request carriage by July 1, 2001. Norwell's first request for carriage on EchoStar's system was mistakenly misdirected to DIRECTV. After learning of this error, Norwell maintains that it sent another carriage request to EchoStar prior to the July 1, 2001, deadline. EchoStar, however, maintains that it did not receive any such request from Norwell, and points out that Norwell has not produced a post office return receipt form establishing that this request was sent. Norwell maintains that EchoStar must have received the Station's request because EchoStar subsequently sent Norwell two written responses. In the alternative, Norwell maintains that EchoStar had constructive notice of its request. EchoStar acknowledges that it sent Norwell two denial letters after July 1, 2001, but maintains that they were sent in an abundance of caution to put Norwell on notice that it had failed to file a timely request for carriage.

6. We find that Norwell failed to file a timely carriage request.<sup>16</sup> Norwell has not produced a return receipt form demonstrating that it mailed its request letter to EchoStar. The Commission's rules require that carriage requests be sent by certified mail, return receipt requested. The reasons for this requirement are to prevent any confusion regarding whether or not a satellite carrier received a request and to avoid exactly the types of claims and counterclaims presented in this proceeding. Consequently, absent a return receipt form, nothing in the record establishes that a second request letter was sent to EchoStar. Further, we need not address the issue of constructive notice because both letters sent to Norwell by EchoStar were based on EchoStar's failure to receive Norwell's request. Contrary to Norwell's contention, the fact that EchoStar sent two letters subsequent to July 1, 2001, informing Norwell that it did not receive a proper carriage request actually supports EchoStar's position.

7. EchoStar also contends that Norwell's complaint was untimely filed. The Commission's rules require that a station, such as WWDP, file a carriage complaint within 60 days of a denial of carriage by a satellite carrier. Norwell asserts that its complaint, filed on March 11, 2002, was timely despite denials of carriage that it received from EchoStar on July 30, 2001, and September 19, 2001, nearly seven months earlier. Norwell maintains that the July denial letter was rescinded by EchoStar's letter of September 19, 2001. To the extent the September 19, 2001 letter could be viewed as rescinding the earlier communication, it appears to have been part of EchoStar's general response to the

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<sup>13</sup> 47 C.F.R. § 76.66(g)(1).

<sup>14</sup> See 47 C.F.R. § 76.66(m)(6); *DBS Must Carry Reconsideration Order*, 16 FCC Rcd at 16574. A television station seeking a finding on the facts and a resulting determination of whether it is entitled to carriage pursuant to Section 76.66 of our rules may file a complaint with the Commission. If, however, a television station that is not being carried seeks damages or other form of monetary or injunctive relief under Section 338(a) of the Act or Section 501(f) of the Copyright Act, then the United States District Court is the exclusive forum for adjudicating the merits of its claim. *DBS Must Carry Report & Order*, 16 FCC Rcd at 1974.

<sup>15</sup> See *DBS Must Carry Reconsideration Order*, 16 FCC Rcd at 16574.

<sup>16</sup> Given that we also find that Norwell's complaint was untimely filed, we are dismissing rather than denying, the complaint.

Commission's conclusions in the *DBS Must Carry Reconsideration Order* that form letters rejecting carriage without a reasonable basis were not valid.<sup>17</sup> Both the July 30 letter and the September 19 letter cited the same ground for denying mandatory carriage to Norwell: Norwell's failure to timely file a request for carriage.<sup>18</sup>

8. Norwell goes on to claim that EchoStar's September denial letter did not trigger a requirement for the Station to file a carriage complaint because the denial letter was ambiguous. Although EchoStar's September 19 denial letter is not a model of grammatical or syntactical clarity, taken together with EchoStar's July 30 letter, it could not reasonably be interpreted as an agreement to carry WWDP. At a minimum, it should have prompted Norwell to question EchoStar's intentions, which the Station did not do.<sup>19</sup> Norwell maintains that the time for it to file a complaint following EchoStar's July and September denial letters was extended because of oral conversations its staff had with EchoStar's local receive facility contractor and EchoStar's own engineering staff. However, the record does not reflect any written communications between the parties nor does it reference any conduct by EchoStar acknowledging any carriage intentions, and EchoStar denies that any meaningful negotiations were ongoing with Norwell. Although EchoStar could have been clearer in its communications, it does not appear that EchoStar said anything that committed it to carry the station or wavered from its earlier communications. Consequently, we do not have evidence to establish that EchoStar and Norwell were engaged in the type of meaningful negotiations regarding carriage that might extend the time for filing a complaint. Even after EchoStar confirmed its earlier rejections by not commencing carriage of WWDP on January 1, 2002, WWDP waited more than three more months, until March 11, 2002, to file a complaint. The record reveals that the only thing Norwell did after the January 1, 2002, carriage deadline was to instruct its attorney to inform EchoStar that Norwell would file a complaint with the Commission if it were not immediately carried. Norwell maintains that it waited until March 11, 2002, because it did not know until a telephone conversation "on or about February 1, 2002," that EchoStar would not carry the Station.<sup>20</sup> However, this telephone conversation was merely in response to a call from Norwell's counsel expressing the Station's intention to file a carriage complaint.<sup>21</sup> Based on the entirety of the record, we find that Norwell failed to timely file a complaint with the Commission.

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<sup>17</sup> *Id.* at 16573. The rescission language appears to apply only to the issue of signal quality and specifically not to the issue of timely carriage election.

<sup>18</sup> In addition, on August 22, 2001, EchoStar informed Norwell's counsel by e-mail that it "did not receive any timely election by WWDP for carriage on the DISH network DBS platform." Opposition at Exhibit 1.

<sup>19</sup> Norwell's consulting engineer contacted EchoStar on September 21, 2001 concerning WWDP's signal quality test and requested verification that the Station would be "launched on January 1, 2002." Opposition at Exhibit 4. To which EchoStar replied later that day reiterating its previous written notification concerning carriage. *Id.* at Exhibit 5.

<sup>20</sup> Reply to Opposition at Exhibit 5, Declaration of Kevin M. Walsh.

<sup>21</sup> *Id.* at Exhibit 5, E-mail from Devon W. Paxson dated February 1, 2002.

**IV. ORDERING CLAUSES**

9. Accordingly, **IT IS ORDERED**, pursuant to Section 338 of the Communications Act, as amended, 47 U.S.C. § 338, and Section 76.66(m)(6) of the Commission's rules, 47 C.F.R. § 76.66(m)(6), that the must carry complaint filed by Norwell Television LLC, licensee of commercial television station WWDP, Norwell, Massachusetts, against EchoStar Communications Corporation **IS DISMISSED**.

10. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules, 47 C.F.R. § 0.283.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson  
Deputy Chief, Media Bureau