

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

In the Matter of:)	
)	
Minority Television Project, Inc.)	
KMTP(TV), Channel 32.)	CSR-5513-M
)	
v.)	
)	
AT&T Broadband, LLC)	
)	
Request for Mandatory Carriage of)	
Television Station KMTP-TV,)	
San Francisco, California)	

MEMORANDUM OPINION AND ORDER

Adopted: November 12, 2002

Released: November 13, 2002

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Minority Television Project Inc. (“MTP”), licensee of television broadcast station KMTP-TV, San Francisco, California (“KMTP” or the “Station”) filed the above-captioned must carry complaint against AT&T Broadband, LLC (“AT&T”), for failing to carry KMTP on its cable television systems serving the San Francisco Bay area and surrounding environs. AT&T filed an opposition to which MTP replied. MTP also provided a supplement to its reply to which AT&T responded.¹ For the reasons discussed below, we grant the complaint, in part, and deny, in part.

II. BACKGROUND

2. Pursuant to Section 615 of the Communications Act of 1934, as amended (“Communications Act”), 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*”), qualified local noncommercial television broadcast stations (“NCE”) are entitled to assert mandatory carriage rights on cable systems with a principal headend located within 50 miles of the station’s community reference point, as defined in Section 76.53 of the Commission’s Rules, or within the station’s Grade B service contour, as defined in Section 73.683(a) of the Commission’s rules.²

¹ We will permit these additional pleadings as they update the record and are useful in addressing the issues raised in this proceeding.

² *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, 2967-2968 (1993); see also 47 U.S.C. § 535(l)(2); 47 C.F.R. § 76.53; 47 C.F.R. § 73.683(a).

III. DISCUSSION

3. In support of its complaint, MTP states that its television station, KMTP, Channel 32, is licensed to San Francisco, California. It states further that AT&T operates cable television systems within the San Francisco television market and within 50 miles of San Francisco. MTP contends that, because KMTP is licensed as a qualified full-power noncommercial educational television station, KMTP is entitled to mandatory carriage in several dozen communities on multiple AT&T cable systems.³ MTP asserts that in 1991, when it acquired KMTP – then known as KQUC, Channel 32 – from KQED, Inc, channel 32 was carried on 65 of the 80 San Francisco market cable systems. Since acquiring the station, however, MTP asserts that AT&T and its predecessors have dropped the carriage of KMTP.⁴ MTP asserts that it formally requested that AT&T commence carriage of KMTP's signal on its San Francisco area cable systems on or about October 1, 1999.⁵ In its opposition, AT&T asserts that KMTP was not entitled to must-carry status on its cable system because it did not provide a good quality signal to the cable systems' principal headends.⁶ In turn, MTP requests that the Commission order AT&T to commence carriage of station KMTP on its cable systems once it delivers a good quality signal to AT&T's Mt. Sutro headend.⁷

4. During 2001, AT&T and MTP settled most of the carriage disputes. However, in February 2002, MTP renewed its complaint against AT&T, asserting that AT&T was no longer cooperating.⁸ MTP requests in its February 15th letter that the Commission order AT&T to commence carriage of KMTP on its cable systems serving approximately 12 remaining communities.⁹ AT&T identifies Woodside, Napa,

³ Complaint at 4. The list of cable systems and additional communities provided by MTP as Attachment C to its complaint, on which MTP alleges it is qualified for must carry, is appended to this order as Attachment A. AT&T identifies the principal headends serving the systems involved in the dispute as Castro Valley, Fremont, Hayward, Healdsburg (Windsor), Napa, Pacifica, Petaluma, Pinole, Pittsburg, Pleasanton (Tri Valley – Rheem), San Mateo, San Rafael (Marin), Santa Clara, Sunnyvale, Walnut Creek, and Woodside. Opposition at 4.

⁴ Complaint at 3-4.

⁵ *Id.* at 5 and Exhibit D.

⁶ Opposition at 4 and Exhibit 3. We note that AT&T also argues that KMTP is not eligible for must carry status because they allegedly air commercials and should therefore not be considered to be a qualified noncommercial educational broadcast station. This issue was addressed by the Commission and need not be addressed here. See *Minority Television Project Inc.*, Notice of Apparent Liability for Forfeiture, DA 02-1945 (rel. Aug. 9, 2002). (finding MTP liable for a forfeiture of \$10,000 for particularly numerous and egregious violations of Section 399B of the Communications Act and Section 73.621(e) of the Commission's rules, but finding no other type of sanction to be necessary or justified at the time). Although not applicable to the present situation, we note that noncommercial educational television stations which are not "qualified" NCE stations within the meaning of Section 615 of the Communications Act, and thus are not entitled to must carry rights under that section, may assert must carry rights under Section 614 within their local market. See 47 U.S.C. §§ 534 and 535. The definition of "local commercial television station" contained in Section 614 includes all stations other than qualified NCE stations; thus, "local commercial television station" includes non-qualified NCE stations. *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, 9 FCC Rcd 6723, 6725 (1994) ("Reconsideration Order").

⁷ Reply to Opposition at 3. MTP's request to designate Mt. Sutro as AT&T's principal headend is discussed below. See *infra* ¶¶ 5-6. AT&T's receive site at Mt. Sutro serves as a principal headend for its San Francisco cable system. See Opposition at 6.

⁸ Letter from James Winston (filed Feb. 15, 2002). In addition, MTP filed a Petition to Initiate a Forfeiture Proceeding, to which AT&T filed its opposition on April 2, 2002.

⁹ MTP identifies the remaining communities as: Petaluma, Santa Rosa, Napa, Sonoma, Pinole, Pittsburg, Walnut Creek, Concord, Moraga, Lafayette, Orinda, Alamo, and Woodside. MTP also includes Santa Rosa and Benecia in its list of outstanding communities. Santa Rosa and Benecia were not included in MTP's initial complaint for carriage. We will not address carriage in Santa Rosa and Benecia in this order; however, to the extent that the

(continued...)

Petaluma, Pittsburg, and Walnut Creek as the principal headends of the systems serving the remaining communities in which KMTP is not carried.¹⁰

A. Principal Headend

5. Rather than installing the necessary equipment at each headend site, MTP would prefer to be carried on AT&T's systems through AT&T's Mt. Sutro headend, and urges the Commission to find that AT&T's principal headend at Mt. Sutro is the principal headend for all communities in the San Francisco television market.¹¹ MTP states that 18 of 20 off-air signals in the Bay area are received and processed at Mt. Sutro and then delivered via two fiber rings to various node sites for distribution to all communities in the market. Given these facts, MTP argues that Mt. Sutro is in effect AT&T's principal headend for the cable systems serving the San Francisco Bay area.¹² MTP also argues that AT&T is attempting to evade the must carry rules by identifying certain of its headends as principal headends, instead of identifying its Mt. Sutro headend as such. MTP further asserts that some of these headends are no longer functioning as headends at all.¹³ AT&T states that its Bay Area systems are served by separate principal headends and maintains that these principal headends still continue to do critical processing of cable services.¹⁴ AT&T also argues that although cable operators are permitted to take exceptional measures to deliver off-air programming, they are not required to do so.¹⁵

6. We cannot conclude that Mt. Sutro is the principal headend for all of AT&T's cable systems in the San Francisco area. The Commission has stated that a cable system may designate its own principal headend, provided that its choice is reasonable and is not made in order to circumvent must-carry obligations.¹⁶ We have permitted cable operators to designate their principal headends even when there may be another receive site controlled by the operator that is more convenient to the broadcaster.¹⁷ We have also stated that cable operators need not employ extraordinary measures or specialized equipment in accommodating carriage requests from stations that are not currently carried.¹⁸ We do not agree with MTP's argument that AT&T's principal headend site designations are unreasonable and

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principal headends for AT&T's Santa Rosa and Benecia cable systems are within 50 miles of San Francisco or within KMTP's Grade B contour, and that KMTP provides a good quality signal to those principal headends, the same analysis would apply.

¹⁰ Letter from Frederick Giroux (filed Sept. 10, 2002) ("AT&T Sept. 10 Letter"). AT&T informed the Commission that it scheduled a launch date at the Pinole headend of October 9, 2002 using existing equipment at that principal headend. MTP has confirmed that carriage in Pinole commenced on October 9th. Letter from James L. Winston (filed Nov. 5, 2002).

¹¹ Supplement to Reply at 2.

¹² *Id.* at 3.

¹³ We address this assertion below. *See infra* ¶ 9.

¹⁴ Response to Supplement at 2-3.

¹⁵ *See* Opposition at 5-7; Response to Supplement at 2.

¹⁶ *Must Carry Order*, 8 FCC Rcd at 2968.

¹⁷ *Complaint of Family Stations, Inc. against Sonic Cable Television*, 10 FCC Rcd 8233 (1995); *Complaint of Channel 5 Public Broadcasting, Inc. against WestStar Cable*, 10 FCC Rcd 8215 (1995); *Good Companion Broadcasting, Inc. d/b/a Channel 68 Broadcasting, Inc. v. Charter Communications VI, LLC*, 15 FCC Rcd 13257 (2000).

¹⁸ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, 8 FCC Rcd 4142, 4143 (1993) ("Clarification Order"); *Complaint of Jasas Corporation against TCI Cablevision of Maryland, Inc.*, 14 FCC Rcd 7063, 7066 (1999).

established to circumvent the must carry rules. The headends that AT&T identifies as its principal headends are historically associated with multiple cable systems in the San Francisco area.¹⁹ That AT&T constructed facilities at Mt. Sutro to receive and then distribute certain broadcast signals does not render its existing principal headend designations unreasonable or intended to evade its must-carry obligations. Although MTP asserts that AT&T's headend sites that received and processed RF signals prior to the installation of the fiber loops have either been deconstructed or deactivated,²⁰ we view the commencement of carriage of KMTP on the majority of the systems initially in dispute, many after the installation of antennas or other equipment at the individual headends, as evidence that these headends continue to function properly as broadcast signal reception facilities. MTP's assertion that some of AT&T's headend designations are unreasonable because reception is difficult or impossible, is contradicted by MTP's own signal quality tests which indicate that using "a more sophisticated antenna and amplifiers," it is able to deliver a good quality signal to each of these headend locations.²¹ That KMTP is able to provide a good quality signal with its own equipment also supports the conclusion that these headends were not designated to evade must carry obligations. As such, MTP's arguments that Mt. Sutro is, or should be determined by the Commission to be, the principal headend for all of AT&T's San Francisco area cable systems is not supported by the record.

B. Signal Quality

7. The Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") provides that a cable operator is not required to carry a qualified local noncommercial educational television station that does not deliver a good quality signal to the principal headend of a cable system.²² Because the cable operator is in the best position to know whether a given station is providing a good quality signal to the system's principal headend, the initial burden of demonstrating the lack of a good quality signal appropriately falls on the cable operator.²³ For broadcast stations not currently carried on the cable system, to the extent that the cable operator is able to do so, the signal level shall be determined based on measurements made with generally accepted equipment that is currently used to receive signals of similar frequency range, type or distance from the principal headend.²⁴ In measuring the signal delivered to the system's principal headend, a cable operator must use generally acceptable engineering practices. At a minimum, signal strength surveys should include the specific make and model numbers of the equipment used, as well as its age, characteristics, and most recent date of calibration, the height and orientation of the antenna, the weather conditions, and the time of day when the tests were conducted.²⁵ With respect to the standard to be used to determine what constitutes a good quality signal at a cable system's headend, the 1992 Cable Act adopted a standard for VHF and UHF commercial stations.²⁶ For VHF commercial television station signals, the standard is -49 dBm; for UHF commercial television station signals, the standard is -45 dBm.²⁷ These signal quality standards are also used to determine

¹⁹ The Physical System Identification numbers ("PSID") associated with the headends at issue are on file with the Commission. See PSID numbers 001964, 001915, 001740, 002722, 001723, 006477, 005474, 005475, 001559, 016790, 005432, 020280, 003281, 002143, 003335, 002152, 001965, 003383, 002150, 002145, 006084, 003859, 002142, 000214, 013533.

²⁰ Supplement to Reply at 3.

²¹ *Id.* at 10-11.

²² 47 U.S.C. § 535(g)(4).

²³ 47 CFR § 76.61(a)(2).

²⁴ *Clarification Order*, 8 FCC Rcd at 4143.

²⁵ *Reconsideration Order*, 9 FCC Rcd at 6736. See also 47 CFR § 76.61.

²⁶ 47 U.S.C. § 534(h)(1)(B)(iii).

²⁷ *Id.* See also 47 C.F.R. § 76.55(c)(3).

whether VHF and UHF NCE stations place a good quality signal at a cable system's principal headend.²⁸ KMTP is a UHF non-commercial station. In this instance, AT&T's signal quality tests indicate that KMTP failed to meet this standard for all but two of the headends at issue.²⁹

8. KMTP alleges that AT&T conducted its signal quality tests using an antenna different from antennas used to receive other signals similar to KMTP.³⁰ MTP conducted its own tests with a "more sophisticated antenna and amplifiers" and provided signal strength measurements at almost all of the headend sites exceeding the levels required by Section 76.55(c)(3) of the Commission's rules.³¹ AT&T personnel attended these tests, and AT&T does not dispute these results.³² According to MTP, it is willing to supply AT&T with the sophisticated antenna and amplification equipment consistent with that used in its measurements to enable AT&T to receive a signal of good quality at each of the AT&T designated sites.³³ In the *Must Carry Order*, the Commission stated that improved antennas are among the types of equipment that the broadcaster may provide to deliver a good quality signal.³⁴ A cable operator's refusal to permit a broadcaster to provide this necessary equipment, either to make test measurements or for the delivery of the signal, interferes with a broadcaster's statutorily mandated must-carry rights and the Commission will take whatever remedial action is deemed appropriate in such cases.³⁵ However, AT&T has stated that it is prepared to carry KMTP once the equipment necessary to deliver an adequate signal to the principal headends at issue is provided.³⁶ KMTP is entitled to mandatory carriage on the cable systems at issue when MTP fulfills its commitment to provide the cable system with a signal of good quality.³⁷

C. Basic Reception Equipment

9. MTP alleges that several of AT&T's headends have been decommissioned or deconstructed and that some locations operate only as nodes for AT&T's fiber optic system.³⁸ MTP also alleges that for some of AT&T's headend locations it is difficult, and in some cases, impossible to receive a good off air

²⁸ *Reconsideration Order*, 9 FCC Rcd at 6735-36.

²⁹ Opposition at 4 and Exhibit 3. AT&T now carries KMTP on these two headends at Hayward and Fremont.

³⁰ Supplement to Reply at 10.

³¹ Supplement to Reply at 10-11; *see* 47 C.F.R. § 76.55(c)(3). It appears that MTP did not conduct signal quality tests at Hayward and Fremont because AT&T's tests indicated that KMTP provided sufficient signal quality at those locations.

³² AT&T notes that some tests were taken more than once to achieve a passing signal, and still doubts that MTP will be able to provide a good quality signal to some of its headends. Response to Supplement at 4. However, once the MTP measurements were made available, it is incumbent upon AT&T, if it intends to continue to resist carriage on signal quality grounds, to demonstrate that KMTP fails to provide a good quality signal to its principal headends using the equipment provided by MTP. *See Complaint of Silver King Broadcasting of Massachusetts, Inc. v. Cablevision of Boston, Inc.*, 11 FCC Rcd 3600, 3602 (1996).

³³ Reply to Opposition at 4; Supplement to Reply at 11.

³⁴ *See* 8 FCC Rcd at 2991.

³⁵ *Clarification Order*, 8 FCC Rcd at 4144.

³⁶ Response to Supplement at 4-5; AT&T Sept. 10 Letter at 2.

³⁷ MTP also suggests that AT&T be subjected to forfeitures by the Commission for lack of cooperation and filed a Petition to Initiate a Forfeiture Proceeding on February 15, 2002. We decline to order forfeitures in this situation, but will re-visit this issue should AT&T fail to comply with the requirements we set forth in this order.

³⁸ *See* Supplement to Reply at 3 and Exhibits A and B (Declaration of Russell Brown and Declaration of Booker T. Wade, Jr.).

signal no matter how much power a transmitter produces.³⁹ However, MTP does not identify by name any of the locations that are allegedly lacking basic receive equipment or unable to receive any off air signal. Although AT&T admits that it has “limited broadcast reception capabilities at various principal headends,” it disputes MTP’s assertions.⁴⁰ The record reflects that, of the five remaining headends, at least Petaluma and Walnut Creek currently receive off-air signals.⁴¹ As for the remaining three principal headends, we have stated that cable operators may not shift the costs of routine reception of broadcast signals to those stations seeking must-carry status.⁴² Further, it is appropriate to require a broadcast station to pay only for antennas, equipment and other needed improvements that are directly related to the delivery of its signal and not to contribute to the general maintenance of the cable system’s facilities.⁴³

D. On-Channel Carriage

10. MTP asserts that KMTP is not carried on Channel 32 on AT&T’s Vallejo system. Although AT&T asserts that there are ongoing discussions involving channel placement on that system, we will rule on MTP’s complaint. Section 615(g)(5) of the Communications Act requires that NCE signals carried pursuant to must-carry must appear on the cable system channel number on which the qualified local NCE station is broadcast over-the-air, or on the channel on which it was carried on July 19, 1985, at the election of the station. In either case, another channel number that is mutually agreed upon by the station and the cable operator may be selected.⁴⁴ MTP requested carriage on channel 32, which is its over-the-air channel. AT&T must carry the channel on Channel 32 on its Vallejo system, unless the parties mutually agree to another channel number.

E. Carriage as of March 29, 1990/ Non-notification of Drops

11. MTP asserts that even if its signal quality measurements are faulty, it is nonetheless entitled to carriage on AT&T’s systems because it was carried on all of the systems now controlled by AT&T as of March 29, 1990.⁴⁵ Section 76.56(a)(5) of our rules requires cable systems to continue carrying qualified local NCE’s on their cable systems that they carried on March 29, 1990.⁴⁶ MTP asserts that in the early 1990s, the signal of its station was carried on fourteen systems, now owned by AT&T, but that subsequently MTP was dropped from these systems without notification.⁴⁷ AT&T disputes this, arguing that it was station KQEC, and not KMTP, that was carried in 1990, and that AT&T was not the operator of the systems at the time KMTP alleges to have been dropped. MTP states that it is not seeking compensation for damages as a result of the signal drops, but is seeking a legal entitlement to be carried on AT&T’s systems without regard to who bears the responsibility for the signal deletions.⁴⁸

12. Section 615(g)(4) of the Communications Act states that “a cable operator shall not be required to carry the signal of any qualified local noncommercial educational television station which

³⁹ See Supplement to Reply at 7 and Exhibit A (Declaration of Russell Brown).

⁴⁰ Response to Supplement at 2.

⁴¹ Supplement to Reply at 4.

⁴² *Clarification Order*, 8 FCC Rcd at 4144.

⁴³ See *id.*

⁴⁴ See 47 U.S.C. § 535(g)(5). See also 47 C.F.R. § 76.57(b), (d).

⁴⁵ Complaint at 5; Supplement to Reply at i, 13.

⁴⁶ 47 C.F.R. § 76.56(a)(5).

⁴⁷ Complaint at 7-8.

⁴⁸ Supplement to Reply at 13.

does not deliver to the cable system's principal headend a signal of good quality or a baseband video signal, as may be defined by the Commission.”⁴⁹ Further, with respect to signal quality, Section 615(i)(1), which permits cable operators to require broadcasters to bear the costs of providing a good quality signal, does not create an exception for stations carried on the system as of March 29, 1990.⁵⁰ Accordingly, any station seeking carriage or already being carried may be required to bear the cost associated with delivering a good quality signal to the principal headend of the cable system, regardless of whether that station had been carried by the cable system prior to March 29, 1990.⁵¹ As we have already stated above, KMTP is entitled to mandatory carriage on the cable systems at issue when MTP fulfills its commitment to provide the cable system with a signal of good quality.

IV. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED**, pursuant to Section 615 of the Communications Act of 1934, as amended, 47 U.S.C. § 535, that the must carry complaint filed by Minority Television Project, Inc., licensee of television broadcast station KMTP, San Francisco, California, against AT&T Broadband, LLC **IS GRANTED IN PART** and **DENIED IN PART**, to the extent discussed herein.

14. **IT IS FURTHER ORDERED** that Minority Television Project, Inc.’s request to designate the Mt. Sutro facility as AT&T Broadband’s principal headend for the San Francisco television market **IS DENIED**.

15. **IT IS FURTHER ORDERED** that AT&T Broadband, LLC **SHALL COMMENCE CARRIAGE** of the KMTP signal on its cable systems serving the communities of Petaluma, Napa, Sonoma, Pittsburg, Walnut Creek, Concord, Moraga, Lafayette, Orinda, Alamo, and Woodside within forty-five (45) days from the date that KMTP provides a good quality signal to AT&T Broadband’s corresponding principal headends of Petaluma, Napa, Pittsburg, Walnut Creek, and Woodside.

16. **IT IS FURTHER ORDERED**, pursuant to Section 76.57 of the Commission’s rules, 47 C.F.R. § 76.57, that Minority Television Project Inc.’s request that KMTP be carried on channel 32, its over-the-air channel, on AT&T Broadband’s Vallejo cable system **IS GRANTED**. AT&T Broadband, LLC **SHALL CARRY** KMTP on channel 32 of its Vallejo cable system, or another mutually agreed upon channel, within 45 days of the release of this order.

17. **IT IS FURTHER ORDERED** that Minority Television Project Inc.’s Petition to Initiate a Forfeiture Proceeding **IS DENIED**.

18. 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

Steven A. Broeckaert
Deputy Chief, Policy Division, Media Bureau

⁴⁹ 47 U.S.C. § 535(g)(4).

⁵⁰ 47 U.S.C. § 535(i)(1).

⁵¹ *Must Carry Order*, 8 FCC Rcd at 2981, n.61.

ATTACHMENT A

List of Systems as Provided by MTP

<u>System</u>	<u>Additional [Associated] Communities</u>
South San Francisco	
San Mateo City	Redwood City, San Carlos, Belmont, Milbrae
Foster City	Hillsborough
Pinole	
Pittsburg	
Milipitas	Los Gatos, Saratoga
Pacifica	
Daly City	Brisbane, Colma
Cupertino	
Mountain View	
Santa Clara	
Concord	
Fremont	
Contra Costa County	Lafayette, Moraga, Orinda
Marin	Big Rock Ridge
Martinez	Danville
Newark	
Walnut Creek	
Woodside	Portola Valley
Tri Valley – Dublin	Pleasanton, San Ramon
Castro Valley	
Livermore	Geysers Park
Rohnert Park	
Alameda	
Hayward	San Leandro
Cupertino	
Petaluma	
Brentwood	Knightsen
Healdsburg	
Napa	
Sonoma	
Los Altos	
Cloverdale	
Windsor	