

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

In the matter of:)	
)	
Flinn Broadcasting Corporation)	
v.)	CSR-5944-M
Knology Cable)	
)	
Request for Carriage)	

MEMORANDUM OPINION AND ORDER

Adopted: February 5, 2003

Released: February 11, 2003

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Flinn Broadcasting Corporation, licensee of television broadcast station WBIH (Ch. 29-Ind.) Selma, Alabama (“WBIH”), filed the above-captioned complaint against Knology Cable (“Knology”) for its failure to carry WBIH on its cable system serving Montgomery, Alabama and surrounding communities. Knology filed a letter seeking to have WBIH’s complaint held in abeyance because of negotiations between the parties, but also filed an answer to the complaint. WBIH filed a response to Knology’s pleading and requested that its complaint be processed. For the reasons discussed below, we grant the complaint.

II. DISCUSSION

2. Pursuant to Section 614 of the 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”), commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station’s market.¹ A station’s market for this purpose is its “designated market area,” or DMA, as defined by Nielsen Media Research.²

3. In support of its complaint, WBIH states that it is a commercial television broadcast station entitled to carriage on Knology’s cable system because WBIH’s city of license and Knology’s cable communities are both located in the Montgomery, Alabama DMA.³ WBIH states that, by letter

¹8 FCC Rcd 2965, 2976-2977 (1993).

²Section 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 requires that a commercial television station’s market be defined by Nielsen Media Research’s DMAs. See *Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, 14 FCC Rcd 8366 (1999) (“*Modification Final Report and Order*”).

³Complaint at 2.

dated May 28, 2002, it formally demanded carriage on Knology's cable system.⁴ WBIH states that when Knology failed to provide a written response to this request within the thirty days required by Section 76.61(a)(2) of the Commission's rules, it contacted Knology by phone and was informed that its carriage request was denied because it duplicated another station in the DMA.⁵ WBIH argues, however, that this contention was unsupported and Knology did not name the duplicating station.⁶ WBIH states that it then sent Knology a second letter, rebutting the allegation of duplication and requesting that Knology review the information.⁷ When no response was received, WBIH filed the instant complaint pursuant to the provisions of Section 76.61(a)(5) of the Commission's rules.⁸

4. Knology states that although it is willing to carry WBIH, the station has refused to accept the channel placement it has designated on its channel line-up.⁹ Knology states that Section 623(b)(7)(A) of the Act requires that a cable system offer its subscribers a basic service tier that include all signals carried to fulfill the must carry requirements of Sections 614 and 615 and "any signal of any television broadcast station that is provided by the cable operator to any subscriber."¹⁰ Knology argues, however, that if a cable system faces effective competition under one of the four statutory tests and is deregulated pursuant to a Commission order, it is no longer subject to the requirement that must carry stations be carried on the basic tier.¹¹ Knology remarks that the Commission declared the Montgomery, Alabama market to be subject to effective competition.¹² Knology asserts that because it is not required to adhere to basic tier placement for WBIH on its Montgomery cable system, and because it remains willing to commence carriage of WBIH, the station's complaint should be dismissed as moot.¹³

5. WBIH argues that Knology's answer is procedurally defective, and provides no factual rebuttal for its refusal to provide carriage.¹⁴ WBIH asserts that Knology raised the issue of channel positioning as an impediment to carriage for the first time in its answer.¹⁵ WBIH states, however, that while Knology asserts that it is willing to carry WBIH, it fails to designate a specific channel.¹⁶ WBIH states that Knology's attempt to blame the delay in negotiations on WBIH is immaterial because the Commission has held that "the existence of negotiations is irrelevant to whether [a cable system has] met its statutory and regulatory obligations to commence carriage [of a station]."¹⁷ In view of the foregoing, WBIH requests that the Commission determine that Knology has failed to meet its carriage obligations with respect to WBIH and order the system to commence carriage of WBIH on cable channel 29 of its Montgomery, Alabama cable system.

⁴*Id.* at Attachment A.

⁵*Id.* at 3; *see also* 47 C.F.R. § 76.61(a)(2).

⁶Complaint at 3.

⁷*Id.* at Attachment B.

⁸47 C.F.R. § 76.61(a)(5).

⁹Knology Answer at 2.

¹⁰*Id.*, citing 47 U.S.C. § 543(b)(7)(A).

¹¹*Id.* at 2, citing *Carriage of Digital Television Broadcast Signals; Amendments to Part 76 of the Commission's Rules*, 16 FCC Rcd 2598, 2643 (2001) ("Digital Must Carry Report and Order").

¹²*Id.* at 3, citing *TCI TKR of Alabama, Inc.*, 12 FCC Rcd 22096 (1997).

¹³*Id.*

¹⁴WBIH Reply at 5.

¹⁵*Id.*

¹⁶*Id.*

¹⁷*Id.* at 6, citing *Cablevision Systems Corporation*, 15 FCC Rcd 24298, 24302 (2000).

6. We agree with WBIH and will grant its request for carriage. The decisions Knology cites in support of its contention that it need not adhere to the basic tier requirement do not negate the carriage requirements of Section 614 of the Communications Act.¹⁸ A finding of effective competition permits a cable operator to price and market its services according to market forces, rather than pursuant to the provisions of Section 623 of the Act. However, such a finding does not relieve a cable operator of its regulatory responsibilities under the Act's mandatory carriage provisions. A cable operator, even if it is found to be subject to effective competition, must honor a television station's channel positioning request subject to Section 614(b)(6)¹⁹ and the signal of such station shall be provided to every subscriber of a cable system.²⁰ Knology has not provided any other information to support a conclusion that it is unable to carry WBIH on the channel which it has requested.

7. In any instance, we note that a finding of effective competition applies only to the cable operator seeking such a conclusion by the Commission. The force and effect of such a finding does not apply to other cable operators in the same franchise area. While the incumbent cable operator, TCI-TKR of Alabama, had sought a finding that was later granted,²¹ the Commission has no record that Knology has filed a Petition seeking a determination of effective competition in its franchise area. Therefore, Knology is subject to the basic service tier requirement under Section 623(b)(7) of the Act.

III. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED** that the Complaint filed by Flinn Broadcasting Corporation is granted pursuant to Section 614(d)(3) of the Communications Act of 1934, as amended. Knology Cable is ordered to commence carriage of WBIH on channel 29 and on the system's basic service tier within 60 days from the release of this Order.

9. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules.²²

FEDERAL COMMUNICATIONS COMMISSION

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Media Bureau

¹⁸ See *Digital Must Carry Report and Order*, 16 FCC Rcd at 2643. The tier placement paradigm, established by the Commission in the Digital Must Carry Report and Order, was designed to facilitate the carriage of digital television signals by local cable operators during the digital broadcast transition. After the transition is complete, and assuming the absence of effective competition, there will be one basic service tier comprised of digital television broadcast signals and public, educational, and governmental access channels (in any format).

¹⁹ See 47 U.S.C. § 534(b)(6).

²⁰ See 47 U.S.C. § 534(b)(7).

²¹ *TCI TKR of Alabama, Inc.*, 12 FCC Rcd 22096 (1997).

²² 47 C.F.R. § 0.283.