

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

In the Matter of:
Family Stations, Inc.
v.
DirectTV, Inc.
Petition for Reconsideration
CSR-5772-M

ORDER ON RECONSIDERATION

Adopted: July 28, 2004

Released: August 2, 2004

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. Family Stations, Inc., ("Family Stations") parent company of Family Stations of New Jersey, Inc., licensee of noncommercial, educational television station WFME-TV ("WFME") filed a petition for reconsideration ("Petition") of the Cable Services Bureau Order ("Order") denying must carry status to WFME on DIRECTV's satellite system providing "local-into-local" satellite service in the New York Designated Market Area ("DMA") where WFME operates. The Petition seeks, in the alternative, a waiver of Section 76.66(c)(5) of the Commission's rules. DIRECTV, Inc. ("DIRECTV") filed an opposition to which Family Stations replied. For the reasons set forth below, we deny WFME's petition for reconsideration and alternatively, petition for waiver of Section 76.66(c)(5).

II. BACKGROUND

2. Section 338 of the Communications Act of 1934, adopted as part of the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"), requires satellite carriers, by January 1, 2002, to carry upon 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. A

1 Family Stations, Inc. v. DirecTV, Inc., 17 FCC Rcd 2372 (2002).

2 WFME has requested a waiver of Section 76.66(c)(3), however, since WFME is a noncommercial station, its election request would have been made pursuant to Section 76.66(c)(5), and we will treat it as such.

3 Although WFME has chosen to seek remedial action for non-carriage with the Commission, the Satellite Home Viewer Improvement Act of 1999 also permits WFME to file a civil action in United States District Court for DIRECTV's refusal to carry its signal. See 47 U.S.C. § 338(a)(2).

4 See Pub. L. NO. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (Nov. 29, 1999).

5 See 47 U.S.C. § 338.

station's market for satellite carriage purposes is its DMA, as defined by Nielsen Media Research.⁶ A DMA is a geographic area that describes each television market exclusive of others, based on measured viewing patterns. In November 2000, the Commission, in *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues; Retransmission Consent Issues*, adopted rules to implement the provision contained in Section 338.⁷ For the initial election cycle, broadcast stations were required to notify satellite carriers by July 1, 2001 of mandatory carriage election for carriage to commence on January 1, 2002.⁸ Section 76.66(d)(1)(ii) requires that must carry elections be made in writing and sent to the satellite carrier's principal place of business, by certified mail, return receipt requested.⁹

III. DISCUSSION

3. In its complaint, WFME stated that on June 28, 2001, it elected mandatory carriage on DIRECTV's system serving the New York DMA. In its opposition, DIRECTV argued that WFME failed to make a proper must carry request by July 1, 2001. DIRECTV asserted that although WFME stated that it mailed its election request by certified mail, DIRECTV has no record of receipt of such a letter. WFME was unable to provide documentary evidence that it complied with Section 76.66(d)(1)(ii), but instead claimed that its election carriage request was prepared and executed by its attorney, who thereafter instructed his administrative assistant to send the letter to DIRECTV, via certified mail, return receipt requested. Based on the record, the Cable Services Bureau denied WFME's request for mandatory carriage because it failed to provide documentary evidence of its request for carriage, in writing, sent to the satellite carrier's principal place of business by certified mail, return receipt requested as required by the Commission's rules.¹⁰

4. In its petition, WFME requests the Commission to reconsider the *Order* or alternatively, to waive Section 76.66(c)(5), to allow it to request carriage on DIRECTV's New York system after the July 1, 2001 deadline. WFME asserts as its basis for reconsideration "erroneous" findings of fact and conclusions of law in the *Order*. WFME asserts that the Bureau decision ignored its evidence, including "the sworn declarations of the persons involved in sending the requests."¹¹ We find that the *Order* addressed fully all of the evidence offered by WFME. The *Order* concluded that *Gannon University*

⁶ See 17 U.S.C. § 122(j)(2)(A)-(C). See also *Implementation of the Satellite Home Viewer Act of 1999: Broadcast Signal Carriage 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 stations, is the designated market area in which a station is located, and (i) in 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) in 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.").

⁷ See generally *DBS Must Carry Report & Order*, 16 FCC Rcd at 1918. The Commission affirmed and made clarifications to its carriage rules in a reconsideration proceeding. See also *Implementation of the Satellite Home Viewer Act of 1999: Broadcast Signal Carriage Issues*, 16 FCC Rcd 16544 (2001) ("DBS Must Carry Reconsideration Order").

⁸ See 47 C.F.R. § 76.66(c)(3); see also § 76.66(c)(5) ("A noncommercial television station must request carriage by July 1, 2001 for the first election cycle and must renew its carriage request at the same time a commercial television station must make its retransmission consent-mandatory carriage election for all subsequent cycles.").

⁹ 47 C.F.R. § 76.66(d)(1)(ii).

¹⁰ See 47 C.F.R. § 76.66(d)(1)(ii).

¹¹ Petition at 3.

Broadcasting, Inc.,¹² requiring carriage requests to be sent by certified mail, was controlling rather than the cases cited by WFME.¹³ WFME's petition also disregards the statement by DirecTV indicating that a request for carriage was never received.¹⁴ As stated in the *Order*, this particular notification method was chosen to provide assurance that satellite carriers are aware of their carriage obligations.¹⁵ Furthermore, this approach provides certainty to satellite carriers, such as DirecTV, which must contend with hundreds of election requests from local stations, and accordingly configure their satellite systems. This bright line approach was expressly designated to avoid the type of argument raised by WFME.¹⁶ Under the Commission's rules, there is a specific mailing requirement for broadcast stations seeking carriage. WFME's representations regarding its standard office practice cannot substitute for these requirements. The *Order* considered WFME's evidence, which consisted of an executed computer generated letter addressed to DirecTV and affidavits from the attorney who drafted the election request, and the Administrative Assistant who stated that the request was addressed to DirecTV and mailed via certified mail, return receipt requested, but that the request and documentation for the return receipt were inadvertently lost. We find that the *Order* correctly found that because WFME failed to perfect its carriage request by the required deadline, it is not entitled to mandatory carriage for the duration of the current cycle.

5. WFME asserts that the Bureau's rejection of its evidence that the election request was timely sent to DirecTV will result in WFME being denied carriage on the DirecTV system for the next four years – a draconian result that clearly frustrates the intent of Congress in ensuring that satellite carriers carry all qualified local stations.¹⁷ WFME argues that the Bureau's result in *Gannon* (default must carry) is contrary to the result in the *Order* (non-carriage). The facts and statutory backdrop underlying each decision, however, dictate the result reached therein. The station in *Gannon* was granted must carry status as the default because cable carriage, unlike satellite carriage, “vests without request.”¹⁸ However, pursuant to SHVIA, and in contrast with the cable provisions, satellite carriers are required to carry broadcast stations only “upon request.”¹⁹ As the Commission stated in the *DBS Must Carry Reconsideration Order*, “unlike the cable rules, the rules for satellite carriers essentially combine the election of must carry with the demand for carriage due to the difference in the statute.”²⁰

6. WFME alternatively requests a waiver of Section 76.66(c)(5), which requires that a non-commercial television station must request carriage by July 1, 2001 for the first election cycle. WFME argues that Section 76.66(c)(5) is an administrative regulation that the Commission can waive.²¹ Petitioner also argues that granting its waiver would serve the public interest and would be consistent

¹² 10 FCC Rcd 8619 (CSB 1995).

¹³ See *United States v. Bowman*, 783 F.2d 1192 (5th Cir. 1986); *United States v. Ledesma*, 682 F.2d 670 (7th Cir. 1980), *cert. denied*, 449 U.S. 1000 (1980). Although WFME cited these cases, which involved documents sent by ordinary mail as supporting its petition for reconsideration, the Bureau distinguished these cases from the instant case, because election requests are required to be delivered by certified mail.

¹⁴ DirecTV Opposition at 4-5.

¹⁵ *Order*, 17 FCC Rcd at 2378.

¹⁶ *Id.*

¹⁷ WFME Reply to Opposition at 5.

¹⁸ See *DBS Must Carry Report & Order*, 16 FCC Rcd at 1929.

¹⁹ See 47 U.S.C. § 338(a)(1); *DBS Must Carry Report & Order*, 16 FCC Rcd at 1929; *DBS Must Carry Reconsideration Order*, 16 FCC Rcd at 16576.

²⁰ *DBS Must Carry Reconsideration Order*, 16 FCC Rcd at 16576 n. 215.

²¹ WFME Reply to Opposition at 5.

with congressional intent.²² WFME asserts, presumably as the result of this proceeding, that DirecTV has actual knowledge of its carriage request, that the public interest will be served because DirecTV's 256,000 subscribers in the New York DMA will receive WFME's unique programming, and that WFME would avoid suffering economic hardship that would result from its not being carried on DirecTV's system in the New York DMA.

7. An applicant for waiver faces a "high hurdle" and "must plead with particularity the facts and circumstances which warrant such action."²³ Furthermore, an applicant for waiver must articulate a specific public interest benefit that justifies its request. Granting petitioner's waiver request based on the general assertions contained in its petition would obviate the rule by creating a precedent for waiving the rule any time a party fails to comply. WFME has cited no special circumstances to distinguish its failure to follow the rules. If the Bureau were to grant WFME's waiver request, it would essentially be eliminating the rule for all parties involved in carriage disputes and would not serve the public interest. Therefore, WFME's petition for waiver of Section 76.66(c)(3) is denied.

IV. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED**, pursuant to Section 338 of the Communications Act of 1934, as amended, 47 U.S.C. § 338, and Section 76.66 of the Commission's rules, 47 C.F.R. § 76.66, that the petition for reconsideration and, alternatively, petition for waiver filed by Family Stations, Inc., licensee of commercial television station WFME, West Milford, New Jersey, **IS DENIED**.

9. This action is taken by the Deputy Chief, Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission's rules.²⁴

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief
Media Bureau

²² *Id.* at 5-6.

²³ *Wait Radio v. Federal Communications Commission*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *aff'd* 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972).

²⁴ 47 C.F.R. § 0.283