

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Minority Television Project, Inc.	)	MB Docket No. 17-313
License of Noncommercial Television	)	CSR-8946-M
Station KMTP, Channel *32	)	
For Carriage of KMTP(TV), San	)	
Francisco, California	)	
	)	

**OPPOSITION OF DISH NETWORK L.L.C. TO PETITION FOR  
RECONSIDERATION**

DISH Network L.L.C. (“DISH”) respectfully opposes, pursuant to 47 C.F.R. § 1.106(g), the Petition for Reconsideration (“Petition”) filed by the Minority Television Project, Inc., licensee of station KMTP-TV of San Francisco, California (“KMTP”) in the above-referenced proceeding. The Media Bureau’s *Memorandum Opinion and Order* (“Order”)<sup>1</sup> made no mistakes of law or fact, and reached a conclusion that serves the public interest by ensuring that broadcast stations and satellite carriers adhere to the Commission’s regulations surrounding mandatory carriage.

**I. THE BUREAU’S DECISION RELIED ON THE RELEVANT FACTS**

The Order correctly found<sup>2</sup> that KMTP’s attempted mandatory carriage election with DISH was defective because KMTP used Priority Express Mail, not “certified mail, return receipt

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<sup>1</sup> Minority Television Project, Inc. Licensee of Noncommercial Television Station KMTP, Channel \*32, *Memorandum Opinion and Order*, DA 18-63, MB Docket No. 17-313 (Jan. 23, 2018) (“Order”).

<sup>2</sup> *Id.* ¶¶ 4-6.

requested,” as the Commission’s rules require.<sup>3</sup> KMTP attempts to challenge the Bureau’s decision based on what it views as a factual dispute about whether the Priority Express Mail service that KMTP used did or did not include a return receipt.<sup>4</sup> Yet no party disputes that KMTP chose to use Priority Express Mail, not certified mail, return receipt requested. It is for that reason, and not whether KMTP’s chosen mail service included a return receipt, that the Bureau correctly found that KMTP had not adhered to every requirement in Section 76.66 to properly assert mandatory carriage. There is, therefore, no basis for the Petition’s claim that the Order “is based on a serious mistake of fact.”<sup>5</sup>

Nor is there any basis for the Bureau to reconsider its decision based on the Petition’s view that Priority Express Mail is “superior to certified mail,” or that it “provides all of the safeguards about which the Commission was concerned when it adopted certified mail as the ‘preferred’ method of service.”<sup>6</sup> As further discussed below, there is no basis to find that certified mail is merely a “preferred” rather than a mandatory form of service under the Commission’s rules. But in any event, there is no basis to re-litigate the question of whether Priority Express Mail shares any common attributes or features with certified mail, return receipt requested. The Bureau already found, correctly, that because certified mail, return receipt requested is not merely a

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<sup>3</sup> 47 C.F.R. § 76.66(d)(1)(ii) (“an election request made by a television station **must** be in writing and sent to the satellite carrier’s principal place of business, by certified mail, return receipt requested.”) (emphasis added)

<sup>4</sup> Petition at 3 (“the Decision erred in finding that [KMTP] had not proven that the notice was sent by Priority Express Mail, return receipt requested.”). *See also id.* at 4-6.

<sup>5</sup> *Id.* at 5.

<sup>6</sup> *Id.* at 6.

“suggested method” but the mandatory and only one, the Bureau did not need to reach the question of whether “priority express mail is an equivalent or better service.”<sup>7</sup> DISH agrees.

Also, for the same reasons, there is no basis to overturn the Order based on the Petition’s unsupported assertion that DISH “had actual notice and is not prejudiced” by KMTP’s choice to use Priority Express Mail. The Order is based on the Bureau’s correct finding that KMTP “did not adhere to the Commission’s clear and express procedural requirements regarding the manner in which carriage elections must be sent.”<sup>8</sup> To the extent that KMTP’s attempted carriage election may have made its way to DISH in this instance is irrelevant. This dispute is not about whether KMTP’s chosen mailing method worked this time. It is about the Commission’s longstanding requirement that broadcasters use a specific method of mailing, and not any other, when electing mandatory carriage. KMTP does not dispute that it chose not to use certified mail, return receipt requested, when attempting to elect mandatory carriage with DISH.

## **II. THE BUREAU CORRECTLY FOLLOWED PRECEDENT**

The Bureau correctly ruled that “Section 76.66(d)(1)(ii) provides one specific mailing method for carriage elections: certified mail, return receipt requested,” and the plain language of the regulation “does not indicate that this is a suggested method, or a preferred method.”<sup>9</sup> Certified mail, return receipt requested, is a mandatory requirement that a broadcaster must meet (among others) in order to perfect its carriage rights with a satellite carrier. The Petition

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<sup>7</sup> Order ¶ 6.

<sup>8</sup> *Id.* ¶ 4.

<sup>9</sup> *Id.* ¶ 6.

misconstrues the implementing order in suggesting that the Commission's intent was merely to cast certified mail, return receipt requested, as a "preferred" rather than a mandatory method.<sup>10</sup>

The implementing order used the word "preferred" in order to explain *why* certified mail, return receipt requested, was being enshrined as a requirement for mandatory carriage in the Commission's regulations: "We believe that certified mail, return receipt requested is the preferred method to ensure that broadcast stations are able to demonstrate that they submitted their elections by the required deadline, and that they were received by the satellite carrier."<sup>11</sup> Nothing in that order suggests that the Commission intended to leave broadcasters with the option to choose any mailing method they desired.

### **III. THE BUREAU CORRECTLY APPLIED THE REGULATIONS IN FORCE AT THE TIME IT RENDERED ITS RULING**

The Bureau should also reject the Petition's attempt to challenge the Order based on a pending, undecided notice of proposed rulemaking ("NPRM"). The Petition suggests<sup>12</sup> that the Bureau erred "because it did not take into account" a pending NPRM that, among other things, seeks comment on potential alternative means of electing mandatory carriage with satellite carriers.<sup>13</sup> The Petition cites no law or precedent establishing that the Commission or one of its Bureaus must consider pending rulemaking proceedings when ruling on a mandatory carriage

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<sup>10</sup> Petition at 7.

<sup>11</sup> *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues*, 16 FCC Rcd 16544 ¶ 65 (2001).

<sup>12</sup> Petition at 9.

<sup>13</sup> Electronic Delivery of MVPD Communications, Modernization of Media Regulation Initiative, *Notice of Proposed Rulemaking*, MB Docket Nos. 17-317, 17-105 (rel. Dec. 14, 2017).

complaint. As the Petition acknowledges, the NPRM is pending, and “[t]he Commission did not indicate what action it might take with respect to modification of the notice requirement.”<sup>14</sup> The Bureau correctly applied the regulations on the books at the time the underlying facts arose.

DISH also disagrees that the Bureau’s “bright line approach” (in the Petition’s words)<sup>15</sup> to this dispute disserves the public interest. To the contrary, if the Order were overturned, it would leave DISH and all other video providers subject to the mandatory carriage rules in confusion over the relevant legal requirements. For this same reason, DISH opposes the Petition’s alternative request for a waiver of Section 76.66(d)(1)(ii),<sup>16</sup> both because such a waiver would not serve the public interest and because the Petition has made no showing that a waiver is warranted in this instance.

#### **IV. CONCLUSION**

For the reasons set forth herein, DISH respectfully urges the Media Bureau to deny the Petition in its entirety.


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<sup>14</sup> Petition at 9 n.5.

<sup>15</sup> *Id.* at 11.

<sup>16</sup> *Id.* at 12.

**DISH Network L.L.C.**

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February 15, 2018

## CERTIFICATE OF SERVICE

I hereby certify that, on this 15th day of February 2018, a copy of the foregoing OPPOSITION OF DISH NETWORK L.L.C. TO PETITION FOR RECONSIDERATION was filed electronically with the Commission by using the ECFS system and that a copy of the foregoing was served upon the parties below via Certified Mail, return receipt requested† or electronic mail\*:

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