EXHIBIT 6

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STAMP & RETURN

Before the

Federal Communications Commission

Washington, DC 20554

In the Matter of	)	
	)	
Johnson Broadcasting, Inc.	)	
	)	CSR No. 5742-M
v.	)	
	)	
DIRECTV, Inc.	)	

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Commission

APPLICATION FOR REVIEW

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January 4, 2002

APPLICATION FOR REVIEW

TABLE OF CONTENTS

Section		*Page*
Summary		i
Application for Review		1
Question Presented For Review		2
Background		2
Arguments		
A.	The Cable Bureau Erred By Finding That KNWS Did Not Make A Timely Election For Mandatory Carriage For Local-Into-Local Satellite Service	6
B.	The DBS Must Carry Reconsideration Order Supports Johnson's Rules Interpretation	9
C.	At A Minimum, Federal Register Publication Of The Original Section 76.66 Rule Amendments Is Grounds For A Waiver Because It Did Not Provide A Reasonable Notice Period For Applicant To Legally Comply	10
D.	The Bureau Incorrectly Concluded That DIRECTV's Motion For Summary Dismissal And Answer Was Timely Filed	10
E.	If The Commission Does Not Find On The Merits For Johnson, In The Alternative, Johnson Should Be Granted A Waiver of The Rules	11
Relief Requested		13
Certificate of Service		15

SUMMARY

The Cable Service Bureau erred in its decision in *Johnson Broadcasting, Inc. v. DIRECTV*, released on December 5, 2001, when it concluded that Section 1.4 of the Commission's Rules does not apply to Johnson Broadcasting, Inc.'s election of mandatory carriage sent to DIRECTV, Inc. for local-into-local satellite service.

Johnson Broadcasting, Inc. sent its notice of election of mandatory carriage on Monday, July 2, 2001, the first business day after July 1, 2001, the date set forth in Section 76.66 of the Commission's Rules. Johnson could not have met the requirements of Section 76.66 on Sunday, July 1, 2001 because Section 76.66 requires television stations making an election of mandatory carriage to do so in writing by certified mail, return receipt requested, and post offices are not open on Sunday. Section 1.4 provides that when a filing date falls on a Saturday, Sunday or holiday, the deadline is extended to the next business day. As such, the Sunday, July 1, 2001 filing date was extended to Monday, July 2, 2001. If the Bureau's decision is upheld, Johnson will have to wait four years until January 1, 2006 before it can again elect mandatory carriage.

Johnson strongly believes that it has demonstrated its election of mandatory carriage for local-into-local service was made in accordance with the Commission's Rules. Should the Commission decide otherwise, Johnson submits that it is appropriate, under the circumstances of this case, for the Commission, on its own motion, to grant a waiver of Section 76.66 (c)(3) of the Commission's Rules.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of	)	
	)	
Johnson Broadcasting, Inc.	)	
	)	CSR No. 5742-M
v.	)	
	)	
DIRECTV, Inc.	)	

To: The Commission

APPLICATION FOR REVIEW

Johnson Broadcasting, Inc., ("Johnson"), licensee of KNWS (TV), Katy, Texas, by its attorneys, hereby files this Application for Review under Section 1.115 of the Commission's Rules seeking reversal of the decision made by the Chief of the Cable Services Bureau in *Johnson Broadcasting v. DIRECTV, Request for Mandatory Carriage of Television Station, KNWS-TV, Katy, Texas, Memorandum Opinion & Order,* DA 01-2822, CSR-5742-M, released December 5, 2001.

The Bureau erred when it concluded that Section 1.4 of the Commission's Rules did not apply to Johnson's election of mandatory carriage sent to DIRECTV, Inc. ("DIRECTV").[1] Johnson sent its notice of election of mandatory carriage on Monday, July 2, 2001, the first business day after July 1, 2001, the date set forth in Section 76.66 of the Commission's Rules. Johnson could not have met the requirements of Section 76.66 on Sunday, July 1, 2001 because Section 76.66 requires television stations making an election of mandatory carriage to do so in writing by certified mail, return receipt requested, and post offices are not open on Sunday.

[1] DIRECTV is a satellite carrier that can retransmit a local television station, such as KNWS, back into the market for reception by subscribers.

Section 1.4 provides that when a filing date falls on a Saturday, Sunday or holiday, the deadline is extended to the next business day. As such, the Sunday, July 1, 2001 filing date was extended to Monday, July 2, 2001. If the Bureau's decision is upheld, Johnson will have to wait four years until January 1, 2006 before it can again elect mandatory carriage.

Question Presented For Review

Whether Johnson's certified mail, return receipt election of mandatory carriage, sent to DIRECTV on the first business day following a Sunday, July 1, 2001 filing date, was timely notice within the meaning of Sections 76.66 and 1.4 of the Commission's Rules.

Background

In November 1999 Congress passed and the President signed legislation called the Satellite Home Viewer Act ("SHIVA"). SHIVA amended the copyright laws and the Communications Act of 1934 ("Act"). As amended by SHIVA, Section 338 of the Act, 47 U.S.C. §338 permitted satellite carriers, for the first time, to transmit local television broadcast signals into the local markets together with distant or national broadcast programming, providing what is known as "local-into-local" service. A satellite carrier electing to carry any one local station in a market under Section 338 of the Act was required to provide carriage by January 1, 2002 for all local television broadcast stations that made similar local-into-local service elections.[2]

[2] As the legislative history of the SHIVA indicated, Congress was concerned that, "without must carry obligations, satellite carriers would simply choose to carry only certain stations which would effectively prevent many other local broadcasters from reaching potential viewers in their service areas." During SHIVA's phase-in period the satellite carriers confined their local-into-local offerings almost exclusively to major network affiliates and plainly announced their intention to cherry pick the major network affiliates. The must carry satellite carriage rules also reflected Congress's desire to provide satellite subscribers with local television service in as many markets as possible.

On November 30, 2000 the Commission released the *DBS Must Carry Report & Order* that adopted new rules under Section 76.66 of the Commission's Rules and Regulations implementing the provisions of Section 338 of the Act.[3] The new Section 76.66 of the Rules did not become effective until June 29, 2001 when notice was published in Vol. 66, No. 126 of the Federal Register. Under Section 76.66(c)(3) of the Rules, a local television station must, during the first four-year election cycle, notify a satellite carrier by July 1, 2001 of its carriage election. July 1, 2001 was a Sunday only two days after the Friday June 29, 2001 effective date of Section 76.66(c)(3) of the Rules.

Under Section 1.4(j) of the Rules, if a filing date falls on a Saturday, Sunday or holiday, the date is extended to the next business day. Accordingly, under Section 1.4(j) of the Rules, the Sunday, July 1, 2001 notification date was extended to the next business day, Monday, July 2, 2001.[4] In addition, Section 76.66(d)(2)(ii) of the Rules requires that the written election notification be made by certified mail, return receipt requested. This requires that the United States Post Office be open on Sunday, which it is not. Also, under Sections 76.66(c)(1) and (c)(2), if the elections date is missed for the provision of local-into-local satellite service

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[3] *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues; Retransmission Consent Issues*, 16 FCC Rcd 1918, (2000) ("*DBS Must Carry Report & Order*").

[4] Sec. 1.4 Computation of time:

(a) Purpose. The purpose of this rule section is to detail the method for computing the amount of time within which persons or entities must act in response to deadlines established by the Commission.

(e) Definitions for purposes of this section:

(1) The term holiday means Saturday, Sunday, officially recognized Federal legal holidays and any other day on which the Commission's offices are closed and not reopened prior to 5:30 p.m.

(j) Unless otherwise provided (e.g. Sec. 76.1502(e) of this chapter) if, after making all the computations provided for in this section, the filing date falls on a holiday, the document shall be filed on the next business day. See paragraph (e)(1) of this section.

Example 14: The filing date falls on Friday, December 25, 1987. The document is required to be filed on the next business day, which is Monday, December 28, 1987.

commencing on January 1, 2001, a local television broadcast station will have to wait for carriage for four years, until the next election cycle that commences on January 1, 2006.

On September 4, 2001, barely more than two months after the July 1, 2001 notification date, the Commission released a *DBS Must Carry Reconsideration Order* where, on its own motion, it amended Section 76.66 of the Rules to clarify uncertainty about the filing deadline.[5] The *DBS Must Carry Reconsideration Order* stated:

> In response to numerous telephone inquiries, we clarify that election requests must be sent by the relevant election deadline. In the cable context, Section 76.64(h) provides that "on or before each must carry/retransmission consent deadline, each television broadcast station shall . . . send via certified mail to each cable system in the station's defined market a copy of the station's election statement with respect to that operator." The rules implementing satellite carriage requirements do not contain the same language, and we received no comments on this specific question during the rulemaking proceeding. In light of our general goal of making the satellite carriage rules comparable and parallel to the cable carriage rules, and in the absence of arguments demonstrating why the procedures for election notifications should differ, we clarify our intent that the election request should be sent by certified mail, return receipt by the election date to be effective. We hereby amend Section 76.66(d) of our rules to clarify this intent, as follows:
>
> "(4) Television broadcast stations must send election requests as provided in Sections 76.66(d)(1), (2), and (3) on or before the relevant deadline."

Unlike the prior Section 76.66 of the Rules, the amended Section 76.66 of the Rules now contained the specific clarifying language of ***"on or before"***.

Johnson filed a Complaint before the Commission on September 19, 2001 stating that DIRECTV wrongfully denied its request for mandatory carriage because of its mistaken belief that the KNWS carriage request was late-filed. Johnson pointed out that it had posted its election letter via certified mail, return receipt requested on Monday, July 2, 2001 because the July 1, 2001 filing date under Section 76.66(c)(3) fell on a Sunday when the United States Post Office

[5] 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*").

was closed. Johnson noted that under Section 1.4(j) when a filing date falls on a Sunday, which is considered a holiday under Section 1.4(e)(1), the filing shall be filed on the next business day. DIRECTV filed an Opposition on October 22, 2001 arguing that the Complaint should be dismissed because Johnson did not comply with the July 1, 2001 election date, the Commission strictly enforces must carry and retransmission consent election dates in the cable television context, and that Section 1.4 of the Rules governs filing dates for documents filed with the Commission, not election notices. Johnson filed a Reply on October 29, 2001 asking for dismissal of DIRECTV's Opposition as late-filed and reaffirming its argument with respect to the applicability of Section 1.4 of the Rules, noting that SHIVA did not suspend or waive Section 1.4 of the Rules.[6]

On December 5, 2001 the Chief of the Cable Services Bureau issued its *Memorandum Opinion & Order* in the above-referenced complaint. The Bureau denied KNWS's request for mandatory carriage. The Bureau found that under Section 76.66 (c)(3), the July 1, 2001 date, which falls on a Sunday, was a "specific predetermined date" by which notification should have been provided to a satellite carrier. As such, the Bureau concluded that Section 1.4 did not apply to KNWS's posting of its must carry election notice on the next business day, Monday, July 2, 2001 because the language "Unless otherwise provided" is used as a preface in Section 1.4 (j) which addresses filing dates when a filing date falls on a holiday. The Bureau also found that DIRECTV had timely filed its Opposition on October 22, 2001, twenty days following public

[6] DIRECTV's opposition also raised the issue of whether the Commission had jurisdiction to address this complaint. The Bureau stated in its decision that it agreed with KNWS that the Commission had jurisdiction, stating that "we need not consider the jurisdictional issue by DIRECTV because it was considered and resolved by the Commission in the *DBS Must Carry Report & Order*."

DIRECTV also filed a motion to accept a supplemental filing and a sur-reply on November 14, 2001. Johnson filed an opposition to the unauthorized motion and a motion to strike and a motion for sanctions on November 26, 2001. These motions were not addressed in the Cable Division's *Memorandum Opinion & Order*, released on December 5, 2001, in the above referenced complaint proceeding.

notice of KNWS's Complaint on September 28, 2001 and following a public notice that extended filings due at the Commission on October 18, 2001 to October 22, 2001.

Arguments

A. The Cable Bureau Erred By Finding That KNWS Did Not Make A Timely Election For Mandatory Carriage for Local-Into-Local Satellite Service

At the outset, the notification language "by July 1, 2001" cannot be viewed as a specific predetermined date that precludes the applicability of Section 1.4 of the Rules. Under Section 76.66(d)(2)(ii) of the Rules the Commission imposed upon the local television station ***specific carriage procedures*** that required written notification "to the satellite carrier's principal place of business by certified mail, return receipt requested...." The fact that these specific requirements could not be met on Sunday, July 1, 2001 precludes the Commission from now concluding that the July 1, 2001 date is a specific predetermined date. The Commission did include the SHIVA date of July 1, 2001 in its Rules, but a plain reading of the rules makes it clear that the ***specific*** carriage procedures under Section 76.66(d)(2)(ii) define and supercede the ***general*** requirement under Section 76.66(c)(3) to provide notification by that date. Under this reading of the rules, Section 1.4 is applicable and the election notice made by KNWS on Monday, July 2, 2001 is in full compliance with the Commission's Rules. Moreover, in this context the Bureau's reliance on the Section 1.4(j) language "Unless otherwise provided..." is without merit.[7]

Furthermore, the Bureau erroneously relies on the decision it made in *Gannon University Broadcasting, Inc.* ("*Gannon*") as precedent supporting its decision of untimely notification by

[7] In addition to not addressing the applicability of Section 1.4 in relation to Section 76.66 of the Commission's Rules in the *DBS Must Carry Report and Order*, the Commission chose not to specify any part of Section 76.66 as an exception under Section 1.4(k) with respect to the applicability of the remainder of Section 1.4 of the Commission's Rules.

Johnson to DIRECTV.[8] The facts of the *Gannon* case are distinguishable from the current set of facts. Gannon University had filed a petition for declaratory ruling requesting that the FCC order Coaxial Cable TV to accept its retransmission consent election. The Commission's Rules required that the retransmission consent election be filed by June 17, 1993. June 17, 1993 falls on a Thursday. Gannon University claimed to have submitted its retransmission consent election on June 17, 1993 at the Gannon University Post Office. However, the Gannon University Post Office is not an agent of the United States Postal Service and could not post certified mail. Apparently, the retransmission consent election was forwarded to a regular U.S. postal facility that provided Gannon University with a registered receipt dated June 18, 1993. As such, the Bureau decided against Gannon University.

In the *Gannon* case the issue was not over the correct filing date, but when the retransmission consent election was actually certified by the U.S Postal Service. Unlike *Gannon*, there is no dispute over when Johnson sent the certified mail, return receipt written election. The issue in the Johnson complaint is what is the correct date for filing under Sections 76.66 and 1.4 of the Commission's Rules when the filing date falls on a Saturday, Sunday, or holiday. The filing date noted in *Gannon* fell on a Thursday. As such, the FCC never addressed the applicability of Section 1.4 of the Commission's Rules concerning when a filing date falls on a Saturday, Sunday, or holiday. In fact, nothing in the *Gannon* case suggests that Section 1.4 of the Commission's Rules is abandoned or inapplicable when a notice provision has a certain date and falls on a Saturday, Sunday, or holiday.[9] Therefore, the *Gannon* case provides no support

[8] *Gannon University Broadcasting, Inc.*, 10 FCC Rcd 8619 (1995).

[9] The only mention of Section 1.4 of the Commission's Rules in the *Gannon* case was in the context of Gannon University arguing that Section 1.4 of the Commission's Rules and Section 6 (e) of the Federal Civil Rules of Procedure stood for the proposition that receipt of its notice within 48 hours is well within the three days considered reasonable when legal documents must be delivered by U.S. Mail. The Bureau never addressed this argument nor is such an argument made in the Johnson complaint. See, *Gannon University Broadcasting, Inc.*, 10 FCC Rcd at 8619.

for the Bureau's decision in the above referenced complaint, since the date for Johnson to elect local-into-local service fell on a Sunday, July 1, 2001 and Johnson correctly relied on Section 1.4 of the Commission's Rules when it sent its certified mail, return receipt written election on the next business day, Monday, July 2, 2001.[10]

In any event, any ambiguity created by the interrelationship of the Commission's Rules must be decided in favor of Johnson. The Commission is required to fairly advise those who would act under its rules what is specifically required.[11] In this instance, it was more than reasonable for KNWS, as a business, to conclude that it would have until July 2, 2001, because the very specific requirements of sending the written notification by certified mail, return receipt requested could not be accomplished on a Sunday, July 1, 2001. Not only is this a reasonable conclusion based on the general practice of the Commission on most all notice matters,[12] but it is a common business practice that a date certain requirement that falls on a non-business day can be satisfied by action on the next business day.[13] Under this set of circumstances, if the Commission did not want the July 1, 2001 date to be meaningful, but wanted to fairly advise local television stations and eliminate any ambiguity in the rules on notification, it either should

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[10] The language quoted by the Bureau from the *Gannon* case that emphasizes the importance of meeting election dates in a timely manner is dicta. See, *Johnson Broadcasting, Inc. v. DIRECTV, Inc., Request for Mandatory Carriage of Television Station KNWS-TV, Katy*, TX, DA 01-2822, CSR-5742-M, released December 5, 2001, par. 10. Johnson does not dispute this policy objective, but in no way agrees that it stands for the proposition that a reasonable reading of the Commission's Rules would deny the applicability of Section 1.4 of the Commission's Rules when a filing date falls on a Saturday, Sunday, or holiday.

[11] See *Banford v. FCC*, 401 F.2d 78, 82 (D.C. Cir.) ("elementary fairness requires clarity of standards sufficient to apprise an applicant of what is expected"), *cert. denied*, 429 U.S. 895 (1976); and *Ridge Radio Corp. v. FCC*, 292 F.2d 770, 773 (D.C. Cir. 1961) (In opening and closing the regulatory door it must "fairly advise prospective applicants of what is being cut off..."). See also, *Athens, Inc. v. FCC*, 535 F.2d 398, 401 (D.C. Cir. 1968) ("When the sanction is as drastic as dismissal without any consideration whatever of the merits, elementary fairness compels clarity in the notice of the material required as a condition for consideration.").

[12] See e.g. Section 73.1020, Station License Period. Applications for broadcast license renewal are due, on a state-by-state bases, on the first day of a particular month. For example, applications for license renewal for Florida will be due February 1, 2004. February 1, 2004 is a Sunday; accordingly applications for license renewal filed on Monday February 2, 2004, the next business day will be considered timely filed.

[13] The most commonly known example is the filing of federal tax returns and payments. Putting aside specific IRS rules, it is generally understood by the business community, as well as the general public that returns and payments due on a date certain, e.g. April 15th, that falls on a Sunday, or holiday are required to be postmarked on the next business day.

have chosen a notification date of June 30, 2001 or specified within its order or its rules that Section 1.4 of the Commission's Rules would not be applicable. Elementary fairness would require as much, considering the harsh consequences a decision such as that made by the Bureau will have on KNWS if it is not reversed. KNWS will suffer damages since it will not be able to commence local-into-local satellite service until January 1, 2006.[14]

Furthermore, the Commission must not allow satellite companies to argue an unreasonable interpretation of the Rules that leads to a harsh and unjust decision that undermines an overall policy objective of the Commission. One policy objective of the Commission was to have appropriate and timely notice given to satellite carriers of a local television station's decision for "local-into-local" carriage.

Equally, if not more important, is the overriding policy objective of allowing local television stations to partake in "local–in-local" carriage to avoid undermining the competitive marketplace. KNWS has been serving the community since 1992. Under the current set of circumstances, to the extent there is any ambiguity in the Commission's Rules, it would be most egregious to abandon this overriding competitive policy objective because KNWS reasonably concluded that sending notification on July 2, 2001 met the Commission's notification requirements.

B. The DBS Must Carry Reconsideration Order Supports Johnson's Rules Interpretation

In addition, the *DBS Must Carry Reconsideration Order* in which the Commission clarified the specific carriage procedures in Section 76.66 (d) bolsters Johnson's rules

[14] The Court of Appeals has held that the FCC acts arbitrarily and capriciously "when it rejects an application as untimely based on an ambiguous cut-off provision, not clarified by FCC interpretations, if the applicant made a reasonable effort to comply." *Florida Inst. of Technology v. FCC*, 952 F.2d 549 (D.C. Cir. 1992). The harsher the consequences of failing to timely meet a deadline, the clearer the deadline must be. In this case the consequences of missing the deadline by one day are very severe -- the next must carry election cycle is in four years.

interpretation argument. In the *DBS Must Carry Reconsideration Order*, the Commission, on its own motion, clarified the election notice provisions by adding Section 76.66 (d) (4) to the Rules which states:

> "Television broadcast stations must send election requests as provided in paragraphs (d)(1), (2), and (3) of this section ***on or before*** the relevant deadline." (Emphasis added).

With the addition of this language, there can be no doubt that Section 1.4 is applicable because KNWS could not have provided notification **"on"** July 1, 2001 and meet the ***specific carriage procedures*** that the written election notice be made by certified mail return receipt requested.

C. At A Minimum, Federal Register Publication Of The Original Section 76.66 Rule Amendments Is Grounds For A Waiver Because It Did Not Provide A Reasonable Notice Period For Applicant To Legally Comply

Even more troubling is the fact that KNWS was under no obligation to file any notification before Friday, June 29, 2001, the date on which the original rule amendments to Section 76.66(c)(3), (c)(5), (d), and (m) became effective through publication in the Federal Register. Johnson had no more than two days to legally comply with the Commissions Rules. Certainly this is an unreasonable notice time period. At a minimum, the date on which the rules became effective through publication in the Federal Register, coupled with any ambiguity in the rules, should provide the Commission with grounds to justify a waiver of the Rules on its own motion with respect to KNWS's election notification to DIRECTV.

D. The Bureau Incorrectly Concluded That DIRECTV's Motion For Summary Dismissal And Answer Was Timely Filed

In the Bureau's *Memorandum Opinion & Order*, the Bureau failed to fully address arguments on the timeliness of DIRECTV's answer to the complaint made by Johnson in its Reply to Motion for Summary Dismissal and Answer of DIRECTV and in its Opposition to

Unauthorized Motion to Accept Motion to Strike and Motion for Sanctions. In these pleadings, the applicant demonstrated that DIRECTV filed an untimely Opposition under Sections 76.66(m) and 76.7(b)(2) of the Commission's Rules. These rules required that DIRECTV file its Opposition within twenty days of service of the Complaint.

The fact is that DIRECTV filed its Opposition thirteen days late on October 22, 2001. The Bureau ignores this argument without discussion or mention and relies on the unsupported statement of DIRECTV that recent Public Notices support that DIRECTV's Answer was due within 20 days of the issuance of the Public Notice. As pointed out by Johnson in its pleadings, the Public Notices referenced by DIRECTV neither changed nor waived the requirements of Sections 76.66(m) and 76.7(b)(2) of the Rules that DIRECTV's Opposition was due within twenty days of service of the Complaint or by October 9, 2001. It would be both ironic and unjust for the Commission to make a strict interpretation of notice rules for KNWS that would undermine an overriding Commission competitive policy and public interest objective and take no action with respect to DIRECTV's egregious violation of the notice rules. As such, the Commission should dismiss DIRECTV's Opposition, reverse the Bureau's order, and find for Johnson.

E. If The Commission Does Not Find On The Merits For Johnson, In The Alternative, Johnson Should Be Granted A Waiver Of The Rules

Johnson strongly believes that it has demonstrated its election of mandatory carriage for local-into-local service was made in accordance with the Commission's Rules. Should the Commission decide otherwise and uphold the Bureau's decision that denies the applicability of Section 1.4 of the Commission's Rules, Johnson submits that it is appropriate for the Commission, on its own motion, to grant a waiver of Section 76.66 (c)(3) of the Commission's

Rules that requires notification as of Sunday, July 1, 2001, such that Johnson's Monday, July 2, 2001 certified mail, return receipt written notification is considered timely notice made to DIRECTV for local-into-local service.

The FCC has authority to waive its rules if there is "good cause" to do so. 47 C.F.R. §1.3. The FCC may waive a rule where particular facts or special circumstances would make strict compliance with a general rule inconsistent with the public interest and the waiver is granted only pursuant to a relevant standard that is best expressed in a rule that obviates discriminatory approaches. *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

In the current instance, there is a compelling set of circumstances that would make strict compliance with Section 76.66 (c)(3) of the Commission's Rules inconsistent with the public interest. These circumstances include the following:

- The filing date fell on a Sunday, July 1, 2001 when it was not possible to meet the requirements of sending a certified mail, return receipt written election.

- There was no delay on the part of Johnson in complying with the specific requirements of Section 76.66 (d)(2)(ii) of the Commission's Rules when it was able to send a certified mail, return receipt written election on the next business day, Monday, July 2, 2001, under the reasonable belief that Section 1.4 of the Commission's Rules was applicable.

- There was insufficient notice of the effectiveness of Section 76.66 (c)(3) of the Commission's Rules, which was not published in the Federal Register until June 29, 2001, just two days prior to the Sunday election date July 1, 2001.

- Any ambiguity in the Commission's Rules with respect to election notification, which the Commission recognized and sought to clarify on its own motion by adding Section 76.66 (d)(4) in the *DBS Reconsideration Order*, should weigh heavily in favor of granting a waiver to avoid discriminatory treatment and promote the overriding competitive public interest concern of providing mandatory local-into-local service through a satellite carrier.

Granting a waiver of Section 76.66 (c)(3) under the special set of circumstances as noted above will not eviscerate the general rules regarding written election notification under Section

76.66 of the Commission's Rules. These are a unique set of circumstances that should neither encourage a flood of waiver requests, nor occur again; especially if the Commission in the future fairly advises those who would act under its Rules what is specifically required.[15] Furthermore, the Commission must take into account the hardship that will be created for KNWS if the waiver is not granted. KNWS will have to wait until January 1, 2006 before the next election cycle commences. Also, failure to grant a waiver on its own motion would be discriminatory and undermine the effective implementation of the overall policy as set forth in the *DBS Must Carry Report & Order*. As the court in *Wait Radio* noted:

> The courts insistence on the agency's observance of its obligation to give meaningful consideration to waiver applications emphatically does not contemplate that an agency must or should tolerate evisceration of a rule by waivers. On the contrary a rule is more likely to be undercut if it does not in some way take into account considerations of hardship, equity, or more effective implementation of overall policy, considerations that an agency cannot realistically ignore, at least on a continuing basis. The limited safety valve permits a more rigorous adherence to an effective regulation. (Footnote 16 omitted)

As such, "good cause" has been shown for the Commission to grant on its own motion to the extent appropriate a waiver of Section 76.66 (c)(3) pursuant to Section 1.3 of the Commission's Rules and allow mandatory carriage for KNWS by DIRECTV.

Relief Requested

Johnson Broadcasting, Inc. has demonstrated herein that it is entitled to mandatory carriage of local-into-local satellite service by DIRECTV because Johnson's certified mail,

[15] See footnote 12 above. Also, Section 76.66 allows a local commercial television broadcast station to elect mandatory carriage by October 1st of the year preceding the new cycle for all election cycles following the first election cycle. The next election date will be October 1, 2005 that falls on a Saturday. To avoid a recurrence of this type notification issue arising again, the Commission should prospectively in this order, a public notice, or the DBS Must Carry proceeding, clarify application of the rules to avoid public confusion in the future. Interestingly, the subsequent election date will fall on a Wednesday, October 1, 2008 lending support to Johnson for the applicability of Section 1.4 of the Commission's Rules or, in the alternative, granting Johnson a waiver.

return receipt election of mandatory carriage, sent to DIRECTV on the first business day following a Sunday, July 1, 2001 filing date, was timely notice within the meaning of Sections 76.66 and 1.4 of the Commission's Rules. As such, the Commission should grant Johnson's Application for Review, reverse the Cable Bureau's *Memorandum Opinion & Order*, released on December 5, 2001, and order DIRECTV to provide mandatory local-into-local satellite carriage for KNWS.

In the alternative, the Commission should, on its own motion, grant Johnson a waiver of Section 76.66 (c)(3) of the Commission's Rules because Johnson has shown "good cause" pursuant to Section 1.3 of the Commission's Rules and order DIRECTV to provide mandatory local-into-local satellite carriage for KNWS.

Johnson Broadcasting, Inc. would appreciate the Commission's prompt review and positive action within 120 days on its application for review, or in the alternative, on its own motion, grant Johnson a waiver of the Commission's rules. This matter is time sensitive to Johnson Broadcasting, Inc. because the date, January 1, 2002, for the initial four year carriage cycle, has now past.

Respectfully submitted,

JOHNSON BROADCASTING, INC.

By: _____
Arthur V. Belendiuk
Anthony M. Alessi
Its Attorneys

January 4, 2002

SMITHWICK & BELENDIUK, P.C.
5028 Wisconsin Avenue, Suite 301
Washington, DC 20016

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CERTIFICATE OF SERVICE

I, Kelly Waltersdorf, a legal assistant in the law offices of Smithwick & Belendiuk, P.C., hereby certify that on January 4, 2002, copies of the foregoing Application for Review were sent via First Class Mail, postage pre-paid, to the following parties:

W. Kenneth Ferre, Chief *
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EXHIBIT 7

ECHOSTAR

ECHOSTAR COMMUNICATIONS CORPORATION

July 30, 2001

Doug Johnson
KLDT
8440 Westpark
Houston, TX 77063

Re: KLDT Mandatory Carriage Election

Dear Mr. Johnson:

The above-referenced election for mandatory carriage made pursuant to the Satellite Home Viewer Improvement Act is rejected for the reason(s) set forth below:

[ ] Duplicate Network Affiliate in Designated Market Area ("DMA")
[ ] Duplicate Non-Network Affiliate Located in State other than State of DMA
[x] Election Postmarked after July 1, 2001 Deadline
[x] Failure to Prove Signal Meets Legal Standard of Quality Necessary for Mandatory Carriage
[ ] Failure to Provide Affirmative Carriage Election
[x] Failure to Provide Community of License
[ ] Failure to Provide DMA Assignment
[ ] Failure to Send Election via Certified Mail Return Receipt Requested
[ ] Low Power & Class A Stations Not Entitled to Must Carry Election
[ ] Must Carry Election Rescinded/Waived by Elector
[ ] Nielsen DMA Assignment and Community of License not in DISH DMA
[ ] Terms of Pre-existing Retransmission Consent Agreement

All inquiries may be directed to: must-carry@echostar.com.

Sincerely,

Eric Sahl
Director of Programming

/nr

5701 S. Santa Fe Drive • Littleton, CO 80120

ECHOSTAR

ECHOSTAR COMMUNICATIONS CORPORATION

July 30, 2001

Doug Johnson
KNWS
8440 Westpark
Houston, TX 77063

Re: KNWS Mandatory Carriage Election

Dear Mr. Johnson:

The above-referenced election for mandatory carriage made pursuant to the Satellite Home Viewer Improvement Act is rejected for the reason(s) set forth below:

[ ] Duplicate Network Affiliate in Designated Market Area ("DMA")
[ ] Duplicate Non-Network Affiliate Located in State other than State of DMA
[x] Election Postmarked after July 1, 2001 Deadline
[x] Failure to Prove Signal Meets Legal Standard of Quality Necessary for Mandatory Carriage
[ ] Failure to Provide Affirmative Carriage Election
[x] Failure to Provide Community of License
[ ] Failure to Provide DMA Assignment
[ ] Failure to Send Election via Certified Mail Return Receipt Requested
[ ] Low Power & Class A Stations Not Entitled to Must Carry Election
[ ] Must Carry Election Rescinded/Waived by Elector
[ ] Nielsen DMA Assignment and Community of License not in DISH DMA
[ ] Terms of Pre-existing Retransmission Consent Agreement

All inquiries may be directed to: must-carry@echostar.com.

Sincerely,

Eric Sahl
Director of Programming

lnr

5701 S. Santa Fe Drive • Littleton, CO 80120

08/08/01 16:30 FAX 713 974 3188 JOHNSON BROADCASTING NWS 005

JOHNSON
BROADCASTING

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

July 1, 2001

Echostar Communications Corporation
90 Inverness Circle East
Englewood, CO 80112

Re: Must Carry Request

To Whom It May Concern:

Johnson Broadcasting Inc. is the licensee of television station KLDT-TV, Channel 55, Lake Dallas, Texas. The purpose of this letter is to advise you that the station requests must carry status, to the extent your satellite system provides local-into-local service in the Dallas-Fort Worth DMA, pursuant to Section 76.66 of the rules of the Federal Communications Commission ("FCC"). 47 C.F.R. § 76.66.

KLDT-TV is located in the Dallas-Fort Worth DMA according to the applicable 1999-2000 Nielsen Station Index Directory and Nielsen Station Index United States Television Household Estimates published by Nielsen Media Research. *See* 47 C.F.R. § 76.66(e)(3). Further, KLDT-TV is committed to doing whatever necessary to deliver a good quality signal to the local receive facility as required by FCC Rule 76.66(g)(1).

We believe that KLDT-TV will be a valuable addition to your local-into-local service and look forward to working with you in the future. Please feel free to contact me if you have any questions concerning this matter. In any event, we request that you respond within 30 days regarding your intent to comply with this request, pursuant to Section 76.66 of the FCC's Rules.

Sincerely,

Doug Johnson
General Manager

8440 Westpark • Houston, Texas 77063 • Office: 713 974-5151 • Fax: 713 974-5188

JOHNSON
BROADCASTING

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

July 1, 2001

Echostar Communications Corporation
90 Inverness Circle East
Englewood, CO 80112

Re: Must Carry Request

To Whom It May Concern:

Johnson Broadcasting Inc. is the licensee of television station KNWS-TV, Channel 51, Katy, Texas. The purpose of this letter is to advise you that the station requests must carry status, to the extent your satellite system provides local-into-local service in the Houston DMA, pursuant to Section 76.66 of the rules of the Federal Communications Commission ("FCC"). 47 C.F.R. § 76.66.

KNWS-TV is located in the Houston DMA according to the applicable 1999-2000 Nielsen Station Index Directory and Nielsen Station Index United States Television Household Estimates published by Nielsen Media Research. *See* 47 C.F.R. § 76.66(e)(3). Further, KNWS-TV is committed to doing whatever necessary to deliver a good quality signal to the local receive facility as required by FCC Rule 76.66(g)(1).

We believe that KNWS-TV will be a valuable addition to your local-into-local service and look forward to working with you in the future. Please feel free to contact me if you have any questions concerning this matter. In any event, we request that you respond within 30 days regarding your intent to comply with this request, pursuant to Section 76.66 of the FCC's Rules.

Sincerely,

Doug Johnson
General Manager

8440 Westpark • Houston, Texas 77063 • Office: 713 974-5151 • Fax: 713 974-5188

EXHIBIT 8

LAW OFFICES
SMITHWICK & BELENDIUK, P.C.
5028 WISCONSIN AVENUE, N.W.
SUITE 301
WASHINGTON, D.C. 20016
TELEPHONE (202) 363-4050
FACSIMILE (202) 363-4266
WWW.FCCWORLD.COM

GARY S. SMITHWICK
ARTHUR V. BELENDIUK

COUNSEL
WILLIAM M. BARNARD
JAMES K. EDMUNDSON
HENRY E. CRAWFORD

DIRECT DIAL NUMBER: (202) 363-4559
E-MAIL ADDRESS: abelendiuk@fccworld.com

August 7, 2001

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Eric Sahl
Director of Programming
Echostar Communications Corporation
5701 S. Santa Fe Drive
Littleton, CO 80120

Re: Johnson Broadcasting of Dallas, Inc.
Licensee of KLDT(TV), Channel 55, Lake Dallas, Texas

Dear Mr. Sahl:

This firm represents Johnson Broadcasting of Dallas, Inc. We are in receipt of your letter dated July 30, 2001, which denied Johnson Broadcasting's request for mandatory carriage. Your reason for denying carriage is based on the incorrect assumption that Echostar was not timely notified of Johnson Broadcasting's request for carriage in accordance with the Federal Communication Commission's rules and regulations. You further claim that Johnson Broadcasting failed to identify the community of license of its station. A careful reading of Johnson Broadcasting's letter will show that in the first sentence of the letter the station's community of license was identified as Lake Dallas, Texas.

Section 76.66 (d)(1)(ii) requires television stations to notify satellite carriers of their carriage election by certified mail return receipt requested. Section 1.47 (f) provides that service by mail is completed upon mailing. July 1, 2001 was the date for notifying a satellite carrier of a commercial television station's mandatory carriage election, as set forth in Section 76.66 (c)(3) of the Commission's rules. July 1, 2001 was a Sunday and therefore a "holiday" within the meaning of Section 1.4 (e)(1) of the rules. Section 1.4 (j) provides that when a filing date falls on a holiday the document may be filed the next business day. In this case, the next business day was Monday July 2, 2001.

Attached is the Certified Mail Receipt for the letter sent on July 2, 2001, to Echostar. The letter was timely sent and therefore Johnson Broadcasting's station is entitled to mandatory carriage on your satellite system.

If you have any questions, please contact the undersigned.

Sincerely yours,

Arthur V. Belendiuk

AVB\ayp.080701a

cc: Johnson Broadcasting of Dallas, Inc.

7001 0320 0006 0458 0976

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

90112

Postage	$ 0.34	UNIT ID: 0066
Certified Fee	2.10	Postmark Here
Return Receipt Fee (Endorsement Required)	1.50	
Restricted Delivery Fee (Endorsement Required)		Clerk: KCBHFC
Total Postage & Fees	$ 3.94	07/02/01

Sent To: Echostar Communications
Street, Apt. No.; or PO Box No.: 90 Inverness Circle East
City, State, ZIP+4: Englewood, CA 80112

PS Form 3800, January 2000 — See Reverse for Instructions

LAW OFFICES
SMITHWICK & BELENDIUK, P.C.
5028 WISCONSIN AVENUE, N.W.
SUITE 301
WASHINGTON, D.C. 20016
TELEPHONE (202) 363-4050
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GARY S. SMITHWICK
ARTHUR V. BELENDIUK

COUNSEL
WILLIAM M. BARNARD
JAMES K. EDMUNDSON
HENRY E. CRAWFORD

DIRECT DIAL NUMBER: (202) 363-4559
E-MAIL ADDRESS: abelendiuk@fccworld.com

August 7, 2001

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Eric Sahl
Director of Programming
Echostar Communications Corporation
5701 S. Santa Fe Drive
Littleton, CO 80120

Re: Johnson Broadcasting, Inc.
Licensee of KNWS-TV, Channel 51, Katy, Texas

Dear Mr. Sahl:

This firm represents Johnson Broadcasting, Inc. We are in receipt of your letter dated July 30, 2001, which denied Johnson Broadcasting's request for mandatory carriage. Your reason for denying carriage is based on the incorrect assumption that Echostar was not timely notified of Johnson Broadcasting's request for carriage in accordance with the Federal Communication Commission's rules and regulations. You further claim that Johnson Broadcasting failed to identify the community of license of its station. A careful reading of Johnson Broadcasting's letter will show that in the first sentence of the letter the station's community of license was identified as Katy, Texas.

Section 76.66 (d)(1)(ii) requires television stations to notify satellite carriers of their carriage election by certified mail return receipt requested. Section 1.47 (f) provides that service by mail is completed upon mailing. July 1, 2001 was the date for notifying a satellite carrier of a commercial television station's mandatory carriage election, as set forth in Section 76.66 (c)(3) of the Commission's rules. July 1, 2001 was a Sunday and therefore a "holiday" within the meaning of Section 1.4 (e)(1) of the rules. Section 1.4 (j) provides that when a filing date falls on a holiday the document may be filed the next business day. In this case, the next business day was Monday July 2, 2001.

Attached is the Certified Mail Receipt for the letter sent on July 2, 2001, to Echostar. The letter was timely sent and therefore Johnson Broadcasting's station is entitled to mandatory carriage on your satellite system.

If you have any questions, please contact the undersigned.

Sincerely yours,

Arthur V. Belendiuk

AVB\ayp.080701b

cc: Johnson Broadcasting, Inc.