

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

Petition for Declaratory Ruling of

Saga Quad States Communications, LLC
Licensee of Station KOAM-TV

and

Saga Broadcasting, LLC
Licensee of Station WXVT(TV)

CSR-8546-M

OPPOSITION OF DIRECTV, INC.

In one of the more notable wastes of Commission resources in recent memory, a broadcaster that timely received certain required notices from DIRECTV now asks the Media Bureau to invalidate those notices solely because they were delivered by Federal Express and not by certified mail.¹ The broadcaster, Saga Broadcasting, was not prejudiced by DIRECTV's use of Federal Express. The Bureau has previously indicated that overnight delivery services are "timely and reliable" and thus acceptable in such circumstances. Broadcasters and distributors alike now routinely use overnight delivery services to deliver thousands of notices subject to requirements identical to those cited by Saga Broadcasting. Granting Saga Broadcasting's Petition would invalidate all of these notices, including hundreds of broadcaster must-carry elections. Accordingly, the Bureau should dismiss Saga Broadcasting's Petition.

¹ Petition for Declaratory Ruling of Saga Quad States Communications, LLC and Saga Broadcasting, LLC (collectively, "Saga Broadcasting"), File No. CSR-8546-M (filed Nov. 15, 2011) ("Petition"). Although Saga Broadcasting styled its request as a Petition for Declaratory Ruling, the Commission has classified it as a Request for Special Relief under Part 76.7 of its rules, presumably to be reviewed by the Media Bureau in the first instance. See Public Notice, Rpt. No. 0357 (Dec. 9, 2011).

BACKGROUND

The facts in this case are undisputed. Both the Communications Act and the Commission's rules require DIRECTV to notify broadcasters at least sixty days prior to each three-year carriage election that it wishes to reserve the right to import same-network "significantly viewed" signals into those broadcasters' markets.² If DIRECTV fails to send this notice, it cannot import the signal in question for that three-year election cycle.³

DIRECTV sent timely notices to two of Saga Broadcasting's television stations by Federal Express, one on June 27, the other on July 21.⁴ *Both stations received those notices.*⁵ Saga Broadcasting's outside counsel nonetheless sent DIRECTV a letter on October 10 indicating that the stations did not receive a notice from DIRECTV "via certified mail, return receipt requested," as specified in the relevant rule.⁶ The letter asserted that, because DIRECTV "failed to comply with the FCC's rules," it had "forfeited any rights it might have had" to import the significantly viewed stations in question. DIRECTV responded on November 2, noting that Saga Broadcasting's objection appeared to relate solely to DIRECTV's method of delivery (*i.e.*, Federal Express rather than certified mail).⁷ DIRECTV pointed out that the Bureau had previously allowed overnight delivery under a rule containing language nearly identical

² 47 U.S.C. § 340(h)(3)(A)(ii); 47 C.F.R. § 76.66(d)(5)(i); 47 C.F.R. § 76.54(e).

³ *Id.*

⁴ *See* Petition, Ex. 1-2. For the convenience of all concerned, DIRECTV will not duplicate, and does not dispute the authenticity of, the exhibits provided by Saga Broadcasting.

⁵ *See* Letter from Arthur V. Belendiuk to "DirecTV Group, Inc." (Oct. 10, 2011), *attached to id.*, Ex. 3, (attaching DIRECTV response, which included Federal Express receipts).

⁶ Petition, Ex. 3, *citing* 47 C.F.R. § 76.54(e).

⁷ Letter from Michael Nilsson to Arthur V. Belendiuk (Nov. 2, 2011), *attached to* Petition, Ex. 4.

to that cited by Saga Broadcasting. DIRECTV also pointed out that, as it had merely *reserved rights* to import significantly viewed stations, it would not respond further at length until it actually sought to exercise those rights (*i.e.*, until there was an actual controversy to dispute). In response, Saga Broadcasting filed the instant Petition.

ARGUMENT

The Bureau should dismiss Saga Broadcasting's Petition, first of all, because the Commission routinely declines to strictly enforce procedural rules such as those at issue here where the party seeking such enforcement has not been prejudiced.⁸ Saga Broadcasting was not prejudiced in the least by DIRECTV's use of Federal Express. It does not and cannot deny having received the notices. It does not dispute the timeliness of the notices. It does not dispute that their content satisfied the requirements of the relevant rules. Its *only* dispute is with the delivery method used.⁹ In such circumstances, it would be inequitable at best for the Bureau to invalidate DIRECTV's notice.

⁸ See, e.g., *Int'l Telecharge, Inc. v. Southwestern Bell Tel. Co.*, 11 FCC Rcd. 10061 (CCB 1996) (allowing complainant to amend complaint to acknowledge proper defendant, a subsidiary of incorrectly named defendant, where proper defendant had actual knowledge of complaint and no prejudice ensued); see also, e.g., *Amor Family Broad. Group v. FCC*, 918 F.2d 960, 962-63 (D.C. Cir. 1990) (upholding FCC's policy of accepting late-filed reservations of interest where there is no opposition of channel proposal and thus no prejudice); *Fiber Tech. Networks, L.L.C. v. N. Pittsburgh Tel. Co.*, 22 FCC Rcd. 3392, ¶ 28 (E.B. 2007) (refusing to dismiss complaint for failure to attach all supporting documentation where later inclusion of documentation did not prejudice defendants); *Application to Assign Wireless Licenses from Worldcom, Inc. to Nextel Spectrum Acquisition Corp.*, 19 FCC Rcd. 6232, ¶ 18 (WTB 2004) (refusing to dismiss petitions for lack of service); *Corporate Media Partners d/b/a/ Americast and Ameritech New Media, Inc. v. Rainbow Programming Holdings, Inc.*, 12 FCC Rcd. 15209, ¶ 17 (CSB 1997) (permitting complaint to be brought against Rainbow that should "technically have been directed to SportsChannel, Bravo and AMCC," where no prejudice was found due to Rainbow's relationship with those entities); *Bright House Networks, LLC*, 22 FCC Rcd. 4169, ¶ 7 (Med. Bur. 2007) (rejecting request to dismiss effective competition petition because footnotes were smaller than 12-point font).

⁹ For this reason, this case differs from that in *Channel 38 Christian Television v. DIRECTV, Inc.*, 24 FCC Rcd. 9419, ¶ 5 (Med. Bur. 2009), in which a broadcaster sought to rely on a telephone conversation as its "election." The Bureau found, correctly, that granting complainant's request would "leave the manner in which it renews its request to the

Granting Saga Broadcasting’s petition would also contravene the Bureau’s prior guidance on this subject. The Communications Act is silent on the method of delivery required for significantly viewed notices.¹⁰ While the relevant Commission rule calls for delivery by certified mail,¹¹ it is not the only or the last word on this matter. The Commission consciously wrote the certified mail provision to be “consistent” with its other carriage notice rules,¹² which also require delivery by certified mail.¹³ Yet when EchoStar (now DISH Network) sought to deny carriage of a must-carry station in 2003 in part because it had delivered its notice by “overnight mail” rather than certified mail, the Media Bureau did not allow EchoStar to do so.¹⁴ It stated: “While the rules state that an election letter should be sent via certified mail, the Commission has not explicitly ruled that an election letter may not be sent by other, reliable and timely methods.”¹⁵ This guidance was settled and understood when the Commission wrote the significantly viewed rules.

discretion of each noncommercial station and would undermine the intent of the rules to provide certainty to satellite carriers in determining their carriage obligations and configuring their satellite systems accordingly.” *Id.* By contrast, the Bureau has acknowledged that use of Federal Express serves all of the Commission’s stated interests in adopting the procedural requirements in question, including timeliness, reliability, and evidence of delivery.

¹⁰ 47 U.S.C. § 340(h)(3)(A)(ii).

¹¹ 47 C.F.R. § 76.54(e).

¹² *Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004; Implementation of Section 340 of the Communications Act*, 20 FCC Rcd. 17278, ¶ 118 (2005) (“2005 Order”).

¹³ 47 C.F.R. § 76.66(d)(1)(ii) (providing that notices must be “sent to the satellite carrier’s principal place of business, by certified mail, return receipt requested”).

¹⁴ *See, e.g., Telefuturo Fresno LLC v. EchoStar Commc’ns Corp.*, 18 FCC Rcd. 22940, n.27 (MB 2003), (citing *Implementation of Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues*, 16 FCC Rcd. 16544, ¶ 64 (2001)).

¹⁵ *Id.*

In explicit reliance on this guidance, DIRECTV now sends out thousands of carriage-related notices and correspondence each year by Federal Express rather than certified mail. It does so precisely because it finds Federal Express to be more “reliable and timely” than certified mail, as well as less expensive. Federal Express can deliver notices more quickly than certified mail and provides “evidence of delivery” of equal reliability.¹⁶ Unlike certified mail, moreover, Federal Express permits DIRECTV to track individual correspondence in the unlikely event that it is not delivered.

Were the Bureau to reverse its prior guidance here, DIRECTV could not provide significantly viewed service anywhere for the next three years.¹⁷ The consequences of such a ruling, however, would extend far beyond DIRECTV itself. In DIRECTV’s experience, overnight delivery services have become the industry standard for the delivery of required carriage notices by broadcasters and distributors alike. Certainly, a substantial percentage of the nearly 1700 carriage elections DIRECTV received for this election cycle were delivered by Federal Express and similar overnight services. The Bureau, of course, cannot prohibit overnight services only for significantly viewed notices. If the phrase “must be sent by certified mail, return receipt requested”¹⁸ does not allow Federal Express delivery for DIRECTV’s significantly viewed notices, then the phrase “must . . . be sent . . . by certified mail, return receipt requested”¹⁹ does not allow overnight delivery for broadcasters’ must carry elections. To hold otherwise would be

¹⁶ See *2005 Order*, ¶ 118 (noting that certified mail, return receipt requested, both “ensures compliance with the statute” and “is necessary to evidence delivery of the notice”).

¹⁷ See Petition at 5 (asking the Commission to declare that DIRECTV has “forfeited any rights it might have had” to import significantly viewed stations).

¹⁸ 47 C.F.R. § 76.54(e).

¹⁹ 47 C.F.R. § 76.66(d)(1)(ii).

reversible error.²⁰ Accordingly, another consequence of granting Saga Broadcasting's Petition would be to allow DIRECTV to discontinue carrying the hundreds of must-carry stations that sent their elections by overnight mail.²¹

* * *

Saga Broadcasting has chosen to spend its time disputing the sufficiency of notices that it actually received which were delivered in the method previously approved by the Media Bureau. The relief it requests would extend beyond Saga Broadcasting's own dispute, needlessly upsetting settled expectations for broadcasters and MVPDs alike. The Bureau should dismiss the Saga Broadcasting Petition.

Respectfully Submitted,

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²⁰ See, e.g., *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (strong presumption that “identical words used in different parts of the same act are intended to have the same meaning”); see also, e.g., *Cellco Partnership v. FCC*, 357 F.3d 88, 96 (D.C. Cir. 2004) (same); *High Cost Universal Service Support*, 24 FCC Rcd. 6475, ¶ 264 (2008) (same).

²¹ 47 C.F.R. § 76.66(d)(1)(v) (providing that “[a] satellite carrier is not required to carry a television station, for the duration of the election cycle, if the station fails to assert its carriage rights by the deadlines established in this section”).

CERTIFICATE OF SERVICE

I, Laura Merkey, certify that on this 29th day of December, 2009, I have caused a true and correct copy of the foregoing pleading to be served via first class mail, postage paid, upon:

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