

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

In the Matter of)	
)	
Smith Media License Holding, LLC)	File No. CSR-8647-M
)	MB Docket No. 12-150
Must-Carry Complaint Concerning)	
KEYT-TV, Santa Barbara, California)	

ANSWER AND OPPOSITION TO COMPLAINT

Time Warner Cable Inc. (“TWC”) hereby submits this Answer and Opposition to the Complaint¹ filed by Smith Media License Holdings, LLC (“Smith”) in the above-referenced docket.²

Smith asserts that KEYT-TV (“KEYT”), its ABC-affiliated station in Santa Barbara, California, is “entitled to invoke the must-carry rights accorded to local commercial television stations,” and that TWC is therefore obligated to carry KEYT’s high-definition signal on cable systems serving the communities of Ojai, Oxnard, Santa Paula, Camarillo, and Ventura, California (the “Ventura Systems”).³ As discussed below, however, Smith is not entitled to invoke must-carry rights on behalf of KEYT because the station elected retransmission consent

¹ Complaint, *Smith Media License Holdings, LLC; Must-Carry Complaint Concerning KEYT-TV, Santa Barbara, California*, File No. CSR-8647-M, MB Docket No. 12-150 (filed May 30, 2012) (“Complaint”). Although Smith styled its pleading as a “Complaint,” it failed to set forth its factual allegations in numbered paragraphs and instead interspersed its allegations with legal arguments. Because it would be impracticable for TWC to admit or deny each factual allegation individually, TWC thus responds to Smith’s factual allegations with a general denial as permitted under the Commission’s rules. *See* 47 C.F.R. § 76.7(b)(2)(iv).

² TWC sought and received two unopposed extensions from the FCC for responding to the Complaint while attempting to reach an agreement with Smith. E-mail of Steven Broeckaert, FCC, to Matthew Brill, counsel for TWC, Jun. 27, 2012; E-mail of Diana Sokolow, FCC, to Matthew Brill, counsel for TWC, Jul. 9, 2012.

³ Complaint at 3 (quotation marks omitted).

for the current election cycle in November 2010. As a result, TWC is carrying KEYT's standard-definition signal pursuant to Smith's grant of retransmission consent, not pursuant to the must-carry provisions of the Communications Act. In fact, at the time Smith filed its Complaint, the parties were negotiating a long-term extension of their retransmission consent agreement that would provide for TWC's carriage of KEYT's high-definition signal. Smith's Complaint is little more than an attempt to end-run those negotiations and to secure HD carriage by regulatory fiat. Because KEYT chose to forego its must-carry rights for the current cycle, the Bureau should dismiss Smith's complaint.

DISCUSSION

I. KEYT HAS ELECTED RETRANSMISSION CONSENT AND DID NOT "DEFAULT" TO MUST-CARRY STATUS

Smith's Complaint hinges entirely on the notion that "KEYT has must-carry status on the Ventura Systems because Smith did not elect retransmission consent status with respect to the Ventura Systems."⁴ Smith appears to be relying on Section 76.64(f)(3) of the Commission's rules, which provides that "[t]elevision stations that fail to make an election by the specified deadline will be deemed to have elected must carry status for the relevant three-year period."⁵ Under the Commission's rules, Smith was required to make an election for the 2012-2014 cycle by October 1, 2011.⁶ Smith's position thus appears to be that it did not make an election for KEYT before that deadline, and that KEYT "defaulted" to must-carry status as a result.⁷

⁴ *Id.*

⁵ 47 C.F.R. § 76.64(f)(3).

⁶ *See id.* § 76.64(f)(2).

⁷ *See* Complaint at 3; *see also id.*, Ex. 1, at 1 (asserting that KEYT has "defaulted to 'must-carry' status" in TWC's service areas).

Smith fails to mention, however, that it *did* make an election before October 1, 2011, and that it elected *retransmission consent* on behalf of KEYT, not must carry. On November 15, 2010, Smith sent a letter to TWC regarding the parties' ongoing efforts "to reach a new long-term retransmission consent agreement."⁸ In that letter, Smith expressly "grant[ed] Time Warner Cable consent to continue retransmitting the primary signal of KEYT-TV on the same channel and same systems that currently retransmit this signal[,] and otherwise in the same manner that the systems carry KEYT-TV as of the date hereof."⁹ The letter goes on to state that "[t]his consent shall remain in effect until Smith Media revokes it by providing at least sixty days written notice."¹⁰ TWC formally accepted these terms three days later, and it has carried KEYT's standard definition signal pursuant to the parties' agreement ever since.¹¹ Following its grant of retransmission consent in November 2010, Smith has never provided any "written notice" of its intention to revoke retransmission consent for KEYT. By granting retransmission consent into 2012 and beyond, KEYT thus elected retransmission consent for the current cycle, and because it did not even purport to revoke that election before the October 1, 2011 deadline, KEYT plainly is barred from shifting to must-carry status after the fact.¹²

⁸ See Letter of Michael Granados, Smith Media, LLC, to Carrie Bocian, TWC, Nov. 15, 2010, attached hereto as Exhibit A.

⁹ *Id.*

¹⁰ *Id.*

¹¹ See Letter of Carrie Bocian, TWC, to Michael Granados, Smith Media, LLC, Nov. 18, 2010, attached hereto as Exhibit B (redacted to preserve the confidentiality of proposed business terms).

¹² As discussed below, even if KEYT had attempted to revoke its election of retransmission consent before October 1, 2011, the Bureau has held that a station cannot undo an election once it is made. Here, the question presented is more straightforward, as KEYT never even made any attempt to withdraw retransmission consent and thereby revoke its prior election.

The Commission has expressly recognized that stations may make retransmission consent elections well before the October 1 deadline, and may do so as part of a retransmission consent agreement. The 2011 *Radio Perry* case, involving a must-carry dispute between WPGA-TV (“WPGA”) and Cox Communications (“Cox”), is squarely on point.¹³ There, WPGA and Cox had entered into a retransmission consent agreement in January 2009 that was “intended by WPGA as a retransmission consent election for the upcoming 2012-2014 carriage cycle.”¹⁴ Nevertheless, when Cox notified WPGA that it no longer wished to carry the station, WPGA attempted to assert must-carry status and filed a complaint asking the Commission to compel Cox to carry the station. The Bureau dismissed the complaint and held that WPGA was bound by its earlier retransmission consent election. Importantly, the Bureau did not find that WPGA had defaulted to must-carry status because its retransmission consent election came more than two-and-a-half years before the October 1, 2011 deadline, or because that election was in the form of a retransmission consent agreement. Instead, the Bureau concluded that, by entering into the January 2009 agreement, “WPGA made a binding retransmission consent election prior to October 1, 2011 for the 2012-2014 election cycle.”¹⁵ The Commission should reach the same conclusion here, ruling that the November 2010 retransmission consent agreement between KEYT and TWC constitutes a valid and binding election for the 2012-2014 cycle.¹⁶

¹³ *Radio Perry, Inc. (WPGA-TV, Perry, Georgia) v. Cox Communications, Inc.*, Memorandum Opinion and Order, 26 FCC Rcd 16392 ¶ 5 (MB 2011) (“*Radio Perry*”).

¹⁴ *Id.* ¶ 5.

¹⁵ *Id.* ¶ 6.

¹⁶ While the station’s election in *Radio Perry* was more overt, such a distinction is immaterial. KEYT’s open-ended grant of retransmission consent extending into the current cycle necessarily was premised on its election of retransmission consent for the upcoming cycle in the first place.

II. SMITH'S FEBRUARY 2012 LETTER WAS NOT A VALID ELECTION OF MUST-CARRY STATUS

Smith also places great weight on a letter it sent to TWC on February 29, 2012, and seems to suggest that, to the extent KEYT did not default to must-carry status, it affirmatively elected must-carry status in the letter.¹⁷ The Commission should reject this argument as well. The letter came nearly five months after the October 1, 2011 deadline for making elections for the 2012-2014 cycle.¹⁸ At best, the letter may constitute a valid must-carry election for the 2015-2017 cycle, but it is plainly untimely as to the current cycle.

Moreover, even if the letter were timely, it would be insufficient to undo KEYT's prior retransmission consent election. The *Radio Perry* case again is instructive. There, shortly before the October 1 election deadline, WPGA sent Cox a letter asserting that it was electing must-carry status, and argued that this new "election" superseded its earlier retransmission consent election. But the Bureau disagreed, noting that "[t]he Commission's rules do not contemplate changing or disaffirming an election once made," and that a broadcaster cannot "unring the election bell."¹⁹ The Bureau further explained that "to de-legitimize earlier carriage elections would imperil the current system of multi-year carriage agreements" and would "lead to administrative chaos."²⁰ Thus, even apart from the untimeliness of the February 2012 letter, Smith may not rely on that letter to supersede its earlier retransmission consent election for the 2012-2014 cycle.

¹⁷ See Letter of Michael Granados, Smith Media, LLC, to Carrie Bocian, TWC, Feb. 29, 2012, attached to Complaint as Ex. 1 (asserting that KEYT "has *elected* and/or defaulted to 'must-carry' status" (emphasis added)); see also Complaint at 1-2 & n.1 (citing the letter).

¹⁸ See *supra* note 6.

¹⁹ *Radio Perry* ¶ 6.

²⁰ *Id.* (quoting *Cablevision Systems Corp.*, Memorandum Opinion and Order, 12 FCC Rcd 13121 ¶ 12 (CSB 1996)).

CONCLUSION

For the foregoing reasons, the Commission should dismiss Smith's Complaint.

Respectfully submitted,

TIME WARNER CABLE INC.

Steven N. Teplitz
Cristina Pauzé
TIME WARNER CABLE INC.
901 F Street, NW
Suite 800
Washington, DC 20004

Julie P. Laine
TIME WARNER CABLE INC.
60 Columbus Circle
New York, NY 10023

July 26, 2012

/s/ Matthew A. Brill

Matthew A. Brill
Matthew T. Murchison
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004

EXHIBIT A

SMITH MEDIA, LLC

November 15, 2010

Ms. Carrie Bocian
Senior Director/Programming
Time Warner Cable
60 Columbus Circle
16th Floor
New York, NY 10023

Re: KEYT-TV, ABC, Santa Barbara, California
Retransmission Consent Agreement

Dear Carrie:

As you know, Smith Media, LLC and Time Warner Cable have been negotiating a long-term retransmission consent agreement for continued carriage of KEYT-TV in certain out-of-market communities since 2005. Despite years of negotiations and countless offers and counter offers, it is apparent that the parties will not be able to reach a new long-term retransmission consent agreement in the foreseeable future.

To avoid any service disruptions for KEYT-TV's viewers, Smith Media, LLC, hereby grants Time Warner Cable consent to continue retransmitting the primary signal of KEYT-TV on the same channel and same systems that currently retransmit this signal and otherwise in the same manner that the systems carry KEYT-TV as of the date hereof.

This consent shall remain in effect until Smith Media revokes it by providing at least sixty days written notice.

Very truly yours,



Michael Granados
CEO
SMITH MEDIA, LLC

EXHIBIT B

60 Columbus Circle
New York, NY 10023
Tel 212-364-8443
Fax 704-973-6235
carrie.bociun@twcable.com

Carrie Bociun
Senior Director
Programming



Via Email/PDF and Fedex

November 18, 2010

Michael Granados
CEO, Smith Media, LLC
[address]

Re: Extension of Retransmission Consent for KEYT-TV, WKTV (TV), WFFF-TV, WVNY (TV)

Dear Mike:

We have received your letter dated November 15, 2010 granting a rolling 60-day extension of retransmission consent for KEYT and your separate letter granting an extension of retransmission consent for WKTV, WFFF and WVNY through December 15, 2010. We accept that our carriage of KEYT is now subject to Smith's right to withdraw consent on 60 days' notice and that Smith will let us continue carrying WKTV, WFFF and WVNY through December 15.

However, we can't accept your characterization of the history of our negotiations in your November 15th letter regarding WKTV, WFFF and WVNY, and since you laid out your view of them, I must take this opportunity to respond. It is true that we began discussing a retransmission consent agreement for carriage of WKTV and WFFF in 2005. In February of 2006 an agreement was reached in principle (which did not include license fees), and we turned to working out a final agreement. Over the course of the next several months matters arose that prevented Smith from engaging in negotiations, and we accommodated Smith's need to delay our discussions by agreeing to extend on a monthly basis.

In January of 2009, Smith indicated that it was ready to reengage in negotiations, and Time Warner Cable sent Smith a written proposal with detailed carriage terms. However, no response was forthcoming from Smith until August of the following year.

Following is the history of our negotiations that next took place:

■ [REDACTED]

It is distressing to be told, as you state in your letter, that "Time Warner Cable simply does not believe that WKTV, WFFF and WVNY should be carried pursuant to generally accepted marketplace terms." Time Warner Cable has entered into hundreds of agreements with broadcast stations over the past few years, and it is unclear to us why the Smith stations should be treated any differently.

As I've repeatedly stated throughout our discussions, we do recognize that carriage of your stations has value to our subscribers, and we hope that you similarly recognize the value of our carriage to your stations. We are eager to reach an agreement with Smith and I am more than willing to continue discussing with you the terms for continued carriage of your stations. However, we expect that Smith will engage in a negotiation rather than simply proffering a 'take it or leave it' offer.

I remain available to discuss this with you at your earliest convenience.

Sincerely,

A handwritten signature in black ink, appearing to read 'Carrie', with a long, sweeping horizontal line extending to the right.

Carrie Bocian

CERTIFICATE OF SERVICE

I certify that, on this 26th day of July, 2012, I caused the foregoing Answer and Opposition to Complaint to be served by first-class mail (and by e-mail where indicated) on the following:

Steven A. Broeckaert*
Deputy Chief, Policy Division, Media Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Robert J. Folliard, III*
Dow Lohnes PLLC
1200 New Hampshire Avenue, NW
Suite 800
Washington, DC 20036

City of Camarillo
Attn: City Attorney
601 Carmen Drive
Camarillo, CA 93010

City of Ojai
Attn: City Attorney
P.O. Box 1570
Ojai, CA 93024

City of Oxnard
Office of the City Attorney
300 West Third Street, Third Floor
Oxnard, CA 93030

City of Santa Paula
Attn: City Attorney
970 Ventura Street
Santa Paula, CA 93060

City of Ventura
Attn: City Attorney
P.O. Box 99
Room 213
Ventura, CA 93002

* also served via e-mail

/s/ Matthew T. Murchison
Matthew T. Murchison