

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

In the Matter of:)	
)	
Duhamel Broadcasting Enterprises)	
)	CSR-5450-A
Modification of the Cheyenne, Wyoming- Scottsbluff, Nebraska DMA)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: March 8, 2000

Released: March 14, 2000

By the Chief, Consumer Protection and Competition Division, Cable Services Bureau:

I. INTRODUCTION

1. Duhamel Broadcasting Enterprises, licensee of Station KDUH-TV (Ch. 4), Scottsbluff, Nebraska (“KDUH-TV”), filed the above-captioned petition for special relief seeking to modify the Cheyenne, Wyoming-Scottsbluff, Nebraska designated market area (“DMA”) to include the communities of Alliance, Hemingford, and the unincorporated areas of Butte County, Nebraska.¹ An opposition to this petition was filed on behalf of Bresnan Telecommunications Company, LLC (“Bresnan”), the cable system operator serving one of the affected communities. In addition, comments were filed on behalf of Mobius Telecommunications Company (“Mobius”), a member of the National Rural Telecommunications Cooperative (“NRTC”), which markets DIRECTV’s DBS service in Box Butte County, Nebraska. KDUH-TV has filed a consolidated reply to both pleadings.

II. BACKGROUND

2. Pursuant to Section 614 of the Communications Act and implementing rules adopted by the Commission in *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues (“Must Carry Order”)*,² commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station’s market. A station’s market for this purpose is its DMA, as defined by Nielsen Media Research.³ A DMA is a

¹KDUH-TV states that these communities are served by two cable operators, Bresnan Telecommunications Company, LLC and Interlink Communications Partners, LLLP.

²8 FCC Rcd 2965, 2976-2977 (1993).

³Section 614(h)(1)(C) of the Communications Act, as amended by the Telecommunications Act of 1996, provides that a station’s market shall be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns. See 47 U.S.C. §534(h)(1)(C). Until January 1, 2000, Section 76.55(e) of the Commission’s rules provided that Arbitron’s “Areas of Dominant Influence,” or ADIs, published in the *1991-1992 Television Market Guide*, be used to implement the
(continued...)

geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.⁴

3. Under the Act, however, the Commission is also directed to consider changes in market areas. Section 614(h)(1)(C) provides that the Commission may:

with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.⁵

4. In considering such requests, the 1992 Cable Act provides that:

the Commission shall afford particular attention to the value of localism by taking into account such factors as –

(I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;

(II) whether the television station provides coverage or other local service to such community;

(III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides new coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and

(IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.⁶

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mandatory carriage rules. Effective January 1, 2000, however, Section 76.55(e) now requires that a commercial broadcast television station's market be defined by Nielsen Media Research's DMAs. For the must-carry/retransmission consent elections that took place on October 1, 1999, commercial television stations were required to make their elections based on DMAs. *See Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules, Order on Reconsideration and Second Report and Order, 14 FCC Rcd 8366 (1999)*(“*Modification Final Report and Order*”).

⁴For a more complete description of how counties are allocated, *see* Nielsen Media Research's *Nielsen Station Index: Methodology Techniques and Data Interpretation*.

⁵47 U.S.C. §534(h)(1)(C).

⁶*Must Carry Order*, 8 FCC Rcd 2965, 2976 (1993).

(continued...)

5. The legislative history of the provision states that:

where the presumption in favor of [DMA] carriage would result in cable subscribers losing access to local stations because they are outside the [DMA] in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the area in which they serve and which form their economic market.

* * * *

[This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.⁷

6. Recently, in the *Modification Final Report and Order*, the Commission, in an effort to promote administrative efficiency, adopted a standardized evidence approach for modification petitions that requires the following evidence be submitted:

(A) A map or maps illustrating the relevant community locations and geographic features, station transmitter sites, cable system headend locations, terrain features that would affect station reception, mileage between the community and the television station transmitter site, transportation routes and any other evidence contributing to the scope of the market.

(B) Grade B contour maps delineating the station's technical service area and showing the location of the cable system headends and communities in relation to the service areas.

Note: Service area maps using Longley-Rice (version 1.2.2) propagation curves may also be included to support a technical service exhibit.⁸

(C) Available data on shopping and labor patterns in the local market.

(D) Television station programming information derived from station

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⁷H.R. Rep. 102-628, 102d Cong., 2d Sess 97 (1992).

⁸The Longley-Rice model provides a more accurate representation of a station's technical coverage area because it takes into account such factors as mountains and valleys that are not specifically reflected in a traditional Grade B contour analysis. In situations involving mountainous terrain or other unusual geographical features, Longley-Rice propagation studies can aid in determining whether or not a television station actually provides local service to a community under factor two of the market modification test.

logs or the local edition of the television guide.

(E) Cable system channel line-up cards or other exhibits establishing historic carriage, such as television guide listings.

(F) Published audience data for the relevant station showing its average all day audience (i.e., the reported audience averaged over Sunday-Saturday, 7 a.m., or an equivalent time period) for both cable and noncable households or other specific audience indicia, such as station advertising and sales data or viewer contribution records.⁹

7. Petitions for special relief to modify television markets that do not include the above evidence shall be dismissed without prejudice and may be re-filed at a later date with the appropriate filing fee. Parties may continue to submit whatever additional evidence they deem appropriate and relevant.

8. With respect to deletions of communities from a station's market, the legislative history of this provision states that:

The provisions of [this subsection] reflect a recognition that the Commission may conclude that a community within a station's [DMA] may be so far removed from the station that it cannot be deemed part of the station's market. It is not the Committee's intention that these provisions be used by cable systems to manipulate their carriage obligations to avoid compliance with the objectives of this section. Further, this section is not intended to permit a cable system to discriminate among several stations licensed to the same community. Unless a cable system can point to particularized evidence that its community is not part of one station's market, it should not be permitted to single out individual stations serving the same area and request that the cable system's community be deleted from the station's television market.¹⁰

9. In adopting rules to implement this provision, the Commission indicated that requested changes should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.¹¹ The rules further provide, in accordance with the requirements of the 1992 Cable Act, that a station not be deleted from carriage during the pendency of a modification request.¹²

⁹47 C.F.R. §76.59(b).

¹⁰H.R. Rep. 102-628, 102d Cong., 2d Sess. 97-98 (1992).

¹¹8 FCC Rcd 15 2977 n. 139.

¹²47 C.F.R. §76.59.

III. DISCUSSION

10. The issue before us is whether to grant KDUH-TV's request to include the communities of Alliance, Hemingford, and unincorporated areas of Box Butte County, Nebraska, within its television market. KDUH-TV is considered to be within the Cheyenne, Wyoming-Scottsbluff, Nebraska DMA, while Box Butte County, in which all of the subject communities are located, is within the Denver, Colorado DMA.

11. In support of its request, KDUH-TV states that as a partial satellite of Station KOTA-TV (Ch. 3), Rapid City, South Dakota, it is seeking to maintain the *status quo* with respect to the instant communities. KDUH-TV indicates that up until January 1, 2000, when the Commission officially switched from the use of ADI markets to DMA markets, Box Butte County was located in the Rapid City, South Dakota ADI and KOTA-TV had must carry rights on the cable systems serving those communities. KDUH-TV states that although it was located in a different ADI, it was permitted to be carried on the Box Butte cable systems in place of KOTA-TV because it was KOTA-TV's satellite. However, KDUH-TV states that since January 1st, neither KOTA-TV nor KDUH-TV are entitled to carriage on the Box Butte cable systems as that county is now in the Denver DMA.

12. KDUH-TV maintains that it has served the subject cable communities since its inception in 1958. It points out that its Grade A contour encompasses all of Box Butte County.¹³ In addition, KDUH-TV states that its transmitter site, which is located in Box Butte County, is only 13.17 miles from Hemingford, the InterLink system headend site, and 19.17 miles from Alliance, the Bresnan system headend site.¹⁴ Moreover, KDUH-TV indicates that there are no terrain features which prevent the cable communities from receiving a good quality, over-the-air signal.¹⁵

13. KDUH-TV argues that shopping and labor patterns in the cable communities reveal an economic interdependency between Scottsbluff, KDUH-TV's city of license, and Box Butte County. KDUH-TV states that the communities of Scottsbluff, Alliance and Hemingford are all located in the Nebraska Panhandle - an 11-county, 14,000 square mile region of rural western Nebraska.¹⁶ Indeed, KDUH-TV states that Scottsbluff County, in which the city of Scottsbluff is located, is considered to be the economic hub of the Panhandle, with Scottsbluff and the nearby community of Gering offering the area's only indoor regional mall, major discount stores, shopping areas, and regional medical center.¹⁷ Moreover, KDUH-TV states that state and federal highways specifically connect Alliance and Hemingford with Scottsbluff and the majority of residents in the Box Butte County communities indicate they shop in Scottsbluff.¹⁸

14. With regard to local programming, KDUH-TV asserts that it provides coverage of news and local events for the residents of Alliance and Hemingford which is not available on other stations carried

¹³Petition at Exhibit A.

¹⁴*Id.* at Exhibit B.

¹⁵*Id.* at Exhibits A-C.

¹⁶*Id.* at Exhibit D.

¹⁷*Id.*

¹⁸*Id.* at Exhibit E, pages 9-11.

by their respective cable systems. Specifically, KDUH-TV states that it broadcasts a daily half-hour local newscast three times a day, as well as a four-minute local news and weather segment during “Good Morning America.”¹⁹ In addition to its coverage of local events in the communities, including public service announcements, KDUH-TV points out that its schedule is carried in the daily *Alliance Times-Herald*. KDUH-TV asserts that it is also the only local outlet for a number of high-quality children’s television programs that meet the educational and informational needs of children.²⁰

15. KDUH-TV points out that it has been historically carried on the Alliance cable system since 1970 and the Hemingford cable system since 1981.²¹ As a result, KDUH-TV argues, if the Box Butte County cable systems are permitted to drop its signal, the historical viewing patterns of the cable subscribers will be disrupted and they will lose a primary source of local programming.

16. Finally, KDUH-TV maintains that it is the most watched television station in Box Butte County, with 67 percent of the residents watching it each week.²² Moreover, KDUH-TV states that according to Nielsen, its quarter-hour audience in Box Butte County represents an 18 percent share of the total viewing by all households in the county during that quarter-hour period.²³ KDUH-TV indicates that this viewership figure is substantially higher than that of any other station in the county, including the Denver market stations. KDUH-TV argues that the Commission has found such audience measurement to be particularly notable in the context of a market modification request.²⁴ Even more important, KDUH-TV asserts, is the fact that, unlike the Denver market stations, it is significantly viewed in Box Butte County.

17. Bresnan argues in opposition that KDUH-TV’s request should be denied because the station signed a retransmission consent agreement with Bresnan on December 14, 1999 for a term of up to nine years beginning on January 1, 2000. Despite KDUH-TV’s allegations, Bresnan states that there is no evidence that KDUH-TV exercised any must carry rights either in Alliance or any of the other Box Butte communities prior to Box Butte County’s reassignment to the Denver DMA. Moreover, Bresnan states that while it may be true that KDUH-TV is a partial satellite of KOTA-TV, it was KOTA-TV and not KDUH-TV which had must carry rights in Box Butte County. Although KDUH-TV states that it had been permitted to be carried on the Box Butte cable systems in place of KOTA-TV, Bresnan points out that it fails to explain how this translated into must carry rights for KDUH-TV.²⁵

18. In addition, Bresnan points out that Box Butte County already has another ABC affiliate, KMGH (Ch. 7), Denver, Colorado, which is geographically more distant than KDUH-TV. As a result, Bresnan argues, KMGH’s must carry rights in Alliance would be severely at risk should KDUH-TV’s petition be granted. Bresnan states that the Commission has in previous instances rejected a station’s attempt

¹⁹*Id.* at 5.

²⁰*Id.* at 6.

²¹*Id.* at Exhibit H.

²²*Id.* at Exhibit 1.

²³*Id.*

²⁴*See California Oregon Broadcasting, Inc.*, 10 FCC Rcd 8218, 8220 (1995).

²⁵Petition at 2.

to include additional communities within its market when doing so would jeopardize the must carry status of the communities' in-market network affiliate.²⁶ Moreover, Bresnan argues that granting KDUH-TV's request may effectively preclude carriage of the Denver network affiliate because it would enable KDUH-TV to assert network nonduplication and syndicated exclusivity rights against the Denver market station. Bresnan maintains, however, that if the Commission should ultimately grant KDUH-TV's request, despite the fact that KDUH-TV has provided no evidence that it meets the required statutory and non-statutory criteria for modification, it should clarify that such an order does not alter its cable community's current inclusion in the Denver DMA.

19. Mobius points out that because of the passage of the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"),²⁷ DBS carriers such as DIRECTV may now deliver Denver television stations to subscribers within the Denver DMA. Therefore, Mobius asserts that Box Butte County DBS subscribers can receive their Denver network-affiliated television stations from the satellite provider. While it has no objection to the Commission granting must carry status to KDUH-TV in Box Butte County, Mobius maintains that such a decision should not adversely affect the right of DIRECTV to provide DBS subscribers in Box Butte County with the Denver network-affiliated stations. Mobius argues to do so would frustrate the purpose of SHVIA. Mobius requests therefore that the Commission specify in its market modification decision that its action is for cable television signal carriage purposes only.

20. KDUH-TV contends that neither Bresnan nor Mobius disputes its entitlement to modification of its market based on the statutory criteria and maintains that it has demonstrated that it serves the Box Butte County communities. KDUH-TV argues that this demonstration is particularly important here where the movement of Box Butte County into the Denver DMA has resulted in the county's cable systems' required carriage of KMGH, a station which has no Grade B coverage, is not significantly viewed, has no ratings and has not shown it provides any local coverage. KDUH-TV states that Bresnan has not attempted to dispute any of these facts, but instead tries to confuse the issue by insisting that the requested inclusion is unnecessary because of a retransmission consent agreement. However, KDUH-TV asserts that there is no improper motive in the instant request because at the time of its filing the retransmission consent agreement to which Bresnan refers had not been reached. Faced with a situation in which it had no statutory carriage rights and no formal retransmission consent agreement, KDUH-TV states that it chose to file a market modification request to ensure cable carriage of its signal in the subject communities. In any event, KDUH-TV points out, the retransmission consent agreement with Bresnan will eventually expire, leaving KDUH-TV with no right to future carriage, and should the station be sold, the agreement would terminate even sooner as the agreement is not assignable.²⁸ Because retransmission consent is not the equivalent of mandatory carriage, KDUH-TV asserts that the instant dispute will remain unsolved unless the Commission makes a determination of carriage rights regardless of the contractual arrangements between the parties.

21. With regard to Mobius' arguments regarding the exclusion of DBS providers from the Commission's cable carriage rules, KDUH-TV notes that this issue is not properly before the Commission in the instant proceeding. It points out that any rules applicable to DBS providers will be more fully developed

²⁶See e.g., *Guy Gannett Communications, Inc.*, 13 FCC RCD 23,470 (1998); *Pacific and Southern Company, Inc.*, 14 FCC Rcd 4558 (1999); and *Broad Street Television, L.P.*, 10 FCC Rcd 5576 (1995).

²⁷Pub. L. No. 106-113, 113 Stat. 1501, Appendix I (1999).

²⁸KDUH-TV also points out that should Bresnan notify KDUH-TV that it chooses not to renew, the agreement could end in as little as three years.

in the Commission's pending SHVIA proceedings. Therefore, KDUH-TV states, the Commission may grant the instant request without prejudice.

22. With respect to the mandatory statutory criteria, we have carefully reviewed the information provided by KDUH-TV in the context of its request. An analysis of this evidence is provided below.

23. Initially, we note that KDUH-TV meets all of the mandatory statutory criteria required in considering a market modification. KDUH-TV has shown that it has a history of carriage in the communities requested for inclusion and that its predicted Grade A contour encompasses all of Box Butte County. In addition, it has demonstrated that it provides local programming which is specifically focused to the communities at issue. Finally, not only is KDUH-TV significantly viewed in Box Butte County, but A.C. Nielsen's 1997 *County/Coverage Study* indicates that KDUH-TV achieves viewership ratings shares of 13 percent total viewing hours and 86 percent net weekly circulation.

24. Bresnan has argued that KDUH-TV is not entitled to seek modification of its market with respect to the community of Alliance because there is a current retransmission consent agreement between Bresnan and KDUH-TV. We disagree. Due to the variables inherent in retransmission consent agreements in general, the existence of such an agreement does not preclude a station from seeking to obtain must carry status through the modification process. Therefore, KDUH-TV is within its rights in seeking modification and the existing retransmission consent agreement between Bresnan and KDUH-TV is not a bar to the instant request.

25. Bresnan is correct in its contention that the Commission is reluctant to grant a modification in instances where the in-market affiliate may be jeopardized. However, in certain instances where core market communities are not involved, modifications have been granted.²⁹ In the present instance, Box Butte County is on the far fringe of the Denver DMA. Indeed, it has only recently been considered to part of that market for must carry purposes. Second, while admittedly the Denver ABC affiliate, KMGH, faces potential endangerment to its carriage, it is noteworthy that KMGH failed to object to KDUH-TV's request or participate in the proceeding. Further, we note that even though it is a market station, KMGH provides no Grade B coverage to the communities, has no indicated viewership and is not significantly viewed in Box Butte County. Moreover, Bresnan has provided no information to indicate that KMGH offers local programming to the instant communities which either equals or exceeds that provided by KDUH-TV.

26. Finally, we note two items. First, Bresnan's concerns with regard to KDUH-TV's nonduplication and syndicated exclusivity rights in Box Butte County is misplaced. The Commission's nonduplication and syndicated exclusivity rules, unlike the must carry requirements, are based on mileage and distance and not market affiliation. They are entirely separate concepts which have no relevance in a modification proceeding.³⁰ Second, grant of KDUH-TV's request does not remove any of the subject communities from their placement within the Denver DMA. A modification request is specific only to the communities and station involved and any rights which exist in those communities relative to their own market are unaffected by grant of a such a waiver. Therefore, based upon our analysis of the evidence presented, we grant KDUH-TV's request for modification of its market.

²⁹See *DP Media License of Battle Creek, Inc.*, 13 FCC Rcd 7122 (1998); *Good Companion Broadcasting, Inc.*, 11 FCC Rcd 4826 (1996); and *Channel 33, Inc.*, 11 FCC Rcd 3579 (1996).

³⁰As a significantly viewed station in Box Butte County, KDUH-TV is considered a "local" station relative to the nonduplication and syndicated exclusivity rules and thus protected from program deletion. See 47 C.F.R. §§76.92 and 76.151.

IV. ORDERING CLAUSES

27. Accordingly, **IT IS ORDERED**, pursuant to Section 614(h) of the Communications Act of 1934, as amended (47 U.S.C. §534(h) and §76.59), that the petition for special relief filed on behalf of Duhamel Broadcasting Enterprises **IS GRANTED**.

28. This action is taken pursuant to authority delegated by Section 0.321 of the Commission's rules.³¹

FEDERAL COMMUNICATIONS COMMISSION

Deborah Klein, Chief
Consumer Protection and Competition Division
Cable Services Bureau

³¹47 C.F.R. §0.321.