

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

In the Matter of:)	
)	
Marks CableVision and TCI)	CSR-4884-A
CableVision of California, Inc.)	
)	
For Modification of the Los Angeles,)	
California ADI)	

ORDER ON RECONSIDERATION

Adopted: January 12, 2000

Released: January 20, 2000

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Marks CableVision and TCI CableVision of California, Inc. ("Petitioners"), operators of cable systems serving communities in and around San Bernardino, California, have requested reconsideration of the Bureau's May 2, 1997 decision denying Petitioners' request for modification.¹ An opposition to this petition was filed on behalf of Sunbelt Television, Inc., licensee of Television Broadcast Station KHIZ (Ind., Ch. 64), Barstow, California to which Petitioners have replied. Subsequently, KHIZ filed a motion to strike portions of Petitioners' reply.²

II. BACKGROUND

2. In their request for modification, Petitioners sought to exclude KHIZ for must carry purposes from carriage on their respective system communities. Petitioners argued that KHIZ failed to meet any of the four statutory modification criteria and was thus not entitled to carriage. KHIZ maintained in opposition that the only reason for its failure to meet the statutory criteria was that, until recently, it was unable to provide a good quality signal to Petitioner's systems due to an intervening mountain range. KHIZ stated,

¹*Marks CableVision and TCI CableVision of California ("Marks Cablevision")*, 12 FCC Rcd 22989 (1997).

²We note that Petitioners filed a motion for stay of the Cable Services Bureau's grants of two related must carry complaints filed by KHIZ against Petitioners (CSR-4860-M and CSR-4856-M). KHIZ's complaint against TCI (CSR-4860-M) was considered jointly with Petitioners' modification request in *Marks CableVision and TCI CableVision of California* and granted at that time. KHIZ's complaint against Marks CableVision (CSR-4856-M) was granted by the Bureau in *Sunbelt Television, Inc. v. Marks CableVision*, 12 FCC Rcd 2419 (1997). In view of our decision herein, we see no need to address the issues raised in this motion or the subsequent opposition filed by KHIZ.

however, that it was now able to transmit a viable signal via microwave. KHIZ asserted that this fact, combined with its Grade A coverage and commonality of interest with the communities argued in favor of a denial of Petitioners' request.

3. The Bureau *Order* agreed with KHIZ and denied Petitioners' request. The Bureau found that the fact that KHIZ's transmitter was only 34 miles from the cable systems' headends and the fact that the station's predicted Grade A contour encompassed all but one system community overrode KHIZ's failure to meet the market modification criteria. The Bureau also noted that there appeared to be significant cultural and economic connections between KHIZ and the San Bernardino-Riverside area.

III. THE PLEADINGS

4. In support of their request, Petitioners state that the Bureau's *Order* denying the original request was internally inconsistent and improperly discounted both KHIZ's failure to provide an actual Grade B contour over the communities at issue and its geographic distance from such communities. Petitioners argue that Section 614(h)(C)(ii) of the Communications Act requires the Commission to "afford particular attention to the value of localism" in considering a request to exclude particular communities from a station's television market and that Congress provided specific market modification procedures because it recognized that ADI classifications are not always a reasonable measure of the type of "localism" that underlies the must carry rules.³ Petitioners maintain that their original request showed that application of each of the four statutory market modification factors strongly supported excluding KHIZ from the relevant communities. Indeed, Petitioners point out that the Bureau's *Order* specifically stated that "[t]he factors recited by Petitioners do weigh in favor of their request."⁴ However, despite this acknowledgment, Petitioners state that the *Order* incorrectly concludes that "other factors deserve more weight."⁵ Petitioners argue that the Bureau's reliance on these "other factors" is misplaced because they are either factually incorrect or legally irrelevant.

5. Petitioners state that while the *Order* notes that KHIZ's transmitter is an average of 34 miles from the systems' headends, this fact is irrelevant because it is undisputed that KHIZ has never placed a usable signal over the San Gabriel or San Bernardino Mountain Ranges which would permit any significant over-the-air or cable reception of its signal. Petitioners point out that the *Order* ignores the fact that Barstow, KHIZ's city of license, is more than 55 miles from the cable communities in question. Petitioners state that such a distance is similar to distances found to justify grant of exclusions in other Commission decisions.⁶ Further, Petitioners state that although the *Order* relies on the fact that KHIZ's predicted Grade A contour encompasses all but one of the communities, the fact remains that KHIZ fails to place an actual Grade B signal over the

³47 U.S.C. §534(h)(C)(ii).

⁴*Marks CableVision*, 12 FCC Rcd 22989, 22997 (1997).

⁵*Id.*

⁶See e.g., *Time Warner Cable*, 1997 FC Lexis 2408 (1997)(42-58 miles); *Time Warner Cable*, 11 FCC Rcd 13149 (1996)(45 miles); *Cablevision of Cleveland and V Cable, d/b/a Cablevision of Ohio*, 11 FCC Rcd 18034 (1996)(41 miles); and *Greater Philadelphia Cablevision, Inc.*, 10 FCC Rcd 8788 (1995)(55 miles).

communities because of the intervening mountain ranges.⁷ Petitioners argue that neither predicted Grade A or Grade B contours should be given any weight because such predicted contours are inconsistent with the fact that KHIZ fails to provide a usable over-the-air signal. Moreover, Petitioners maintain, KHIZ's Grade A and Grade B contour coverage fails to show that the station provides local service for must carry purposes to the communities in question. Finally, Petitioners assert that the *Order* incorrectly concludes that limited non-specific county-wide programs identified by KHIZ demonstrate a nexus between KHIZ and the communities. In view of what it characterizes as incorrect conclusions, Petitioners argue that the Bureau's decision should be reversed.

6. In opposition, KHIZ states that the matters raised in Petitioners' petition for reconsideration have all been addressed in previous pleadings and significantly misstate the record in this proceeding. KHIZ argues that, despite Petitioners' claim, the Commission is under no obligation to give particular weight to any one (or all) of the statutory factors for market modification.⁸ KHIZ points out that in previous decisions, the Commission has discounted several of the market modification factors.⁹ Moreover, KHIZ states that the legislative history of this provision indicates that the factors are not intended to be exclusive.¹⁰ As a result, KHIZ maintains that the Commission was well within its rights to consider "other factors" that "deserve more weight" in rendering its decision, particularly because the goal of a market modification proceeding is to determine whether a particular community is within a station's economic unit.¹¹ KHIZ argues that, based on the totality of evidence it presented in the original proceeding with regard to its service to the instant communities, the Commission's denial of Petitioners' request was warranted.

7. Further, KHIZ states that Petitioners provide no data to support their claim that KHIZ has never placed a usable signal over the San Gabriel or San Bernardino Mountain Ranges to permit any significant over-the-air (or cable) reception in any of the communities at issue. KHIZ states that all that has been established was that KHIZ did not place a "good quality signal" over the cable systems' headends. In any event, KHIZ points out that Petitioners' claims that KHIZ's "actual" Grade B contour does not cover the communities, even if true, should not be considered since Grade A and Grade B contours, by definition, are estimations based upon F(50,50) curves.¹² In addition, KHIZ states that such a claim is misleading because

⁷*Marks CableVision*, 12 FCC Rcd 22989, 22997 (1997).

⁸*See e.g., Time Warner Entertainment Co. v. FCC*, 56 F. 3d 151, 175 (D.C. Cir. 1975); and *Omnipoint Corp. v. FCC*, 78 F. 3d 620, 633-34 (D.C. Cir. 1996)(when Congress directs an agency to consider certain factors, the agency simply "must reach an express and considered conclusion about the bearing of a factor, but is not required to give any specific weight to it.").

⁹*See e.g., Avenue TV Cable Service, Inc.*, 11 FCC Rcd 4803, 4811 (1996)(lack of historic carriage); *News Press and Gazette*, 10 FCC Rcd 10331, 10333 (1995), *KTTC Television, Inc.*, 10 FCC Rcd 12078, 12080 (1995), and *Nationwide Communications, Inc.*, 10 FCC Rcd 13090, 13092-93 (1995)(local coverage by other stations); and *Rifkin/Narragansett South Florida, CATV Limited Partnership*, 11 FCC Rcd 21090 (1996)(viewership ratings).

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

¹¹*Marks CableVision*, 12 FCC Rcd 22989, 11997 (1997).

¹²47 C.F.R. §73.683.

signal strength tests recently conducted at the cable systems' headends in anticipation of commencing carriage reveal that KHIZ provides a signal far above the required minimum levels.¹³ As KHIZ indicated in its opposition to Petitioners' original request, delivery of its signal is by a television relay and microwave system located on Paivika Peak.¹⁴

8. In addition, KHIZ argues that Petitioners' claim that the distance from the station's community of license to the communities is of primary importance is contrary to Commission precedent. KHIZ states that a station's Grade B contour is determined from its transmitter location and not its community of license. KHIZ points out that the Commission has specifically denied ADI modification requests when it has been shown that a Grade B contour encompasses all or part of the community involved or even those communities considered to be on the fringe. KHIZ asserts that focusing solely on the location of a station's community of license ignores the fact that a television station is a "regional" facility rather than a purely "local" outlet.¹⁵ KHIZ states that the fact that the communities herein are within its predicted Grade A and Grade B contours is of extreme importance. Indeed, it indicates that the Commission has recognized in cases where reception is currently difficult due to terrain obstacles that "[t]his, however, does not negate the fact that [such] communities are within the area [such] stations have been licensed to serve."¹⁶ Moreover, KHIZ maintains that it is entitled to establish translator and booster stations within its predicted service area to cure any signal deficiencies to the public and is permitted to utilize television relay service to provide a good quality signal to cable systems in order to establish must carry rights.¹⁷ KHIZ states that it has gone through a great deal of time and expense to purchase, test, and install the equipment necessary to provide a good quality signal to Petitioners' headends. KHIZ concludes that now that it can provide service to the precise area it normally would be expected to reach, denial of Petitioners' request was entirely appropriate.

9. In reply, Petitioners argue that while it may well be that the Commission is not required to give equal weight to all of the modification factors in every situation, it was demonstrated in the original request, and the Commission agreed, that all four factors supported exclusion of the subject communities from KHIZ's market. Petitioners point out that the only way to justify a contrary result is by ignoring all of those factors, which the Commission did in this case. They maintain that there is no support for such an action in the statute, legislative history, the Commission's rules or the *Must Carry Order*.

10. Petitioners reiterate that despite KHIZ's assertions, the fact remains that KHIZ fails to place an actual Grade B signal over the communities. Therefore, they argue, KHIZ's predicted Grade A and Grade

¹³Opposition at 6.

¹⁴*Marks CableVision*, 12 FCC Rcd 22989, 22993 (1997).

¹⁵See *Debra D. Carrigan*, 100 FCC 2d 721, 728 (1985) ("The foremost example of a broadcast channel intended expressly to be a 'regional' rather than a local facility, is, of course, a television channel").

¹⁶See *The Chronicle Publishing Company d/b/a Ventura County Cablevision*, 10 FCC Rcd 9474, 9482 n. 27 (1995).

¹⁷47 C.F.R. §74.731(a). See also *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues ("Must Carry Order")*, 8 FCC Rcd 2965, 2991 (1993).

B contour coverage should be given no weight because those contours are inconsistent with the fact that KHIZ fails to provide a usable over-the-air signal to the communities. Petitioners state that they do not dispute that KHIZ can deliver a good quality signal to their cable systems' headends via microwave, but they insist that there is simply no viewing of KHIZ "in cable and non-cable households" in the subject communities. Therefore, they state, KHIZ's failure to be available over-the-air does not provide any local nexus to those communities. In support of KHIZ's failure to demonstrate any local nexus with the instant communities, Petitioners submit various materials found on KHIZ's web site.¹⁸ Petitioners point out that these exhibits clarify that virtually all of the cable systems which carry KHIZ are located in the High Desert area across the mountains from the San Bernardino cable systems; that its programming orientation and its home page are directed to the High Desert country; and that its programming schedule lists no programs specifically directed to the subject communities.

11. KHIZ has filed a motion to strike the exhibits submitted by Petitioners in their reply. KHIZ argues that none of the material presented was included in Petitioners' previous filings and they may not now supplement the record with new material or new arguments.¹⁹ KHIZ states that Petitioners have made no showing that the facts contained in the exhibits were previously unknown or could have been learned earlier.²⁰ Moreover, KHIZ points out that not all of the exhibits are from KHIZ's web site.²¹ Finally, KHIZ states that Petitioners have provided no engineering exhibit or declaration to establish the accuracy of their statement that KHIZ fails to place an actual Grade B contour over the communities. As such, KHIZ asserts that this allegation should be stricken.

IV. DISCUSSION

12. We do not agree with the arguments raised by Petitioners and will deny the reconsideration petition.

13. In *Time Warner Entertainment Co. v. FCC*, the court stated that when Congress directs an agency to consider certain factors, the agency simply "must reach an express and considered conclusion about the bearing of a factor, but is not required to give any specific weight to it."²² It was undisputed by all parties that KHIZ's transmitter is only 34 miles from the cable systems' headends and that KHIZ's predicted Grade A and Grade B contours encompass either a majority or all of the communities in question. In an effort to refute

¹⁸Reply at Exhibits A, B and C.

¹⁹See *Colorado Radio Corp. v. FCC*, 118 F. 2d 24 (D.C. Cir. 1941)(a litigant "[cannot] sit back and hope that a decision will be in its favor and then, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed.").

²⁰47 C.F.R. §1.106(b)(2)(ii).

²¹KHIZ state that pages 3 and 4 of Exhibit B are from "<http://www.ceol.com/digitaldesert>" and "<http://www.ceol.com/digitaldesert/ddpi/index.html>," neither of which are KHIZ web pages.

²²56 F. wd 151, 175 (D.C. Cir. 1995); accord *Omnipoint Corp. v. FCC*, 78 F. 3d 620, 633-634 (D.C. Cir. 1996).

these facts, Petitioners have emphasized KHIZ's long-term inability to transmit a good quality signal to their respective headends due to intervening mountain ranges between the cable systems and KHIZ's transmitter. Although KHIZ is now capable of providing a good quality signal via a microwave relay, a fact Petitioners do not dispute, Petitioners have argued that the Bureau should give no weight to this or KHIZ's predicted contour coverage because KHIZ's failure to provide an actual over-the-air signal precludes the station from having any local nexus with the system communities. We disagree. The objective of the market modification process is to attempt to define an area that is logically part of the market from which a station may draw economic support and to which its programming output would be directed. A station's Grade A contour generally reflects a sufficiently proximate area to be considered part of its service and logical market area. As the Bureau stated in *Time Warner Entertainment-Advance/Newhouse Partnership*, "the Commission has expressed considerable reluctance to delete communities within an ADI that are within the broadcast service contours of the stations involved."²³ The underlying decision, after reviewing all of the evidence as to the geography and market characteristics of the area, concluded that there were significant cultural and economic connections between KHIZ and the communities, that the station's transmitter was relatively close to the communities (34 miles), and that the intervening mountains did not present a market barrier. Nothing in the reconsideration petition alters these conclusions. We reject Petitioners' specific arguments as to geographic distance. Stations' transmitter sites are clearly relevant to the analysis and such locations are often cited where geographic distance is an issue.²⁴ In this instance, we find that the distance involved weighs against the requested market modification.

14. Petitioners have argued that in situations where all of the explicit modification criteria support deletion, the Bureau has never before ignored the four criteria in favor of other factors. The statute is clear, however, that the factors set forth are illustrative and not exclusive and the Commission's decisions in this area have been consistent in treating them as tools to help in ascertaining the shape of the market involved rather than as limiting the scope of the analysis. As KHIZ notes, the Commission, in deciding modification requests, is not required to give any factor or factors overriding control. On the contrary, the Commission was instructed by Congress to take certain statutory factors into consideration, although they need not be controlling.²⁵ All of the relevant factors have been considered here and the communities in question found to be within the station's market area. In this regard, the relatively short distances involved and the absence of market barriers, notwithstanding the mountainous terrain in the area, were found to be of particular importance.

15. Finally, Petitioners have provided no statement that the information contained in the exhibits presented was unknown to them previously. We agree with KHIZ that the exhibits submitted by Petitioners, purportedly obtained from KHIZ's Internet Web Site, should not be accepted. In order to be accepted, new information must either be based on events or circumstances that have changed or were unknown at the time

²³13 FCC Rcd 5900, 5908 (1997), citing *Cablevision Systems Corporation*, 12 FCC Rcd 12262 (1997).

²⁴See e.g., *Continental Cablevision of Western New England, Inc.*, e.g., 11 FCC Rcd 6488 (1996); *Time Warner Entertainment-Advance/Newhouse Partnership*, 11 FCC Rcd 6541 (1996); *Time Warner Cable*, 11 FCC Rcd 8047 (1996); and *Erie County Cablevision, Inc.*, 13 FCC Rcd 6403 (1998).

²⁵H.R. Rep. 102-628, 102nd Cong., 2d Sess. 97-98 (1992).

of the previous proceeding.²⁶ Even if we were to consider the information contained in the exhibits, it would fail to materially change the facts of the case.

V. ORDERING CLAUSES

16. Accordingly, **IT IS ORDERED** that the petition for reconsideration filed by Marks CableVision and TCI CableVision of California, Inc. **IS DENIED**.

17. This action is taken pursuant to authority delegated by Sections 0.321 and 1.106 of the Commission's rules.²⁷

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

²⁶47 C.F.R. §1.106(b)(2)(ii).

²⁷47 C.F.R. §§0.321 and 1.106.