

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

In the Matter of:)
)
South Texas Vision, L.L.C.)
) CSR-5653-A
Modification of the Austin, Texas DMA)

MEMORANDUM OPINION AND ORDER

Adopted: July 5, 2001

Released: July 9, 2001

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

I. INTRODUCTION

1. South Texas Vision, L.L.C., licensee of television broadcast station KPXL, Uvalde, Texas (“KPXL”), filed the above-captioned petition for special relief seeking to modify the Austin, Texas designated market area (“DMA”) to include the community of Fredericksburg, Texas, and the adjacent, unincorporated areas of Gillespie County, Texas. No opposition to this petition has been received.

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*”), commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station’s market.¹ A station’s market for this purpose is its DMA, as defined by Nielsen Media Research.² A DMA is a 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

¹8 FCC Rcd 2965, 2976-2977 (1993).

²Section 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 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*”).

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.³

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.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.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.

³For a more complete description of how counties are allocated, see Nielsen Media Research's *Nielsen Station Index: Methodology Techniques and Data Interpretation*.

⁴47 U.S.C. §534(h)(1)(C).

⁵*Id.*

* * * *

[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.⁶

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.⁷ 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.⁸

4. 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.⁹

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

(D) Television station programming information derived from station logs or the local edition of the television guide.

(E) Cable system channel line-up cards or other exhibits establishing

⁶H.R. Rep. 102-628, 102d Cong., 2d Sess 97 (1992).

⁷*Must Carry Order*, 8 FCC Rcd 15 2977 n. 139.

⁸47 C.F.R. §76.59.

⁹The 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.

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.¹⁰

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. The *Modification Final Report and Order* provides that parties may continue to submit whatever additional evidence they deem appropriate and relevant.

III. DISCUSSION

5. The issue before us is whether to grant KPXL's request to include the community of Fredericksburg, Texas, and the adjacent, unincorporated areas of Gillespie County, Texas, within its television market. KPXL is considered to be within the Austin, Texas DMA, while Fredericksburg and Gillespie County are located within the San Antonio, Texas DMA.

6. In support of its request, KPXL states that it has only been on-the-air since February 19, 1999 and therefore has not had the opportunity to establish a history of carriage in the subject communities. However, KPXL notes that the Commission has acknowledged that for new stations, such as KPXL, historic carriage is not a controlling factor because otherwise, "the 1992 Cable Act would, in effect, prevent new stations, which cable systems had previously declined to carry, from ever being entitled to carriage."¹¹ KPXL states that its predicted Grade B contour encompasses the subject areas and that some areas are located within its Grade A and City Grade contours.¹² KPXL argues that the Commission has repeatedly emphasized the importance of a station's Grade B coverage of a particular community as a demonstration of local service.¹³ KPXL maintains that its Grade B coverage conclusively demonstrates its local service to Fredericksburg and Gillespie County. In addition, KPXL points out that not only is it geographically proximate to the communities at a distance of 46 miles, but it is carried on the only other cable system serving Gillespie County, located in the community of Harper, which is only 22 miles from Fredericksburg.¹⁴ KPXL states that these distances are well within the range of distances approved in previous market modification cases.¹⁵ As further support, KPXL states that in May 1999, Nielsen

¹⁰*Modification Final Report and Order*, 14 FCC Rcd at 8385-86; see 47 C.F.R. §76.59(b).

¹¹*Time Warner Cable*, 11 FCC Rcd 8047, 8053 (1996).

¹²Petition at Exhibit B.

¹³See e.g., *USA Station Group Partnership of Hollywood, Florida*, 14 FCC Rcd 7211 (1999); *Time Warner Cable*, 11 FCC Rcd 8047 (1996); *Burnham Broadcasting Co.*, 10 FCC Rcd 7117 (1995); and *Time Warner Cable*, 10 FCC Rcd 8040 (1995).

¹⁴Petition at 5 and n. 8.

¹⁵See *Pappas Telecasting, Inc.*, 11 FCC Rcd 6102 (1996)(65 miles).

reassigned Gillespie County from the San Antonio DMA to the Austin DMA, to which KPXL is assigned. KPXL asserts that Nielsen's reassignment provides compelling evidence of the common economic market between KPXL and the subject areas.

7. KPXL states that it broadcasts programming from the PAXTV network. Even though it is a relatively new station, KPXL states that it has a measurable audience share in the San Antonio DMA and in Gillespie County. For instance, KPXL states that the November 2000 Nielsen ratings indicate that KPXL had an average audience share of 0.9 percent of Gillespie County households between 7 a.m. through 1 a.m., Monday through Friday.¹⁶ KPXL states that this share rose to 1.8 percent during prime time hours.¹⁷ KPXL asserts that this ratings information provides evidence that its programming is of interest to the residents of the subject areas. KPXL argues that inclusion of the requested communities would put it on an even level with Station KBEJ, Fredericksburg, Texas, which was recently granted a market modification to include Time Warner's San Antonio, Texas communities to its market.¹⁸

8. We grant KPXL's petition. The legislative history of the 1992 Cable Act provides that the use of DMA market areas is intended "to ensure that television stations be carried in the areas which they serve and which form their economic market."¹⁹ The Act specifically provided that the Commission was to consider adding additional communities or excluding communities from the markets of television stations "to better effectuate the purposes" of the mandatory carriage requirements using four market modification factors as a guide.²⁰ These factors, however, were "not intended to be exclusive."²¹ In acting on such requests, the Commission was instructed to "afford particular attention to the value of localism, taking into account the four specified statutory factors."²² We believe that the addition of the communities herein to KPXL's television market will better effectuate the purposes of the must carry statutory provisions.

9. In an analysis of the four statutory factors for market modification, we find that KPXL's failure to meet the historic carriage factor is not a barrier to grant of its request. Evaluation of this factor must be done bearing in mind that the objective of the Section 614(h) process is to better effectuate the broadcast signal carriage scheme.²³ In this instance, evidence relating to this statutory factor is not outcome determinative by itself. With regard to the other modification factors, we note that the subject areas are encompassed by KPXL's predicted Grade B contour. This fact, along with Nielsen's reassignment of Gillespie County to the San Antonio DMA evidences a nexus between KPXL and Fredericksburg and Gillespie County. With regard to viewership, while KPXL submits November 2000 Nielsen ratings information, based on unweighted meter household samples, we observe that Nielsen's 2000

¹⁶Petition at Exhibit F.

¹⁷*Id.*

¹⁸*See Corridor Television L.L.P.*, DA 01-468 (released February 20, 2001).

¹⁹H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

²⁰47 U.S.C. §534(h)(1)(C).

²¹H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

²²*Id.*

²³*Gulf & Pacific Communications, L.P.*, 12 FCC Rcd 21986 (1997).

County/Coverage Study for Gillespie County does not indicate any viewership for KPXL in Gillespie County. However, we note that lack of an over-the-air audience in the areas does not control our evaluation, particularly for newer stations which can take up to three years to achieve viewership.²⁴ We therefore find that the public interest favors grant of KPXL's request.

IV. ORDERING CLAUSES

10. Accordingly, **IT IS ORDERED**, pursuant to Section 614(h) of the Communications Act of 1934, as amended (47 U.S.C. §534(h)), that the petition for special relief filed on behalf of South Texas Vision, L.L.C. **IS GRANTED**.

11. This action is taken pursuant to authority delegated by Section 0.321 of the Commission's rules.²⁵

FEDERAL COMMUNICATIONS COMMISSION

Steven Broeckaert, Acting Chief
Consumer Protection and Competition Division
Cable Services Bureau

²⁴*Market Modifications and the New York Area of Dominant Influence*, 12 FCC Rcd 12262 (1997).

²⁵47 C.F.R. §0.321.