

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

In the Matter of:
TCI Cablevision of New Mexico, Inc.
For Modification of the Albuquerque-Santa Fe, New Mexico DMA
Prime Time Christian Broadcasting, Inc. v. TCI Cablevision of New Mexico, Inc.
Request for Carriage
CSR-5623-A
CSR-5598-M

MEMORANDUM OPINION AND ORDER

Adopted: February 7, 2001

Released: February 9, 2001

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

I. INTRODUCTION

1. TCI Cablevision of New Mexico, Inc. ("TCI") filed the above-captioned petition for special relief seeking to modify the Albuquerque-Santa Fe, New Mexico DMA relative to television broadcast station KRPV (Ch. 27) ("KRPV" or the "Station"), Roswell, New Mexico. Specifically, TCI requests that KRPV be excluded, for purposes of the cable television mandatory broadcast signal carriage rules, from the communities served by four of its cable systems. An opposition to this petition was filed on behalf of Prime Time Christian Broadcasting, Inc. ("Prime Time"), licensee of Station KRPV. In addition, Prime Time, Inc. has filed a must carry complaint against TCI for its failure to carry KRPV's signal on its Raton, Red River, Santa Fe and Springer cable systems (the "subject communities"). TCI has filed an opposition to this complaint and Prime Time has replied. We are consolidating these cases in order to determine the signal carriage rights of KRPV in the communities in question.

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

1 The cable systems at issue are located in Raton, Red River, Santa Fe and Springer, New Mexico. Petition at 1.

2 In addition, TCI filed a Supplement to Reply to Opposition to Petition for Special Relief ("Supplement") and Prime Time filed a Supplement to Opposition to Petition for Special Relief ("Supplement Response").

are entitled to assert mandatory carriage rights on cable systems located within the station's market.³ A station's market for this purpose is its "designated market area," or DMA, as defined by Nielsen Media Research.⁴ 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 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 viewings are included.⁵

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.⁶

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 factor 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.

³ 8 FCC Rcd 2965, 2976-2977 (1993).

⁴ Section 614(h)(1)(C) of the Communications Act, as amended by the Telecommunications Act of 1996, provides that a station's market 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) requires that Nielsen Media Research's DMAs define a commercial broadcast television station's market. For the must carry/retransmission consent elections that took place on October 1, 1999, commercial television stations were required to make their selections 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").

⁵ For a more complete description of how counties are allocated, see Nielsen Media Research's *Nielsen Station Index: Methodology Techniques and Data Interpretation*.

⁶ 47 U.S.C. § 534(h)(1)(C).

- (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.⁷

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 section] 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 intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.⁸

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(ies) 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.

⁷ *Must Carry Order*, 8 FCC Rcd 2965, 2976 (1993).

⁸ H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

⁹ The 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 station actually provides local service to a community under factor two of the market modification test.

- (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 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. Parties may continue to submit whatever additional evidence they deemed appropriate and relevant.

7. With respect to deletion of communities from a station's market, the legislative history of the 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.¹¹

8. 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.¹² 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.¹³

¹⁰ 47 C.F.R. § 76.59(b).

¹¹ H.R. Rep. 102-628, 102d Cong., 2d Sess. 97-98 (1992).

¹² *Must Carry Order*, 8 FCC Rcd 2965, 2977 n. 139.

¹³ 47 C.F.R. § 76.59.

III. DISCUSSION

A. Market Modification

9. The issue before us is TCI's request to exclude Roswell television station KRPV from mandatory carriage in the subject communities. TCI's communities are located in the New Mexico counties of Colfax, Taos and Santa Fe, which are deemed to part of the Albuquerque-Santa Fe DMA. KRPV is licensed to Roswell, Chavez County, New Mexico, which is also considered to be part of the Albuquerque-Santa Fe DMA.

10. In support of its request, TCI states that although Roswell is in the same DMA as the Systems, KRPV has no local nexus with nor does it serve the subject communities. TCI notes that KRPV is geographically remote from the subject communities, as Roswell is located more than 200 miles away.¹⁴ TCI argues that the exclusion of KRPV is necessary to better effectuate market realities.¹⁵ In that regard, TCI notes that the Commission has observed that "the broadcast signal carriage rules were not intended to transform an otherwise local station into a regional 'super station' that must be automatically carried in every single community in a [DMA] ..."¹⁶ TCI maintains that denying the instant petition, and requiring it to carry KRPV, would limit TCI's ability to provide the programming and services its subscribers desire.¹⁷ TCI points out that even though KRPV has been on the air for more than 14 years, it has no history of carriage in the subject communities.¹⁸ In addition, TCI notes that KRPV has no local ratings, and argues that removing the subject communities from the Station's DMA would be consistent with congressional intent because there "would be no disruption to established viewing patterns, nor would the requested action deprive the Station of any existing cable audience."¹⁹ TCI argues that in previous decisions the Commission has considered stations and communities as close as 38 miles apart to be in different markets.²⁰ TCI indicates that not only does KRPV's Grade B contour fail to encompass any of the communities, but the Station does not provide any local programming tailored to the subject communities.²¹ TCI maintains that KRPV's failure to provide local programming is not mitigated by the fact that it provides a "specialized" format. It points out that the Cable Services Bureau, in a recent decision in a similar case, stated, "[w]e are not convinced that [KRPV's] programming, while of potential

¹⁴ Petition at 2.

¹⁵ In support, TCI cites *Comcast Cablevision of New Mexico, Inc.*, 15 FCC Rcd 7922 (2000), where the Commission granted an analogous petition modifying KRPV's market to exclude similarly distant cable communities. Petition at 2-3.

¹⁶ Citing *Time Warner Entertainment-Advance/Newhouse Partnership*, 11 FCC Rcd 6541, 6553-54 (1996), *Id.* at 3.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 3-4.

²⁰ Citing, *Greater Worcester Cablevision, Inc.*, 13 FCC Rcd 2220 (1998)(39 to 70 miles); *Greater Worcester Cablevision, Inc.*, 12 FCC Rcd 17347 (1997)(38 to 61 miles); *Time Warner Cable*, 12 FCC Rcd 23,249 (1997)(42 to 58 miles, where the Commission stated that the "station's lack of Grade B coverage and [the station's] geographic distance from the cable communities, although not conclusive of themselves ... strongly indicated that the Communities served by Time Warner Cable are not part of [the station's] market."); *Time Warner Cable*, 11 FCC Rcd 13149 (1996) (45 miles); and *Cablevision of Cleveland, L.P. and V Cable, Inc. d/b/a Cablevision of Ohio*, 11 FCC Rcd 18034 (1996)(41 miles). Petition at 4-5.

²¹ *Id.* at 5.

general interest, is the kind that suggests that the subject communities, in total, are a particular focus of the station or are in any sense served in a manner that establishes a specific market connection.²²

11. TCI maintains that KRPV's lack of nexus to the subject communities is evidenced by the fact that the Station's programming is not listed in television programming guides available in the *Raton Range* or the local edition of *TV Guide*.²³ In addition, TCI notes that the distance between Roswell and Raton (280 miles), Red River (311 miles), Santa Fe (191 miles) and Springer (261 miles) establish further the lack of nexus between KRPV and the subject communities. TCI argues that its cable communities already receive ample local programming addressing their interests and concerns from stations which it currently carries.²⁴ TCI contends that this factor strongly favors the modification of KRPV's television market to exclude the communities in question.²⁵ Further, TCI points out that a study conducted by Media Strategies showed that KRPV has no ratings whatsoever in either cable or non-cable households in Colfax, Santa Fe or Taos counties where the communities at issue are located. In view of the above, TCI requests that its petition for exclusion be granted.

12. In opposition, Prime Time argues that TCI's justifications for its request for exclusion are either irrelevant or incorrect in weighing KRPV's mandatory carriage rights in the subject communities.²⁶ Prime Time maintains that other cable systems will carry KRPV as of December 31, 2000.²⁷ Prime Time points to a letter from Adelphia Cable, which shows a startup date of January 15, 2001 to start carrying KRPV on four of its systems serving Enchanted, South Santa Fe, Tesuque and Pojoaque, New Mexico.²⁸ Hence, Prime Time argues that it should be credited with "voluntary historical carriage" and cable viewing on the four Adelphia cable systems and other 25 cable systems within the Santa Fe 30 mile-ring.²⁹ Prime Time asserts that KRPV is carried on three cable systems serving Red River, New Mexico.³⁰ In addition, it notes that there are no off-air television signals available to TCI's cable systems because the Grade B contour of none of the stations TCI carries reaches Red River, Raton or Springer.³¹ Prime Time notes that pursuant to a retransmission consent agreement, Adelphia's Angel Fire, Colfax County, New Mexico system has carried KRPV since Summer 2000.³² Prime Time points out that the Commission has long held that a station's inability to establish historical carriage is not entitled to great

²² Citing, *Comcast Cablevision of New Mexico, Inc.*, 15 FCC Rcd 7922, 7929-7930 (2000); Petition at 5.

²³ *Id.* at Exhibit 8 and Exhibit 9.

²⁴ TCI notes that it carries "Stations KRQE (CBS), KOAT (ABC) and KOB (NBC), which air local newscasts Monday through Friday at 5:00 a.m., 12:00 noon, 5:00 or 5:30 p.m., 6:00 p.m. and 10:00 p.m., that cover news and events concerning the subject communities." In addition, TCI states that the Santa Fe system carries a local station, KCHF, which provides religious programming to the residents of that community. *Id.* at 6. See Petition at Exhibits 4 and 8.

²⁵ Petition at 7.

²⁶ Opposition at 2.

²⁷ *Id.* at 3.

²⁸ *Id.* at 3 and Exhibit 4.

²⁹ *Id.* at 3 and Exhibit 5.

³⁰ Opposition at 4. According to Prime Time, Adelphia's Taos and Questa, New Mexico systems, and US Cable's Arroyo Seco system carry KRPV.

³¹ *Id.*

³² *Id.*

weight, especially, as here, where a religious “specialty” station is involved.³³ Prime Time requests that the Commission should not give any weight to the historical criterion. It requests further that the Commission ignore the fact that TCI is discriminatorily not carrying KRPV, and that it presume, for purposes of this proceeding, that TCI has carried KRPV since 1986.³⁴

13. Prime Time maintains that the distance between Roswell and the subject communities should not make any difference because the KRPV signal will be available to TCI’s headend via satellite transmission, at the Station’s expense, to ensure a good quality signal.³⁵ Prime Time maintains that the Commission’s listing of delivery mechanisms is not intended to be exclusive and should therefore include satellite feeds such as it proposes. Prime Time believes that such delivery can supersede the Commission’s historical view that “[a]s a general matter, Grade B coverage demonstrates service to cable communities and serves as a measure of a station’s natural economic market.”³⁶ Prime Time maintains that the “local-into-local” provisions of the Satellite Home Viewer Improvement Act of 1999 (“SHVIA”) modified the meaning of “other local service, and thus, support Prime Time’s view.³⁷ Prime Time argues that in evaluating the “local signal” criterion, the Commission should conclude that a television signal delivered via satellite, as KRPV proposes to deliver its signal to TCI, should be treated as if it were an off-air Grade B signal delivered to a cable system’s headend.³⁸

14. Prime Time argues that TCI mistakenly attempts to minimize the significance of KRPV’s religious programming by asserting that none of the programming is specifically targeted to the subject communities and that other currently carried stations provide local programming. Prime Time maintains that its religious format specifically fulfills an important community programming need in the communities at issue.³⁹ According to Prime Time, TCI does not meet the specific religious needs of all the subject communities because KCHF, a religious broadcaster, is carried only by TCI’s Santa Fe cable system, and not by the Raton, Red River or Springer systems.⁴⁰ Prime Time, however, contends that KRPV would offer each community, as it does in other communities where KRPV is carried, five 30-minute segments, seven days a week, in which all local churches would have television access for their public announcements, promotional spots and interviews.⁴¹ As an example, Prime Time points out that it recently broadcast a New Mexico Teen Challenge Fund Drive live for two hours, something that could not have happened otherwise because other local stations would not give more than 10-15 minutes of free television airtime.⁴² Moreover, according to Prime Time, KRPV specifically targets Spanish-speaking

³³ See e.g. *Time Warner Cable*, 10 FCC Rcd 936, 938 (1995), citing *Amendment of Part 76, Subparts A and D of the Commission’s Rules and Regulations Relative to Adding a New Definition for “Specialty Stations” and “Specialty Format Programming” and Amending the Appropriate Signal Carriage Rules*, First Report and Order, 58 FCC 2d 442, 452 (1976), *recon. denied*, 60 FCC 2d 661 (1976).

³⁴ Opposition at 6.

³⁵ *Id.*

³⁶ *Id.* at 7, citing *Rifkin/Narragansett South Florida*, 11 FCC Rcd 21090, 21104 n. 59 (1996).

³⁷ Opposition at 6; see P.L. 106-113, § 1000(9), 113 Stat. 1501 (1999).

³⁸ Opposition at 7.

³⁹ *Id.* at 7-9.

⁴⁰ *Id.* at 7.

⁴¹ *Id.* at 7-8.

⁴² *Id.* at 8.

viewers in the subject communities by offering “many” hours of Hispanic religious programming every week; something that no other local station does.⁴³ In support of this contention, Prime Time points out that KCHF only provides a weekly 30-minute Spanish-language program.⁴⁴ In addition, Prime Time explains that the absence of KRPV listings in *TV Guide* is simply because *TV Guide* does not list any religious stations in its New Mexico publication.⁴⁵ Finally, Prime Time maintains that the record shows that KRPV offers sufficient local programming and programming of local interest for the subject communities, and argues that TCI has failed to meet its burden of proof to establish the need for a market modification.⁴⁶

15. Prime Time acknowledges that KRPV has no Nielsen ratings, but argues that it is because the Station does not pay Nielsen for rating its program schedule because KRPV does not sell commercial airtime.⁴⁷ Prime Time, however, notes that its public files are filled with viewer letters thanking it for providing religious-educational programming, which is also free of commercial advertising.⁴⁸ In addition, Prime Time argues that “it is simply too soon” for Nielsen’s ratings to include KRPV.⁴⁹ It points out that the February and May, 2000 audience viewership sweeps in the communities in question were missed because TCI was not carrying KRPV as Prime Time had requested in September 1999.⁵⁰ According to Prime Time, by the time it completed the installation and testing of the equipment in the Adelphia systems, the August 2000 sweeps period had passed.⁵¹ Prime Time notes that the first Nielsen sweeps period for US Cable’s Espanola system was conducted in November 2000, and that other systems will start carrying KRPV either in December 2000 or January 2001.⁵² Prime Time argues that granting TCI’s petition to exclude KRPV from its cable systems in the Santa Fe ZIP Code (87501) would be an injustice to Prime Time and to local cable subscribers, since Adelphia Cable will be carrying it on all six of its Northern New Mexico cable systems.⁵³ Prime Time contends that if the instant petition is granted, KRPV would be deprived of access to the households in the subject communities, and KRPV would be paying a regulatory fee not based on the total number of television households in the DMA as the Commission has established. Consequently, it argues that KRPV be given access to all of the television households if it is going to pay a regulatory fee based on all households.⁵⁴

16. In reply, TCI maintains that Prime Time has failed to establish that it has local nexus with the subject communities.⁵⁵ TCI argues that the Commission cannot ignore or give no weight to the

⁴³ *Id.* at 9.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 10.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 11.

⁵⁰ *Id.* at 10-11.

⁵¹ *Id.*

⁵² *Id.* at 11.

⁵³ *Id.*

⁵⁴ *Id.* at 12.

⁵⁵ Reply at 2.

historical carriage requirement, as Prime Time requests. It points out that the historical carriage requirement is statutory in nature pursuant to Section 614(h)(1)(ii)(I) of the Communications Act.⁵⁶ TCI points out that Prime Time offers no legal authority for its position that it should be credited with voluntary “historic carriage.”⁵⁷ TCI states that as far as it knows, the four Adelphia systems Prime Time indicated would carry KRPV in Enchanted, Pojoaque Valley, South Santa Fe and Tesuque Pueblo, were not carrying the Station even after January 15, 2001.⁵⁸ In this regard, TCI filed a Supplement, in which it refers to Prime Time’s assertion that four Adelphia cable systems would start carrying KRPV as of January 15, 2001, and notes that those four systems are now owned by Comcast Cable Communications, Inc. (“Comcast”).⁵⁹ With its Supplement, TCI submitted a Declaration from Comcast’s Area Manager for the northern New Mexico area. In his Declaration, dated January 22, 2001, Comcast’s Area Manager states that the Enchanted, Pojoaque Valley, South Santa Fe and Tesuque Pueblo systems are not carrying KRPV, and notes that Comcast intends to file petitions for special relief to remove these communities from KRPV’s market.⁶⁰

17. TCI further notes the geographical distances between KRPV’s transmitter and the communities at issue, indicating that the closest community (Santa Fe) is about 150 miles from the outermost reaches of KRPV’s Grade B contour.⁶¹ TCI asserts that Prime Time incorrectly argues that the SHVIA and the Commission modified the meaning of “other local service” in Section 614. Moreover, TCI points out, SHVIA only applies to satellite carriers, not cable operators.⁶² Finally, TCI reiterates its earlier argument that KRPV offers no local programming specifically targeted to the System’s communities, and maintains that the local stations it carries provide the type of local programming envisioned by Congress.⁶³

18. In response to TCI’s Supplement, Prime Time filed a Supplement Response in which it restated its argument that “immediate vicinity” carriage is highly probative in market modification cases and “that such ‘immediate vicinity’ carriage may be demonstrated by cable carriage on other systems in the ZIP code.”⁶⁴ Thus, it argues, the Commission should use a ZIP code as the common denominator to measure “whether a TV station is carried by cable systems in that ‘community’ or ‘area.’”⁶⁵ Prime Time restates that it is being carried by Adelphia’s Taos, Questa, Angel Fire, Las Vegas and Pecos cable systems, and by US Cable’s Arroyo Seco.⁶⁶ Prime Time points out that Nielsen’s Media audience ratings for KRPV in the Albuquerque-Santa Fe DMA for the November sweeps period show that the Station received a 1.9 % cume in the DMA with 10,830 households.⁶⁷ Thus, Prime Time contends that the

⁵⁶ *Id.* at 3.

⁵⁷ *Id.* at 4.

⁵⁸ *Id.*

⁵⁹ Supplement at 1.

⁶⁰ Declaration at 1-2.

⁶¹ Reply at 6.

⁶² *Id.* at 8.

⁶³ *Id.* at 10-11.

⁶⁴ Supplement Response at 2.

⁶⁵ *Id.*

⁶⁶ *Id.* at 3.

⁶⁷ *Id.* at 4.

November 2000 audience ratings results shows that it has an audience share in Colfax, Santa Fe and Taos Counties.⁶⁸

19. As an initial matter, we note that, according to the legislative history of the 1992 Cable Act, the use of [DMA] market areas is intended “to ensure that television stations be carried in the areas which they service and which form their economic market.”⁶⁹ The DMA market change process incorporated into the Communications Act, however, is neither intended to be a process whereby cable operators may seek relief from the mandatory signal carriage obligations apart from the question of whether a change in the market area is warranted, nor is it a vehicle for broadcast stations to reach service areas that otherwise could not serve. When viewed against this backdrop, and considering all of the relevant factual circumstances in the record, we believe that TCI’s exclusion petition appears to be a legitimate request to redraw DMA boundaries to make them more harmonious with market realities. TCI’s actions do not reflect an intention to skirt its signal carriage responsibilities under the Communications Act and the Commission’s rules, nor do they evidence a pattern of discriminatory conduct against KRPV.

20. **Historic Carriage.** As Prime Time indicates, KRPV began operation in September 1986. However, despite being on the air for 14 years, the Station has no history of carriage on TCI’s cable systems. In this regard, we disagree with Prime Time’s argument that the Cable Services Bureau should give no weight to this criterion and presume, for purposes of this proceeding, that TCI has carried KRPV since 1986. Historical carriage is a factor that the enabling statute requires the Commission to consider when giving value to localism.⁷⁰ Therefore, it cannot be ignored or waived by a simple request that the Commission give credit for “voluntary carriage” that is not there. Given the statutory directive, consideration must be given to this factor, bearing in mind that the objective of the Section 614(h) process is to “better effectuate the purposes” of the broadcast signal carriage scheme. Thus, with respect to the question of historical carriage patterns, attention must be paid to the circumstances from which such patterns developed. Some stations have not had the opportunity to build a record of historical carriage for specific reasons that do not necessarily reflect a judgment as to the geography of the market involved. Therefore, the historical carriage factor – to the extent such lack of carriage is reflective of factors outside of the shape of the market – is not by itself controlling in these circumstances. Such an implementation of the 1992 Cable Act would, in effect, prevent weaker stations, that cable systems had previously declined to carry, from ever obtaining carriage rights. In this instance, however, we note that, along with KRPV, which is a specialty station, no other station licensed to Roswell has ever been carried on TCI’s cable systems, nor, apparently, on any other cable systems within the communities at issue. Even with the supplemental information submitted, Prime Time cannot establish historical carriage of KRPV in the subject communities. The new information appears to show, however, that KRPV has carriage of recent origin on three non-contiguous cable systems, including Adelphia’s Angel Fire system, which began carriage in June 2000. This information is not enough to tip the balance in favor of Prime Time. Moreover, based on the recent information Comcast gave TCI, it appears that Prime Time’s assertions that KRPV would be carried on four systems close to the Santa Fe area were premature. TCI’s failure to carry other similarly situated stations demonstrates a lack of nexus between KRPV and the subject cable communities.

21. **Grade B Coverage/Local Service.** A station’s local service to cable communities is one

⁶⁸ *Id.*

⁶⁹ H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

⁷⁰ 47 U.S.C. § 534(h)(1)(C)(ii)(I).

of the relevant factors to consider. The type or age of the station involved or historical carriage does not influence consideration of this factor. Service may be measured through geographic means: by examining the distance between the station and the cable communities subject to the deletion request and taking into account natural phenomena such as waterways, mountains and valleys which tend to separate communities. A station's broadcast of local programming, which has a distinct nexus to the cable communities, is evidence of local service. Also, a station's Grade A or Grade B contour coverage is an additional indicator of local service and we will weigh the presence or absence of such technical coverage accordingly.⁷¹ In the instant case, KRPV does not satisfy any of the local coverage elements we find important in the market modification analysis. KRPV cites no examples of programming specifically directed to the subject communities, but instead contends that its religious format provides valuable programming services to the communities. We find that although the Station's programming may be of potential general interest, it has no specific ties to the communities in question. It is true that KRPV offers Spanish programming. That programming, however, is also not specifically addressed to the communities in total. Thus, we find that KRPV's programming does not serve the communities in a manner that establishes a specific market connection. Without that local market connection, being in the same DMA is not enough to require TCI to begin carrying KRPV in the cable systems at issue. In that regard, we note that the cable communities in question lie outside of KRPV's Grade B contour and are, on average, approximately 260 miles from KRPV's city of license. As TCI points out, the Bureau has observed that "the broadcast signal carriage rules were not intended to transform an otherwise local station into a regional 'super station' that must be automatically carried in every single community in a [DMA]."⁷² Finally, we point out that the enabling statute and Commission's rules require us to look at communities, not at ZIP codes when dealing with must carry and DMA issues. In the instant case, KRPV has not shown that the ZIP code it submitted encompasses the disputed communities.

22. **Carriage of Other Stations.** We also believe that TCI's carriage of other local television stations provides support for the action requested. Where a cable operator is seeking to delete a station's mandatory carriage rights in certain communities, the issue of local coverage by other stations becomes a factor to which we will give greater weight than in cases where a party is seeking to add communities. In this case, we find that the Albuquerque stations TCI carries have a closer nexus to the cable systems herein than does KRPV. These market facts, coupled with the distance between the cable systems and KRPV, support TCI's modification under the third factor.

23. **Viewership.** Nielsen's *2000 County/Coverage Study* fails to indicate any viewership for KRPV in the counties in which the subject cable communities are located. The supplemental information Prime Time filed recently shows that KRPV has some viewership in the Albuquerque-Santa Fe DMA. The audience ratings of 1.9 % cume, however, is not community or County specific. Rather, it is DMA-wide, and consequently, is of little probative value. Thus, although viewership is generally not relevant to specialty stations, this dearth of viewership is of evidentiary significance when tied with the lack of historical carriage and Grade B coverage.

24. After carefully considering each statutory factor in the context of the circumstances presented here, as well as other relevant information, we grant TCI's petition for market modification.

⁷¹ As a general matter, Grade B coverage demonstrates service to cable communities and serves as a measure of a station's natural economic market. *See Must Carry Order*, 8 FCC Rcd at 2977. *See also Amendment of Section 76.5d1 Orlando-Daytona Beach-Melbourne, and Cocoa, Florida*, Report and Order, 102 FCC 2d 1062, 1070 (1985) ("We believe that television stations actually do or logically can rely on the area within their Grade B contours for economic support.")

⁷² *Time Warner Entertainment-Advance/Newhouse Partnership*, 11 FCC Rcd 6541, 6553-6554 (1996).

Based on geography, we believe that the cable communities at issue are sufficiently removed from KRPV that they ought not to be deemed part of KRPV's market for mandatory carriage purposes.⁷³ According to the legislative history of the 1992 Cable Act, the use of DMA market areas is intended "to ensure that television stations be carried in the areas which they service and which form their economic market."⁷⁴ The Commission may make changes to market areas "to better effectuate the purposes" of the mandatory carriage requirements.⁷⁵ Moreover, given the evidence as to the lack of Grade B coverage, the lack of viewership in the cable communities at issue, the lack of historical carriage, and the absence of evidence indicating that KRPV provides local programming, we conclude that deletion of Santa Fe, Red River, Springer and Raton, from KRPV's market for mandatory carriage purposes effectuates the purposes of Section 614 of the Communications Act.

25. Finally, we note that KRPV's obligation to pay a regulatory fee for its designation as part of the Albuquerque-Santa Fe market is a matter which is separate from any market modification proceedings.⁷⁶ If KRPV thinks that it is paying an unfair fee, it may seek relief pursuant to the Commission's rules.

B. Must Carry Complaint

26. In view of our decision in the instant petition, the arguments raised by Prime Time and TCI in reference to the above-described must carry complaint are now moot. As such, Prime Time's must carry complaint is dismissed.

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) and Section 76.59 of the Commission's rules (47 C.F.R. § 76.59), that the captioned petition for special relief (CSR-5623-A), filed by TCI Cablevision of New Mexico, Inc. **IS GRANTED**.

⁷³ H.R. Rep. 102-628, 102d Cong., 97-98 (1992).

⁷⁴ *Id.* at 97.

⁷⁵ 47 U.S.C. § 534(h).

⁷⁶ See *Texas Partners, L.P. d/b/a Paragon Cable*, 2000 WL 1610320 (2000).

28. **IT IS FURTHER ORDERED**, that the must carry complaint (CSR-5598-M) filed September 27, 2000, on behalf of Prime Time Christian Broadcasting, Inc. **IS DISMISSED**.

29. These actions are taken pursuant to authority delegated by Section 0.321 of the Commission's rules.⁷⁷

FEDERAL COMMUNICATIONS COMMISSION

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

⁷⁷ 47 C.F.R. § 0.321.