

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

In the Matter of:)	
)	
Time Warner Cable)	CSR-6173-A
)	
Petition For Modification of the Television Market)	
of Television Station KHIZ (TV), Barstow,)	
California)	

MEMORANDUM OPINION AND ORDER

Adopted: October 8, 2003

Released: October 14, 2003

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Time Warner Cable (“Time Warner”) filed the above-captioned petition for special relief seeking to modify the Los Angeles, California designated market area (“DMA”) with respect to television broadcast station KHIZ (Ch. 64), Barstow, California (“KHIZ”). KHIZ is licensed to Sunbelt Television, Inc. Specifically, Time Warner requests that certain communities in the Los Angeles DMA (“cable communities”),¹ where it operates cable television systems, be excluded from the television market of KHIZ for the purposes of the cable television mandatory broadcast signal carriage rules. KHIZ filed an opposition to which Time Warner replied. For the following reasons, we grant Time Warner’s petition.

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.² A station’s market for this purpose is its “designated market area,” or DMA, as defined by Nielsen Media

¹Time Warner lists the following communities which it seeks to exclude from the television market of station KHIZ: San Fernando, Santa Clarita, unincorporated areas of Los Angeles County, Stevenson Ranch, and discrete areas of the City of Los Angeles known as Canoga Park, Chatsworth, Encino, Granada Hills, Northridge, Reseda, Sepulveda, Sherman Oaks, Tarzana, Van Nuys, West Hills and Woodland Hills (the “Chatsworth System”); Gardena, Hawthorne, El Segundo, Lawndale, Torrance, and North Torrance (the “Gardena System”); South Pasadena and San Marino (the “South Pasadena System”); and Orange, Orange County, Garden Grove, Los Alamitos, Huntington Beach, Westminster, Stanton, Fountain Valley, Rossmoor, Midway City, and Cypress (the “Orange System”). Petition at 2.

²8 FCC Rcd 2965, 2976-1977 (1993).

Research.³ 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 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

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 news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community;
- (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.⁶

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

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). Section 76.55(e) requires that a commercial broadcast television station's market be defined by Nielsen Media Research's DMAs. 47 C.F.R. §76.55(e); see *Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, 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*Id.*

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

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.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:

(1) 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.

(2) 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 to Paragraph (b)(2): Service area maps using Longley-Rice (version 1.2.2) propagation curves may also be included to support a technical service exhibit.⁹

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

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

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

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

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.

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

(6) 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.-1 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 with a filing fee. The *Modification Final Report and Order* provides that parties may continue to submit additional evidence that they deem appropriate.

III. DISCUSSION

5. The issue before us is whether to grant Time Warner's request to exclude KHIZ from mandatory carriage on its cable systems serving the cable communities.¹¹ The cable communities are located in the Los Angeles area of the Los Angeles DMA. KHIZ is licensed to Barstow, California, which is also located in the Los Angeles DMA.¹² Considering the relevant facts in the record, we believe that Time Warner's market modification petition is a proper request to redraw DMA boundaries to make them congruous with market realities.

6. In support of its petition, Time Warner states that KHIZ has never been carried by its cable systems in the cable communities.¹³ Time Warner also explains that the cable communities are located 79 to 102 miles from Barstow, mountain ranges exist between KHIZ and the cable communities, and that KHIZ fails to provide a good quality signal to the cable communities. In support of the last claim, Time Warner provided an engineering study that it states reflects that KHIZ did not provide a Grade B signal to the cable communities except for a small portion of the City of Orange, and a Longley-Rice propagation study that indicates that none of the cable communities receive a Grade B signal.¹⁴ Time Warner finally argues that there is no nexus between KHIZ and the cable communities. Time Warner claims that the lack of connection is illustrated by KHIZ's lack of programming directed toward the cable communities, lack of reportable audience in these areas, no carriage on nearby cable systems, and omission from principal local television program listings.¹⁵

7. In its opposition, KHIZ states that the Commission has denied two similar requests to exclude KHIZ from cable systems in the Los Angeles area.¹⁶ KHIZ also asserts that the Los Angeles

¹⁰47 C.F.R. §76.59(b).

¹¹Petition at 1.

¹²*Id.* at 3.

¹³*Id.* at 6.

¹⁴*Id.* at 7-11, and Attachment 7. It is estimated that the closest KHIZ's Grade B signal comes to the edge of the cable communities based on Time Warner's Longley-Rice study ranges from approximately 15 miles for the Chatsworth system to 40 miles for the Gardena system.

¹⁵*Id.* at 11-13.

¹⁶Opposition at 2 n.5, citing *Comcast Cablevision of Inland Valley*, 12 FCC Rcd 6461 (1997); *Marks Cablevision and TCI Cablevision of California*, 12 FCC Rcd 22989 (1997).

market has unique characteristics, such as special geographic, social and economic attributes, which need to be considered in market modification proceedings. For example, KHIZ explains that there are significant cultural and economic connections between KHIZ and the cable communities, and that Barstow area residents commute to jobs in the cable communities and vice versa.¹⁷ KHIZ further states that a station's lack of historic carriage on a cable system "is not determinative of whether a community should be deleted from a station's market," that KHIZ is carried on other cable systems in the area, and that Time Warner carries two television stations that, like KHIZ, are located in the eastern part of the Los Angeles DMA.¹⁸ KHIZ also asserts that it provides at least fringe coverage to the cable communities because they are within 11 to 16 miles of KHIZ's predicted Grade B contour, and that its "transmitter is located on the average, only 73 miles from the" cable communities.¹⁹ With regard to local programming, KHIZ explains that it provides programs specifically geared to the cable communities and plans to increase this programming in the future. According to KHIZ, its current local programs are "Money Matters," "The Macabre Theatre," and "Community Calendar."²⁰ Finally, KHIZ states that it is "listed as a local channel in various newspapers distributed in the" cable communities, and "is in the process of rebuilding its viewership base [in these communities] after its financial troubles in the late 1990's."²¹

8. In its reply, Time Warner discusses the two cases that KHIZ cited as similar to the present situation where the Commission denied requests to exclude KHIZ from cable systems in the Los Angeles DMA. Time Warner distinguishes the cases by explaining that one decision, "The *Comcast* decision," concerned cable systems "in San Bernardino County, Barstow's home county, located at an average distance of only 35 miles from KHIZ, all of which with but one exception are encompassed within KHIZ's Grade A contour. Virtually the same factors were present in the *Marks CableVision and TCI Cablevision* case cited by Sunbelt."²² With regard to KHIZ's assertion that the Los Angeles DMA has unique characteristics and is geographically, socially and economically integrated, Time Warner states that "the Commission does not share Sunbelt's [KHIZ] views as to the solidarity of the Los Angeles DMA [as] is graphically evidenced by the number of instances in which in-market cable communities have been excluded from the television markets of stations assigned to the Los Angeles DMA."²³

9. Time Warner also addresses in its reply KHIZ's claim that it is carried on other cable systems in the area by explaining that its closest cable community is 19 and 28 miles away from the cable systems carrying KHIZ.²⁴ Concerning KHIZ's claim that Time Warner carries other television stations located in the eastern portion of the Los Angeles DMA, Time Warner states that these stations are considerably closer to, and provide at least a predicted Grade B coverage over the cable communities.²⁵ Although Time Warner submitted a Longley-Rice study indicating that KHIZ's Grade B signal did not come close to the cable communities, Time Warner responded to KHIZ's claim that it should be carried

¹⁷Opposition at 3-5.

¹⁸*Id.* at 8-9.

¹⁹*Id.* at 10-12. and Attachment 1.

²⁰*Id.* at 13-16.

²¹*Id.* at 19.

²²Reply at 3 (footnotes omitted).

²³*Id.* at 4.

²⁴*Id.* at 5.

²⁵*Id.* at 5-6.

in the cable communities because it provides “fringe” coverage beyond its predicted Grade B contour. Time Warner indicates that allowing “fringe” areas to be included within KHIZ’s market would result in the cable communities “as effectively being located within the Grade B contour for purposes of market modification analysis,” and that “the decisions relied upon by Sunbelt [KHIZ] to support its position are readily distinguishable from those involved in this proceeding.”²⁶ For example, according to Time Warner, in one case cited by KHIZ in support of its “fringe” argument, the Commission stated that “the station’s Grade A contour covered ‘almost all’ of the cable communities, and none of the four exceptions [where there was possible fringe coverage] were located more than five miles beyond the Grade B contour.”²⁷ Finally, Time Warner answers KHIZ’s claim that it provides local programming and is listed in newspapers distributed in the cable communities by stating that “a general interest financial advice program, a weekly monster movie show and a DMA-wide bulletin board of community events fail to establish any nexus between KHIZ’s programming and residents of the TWC communities,” and that KHIZ’s programs are not listed in “the market’s major newspapers.”²⁸ Regarding possible future KHIZ programs of local interest, Time Warner states programs of this nature “remain speculative at this time.”²⁹ Time Warner concludes its reply by asserting that KHIZ acknowledges that it has no off-air viewing in the cable communities.³⁰

10. In granting Time Warner’s petition to modify its DMA to exclude the cable communities from the television market of KHIZ for the purposes of the mandatory broadcast signal carriage rules, we find that Time Warner meets the statutory criteria for market modification. As explained above, the first statutory factor is “whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community.” KHIZ has no history of carriage by cable systems in the cable communities. Further, although Time Warner carries two television stations licensed in the eastern part of the Los Angeles DMA, the cities of license, Riverside and San Bernadino, are considerably closer to the cable communities than KHIZ’s city of license, Barstow. In addition, the two stations appear to provide at least predicted Grade B coverage to the cable communities. Although KHIZ states that it is carried by other cable systems in the Los Angeles DMA, namely, Palmdale and Action, there are a number of differences between these cities and the cable communities. The cities are located on the eastern edge (the same side as KHIZ) of mountains which divide the DMA and separate these cities from the cable communities. The cities are considerably closer to KHIZ’s city of license than Time Warner’s cable communities, and the cities appear to be included within KHIZ’s predicted Grade B coverage area.³¹ Cable carriage of KHIZ in these cities, therefore, does not overcome the fact that KHIZ is not carried in or near the cable communities. Accordingly, we find that Time Warner meets the requirements of the first statutory factor.

11. The second statutory factor is “whether the television station provides coverage or other local service to such community.” As discussed above, KHIZ lists two programs, “Money Matters” and “The Macabre Theatre,” which it states are locally produced and geared to the interest of local residents. The former appears to be a general interest financial advice program and the latter is a weekly horror

²⁶*Id.* at 7.

²⁷*Id.*

²⁸*Id.* at 9-10, 11 n.37.

²⁹*Id.* at 10.

³⁰*Id.* at 10-11.

³¹Opposition at Exhibit J.

movie. KHIZ states that it also broadcast a community calendar several times a day. This program covers events across the Los Angeles DMA, including some events within the cable communities. KHIZ also indicates that it intends to increase local programming in the future. The Communications Act, however, requires the Commission to base its market modification decisions on whether a station provides local service to a community and not on promises of future programming.³²

12. KHIZ acknowledges that it does not provide a predicted Grade B signal to the cable communities. Time Warner, moreover, has provided a service area map for KHIZ, using Longley-Rice propagation curves, which reflects that KHIZ does not provide Grade B service to any of the cable communities. As discussed above, the Commission accepts service area maps based on the Longley-Rice model because Longley-Rice provides an accurate representation of a station's technical coverage area by taking into account such factors as mountains and valleys that are not specifically reflected in traditional predicted Grade B contour analysis.³³ Thus, in areas such as the Los Angeles DMA, where there are distinctive geographical features, Longley-Rice propagation studies are an especially important aid in determining whether a television station provides local service to a community. KHIZ's argument that the Commission should, in effect, disregard its lack of Grade B coverage in analyzing whether it provides service to local communities is contrary to the Commission's consistent emphasis on the significance of this factor in its market modification analysis.³⁴

13. KHIZ argues that the Los Angeles area is a single market, and that Barstow area residents commute to jobs in the cable communities and vice versa. However, KHIZ did not provide significant data or statistics in support of this claim. The Los Angeles DMA in terms of territory and population is vast and varied. At the western edge, there is the Pacific Ocean and large population centers, including the City of Los Angeles, in the central area of the DMA there are mountains, and on the eastern edge, there is desert extending to the Arizona border and sparse population. The Commission has explained that where a DMA covers a large geographic area, the mandatory broadcast signal carriage rules do not transform a station serving a portion of the DMA's market and service area into a regional 'super station' that must be carried by cable systems throughout the DMA.³⁵ Thus, the second statutory factor supports Time Warner's petition to modify the Los Angeles DMA.

14. The Third statutory factor is "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 news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community." In general, we believe that Congress did not intend this third criterion to operate as a bar to a request to modify a DMA when other stations could be shown to serve the communities at issue. Rather, we believe this criterion was intended to enhance a station's claim where it could be shown that other stations do not serve the communities at issue.³⁶ In this case, because other stations serve the communities in question, this enhancement factor is not applicable.

³²47 U.S.C. §534(h)(1)(C)(II); *Cablevision of Cleveland*, 16 FCC Rcd 15575, 15577 (2001).

³³*See, e.g., Comcast Cablevision of Danbury*, 18 FCC Rcd 274, 279 (2003).

³⁴*See, e.g., Frontier, A Citizens Communications Company*, 18 FCC Rcd 9589, 9594 (2003).

³⁵*Id.*

³⁶*See, e.g., Great Trails Broadcasting Corp.*, 10 FCC Rcd 8629 (1995); *Paxson San Jose License, Inc.*, 12 FCC Rcd 17520 (1997).

15. The fourth statutory factor concerns “evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.” There is no evidence that KHIZ has significant off-air viewing in the cable communities. The above factors tend to explain the history of KHIZ’s lack of carriage in Time Warner’s cable communities, and strongly indicate that the communities are too distant to properly be part of KHIZ’s television market.

IV. ORDERING CLAUSE

16. 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-6173-A), filed by Time Warner Cable, **IS GRANTED**.

17. These actions are taken pursuant to authority delegated by Section 0.283 of the Commission’s rules.³⁷

FEDERAL COMMUNICATIONS COMMISSION

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³⁷47 C.F.R. §0.283.