

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

In the Matter of:	)	
	)	
Time Warner Entertainment/Advance Newhouse	)	
Partnership d/b/a Time Warner Cable	)	CSR-6028-A
	)	
For Modification of Television Market of	)	
Television Station KXLA(TV),	)	
Rancho Palos Verdes, California	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 17, 2003**

**Released: March 19, 2003**

By the Deputy Chief, Policy Division, Media Bureau:

**I. INTRODUCTION**

1. Time Warner Entertainment/Advance Newhouse Partnership d/b/a Time Warner Cable ("Time Warner") filed the captioned petition which seeks to exclude the city of Barstow, the nearby Marine Corps Logistics Base, and adjacent unincorporated areas of San Bernardino County, California known as Daggett, Hinkley, Lenwood and Yermo (the "communities") served by Time Warner's cable system from the market of television station KXLA, channel 44, Rancho Palos Verdes, California,. Rancho Palos Verdes Broadcasters, Inc. ("Rancho"), licensee of KXLA, filed an opposition to the petition, and Time Warner replied. Rancho also filed a supplement to its comments which Time Warner opposed.<sup>1</sup> For the reasons stated below, we grant the 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")*,<sup>2</sup> commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its designated market area ("DMA"), as defined by Nielsen Media Research.<sup>3</sup> A DMA is a geographic market designation that defines each television market exclusive of

<sup>1</sup> Rancho filed a Petition for Leave to File Pleading. Time Warner opposed the petition, arguing that the proposed supplement was filed well after the normal pleading cycle had closed. See 47 C.F.R. § 76.7.

<sup>2</sup> 8 FCC Rcd 2965, 2976-2977 (1993).

<sup>3</sup>Section 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) of the Commission's rules requires that a commercial broadcast television station's (continued....)

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.<sup>4</sup>

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.<sup>5</sup>

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.<sup>6</sup>

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

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market be defined by Nielsen Media Research's DMAs. *See Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, 14 FCC Rcd 8366 (1999) ("Modification Final Report and Order").

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

<sup>5</sup>47 U.S.C. §534(h)(1)(C).

<sup>6</sup>*Must Carry Order*, 8 FCC Rcd at 2976.

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.

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[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.<sup>7</sup>

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

The provisions of [this subsection] reflect a recognition that the Commission may conclude that a community within a station's [DMA] may be so far removed from the station that it cannot be deemed part of the station's market. It is not the Committee's intention that these provisions be used by cable systems to manipulate their carriage obligations to avoid compliance with the objectives of this section. Further, this section is not intended to permit a cable system to discriminate among several stations licensed to the same community. Unless a cable system can point to particularized evidence that its community is not part of one station's market, it should not be permitted to single out individual stations serving the same area and request that the cable system's community be deleted from the station's television market.<sup>8</sup>

7. 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.<sup>9</sup> 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.<sup>10</sup>

### III. DISCUSSION

8. Station KXLA is located in the Los Angeles, California DMA as are the communities served by Time Warner's cable system. Time Warner requests that the Commission modify KXLA's television market by excluding the communities served by Time Warner's cable system. In support of this request, Time Warner states that KXLA has never been carried on the system, is geographically

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

<sup>8</sup>H.R. Rep. 102-628, 102d Cong., 2d Sess. 97-98 (1992).

<sup>9</sup>*Must Carry Order*, 8 FCC Rcd at 2977 n. 139.

<sup>10</sup>47 C.F.R. §76.59.

distant from the cable communities in question, does not provide a Grade B signal to the cable communities nor broadcast programming of specific interest to residents of the communities, and achieves no measurable viewing audience in the cable communities.<sup>11</sup> Time Warner also states that the distances from Rancho Palos Verdes to the communities range from 105 to 118 miles.<sup>12</sup> Time Warner asserts that its cable system carries local television stations that provide coverage of news, sporting events and issues of concern to the communities.<sup>13</sup> Time Warner further asserts that the San Gabriel Mountains and the San Bernadino National Forest are situated between KXLA's transmitter site in Los Angeles County<sup>14</sup> and the communities, effectively shielding those communities from off-the-air reception of Los Angeles television broadcast stations.<sup>15</sup> Time Warner contends that KXLA fails to broadcast any programming of specific interest to the residents of the cable communities, that the station is not listed in the local daily newspaper, and is not carried by the cable system most proximate to the communities.<sup>16</sup> In addition, Time Warner states that the system carries the VHF stations licensed to Los Angeles and KHIZ, Barstow, California, which afford subscribers a wide range of news, sports, public affairs and public service coverage from in-state stations.<sup>17</sup> Finally, Time Warner contends that KXLA fails to achieve reportable off-air viewing in the remote area of San Bernadino County served by the system.<sup>18</sup>

9. Rancho argues that because KXLA is a relatively new station specializing in foreign language programming, historical carriage and viewership levels should be afforded little weight. Rancho contends that because of the remote location of the system's headend, the Commission should not consider the station's signal contour as outcome determinative. In addition, Rancho states that KXLA will be carried on Charter Communications' cable system serving the proximate communities of Apple Valley, Victorville and Hesperia.<sup>19</sup> Rancho argues that the critical factor in this proceeding is the lack of local Asian-language programming on the system and KXLA's ability to fill this void. Rancho states that KXLA's program "UCTV" provides "local news and public affairs programming specifically directed to Chinese-American residents in San Bernadino, Riverside, and Orange counties, as well as movies and talk shows in Chinese."<sup>20</sup> Rancho asserts that KXLA intends to bring the various Asian-American

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<sup>11</sup>Petition at 5-10.

<sup>12</sup>*Id.* at 6.

<sup>13</sup> *Id.* at 9-10.

<sup>14</sup> Time Warner states that KXLA began operations in December, 2000 and is transmitting from a site on Mount Wilson with reduced facilities. *Id.* at 3.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 9.

<sup>17</sup> *Id.* at 10.

<sup>18</sup> *Id.*

<sup>19</sup> Opposition at 5.

<sup>20</sup> *Id.* at 8. In addition, Rancho states that the station broadcasts "Korean Christian" and "Saigon Communications" which provide native language programming to the Korean-American and Vietnamese-American communities in the three counties, and that "Asahi TV" provides local news as well as dramas in Japanese.

communities in Barstow significant native language programming, which is not available on the stations currently carried on the cable system.<sup>21</sup> Rancho states that the Asian community accounts for 4.7% of the population of San Bernadino County, and argues that the Commission has recognized that foreign language programming can be taken into account in such a situation.<sup>22</sup>

10. In reply, Time Warner argues that KXLA is not carried on the Charter system serving Apple Valley, Victorville and Hesperia, and the speculative nature of any agreement for future carriage between the station and Charter should not be considered in the instant proceeding. Time Warner also points out that the Charter cable communities, in any event, are not geographically close to the Time Warner communities and are closer to KXLA's city of license and transmitter site.<sup>23</sup> Time Warner emphasizes that KXLA's Grade B contour falls over 40 miles short of the communities, and that the distance factors and signal coverage deficiency are entitled to substantial evidentiary weight in the instant proceeding. Time Warner states that it does not carry five other Los Angeles stations with transmitter sites on Mount Wilson on the basis of distance and lack of market connection, and that it has not singled out KXLA for "special treatment."<sup>24</sup>

11. In regard to Rancho's supplemental pleading, we do not believe that the supplement is timely filed in accordance with Section 76.7 of the Commission's rules.<sup>25</sup> Further, we agree with Time Warner that the basis for acceptance of a late-filed supplement cannot be predicated on reminding the Bureau to pay attention to a recently issued Bureau decision. Even if we were to accept the supplement, it would not alter our decision in the instant proceeding. In its supplement, Rancho argues that the Bureau should pay particular attention to a recent Bureau decision which Rancho contends is dispositive in the instant matter.<sup>26</sup> We do not agree. In *Comcast*, the Bureau rejected Comcast Cablevision of Danbury's request to exclude certain communities in Connecticut from the market of specialty station WFUT(TV), Newark, New Jersey. However, in that proceeding, the cable communities were 57 miles from the station, the station's Grade B contour encompassed one of the communities and was close to the other two communities, no geographical features separated the station from the communities, and the cable system carried another station licensed to Newark, New Jersey.<sup>27</sup> We would not be persuaded to further examine the current proceeding in light of our ruling in *Comcast* even if we were to accept Rancho's supplement. Rancho further contends that we focus on its Asian-language programming as filling a void in the local

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<sup>21</sup> *Id.* at 9.

<sup>22</sup> *Id.*, citing *Fouce Amusement Enterprises, Inc.* 10 FCC Rcd 668, 671 (1995) ("*Fouce*").

<sup>23</sup> Time Warner states that Victorville is 29 miles from Barstow and Hesperia is 34 miles from Barstow. Time Warner contends that the only common element of its system and the Charter system is their common location in San Bernadino County. Reply at 4.

<sup>24</sup> *Id.* at 7.

<sup>25</sup> Rancho's petition was placed on public notice on November 18, 2002. The pleading cycle in this matter ended on December 19, 2002. See 47 C.F.R. § 76.7. Rancho filed its petition to allow filing of a supplement on January 23, 2003.

<sup>26</sup> Supplement at 1, citing *Comcast Cablevision of Danbury, Inc.*, DA 03-94 (rel. January 15, 2003) ("*Comcast*").

<sup>27</sup> See *Comcast*, *supra*.

communities served by Time Warner, and relies on our decision in *Fouce*.<sup>28</sup> However, in *Fouce*, the Commission noted that the station in question provided the only locally produced programming of particular appeal to the Asian community.<sup>29</sup> In the instant matter, KXLA fails to provide any specific information or documentation regarding the orientation of its programming to the cable communities at issue.

12. Section 614(h)(1)(C) of the Communications Act authorizes the Commission to include or exclude particular communities from a television station's market for the purpose of ensuring that a television station is carried in the areas which it serves and which form its economic market. Section 614(h)(1)(C)(i) specifically and unambiguously directs the Commission, in considering requests for market modification, to afford particular attention to the value of localism by taking such matters into account. In this matter, KXLA has no history of carriage and no discernable viewership in the cable communities. It does not appear that any proximate cable systems carry KXLA. As a relatively new specialty station, we do not afford considerable weight to these deficiencies. However, it is clear that the station is geographically distant from the cable communities, from 105 to 118 miles, that the station's Grade B contour falls far short of the communities, and that the station is separated from the communities by the San Gabriel Mountains and the San Bernadino National Forest. These factors also tend to explain the history of non-carriage of the station in the communities, and strongly indicate that the communities served by Time Warner are too distant to properly be a part of KXLA's television market. We therefore grant Time Warner's petition.

#### IV. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED**, pursuant to Section 614(h) of the Communications Act of 1934, as amended,<sup>30</sup> that the petition for special relief filed on behalf of Time Warner

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<sup>28</sup> Petition at 9.

<sup>29</sup> The Commission's ruling in *Fouce* was not decided on the issue of foreign language programming. In that matter, inter alia, the cable communities were located within the City Grade coverage of the station at issue. *See Fouce*, 10 FCC Rcd at 671.

<sup>30</sup> 47 U.S.C. § 534(h) and 47 C.F.R. § 76.59.

Entertainment/Advance Newhouse Partnership d/b/a Time Warner Cable **IS GRANTED**, and the city of Barstow, the Marine Corps Logistics Base, and adjacent unincorporated areas of San Bernardino County, California known as Daggett, Kinkley, Lenwood and Yermo **ARE HEREBY EXCLUDED** from the television market of television station KXLA, Rancho Palos Verdes, California.

14. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules.<sup>31</sup>

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broecker  
Deputy Chief, Policy Division, Media Bureau

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<sup>31</sup>47 C.F.R. § 0.283.