

**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)	

ORDER ON RECONSIDERATION

Adopted: September 16, 2004

Released: September 22, 2004

By the Deputy Chief, 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 requested 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. In the *Bureau Order*² addressing Time Warner’s petition for special relief, we granted the petition and excluded the cable communities from KHIZ’s market. KHIZ subsequently filed a petition for reconsideration of the *Bureau Order*, which is now before us. An opposition to this petition was filed by Time Warner. For the reasons explained below, we deny KHIZ’s petition for reconsideration.

II. BACKGROUND

2. Pursuant to Section 614 of the Communications Act³ and implementing rules adopted by the Commission in *Implementation of the Cable Television Consumer Protection and Competition Act of*

¹Time Warner listed the following communities which it sought 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 For Modification at 2.

²*Time Warner Cable v. KHIZ (TV), Barstow, California*, 18 FCC Rcd 20536 (2003) (“*Bureau Order*”).

³47 U.S.C. §534.

1992, *Broadcast Signal Carriage Issues (“Must Carry Order”)*,⁴ 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,” or DMA, as defined by Nielsen Media Research.⁵ 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.⁶

3. Section 614 of the Act also directs the Commission to consider changes in market areas, and provides guidance regarding factors to take into consideration in reviewing requests to alter a station’s market for must carry purposes. These factors were discussed in the *Bureau Order*.⁷ The *Bureau Order* also discussed how these factors applied to Time Warner’s request to modify the Los Angeles DMA to exclude its cable systems in the cable communities from the television market of KHIZ for the purpose of the cable television mandatory broadcast signal carriage rules, and why we granted Time Warner’s request.⁸

III. DISCUSSION

4. KHIZ in its petition for reconsideration requests that the Media Bureau reverse its decision, and include the cable communities in its television market. KHIZ claims that the *Bureau Order* prevents it from competing fairly within its own market because the station is faced with paying Los Angeles DMA costs without the opportunity to earn Los Angeles DMA revenue.⁹ KHIZ also explains that KHIZ lack of past carriage in the cable communities should not be a factor because the must carry rules were intended to cure the traditional failure to carry small television stations.¹⁰ With regard to the carriage of KHIZ on cable systems in Palmdale and Acton, KHIZ claims that this indicates it should be granted must carry rights on other cable systems in the same DMA.¹¹ Further, KHIZ asserts that it is now carried on cable systems throughout the Los Angeles DMA and on numerous systems near Time Warner’s cable communities.¹² In addition to these cable systems, KHIZ states it is carried by the

⁴8 FCC Rcd 2965, 2976-7 (1993).

⁵Section 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*”).

⁶For a more complete description of how counties are allocated, see Nielsen Media Research’s *Nielsen Station Index: Methodology Techniques and Data Interpretation*.

⁷18 FCC Rcd at 20537-9.

⁸*Id.* at 20541-3.

⁹Petition for Reconsideration at 2.

¹⁰*Id.* at 4.

¹¹*Id.* at 4-5.

¹²According to KHIZ, the communities where it is carried on cable systems include Diamond Bar, Anaheim and surrounding Orange County, Buena Park, Santa Ana, Seal Beach, Santa Monica, Beverly Hills, Ventura, Fullerton, and Newport Beach. *Id.* at 2, 5-6, and attached affidavit and map.

DirecTV and Dish Network satellite systems that serve the entire Los Angeles area.¹³ KHIZ also repeats arguments contained in its pleadings that were addressed by the *Bureau Order*, namely, that it broadcast programs that provide local service in the cable communities such as Money Matters, and that the Bureau should take into consideration its future programming plans to address local issues.¹⁴

5. Time Warner in its opposition states that KHIZ's petition for reconsideration should be denied by the Bureau because it only debates issues already resolved by the Bureau, and does not present new facts or indicate a material error or omission in the *Bureau Order*.¹⁵ With regard to KHIZ's claim that the *Bureau Order* prevents it from competing fairly within its market, Time Warner asserts that KHIZ did not cite any precedent, and that the Commission in resolving market modification cases does not take into consideration "the impact of a market modification on the subject station's competitive position in the market."¹⁶ Time Warner, furthermore, states that the *Bureau Order* properly distinguished between the carriage of KHIZ on cable systems in Palmdale and Acton ("Grade B coverage and geographic proximity to KHIZ") and the situation involving Time Warner's cable systems in the cable communities.¹⁷ Time Warner also questions KHIZ's claim that it is carried by cable systems throughout the Los Angeles DMA and on systems near the cable communities. For example, Time Warner explains that websites for the cable systems in Anaheim and Beverly Hills do not list KHIZ as a station carried on the cable systems. Further, Time Warner indicates that some of its cable systems are not close to cable systems carrying KHIZ, and that where the cable systems are close, this "does not offset KHIZ's lack of nexus to the Orange System communities as evidenced by the host of other factors recognized by the Media Bureau in the *Order*."¹⁸ Time Warner, moreover, claims that KHIZ's programs such as "Money Matters" are general interest programs and do not have "a distinct nexus between the originating television station and a particular cable community."¹⁹ Concerning KHIZ's assertion that the Bureau should consider its plans for future programs, Time Warner states "[i]n sole support of its position, Sunbelt relies upon a 1996 decision in which the former Cable Bureau recognized a station's planned future programming in its analysis of the coverage and other local service factors. The holding is readily distinguishable, however, if for no other reason than the cable communities involved were located within the subject station's 'regular predicted service coverage area.'"²⁰ Time Warner concludes that KHIZ does not contest the Bureau's finding that it lacks "off-air viewing" in the cable communities, and instead relies on potential cable and satellite viewership to support its claim that it now serves the Los Angeles DMA without providing any "specific viewership data."²¹

6. We deny KHIZ's petition for reconsideration. In doing so, we uphold the *Bureau Order* granting Time Warner's request to modify the Los Angeles, California DMA. We find the *Bureau Order* was correct in concluding that KHIZ lacked historic cable carriage, coverage by its television signal and

¹³*Id.* at 8.

¹⁴*Id.* at 6-7.

¹⁵*Opposition* at 2.

¹⁶*Id.* at 3-4.

¹⁷*Id.* at 4.

¹⁸*Id.* at 5-6.

¹⁹*Id.* at 6.

²⁰*Id.* at 6-7 (footnotes omitted).

²¹*Id.* at 7.

local service, and off-air viewing in the cable communities.²² The *Bureau Order* explained that:

[t]he 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.²³

The conclusions in the *Bureau Order* are consistent with Section 614 of the Communications Act, the Commission's implementing rules, and the interpretation of these provisions by the United States Court of Appeals.²⁴

7. On reconsideration, KHIZ argues that we should take into consideration that KHIZ is carried by satellite television systems that serve the entire Los Angeles DMA. This, however, is simply indicative of the nature of satellite television service because satellites provide service to an entire DMA. Satellite carriage does not necessarily reflect local interest in a station within various or different regions of a market. KHIZ also argued that the Bureau should take into consideration its plans to provide programs in the future that address local issues in the cable communities, and cites a Bureau Order in support of its position. KHIZ is correct that in *Time Warner Cable v. Group H Broadcasting Corporation* the Bureau in 1995 stated "WYED has sufficiently demonstrated that its current and planned programming is in fact designed to serve the needs and interests of the communities in question."²⁵ We believe that the relevant reference was to WYED's "current" programming and that the reference to "planned" programming was dictum, and not essential to the Bureau's decision. More importantly, the Commission in 2001 stated "Section 614(h)(1)(C)(II) [of the Communications Act] requires that market modification decisions be made on the basis of whether a television station provides local service to a community and not on promises of future programming."²⁶ Because this is a recent holding by the Commission, as opposed to a Bureau decision, it is entitled to greater precedential value.

8. Finally, with regard to KHIZ's assertion that it is carried on cable systems throughout the Los Angeles DMA, including cable systems near Time Warner's cable communities, Time Warner responds, in part, that the websites for two of the cable systems listed by KHIZ do not reflect that their cable systems carry KHIZ. We recently checked the websites for these cable systems in Anaheim and Beverly Hills, and while they may not have listed KHIZ as a carried station when Time Warner filed its

²²18 FCC Rcd at 20541-3.

²³*Id.* at 20542, citing *Frontier, A Citizens Communications Company*, 18 FCC Rcd 9589, 9594 (2003).

²⁴*WLNY-TV, Inc. et al. v. FCC*, 163 F. 3d 137 (2nd Cir. 1998).

²⁵10 FCC Rcd 962, 964 (C. S. B. 1995).

²⁶*Cablevision of Cleveland, L.P. and V Cable, Inc, d/b/a Cablevision of Ohio*, 16 FCC Rcd 15575, 15577 (2001). In this market modification case, the television station raised an argument similar to an argument made by KHIZ, namely, that it was charged higher programming prices because it is located in a major DMA. The Commission in its decision responded "When viewed against the overall relevant factual circumstances, we believe the *Bureau Order* properly gave minimal weight to this evidence in determining whether WGGN-TV carries programming of specific local interest or import for cable viewers in the Communities at issue." *Id.*

opposition to KHIZ's reconsideration petition, the websites currently list KHIZ. We note that most of the cable systems indicated by KHIZ as carrying its programming and located near Time Warner are in close proximity to only one of the four Time Warner cable systems involved in this proceeding, namely, the Orange County system. While the carriage of KHIZ on cable systems near Time Warner's Orange County system is a factor in favor of the station's petition for reconsideration, we believe that other factors discussed above and in the *Bureau Order* out weigh this, and are controlling.

IV. ORDERING CLAUSE

9. Accordingly, **IT IS ORDERED**, that the petition for reconsideration filed by television broadcast station KHIZ (Ch. 64), Barstow, California **IS DENIED**.

10. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules.²⁷

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief
Media Bureau

²⁷47 C.F.R. §0.283.