

**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
)	
Petition For Modification of the Television Market of Television Station KXLA (TV), Rancho Palos Verdes, California)	

ORDER ON RECONSIDERATION

Adopted: February 25, 2005

Released: March 2, 2005

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. Time Warner Entertainment/Advance Newhouse Partnership d/b/a Time Warner Cable (“Time Warner”) filed the above-captioned petition for special relief seeking to modify the Los Angeles, California designated market area with respect to television broadcast station KXLA (Ch. 44), Rancho Palos Verdes, California (“KXLA”). KXLA is licensed to Rancho Palos Verdes Broadcasters, Inc. (“Rancho”). Specifically, Time Warner requested that certain communities, near and including Barstow, in the Los Angeles DMA (“cable communities”),¹ where it operates cable television systems, be excluded from the television market of KXLA for the purposes of the cable television mandatory broadcast signal carriage rules. KXLA is located near the Pacific Ocean west of Long Beach in the Los Angeles DMA. In the *Bureau Order*² addressing Time Warner’s petition for special relief, we granted the petition and excluded the cable communities from KXLA’s market. KXLA 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, and KXLA replied. For the reasons explained below, we deny KXLA’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 seeks to exclude the following communities from the television market of KXLA: 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. *Time Warner Entertainment v. KXLA (TV), Rancho Palos Verdes, California*, 18 FCC Rcd 4990 (2003)(“*Bureau Order*”).

²*Id.*

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 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 KXLA for the purpose of the cable television mandatory broadcast signal carriage rules, and why we granted Time Warner's request.⁸

III. DISCUSSION

4. KXLA in its petition for reconsideration requests that the Media Bureau reverse its decision, and include the cable communities in its television market. KXLA claims that the *Bureau Order* placed too much emphasis on the distance separating KXLA from the cable communities, the failure of the station's Grade B contour to cover the cable communities, and terrain features between KXLA and the cable communities. KXLA further claims that the Media Bureau should have considered or placed more emphasis on other factors as required by the Communications Act.⁹ For example, KXLA explains that it is carried by a cable system serving the nearby communities of Apple Valley, Victorville and Hesperia. KXLA also asserts that television stations licensed to the "same geographic area as the Station" are carried by Time Warner in the cable communities.¹⁰ KXLA, moreover, states that it "carries unique programming specifically addressed to Asian-American residents, who constitute sizeable and significant populations in the communities at issue." KXLA cites in support of the above arguments the Media Bureau's decision in *Comcast Cablevision of Danbury, Inc.*, 18 FCC Rcd 274 (2003)(*Comcast*).¹¹

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 4991-2.

⁸*Id.* at 4994-5.

⁹Petition for Reconsideration at 2 and 10.

¹⁰*Id.* at 3-6.

¹¹*Id.* at 6-7.

5. Time Warner in its Opposition states that KXLA's petition for reconsideration should be denied because it "does nothing more than debate matters already considered and rejected."¹² With regard to KXLA's arguments, Time Warner states that the cable system serving Victorville and Hesperia, which now carries KXLA, is not geographically close to its Barstow cable system since Victorville and Hesperia are 29 and 34 miles from Barstow, and "located southwest of the Barstow System, in the direction of Los Angeles... and KXLA's city of license."¹³ With regard to KXLA's arguments that Time Warner's Barstow cable system carries certain other Los Angeles television stations, Time Warner claims that carriage of these stations has a long history, and that five other stations with transmitters located on Mount Wilson, where KXLA has its transmitter, are not carried by Time Warner.¹⁴

6. Time Warner also asserts that the *Bureau Order* properly distinguished the *Comcast* decision from KXLA's situation. Time Warner argues that in *Comcast* the cable communities were only 57 miles from the station, the station's Grade B contour covered one community and was close to two other communities, and no geographical features separated the broadcaster from the cable system.¹⁵ Time Warner further argues that KXLA has provided "no specific evidence that its programming is in fact locally focused on, or has a distinct nexus to the Barstow area, as distinguished from other areas of widespread San Bernardino County which are substantially closer to KXLA and support a larger Asian-American population." For example, Time Warner claims that the City of Barstow contains less than one percent of the Asian-American population of San Bernardino County.¹⁶ Time Warner states that its Barstow cable system is not part of KXLA's television market because of "KXLA's distance from the cable communities (105-118 miles), the over 40 mile shortfall of Grade B coverage, the presence of intervening natural barriers and KXLA's failure to provide any specific information... to establish a programming nexus to the cable communities."¹⁷

7. In reply, KXLA states that the cable system carrying its programming in Apple Valley, Hesperia and Victorville is the closest cable system to the cable communities, and, thus, this is decisionally significant.¹⁸ KXLA also repeats its argument that the *Bureau Order* erred by relying exclusively on distance, contour, and terrain considerations. KXLA explains that the Commission in market modification proceedings considers four factors, and that distance, contour, and terrain constitute only a subfactor of the second factor, and should not be relied on exclusively to determine market modification proceedings. KXLA indicates that while it may not satisfy distance and contour requirements, it should prevail regarding the second factor because of local programming considerations in that it provides Asian-language programming specifically directed to Asian-Americans in San Bernardino County. Further, KXLA cites the Bureau's decision in *Fouce Amusement Enterprise, Inc.*, to support its claim that its programming has local appeal because Asian-American communities across the greater Los Angeles area form interrelated markets.¹⁹ KXLA in addition states that Time Warner

¹²Opposition at 2.

¹³*Id.* at 3.

¹⁴*Id.* at 3-4.

¹⁵*Id.* at 4-5.

¹⁶*Id.* at 5-6.

¹⁷*Id.* at 6-7.

¹⁸Reply at 2.

¹⁹10 FCC Rcd 668, 670 (1995) ("*Fouce*").

currently does not provide this type of programming in the cable communities.²⁰ KXLA, moreover, argues that even if the Bureau decides the second factor in favor of Time Warner, this should not determine the outcome of the proceeding, and the Bureau should ultimately decide in favor of KXLA. In support of this position, KXLA argues that it is entitled to carriage because Time Warner carries other television stations licensed to the same area as KXLA, and, citing the *Comcast* decision, asserts it is located in the “hub” of the Los Angeles DMA, and that “hub” stations usually have no problem in satisfying the four factors considered by the Bureau in market modification proceedings.²¹

8. We deny KXLA’s petition for reconsideration. In doing so, we uphold the *Bureau Order* granting Time Warner’s request to modify the Los Angeles, California DMA to exclude its cable television systems in the cable communities near and including Barstow from the television market of KXLA, which is licensed to Rancho Palos Verdes near the Pacific Ocean west of Long Beach.

9. The *Bureau Order* addressed KXLA’s claim that the *Comcast* decision supports its petition. The *Bureau Order* found that there were significant factual differences between *Comcast* and KXLA’s situation. The *Bureau Order* explained that:

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 systems carried another station licensed to Newark, New Jersey.²²

10. The *Bureau Order* also considered KXLA’s claim that consideration should be given to its Asian-language programming, and that its situation was similar to that in the Bureau’s *Fouce* decision. The *Bureau Order* explained that “in *Fouce*, the Commission noted that the station in question provided the only locally produced programming of particular appeal to the Asian community. 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.”²³ KXLA merely provided a programming schedule that listed such programs as “Saigon (Vietnamese)” and “Korean Christian.” Furthermore, a majority of the program schedule did not list any programs and only had a notation “TBA.”²⁴ KXLA also cited *Fouce* in support of its claim that its programming had “local appeal because Asian-American communities across the greater Los Angeles area form interrelated markets.”²⁵ However, this was an argument presented by one of the parties, and was not part of the Bureau’s decision in *Fouce*.²⁶ The *Bureau Order* noted that

²⁰*Id.* at 2-3.

²¹*Id.* at 4.

²²18 FCC Rcd at 4994-5 (citation omitted). *See also Comcast*, 18 FCC Rcd at 278-9. The *Comcast* decision also found that WFUT was a “hub” station located in the center of the New York DMA, and indicated that hub stations ordinarily will be able to repel requests for exclusion from DMAs. KXLA is licensed to Rancho Palo Verdes which is located at the western edge of the Los Angeles DMA near the Pacific Ocean.

²³18 FCC Rcd at 4995 (citation omitted).

²⁴Petition for Reconsideration at Exhibit B.

²⁵Reply at 3.

²⁶10 FCC Rcd at 670.

Fouce was not decided based on the issue of foreign programming, and that a major consideration in favor of the station was that the cable communities were covered by the station's City Grade signal.²⁷

11. The *Bureau Order*, moreover, held that "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."²⁸ Although KXLA argued in this earlier stage of the proceeding that it anticipated that it would soon be carried by the cable system serving Apple Valley, Victorville and Hisperia (this subsequently occurred), Time Warner countered that KXLA's claim of future carriage was speculative and that these communities were not close to its cable communities.²⁹ The *Bureau Order* did not assign much weight to these deficiencies because KXLA is a relatively new specialty station.³⁰ The *Bureau Order* properly concluded that:

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 the station is separated from the communities by the San Gabriel Mountains and the San Bernardino 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.³¹

12. This conclusion was recently affirmed in an Order on Reconsideration by the Bureau in *Time Warner Cable v. KHIZ(TV), Barstow, California*.³² This case involved similar facts, but the reverse situation in that Time Warner sought to exclude its cable television systems in a number of communities in the Los Angeles area from the television market of KHIZ in Barstow, California. However, in this case, less distance (79 to 102 miles) separated the television station and the cable communities compared to KXLA's situation.³³ The *KHIZ* decision granted Time Warner's request to exclude its cable systems and properly concluded 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

²⁷18 FCC Rcd at 4995 n.29.

²⁸*Id.* at 4995.

²⁹*Id.* at 4993-4.

³⁰*Id.* at 4995.

³¹*Id.* KXLA also asserts that consideration should be given to Time Warner's carriage of television stations licensed to the same geographic area as KXLA. Petition for Reconsideration at 4. These stations are licensed to the City of Los Angeles and are closer to Barstow. *Television & Cable Factbook 2002*, A-147 through A-165. Nevertheless, although this factor could favor KXLA's position, the factors discussed above outweigh this, and are controlling.

³²19 FCC Rcd 18618 (2004)("KHIZ").

³³*Time Warner Cable v. KHIZ(TV), Barstow, California*, 18 FCC Rcd 20536, 20539(2003), *upheld on reconsideration, id.*

the DMA's market and service area into a regional "super station" that must be carried by cable systems throughout the DMA.³⁴

IV. ORDERING CLAUSE

13. Accordingly, **IT IS ORDERED**, that the petition for reconsideration filed by television broadcast station KXLA (Ch. 44), Rancho Palos Verdes, California **IS DENIED**.

14. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules.³⁵

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief
Media Bureau

³⁴19 FCC Red at 18621 (citation omitted).

³⁵47 C.F.R. §0.283.