

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

In the Matter of:	)	
	)	
KVMD Licensee Co., LLC	)	CSR-6961-M
v.	)	
Time Warner Cable	)	
	)	
Request for Carriage	)	

**MEMORANDUM OPINION AND ORDER**

Adopted: May 22, 2006

Released: May 30, 2006

By the Deputy Chief, Policy Division, Media Bureau:

**I. INTRODUCTION**

1. KVMD Licensee Co., LLC, permittee station KVMD-DT, Twentynine Palms, California ("KVMD"), filed the above-captioned complaint against Time Warner Cable ("Time Warner") for its failure to carry KVMD on its Barstow, Chatsworth, Gardena, South Pasadena and Orange, California cable systems.<sup>1</sup> Time Warner filed a motion to dismiss the complaint which KVMD opposed and Time Warner replied. For the reasons discussed below, we grant KVMD's request.

**II. DISCUSSION**

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.<sup>2</sup> A station's market for this purpose is its "designated market area," or DMA, as defined by Nielsen Media Research.<sup>3</sup>

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<sup>1</sup>The specific communities involved are Barstow, Yermo, Daggett, Grandview, Lenwood, Hinkley, Canyon Country, Newhall, Santa Clarita, Saugus, Chatsworth, Cayoga Park, Encino, Granada Hills, North Hills, Northridge, Reseda, San Fernando, Sherman Oaks, Tarzana, Universal City, Van Nuys, West Hills, Woodland Hills, Stevenson Ranch, San Marino, South Pasadena, Costa Mesa, Cypress, Fountain Valley, Huntington Beach, Midway City, Rossmoor, Stanton, Westminster, Garden Grove, Los Alamitos, Orange, Santa Ana, Gardena, El Segundo, Hawthorne, Inglewood, Lawndale, Lennox, Los Angeles, North Torrance and Torrance, California.

<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 market be defined by Nielsen Media Research's DMAs. See 47 C.F.R. § 76.55(e).

3. In support of its complaint, KVMD states that in *Time Warner Cable*, the Media Bureau granted a market modification filed on behalf of Time Warner to exclude KVMD from carriage on its cable system serving the cable communities herein.<sup>4</sup> KVMD states that it filed a reconsideration to seek reversal of this order, but it remains pending before the Commission.<sup>5</sup> KVMD states that, by certified letters dated September 21, 2005, it demanded must carry status on Time Warner's cable systems within the Los Angeles DMA for the 2006-2008 election period, pursuant to Section 76.61(a)(1) of the Commission's rules.<sup>6</sup> Time Warner rejected this demand on October 12, 2005.<sup>7</sup> As a result, KVMD states that it filed this complaint in order to assert and preserve its 2006-2008 must carry rights during the pendency of the above-described reconsideration proceeding. KVMD also requests that, upon reversal of the *Time Warner* decision, the Commission require Time Warner to carry the digital broadcast signal of KVMD-DT.

4. In a Motion to Dismiss, Time Warner argues that KVMD's complaint is frivolous and has no basis in fact or law. Time Warner maintains that KVMD did not establish that Time Warner failed to comply with a *bona fide* request for carriage.<sup>8</sup> Instead, as shown in Exhibit B to the complaint, Time Warner states that it responded to KVMD's carriage demands by referencing the *Time Warner* market modification decision and indicating that, as a result, KVMD-DT had no must carry rights on the subject cable systems.<sup>9</sup> Time Warner argues that Section 76.61(a)(3)(i) of the Commission's rules requires that a complainant television station "allege the manner in which such cable operator has failed to meet its obligations and the basis for such allegations."<sup>10</sup> Time Warner asserts, therefore, that KVMD is unable to meet the threshold criteria for a valid must carry complaint and its complaint should be dismissed for failure to state a cause of action.<sup>11</sup>

5. In opposition, KVMD argues that it is aware of the Bureau's decision in *Time Warner* and the fact that the *Order* remains in full-effect during the pendency of the reconsideration proceeding.<sup>12</sup> However, in considering the 2006-2008 must carry landscape in the event the Commission should reverse *Time Warner*, KVMD states that it sought to prevent Time Warner from arguing that KVMD failed to perfect its carriage rights in the new triennial carriage cycle.<sup>13</sup> KVMD maintains that its only intent in filing the instant complaint was to preserve its must carry rights during 2006-2008 election cycle.<sup>14</sup> It is not seeking carriage on Time Warner's systems during the pendency of the reconsideration request.

6. We agree with KVMD and will grant its complaint. Section 76.64(f)(2) of the Commission's rules requires that all television stations make an election between must carry and retransmission consent every three years.<sup>15</sup> KVMD did so in its September 21, 2005 letters to Time

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<sup>4</sup>Complaint at 2, citing 18 FCC Rcd 21384 (2003), *recon. pending*.

<sup>5</sup>*Id.*

<sup>6</sup>*Id.* at Exhibit A; *see also* 47 C.F.R. § 76.61(a)(1).

<sup>7</sup>*Id.* at Exhibit B.

<sup>8</sup>Motion at 1.

<sup>9</sup>*Id.*, citing Exhibit B to the Complaint.

<sup>10</sup>*Id.* at 2, citing 47 C.F.R. § 76.61(a)(3)(i).

<sup>11</sup>*Id.*, citing 47 C.F.R. § 76.6(a)(4).

<sup>12</sup>Opposition at 1.

<sup>13</sup>*Id.* at 2.

<sup>14</sup>*Id.*

<sup>15</sup>47 C.F.R. § 76.64(f)(2).

Warner and, at the same time, made a demand for carriage pursuant to Section 76.61(a)(1) of the rules.<sup>16</sup> While both parties agree that KVMD does not currently have carriage rights in the subject communities due to the Media Bureau's decision in *Time Warner*, KVMD was within its rights in construing Time Warner's October 12, 2005 response as a denial of carriage and in subsequently filing the instant complaint in order to preserve any future must carry rights. Should the decision in *Time Warner* be reversed during the current election cycle, Time Warner will be subject to the must carry requirements with regard to carriage of KVMD.

### III. ORDERING CLAUSES

7. Accordingly, **IT IS ORDERED** that the petition filed by KVMD Licensee Co., LLC **IS GRANTED** pursuant to Section 614(d)(3) of the Communications Act of 1934, as amended, 47 U.S.C. § 534, to the extent indicated herein.

8. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules.<sup>17</sup>

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert  
Deputy Chief, Policy Division  
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<sup>16</sup>47 C.F.R. § 76.61(a)(1).

<sup>17</sup>47 C.F.R. § 0.283.