

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

In the Matter of)
)
Free State Communications, LLC)
) CSR-8121-A
For Modification of the Topeka, Kansas)
DMA)

MEMORANDUM OPINION AND ORDER

Adopted: May 27, 2009

Released: May 28, 2009

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Free State Communications, LLC, licensee of station KTKA-TV (ABC, Ch. 49 (analog); Ch. 48 (digital)), Topeka, Kansas ("KTKA"), filed the above-captioned petition for special relief seeking to modify the Topeka, Kansas designated market area ("DMA") to include communities and unincorporated areas located in Douglas County, Kansas, which are served by cable systems operated by The World Company d/b/a Sunflower Broadband ("Sunflower"), Mediacom Southeast, LLC ("Mediacom"), and SCI Cable, Inc. ("SCI," formerly Perry Cablevision) (collectively the "cable systems").

II. BACKGROUND

2. Pursuant to Section 614 of the Communications Act and implementing rules adopted by the Commission, commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station's market.

1Petition for Special Relief filed Jan. 16, 2009 by Free State Communications, LLC (hereinafter "Modification"), at 1. KTKA requests the inclusion of the following communities and their respective cable systems: 1) Sunflower Cablevision -- Lawrence, Eudora and unincorporated areas of Douglas County, Kansas; 2) Mediacom -- Baldwin City, and the unincorporated areas of Douglas County adjacent to Baldwin City, Kansas; and 3) SCI Cable -- Lecompton, Kansas. Modification at Ex. 1-2.

2 Opposition to Petition for Special Relief filed Feb. 19, 2009, by KMBC Hearst-Argyle Television, Inc. and KCWE-TV ("Opposition")

3 Reply filed Mar. 4, 2009 by Free State Communications, LLC ("Reply").

4Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues, 8 FCC Rcd 2965, 2976-2977 (1993) ("Must Carry Order").

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. 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 market to better effectuate the purposes of this section.⁷

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 in -

- (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.⁸

The legislative history of the provision states that:

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*.

⁷47 U.S.C. § 534(h)(1)(C).

⁸*Id.*

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 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.⁹

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.¹⁰

4. In the *Modification Final Report and Order*, the Commission, in an effort to promote administrative efficiency, adopted a standardized evidence approach for modifications 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.¹¹
- (3) Available data on shopping and labor patterns in the local market.

⁹H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

¹⁰*Must Carry Order*, 8 FCC Rcd 2965, 2977 n.139.

¹¹Note 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. The 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 geographic 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.

- (4) Television station programming information derived from station logs or the local edition of the television guide.
- (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.¹²

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 at a later date with the appropriate filing fee. The *Modification Final Report and Order* provides that parties may continue to submit whatever additional evidence they deem appropriate and relevant.

III. DISCUSSION

A. Analysis of the Four Statutory Factors

5. The issue before us is whether to grant KTKA's request to include in its market the following communities all located in Douglas County, Kansas: Lawrence, Eudora, Lecompton, Baldwin City and its associated unincorporated areas and the unincorporated areas of Douglas County.¹³ While KTKA is licensed to Topeka, Kansas in the Topeka, Kansas DMA, Douglas County and its communities are part of the Kansas City, Missouri DMA. Based on our consideration of the four statutory factors, and for the reasons discussed below, we deny KTKA's request.

6. The first statutory factor we consider 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."¹⁴ KTKA states it has been carried on Sunflower's cable system (on channel 12)¹⁵ and SCI's cable system (on channel 8) since 1984,¹⁶ and has been carried on Mediacom's system (on channel 6) since 1998.¹⁷ These cable systems have historically also carried several other Topeka, Kansas stations in Douglas County – WIBW-TV (Ch. 13); KTWU (Ch. 11); and KSNT (Ch. 27, previously KTSB).¹⁸ Hearst-Argyle

¹²47 C.F. R. § 76.59(b).

¹³ Modification at Ex. 1.

¹⁴47 U.S.C. § 534(h)(1)(C)(ii)(I).

¹⁵ Modification at 5 & nn. 22, 23. KTKA states that Sunflower previously carried its signal on channel 14 and, until December 1987, its call sign was KLDH(TV).

¹⁶ Modification at 6 & n.25.

¹⁷*Id.* at 5-6 & n.24.

¹⁸*Id.* at 7, citing Ex. 4. Hearst-Argyle admits KTKA's history of carriage, but argues it provides marginal assistance in resolving whether the subject communities are part of KTKA's market when the systems obviously carry stations from both markets. Opposition at 4, citing *Group W Television, Inc.*, 10 FCC Rcd 2737, 2741 ¶ 21 (1995) (Where cable systems have historically carried signals from both television markets at issue, the Commission

(continued...)

notes the Commission has denied market modifications that would give one particular station a competitive advantage over its own in-market competitors that are carried voluntarily.¹⁹

7. The second statutory factor is “whether the television station provides coverage or other local service to such community.”²⁰ KTKA asserts that all of the cable communities are located within its predicted Grade B contour and some within its Grade A contour,²¹ though it does not provide Grade A coverage to all of Lawrence, the largest of the communities.²² Hearst-Argyle asserts that because both KMBC and KCWE-DT, as well as other Kansas City network affiliates, all place Grade A or digital equivalent signals over these communities, the significance of KTKA’s Grade B coverage is lessened.²³

8. With respect to the second factor, KTKA further asserts that its city of license, Topeka, is geographically proximate to the cable communities.²⁴ Indeed, Topeka is geographically closer than Kansas City to all of the communities with the exception of Eudora which is equidistant from both. Topeka is 24 miles from Lawrence, 33 miles from Baldwin City, 15 miles from Lecompton and 32 miles from Eudora. In contrast, Kansas City is 36 miles from Lawrence, 40 miles from Baldwin City, 44 miles from Lecompton, and 30 miles from Eudora.²⁵ Moreover, Topeka is closer than Kansas City to all the headends of the cable systems serving these communities.²⁶ KTKA maintains that its proximity to the communities is well within the range found acceptable in previous market modifications.²⁷

9. With respect to factor two, KTKA argues it also offers a wide variety of programming specifically targeted to the communities.²⁸ For instance, KTKA states that 6News Lawrence, a news bureau under common ownership with KTKA and Sunflower Broadband, produces high quality programming for the communities.²⁹ Over the past year, KTKA states that it has covered at least 350

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finds this factor to be “of marginal assistance in resolving the issue” of whether communities should be moved into a station’s market.)

¹⁹Opposition at 4, citing *Guy Gannett Communications, Inc.*, 13 FCC Rcd 23470, 23479 ¶ 24 (1998), *aff’d*, 15 FCC Rcd 10762, 10765-66 ¶ 13 (2000); *Pacific & Southern Co., Inc.*, 14 FCC Rcd 4558, 4566 at ¶ 28 (1999).

²⁰47 U.S.C. § 534(h)(1)(C)(ii)(II).

²¹Modification at 8 and Ex. 20.

²²Opposition at 5, citing Modification at 8, n.30.

²³*Id.* at 5 & n.12, citing *Group W. Television*, 10 FCC Rcd 2741 ¶ 22.

²⁴Modification at 16 and Ex. 37.

²⁵Opposition at 15 & n.38, citing Ex. 6.

²⁶*See id.* at n.38.

²⁷Modification at 16 & n.67, citing cases.

²⁸Modification at 9. KTKA points out that the Mayor of the City of Lawrence, the Chairman of the Douglas County Commission, the Douglas County Administrator, a member of the Lawrence Public Schools Board of Education, and the heads of both the Lawrence and Baldwin City Chambers of Commerce have all expressed their support for KTKA’s continued carriage. *See Id.* at 9 n.33, citing Ex’s 23-29.

²⁹*Id.* at 10 & nn. 34, 38, citing Ex’s 30-31. KTKA states that 6News Lawrence operates out of studio and production facility Free State Studios and has a 12-person team of anchors/reporters, photographers, meteorologists etc. *Id.* at 10. KTKA states it airs locally originated news broadcasts on weekdays at 6-7 a.m., 6-6:30 p.m., and 10-10:30 p.m., and Saturday and Sunday at 10-10:30 p.m. *See Id.* at 10 & n.36, citing Ex. 6.

stories focusing on items of particular interest, not only to residents of Topeka, but to residents of all of the subject communities.³⁰ In particular, KTKA points out that it broadcasts locally-originated programming each weekday at 11 a.m., covers local sports from high schools and the University of Kansas, whose main campus is located in Lawrence, covers local and state governmental affairs, and provides extensive local weather - including tornado - coverage.³¹

10. In response, Hearst-Argyle criticizes KTKA's listed segments or stories as more general rather than specific, more limited in number than as presented, and virtually all re-purposed from its co-owned cable channel.³² It points out that, aside from local programming from 6News Lawrence that Sunflower provides its own cable subscribers and which viewers would continue to receive even if KTKA did not obtain carriage rights in the communities, KTKA is deficient in providing local programming of specific interest to the communities served by the Mediacom and SCI cable systems.³³ Hearst-Argyle states that in comparison, Kansas City DMA station KMBC provided 625 items to viewers in the Kansas City communities in roughly the same time frame, including 510 of specific interest to Lawrence, 5 items for Baldwin City, 34 items of interest to viewers from Eudora, 2 items for Lecompton, and 75 specifically covering Douglas County issues.³⁴ It argues the Commission has noted the merits of local programming provided by out-of market stations "is of less weight when viewed in relation to that provided by" an in-market station, such as KMBC.³⁵

11. 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."³⁶ We do not believe this factor applicable herein, as this criterion was intended to enhance a station's market modification claim where it could be shown that other stations did not serve the communities at issue, but as mentioned above, other stations do serve the communities.

12. 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."³⁷ In a report commissioned from Griffin Media Research for the first quarter of 2008, KTKA's audience shares among viewers residing in Lawrence and Eudora, Kansas, indicate that the station achieves an average weekly

³⁰*Id.* at 10 & Ex. 31.

³¹*Id.* at 11-13 & Ex's 6, 23-27, 29, 31, 33, 34, and 35.

³²Opposition at 5-7.

³³*Id.* at 6-7. Hearst-Argyle states that over the 13 month sample period of local programming provided by KTKA, it cites only 3 stories that mention Baldwin City, 5 stories mentioning Eudora or its environs, and none referencing Lecompton.

³⁴*Id.* at 7-8.

³⁵*Id.* at 8, citing *Group W Television, Inc.*, 10 FCC Rcd at 2741 ¶ 22.

³⁶47 U.S.C. § 534(h)(1)(C)(ii)(III).

³⁷47 U.S.C. § 534(h)(1)(C)(ii)(IV).

cume of 26 for that period.³⁸ KTKA maintains that this figure far exceeds those that were previously found sufficient by the Commission to justify a market modification.³⁹

13. In contrast, Hearst-Argyle states that data from the 2008 Nielsen County Coverage Study/County Summary for Douglas County for the May/July/November 2007 and February 2008 ratings periods shows virtually no viewership of KTKA.⁴⁰ Hearst-Argyle states that the same survey indicates that KMBC achieves a much higher viewership than KTKA for the same period.⁴¹ In addition, Hearst-Argyle notes that KTKA is not significantly viewed in Douglas County.⁴² Finally, Hearst-Argyle notes it is significant that a major network affiliate such as KTKA, with more than 20 years of continuous cable carriage in Douglas County, should have virtually no audience share in either cable or noncable households despite a strong Grade B signal.⁴³ It argues this alone is conclusive evidence that local viewers do not consider KTKA to be part of their local market.⁴⁴ KTKA responds that it has measurable viewing audience in the communities, although admittedly not as large as KMBC's.⁴⁵

14. Finally, in addition to these statutory factors, KTKA argues that a significant economic nexus exists between the cable communities and Topeka.⁴⁶ KTKA states that Shawnee County, where Topeka is located, is geographically and economically linked to Douglas County via Interstate 70 and residents of both counties travel back and forth for the purposes of work, shopping, governmental affairs and entertainment.⁴⁷

³⁸Modification at 15 & nn. 61-62, citing Ex. 21. KTKA states that Sunflower, one of its sister companies, commissioned this report in order to study cable viewership habits, including cable viewership of broadcast channels. *Id.* at n.61.

³⁹*Id.* at 15 & n.63. Hearst-Argyle questions the reliability of the Griffin Media Research data, particularly as it is not "published audience data," as required by Section 76.59(b)(6) of the Commission's rules. Opposition at 9 citing Modification at Ex. 21. KTKA responds that the Commission's rules clearly provide that stations may submit evidence of published audience data for cable and noncable households *or* other specific audience indicia. Reply at 17, citing 47 C.F.R. § 76.59(b)(6) (emphasis in original).

⁴⁰Opposition at 10-11 & Ex. 5. From Sunday-Saturday 7 a.m. to 1 a.m., the Nielsen data shows that KTKA only achieves a 1 share in total households and an 18 average total weekly cume. *Id.* at 10.

⁴¹*Id.* at 10. For all day audience in Douglas County KMBC achieves a 7 share in total households, and a 54 average weekly total cume.

⁴²*Id.* at 11.

⁴³*Id.* at 13.

⁴⁴*Id.*

⁴⁵Reply at 17.

⁴⁶Modification at 17.

⁴⁷*Id.* at 17 & nn.69-70, citing Ex's 38-39. KTKA points out that 23 percent of the Shawnee County population commutes to Douglas County; 17 percent of Douglas County's population commutes to Shawnee County; and 31 percent of the population outside the city of Lawrence commuted to the Topeka metro area. *Id.* at 17 & nn.70-71, citing Ex's 39-40. Moreover, KTKA argues that local advertisers generally treat the cable communities as part of KTKA's market with a number of Lawrence-based businesses purchasing advertising time on the station. *Id.* at 18 & nn.75-76, citing Ex's 45-46.

15. Hearst-Argyle retorts that KTKA faces a high bar in attempting to demonstrate that Lawrence and the other Kansas City communities are actually part of the Topeka Market.⁴⁸ It notes the Commission has previously found Lawrence to be a part of the Kansas City market.⁴⁹ Arbitron itself placed Douglas County in the Kansas City ADI, as Nielsen now places it in the Kansas City DMA.⁵⁰

B. Other Arguments Raised by the Parties

16. Hearst-Argyle argues that KTKA's market modification petition should be denied for additional reasons. First, Hearst-Argyle points out that KTKA's greater proximity than the Kansas City DMA stations to the Douglas County communities should actually be fatal to its request.⁵¹ Hearst-Argyle argues that, pursuant to Section 76.56(b)(5) of the Commission's rules, grant of the instant petition would jeopardize the must carry rights of in-market ABC affiliate, KMBC because KTKA is also closer to the principal headends of the cable systems serving the communities at issue than is KMBC.⁵² Therefore, relying on the *Portland* line of cases and others, Hearst-Argyle asserts that grant of KTKA's petition would upset the economic marketplace expectations underlying the network-affiliate relationship.⁵³ Meanwhile, Hearst-Argyle asserts, KMBC provides the communities with Grade A coverage and hundreds of stories and segments of specific interest to them; and, KMBC has substantially greater viewership, being significantly viewed in Douglas County.⁵⁴ Hearst-Argyle asserts that it is unaware of any Commission decision which has granted a market modification in similar circumstances.

17. Furthermore, Hearst-Argyle points out that KTKA is co-owned with Sunflower Broadband, a cable company that serves approximately 95 percent of all cable households in Douglas County.⁵⁵ Hearst-Argyle states that, at the beginning of 2009, Sunflower failed to reach a new retransmission consent agreement with KMBC and KCWE-DT and, as a result, ceased carriage of these stations on its system serving Lawrence, Eudora, and the unincorporated portions of Douglas County.⁵⁶ During this time,

⁴⁸Opposition at 21.

⁴⁹*Id.*, citing *Kansas City Cable Partners d/b/a American Cablevision of Kansas City*, 10 FCC Rcd 3807, 3809 ¶ 12 (1995) (Commission denied a Kansas City cable operator's request to eliminate a Lawrence, Kansas station's must carry rights because the Commission found Lawrence to be part of the Kansas City market).

⁵⁰*Id.* at 24. Hearst-Argyle argues KTKA's arguments are also unsupported by U.S. Census Bureau data and commuter and shopping patterns. *Id.* at 22-24.

⁵¹*Id.* at 14.

⁵²*Id.*, citing 47 C.F.R. § 76.56(b)(5) ("A cable operator is not required to carry the signal of any local commercial television station that substantially duplicates the signal of another local commercial television station that is carried on its cable system, or to carry the signals of more than one local commercial television station affiliated with a particular broadcast network, as defined in § 76.55(f). However, if a cable operator declines to carry duplicating signals, such cable operator shall carry the station whose community of license reference point, as defined in § 76.53, is closest to the principal headend of the cable system.").

⁵³*Id.* at 14-17, citing *Broad Street Television, L.P.*, 10 FCC Rcd 5576, 5578 ¶ 12 (1995); *Guy Gannett Communications, Inc.*, 13 FCC Rcd 23470, 23478 ¶ 21 (1998), *aff'd*, 15 FCC Rcd 10762 (2000); *Pacific & Southern Co., Inc.*, 14 FCC Rcd 4558, 4566 ¶ 25 (1999); *Harron Communications Corp.*, 14 FCC Rcd 4547, 4556 ¶ 26 (1999) (the "*Portland Cases*").

⁵⁴*Id.* at 18.

⁵⁵*Id.* at 1-2.

⁵⁶*Id.* at 2 & n.2. Hearst-Argyle states that Sunflower has since resolved its retransmission consent dispute with KMBC and KCWE-DT and the stations' carriage has been restored. *Id.* at 3, n.4.

Sunflower continued carrying co-owned KTKA, the duplicating ABC affiliate from Topeka.⁵⁷ According to Hearst-Argyle, this raised the question whether KTKA even had the right to grant retransmission consent to Sunflower for carriage in Douglas County, given that KTKA is not significantly viewed in the county, and KTKA's network affiliation agreement is most probably limited to the Topeka DMA.⁵⁸

18. Hearst-Argyle maintains that, by filing the instant market modification in the middle of the retransmission consent dispute, KTKA was really seeking two advantages: first, to obtain legitimate retransmission consent rights in these communities under its ABC network affiliation agreement; and, second, by obtaining such rights, to shift leverage in any current and future retransmission consent negotiations in favor of its sister cable company, Sunflower.⁵⁹ Hearst-Argyle maintains that should the Commission grant this petition, it should also be wary of an unprecedented accumulation of media market power that will accrue to Sunflower/KTKA in the Lawrence Metropolitan Statistical Area.⁶⁰ KTKA and Sunflower's parent, The World Company, also owns: (i) Lawrence's principal local daily newspaper, the *Lawrence Journal-World*; (ii) the newspapers serving Baldwin and Eudora; (iii) Douglas County's primary Internet service provider (Sunflower Broadband); and, (iv) a local telephone company (also Sunflower Broadband).⁶¹ Hearst-Argyle states that Lawrence has more than 80,000 residents and more than 90 percent of the total population in the subject communities. It points out that if KTKA did provide Grade A coverage to all of Lawrence, it would be in violation of the Commission's newspaper/television station cross-ownership rules since it is also co-owner of the *Lawrence Journal-World*.⁶²

19. Hearst-Argyle argues KTKA does not need its market modified in order to ensure carriage on its co-owned Sunflower cable system, which possesses nearly 80 percent penetration and a 95 percent market share in Douglas County.⁶³ Furthermore, a majority of the locally-originated shows and news programming cited by KTKA also airs on Sunflower's own 6News Lawrence cable channel. Therefore, even if KTKA's must carry status was denied on the system, such programming would continue to be provided by Sunflower to its subscribers.⁶⁴

20. KTKA argues that, even relying on the *Portland Cases*, there is no basis for Hearst-Argyle's contention that grant of the request herein would "upset the economic marketplace expectations

⁵⁷*Id.* at 2.

⁵⁸*Id.*

⁵⁹*Id.* Hearst-Argyle argues that, because of the "no deletion" provision in Section 76.59(d) of the Commission's rules, the filing of KTKA's market modification petition also ensured continued carriage of the station during the petition's pendency, regardless as to whether KTKA's retransmission consent to Sunflower was lawful.

⁶⁰*Id.* at 3.

⁶¹*Id.* at 3 & n.6.

⁶²*Id.* at 5 & n.10, citing 47 C.F.R. § 73.3555(d).

⁶³*Id.* at 5. Hearst-Argyle states that KTKA and Sunflower are so intertwined that the letter from the Chairman of the Douglas County Commission in support of the market modification uses the terms "Sunflower Broadband" and "Sunflower Cable Television" interchangeably. *Id.* at 3 & n.5, citing Modification at Ex. 25, Jan. 10, 1999 Letter from Bob Johnson, Chairman, Douglas County Commission.

⁶⁴Opposition at 6.

underlying the network-affiliate relationship.”⁶⁵ KTKA argues that Hearst-Argyle has not provided any evidence that it faces competitive harm if the instant petition should be granted.⁶⁶ Moreover, Hearst-Argyle also offers no evidence that it ever intends to elect must carry status for KMBC on the cable systems serving the communities, or that if it did, that such a must carry request would be rejected given KMBC’s claimed domination in the marketplace.⁶⁷ Indeed, KTKA states that, except for the short-lived retransmission consent dispute between Sunflower and Hearst-Argyle, both KTKA and KMBC have been carried simultaneously by the cable systems serving the communities for over 20 years.⁶⁸ KTKA maintains that such long-term carriage of KMBC negates Hearst-Argyle’s argument that grant of the petition will impact its must carry status.⁶⁹ In addition, KTKA states that grant of the petition would have a *de minimis* impact on KMBC.⁷⁰ KTKA points out that the Kansas City DMA contains more than 937,970 households and the instant petition seeks to add approximately 56,955 households located in one county.⁷¹ KTKA argues that this amounts to little more than 6 percent of all households in the entire DMA which should have little impact on Hearst-Argyle’s ability to compete against other stations in the Kansas City DMA.⁷² KTKA argues that it more than meets the other market modification criteria – history of carriage, Grade B or better coverage, local programming of specific interest with coverage of local news and sports, and that its viewership values are comparable to approximately seven Kansas City broadcast stations.⁷³

21. In our review of the market modification factors, some of the evidence presented by KTKA ordinarily would argue for grant of its request. For example, KTKA has a history of carriage in the communities at issue (factor I) and provides Grade B or better coverage and programming to those communities (factor II), and KTKA garners some, albeit minimal, viewership in Douglas County (factor IV). Nevertheless, these factors are of less weight when viewed in relation to evidence supporting the denial of the petition.

22. KTKA, an ABC affiliate located in the Topeka Kansas DMA, is seeking to add certain communities in the Kansas City DMA, which are already served by an ABC affiliate from Kansas City - KMBC. In such a circumstance, we are especially concerned that our decision not unduly upset the economic marketplace expectations underlying the affiliation concept. Therefore, we must take into account the effect a grant of must carry status to KTKA will have on KMBC. The evidence presented shows that all of the communities at issue are closer to Topeka than to Kansas City, with the exception of

⁶⁵Reply at 10, citing the *Portland Cases*; see *supra* n.53.

⁶⁶Reply at 11.

⁶⁷*Id.* KTKA states KMBC is currently carried on Sunflower pursuant to a retransmission consent agreement. *Id.* at n.40.

⁶⁸*Id.* at 11.

⁶⁹*Id.* at 12.

⁷⁰*Id.*, citing *Gray Television Licensee, Inc.*, 21 FCC Rcd 8719, 8729 ¶ 19 (2006) (emphasizing the “relatively small number of subscribers affected by this request, when compared to [the] total number of subscribers within the Washington D.C. DMA”).

⁷¹*Id.*, citing Modification at 9 n.32 (citing Ex. 22, *Television & Cable Factbook*, Volume 77, at A-2, D-473, D-507, D-496 (2009)).

⁷²*Id.* at 12-13.

⁷³*Id.* at 14-18.

one which is equidistant from the two, and that the cable system headends of the three systems serving these communities are also all closer to Topeka. A grant of must carry status to KTKA would therefore jeopardize KMBC's must carry status within its own market, a situation not intended or envisioned by the Communications Act.⁷⁴ Viewership levels are also important in reaching our determination, as KMBC, in addition to being significantly viewed, achieves substantial viewership levels of 7/54 in Douglas County, whereas KTKA is not significantly viewed and achieves viewership levels of 1/18.⁷⁵ Viewership therefore shows a marked preference for KMBC, yet it is KMBC that could face being dropped from the cable systems through grant of the instant petition. Furthermore, KMBC and other Kansas City network affiliates all place Grade A or digital equivalent signals over the subject communities, and this decreases the significance of KTKA's Grade B coverage.

23. In granting KTKA's petition, we would place KMBC in an awkward position whether it chose to negotiate for retransmission consent or elected mandatory carriage on Sunflower and the other affected cable systems. By choosing mandatory carriage, KMBC would face the possibility that cable operators would choose to carry only the affiliate closer to the communities: KTKA. In particular, Sunflower's decision to carry KTKA would almost certainly be influenced by the common ownership it shares with KTKA. Alternatively, if KMBC elected to bargain for retransmission consent instead, the cable operators could carry KTKA in replacement of KMBC if negotiations failed, thereby imparting Sunflower and the other affected cable operators with greater bargaining power.⁷⁶ Therefore, KTKA's petition must be denied.

24. Furthermore, these communities are located in Douglas County, which is immediately adjacent to the Kansas City Metropolitan Statistical Area. The largest community at issue, Lawrence, contains 90 percent of the population of the communities at issue, and is only 35 miles west of Kansas City, the center of the Kansas City DMA.⁷⁷ These communities are therefore part of the core of the Kansas City market. The Commission has generally been circumspect about allowing the annexation of core communities by stations assigned to other markets.⁷⁸ The Commission has stated that "[i]n granting

⁷⁴ This is because KMBC's mandatory carriage election would allow Sunflower to use Section 76.56(b)(5) of our rules. *See supra* n.52.

⁷⁵ Opposition at Ex. 4.

⁷⁶ Although not the basis for our decision, it does not escape our attention that were this petition granted, the World Company would accumulate a greater degree of media market power in the Douglas County and the Lawrence area – where Lawrence currently contains more than 90 percent of the total population of the subject communities and Sunflower Broadband is the cable company serving approximately 95 percent of all cable households in Douglas County. In *Northeast Kansas Broadcast Service, Inc.*, 20 FCC Rcd 13675 (2005), we granted the assignment of KTKA's license to the World Company, even though the latter published the *Lawrence Journal World*, the daily newspaper in Lawrence, and even though KTKA placed a grade A contour over Lawrence in apparent violation of Section 73.3555 of our rules. This was because Longley Rice modeling subsequently revealed "significant gaps in KTKA's Grade A coverage" that "preclud[ed] any meaningful encompassment of the city" such that the cross-ownership rules did not apply. 20 FCC Rcd at 13676. However, in addition to owning KTKA and Sunflower, the World Company, also owns: (i) the newspapers serving Baldwin and Eudora; (ii) Douglas County's primary Internet service provider (Sunflower); and, (iii) a local telephone company (also Sunflower).

⁷⁷ *Kansas City Cable Partners*, 10 FCC Rcd 3807, 3809 ¶12 (1995).

⁷⁸ *See Agape Church, Inc.*, 14 F.C.C.R. 2309, 2317-18, ¶ 30 (1999) (denying a station must-carry status for communities located within the station's Grade B contour, but which nevertheless formed the core or "hub" another DMA).

the Commission authority to modify market areas ... we do not believe that Congress in the 1992 Cable Act intended for us to alter the basic structure of [DMAs] themselves.”⁷⁹ In particular, we do not modify one market to include within it the core community of another market.⁸⁰ KTKA admits it provides a Grade B contour to all the subject communities, but not a Grade A contour, whereas all the Kansas City affiliates provide a Grade A contour to the communities. In fact, we cannot credit KTKA’s argument that it covers Lawrence with a Grade A contour when we previously accepted its argument that there were significant gaps in its Grade A coverage of Lawrence, so that its ownership of the *Lawrence Journal World* did not violate our newspaper/television cross-ownership ban.⁸¹ KTKA has also historically garnered significantly lower viewership in Douglas County than in Shawnee County for example.⁸² These facts do not support adding these core communities from the Kansas City DMA to KTKA’s market and provide further basis for denying KTKA’s petition.⁸³

IV. CONCLUSION

25. We will deny the market modification petition filed by Free State Communications/KTKA because addition of the requested communities would violate the economic marketplace expectations underlying the affiliation concept, and because the communities sought form an important part of the core of another broadcast market.

V. ORDERING CLAUSES

26. 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-8121-A), filed by Free State Communications, LLC, licensee of station KTKA-TV, **IS DENIED**.

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

FEDERAL COMMUNICATIONS COMMISSION

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

⁷⁹ *Channel 33, Inc.*, 11 FCC Rcd 3579, 3582 ¶ 17 (1996).

⁸⁰ *Id.*

⁸¹ See 47 C.F.R. § 73.3555(d); see *supra* n. 76.

⁸² See 2000, 2003 and 2005 Nielsen County Coverage Surveys.

⁸³ Furthermore, by denying this petition, we maintain KTKA’s competitive parity with other Topeka DMA television stations that are voluntarily carried by cable systems serving the Kansas City DMA.