

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

In the Matter of	)	
	)	
Mauna Kea Broadcasting Company, Licensee of	)	CSR-8658-M
Television Station KLEI-DT, Kailua-Kona, Hawaii	)	Docket No. 12-167
	)	
v.	)	CSR-8682-M
	)	Docket No. 12-197
	)	
Time Warner Entertainment Company, L.P., d/b/a	)	
Oceanic Time Warner Cable, and Hawaiian	)	CSR-8686-A
Telcom, Inc., d/b/a Hawaiian Telcom Services	)	Docket No. 12-208
Company, Inc.	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: October 19, 2012**

**Released: October 19, 2012**

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

**I. INTRODUCTION**

1. Mauna Kea Broadcasting Company (“Mauna Kea”) licensee of commercial broadcast television station KLEI-DT, Kailua-Kona, Hawaii (“KLEI”) filed the above captioned must carry complaints pursuant to Sections 76.7, 76.56 and 76.61(a)(1) of the Commission's rules,<sup>1</sup> seeking carriage on cable systems operated by Oceanic Time Warner Cable (“TWC”) and Hawaiian Telcom Services Company, Inc., (“HTSC”) in the Honolulu designated market area (“DMA”).<sup>2</sup> Both TWC and HTSC opposed these complaints<sup>3</sup> and TWC filed a petition – which HTSC joined – to modify KLEI’s mandatory carriage market to exclude it from certain communities served by TWC and HTSC.<sup>4</sup> Given their

<sup>1</sup> 47 C.F.R. §§ 76.7, 76.56 and 76.61(a)(1).

<sup>2</sup> Complaint of Mauna Kea Broadcasting Co., against Oceanic Time Warner Cable (CSR-8658-A), filed June, 13, 2012 (“KLEI Complaint v. TWC”); Complaint of Mauna Kea Broadcasting Co., against Hawaiian Telcom, Inc., (CSR-8682-A), filed July 3, 2012 (“KLEI Complaint v. HTSC”).

<sup>3</sup> Opposition to KLEI Complaint v. TWC by TWC (CSR-8658-A), filed July 12, 2012 (“TWC Opposition”); Opposition to KLEI Complaint v. HTSC by HTSC (CSR-8682-A), filed Aug. 12, 2012 (“HTSC Opposition”). KLEI subsequently filed a reply only as to HTSC’s Opposition. *See* Reply to HTSC Opposition by KLEI, filed Aug. 15, 2012 (“KLEI Reply to HTSC”). HTSC has argued for dismissal of KLEI’s complaint on the grounds that the complaint intended for it was served on the wrong party, its subsidiary Hawaiian Telcom, Inc. (“HTI”). HTSC Opposition at 2. However, we note that Hawaiian Telcom responded to KLEI’s carriage demand letter as “Hawaii Telcom,” and the address HTSC provides for its headquarters is the same as that used by KLEI. *See* KLEI Complaint v. HTSC at Exh. 2 & HTSC “Contact Us,” Hawaiian Telcom Headquarters Address <http://www.hawaiiantel.com/support/Support/ContactUs/tabid/275/Default.aspx> and Investor Relations – Investor FAQ, Where is Hawaiian Telcom’s headquarter? <http://ir.hawaiiantel.com/phoenix.zhtml?c=221642&p=irol-faq> (last visited Oct. 16, 2012). Accordingly, we deny HTSC’s argument and consider KLEI’s complaint on the merits.

<sup>4</sup> Petition for Special Relief of Time Warner Cable (CSR-8686-M) (“TWC Petition”). TWC lists the following cable system communities by Community Unit ID as part of its petition: Oahu Systems – Honolulu (HI0005 and HI0006), Hickam AFB (HI0043), Aliamanu (HI0058), Kaneohe Marine Corps (HI0066) & Pearl Harbor (HI0070); Kauai Systems: Kauai (HI0011) & Barking Sands Naval (HI0098); and Maui Systems: Kalaupapa (HI0107) & (continued...)

interrelatedness, for administrative convenience and because TWC has not objected to HTSC seeking to join its market modification petition and has requested that we combine the proceedings,<sup>5</sup> the Bureau will consolidate these matters into one proceeding, and deny TWC/HTSC's market modification petition and grant KLEI's carriage complaints against both cable operators.<sup>6</sup>

## II. BACKGROUND

1. Pursuant to Section 614 of the Communications Act of 1934, as amended (the "Act"), and implementing rules adopted by the Commission, commercial television broadcast stations, such as KLEI, are entitled to assert mandatory carriage rights on cable systems located within their market.<sup>7</sup> A station's market for this purpose is its "designated market area," or DMA, as defined by the Nielsen Company.<sup>8</sup>

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(HI0113). TWC has noted it does not object to carrying KLEI throughout all of Hawaii County so long as KLEI fulfills its obligation of providing a good quality signal to TWC's headend located in the eastern part of Hawaii county. TWC Petition at 14. Two oppositions to TWC's petition were filed, by KLEI and the State of Hawaii, and a reply was filed by TWC. See Opposition to Petition for Special Relief by KLEI, filed Aug. 16, 2012 ("KLEI Opposition"); Opposition to Petition for Special Relief by the State of Hawaii, filed Aug. 16, 2012 ("Hawaii Opposition"); and Reply by Time Warner Cable, Inc. to Opposition KLEI, filed May 31, 2012 ("TWC Reply"). HTSC sought to join TWC's petition to exclude KLEI from its market, but HTSC only has one franchised cable system on the Island of Oahu, County of Honolulu – with Community Unit ID HI0112, and presumably this is the only system to which its pleading applies. See Comments of Hawaiian Telcom Services Company, Inc., at 1-2, filed Aug. 22, 2012 ("HTSC Comments"). Finally, KLEI filed a Surreply to TWC's Petition, filed Oct. 4, 2012 ("KLEI Surreply").

<sup>5</sup> TWC Opposition at 3.

<sup>6</sup> HTSC argues that it would be unconstitutional to require it to carry KLEI because it is not a "cable operator" within the meaning of Section 614 of the Communications Act or the Commission's must carry rules. HTSC Opposition at 3. Furthermore, it raises the argument that it would be unconstitutional to apply the mandatory carriage regime to it – a non-dominant, new entrant with a small system, as this does not achieve the statute's interest in promoting fair competition between cable operators and TV broadcasters. See *id.* at 3-4. Our records indicate HTSC has filed a form 322 to register itself as a cable system in Honolulu, HI. See Hawaiian Telcom Services Co., Form 322, Confirmation Number: CB57824687, July 7, 2011, available at [http://fjallfoss.fcc.gov/coals7/formsPrint?reference\\_number=245878208&FCC\\_Identifier=HI0112&appType=CR&showMsg=False](http://fjallfoss.fcc.gov/coals7/formsPrint?reference_number=245878208&FCC_Identifier=HI0112&appType=CR&showMsg=False), and it admits it obtained a cable franchise for the island of Oahu from the Hawaii Department of Commerce and Consumer Affairs in June 2011. See HTSC Opposition at 1 & KLEI Reply to HTSC at 9-10 & n.27; See [http://hawaii.gov/dcca/catv/decisions\\_orders/files/Hawaiian\\_Telcom\\_Services\\_Oahu\\_Franchise\\_D-O\\_6\\_24\\_11.pdf](http://hawaii.gov/dcca/catv/decisions_orders/files/Hawaiian_Telcom_Services_Oahu_Franchise_D-O_6_24_11.pdf). Accordingly, under the Communications Act, our rules and the terms of its own franchise, we deem HTSC a cable operator subject to the must-carry rules for purposes of these matters. We also note that the Supreme Court upheld the must-carry regime as consistent with the First Amendment without drawing a distinction between cable operators on the basis of size, dominance or time in existence, and that promoting fair competition was but one of the given purposes of the statute, which also included promoting the widespread dissemination of information from a multiplicity of sources. See *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 189-90 (1997). Accordingly, HTSC is a cable operator and our must-carry rules apply to it.

<sup>7</sup> See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, MM Docket No. 92-259, Report and Order, 8 FCC Rcd 2965, 2975-77 ¶¶ 41-46 (1993) ("Must Carry Order"). The Commission has subsequently extended mandatory carriage rights to digital television stations under Section 614(a) of the Act and has amended its rules accordingly. See *Carriage of Digital Television Broadcast Signals First Report and Order*, See 16 FCC Rcd 2598, 2606 ¶¶ 15-16, 2610 ¶ 28 (2001) ("DTV Must Carry Order"); see also 47 C.F.R. §76.64(f)(4).

<sup>8</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 measured viewing patterns. See 47 U.S.C. § 534(h)(1)(C). Section 76.55(e)(2) of the Commission's rules specifies that a commercial broadcast television station's market is its Designated Market Area as determined by The Nielsen Company. 47 C.F.R. § 76.55(e)(2).

The term DMA is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Pursuant to the Commission's must carry rules, cable operators have the burden of showing that a commercial station located in the same DMA is not entitled to carriage.<sup>9</sup> One method of doing so is for a cable operator to establish that a station, which would otherwise be entitled to carriage, does not provide a good quality signal to its cable system's principal headend.<sup>10</sup> Should a station fail to provide such requisite signal quality, it still may obtain carriage rights by providing a cable operator with specialized equipment, at the station's expense, which will improve the station's signal to an acceptable quality at a cable system's principal headend.<sup>11</sup>

2. TWC and HTSC operate cable television systems on the islands of the State of Hawaii, which comprises one, isolated television designated market area – the Honolulu DMA. TWC serves the islands of Hawaii, Oahu, Kauai, and Maui/Moloka'I (and each of the State's five counties: Hawaii, Honolulu, Kauai, Kalawao and Maui) whereas HTSC serves only the island of Oahu. KLEI states it elected mandatory carriage on TWC's and HTSC's cable systems by letters dated September 30, 2011.<sup>12</sup> After neither TWC nor HTSC had started carrying KLEI, the station sent them carriage demand letters.<sup>13</sup> TWC filed no response to KLEI's demand, and HTSC responded with a carriage denial letter;<sup>14</sup> therefore, KLEI subsequently filed timely complaints against both companies. Both TWC and HTSC argue KLEI is not entitled to carriage because it provides no service to any areas or islands other than on its immediate area on the island of Hawaii.<sup>15</sup> KLEI responds it has unequivocally offered, at its own cost, to be responsible for delivering a good quality signal by alternative means (fiber) to both TWC and HTSC's cable system headends.<sup>16</sup> Finally, TWC has argued that to the extent KLEI is granted carriage on any of its systems prior to December 12, 2012, it be allowed to carry KLEI in a digital format only, and provide, where necessary, equipment for free or at a low cost to those incapable of viewing this digital signal, consistent with the Commission's *Fifth Report and Order*.<sup>17</sup>

1. In response to KLEI's must carry complaints, TWC filed a separate petition for special relief, seeking to modify the Honolulu DMA to exclude KLEI from its cable system communities, and HTSC has joined TWC's petition. Under the Act, Section 614(h)(1)(C) provides that the Commission may:

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<sup>9</sup> See *Must Carry Order*, 8 FCC Rcd at 2990 ¶ 102.

<sup>10</sup> 47 C.F.R. § 76.55(c)(3).

<sup>11</sup> *Must Carry Order*, 8 FCC Rcd at 2991 ¶ 104.

<sup>12</sup> KLEI Complaint v. TWC at 3; KLEI Complaint v. HTSC at 3.

<sup>13</sup> KLEI Complaint v. TWC at Exhibit 1 (Letter from Dr. Christopher J. Racine, General Manager, KLEI to Bob Barlow, President, Oceanic Time Warner Cable (May 1, 2012)); KLEI Complaint v. HTSC at Exhibit 1 (Letter from Dr. Christopher J. Racine, President and CEO, Mauna Kea Broadcasting Company, Inc. to Eric K. Yeaman, President & CEO, HTSC (June 21, 2012)). TWC further asserts that because KLEI's complaint does not list in which cable system communities of the Honolulu DMA it is requesting carriage, TWC assumes it must seek carriage in all the counties of Hawaii. See TWC Opposition at 2. We will treat KLEI's complaint as invoking carriage rights on all of TWC and HTSC's systems.

<sup>14</sup> KLEI Complaint v. TWC at 4; KLEI Complaint v. HTSC at 2 & Exh. 2 (Letter from Ernest Villicana, Director – Video Content Programming, HTSC, to Dr. Christopher J. Racine, President and CEO, Mauna Kea Broadcasting Company, Inc. (June 25, 2012)).

<sup>15</sup> TWC Opposition at 1-2 & HTSC Opposition at 2.

<sup>16</sup> KLEI Complaint v. TWC at 2-3; KLEI Complaint v. HTSC at 3; KLEI Reply to HTSC at 2.

<sup>17</sup> TWC Opposition at 3 & n.7 (citing *Carriage of Digital Television Broadcast Signals: Amendment to the Commission's Rules*, CS Docket No. 98-120, Fifth Report and Order, FCC 12-59, 27 FCC Rcd. 6529 (June 12, 2012) (“*Fifth Report and Order*”)).

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.<sup>18</sup>

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 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.<sup>19</sup>

2. 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>20</sup> 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<sup>21</sup> delineating the station's technical service area<sup>22</sup> and showing the location of the cable system headends and communities

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<sup>18</sup> 47 U.S.C. § 534(h)(1)(C).

<sup>19</sup> *Id.*

<sup>20</sup> *Must Carry Order*, 8 FCC Rcd 2965, 2977 n.139.

<sup>21</sup> 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.

<sup>22</sup> While the Grade B contour defined an analog television station's service area, *see* 47 C.F.R. § 73.683(a), with the completion of the full power digital television transition on June 12, 2009, there are no longer any full power analog

in relation to the service areas.

- (3) Available data on shopping and labor patterns in the local market.
- (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.<sup>23</sup>

3. 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.

4. In its *DTV Must Carry Order*, the Commission concluded that under Section 614(a) of the Act, digital-only television stations had mandatory carriage rights, and amended its rules to reflect this.<sup>24</sup> The Commission also clarified its framework for analyzing market modifications for digital television stations.<sup>25</sup> It found that the statutory factors in Section 614(h), the current process for requesting market modifications, and the evidence needed to support such petitions, would be applicable to digital television modification petitions.<sup>26</sup> While the Commission presumed the market of a station's digital signal would be coterminous with that station's market area for its prior analog signal, it recognized that the technical coverage area of a digital television signal may not exactly replicate the technical coverage area of its

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stations. Instead, as set forth in Section 73.622(e), a station's DTV service area is defined as the area within its noise-limited contour where its signal strength is predicted to exceed the noise-limited service level – which for UHF stations is 41 dBu. *See* 47 C.F.R. § 73.622(e). Accordingly, the Commission has treated a digital station's noise limited service contour as the functional equivalent of an analog station's Grade B contour. *See Report To Congress: The Satellite Home Viewer Extension and Reauthorization Act of 2004; Study of Digital Television Field Strength Standards and Testing Procedures*, 20 FCC Rcd 19504, 19507 ¶ 3, 19554 ¶ 111 (2005); *Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004, Implementation of Section 340 of the Communications Act*, Report and Order, 20 FCC Rcd 17278, 17292 ¶ 31 (2005). *See also Lenfest Broadcasting, LLC*, 19 FCC Rcd 8970, 8974 ¶ 7 n.27 (2004) (“For digital stations operating on channels 14-69 [UHF stations], for market modification purposes the 41 dBu DTV service area contour is the digital equivalent of an analog station's Grade B contour.”).

<sup>23</sup> 47 C.F. R. § 76.59(b).

<sup>24</sup> *See* 16 FCC Rcd 2598, at 2606, 2610 (2001); 47 C.F.R. §76.64(f)(4).

<sup>25</sup> *See* 16 FCC Rcd at 2635-36. The Commission affirmed that for digital signal carriage issues, it would continue to rely on the Nielsen market designations, publications, and assignments it used for analog signal carriage issues. *See id.* at 2636.

<sup>26</sup>*See DTV Must Carry Order*, 16 FCC Rcd at 2636.

former analog television signal.<sup>27</sup> Therefore, in deciding DTV market modifications, the Commission would take changes in signal strength and technical coverage into consideration, on a case-by-case basis.

### III. DISCUSSION

5. The first issue before us is whether to grant TWC and HTSC's request to exclude their cable system communities from KLEI's market. The second issue, whether KLEI has a right to demand carriage on these cable systems, hinges on whether KLEI should be considered local to the communities served by those systems. Considering all of the relevant facts in the record, we will deny TWC's and HTSC's market modification petition and grant KLEI's carriage complaints for the reasons stated below.

6. The first statutory factor we consider in determining the scope of KLEI's market concerns whether KLEI, or other stations located in the same area, have been historically carried on TWC's and HTSC's cable systems.<sup>28</sup> TWC argues that despite being on the air for many years, its systems do not currently carry KLEI and have never done so,<sup>29</sup> and neither have HTSC's systems.<sup>30</sup> TWC argues KLEI has not been singled out for discriminatory treatment with respect to similarly situated stations because there are no other stations licensed to Kailua-Kona, KLEI's city of license, or any other stations from the Island of Hawaii that are carried on TWC's or HTSC's systems.<sup>31</sup> We note, however, that TWC's assertion may need to be analyzed from the perspective of historic carriage patterns. For example, KLEI was previously a satellite station of Ion Network Affiliate KPXO, and TWC carried Ion programming from KPXO in the past without carrying KLEI,<sup>32</sup> just as it has carried the programming of other major networks situated on Oahu, while not carrying the satellite stations of those other networks.

7. Furthermore, with new or specialty stations, failure to establish either historic carriage or significant viewership is given lesser weight.<sup>33</sup> KLEI argues it should be considered a new station because it changed ownership in September 2011, and the new licensee has invested considerable resources to change the Station's programming to include a daily news program and unique programs specifically responsive to the native Hawaiian population.<sup>34</sup> It argues it is the only station outside the Island of Oahu that produces and broadcasts any local programming, including daily news.<sup>35</sup> It also notes that all full power stations licensed to Hawaiian islands other than Oahu are operated as satellites of Oahu stations, including all other stations licensed on the island of Hawaii.<sup>36</sup> Furthermore, KLEI notes that until last year, with the entry of HTSC, TWC was the only cable operator in Hawaii and faced no

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<sup>27</sup> See *id.* In adopting technical rules for the digital transmission of broadcast signals, the Commission attempted to ensure that a station's digital over-the-air coverage area would replicate as closely as possible its former analog coverage area. See *id.* at 2636 n.254 (citing *Sixth DTV Report and Order*, 12 FCC Rcd 14588, 14605 (1997)).

<sup>28</sup> This statutory factor is typically evidenced by "cable system channel line-up cards or other exhibits establishing historic carriage, such as television guide listings." 47 C.F.R. § 76.59(b)(6).

<sup>29</sup> TWC Petition at 4. TWC attaches its current channel lineup as well as Hawaii specific pages from the Television and Cable Factbook for the years 1988, 1993, 1998, 2003 and 2008. TWC Petition at n.9 & Exhs A & B.

<sup>30</sup> TWC Petition at 5 & n.10 (citing Exh C, HTSC's Oahu channel lineup). HTSC asserts it began operating in June of 2011, and there is only one channel lineup card provided. See HTSC Comments at 2.

<sup>31</sup> TWC Petition at n.12.

<sup>32</sup> See *Paxson Hawaii License, Inc.*, 14 F.C.C.R. 9105 (CSB 1999).

<sup>33</sup> See *Paxson San Jose License, Inc.*, 12 F.C.C.R. 17520, 17525 ¶ 11 (CSB 1997).

<sup>34</sup> KLEI Opposition at 3.

<sup>35</sup> *Id.*

<sup>36</sup> KLEI Opposition at 4 & n.13 & 14.

competition for customers.<sup>37</sup>

8. The second statutory factor asks “whether the television station provides coverage or other local service to such community.”<sup>38</sup> TWC argues KLEI provides neither technical service nor programming service to the communities.<sup>39</sup> It argues the communities are on average 66 to 294 miles from KLEI’s city of license (or its transmitter location),<sup>40</sup> and it attaches a Grade B contour map which it asserts shows that KLEI’s signal contour does not reach any of the communities.<sup>41</sup> HTSC joins TWC’s distance based argument, stating its system is 208 miles removed from KLEI and that residents of Oahu cannot view the station over the air.<sup>42</sup> According to TWC, the ocean forms a geographic boundary between the islands separating the communities from KLEI.<sup>43</sup> We note that we have stated before that even with substantial distances between islands, we do not believe that this fact alone should serve to preclude a finding of a unified market, particularly in island markets.<sup>44</sup> Furthermore, based on our internal analysis of KLEI’s Longley Rice coverage – which TWC did not supply – KLEI does in fact reach some areas on the island of Maui in addition to Hawaii. For example, it appears to reach Hana-Maui but does not appear to be carried on the TWC cable system serving Hana-Maui, even though other stations operating out of Oahu with Grade B contours that also do not reach this region appear to be carried there.<sup>45</sup>

9. Next, TWC argues KLEI’s programming does not focus on specific local needs and interests of the communities, primarily offering reruns of entertainment programs and infomercials,<sup>46</sup> and that any local programming it does air is focused on Hawaii County with little nexus to other communities.<sup>47</sup> KLEI responds that it produces more than 17 hours of locally-produced programming each week.<sup>48</sup> It argues the unique nature of the Hawaiian Islands makes issues addressed in its programs important to all the residents of Hawaii.<sup>49</sup> Its nightly news program, *KLEI 6 News*, provides coverage of both local and statewide issues in a ten to twelve minute news segment, one third of which covers Oahu, Maui, Kauai, Molokai and Lanai, one third covering Hawaii County, and one third covering national news.<sup>50</sup> KLEI

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<sup>37</sup> KLEI Opposition at 5.

<sup>38</sup> 47 U.S.C. § 534(h)(1)(C)(ii)(II).

<sup>39</sup> TWC Petition at 5.

<sup>40</sup> *Id.* at 7 & Exhibit E (Distances in miles between Kailua-Kona and certain communities are Maui (66), Kalaupapa (123), Honolulu Unincorporated (166), Kaneohe Marine Corps (169), Hickam AFB (171), Aliamanu (171), Pearl Harbor (175), Oahu Central (177), Honolulu City (179), Kauai (281), Barking Sands Naval (294).

<sup>41</sup> TWC Petition at 6 & Ex. D, Grade B Coverage Contour Map of KLEI.

<sup>42</sup> HTSC Comment at 2.

<sup>43</sup> TWC Petition at 7 & n.22 (citing Exh. F, Hawaii state map showing Kailua-Kona and the Communities).

<sup>44</sup> *In re WVXF, Charlotte Amalie, Virgin Islands*, 24 FCC Rcd 8264, 8270 ¶ 11 (MB 2009).

<sup>45</sup> These stations include KFVE, KGMB, KHNL, KAAH, KHON and KIKU. Huffpost TV Listings, Hana-Maui, Hawaii 95354, <http://tvlistings.aol.com/listings/hi/hana-maui/oceanic-time-warner/HI51418> (last visited Oct. 16, 2012); *see also* Television and Cable Factbook 2012 at A-384 to A-392.

<sup>46</sup> TWC Petition at 8 & n.28 (citing Exh. G, KLEI programming lineup).

<sup>47</sup> TWC Petition at 9. HTSC joins this argument as well, adding that there is no “localism” justification for including KLEI on Oahu. *See* HTSC Comment at 2-3.

<sup>48</sup> KLEI Opposition at 9 and citing Exh. B, KLEI-TV August Program Schedule, *available at* <http://www.klei.tv/docs/KLEISchedule10.pdf>.

<sup>49</sup> KLEI Opposition at 9.

<sup>50</sup> KLEI Opposition at 9 & n.34 (citing [www.klei.tv](http://www.klei.tv) for clips of recent episodes); *See also* KLEI Surreply at 5.

also airs a weekly program, *City News*, covering news stories and events occurring in Oahu, the state capital,<sup>51</sup> as well as two other shows, *Talk Story Hawaii*, an interview segment, and *Eye on Hawaii*, which covers past and upcoming events on all the islands.<sup>52</sup> Every week, it also airs the *O'ahu Mayor's Report*, a 30-minute weekly program in which the Mayor of Honolulu discusses important issues in the City of Honolulu and on the island of *O'ahu*.<sup>53</sup> And it airs another show entitled *The Mayor's Report* every week, in which the Hawaii County Mayor updates the community about current affairs of the island of Hawaii and what the County is doing to address certain issues.<sup>54</sup> Similarly, KLEI states that it produces shows addressed to special segments of the population and to local concerns. For example, it produces and airs *Native Ways*, a show addressing issues of importance to Native Americans and Native Hawaiians and *Latitudes and Truly Pinoy*, the only shows directed specifically at Hawaii's Hispanic and Filipino communities.<sup>55</sup> With respect to local matters, it also airs *Healthy Hawaii*, a show about medical issues of particular concern to the state – such as diabetes; *Education Matters*, billed as the only educational program in the state hosted by a Hawaii State school psychologist, *Keiki 808*, an educational/informational children's program designed to educate the children of Hawaii on varied topics of interest throughout the islands.<sup>56</sup> Finally, it produces and airs *Olelo Hawai'i* – a local television program that provides language instruction in native Hawaiian, beginning with basic Hawaiian sounds and progressing to advanced sentence structure.<sup>57</sup> KLEI states its local shows – apart from its nightly news and Mayor programs - have each generally aired between 12 to 24 episodes.<sup>58</sup>

10. 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.”<sup>59</sup> TWC argues the Commission gives greater weight to the carriage of other stations where a cable operator is seeking to delete a station's mandatory carriage rights, and it is clear that the station is not providing a local service to those communities.<sup>60</sup> TWC and HTSC argue their cable systems serving the communities currently carry several truly local stations each of which air local news, sports and weather programming, including KAAH (Honolulu and Maui only), KALO (Honolulu only), KBFD, KFVE, KGMB, KHET, KHNL, KHON, KIKU, KITV, KPXO (Honolulu only), KWHE (Honolulu only), and KWHM (Maui only).<sup>61</sup> TWC argues its subscribers are therefore already well served with an abundance of local programming broadcast by truly local television stations it carries.

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<sup>51</sup> TWC points out that *City News*, or *Honolulu City News*, is actually a program produced by Honolulu Municipal Television for viewers in Honolulu County on PEG channel Olelo 54. TWC Reply at 6.

<sup>52</sup> KLEI Opposition at 10; see also <http://www.klei.tv/local-shows/> (last visited Oct. 16, 2012).

<sup>53</sup> KLEI Opposition at 10 & n.36 (citing <http://www.klei.tv/local-shows/> (last visited Oct. 16, 2012)). This program is not produced by KLEI.

<sup>54</sup> See <http://www.klei.tv/local-shows/> (last visited Oct. 16, 2012).

<sup>55</sup> KLEI Opposition at 10-12; see also <http://www.klei.tv/local-shows/> (last visited Oct. 16, 2012).

<sup>56</sup> See *id.*

<sup>57</sup> See *id.*

<sup>58</sup> KLEI Surreply at 4.

<sup>59</sup> 47 U.S.C. § 534(h)(1)(C)(ii)(III).

<sup>60</sup> TWC Petition at 10.

<sup>61</sup> TWC Petition at 10-11; HTSC Petition at 2. TWC also argues the issues/programs lists of these stations show that they provide significantly more local programming than KLEI. TWC Petition at 10-11 citing Exhs. I-M (attaching issues/programs lists for the first quarter of 2012 by KHNL – Exh. I, KGMB – Exh. J, KFVE – Exh. K, KHON – Exh. L and KITV (Exh. M)).

11. 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.”<sup>62</sup> TWC argues KLEI has no reported viewership in any of the communities.<sup>63</sup> KLEI responds only that as a station offering specialized programming that is currently establishing its audience, its ratings information should be discounted.<sup>64</sup> Finally, TWC argues that the geographic separation between Kailua-Kona and the communities naturally results in a lack of business and economic connections, including shopping and labor patterns, between them.<sup>65</sup>

12. The four enumerated factors are not intended to be exhaustive in determining a particular station's television market and we look to shopping and labor patterns and other non-specified factors such as geography.<sup>66</sup> While TWC argues that “vast ocean reaches” separate the islands and attenuate any meaningful ties between and among the islands,<sup>67</sup> KLEI notes that the Hawaiian people retain a unique “cultural identity” stretching back to the time when they formed a unified kingdom, and that travel between the islands is easy and popular.<sup>68</sup> KLEI notes that in 2010, almost 7 million passengers traveled between the islands, and 9 million did so in 2007.<sup>69</sup> KLEI also notes that a single school district, administered by the State, covers all the Hawaiian Islands,<sup>70</sup> and the State serves as the principal provider of medical care through the state via the Hawaii Health Systems Corporation.<sup>71</sup> Hawaii's Second Congressional District also includes all of the State except for an area in and around the City of Honolulu.<sup>72</sup> KLEI argues even TWC has professed before the Cable Television Division of the State's Department of Commerce and Consumer Affairs, that it “views the whole state as one system and provides the exact same service throughout the state,” and having said so, TWC should not take a contrary position now.<sup>73</sup> Therefore, KLEI argues the region should be treated as a single market.<sup>74</sup> In

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<sup>62</sup>47 U.S.C. § 534(h)(1)(C)(ii)(IV).

<sup>63</sup> TWC Petition at 11-12.

<sup>64</sup> KLEI Opposition at 13.

<sup>65</sup> TWC Petition at 13. TWC lists census bureau data that only 734 (.08%) of Honolulu County's 953,207 residents 48 (.03%) of Maui County's residents, and only 33 (.05%) of Kauai County's 67,091 residents, work in Hawaii County. *Id.* at 13 & n.44, Exh. O, 2000 Census County to County Worker Flow Data for Hawaii Counties, <http://www.census.gov/population/www/cen2000/commuting/#HI> (last visited Oct. 12, 2012).

<sup>66</sup> See *WLNY-TV, Inc. v. FCC*, 163 F.3d 137,145 (2d Cir. 1998).

<sup>67</sup> TWC Petition at 7.

<sup>68</sup> KLEI Opposition at 6.

<sup>69</sup> KLEI Opposition at 6 & nn.21-22 (citing State of Hawaii Department of Business, Economic Development & Tourism, 2010 State of Hawaii Data Book at Table 18.36, *available at* <http://hawaii.gov/dbedt/info/economic/databook/db2010/section18.pdf>). Furthermore, KLEI argues at least five airlines offer inter-island service. KLEI Petition at 6 & n.23 (citing [www.islandair.com](http://www.islandair.com); [www.mokuleleairlines.com](http://www.mokuleleairlines.com); [www.pacificwings.com](http://www.pacificwings.com); [www.iflygo.com](http://www.iflygo.com); and [www.hawaiianair.com](http://www.hawaiianair.com)).

<sup>70</sup> KLEI Opposition at 7 & n.26 (citing Hawaii Department of Education, About Us, at <http://doe.k12.hi.us/about/index.htm> (last visited Oct. 18, 2012)).

<sup>71</sup> KLEI Opposition at 7 & n.27 (citing Hawaii Health Systems Corporation – A Brief History, at <http://hawaii.gov/hhsc/about-our-organization> (last visited Oct. 18, 2012)).

<sup>72</sup> KLEI Opposition at 7 & n.28 (citing [http://nationalatlas.gov/printable/images/pdf/congdist/HI02\\_110.pdf](http://nationalatlas.gov/printable/images/pdf/congdist/HI02_110.pdf) (last visited Oct. 18, 2012)).

<sup>73</sup> KLEI Opposition at 8 & n.30 (citing Cable Advisory Committee, Department of Commerce and Consumer Affairs, State of Hawaii, Minutes of December 12, 2011 Meeting at §II(B), p.2, available at [http://hawaii.gov/dcca/catv/cable\\_advisory\\_committee/CAC-minutes-meeting-12-12-2011-final-01-11-2012.pdf](http://hawaii.gov/dcca/catv/cable_advisory_committee/CAC-minutes-meeting-12-12-2011-final-01-11-2012.pdf)).

<sup>74</sup> KLEI Opposition at 9.

support of KLEI, the State of Hawaii also argues that Hawaii's unique location, given both its isolation and the large distances between regions of the same DMA, makes broadcasting between the islands a valuable unifying factor.<sup>75</sup> The State opposes efforts that would reduce viewers' access to diversity in content or to the cultural value of local programming from across the islands, particularly given recent consolidations in broadcaster and newspaper newsrooms.<sup>76</sup> The State argues TWC's petition acts to contract rather than expand local program offerings.<sup>77</sup>

13. We agree that KLEI has not shown a history of cable carriage in the communities and has no measurable viewing in the communities and therefore does not meet the first and fourth market modification factors. However, as noted above, lack of historical carriage is not determinative, particularly when there has been a fundamental change in a station's ownership and programming,<sup>78</sup> and Mauna Kea acquired KLEI in September 2011 and immediately began working to produce new programming for the station.<sup>79</sup> With regard to the first statutory factor, we have noted that historical carriage is not by itself controlling because if it were, it would, in effect, prevent newer or weaker stations from ever being entitled to carriage, contrary to the policy of the statute.<sup>80</sup> Nor is the absence of audience viewership of particular merit in cases such as this where the station has been airing its new programming for less than three years.<sup>81</sup>

14. We concede KLEI does not appear to provide the digital equivalent of a Grade B contour coverage to the communities,<sup>82</sup> yet, we find that KLEI has adequately supported its claim that it provides a strong lineup of local programming of relevance to the inhabitants of Hawaii County and to all Hawaiians, as well as foreign language programming targeted at special groups and residents. We also agree with commenters who assert that in an island market such as Hawaii, local broadcasting is relevant not just to the island of origin, but also to the DMA as a whole.<sup>83</sup> Furthermore, in the case of such a station located at essentially the 'spoke' of a market with Oahu at its 'hub,' it is incumbent upon us to pay closer attention to geographical and political boundaries and other unenumerated factors to limit the scope of a request for market exclusion.<sup>84</sup>

15. The unique geographic circumstances of the Hawaiian Islands, in addition to other factors, argue in favor of not excluding KLEI from TWC and HTSC's cable system communities. As parties have

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<sup>75</sup> See Hawaii Opposition at 2.

<sup>76</sup> See *id.* at 2-3.

<sup>77</sup> See *id.* at 5.

<sup>78</sup> See *Comcast Cablevision of Danbury, Inc.*, 18 FCC Rcd 274, 278, ¶ 8 (MB 2003), *CoxCom, Inc. v. KPFFH*, 17 FCC Rcd 17192, 17195, ¶ 7 (MB 2002).

<sup>79</sup> KLEI Surreply at Exh. A, Declaration of Dr. Christopher Racine at ¶ 7.

<sup>80</sup> *Paxson San Jose License, Inc.*, 12 F.C.C.R. 17520, 17525 ¶ 11 (CSB 1997).

<sup>81</sup> *Avenue Cable TV Service, Inc.*, 16 F.C.C.R. 16436, 16445 ¶ 22 (2001) (Stations normally take up to 3 years to build viewership within their licensed areas.).

<sup>82</sup> Though KLEI reaches the community of Hana-Maui. See *supra* ¶ 10.

<sup>83</sup> Hawaii Opposition at 5 (citing Letter from Joshua Booth Green, Senator, 3rd District, Hawaii State Senate, to Marlene Dortch, Secretary, Federal Communications Commission, filed Aug. 1, 2012); see also Letter from Governor Neil Abercrombie to Marlene Dortch, Secretary, Federal Communications Commission, filed Aug. 15, 2012 (Stating that "[f]or over 200 years Hawaii's people and society have been united across the islands... [and KLEI's] shows not only provide valuable information to our citizens who are originally from the island of Hawaii but now reside on one of the other islands, but also to our tourist population who will be visiting multiple islands during their trip to Hawaii.").

<sup>84</sup> See *WLNY-TV, Inc. v. F.C.C.*, 163 F.3d 137, 145 (2d Cir. 1998).

argued, Hawaii is geographically unique because the entire state is one television market with no adjacent markets to serve. A station either possesses the resources, arrangements or popularity to be carried in this market, or it faces the possibility of curtailed revenues. In addition, TWC is virtually the only cable operator, serving 94 percent of the households on Oahu and over 90 percent of the households in the state.<sup>85</sup> Therefore, without carriage on TWC's and HTSC's systems, KLEI would have no cable carriage at all. And indeed, Hawaiian broadcasters appear to rely on cable as one of the chief ways to serve the geographically fragmented audience of these islands. For example, although under the third factor of our market modification analysis, other stations based on Oahu do provide local programming and serve the cable system communities at issue, the distances between the islands ensures that the signal of each station hardly reaches farther than its island of origin.<sup>86</sup> Therefore, the local story coverage provided by other stations would also likely not be viewed on different islands without the use of cable, DBS service, or satellite broadcast stations. Other Hawaiian stations are thus no different than KLEI in reach, except that KLEI currently has no cable carriage.<sup>87</sup> Given the station's new ownership and attention to local programming, and its service to the population of both Hawaii County and all Hawaii, it should be given the opportunity to establish an audience. Therefore, we will not remove KLEI from the markets of TWC or HTSC. KLEI has offered to provide a good quality signal to these operators' headends by alternative means, and if it does so, it is entitled to carriage.

16. TWC has asked that it be allowed to carry KLEI only digitally through December 12, 2012 and thereafter. Although the viewability rules requiring dual carriage sunseted on June 12, for the six month period between June 12 and December 12, 2012, the Commission adopted an interim requirement that operators of hybrid cable systems continue to carry the signals of must-carry stations in analog format to all analog cable subscribers.<sup>88</sup> Therefore, we deny TWC's request for digital only carriage of KLEI through December 12, and require that it carry the station in analog until TWC satisfies the conditions allowing digital only carriage set forth in the *Fifth Report and Order*.<sup>89</sup>

17. HTSC has also argued that it cannot grant KLEI's request that it be carried on channel 6 in Honolulu, because it already carries station KBFD on channel 6.<sup>90</sup> As we have clarified previously, stations affirmatively electing mandatory carriage are entitled to be carried on their over-the-air channel number, and in digital broadcasting that channel number is identified by reference to a station's major channel number as carried in its PSIP.<sup>91</sup> KBFD's PSIP is 32 while KLEI's is 6,<sup>92</sup> giving KLEI priority on channel 6 because it affirmatively elected mandatory carriage.<sup>93</sup>

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<sup>85</sup> HTSC Comments at 2.

<sup>86</sup> See Television and Cable Factbook 2012 at A-383 to A-391, A394, & A399.

<sup>87</sup> KLEI has provided letters from Dish and DirecTV stating that they would carry the station if it provides them with a good quality signal. See KLEI Surreply at Attachment A to the Declaration of Dr. Christopher Racine: Letters From Dish Network and DirecTV.

<sup>88</sup> *Fifth Report and Order*, 27 FCC Rcd. 6529 at ¶ 17.

<sup>89</sup> *Id.* at ¶¶ 17-18.

<sup>90</sup> HTSC Opposition at 3.

<sup>91</sup> *Carriage of Digital Television Broadcast Signal: Amendment to Part 76 of the Commission's Rules*, Declaratory Order, 23 FCC Rcd. 14254, 14258, ¶¶ 15-16 (2008); see also *Ion Media Networks, Inc. v. Charter Communications*, 24 F.C.C.R. 2461, 2465, ¶ 10 & 2468, ¶ 17 (MB 2009).

<sup>92</sup> See KLEI Reply to HTSC at 7.

<sup>93</sup> KLEI asserts it submitted a mandatory carriage election letter to HTSC on September 30, 2012. See KLEI Complaint v. HTSC at the Declaration of Dr. Christopher Racine, ¶ 3.

**V. ORDERING CLAUSES**

1. Accordingly, **IT IS ORDERED**, that 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, the Petition for Special Relief (CSR-8686-A), filed by Oceanic Time Warner Cable and joined by Hawaiian Telcom Services Company, Inc., **IS DENIED** and the Mandatory Carriage Complaints (CSR-8658-M & CSR-8682-M) of Mauna Kea Broadcasting Company, licensee of commercial broadcast television station KLEI-DT, Kailua-Kona, Hawaii **ARE GRANTED**; and,

2. **IT IS FURTHER ORDERED THAT** within 60 days of the date on which KLEI-DT delivers a good quality signal to their respective headends, Oceanic Time Warner Cable and Hawaiian Telcom Services Company, Inc., **MUST COMMENCE CARRIAGE OF KLEI-DT** on each cable system they operate that serves communities within the Honolulu, Hawaii DMA.

18. This action is taken under authority delegated by Section 0.283 of the Commission's rules.<sup>94</sup>

FEDERAL COMMUNICATIONS COMMISSION

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

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<sup>94</sup> 47 C.F.R. § 0.283.