

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

In re:	)	
	)	
	)	
Avenue TV Cable Service, Inc.	)	
	)	CSR-4622-A
	)	
For Modification of the	)	
ADI Markets of	)	
KWHY-TV and	)	
KZKI(TV)	)	
	)	
	)	
	)	

**ORDER ON RECONSIDERATION.**

**Adopted: August 22, 1996**

**Released: September 4, 1996**

By the Deputy Chief, Cable Services Bureau:

**INTRODUCTION**

1. Harriscope of Los Angeles, Inc., licensee of television broadcast station KWHY-TV (Channel 22), Los Angeles, California and Paxson Los Angeles License, Inc., licensee of television broadcast station KZKI(TV) (Channel 30), San Bernardino, California have each filed a petition for reconsideration of the decision in *Avenue TV Cable Service, Inc.*<sup>1</sup> In that decision, the Commission granted a petition for special relief filed by Avenue TV Cable Service, Inc., ("Avenue Cable"), a cable operator providing service in the City of Ventura and in the unincorporated portions of the western half of Ventura County, California (collectively, the "Ventura Communities"). KWHY-TV and KZKI(TV) respectively request that the Commission reconsider that decision, in which the Ventura Communities were excluded from petitioners' area

---

<sup>1</sup>*Avenue TV Cable Service, Inc.*, CSR-4622-A, DA 96-559 (Cab. Serv. Bur., released April 17, 1996) ("*Avenue Cable*").

of dominant influence ("ADI"). KWHY-TV filed a supplement to its petition for reconsideration<sup>2</sup> and Avenue Cable filed a consolidated opposition.

### SUMMARY OF ARGUMENTS

2. In support of its petition for reconsideration, KWHY-TV first asserts that, because it is the only one of nine commercial television stations licensed to the city of Los Angeles which is not carried by Avenue Cable, the Commission has ignored both its own precedent and a Congressional mandate which directs the Commission not to allow cable operators to discriminate against similarly situated television licensees. In particular, KWHY-TV believes that the Commission's decision allows Avenue Cable to discriminate against KWHY-TV in favor of its competitor, KMEX, which is currently carried by Avenue Cable on its system serving the Ventura Communities and which has characteristics similar to KWHY-TV. KWHY-TV maintains that KMEX is a similarly situated television station because KMEX, like KWHY-TV, is licensed to the city of Los Angeles, transmits from Mount Wilson, places a predicted Grade B contour over at least as much of western Ventura as does KWHY-TV, and is subject to the market dichotomy which delineates eastern Ventura from western Ventura.<sup>3</sup> Moreover, KWHY-TV states that since both KWHY-TV and KMEX are Spanish language channels, they are direct competitors for a small segment of the television market.

3. KWHY-TV next asserts that the Commission has erred in relying on two prior decisions, *Chronicle* and *Smith*, both of which dealt with market modification proceedings in Ventura County primarily because those cases involved television stations which are not licensed to the city of Los Angeles. *Chronicle* can be further distinguished, KWHY-TV submits, as the television stations there at issue broadcast from a transmitter site other than the Mount Wilson site used by KWHY-TV. KWHY-TV argues that *Smith* is factually distinct because the television station at issue is licensed to the city of Santa Barbara and sought to include Ventura County in the Santa Barbara-Santa Maria-San Luis Obispo ADI.

4. In its supplement to its petition for reconsideration, KWHY-TV notes that a recent decision of the Commission, *Time Warner Cable*, bears close resemblance to the case at hand. In *Time Warner*, a decision involving issues of geographical distance and topography, the

---

<sup>2</sup>KWHY-TV requested the Commission to take notice of its decision in *Time Warner Cable*, DA 96-1092 (Cab. Serv. Bur., released July 17, 1996) and grant KWHY-TV leave to file a supplement to its petition for reconsideration. KWHY-TV states that the *Time Warner Cable* decision should weigh heavily in its favor on reconsideration. As is customary in these proceedings, the Commission takes note of all decisions which may have precedential value to the case at hand.

<sup>3</sup>In *Avenue TV Cable Service, Inc.*, *supra*, the Commission took notice of the fact that, for audience review purposes, Arbitron bifurcated Ventura County into eastern and western portions. See also *Chronicle Publishing*, (CSR-4490-A, CSR-4468-M), 10 FCC Rcd 9474, DA 95-1829 (Cab. Serv. Bur., released Aug. 23, 1995) ("*Chronicle*") and *Smith Broadcasting of Santa Barbara, L.P.* (CSR-3822-A) 10 FCC Rcd 9447, DA 95-1825 (Cab. Serv. Bur., released Aug. 23, 1995) ("*Smith*").

Commission denied a petition filed by Time Warner Cable to exclude a television station from its ADI because Time Warner Cable had not introduced "particularized and persuasive evidence"<sup>4</sup> that that station was not part of the relevant ADI. KWHY-TV argues that its case is factually similar to *Time Warner Cable* and that the Commission should reach the same result.

5. KZKI(TV), in its petition for reconsideration, states that the Commission has misapplied the "localism" test as enunciated in the legislative history of the relevant portions of the 1992 Cable Act.<sup>5</sup> KZKI(TV) maintains that the legislative history makes clear that (1) KZKI(TV) has a presumption in favor of carriage throughout the Ventura County ADI, both eastern and western portions, and that (2) the cable operator can only overcome that presumption by demonstrating that carriage of KZKI(TV) on its system serving the Ventura Communities would result in the exclusion of a station which was local but not within the ADI. KZKI(TV) next asserts that the Commission improperly relied solely on one of the statutory factors -- signal coverage or other local service -- to exclude the Ventura Communities from KZKI(TV)'s ADI.

6. In its consolidated reply, Avenue Cable maintains that neither KWHY-TV nor KZKI(TV) has put forth compelling reasons in support of reconsideration. Avenue Cable argues that the television stations' respective positions are not supported by an analysis of how a reevaluation of the four statutory factors supports overturning the Commission's original decision. Avenue Cable states that KZKI(TV)'s interpretation of the Congressional directive to preserve localism ignores the plain language of the statute and the plain interpretation given that statute by the Commission. Likewise, Avenue Cable replies that KWHY-TV's arguments in support of reconsideration misinterpret the statute which requires the Commission to analyze each market modification on the basis of the four statutory factors, and which does not include exemptions for television stations based upon city of license, transmitter site, or the presence of competitor stations.

#### ANALYSIS AND DECISION

7. We are not persuaded by KWHY-TV's and KZKI(TV)'s arguments. With respect to the specific arguments raised by KZKI(TV), we find that, while petitioner is correct in asserting that Congress directed the Commission "to afford particular attention to the value of localism,"<sup>6</sup> the totality of evidence must show that the station (or stations) at issue serves the relevant communities and that those communities form a part of the economic market of the station. Congress ensured that localism would be properly considered by the Commission when it prescribed the four statutory factors as guidelines in market modification proceedings. Contrary to KZKI(TV)'s assertion, we considered evidence presented with respect to each of the four

---

<sup>4</sup>*Time Warner Cable* at ¶ 13.

<sup>5</sup>See *Cable Television Consumer Protection and Competition Act of 1992*, H.R. Rep. No. 102-628, 102d Cong., 2d Sess. 97 (1992).

<sup>6</sup>Communications Act of 1934, as amended, § 614(h)(1)(C)(ii), 47 U.S.C. § 534 (h)(1)(C)(ii).

statutory factors and concluded that, on balance, the evidence weighed in favor of excluding the Avenue TV Cable communities from the television station markets at issue particularly with respect to local service and coverage and the market dichotomy between eastern and western Ventura County. KZKI(TV) has presented no new evidence of local service and it has not denied that it does not provide a predicted Grade B contour over the relevant communities. KZKI(TV)'s assertion that its presumption of carriage can *only* be overcome where carriage of the station would force the cable operator "to drop a local but out-of-ADI station" ignores the Commission's obligation to weigh the evidence against each of the four statutory factors.

8. Contrary to KWHY-TV's allegation that we improperly relied on only one statutory factor, we note that we considered evidence in the record relevant to each of the four factors in our decision to deny KWHY-TV's mandatory carriage request. After careful consideration of the record, we determined that evidence with respect to statutory factor two, coverage or local service, should be accorded significant weight.<sup>7</sup> We noted that the market dichotomy between eastern and western Ventura County which results from the natural barrier formed by the Santa Monica Mountains informed our analysis. We also noted the long distance between the station and the relevant communities as well as the station's level of viewership and lack of historic carriage. We find therefore that in *Avenue Cable* the petitioner demonstrated with particularized evidence that the Ventura Communities are distinct from and outside of the specific market of KWHY-TV. Accordingly, on reconsideration we conclude that the balance of the evidence weighs against inclusion of these communities within KWHY-TV's television market for mandatory carriage purposes.

### ORDERING CLAUSES

9. Accordingly, IT IS ORDERED, pursuant to §1.106 of the Commission's rules, the Petitions for Reconsideration (CSR-4622-A) filed by KWHY-TV and KZKI(TV), respectively, ARE DENIED.

10. This action is taken pursuant to authority delegated by §0.321 of the Commission's rules.

### FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson  
Deputy Chief, Cable Services Bureau

---

<sup>7</sup>See *Avenue Cable* at ¶ 23.