

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

In Matter of Petition of	)	
	)	
KBL CABLESYSTEMS OF THE SOUTHWEST, INC.	)	CSR 4779-A
dba PARAGON CABLE	)	
	)	
For Modification of Market of	)	
Station KVAW, Eagle Pass, Texas	)	

**MEMORANDUM OPINION AND ORDER**

Adopted: November 6, 1996

Released: November 12, 1996

By the Deputy Chief, Cable Services Bureau:

**INTRODUCTION**

1. KBL Cablesystems of the Southwest, Inc., dba Paragon Cable ("Paragon"), filed a petition pursuant to Sections 76.7(a) and 76.59(a) of the Commission's rules<sup>1</sup> requesting that San Antonio, Texas and the other communities in Bexar County, Texas served by its cable system<sup>2</sup> be excluded from the television market of Station KVAW, Eagle Pass, Texas ("KVAW"). Juan Wheeler ("Wheeler"), licensee of KVAW, filed an opposition to the petition,<sup>3</sup> and Paragon filed a reply.

**BACKGROUND**

2. Pursuant to Section 614 of the Communications Act of 1934, as amended by the Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"),<sup>4</sup> and implementing rules adopted by the Commission in its *Report and Order in MM Docket 92-259*,<sup>5</sup>

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<sup>1</sup>47 C.F.R. §§ 76.7(a) and 76.59(a).

<sup>2</sup>The other Bexar County, Texas communities are Fort Sam Houston, Kelly Air Force Base, Brooks Air Force Base, Randolph Air Force Base, Lackland Air Force Base, the Town of Hollywood Park, and the Cities of Alamo Heights, Balcones Heights, Blanco, Castle Hills, China Grove, Cibolo, Converse, Elemendorf, Grey Forest, Helotes, Hill County Village, Kirby, Leon Valley, Live Oak, Marion, Olmos Park, Schertz, Selma, Shavano Park, Terrell Hills, Universal City, and Windcrest.

<sup>3</sup>Wheeler also filed three supplements to his opposition. Because these supplements provide information about relevant developments occurring after the close of the normal pleading cycle, they will be considered.

<sup>4</sup>Pub. L. No. 102-385, 106 Stat. 1460 (1992).

<sup>5</sup>8 FCC Rcd 2965, 2976-2977 (1993) ("*Must-Carry Order*").

commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence" or ADI as defined by the Arbitron audience research organization.<sup>6</sup> An ADI 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.<sup>7</sup>

3. The Commission is also directed to consider changes in market areas. Section 614(h)(1)(C) further 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 television market to better effectuate the purposes of this section.

In considering such requests, Section 614(h)(1)(C)(ii) 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

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<sup>6</sup>Section 614(h)(1)(C) of the Communications Act, as amended by the Telecommunications Act of 1996, provides that a station's market shall be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns. *See* 47 U.S.C. § 534(h)(1)(C). Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*. The Commission is currently addressing in a rulemaking proceeding the question of whether Nielsen DMAs would better define television markets. *See* Definition of Markets for Purposes of the Cable Television Mandatory Television Broadcast Signal Carriage Rules, Report and Order and Further Notice of Proposed Rule Making, CS Docket No. 95-178, 11 FCC Rcd 6201, (1996) ("*Market Determinations*").

<sup>7</sup>Because of the topography involved, certain counties are divided into more than one sampling unit. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. For a more complete description of how counties are allocated, *see* Arbitron's *Description of Methodology*.

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; and

(IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.<sup>8</sup>

4. The legislative history of this provision indicates that:

where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI 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 areas 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.<sup>9</sup>

5. The Commission provided guidance in its *Report and Order in MM Docket 92-259, supra*, to aid decision making in these matters, as follows:

For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.*, rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically

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<sup>8</sup>47 U.S.C. §534(h)(1)(C)(ii).

<sup>9</sup>H.R. Rep. No. 628, 102d Cong., 2d Sess. 97 (1992).

measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.<sup>10</sup>

6. In adopting rules to implement this provision, the Commission indicated that changes requested 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>11</sup> The rules further provide, in accordance with the requirements of the Act, that a station not be deleted from carriage during the pendency of a market change request.<sup>12</sup>

### MARKET FACTS AND ARGUMENT

7. Paragon's petition seeks an order pursuant to the provisions of Section 614(h)(1)(C) of the Act deleting San Antonio, Texas and the listed Bexar County, Texas communities from the television market of KVAW, a commercial television station licensed to Eagle Pass, Texas. Paragon asserts that Wheeler, recognizing that KVAW cannot deliver a qualifying signal for direct off-the-air pick-up in San Antonio, approached Paragon about installing a telephone or microwave transmission link between Eagle Pass and San Antonio for delivery of KVAW's signal to Paragon. Paragon states that it filed the instant market modification petition for the purpose of obtaining a ruling that KVAW would not be converted into a "local" station entitled to must-carry by means of a 130 mile transmission link proposed by Wheeler.

8. In support of the petition, Paragon asserts that KVAW has never been carried on its cable system, is geographically distant from and fails to provide a Grade B signal over any portion of its cable system, fails to broadcast any programming of specific local interest to residents of the relevant Bexar County communities, and fails to achieve any measurable viewing audience in Bexar County. Paragon also asserts that its cable system carries numerous other television stations that provide coverage of news and issues of concern to the communities served by its cable system. Paragon points out that San Antonio's daily newspaper, the *Express News*, contains no listing for KVAW, not does the San Antonio edition of *TV Guide*. For those reasons, Paragon argues that KVAW fails to satisfy the criteria established by Congress in Section 614(h)(1)(C)(ii) for carriage on its cable system.

9. Paragon argues that three market modification decisions provide settled precedent that is applicable where a television station is separated by large distances from a community

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<sup>10</sup>*Must-Carry Order*, 8 FCC Rcd at 2977 (emphasis in original).

<sup>11</sup>*Must-Carry Order*, 8 FCC Rcd at 2977 n.139. Viewership data cited herein is county data rather than community-specific data. However, absent evidence that such data is not fairly reflective of viewing in the actual communities in question, we accept such data as probative in cases of this type.

<sup>12</sup>47 C.F.R. §76.59(c).

served by a cable system and fails to provide local service to that community.<sup>13</sup> In such circumstances, Paragon contends, that precedent requires that the distant communities be deleted from the station's market for must-carry purposes. It also contends that a station's reliance on a direct feed of its signal to a cable system for the purpose of overcoming the absence of off-air pick-up capability may not serve to convert a distant station into a "local" station for market modification analysis purposes.<sup>14</sup> Paragon argues that a station's carriage rights do not extend beyond the area which it serves and which form its economic market.<sup>15</sup>

10. Wheeler states in opposition that on January 23, 1996 he obtained a license for KVAW, which is a Spanish language television station carrying the Spanish language Telemundo Network programming. According to Wheeler, KVAW is one of the few 100% Hispanic owned and operated television stations in the country, carrying programming directed to the Spanish speaking population within its market.

11. Wheeler states that on April 11, 1996, he requested carriage of KVAW on Paragon's cable system in the San Antonio market and subsequently provided Paragon with information requested about signal delivery. Wheeler asserts that, after Paragon filed the instant petition for relief on July 2, 1996, he gave Paragon notice under Section 76.61(a)(1) of the rules on July 22, 1996 that it failed to meet its obligation to carry KVAW on its cable systems in the San Antonio market. Wheeler also asserts here that Paragon has failed to meet that carriage obligation with respect to KVAW.

12. Wheeler requests that Paragon's petition be dismissed without consideration. He argues that Paragon's failure to carry KVAW during the pendency of this proceeding is in violation of Section 76.59(c) of the rules. Wheeler argues that, because Paragon has failed in its obligation to carry KVAW in violation of Section 76.59(c), it comes with "unclean hands" and it should not be permitted to manipulate its carriage obligations, and that the Commission should not consider Paragon's petition until compliance with Section 76.59 is demonstrated.

13. If the Commission considers the petition on the merits, Wheeler requests that it be denied. Wheeler responds to Paragon's argument that KVAW's market should be modified by addressing the four market modification factors set forth in Section 614(h)(1)(C)(ii). Respecting the first factor (historic carriage), Wheeler admits that KVAW has not been carried on Paragon's cable system. However, he asserts that lack of carriage stems from Paragon's refusal to meet its must-carry obligation, and for that reason, lack of carriage of KVAW should not be used as a basis for granting the relief requested by Paragon. Regarding the second factor

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<sup>13</sup>Paragon cites *Comcast Cablevision of Monmouth County, et al.*, 11 FCC Rcd 6426, (Cable Serv. Bur. 1996); *TCI Cablevision of Colorado, Inc.*, 11 FCC Rcd 6109, (Cable Serv. Bur. 1996); and *Columbine Cablevision*, 11 FCC Rcd 5662, (Cable Serv. Bur. 1996).

<sup>14</sup>Paragon cites *Comcast*, 11 FCC Rcd at 6436.

<sup>15</sup>Paragon cites *Columbine*, 11 FCC Rcd at 5671.

(coverage and local service), Wheeler does not dispute that station KVAW is located approximately 130 miles from San Antonio. He contends, though, that Eagle Pass is a part of the San Antonio hub despite its distance from San Antonio, the nearest major city, and that the removal of San Antonio from KVAW's market "would be the death Knell" of KVAW.<sup>16</sup> Wheeler states that he has arranged for KVAW programming to be carried on an LPTV/translator station (translator) in San Antonio and that KVAW will thus provide an adequate signal to San Antonio.<sup>17</sup> For these reasons, Wheeler argues that geographical distance should not be considered as a factor supporting grant of the petition.

14. With regard to the third factor (programming to cover issues and events of interest to the community), Wheeler asserts that he is changing KVAW programming from the Spanish language Telemundo Network to the SUR Network, which also provides Spanish language programming.<sup>18</sup> He asserts that with the change to the SUR Network, KVAW programming will not duplicate the Telemundo programming service offered by another station carried on Paragon's cable system. Wheeler contends that KVAW's carriage of a third Spanish language programming, *i.e.*, SUR Network programming, is vital to the interests of San Antonio, considering that a majority of San Antonio's total population is Hispanic. Wheeler contends that KVAW's Spanish language programming is indeed programming of specific local interest to the majority, Spanish speaking population of San Antonio. He suggests that, because eight of the ten stations carried on Paragon's cable system carry English language programming while only two carry Spanish language programming, the majority Hispanic population of San Antonio is under-served by Paragon, and that carriage of KVAW with its Spanish language programming will serve to fill that void. Regarding the fourth factor (viewing patterns), Wheeler admits to the absence of KVAW viewing in the San Antonio area, but asserts that KVAW will garner a significant audience once it is on the cable system and by means of its carriage on the LPTV satellite in San Antonio. Finally, Wheeler asserts that the petition makes no showing of any hardship on Paragon's cable system from affording KVAW carriage rights.

15. In reply, Paragon states that it tried to measure KVAW's signal level from the rooftop of a building in downtown San Antonio. Paragon asserts that despite maximum search efforts it was unable to pick up any signal whatever from KVAW and that the results of that effort show how absent the KVAW signal actually is in the San Antonio area. Paragon asserts

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<sup>16</sup>Opposition at 4.

<sup>17</sup>Wheeler's second supplement to his opposition, filed August 30, 1996, states that KVAW programming is being broadcast over station K-52EA in San Antonio.

<sup>18</sup>Wheeler's third supplement to his opposition, filed September 13, 1996, states that KVAW has obtained consent to carry SUR Network programming and is thus providing a third Spanish language programming service to San Antonio by means of station K-52EA, which is carrying KVAW programming in San Antonio. Paragon filed a reply to this supplement on September 16, 1996, pointing out that K-52EA is not owned by Wheeler. Paragon asserts that KVAW and K-52EA therefore cannot be considered as a regular parent/satellite providing evidence of KVAW's presence in the San Antonio area, citing Dynamic Cablevision of Florida, Ltd., DA 96-1291 (Cable Serv. Bur. released August 20, 1996) ("*Dynamic*") at ¶ 20.

that Wheeler has offered no evidence showing any community of interest or nexus between Eagle Pass and San Antonio and that the vast, unpopulated area between the two cities precludes any such showing. It contends that Wheeler's effort to avoid the precedent of *Comcast* is unavailing, and reasserts that modification of KVAW's market in this case is justified when tested under the four statutory market modification factors. Paragon argues that failure to carry KVAW is not likely to be the death knell of that station, which began operations in June 1991 and has survived for over five years without carriage in San Antonio. Regarding KVAW's switch from the Telemundo Network to the SUR Network, Paragon contends that satellite delivered programming service such as the Telemundo and SUR Networks is not designed to serve the specific needs and interest of any particular market, much less the San Antonio market in this instance. Paragon argues further that the presence or absence of channel capacity to accommodate a must-carry channel, or the resulting harm to a cable system, is not one of the statutory evidentiary factors considered by the Commission in market modification cases. Rather, Paragon asserts, the bottom line test is the station's service to the community. Paragon argues that KVAW fails to serve the San Antonio area and therefore should not be afforded carriage on its cable system serving the San Antonio area.

#### DISCUSSION AND ANALYSIS

16. KVAW is a UHF commercial television station licensed to operate on Channel 16 at Eagle Pass, Texas, which is located on the U.S.-Mexico border, some 130 miles from San Antonio, Texas and the other Bexar County, Texas communities served by Paragon's cable systems. Because of this great distance, KVAW does not deliver a Grade B or better signal to any of these relevant communities. In fact, KVAW's Grade B signal does not reach outside of Maverick County, Texas, where Eagle Pass is located.<sup>19</sup> None-the-less, on April 11, 1996, Wheeler requested carriage of KVAW on Paragon's cable system serving the San Antonio area. In response to that request, Paragon filed the instant petition for relief on July 2, 1996 and has declined to provide carriage of KVAW.

17. As a preliminary matter, we deny Wheeler's request that the petition be dismissed on the alleged grounds that Paragon is in violation of Section 76.59(c)(1) of the rules for not carrying KVAW during the pendency of this proceeding. Section 76.59(c)(1) states, "A cable operator shall not delete from carriage the signal of a commercial television station during the pendency of any proceeding pursuant to this section."<sup>20</sup> The filing of the petition stayed Paragon's obligation to commence carrying KVAW. Section 614(h)(1)(C)(iii) of the Act clearly intends for the status quo to be maintained during the pendency of a market modification petition.<sup>21</sup>

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<sup>19</sup>See Television and Cable Factbook, No. 63, TV Stations 1995 at p. A-1066, and falls approximately 100 mile short of San Antonio, Texas. Petition, p. 3.

<sup>20</sup>See 47 C.F.R. § 76.59(c)(1).

<sup>21</sup>See 47 U.S.C. § 614(h)(1)(C)(iii). See also 47 C.F.R. § 76.59(c)(1).

18. Accordingly, we turn to the merits of Paragon's request that San Antonio, Texas and the Bexar County, Texas communities served by Paragon's cable system be excluded from KVAW's television market of KVAW for must-carry purposes. As noted above, Congress and the Commission have provided guidance for our resolution of this request.<sup>22</sup> We begin our analysis by examining the history of carriage of KVAW on Paragon's cable system.

#### A. Historic Signal Carriage

19. Wheeler admits that KVAW has not historically been carried on Paragon's cable system at issue here. However, he requests that we not consider absence of carriage as decisionally significant, arguing that lack of carriage stems from Paragon's refusal to meet its must-carry obligations with respect to KVAW. However, Wheeler's request begs the question. KVAW has been on the air since 1991. In that time it has never been carried on Paragon's cable systems serving the relevant communities. The Congress intended for a station's history of carriage prior to adoption of the 1992 Act to be given weight in the ADI modification process. The fact that KVAW has not historically been carried on Paragon's cable system serving the San Antonio area market must be considered as a factor in favor of the requested market modification.

#### B. Station Audience in Communities Served by Cable System

20. Not only has KVAW not been carried on Paragon's cable system, the available audience viewing data shows no viewing of KVAW in any of the communities served by Paragon's cable system. In fact, the *Nielson Station Index* does not include KVAW in the listing of stations serving that market.<sup>23</sup> The absence of any viewing of KVAW in the San Antonio area market is made understandable when it is noted that KVAW's Grade B contour does not extend beyond the boundaries of Maverick County, Texas, and that KVAW and the relevant communities are some 130 miles apart.<sup>24</sup> We find that the absence of any viewing of KVAW in the San Antonio area communities served by Paragon's cable system also lends strong support for the requested market modification request.

21. Wheeler stated in the second supplement to his opposition that the KVAW signal "is now being carried over K-52EA in San Antonio," and that "KVAW now serves San Antonio and Bexar county with a Grade B or better signal through use of K-52EA as a translator." Although a station otherwise entitled to must-carry may use a translator signal to deliver its signal to the principal headend of a cable system, a translator signal cannot be used to establish its parent station's television market. The Commission, in the *Must-carry Order*, pointed out that

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<sup>22</sup>See paragraphs 3 and 5, above.

<sup>23</sup>See *Nielson Station Index, County/Coverage Study*, 1995, p. 3508-09.

<sup>24</sup>See *Television and Cable Factbook*, No. 63, TV Stations 1995 at p. A-1066. KVAW's Grade B contour falls approximately 100 mile short of San Antonio, Texas. Petition, p. 3.



Section 614 (h)(1)(C) specifically excludes translators from the definition of a local commercial station.<sup>25</sup> Further, in this instance we do not believe that KVAW's presence as a "local" station has been achieved to its carriage by a translator station. For these reasons, we conclude that station KVAW's translator does not establish KVAW's presence in the San Antonio area.<sup>26</sup>

**C. Programming Specifically For Communities Served by Cable System/By Other Stations on Cable System**

22. Wheeler's contention that KVAW should be credited for providing coverage of issues and events of interest and concern to the San Antonio market area because of its carriage of certain Spanish language network programming is without merit. Telemundo and SUR Network programming<sup>27</sup> may serve Spanish language audiences generally. However, such programming provides KVAW with no credit for programming specifically for the San Antonio area communities. Aside from the claims made respecting Spanish language network programming, Wheeler has made no showing that any of its other programming is specifically programmed for the San Antonio area market that is relevant here. On the other hand, the petition shows that Paragon's cable system carries eight San Antonio television stations,<sup>28</sup> and that two of those stations provide Spanish language network programming. KWEX-TV carries the Univision Network programming, and KVDA carries the Telemundo Network programming. On balance, we conclude that Wheeler should receive no credit for programming specifically for the San Antonio market communities served by Paragon's cable system.

**D. Station Coverage of Communities Served by Cable System**

23. As noted earlier, KVAW is located some 130 miles from the San Antonio area and does not provide any Grade B contour signal over any of the relevant San Antonio/Bexar County communities. However, Wheeler offers to transmit the signal of KVAW to the headend of Paragon's cable system by telephone line at KVAW's expense. Where, as here, the statutory factors so overwhelmingly demonstrate that the San Antonio area communities are not a part of KVAW's market, we conclude that, just as a translator station does not establish KVAW's presence in the San Antonio area, neither does the proposed use of a telephone line convert KVAW into a "local" San Antonio station.

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<sup>25</sup>See *Must Carry Report Order*, 8 FCC Rcd 2965, 2973 (1993).

<sup>26</sup>See 47 U.S.C. § 534(h)(1)(B)(i), which excludes television translator stations from the definition of a "local commercial television station." Moreover, the establishment of a translator station in San Antonio does not of itself constitute a showing of a KVAW audience in the San Antonio area.

<sup>27</sup>See Wheeler's third supplement to his opposition.

<sup>28</sup>The Paragon cable system carries KMOL-TV (NBC), KENS-TV (CBS), KLRN-TV (PBS), KSAT-TV (ABC), KABB (FOX), KRRT (UPN), KWEX-TV (Univision), and KVDA (Telemundo).

**SUMMARY**

24. In summary we find persuasive Paragon's showing that KVAW has no historic carriage in the San Antonio area communities at issue. Moreover, KVAW is geographically distant from the communities in question. In our analysis, geographic distance coupled with KVAW's lack of historic carriage are probative under the first and fourth statutory factors we must take into consideration. Section 614(h)(1)(C) of the Communications Act allows the Commission to include or exclude particular communities from a television station's market for the purpose of insuring that a television is carried in the areas which it serves and which form its economic market.

25. We believe that the requested exclusion of San Antonio, Texas and other Bexar County, Texas communities served by Paragon's cable system from KVAW's television market will better effectuate the purposes of the must-carry statutory provisions. In reaching this conclusion, we have considered the statutory factors under which the value of KVAW to San Antonio area localism is to be tested and found it to be lacking. San Antonio's daily newspaper, the *Express News*, contains no listing for KVAW, nor does the San Antonio edition of *TV Guide*. KVAW has no viewing presence in the San Antonio and Bexar County area, is located approximately 130 miles from the San Antonio area, has never been carried on the cable system in question, offers no programming specifically for the San Antonio and Bexar County area, and provides no over-the air signal coverage of the San Antonio and Bexar County area. For the foregoing reasons, we find that grant of TCI's petition is in the public interest.

**ORDER**

26. Accordingly, **IT IS ORDERED**, pursuant to §614(h)(1)(C) of the Communications Act of 1934, as amended, 47 U.S.C. §534(h)(1)(C), and §76.59 of the Commission's Rules, 47 C.F.R. §76.59, that the petition for special relief filed on July 3, 1996 by KBL Cablesystems of the Southwest, Inc., dba Paragon Cable in File No. CSR-4779-A **IS GRANTED**.

27. This action is taken pursuant to authority delegated by Section 0.321 of the Commission's Rules, 47 C.F.R. Section 0.321.

**FEDERAL COMMUNICATIONS COMMISSION**

William H. Johnson  
Deputy Chief, Cable Services Bureau