

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

In re Petition of	)	
	)	
TCI Cablevision of Colorado, Inc.	)	CSR-4600-A
	)	
For Modification of ADI Market of	)	
Station KSBS-TV	)	

**MEMORANDUM OPINION AND ORDER**

Adopted: May 10, 1996

Released: May 23, 1996

By the Deputy Chief, Cable Services Bureau:

**INTRODUCTION**

1. TCI Cablevision of Colorado, Inc., ("TCI"), filed the above-captioned petition requesting that the television market of television station KSBS-TV (Channel 24, Steamboat Springs, Colorado) ("KSBS-TV") be modified to exclude the communities served by TCI's cable systems located in and around Denver, Colorado, for purposes of determining the must-carry obligations of those systems under 47 U.S.C. § 534. GreenTV Corp. ("GreenTV") licensee of television broadcast station KSBS-TV, filed an opposition to the petition to which TCI replied.

**BACKGROUND**

2. Pursuant to §614 of the Communications Act and implementing rules adopted by the Commission in its *Report and Order in MM Docket 92-259*,<sup>1</sup> 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>2</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

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<sup>1</sup> 8 FCC Rcd 2965, 2976-2977 (1993).

<sup>2</sup> 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*.

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>3</sup>

3. Under the Act, however, the Commission is also directed to consider changes in ADI 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 television market to better effectuate the purposes of this section.

In considering such requests, the 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; 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>4</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

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<sup>3</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*.

<sup>4</sup> Communications Act of 1934, as amended, §614(h)(1)(C)(ii), 47 U.S.C. §534(h)(1)(C)(ii).

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.

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[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>5</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 measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.<sup>6</sup>

6. As for deletions of communities from a station's ADI, the legislative history of this provision indicates that:

The provisions of [this subsection] reflect a recognition that the Commission may conclude that a community within a station's ADI may be so far removed from the station that it cannot be deemed part of the station's market. It is not the Committee's intention that these provisions be used by cable systems to manipulate their carriage

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<sup>5</sup> H.R. Rep. No. 628, 102d Cong., 2d Sess. 97 (1992).

<sup>6</sup> 8 FCC Rcd at 2977 (emphasis in original).

obligations to avoid compliance with the objectives of this section. Further, this section is not intended to permit a cable system to discriminate among several stations licensed to the same community. Unless a cable system can point to particularized evidence that its community is not part of one station's market, it should not be permitted to single out individual stations serving the same area and request that the cable system's community be deleted from the station's television market.<sup>7</sup>

7. 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>8</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 an market area change request.<sup>9</sup>

#### MARKET FACTS AND ARGUMENTS OF THE PARTIES

8. TCI asserts in its petition that, although the Denver ADI encompasses about two-thirds of Colorado and portions of Wyoming and Nebraska, providing must-carry status in Denver to KSBS-TV, licensed to Steamboat Springs, Colorado approximately 158 miles from Denver, would be counter to the overall goals of the must-carry statutory and regulatory provisions. According to TCI, the circumstances here fall within that ambit of the must-carry provisions which allows the Commission to modify an ADI to exclude communities from a station's television market to better effectuate the overall must-carry goals.

9. In support of these assertions, TCI alleges that KSBS-TV has not historically been carried on its systems at issue here, KSBS-TV does not provide coverage or other local service to the Denver and the surrounding communities served by TCI's systems, and KSBS-TV is not generally viewable in either cable or non-cable households in these communities. TCI alleges further that local Denver stations currently carried on its systems provide coverage of local issues, sporting and other events of interest to these communities. It asserts that KSBS-TV is geographically remote from the Denver area communities and does not provide a Grade A or Grade B signal to any of these communities. TCI argues that, because KSBS-TV has no local nexus with the Denver area communities, requiring carriage of KSBS-TV will disserve TCI subscribers by limiting its ability to provide programming and services desired by its customers, contrary to the purpose of the must-carry provisions.

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<sup>7</sup> H.R. Rep. 102-628, 102d Cong., 2d Sess. 97-98 (1992).

<sup>8</sup> 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>9</sup> 47 C.F.R. §76.59.

10. GreenTV opposes the request for modification of KSBS-TV's television market to exclude the communities served by the TCI cable systems located in and around the Denver ADI. GreenTV asserts that Steamboat Springs has always been considered a factor in the Denver ADI, and that KSBS-TV is considered a part of the Denver market by the Arbitron and Nielsen national rating services. GreenTV asserts that this market reality is reflected by the Commission's assessment on KSBS-TV of a 1995 Mass Media Regulatory Fee of \$15,950, which is the amount applicable to Commercial/UHF Stations Markets 11 - 25, along with other Denver (Market 18) stations. It argues that it would be unfair and inappropriate for the Commission to remove KSBS-TV from the Denver ADI while requiring it to pay a regulatory fee reflective of the entire Denver ADI.

11. GreenTV asserts that KSBS-TV serves the Hispanic population of the entire ADI by broadcasting Spanish language programming that includes statewide and regional news of interest in its coverage area. In this connection, it points out that Colorado has the ninth largest Hispanic population in the United States and that the documented Denver Hispanic population of 338,000 now makes up 11.9 percent of overall Denver population. GreenTV argues that, considering that Denver's other 2,509,700 people are served by the 17 other stations on TCI's system (for an average of 147,629 non-Hispanics per station), the 338,000 Denver Hispanics are under served by the one station now on TCI's system providing Spanish language programming.

12. The fact that KSBS-TV has not been carried TCI's system previously must not be considered significant, according to GreenTV. It states that KSBS-TV had no carriage rights on TCI prior to the effective date of the must-carry rules on June 2, 1993, because KSBS-TV was then broadcasting FOX Network programming in duplication of another station closer to the cable system principal headend. GreenTV notes also that, prior to the recent changes in the copyright laws, KSBS-TV's location more than 35 mile from the TCI principal headend would have made it subject to large copyright fees.

13. GreenTV asserts further that it has a news office, telephone and auxiliary facilities at 2100 Downing Street in Denver, to facilitate its coverage of events within the Denver area. A KSBS-TV translator station at Woodbine Park, Colorado provides for an over-the-air signal throughout the Denver Front Range to make up for technical deficiencies caused by topographical features of that region, according to GreenTV. The 110 air miles between KSBS-TV and the TCI headend, GreenTV argues, cannot be considered a long distance by western standards when the area's less dense population and market realities are taken into account. It also states that a baseband video signal is currently offered, at its own cost, to the principal TCI headend at Mile High.

14. In reply, TCI alleges that its cable system currently is carrying two Spanish language stations -- KCEC (Channel 50, Univision) and Channel 60 (Galavision). Also, according to TCI, another station KDEN(TV) (Channel 25, Longmont) will soon be going on the air with the same Telemundo Spanish language programming that KSBS-TV carries, and that unlike KSBS-TV, KDEN-TV will be a true Denver area station entitled to carriage. At

that time TCI alleges it will have three Spanish language stations, with KDEN-TV then duplicating the programming of the more distant KSBS-TV.

15. TCI also asserts that it cannot confirm the address given by GreenTV for its Denver office. TCI asserts that the *1995 Broadcasting and Cable Yearbook* show the address given by GreenTV as being that of station KTVJ(TV), Boulder, Colorado, and further that telephone directory assistance in Denver allegedly has no listing for either KSBS-TV or GreenTV in Denver. TCI asserts further that there are no Commission records of any translator located as suggested by GreenTV or anywhere else proposing to retransmit the signal of KSBS-TV. On these grounds, TCI challenges the veracity of the matters presented by GreenTV in opposition to its market modification request. TCI argues that Steamboat Springs is well removed from the Denver Market and is not part of that market under any of the statutory market modification factors, and that a failure to remove KSBS-TV from the Denver market would render those factors meaningless. Finally, TCI asserts that carriage by KSBS-TV of Spanish language programming should not be considered as decisionally significant, because GreenTV will be free to change to another programming format once it gains carriage on its cable systems.

#### ANALYSIS AND DECISION

16. As a preliminary matter, we note that Steamboat Springs, Colorado is currently listed as being in the Denver ADI.<sup>10</sup> Station KSBS-TV is licensed to Steamboat Springs, and the communities served by TCI's cable system are also located in the Denver ADI, as is the principal headend of that system. Given these circumstances, KSBS-TV would be entitled to must-carry on the TCI cable system, subject to the condition, among others, that it delivers a signal of sufficient strength at the TCI principal headend.<sup>11</sup> With the distance to KSBS-TV from TCI's headend being some 110 airline miles,<sup>12</sup> understandably GreenTV has made no claim on behalf of KSBS-TV of delivering a good signal over-the-air to TCI's principal headend. Instead, GreenTV represents that, "A baseband video signal is currently offered by KSBS-TV, at its own cost, to the principal TCI headend at Mile High."<sup>13</sup> In apparent response to such offer,<sup>14</sup> TCI has petitioned the Commission to modify the television market of KSBS-TV for must-carry purposes to exclude the Denver area communities served by its

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<sup>10</sup> See Arbitron's 1991-1992 *Television Market Guide*, p. 376.

<sup>11</sup> See 47 U.S.C. § 534 and particularly 47 U.S.C. §534(h)(1)(B)(iii).

<sup>12</sup> See Opposition, p. 6.

<sup>13</sup> Opposition, p. 5.

<sup>14</sup> No documentation of such offer has been provided for the record, however.

cable system. As noted above, the Commission has provided guidance for our resolution of this request.<sup>15</sup>

#### **A. Historic Signal Carriage**

17. KSBS-TV has not historically been carried on the KSBS-TV cable system at issue here. GreenTV argues that we should not consider absence of carriage as decisionally significant, because KSBS-TV, which was then broadcasting FOX Network programming in duplication of another station closer to the cable system principal headend, had no carriage rights on TCI prior to the effective date of the must-carry rules on June 2, 1993. GreenTV notes also that, prior to the recent changes in the copyright laws, KSBS-TV's location more than 35 mile from the TCI principal headend would have made it subject to large copyright fees. Instead of offering support for KSBS-TV's effort to avoid the requested ADI modification, both of these circumstances are reflective of the distance of KSBS-TV from the Denver area communities served by TCI's cable system.

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

18. Not only has KSBS-TV not been carried on the TCI cable systems, the available audience viewing data shows no viewing of KSBS-TV in any of the communities served by TCI's cable system. For example, The *Nielson Station Index* for the Denver market shows no viewing of KSBS-TV, but contains instead a notation that KSBS-TV is one of two stations that operate in or are assigned for reporting purposes to this market but did not meet the minimum reporting standards, indicating no reportable presence in the Denver market.<sup>16</sup> We find that the clear absence of any viewing of KSBS-TV in the Denver area lends strong support towards the requested market modification request.

#### **C. Station Coverage of Communities Served by Cable System**

19. The absence of KSBS-TV viewing in the Denver market is understandable, when it is noted that the station's predicted Grade B signal falls short of the Rocky Mountains lying to the East between the station and the Denver area, and, of course, also well short of the Denver area itself.<sup>17</sup> GreenTV asserts that KSBS-TV is only 110 miles from the TCI principal headend at Mile High. However, information provided by GreenTV shows that

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<sup>15</sup> See paragraphs 3 and 5, above.

<sup>16</sup> See Petition, Exhibit 7.

<sup>17</sup> See Opposition, Exhibit 1.

KSBS-TV's predicted Grade B signal covers hardly half of that distance toward the Denver area.<sup>18</sup>

#### **D. Station Programming Specifically for Communities Served by Cable System**

20. GreenTV asserts that, upon acquiring KSBS-TV in July of 1995, the station commenced carrying Spanish language programming. It claims that this programming, allegedly carried previously by station KUBD, Denver, would serve the significant Hispanic population of the Denver area. GreenTV also alleges that it has a news office in Denver to facilitate its coverage of events within the Denver area. However, TCI alleges that the address given by GreenTV is listed as the Denver office of station KTVJ(TV), Boulder, Colorado.<sup>19</sup> It is unnecessary to our decision here to resolve these conflicting allegations. It is significant, however, that the KSBS-TV Program Guide for the period "October 21st - November 22nd, 1995" provided for the record does not on its face reveal any programming specifically for the Denver area communities at issue here. Absent further information, we interpret the designation in that Program Guide for "Steamboat's Own KSBS-TV" of certain programming as "Local" as meaning programming "local" to Steamboat Springs. While the remaining programming listed there, "Telenoticias," may serve Spanish language audiences generally, such programming provides GreenTV with no credit for programming specifically for the Denver area communities.

#### **E. Coverage of Community Issues by Other Stations on Cable System**

21. TCI provided a "Channel Chart," which lists programming carried on its TCI cable system. The Channel Chart shows that TCI's system carries Station KCEC, (Channel 50, Denver).<sup>20</sup> TCI states that KCEC carries 24-hour Spanish language programming consisting of daily news shows and locally produced video and entertainment shows that include stories about local entertainers and weekly reports on entertainment and cultural activities in the Denver metropolitan area.<sup>21</sup> The cable system also carries Spanish language

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<sup>18</sup> *Ibid.* GreenTV represents that a KSBS-TV translator provides for an over-the-air signal that makes up for the topographical circumstances of the region. However, no station call letters or other specific licensed operating parameters for such translator station are provided. See Opposition, Exhibit 5. Moreover, no information regarding the translator's signal strength at TCI's principal headend has been provided.

<sup>19</sup> See TCI Reply, Exhibit 3.

<sup>20</sup> See *Television & Cable Factbook*, Station Vol. No. 63, 1995 Ed., at P. A-191.

<sup>21</sup> See Petition, Exhibit 5.

programming on Channel 60 called "Galavision."<sup>22</sup> We have considered this statutory factor, namely, that of coverage issues by other stations on the cable system, as an enhancement criterion where a station could show that it provides a service that other local stations do not provide. Because other stations do appear to serve the cable communities at issue, this enhancement factor does not appear to be decisionally significant in this case.

### SUMMARY

22. In summary, we believe that the requested exclusion of the Denver area communities served by TCI's cable system from KSBS-TV'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 KSBS-TV to Denver area localism is to be tested and found it to be lacking. KSBS-TV has no viewing presence in the Denver area, is located well over a hundred miles from the Denver area, has never been carried on the cable system in question, offers no programming specifically for the Denver area, and provides no over-the air signal coverage of the Denver area.

### ORDER

23. For the foregoing reasons, we find that grant of TCI's petition is in the public interest.

24. 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 October 11, 1995 by TCI Cablevision of Colorado, Inc. in File No. CSR-4600-A **IS GRANTED**.

25. 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

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<sup>22</sup> See TCI Reply, Exhibit 1. We decline to consider as too speculative and unnecessary to our decision TCI's assertion that at some indefinite future time another station may commence operating with Spanish language programming and be entitled to must-carry status on the TCI system.