

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

In Matter of Petition of)	
)	
KBL CABLESYSTEMS OF THE SOUTHWEST, INC.)	CSR 5087-A
dba PARAGON CABLE)	
)	
For Modification of Market of)	
Station KTRG(TV), Del Rio, Texas)	

MEMORANDUM OPINION AND ORDER

Adopted: December 17, 1997

Released: December 19, 1997

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 rules¹ requesting that San Antonio, Texas and the other communities in Bexar County, Texas served by its cable system² be excluded from the television market of Station KTRG(TV), Del Rio, Texas. Ortiz Broadcasting Corp. ("Ortiz"), licensee of KTRG(TV), filed an opposition to the petition, 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"),³ and implementing rules adopted by the Commission in its *Report and Order in MM Docket 92-259*,⁴ 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

¹47 C.F.R. §§ 76.7(a) and 76.59(a).

²The 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.

³Pub. L. No. 102-385, 106 Stat. 1460 (1992).

⁴8 FCC Rcd 2965, 2976-2977 (1993) ("*Must-Carry Order*").

by the Arbitron audience research organization.⁵ 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.⁶

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 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

⁵Section 614(h)(1)(C) of the Communications Act, as amended by the Telecommunications Act of 1996, provides that a station's market shall be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns. *See* 47 U.S.C. § 534(h)(1)(C). Section 76.55(e) 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*").

⁶Because 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*.

(IV) evidence of viewing patterns in cable and non-cable households within the areas served by the cable system or systems in such community.⁷

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.⁸

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* non-cable 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 non-cable homes, and significantly viewed surveys typically measure viewing only in non-cable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.⁹

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

⁷47 U.S.C. §534(h)(1)(C)(ii).

⁸H.R. Rep. No. 628, 102d Cong., 2d Sess. 97 (1992).

⁹*Must-Carry Order*, 8 FCC Rcd at 2977 (emphasis in original).

to all stations in the market.¹⁰ 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 modification request.¹¹

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 other listed Bexar County, Texas communities from the television market of KTRG(TV), a commercial television station licensed to Del Rio, Texas. Paragon asserts that Ortiz, recognizing that KTRG(TV) cannot deliver a qualifying signal for direct off-the-air pick-up in San Antonio, retransmits KTRG(TV)'s programming over a translator station K52EA-TV located at San Antonio. Paragon states that it filed the instant market modification petition for the purpose of obtaining a ruling that KTRG(TV) would not be converted into a "local" station entitled to must-carry by means of a translator station located at San Antonio that rebroadcasts the programming of KTRG(TV).

8. In support of the petition, Paragon asserts that KTRG(TV) 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,¹² 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 eight San Antonio television stations that provide ample 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 KTRG(TV), nor does the San Antonio edition of *TV Guide*. For those reasons, Paragon argues that KTRG(TV) 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 the Commission's market modification decisions provide settled precedent that governs where a television station is separated by large distances from a community served by a cable system and fails to provide local service to that community.¹³ Paragon contends that such circumstances are shown to exist in this case, requiring deletion of the distant communities served by its cable system from the market of KTRG(TV) for must-carry purposes. Paragon also contends that the reliance by KTRG(TV) on a translator station, K52EA-TV, located in San Antonio for the purpose of overcoming the distance and remoteness of the KTRG(TV) from the San Antonio area does not lessen the station's failure to place a Grade B signal over the subject cable communities or serve to convert the

¹⁰*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.

¹¹47 C.F.R. §76.59(c).

¹²Paragon states that the distance between Del Rio and San Antonio is approximately 140 miles, the station's Grade B contour coverage is limited and falls approximately 115 miles short of San Antonio, and the area between Del Rio and San Antonio is scarcely populated, factors that precludes any significant community of interest between the two communities.

¹³Paragon cites *Market Modification and the New York Area of Dominant Influence*, FCC 97-285 (released August 13, 1977) ("*New York ADI*"); *Dynamic Cablevision of Florida, Ltd., et al.*, 12 FCC Rcd 9952 (1997) ("*Dynamic*"); and *TCI Cablevision of Texas, Inc.*, DA 97-1711 (Cable Serv. Bur. released August 13, 1997) ("*TCT*")

distant station into a "local" station for market modification analysis purposes.¹⁴ Paragon argues that commercial translators, such as K52EA-TV, are classified as secondary services which have no independent carriage rights and do not impact on the Commission's market modification analysis.¹⁵ Paragon also points out that eight of the ten television stations carried on its cable system are licensed to San Antonio and that those stations provide its subscribers with a wide range of local English and Spanish language news, public affairs and public service coverage designed to meet their specific needs and interests.¹⁶

10. Ortiz states in opposition that it obtained a license for KTRG(TV) on May 1, 1997, only three and a half months before Paragon filed its petition, and admits that KTRG(TV) has not been carried on Paragon's cable system. However, Ortiz asserts that lack of carriage stems from its recent licensing, and for that reason lack of historic carriage of KTRG(TV) does not provide a basis for granting the relief requested by Paragon. Ortiz argues that precluding carriage of a recently licensed station because of lack of historic carriage disproportionately hurts minority and small business start-up stations and is contrary to public policy. Regarding the statutory factor concerning coverage and local service, Ortiz admits that KTRG(TV) is located approximately 140 miles from San Antonio. He contends, however, that a commonality between Del Rio and San Antonio is shown by the encompassing of both Del Rio and a portion of San Antonio by the 23rd U. S. Congressional District, by their large Hispanic communities, by the similar ages of their respective populations, by the presence of several military installations within the San Antonio television market that provide employment opportunities to both communities, and by chamber of commerce data showing that average Del Rio area shoppers visit San Antonio at least once a month.

11. With regard to the factor concerning programming to cover issues and events of interest to the community, Ortiz asserts that seventeen local programs a week are produced and aired on KTRG(TV). Ortiz provided descriptions of several of those programs and states that many of these programs are produced in a satellite studio located in San Antonio and deal with issue of concern to San Antonio residences in several ways. Ortiz states also that KTRG(TV) serves the large Hispanic population of San Antonio with 11 hours per week of Spanish language programming. Ortiz identifies KTRG(TV) as one of only a few 100% minority owned television stations licensed in the country. Noting its minority ownership, Ortiz seeks a level playing field and argues that allowing large cable systems like Paragon to delete small, minority broadcasters from their markets without allowing them time to build up a following and develop measurable rating would be inconsistent with stated national policy that encourages minority ownership of broadcast properties.

12. Ortiz contends that KTRG(TV) should be credited, in this market modification proceeding, for the local services made available in San Antonio by means of translator station K52EA TV, which rebroadcasts KTRG(TV)'s programming and provides a city grade signal to the San Antonio principal headend of Paragon's cable system serving the communities in issue. Ortiz notes also that the Commission in the *Must Carry Order* established that a translator station may be utilized for delivering a good quality signal of a commercial television station to a cable system headend. Ortiz argues that

¹⁴Paragon cites *New York ADI* and *Dynamic*.

¹⁵*Id.*

¹⁶Petition, Attachment 8.

recent Commission rulings in market modification cases involving translators contain no indication that its position on translators announced in the *Must-Carry Order* has been overturned or reversed.

DISCUSSION AND ANALYSIS

13. As we consider 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 KTRG(TV)'s television market for must-carry purposes,¹⁷ we take special notice of the fact that KTRG(TV) is located some 140 miles from San Antonio, Texas and the other Bexar County, Texas communities served by Paragon's cable systems. Because of such great distance, KTRG(TV) cannot deliver a Grade B or better signal to any of these relevant communities. In fact, KTRG(TV)'s Grade B signal reaches eastward toward San Antonio only to the western edges of Uvalde and Zavala counties and falls approximately 115 miles short of the relevant communities.¹⁸ Such separation of KTRG(TV)'s technical service area from the communities served by Paragon must be given significant and substantial weight in the context of the statutory factors we are commanded to consider in market modification cases. The scope of a local station's market may be measured through geographic means by examining the distance between the station and the cable communities subject to the deletion request and by taking into account basic geographic features such as the extensive unpopulated area involved here as evidence of the market boundaries of the relevant station. In this regard the Commission has explicitly noted the relevance of Grade B contours.¹⁹ Along with other information, station service contours provide at least one objective measure of the scope of a station's local market.

14. The record contains no evidence that KTRG(TV) is viewed in San Antonio. The lack of evidence of such viewing may be attributed as much to the station's recent commencement of operations as to its distance from the communities at issue.²⁰ For these reasons, we give little weight to the absence of viewing of KTRG(TV) in the communities served by Paragon's cable system. However, we cannot overlook the fact that the geographic location of the station precludes carriage of KTRG(TV) programming on Paragon's cable system absent use of additional facilities such as a local translator station.

15. Ortiz identifies a significant amount of programming carried on KTRG(TV) and rebroadcast on K52EA-TV that is specifically directed toward the needs and interests of the communities served by Paragon. Although such programming is available in the San Antonio area solely through its rebroadcast on K52EA-TV, Ortiz argues that KTRG(TV) should receive credit in this market modification

¹⁷KTRG(TV) is a commercial television station licensed to operate on Channel 10 at Del Rio, Texas, which is located on the U.S.-Mexico border.

¹⁸See, Petition, p. 3 and Attachment 2.

¹⁹As a general matter, Grade B coverage demonstrates service to cable communities and serves as a measure of a station's natural economic market. See *MM Docket No. 92-259*, 8 FCC Rcd at 2977. See also *Amendment of Section 76.51 (Orlando-Daytona Beach, Melbourne, and Cocoa, Florida)*, 102 FCC 2d 1062, 1070 (1984) ("We believe that television stations actually do or logically can rely on the area within their Grade B contours for economic support."). See also *New York ADI* at ¶ 12.

²⁰KTRG(TV)'s Grade B contour does not extend beyond the western edges of Uvalde and Zavala counties located approximately 115 miles from San Antonio.

proceeding for providing coverage of issues and events of interest and concern to the San Antonio market area.²¹ We reject this argument. The Commission, in the *Must-Carry Order*, pointed out that Section 614 (h)(1)(C) specifically excludes translators from the definition of a local commercial station.²² More recently in *Dynamic*, the Commission pointed out that translators are a secondary service explicitly not entitled to carriage in their own right and held that translator coverage of the Miami, Florida area does not lessen the relevance of the failure of the parent full power station to directly serve the subject cable communities.²³ The instant case involving cable communities separated by an even greater distance over a very sparsely populated portion of southwest Texas presents a more compelling reason than *Dynamic* for not permitting translator station K52EA-TV to be used to establish KTRG(TV)'s television market for purposes of Section 614(h)(1)(C). While public interest benefits may well flow from KTRG(TV)'s minority ownership and Spanish language programming, the geographic separation of KTRG(TV) from the communities at issue precludes crediting KTRG(TV) for such programming in this market modification proceeding.

16. Finally, Ortiz points to indicators of commonality between Del Rio and San Antonio stemming from the location of both Del Rio and a portion of San Antonio within the 23rd U. S. Congressional District, the large Hispanic population of both communities, the similar ages of their respective populations, the presence of several military installations within the San Antonio television market that provide employment opportunities to both communities, and chamber of commerce data showing that average Del Rio area shoppers visit San Antonio at least once a month. These factors may well indicate a minimum level of economic interchange between Del Rio, KTRG(TV)'s city of license, and San Antonio. However, we cannot ignore that KTRG(TV)'s signal reaches only to the western edges of Uvalde and Zavala counties and falls approximately 115 miles short of the relevant communities.²⁴ The sparsely populated area between Del Rio and San Antonio serves as a natural barrier tending to remove those communities from one another.²⁵ For these reasons, we believe the record fails to establish that KTRG(TV) actually does or logically could rely on San Antonio and the other Bexar County communities at issue for economic support, or that these communities rely on KTRG(TV) for television services to any degree.²⁶

²¹See ¶ 11, above.

²²See *Must-Carry Order*, 8 FCC Rcd 2965, 2973 (1993). A station otherwise entitled to must-carry may use a translator signal to deliver its signal to the principal headend of a cable system.

²³See *Dynamic*, 12 FCC Rcd at 9957-58. Full power station WEYS, which is located in Key West, Florida more than 125 miles from the nearest cable system headend, failed to place at least a Grade B signal over the Miami area cable communities at issue.

²⁴See, Petition, p. 3 and Attachment 2.

²⁵The combined 4,200 square mile area of Kinney, Uvalde, and Medina counties lying between Del Rio and Bexar County contains a total population of only 56,200. See Rand McNally, 1994 *Commercial Atlas & Marketing Guide*, 125th Edition, p. 520-21.

²⁶As pointed out in this connection earlier, KTRG(TV) obtains no credit for the communities' reliance on and economic support of KTRG(TV)'s translator station.

SUMMARY

17. Section 614(h)(1)(C) of the Communications Act authorizes 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. We believe that the requested exclusion of San Antonio, Texas and other Bexar County, Texas communities served by Paragon's cable system from KTRG(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 KTRG(TV) to San Antonio area localism is to be tested and found it to be lacking. The record shows that San Antonio's daily newspaper, the *Express News*, contains no listing for KTRG(TV), nor does the San Antonio edition of *TV Guide*. It also shows that KTRG(TV) is located approximately 140 miles from the San Antonio area. Although KTRG(TV) offers programming specifically for the San Antonio and Bexar County, it provides no over-the air signal coverage of the San Antonio and Bexar County area, and its programming reaches these relevant communities solely by means of a translator station explicitly not entitled to must carry rights. On this record, we find particularly persuasive KTRG(TV)'s geographic separation by a large and sparsely populated area from the communities in question. For the foregoing reasons, we conclude that the communities at issue are not part of KTRG(TV)'s television market and that a grant of TCI's petition will better effectuate the purposes of the must-carry statutory provisions.

ORDER

18. Accordingly, **IT IS ORDERED**, pursuant to Section 614(h)(1)(C) of the Communications Act of 1934, as amended, 47 U.S.C. §534(h)(1)(C), and Section 76.59 of the Commission's Rules, 47 C.F.R. §76.59, that the petition for special relief filed on August 29, 1997 by KBL Cablesystems of the Southwest, Inc., dba Paragon Cable in File No. CSR-5087-A **IS GRANTED**.

19. 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