

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

In the Matter of:)
)
Ackerley Media Group, Inc.) CSR-6130-A
)
For Modification of the Television Market of)
Television Station KION (TV), Monterey,)
California)

MEMORANDUM OPINION AND ORDER

Adopted: July 31, 2003

Released: August 4, 2003

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Ackerley Media Group, Inc. (“Ackerley”), licensee of television broadcast station KION (Ch. 46), Monterey, California (“KION”), filed the above-captioned petition for special relief seeking to modify KION’s designated market area (“DMA”) to include the Charter Communications, Inc. (now Falcon Cable Systems Company II, L.P.) (“Falcon”) cable system communities of Gilroy, Morgan Hill and areas of Santa Clara County, including San Martin, California (“cable communities”). Falcon filed an opposition to which Ackerley replied. For the following reasons, we grant the petition.

II. BACKGROUND

2. Pursuant to Section 614 of the Communications Act and implementing rules adopted by the Commission in *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues (“Must Carry Order”)*, commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station’s market.¹ A station’s market for this purpose is its “designated market area,” or DMA, as defined by Nielsen Media Research.² A DMA 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

¹8 FCC Rcd 2965, 2976-1977 (1993).

²Section 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) requires that a commercial broadcast television station’s market be defined by Nielsen Media Research’s DMAs. 47 C.F.R. §76.55(e); *see Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, 14 FCC Rcd 8366 (1999) (“*Modification Final Report and Order*”).

county. For purposes of this calculation, both over-the-air and cable television viewing are included.³

3. Under the Act, however, the Commission is also directed to consider changes in market 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.⁴

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.⁵

The legislative history of the provision states that:

where the presumption in favor of [DMA] carriage would result in cable subscribers losing access to local stations because they are outside the [DMA] 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 area in 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

³For a more complete description of how counties are allocated, see Nielsen Media Research's *Nielsen Station Index: Methodology Techniques and Data Interpretation*.

⁴47 U.S.C. §534(h)(1)(C).

⁵*Id.*

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.⁶

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.⁷

4. In the *Modification Final Report and Order*, the Commission, in an effort to promote administrative efficiency, adopted a standardized evidence approach for modification petitions 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 delineating the station's technical service area and showing the location of the cable system headends and communities in relation to the service areas.

Note to Paragraph (b)(2): Service area maps using Longley-Rice (version 1.2.2) propagation curves may also be included to support a technical service exhibit.⁸

(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.⁹

⁶H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

⁷*Must Carry Order*, 8 FCC Rcd 2965, 2977 n.139.

⁸The 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 geographical 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.

⁹47 C.F.R. §76.59(b).

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 with a filing fee. The *Modification Final Report and Order* provides that parties may continue to submit additional evidence that they deem appropriate.

III. DISCUSSION

5. The issue before us is whether to grant KION's request to include the communities of Gilroy, Morgan Hill and areas of Santa Clara County including San Martin, California, within its television market. KION is an affiliate of the CBS network, and is in the Monterey-Salinas DMA, while the above cable communities are located in the San Francisco-Oakland-San Jose, California DMA, but are geographically close to the Monterey DMA.

6. KION explains in its petition that it has been carried on the cable system (the "Gilroy cable system") since at least 1984, and perhaps as early as 1969. In addition, KION states that the Gilroy cable system has historically carried most of the other television stations licensed to Monterey and nearby Salinas.¹⁰ KION further explains that the all cable communities are included within KION's Grade A contour, and many are within its City Grade contour.¹¹ KION asserts that it provides significant local programming services to the cable communities such as local news regarding crime, community events, breaking news, weather, and high school sports; and special feature programs concerning local non-profit organizations, educational services, and products.¹² In support of its claimed local programming, KION provided transcripts of a sample of its programs.¹³ KION also provided a letter from the Gilroy City Council to the cable system requesting that it continue to carry KION because the station has "For years... provided valuable news, local information, weather and other programming to our citizens," is "much closer to our city geographically than" stations "in the San Francisco bay area," and "cover our local weather and traffic conditions better."¹⁴ KION further asserts that it has an appreciable viewing audience in the cable communities, and has a 2 to 3 rating share in the evenings.¹⁵ Finally, KION explains that it is in the same economic market as the cable communities, and is geographically closer to the cable communities than most other television stations, especially the San Francisco stations eligible for mandatory carriage in the cable communities.¹⁶ In support of the above, KION points out that the Commission, in a decision involving similar facts, modified the must carry market of television station KSBW in nearby Salinas to include the same cable communities.¹⁷

7. In its opposition, Falcon claims that KION exaggerates its local nexus with the cable communities. For example, according to Falcon, there are times when KION has virtually no viewership in the market.¹⁸ Falcon asserts that the cable communities also have a close link to the San Francisco

¹⁰Petition at 4-6.

¹¹*Id.* at 4-7.

¹²*Id.* at 7-9.

¹³*Id.* at Exhibits 7-11.

¹⁴*Id.* at 9, and Exhibit 12.

¹⁵*Id.* at 11-12, and Exhibit 14.

¹⁶*Id.* at 12-14.

¹⁷*Id.* at 16-18. See *KSBW License, Inc.*, 11 FCC Rcd 2368 (1996).

¹⁸Opposition at 2, and 4-5.

DMA.¹⁹ Further, KION's claim of local programming only "points to a limited number of stories over the course of a year" and these stories "appear to be of regional interest and not specifically directed to residents of the Cable Communities."²⁰ Falcon also asserts that the *KSBW* case cited by KION is distinguishable from the circumstances in the instant proceeding.²¹ Finally, Falcon explains that it currently carries KPIX, a station in the San Francisco DMA that, like KION, is also affiliated with CBS, and if KION were "to prevail in this proceeding, it would essentially either (1) gain must carry priority over the in-market CBS affiliate by virtue of a literal reading of the Commission's rules that require cable carriage of only the closer of two network affiliates; or (2) further increase Falcon's already considerable must carry burden by forcing carriage of both KION and KPIX."²² Falcon states that the Commission has rejected other "market modification requests because it feared a grant would jeopardize the existing in-market affiliates' must carry rights" and cited decisions which it collectively referred to as the "*Portland Cases*."²³

8. In its reply, KION argues that Falcon's assertion regarding carriage of duplicative CBS affiliates "does not provide a basis for denying Ackerley's Petition, and, moreover, is extremely unlikely to occur."²⁴ KION asserts that in a recent decision, the Commission granted a market modification petition, although this might have jeopardized the in-market affiliate's carriage.²⁵ KION also indicates that the *Portland Cases*²⁶ relied on by Falcon involved different facts, and that KPIX, the San Francisco CBS affiliate, did not oppose KION's petition.²⁷

9. In granting KION's petition to modify its DMA to include the cable communities, we find that KION meets the mandatory statutory criteria for market modification. With regard to the first of the four statutory factors, KION has a long history of carriage on the Falcon system serving the cable communities. We also note that Falcon carries KSMS which is licensed to Monterey, KION's city of license. Carriage by a cable system of a colocated station is frequently a reflection that these stations are part of the cable system's market. Secondly, KION has demonstrated that it provides coverage and local service because its Grade A contour encompasses the cable communities. We have stated previously that such coverage alone may be sufficient to satisfy the second statutory requirement.²⁸ In addition, KION presented evidence that it provides local programming to the cable communities, and a letter from the Gilroy City Council stating that KION provides valuable programming to its community. With regard to the third statutory factor, namely, whether other television stations provide local programming, we

¹⁹*Id.* at 5-6, and 9-10.

²⁰*Id.* at 7-8.

²¹*Id.* at 10-11.

²²*Id.* at 2-6, and 11.

²³*Id.* at 2 and 4, citing *Guy Gannett Communications, Inc.*, 13 FCC Rcd 23470 (1998), *recon. denied*, 15 FCC Rcd 10762 (2000); and *Pacific and Southern Company, Inc.*, 14 FCC Rcd 4558 (1999). (the "*Portland Cases*"). The *Portland Cases* involved requests by television stations in Portland, Maine, to modify their market to include cable communities in the Boston market.

²⁴*Id.* at 6-7.

²⁵*Id.* at 8, citing *Duhamel Broadcasting Enterprise*, 15 FCC Rcd 4965 (2000).

²⁶*Supra* n.23.

²⁷*Id.* at 6, 9-10.

²⁸*KSBW License, Inc.*, 11 FCC Rcd 2368, 2371 (1996).

believe that Congress did not intend this criterion to bar a station's DMA modification claim, but instead was intended to enhance its claim where it could be shown that other stations do not serve the communities at issue.²⁹ In this case, because other stations serve the cable communities, this enhancement factor is not applicable. Concerning the fourth factor, viewing patterns, KION's petition indicates it has a moderate level of viewership in the cable communities.³⁰

10. It should also be noted that in a decision involving similar, but not identical facts, the Commission granted a petition to modify the Monterey-Salinas DMA to include the cable communities served by Falcon's system in Gilroy, California. In *KSBW License, Inc.*,³¹ KSBW, licensed to Salinas, California, approximately 15 miles east of Monterey, sought to include within its area of dominant influence (ADI), now DMA, the Gilroy cable system and other cable systems in the San Francisco ADI. Similar to the circumstances in the instant proceeding, the Commission's decision in granting the modification found that KSBW had a history of prior carriage by the cable systems, covered the area with its Grade A contour, and had a moderate level of viewership. The *KSBW* decision also explained that the grant of KSBW's market modification request "harmonizes the market inconsistency resulting from the home county rule by providing KSBW access to the same cable subscribers in Santa Clara County as KNTV currently serves."³² Falcon states in its opposition that the Commission's decision in favor of KSBW "was based largely on" this consideration.³³ We disagree with Falcon's reading of the *KSBW* decision, which was based on an overall analysis of the four statutory factors.³⁴

11. With regard to Falcon's argument that grant of KION's petition could lead to the dropping of the in-market CBS affiliate,³⁵ we acknowledge that the Commission is reluctant to grant a market modification where an in-market affiliate's status on a cable system may be jeopardized,³⁶ this does not mean that the Commission will not grant market modifications merely because there is an in-market affiliate. In the *Portland Cases*, network stations in Portland, Maine, in the Portland-Poland Spring ADI (now DMA) sought to include in their market cable communities in the Boston, Massachusetts ADI. The Commission noted, in denying the requests, that this would jeopardize the continued carriage on the cable system of stations licensed to Boston that were affiliated with the same network. In the *Portland Cases*, however, the Portland television stations and the Boston stations were generally an equal distance from

²⁹See *Great Trails Broadcasting Corp.*, 10 FCC Rcd 8629 (1995); *Paxson San Jose License, Inc.*, 12 FCC Rcd 17520 (1997).

³⁰See *KSBW License, Inc.*, 11 FCC Rcd at 2371.

³¹*Id.*

³²*Id.* at n.17. The "home county rule" provides that the county in which a station's community of license is located is considered within its market. 47 C.F.R. §76.55(e)(3). KSBW argued that the Commission had previously expanded KNTV's must carry rights based on the home county rule, and that KSBW's market should be expanded to cure the resulting imbalance imposed on its station. The Commission in the *KSBW* decision found that by expanding KSBW's market, this imbalance would be cured and KSBW would have access to the same cable subscribers as KNTV. *KSBW License, Inc.*, 11 FCC Rcd at 2370-1.

³³Opposition at 10-11.

³⁴11 FCC Rcd at 2371. We note that KNTV in its opposition in the KSBW proceeding appeared to have acquiesced to KSBW's claim for carriage on the Gilroy cable system, and directed most of its objections to KSBW's request for carriage on other cable systems. *Id.* at 2370.

³⁵Opposition, *supra* n.23.

³⁶See, e.g., *Duhamel Broadcasting Enterprises*, 15 FCC Rcd 4965, 4972 (2000).

the cable communities at issue. In that instance, the Commission concluded that if the market modifications were granted, the in-market Boston affiliates' must carry status within their own ADI market would be jeopardized.³⁷ The facts are different in the present situation. Monterey, KION's city of license, is about 33 miles south from the Gilroy cable system whereas San Francisco, KPIX's city of license, is approximately 76 miles north of Gilroy.³⁸ The Monterey station, therefore, is considerably closer to the cable communities than the San Francisco station, and these communities are on the southern fringe of the San Francisco DMA and near the border of the Monterey DMA.³⁹ An additional important distinction between the *Portland Cases* and KION's situation is that in the *Portland Cases* the television stations provided only Grade B coverage to the cable communities whereas KION provides Grade A coverage. For the reasons discussed above, we grant KION's request.

IV. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED**, 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, that the captioned petition for special relief (CSR-6130-A), filed by Ackerley Media Group, Inc., licensee of television station KION, **IS GRANTED**.

13. These actions are taken pursuant to authority delegated by Section 0.283 of the Commission's rules.⁴⁰

FEDERAL COMMUNICATIONS COMMISSION

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³⁷*Guy Gannett Communications, Inc.*, 13 FCC Rcd at 23478. *See Portland Cases*, *supra* note 23.

³⁸Reply at 6.

³⁹We also note that KPIX in San Francisco did not object to KION's market modification request or participate in this proceeding. *See Duhamel Broadcasting Enterprises*, 15 FCC Rcd at 4972.

⁴⁰47 C.F.R. §0.283.