

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

In the Matter of:)	
)	
Time Warner Cable)	CSR-6181-A
Petition for Special Relief)	
)	
)	
KVMD Licensee Co., LLC)	
Complaint for Carriage)	CSR-6180-M
)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: October 16, 2003

Released: October 20, 2003

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. KVMD Licensee Co., LLC (“KVMD” or “Station”), permittee of Station KVMD-DT, Twentynine Palms, California (Ch. 23-Ind.), has filed a Complaint against Time Warner Cable (“Time Warner”) because of the cable operator’s refusal to carry the station’s digital television signal on its cable systems.¹ Time Warner filed an Opposition to the Complaint and KVMD filed a Reply.

2. Time Warner filed a Petition, pursuant to Section 76.7 of the Commission’s Rules and Section 614(h) of the Communications Act (“Act”),² seeking to exclude certain cable communities from KVMD’s market so that it would be under no obligation to carry the Station’s signal on its cable systems.³ KVMD filed an Opposition to the Petition and Time Warner filed a Reply. We jointly consider

¹ The Media Bureau had earlier dismissed KVMD’s must carry complaint against Time Warner and Time Warner’s first market modification request. *See KVMD Corp.*, 18 FCC Rcd 283 (2003). Given that KVMD has not been authorized to terminate its analog facility and because the Commission had not yet issued final digital television carriage rules relevant to its circumstance, the Bureau found that the Station’s digital signal was ineligible for carriage at that time. *Id.* KVMD’s complaints against the named cable operators were dismissed as unripe for review. Time Warner Cable’s related market modification petition was dismissed as moot.

² 47 U.S.C. § 614(h)(1)(c).

³ The Time Warner cable systems subject to the modification request are: (1) Barstow; (2) Chatsworth; (3) Gardena; (4) South Pasadena; and (5) Orange. The specific Time Warner cable communities at issue, and located throughout the DMA, are: Barstow, Yermo, Daggett, Grandview, Lenwood, Hinkley, Canyon Country, Newhall, Santa Clarita, Saugus, Chatsworth, Cayoga Park, Encino, Granada Hills, North Hills, Northridge, Reseda, San Fernando, Sherman Oaks, Tarzana, Universal City, Van Nuys, West Hills, Woodland Hills, Stevenson Ranch, San Marino, South Pasadena, Costa Mesa, Cypress, Fountain Valley, Huntington Beach, Midway City, Rossmoor, Stanton, Westminster, Garden Grove, Los Alamitos, Orange, Santa Ana, Gardena, El Segundo, Hawthorne, Inglewood, Lawndale, Lennox, Los Angeles, North Torrance, and Torrance.

the Complaint and the Petition because they are interrelated.

II. BACKGROUND

3. Pursuant to Section 614 of the Act and the 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.⁴ A station's market for this purpose is its "designated market area," or DMA, as defined by Nielsen Media Research.⁵ A DMA is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Each county in the United States is assigned 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

4. Under the Act, however, the Commission is 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.⁷

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;

⁴8 FCC Rcd 2965, 2976-2977 (1993).

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) 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").

⁶For a more complete description of how counties are allocated, see Nielsen Media Research's *Nielsen Station Index: Methodology Techniques and Data Interpretation*.

⁷47 U.S.C. § 534(h)(1)(C).

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

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 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.⁹

In adopting rules to implement this provision, 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.¹⁰

5. In the *Market 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:

(A) 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.

(B) Grade B contour maps delineating the station's technical service area and showing the location of the cable system headends and communities in relating to the service areas.

Note: Service area maps using Longley-Rice (version 1.2.2) propagation curves may also be included to support a technical service exhibit.¹¹

⁸*Id.*

⁹H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

¹⁰*Must Carry Order*, 8 FCC Rcd at 2977 n.139.

¹¹The Longley-Rice model provides a more accurate representation of a station's technical coverage area because it
(continued...)

- (C) Available data on shopping and labor patterns in the local market.
- (D) Television station programming information derived from station logs or the local edition of the television guide.
- (E) Cable system channel line-up cards or other exhibits establishing historic carriage, such as television guide listings.
- (F) 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., 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.¹²

Petitions for special relief to modify television markets that do not include the above evidence shall be dismissed without prejudice and may be refiled at a later date with the appropriate filing fee. The *Market Modification Final Report and Order* provides that parties may continue to submit whatever additional evidence they deem appropriate and relevant.

6. In *Carriage of Digital Television Broadcast Signals First Report and Order* (“*DTV Must Carry Report and Order*”), the Commission concluded that under Section 614(a) of the Act, a digital-only television station has mandatory carriage rights, and amended the rules accordingly.¹³ The Commission has established a framework for analyzing market modifications for digital television stations.¹⁴ The Commission stated that Nielsen’s market designations, publications, and assignments for the analog television market should continue to be binding on broadcast stations transitioning to digital television broadcasting. The presumption is that the market of the station’s digital signal is coterminous with the station’s market area for its analog signal during the transition period.¹⁵ The Commission also found that the statutory factors in Section 614(h), the current process for requesting market modifications, and the

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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.

¹²47 C.F.R. § 76.59(b).

¹³See 16 FCC Rcd 2598, 2606 (2001); 47 C.F.R. § 76.64(f)(4). The Commission has held that a television station may elect to have its digital signal carried in an analog format by local cable systems. The Commission concluded that for purposes of supporting the conversion to digital signals and facilitating the return of the analog spectrum, a television station may demand that one of its high definition digital (“HDTV”) or standard definition digital (“SDTV”) television signals be carried on the cable system for delivery to subscribers in an analog format. *DTV Must Carry Report and Order*, 16 FCC Rcd at 2630.

¹⁴See *id.* at 2635-36.

¹⁵We note that in adopting technical rules for the digital transmission of broadcast signals, the Commission attempted to insure that a station’s digital over-the-air coverage area would replicate as closely as possible its current over-the-air analog coverage area. See *Sixth DTV Report and Order*, 12 FCC Rcd 14588, 14605 (1997).

evidence needed to support such petitions, will be applicable to digital television modification petitions during the transition period when television stations broadcast both an analog signal and a digital signal.¹⁶ The Commission recognized that the technical coverage area of a digital television signal may not exactly replicate the technical coverage area of the analog television signal. Therefore, in deciding DTV market modification cases, the Commission stated that it would take into consideration changes in signal strength and technical coverage because of new digital television channel assignments and power limits. It concluded that all other matters concerning the modification process for digital television signals will be decided on a case-by-case basis.¹⁷

III. DISCUSSION

7. KVMD states that it is an authorized full service digital UHF station whose city of license is Twentynine Palms, California, a community located in San Bernadino County, California.¹⁸ KVMD further states that its DTV facility is authorized to broadcast on Channel 23 and commenced operations, pursuant to special temporary authority, on July 29, 2002. KVMD adds that on June 3, 2003, it discontinued analog operations, and commenced digital-only operations, pursuant to Commission authorization.¹⁹ KVMD states that the Station and Time Warner's cable systems are both located in the Los Angeles Designated Market Area ("DMA"). KVMD states that by certified letters dated May 5, 2003, it elected and sought mandatory carriage on Time Warner's cable systems. The Station asserts that Time Warner did not respond directly to KVMD's correspondence, but instead, on June 6, 2003, filed a Petition for Special Relief seeking modification of KVMD's market. Time Warner's market modification arguments are set forth below.

8. **History of carriage.** Time Warner asserts that KVMD's digital signal has no history of carriage on its cable systems.²⁰ Time Warner notes that KVMD's analog signal also did not have a history of carriage despite being on-the-air for a period of nearly five years. Time Warner also asserts that no cable system located in proximity to any of its systems has carried, or is carrying, KVMD's analog or digital television signal.²¹ In its response, the Station asserts that Adelphia Communications and Charter Communications have "understandings" with KVMD to carry its signal on their respective cable systems in the Los Angeles DMA.²² According to KVMD, Adelphia and Charter serve communities close in geographic proximity to Time Warner's cable systems. Time Warner asserts that its decision to seek modification of KVMD's market was predicated on the Station's lack of nexus to the cable communities, a circumstance that is unaffected by proposed carriage of KVMD by other operators in the market.²³

¹⁶See *DTV Must Carry Report and Order*, 16 FCC Rcd at 2636.

¹⁷*Id.*

¹⁸Twentynine Palms is on the eastern edge of the Los Angeles DMA.

¹⁹KVMD Must Carry Complaint at 2, citing *KVMD(TV), Twentynine Palms, CA*, DA 03-1481 (rel. May 1, 2003).

²⁰Time Warner Petition at 7.

²¹See Time WarnerWarner Petition, Declaration of Kristy Hennessey, Vice President of Government Relations, Los Angeles Division of Time Warner Cable.

²²KVMD Opposition to Petition for Special Relief at 7.

²³Time Warner Reply at 5.

9. **Local Service.** Time Warner asserts that KVMD fails to provide any coverage or local service to the Time Warner communities.²⁴ Time Warner provides evidence showing that Barstow, at 76 air miles away (130 road miles) is the closest cable community to Twentynine Palms while Woodland Hills, at 146 air miles away (167 road miles) is the farthest cable community from the Station's City of License.²⁵ Time Warner states that it performed two separate technical analyses to measure the Station's reach. It asserts that, using a standard predicted contour methodology, KVMD fails to deliver an interference-free digital signal to any of the cable communities except Orange in Orange County.²⁶ Time Warner asserts that a Longley-Rice propagation study of KVMD's technical coverage indicates that terrain features, such as the Santa Ana mountains, restricts KVMD's technical service area.²⁷ According to Time Warner, the Longley-Rice study supports the findings of its standard technical service study with both showing that only a small portion of Orange County is able to receive KVMD's digital signal.

10. In response, KVMD asserts that Time Warner's technical analysis is inaccurate. The Station explains that Trinity Christian Center of Santa Ana is the licensee of KTBN-DT, Channel 23. As a co-channel station, there is predicted interference from KTBN to KVMD. Trinity currently has a petition pending before the Commission requesting that it commence a rulemaking to change the allotment for KTBN from Channel 23 to Channel 45. Assuming favorable action on the Trinity petition and removal of HDTV interference from KTBN, KVMD states that it will provide an interference-free signal over 32,490 kilometers.²⁸ KVMD asserts that when all relevant factors are taken into consideration, KVMD will provide 41 dBu signal strength coverage, or fringe coverage, to a majority of the cable communities. KVMD adds that analog-based contour and distance concepts are poorly suited to the propagation of digital signals which are subject to the "cliff effect."²⁹ KVMD urges the Commission to replace contour and distance standards with a good quality signal rule, that is, if a digital station is able to deliver a good quality signal to the cable operator's headend, it should qualify for carriage.³⁰ Time Warner states that the Commission has yet to decide, almost five months following the submission date, whether Trinity's petition has sufficient merit to warrant institution of a formal rulemaking; it adds that should a Notice of Proposed Rulemaking be forthcoming at some point, the normal multi-month review process will be substantially delayed by the requirement to obtain Mexico's prior approval for the change

²⁴ Time Warner Petition at 8.

²⁵ *Id.* at 9.

²⁶ *Id.* at 10. In this analysis, Time Warner states that it adopted the Commission's traditional method of using average elevation data from 3.2 to 16.1 km at ten degree intervals beginning at true north based on NGDC 3-second computerized terrain database. *See* Time Warner Petition for Special Relief at Attachment 6 (Engineering Report). Time Warner notes that KVMD's digital transmitter site is located on the far side of the San Gabriel and Santa Ana mountain ranges, which lie between all of the cable communities except Barstow.

²⁷ Time Warner states that the propagation evaluation program was accessed by using the U.S. Department of Commerce TA Service of the Telecommunications Engineering, Analysis and Modeling Division, Boulder, CO. *See* Time Warner Petition for Special Relief at Attachment 6 (Engineering Report). Time Warner also states that the Mojave Desert separates KVMD from the cable communities. Time Warner Reply at 6.

²⁸ KVMD's Opposition to Petition for Special Relief at 9.

²⁹ *Id.* at 11. The Commission has explained the cliff effect in its *DTV Must Carry Report and Order*. If a digital signal is received, a good quality picture can be constructed at the television receiver; however, once the signal falls below a minimum signal threshold, no picture can be reconstructed or displayed by the television receiver. *See* 16 FCC Rcd at 2617 n.131

³⁰ KVMD Opposition to Petition for Special Relief at 12.

in KTBN-DT's allotment.³¹ Time Warner concludes that it is far from certain that the events leading to KVMD providing an interference-free signal will occur as the Station predicts.

11. Time Warner asserts that KVMD does not carry any news, public affairs or public service programming and does not broadcast programming of specific interest to residents of the cable communities.³² Time Warner further asserts that the lack of any nexus between the Station and the cable communities is further evidenced by the absence of KVMD from the principal local print sources of television station listings for its cable subscribers. KVMD counters that its programming has a "distinct nexus" to the cable communities at issue. It asserts that it carries a substantial amount of programming about horses and that there are many horse enthusiasts throughout the Los Angeles DMA.³³ KVMD also states that it carries informational and "inspirational" local programming such as "Working Wardrobe" and "This Week in Garden Grove" for viewers in Garden Grove as well as "City Beat" for viewers in Pasadena and "Inland Empire Alive" for people living in San Bernadino and Riverside Counties.³⁴ KVMD adds that it expects to launch a new locally produced news program directed at viewers in San Bernadino, Riverside, Orange, and Los Angeles Counties. Time Warner asserts that KVMD has not provided sufficient evidence in the record to support its claim that the Station's programming serves the interests of viewers in the cable communities.³⁵

12. **Carriage of other local television stations.** Time Warner asserts that it carries Los Angeles television stations that cover news, sporting events, and issues of concern to the cable communities.³⁶ KVMD states that Time Warner has made no showing that it currently carries any broadcast television station that offers the unique programming provided by KVMD, or that promises to deliver the multicultural news and community interest stories that the Station plans to offer in the near future.³⁷

13. **Viewing patterns.** Time Warner asserts that KVMD's analog signal had failed to achieve reportable off-air viewing in Los Angeles County, Orange County, or remote areas of San Bernadino County.³⁸ Time Warner asserts that the dearth of viewers is consistent with the absence of technical and programming service to the cable communities. Time Warner adds that there is no reason to expect that the Station's digital signal, transmitting from a different site but with the same programming, will achieve greater viewer penetration than its former analog signal. KVMD argues that it should be treated as a new station for market modification purposes because it is under new ownership and because it is a new digital-only station.³⁹ Based on these facts, KVMD states that viewership levels should not be accorded substantial weight in this proceeding.

14. **Other factors.** Time Warner argues that KVMD is the paradigmatic "rim" station of the

³¹ Time Warner Reply at 8.

³² Time Warner Petition at 12.

³³ KVMD Opposition to Petition for Special Relief at 13.

³⁴ *Id.* at 15.

³⁵ Time Warner Reply at 10.

³⁶ Time Warner Petition at 13.

³⁷ KVMD Opposition to Petition for Special Relief at 18.

³⁸ Time Warner Petition at 14.

³⁹ KVMD Opposition to Petition for Special Relief at 19.

type whose exclusion from core market cable systems by the Commission has been upheld by the United States Court of Appeals for the Second Circuit.⁴⁰ KVMD argues that full market cable carriage of digital stations is necessary to spur consumer interest and participation in the digital television transition.⁴¹ Time Warner, in its Reply, argues that KVMD is “attempting to eviscerate” federal law, policy, and precedent by proposing that the Commission ignore the statutory modification factors when a market modification involves a digital television station.⁴²

15. 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 ensuring that a television station is carried in the areas which it serves and which form its economic market.⁴³ Section 614(h)(1)(C)(i) specifically and unambiguously directs the Commission, in considering requests for market modification, to afford particular attention to the value of localism by taking such matters into account.⁴⁴ These principles apply to all television stations without regard to the mode in which the station broadcasts. KVMD urges us to adopt a new paradigm for market modification cases involving digital television stations. It asks us to abandon precedent and order a cable operator to carry a digital television signal if a subject television station promises to provide a good quality signal to the cable system’s principal headend. KVMD’s proposal is directly contrary to Section 614(h). As Time Warner argues, KVMD’s proposal would render Section 614(h) a nullity.

16. Furthermore, the Commission has found that the statutory factors in Section 614(h), the current process for requesting market modifications, and the evidence needed to support such petitions, are applicable to digital television modification proceedings during the transition period.⁴⁵ KVMD’s proposal ignores the directives the Commission established over two years ago. KVMD did not petition the Commission to reconsider its conclusions on the application of Section 614(h) to digital television stations. It is inappropriate for KVMD to attempt to do so here, or in other market modification proceedings.

17. Time Warner has presented evidence in the record to support its request. In this matter, KVMD has no history of carriage and no discernable viewership in the communities at issue. The record evidence also indicates that KVMD’s analog signal, when it was broadcasting, was not carried and did not have viewership in the cable communities. Although KVMD claims to have carriage “understandings” in place with Adelphia and Charter, neither operator is now carrying the station’s signal and there is no clear indication in the record as to when, where, or why such carriage would commence. It is also evident that KVMD is geographically distant from the communities, that its digital coverage area falls short of the cable communities, and that the Station is separated from the communities by mountain ranges, desert plateaus, and political boundaries.⁴⁶ Although KVMD claims that its signal now suffers from co-channel interference, which may be rectified if the Commission grants KTBN’s request for an

⁴⁰ Time Warner Petition at 15, citing *WLNY-TV v. FCC*, 163 F.3d 137 (2d Cir. 1998).

⁴¹ KVMD Opposition to Petition for Special Relief at 20.

⁴² Time Warner Reply at 4.

⁴³ 47 U.S.C. § 534(h)(1)(C).

⁴⁴ 47 U.S.C. § 534(h)(1)(C)(i).

⁴⁵ See *DTV Must Carry Report and Order*, 16 FCC Rcd at 2636.

⁴⁶ While the Station’s digital coverage area extends into Orange County, its signal does not cover the cable communities served by Time Warner in that County.

allotment change, there is no dispute that under current circumstances the Station cannot reach the cable communities at issue.⁴⁷ KVMD has also failed to rebut Time Warner's showing with sufficient evidence that its programming has a distinct nexus to the cable communities. Moreover, although the Station has indicated that it plans to provide locally oriented programming in the future, we cannot base our decision on future programming predictions.⁴⁸ Time Warner has shown, however, that there are numerous local television stations that it currently carries that provide specific programming of interest to the cable communities.⁴⁹ In conclusion, relying on case precedent for analog television station market modifications, the grant of Time Warner's market modification request would effectuate the purposes of Section 614(h) of the Act. Because we find that KVMD is not local for mandatory carriage purposes, its must carry complaint is dismissed as moot.

IV. ORDERING CLAUSES

18. Accordingly, **IT IS ORDERED** that the must carry complaint filed by KVMD Licensee Co., LLC against Time Warner Cable **IS DISMISSED**.

19. **IT IS FURTHER ORDERED** that the petition for special relief to modify the television market of Station KVMD-DT filed by Time Warner Cable **IS GRANTED**.

20. These actions are taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.⁵⁰

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Deputy Chief, Policy Division
Media Bureau

⁴⁷ In market modification proceedings, we do not accord evidentiary weight to technical changes that may occur in the future. See *Avenue TV Cable Services, Inc.*, 16 FCC Rcd 16536, 16445 (2001) (Commission declined to give evidentiary weight to improved coverage proposed in a pending facilities modification application.); *Texas Cable Partners, L.P.*, 14 FCC Rcd 11734 (1999) (Station was unable to provide evidence that an authorized improvement in facilities was imminent and Commission refused to consider this possibility in evaluating the station's coverage area.).

⁴⁸ KVMD filed a Supplement to Opposition on September 22, 2003. In this pleading, KVMD asserts that it is airing or developing new local programming of interest to households in the cable communities at issue. This new information does not change our conclusion, as stated above.

⁴⁹ See Time Warner Petition at 14.

⁵⁰ 47 C.F.R. § 0.283.