

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

In the Matter of:	)	
	)	
Minority Television Project, Inc.	)	
v.	)	CSR-5665-M
Falcon Cable Systems Company II, L.P.,	)	
d/b/a Charter Communications, Inc.	)	
	)	
Petition for Reconsideration	)	

**ORDER ON RECONSIDERATION**

**Adopted: July 28, 2004**

**Released: August 2, 2004**

By the Deputy Chief, Media Bureau:

**I. INTRODUCTION**

1. Minority Television Project, Inc., licensee of television broadcast station KMTP (Educ., Ch. 32), San Francisco, California (“KMTP”) has requested reconsideration of the Cable Service’s Bureau’s (“Bureau”) decision denying the must carry complaint it filed against Falcon Cable Systems Company II, L.P., d/b/a Charter Communications, Inc. (“Charter”).<sup>1</sup> An opposition to this petition was filed on behalf of Charter to which KMTP replied.

**II. BACKGROUND**

2. KMTP filed a must carry complaint against Charter, for the system’s failure to carry its signal on its cable system serving Gilroy, Morgan Hill, and surrounding California communities, despite allegedly being fully qualified for carriage. Charter maintained that KMTP was not entitled to carriage because its city of license was not located within 50 miles of the system’s principal headend nor did KMTP’s Grade B contour encompass the headend as required by the Commission’s rules for carriage.<sup>2</sup> Based on the evidence provided, the Bureau agreed with Charter and denied KMTP’s request for its failure to meet the above qualifications necessary to be considered a local noncommercial educational television station (“NCE”) station.

**III. DISCUSSION**

3. KMTP maintains that the Bureau erred when it refused to accept actual measurements of

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<sup>1</sup>*Minority Television Project, Inc., v. Falcon Cable Systems Company II, L.P., d/b/a Charter Communications, Inc.*, 16 FCC Rcd 13617 (2001) (“Bureau Order”).

<sup>2</sup>47 C.F.R. §76.55(b).

KMTP's Grade B signal. KMTP asserts that the Communications Act required the use of actual Grade B contours, not predicted, in determining whether an NCE station was qualified for must carry status.<sup>3</sup> KMTP points out that it submitted actual measurements of its signal in its must carry complaint and that these measurements showed that KMTP's actual contour encompassed the Charter headend at a signal strength far in excess of that required for Grade B signals.<sup>4</sup> KMTP concludes, therefore, that it is a qualified NCE station and its petition for reconsideration should be granted.

4. Charter argues in opposition that the *Bureau Order* was correct in its determination and that KMTP's petition is both procedurally and substantially flawed. First, Charter notes that the petition for reconsideration is procedurally flawed because KMTP relies on allegations regarding actual signal strength measurements that were not raised in the original proceeding.<sup>5</sup> Second, Charter states that KMTP overlooks the fact that the Commission has repeatedly relied on predicted Grade B contours for determination of a NCE's qualifications for carriage.<sup>6</sup> Indeed, Charter points out that the Bureau confronted this very issue in *KTEH-TV* and it expressly and unequivocally rejected the argument, explaining that:

It was recognized that when the Commission first adopted its television broadcast signal contour prediction system, that a service contour does not represent a point at which a signal's availability abruptly terminates or conversely that a signal is always available within the contour. Rather, the Commission recognized, and the rules reflect, that such contour are useful administrative tools for establishing rights and responsibilities of individual stations and parties in a variety of areas from ownership regulation to interference protection. Given that signals gradually diminish in strength with distance and that reception varies according to equipment and terrain features, no absolute rather than statistical measure is available. Predicted service contours nevertheless have been widely used as a means of fixing service boundaries that can be calculated with a minimum of expense and dispute. The use of a Grade B contour standard in the mandatory carriage rules, reflects this desire to have a readily available standard.<sup>7</sup>

Charter argues that there is nothing in the Communications Act or case precedent which would allow KMTP or the Commission to substitute an actual signal strength measurement for a predicted Grade B contour to demonstrate a NCE station's qualification for carriage. As a result, Charter states that KMTP's petition should be denied.

5. In reply, KMTP states that while it concedes that the decision in *KTEH-TV* did not allow for the use of actual contours over predicted contours, it nevertheless argues that because of changes since

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<sup>3</sup>Reconsideration Petition at 2, citing *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 2965, 2967 (1993) ("*Must Carry Order*").

<sup>4</sup>*Id.* at 2, citing Complaint at Attachment B.

<sup>5</sup>Opposition at 3.

<sup>6</sup>*Id.*, citing *Washburn University v. Kansas City Cable Partners d/b/a Time Warner Cable*, 14 FCC Rcd 9323 (1999); *KTEH-TV Foundation v. Viacom Cable*, 9 FCC Rcd 4433 (1994); *Central Missouri State University v. Lake Cable, Inc.*, 9 FCC Rcd 2264 (1994).

<sup>7</sup>*KTEH-TV*, 9 FCC Rcd at 4433.

1994, *KTEH-TV* should either be re-visited or reconsidered.<sup>8</sup> KMTP states that in *Time Warner Entertainment Co., L.P. v. Federal Communications Commission*, the United States Court of Appeals for the District of Columbia Circuit invalidated the Commission's cable system horizontal ownership limits, holding, *inter alia*, that arbitrary, unsupported rules that preclude cable operators' ability to reach and speak to a greater number of viewers were constitutionally impermissible as unduly burdening First Amendment protections.<sup>9</sup> KMTP argues that the same reasoning applies here because NCE stations, like cable operators, have First Amendment protections.<sup>10</sup> Moreover, KMTP maintains that not only does *KTEH-TV* unduly burden more speech than is necessary, but the holding limiting KMTP's right to reach all viewers to whom it can speak is unsupported by a substantial factual record.<sup>11</sup> KMTP points out that the overriding fault in *Time Warner* was the lack of substantial record support.

6. In *KTEH-TV*, KMTP states that the Commission simply assumes the use of a predicted contour, rather than a measured signal, better serves its administrative needs.<sup>12</sup> KMTP argues that *KTEH-TV* does not explain how a review of a statistical field strength measurement offered by KMTP is administratively more burdensome than the review of a predicted contour map offered by Charter.<sup>13</sup> KMTP asserts that *KTEH-TV* blindly limits its First Amendment rights in exchange for a desire for "useful administrative tools," but such a supposition would not withstand the heightened judicial review required by *Time Warner*.<sup>14</sup> KMTP states that this is particularly so since the Commission already employs individualized complaint procedures to resolve carriage complaints, including signal strength levels, and procedures which allow the cable operator to demonstrate the unavailability of a qualified signal but conversely precludes the station from demonstrating its availability.<sup>15</sup> KMTP argues that because *KTEH-TV* candidly acknowledges that it burdens more speech than is necessary, under *Time Warner* this renders *KTEH-TV* invalid. KMTP concludes that it is elementary that the Commission may not deny KMTP a benefit to which it is otherwise entitled on a basis that infringes constitutionally protected interests.<sup>16</sup>

7. Section 615(1)(2)(B) of the Communications Act, as amended, defines a "qualified local noncommercial educational television station" as a station "whose Grade B service contour, as defined in Section 73.683(a) of such title (as in effect on March 29, 1990), or any successor regulations thereto, encompasses the principal headend of the cable system."<sup>17</sup> As such, in processing must carry complaints involving NCE stations, the Commission is statutorily obligated to rely on a station's predicted Grade B contour in determining coverage because that is the type of Grade B defined by Section 73.683 of the Commission's rules. While KMTP argues that the Commission's decision in *KTEH-TV* is invalid, it ignores the fact that the statutory provision on which the denial of that case was based is still in effect and

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<sup>8</sup>Reply at 1.

<sup>9</sup>Reply at 2, citing *Time Warner v. FCC*, 240 F. 3d 1126, 1139 (D.C. Cir. 2001).

<sup>10</sup>*Id.* at 2.

<sup>11</sup>*Id.*

<sup>12</sup>*KTEH-TV*, 9 FCC Rcd at 4434.

<sup>13</sup>Reply at 2.

<sup>14</sup>*Id.* at 3.

<sup>15</sup>*Id.*

<sup>16</sup>*Id.*, citing *League of Women Voters of California*, 468 U.S. 364, 385, 399 (1984).

<sup>17</sup>47 U.S.C. §535(1)(2)(B). *See also*, 47 C.F.R. §§76.55(b)(2) and 76.5(d).

can only be altered by congressional action. Therefore, in view of the fact that there is a statutory mandate to rely on predicted Grade B contours in these cases, we deny KMTP's petition for reconsideration.

#### IV. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED**, that the petition for reconsideration filed by Minority Television Project, Inc., **IS DENIED**.

9. This action is taken pursuant to authority delegated by Sections 0.283 and 1.106 of the Commission's rules.<sup>18</sup>

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson  
Deputy Chief  
Media Bureau

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<sup>18</sup>47 C.F.R. §§0.283 and 1.106.