

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

In the Matter of:)	
)	
CoxCom, Inc. d/b/a)	CSR-6252-A
Cox Communications Orange County)	
)	
Petition for Modification of the Los Angeles, California DMA)	
)	
KVMD Licensee Co., LLC)	CSR-6200-M
v.)	CSR-6242-M
Cox Communications, Inc.)	
)	
Request for Carriage)	

MEMORANDUM OPINION AND ORDER

Adopted: March 8, 2004

Released: March 11, 2004

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. KVMD Licensee Co., LLC (“KVMD”), permittee of Station KVMD-DT, Twentynine Palms, California (Ch. 23 – Ind.) has filed two complaints and a Motion to Consolidate against CoxCom, Inc. d/b/a Cox Communications Orange County (“Cox”) because of the cable operator’s refusal to carry the station’s digital television signal on its cable television systems serving Orange and Los Angeles counties. Cox filed a Motion to Dismiss in the first matter, and a Consolidated Opposition and Response to the motion in the second matter. KVMD filed replies in both matters.

2. Cox filed the above-captioned petition for special relief, seeking to exclude certain cable communities from KVMD’s market so that Cox would be under no obligation to carry the station’s signal on its cable systems serving the Los Angeles market. KVMD filed an opposition to the petition and Cox filed a reply. Specifically, Comcast requests that KVMD be excluded, for purposes of the cable television mandatory broadcast signal carriage rules, from 35 communities in the Los Angeles DMA (the “Cox communities”).¹ We are consolidating these cases in order to determine the signal carriage rights of

¹ The subject communities are: Los Angeles County System - Los Angeles (San Pedro), L. A. County (unincorporated), Fort MacArthur AFB, Palos Verdes Estates, Rancho Palos Verdes, Rolling Hills Estates, and Rolling Hills, California; Orange County System – Aliso Viejo, Camp Pendleton, Coto De Caza, Dana Point, Dove Canyon, El Moro Beach, Marine Air Station (El Toro), Emerald Bay, Foothill Ranch, Foothill/Sonterra, Irvine, Laguna Beach, Laguna Hills, Laguna Niguel, Lake Forest, Mission Viejo, Modjesda Canyon, Newport Beach, Newport Coast, Orange, Rancho Cielo, Rancho Santa Margarita, San Clemente, San Juan Capistrano, Silverado

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KVMD in the Cox communities.

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.² A station's market for this purpose is its "designated market area," or DMA, as defined by Nielsen Media Research.³ 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.⁴

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.⁵

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

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Canyon, Trabuco Canyon, Tustin/Tustin Heights, and Marine Air Station (Tustin), California.

² 8 FCC Rcd 2965, 2976-2977 (1993).

³ Section 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").

⁴ For a more complete description of how counties are allocated, see Nielsen Media Research's *Nielsen Station Index: Methodology Techniques and Data Interpretation*.

⁵ 47 U.S.C. § 534(h)(1)(C).

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.⁶

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.⁷

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.⁸

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

⁶ *Id.*

⁷ H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

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

curves may also be included to support a technical service exhibit.⁹

(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.¹⁰

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.¹¹ The Commission has established a framework for analyzing market modifications for digital television stations.¹² 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.¹³ The Commission also found that

⁹ The 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.

¹⁰ 47 C.F.R. § 76.59(b).

¹¹ See 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.

¹² See *id.* at 2635-36.

¹³ We 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).

the statutory factors in Section 614(h), the current process for requesting market modifications, and the 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.¹⁴ 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.¹⁵

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.¹⁶ 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 1, 2003, it discontinued analog operations, and commenced digital-only operations, pursuant to Commission authorization. KVMD states that the station and Cox's cable systems are both located in the Los Angeles DMA. KVMD states that by letter dated May 5, 2003 it elected and sought mandatory carriage on Cox's cable systems. KVMD further states that by letter dated August 7, 2003, it again demanded mandatory carriage on the cable systems in question. The station asserts that Cox did not respond directly to either letter.¹⁷ Simultaneous with its Consolidated Opposition and Response, Cox filed a petition for special relief seeking modification of KVMD's market. In order to determine the carriage rights of KVMD in the Los Angeles market, we grant KVMD's Motion to Consolidate its two mandatory carriage complaints and consider Cox's market modification in this matter. Cox's market modification arguments are set forth below.

8. **History of carriage.** Cox asserts that KVMD's digital signal has no history of carriage on its cable systems, nor did the station's analog predecessor.¹⁸ Further, Cox argues that the station has not been carried by cable operators in nearby communities, either in analog or digital mode, despite the fact that the station broadcast its analog signal for more than five years.¹⁹ KVMD contends that the station is currently carried by cable systems operated by both Adelphia Communications and Charter Communications in the Los Angeles DMA, and that Adelphia carries the station on several systems directly adjacent to communities served by Cox.²⁰ In reply, Cox contends that the any recent or future carriage agreements by Adelphia and Charter are irrelevant in analyzing the historic carriage factor.²¹

¹⁴ See *DTV Must Carry Report and Order*, 16 FCC Rcd at 2636.

¹⁵ *Id.*

¹⁶ Twentynine Palms is on the eastern edge of the Los Angeles DMA.

¹⁷ KVMD explains that it filed the second request for mandatory carriage "to protect fully its must-carry rights" pursuant to Cox's procedural argument that KVMD's initial request for carriage was premature. Motion to Consolidate at 2.

¹⁸ Modification at 3.

¹⁹ *Id.*

²⁰ Modification Opposition at 7, Exhibits B and C.

²¹ Cox states that nearly two-thirds of the station's carriage on Adelphia and Charter's systems commenced after the
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Cox argues that recent carriage by nearby cable operators may be relevant in certain modification cases, but not in the instant matter, where such evidence is overwhelmed by the station's lack of a local nexus to the cable communities at issue.²² Further, Cox argues that the Bureau's recent modification of KVMD's market in Los Angeles and Orange Counties adjacent to or nearby the Cox communities underscores the absence of any market nexus.²³

9. **Local Service.** Cox asserts that KVMD fails to provide any coverage or local service to the subject communities.²⁴ Cox states that the station's city of license is an average of 100 air miles from the Cox communities in Orange County, and 133 air miles from its Los Angeles County communities.²⁵ Cox argues that the significant distances from the station's city of license and all of the cable communities proves that KVMD operates in a wholly separate market from the Cox communities. In addition, Cox argues that the station's city of license and the communities are also separated by the Santa Ana Mountains, the Mojave Desert, and the Angeles National Forest, thereby increasing the distance and diminishing the market connections between Twentynine Palms and the Cox communities.²⁶ Cox states that KVMD provides a predicted 41 dBu signal strength contour²⁷ showing that the station's signal encompasses a small portion of Orange County and falls far short of Los Angeles County.²⁸ Cox contends that the prediction of minimal technical coverage overstates KVMD's actual service area as the station is currently operating at reduced power, and even assuming full power operation, more precise signal strength predictions using the Longley-Rice methodology demonstrates the probable lack of an interference-free signal in any Cox community.²⁹ Cox notes that the station's service area is physically limited by the Santa Ana Mountains, which are located between the station's transmitter site and the cable communities, and that the Longley-Rice analysis of the station's facilities and the terrain surrounding its transmitter site reveals that the predicted field strength of the station's signal is less than 41 dBu throughout Cox's Orange County system.³⁰ Cox acknowledges that although the Los Angeles County Cox communities are far beyond the station's predicted 41 dBu contour, the Longley-Rice analysis shows

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filing date of Cox's petition or have yet to commence carriage. Modification Reply at 5.

²² See *Avenue TV Cable Service, Inc.*, 18 FCC Rcd 23823 (2003).

²³ Modification Reply at 5, citing *Time Warner Cable*, 18 FCC Rcd 21384 (2003).

²⁴ Modification at 5.

²⁵ *Id.* at 10. Cox also states, as an example, that although the distance from Twentynine Palms to one of the closest of the cable communities, Rancho Santa Mararita, is 95 air miles, the actual driving distance is 133 miles, 40 percent farther. *Id.* at 12.

²⁶ *Id.* at 11.

²⁷ The 41 dBu signal strength contour of a digital television station generally approximates the Grade B contour of the corresponding analog station. See *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast*, 12 FCC Rcd 14588 (1997); See also, *Carriage of Digital Television Broadcast Signals*, 16 FCC Rcd 2598 (2001).

²⁸ Modification at 6, 9, Exhibit D.

²⁹ *Id.* at 6, Exhibit D. See Engineering Statement of du Triel, Ludlin & Rackley, which assumes that KVMD operates at the full power authorized in its construction permit (150 kW), although Cox states that the station currently operates at a lower, reduced power of 100 kW, pursuant to a low power Special Temporary Authority. See FCC File Nos. BPCDT-19991101AIP; BEDSTA-20030514AEP.

³⁰ Modification at 6-9, Exhibit D.

that some of the communities theoretically might receive an off-air signal from KVMD. However, Cox contends that predicted interference from co-channel station KTBN-DT, Santa Anna and other Los Angeles DMA stations makes actual, interference-free service in the Los Angeles Cox communities “extremely unlikely.”³¹ In addition, Cox argues that since KVMD transmits from a different location than the majority of the Los Angeles stations, most viewers in the Los Angeles DMA will have difficulty receiving the station’s signal due to “receiver antenna discrimination.”³² Cox also argues that KVMD provides no local programming directed to the Cox communities. Cox states that 51 percent of the station’s broadcast schedule consists of paid programming, and that the remainder of the schedule is general interest programming with no apparent nexus to the communities.³³

10. In response, KVMD states that, under standards developed by the Commission in the analog context, Grade B coverage has generally been held to demonstrate a station’s service to cable communities and to reflect a station’s natural geographic market.³⁴ KVMD states that, as demonstrated by Cox’s engineering showing, the 41dBu predicted contour encompasses a portion of the Cox communities located in Orange County. KVMD argues that although the Longley-Rice study provided by Cox demonstrates that the predicted 41 dBu contour overstates the station’s actual service to the Orange County communities, other determinative market facts are relevant to the consideration of coverage and local service.³⁵ KVMD also argues that although the station’s 41 dBu contour is predicted not to encompass the Los Angeles County communities, the Longley-Rice study shows that there is a clear line-of-sight propagation to these communities.³⁶ KVMD states that the predicted interference from co-channel station KTBN-DT in Los Angeles County will not materialize since that station has a pending petition before the Commission to change its allotment to channel 45, and, in any case, that KTBN-DT is not yet broadcasting.³⁷ KVMD argues that Cox’s claim of “receive antenna angle discrimination” can be easily corrected by Cox and that the station is willing to offer Cox the antenna to accomplish the correction.³⁸ Further, KVMD contends that the station has made a commitment to deliver its digital signal to Cox via satellite to ensure delivery of a good quality signal to Cox’s cable headends.³⁹ KVMD argues that it provides meaningful local programming to the communities, and provides information regarding carriage of various sporting events, foreign language programming directed to different ethnic communities in the greater Los Angeles area, and affiliated programming of the American One Network.⁴⁰

³¹ Modification at 9, Exhibit D.

³² *Id.* at 10. Cox states that KVMD broadcasts from a site 90 miles east-northeast from the Cox communities, at an angle 50 degrees off from the Mt. Wilson “antenna farm.” *See also*, Exhibit D.

³³ *Id.* at 13.

³⁴ Modification Opposition at 8, citing *First Report and Order and Further Notice of Proposed Rulemaking*, 16 FCC Rcd 2598, 2977 (2001); *see also* 47 C.F.R. § 73.622(e).

³⁵ Modification Opposition at 7.

³⁶ *Id.* at 8.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 9.

⁴⁰ KVMD states that such local programming includes Big West Conference basketball games, the “KVMD High School Football Game of the Week,” minor league professional baseball, a local equestrian show filmed in Burbank and Del Mar, California, Big West Conference Women’s Soccer, the Long Beach Sea Dogs (a minor league
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11. In reply, Cox asserts that KVMD does not deny operating at reduced power and fails to address Cox's contention that such low power operation would reduce the station's actual service and technical coverage.⁴¹ Cox argues that KVMD does not dispute Cox's showing that the station provides no actual service to the Orange County communities, and admits that the Los Angeles County communities lie far beyond the station's predicted 41 dBU contour.⁴² Cox also contends that KVMD misconstrues the nature and implications of Cox's "receiver angle antenna discrimination" argument. Cox argues that such discrimination impairs reception of broadcast television signals by local viewers, and not Cox's inability to establish a good-quality signal at its cable headend receive sites.⁴³ Cox argues that even a cursory review of KVMD's programming reveals that the station actually offers no local programming specifically directed at the Cox communities, including any local news programming relevant to either the Cox communities or the station's own city of license.⁴⁴ Cox argues that even if some of the programming identified by KVMD had some specific local interest or import for the Cox communities, "which is a dubious proposition at best," it would be de minimus overall and therefore insufficient to overcome the station's lack of other factors weighing against market modification.⁴⁵

12. **Carriage of other local television stations.** Cox asserts that it carries twelve local broadcast stations, including the local affiliates of ABC, CBS, Fox, NBC, UPN, the WB network, Univision, and Telemundo, as well as independent station KCAL and Orange County non-commercial educational station KOCE, which provide extensive coverage of news and events of particular interest to residents of the Cox communities.⁴⁶ KVMD states that Cox has made no showing that it currently carries any broadcast television station that offers the unique local and regional sporting events and distinctive multicultural programming provided by KVMD.⁴⁷

13. **Viewing patterns.** Cox asserts that KVMD's signal failed to achieve reportable off-air viewing in Los Angeles or Orange counties, nor did the station's analog signal.⁴⁸ 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.⁴⁹ Based on these facts, KVMD states that viewership levels should not be accorded substantial weight in this proceeding.

14. 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.⁵⁰ Section

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professional hockey team), various foreign-language programming, and "Horse-TV" on the America One Network.

⁴¹ Modification Reply at 6.

⁴² *Id.* at 7.

⁴³ *Id.*

⁴⁴ *Id.* at 8-11.

⁴⁵ *Id.* at 12.

⁴⁶ Modification at 14, Exhibit C.

⁴⁷ Modification Opposition at 14.

⁴⁸ Modification at 15.

⁴⁹ Modification Opposition at 15.

⁵⁰ 47 U.S.C. § 534(h)(1)(C).

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.⁵¹ These principles apply to all television stations without regard to the mode in which the station broadcasts. 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.⁵²

15. Cox 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. KVMD claims to have recent carriage on certain nearby Adelphia and Charter cable television systems. While such carriage may be a relevant factor in certain modification cases, such evidence is clearly overwhelmed by the station's lack of a local connection to the cable communities at issue.⁵³ In addition, KVMD's commitment to provide a good quality signal to Cox's headends is irrelevant in a market modification proceeding.

16. It is evident that KVMD is geographically distant from the communities, and that the station is separated from the communities by mountain ranges, desert plateaus, and political boundaries. While KVMD's predicted 41 dBu contour encompasses a portion of the Orange County communities, the Longley-Rice analysis, which takes into account the topography of the region, shows that KVMD's signal is not available to those communities. In contrast, although the Los Angeles County communities are clearly distant from the station's predicted 41 dBu contour, the Longley-Rice study shows that KVMD's signal, at full power operation, is potentially available to some communities in the county. We note that the station is currently operating at less than full authorized power and coverage is likely to be diminished. It also appears that the majority of the communities served by Cox's Los Angeles County system are not within the Longley-Rice coverage of the station. In addition, it appears that viewers in the Los Angeles County communities may have a problem with over-the-air viewing based on the station's transmission location and subsequent antenna angle discrimination. KVMD has also failed to provide evidence that its programming has a distinct nexus to the cable communities in question. Cox has shown, however, that there are numerous local television stations that it currently carries that provide specific programming of interest to the cable communities.⁵⁴ In conclusion, relying on case precedent for analog television station market modifications, the grant of Cox' market modification request for the above-listed communities would effectuate the purposes of Section 614(h) of the Act.

⁵¹ 47 U.S.C. § 534(h)(1)(C)(i).

⁵² See *DTV Must Carry Report and Order*, 16 FCC Rcd at 2636.

⁵³ See *Avenue Cable TV*, *supra*.

⁵⁴ See Modification at 10.

IV. ORDERING CLAUSES

17. Accordingly, **IT IS ORDERED**, pursuant to Section 614(h) of the Communications Act of 1934, as amended, 47 U.S.C. § 534(h), and Section 76.59 of the Commission's rules, 47 C.F.R. § 76.59, that the captioned petition for special relief (CSR-6252-A), filed by CoxCom, Inc. d/b/a Cox Communications Orange County **IS GRANTED**.

18. **IT IS FURTHER ORDERED**, pursuant to Section 614 of the Communications Act of 1934, as amended, 47 U.S.C. § 534, that the must carry complaints (CSR-6200-M, CSR-6242-M) filed by KVMD Licensee Co., LLC against Cox Communications **ARE DENIED**.

19. These actions are taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.⁵⁵

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Deputy Chief, Policy Division
Media Bureau

⁵⁵ 47 C.F.R. § 0.283.