

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

In the Matter of:
Avenue TV Cable Service, Inc.
For Modification of the ADI Markets
of KWHY-TV and KZKI-TV
CSR-4622-A

MEMORANDUM OPINION AND ORDER

Adopted: July 31, 2003

Released: August 6, 2003

By the Commission:

I. INTRODUCTION

1. Paxson Los Angeles License, Inc. ("Paxson"), licensee of KPXN, formerly KZKI-TV, San Bernardino, California, has filed an Application for Review of the Order on Reconsideration regarding Avenue TV Cable Service, Inc. ("Bureau Order").

II. BACKGROUND

2. Pursuant to Section 614 of the Communications Act of 1934, as amended ("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 a station's market.

1 Avenue TV Cable Service, Inc., 11 FCC Rcd 10419 (CSB 1996), aff'g, Avenue TV Cable Service, Inc., 11 FCC Rcd 4803 (CSB 1996).

2 Harriscope of Los Angeles, Inc., licensee of KWHY-TV, Los Angeles, California, has not filed an Application for Review in this proceeding.

3 8 FCC Rcd 2965, 2976-2977 (1993).

4 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). Until January 1, 2000, Section 76.55(e) of the Commission's rules provided that Arbitron's "Areas of Dominant Influence," or ADIs, published in the 1991-1992 Television Market Guide, be used to implement the (continued...)

stations' ADI as defined by Arbitron. A DMA or 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.⁵

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.⁶

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

III. DISCUSSION

5. Paxson argues that the *Bureau Order* should be reversed pursuant to Section 1.115 of the Commission's rules. Paxson first argues that the *Bureau Order* directly conflicts with the provisions of

(...continued from previous page)

mandatory carriage rules. Effective January 1, 2000, however, Section 76.55(e) now requires that a commercial broadcast television station's market be defined by Nielsen Media Research's DMAs. 47 C.F.R. § 76.55(e). For the must-carry/retransmission consent elections that took place on October 1, 1999, commercial television stations were required to make their elections based on DMAs. *See Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, 14 FCC Rcd 8366 (1999) ("Modification Final Report and Order").

⁵ For a more complete description of how counties are allocated, *see* Nielsen Media Research's *Nielsen Station Index: Methodology Techniques and Data Interpretation*. *See also* Arbitron's *Description of Methodology*.

⁶ 47 U.S.C. § 534(h)(1)(C).

⁷ 47 U.S.C. § 534(h)(1)(C)(i).

the Cable Television Consumer Protection and Competition Act of 1992 (“1992 Cable Act”).⁸ Paxson next asserts that the *Bureau Order* resolves a question of law upon which the Commission has not previously passed. Finally, Paxson argues that the *Bureau Order* will impose serious hardship on independent broadcast stations such as KPXN by allowing cable operators to continue to deny congressionally conferred carriage rights to such stations.⁹ In this regard, Paxson argues that local service, competition, and diversity will be diminished if the Bureau’s decision is not overturned.¹⁰

6. We affirm the *Bureau Order* and deny the application for review. The *Bureau Order* stated that “we considered evidence presented with respect to each of the four statutory factors and concluded that, on balance, the evidence weighed in favor of excluding the Avenue TV communities from KPXN’s television market particularly with respect to local service and coverage and the market dichotomy between eastern and western Ventura County.”¹¹ The *Bureau Order* concluded that KPXN presented no new evidence of local service and the station did not deny that it does not provide a predicted Grade B contour over the relevant communities.¹² In making its determination, we find that the Bureau carefully considered each statutory factor in this case, as well as other relevant considerations.

7. With regard to KPXN’s television market, the Commission recognized in previous cases that Arbitron divided Ventura County into an eastern and western portion for audience reporting purposes and the Bureau applied that bifurcation for purposes of its market modification analysis.¹³ Ventura County is an area of rugged terrain where there is an overlap of signals from the Los Angeles and the Santa Barbara-Santa Maria-San Luis Obispo markets.¹⁴ The decision by Arbitron to divide Ventura County into western and eastern portions reflected the associated terrain and viewing patterns in the county.¹⁵ Specifically with regard to KPXN, the Commission previously determined in *Chronicle Publishing* that the cable communities in the western portion of Ventura County should be deleted from KPXN’s television market.¹⁶ The Commission found that the western communities of Ventura County are more connected to the Santa Barbara-Santa Maria-San Luis Obispo market than to the Los Angeles market.¹⁷ Therefore, consistent with prior decisions, and based on the review of relevant data, the general geography, television reception, and viewing patterns, it was determined that the decision to delete certain communities in the western portion of Ventura County from KPXN’s market would better effectuate the purposes of the must carry requirements in accordance with Section 614(h) of the Communications Act.¹⁸

⁸ Application for Review at 2; see Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

⁹ Application for Review at 2; 47 C.F.R. § 1.115(b)(2)(i)-(iii)

¹⁰ Application for Review at 2.

¹¹ *Avenue TV Cable Service, Inc.*, 11 FCC Rcd at 10422.

¹² *Id.*

¹³ See *Chronicle Publishing Company d/b/a Ventura County Cablevision*, 10 FCC Rcd 9474 (1995) (“*Chronicle Publishing*”); *Smith Broadcasters of Santa Barbara*, 10 FCC Rcd 9447 (1995) (“*Smith*”).

¹⁴ See *Smith*, 10 FCC Rcd at 9452.

¹⁵ See *Chronicle Publishing*, 10 FCC Rcd at 9481; *Smith*, 10 FCC Rcd at 9452.

¹⁶ See *Chronicle Publishing*, 10 FCC Rcd at 9483.

¹⁷ *Id.*

¹⁸ See *Avenue TV Cable Service, Inc.*, 11 FCC Rcd at 4811; 47 U.S.C. § 534(h).

8. In its application for review, KPXN argues that the Bureau has erred because the language of Section 614 of the Act mandates carriage of KPXN throughout the Los Angeles television market.¹⁹ KPXN further argues that Congress directed the Commission to delete communities from television markets only in exceptional circumstances such as when another out-of-market station that is providing greater local service would be deprived of carriage.²⁰

9. KPXN asserts that it is logical to discern how the four statutory factors promote the value of localism when determining whether to include additional communities within a station's market, but less clear how these same factors can be used to further the value of localism when removing signals of eligible local stations from cable systems.²¹ KPXN argues that the Bureau seeks to depart from the statutory mandate of Section 614 by suggesting that the Grade B coverage area provides a suitable measure of a station's market.²² Furthermore, KPXN contends that the Bureau's reliance on Arbitron's bifurcation of Ventura County for only audience survey purposes is contrary to Congress' mandate to give a station must carry rights throughout its ADI.²³ KPXN also argues that given Congress' unambiguous rejection of an arbitrary mileage based market definition,²⁴ the Bureau's reliance on geography and distance in market modification decisions has given rise to an arbitrary *de facto* Grade B contour measure in order to define KPXN's and other stations' markets.²⁵ KPXN argues that the Bureau's reasoning results in the reduction of the must carry markets of all stations, not only the newer, specialty stations such as KPXN.²⁶

10. In response, Avenue TV argues that where a station is not local, the 1992 Cable Act and its legislative history allow the Commission to remove communities from a television station's ADI if those communities are not properly a part of the station's market.²⁷ Avenue TV asserts that because KPXN does not meet the four prong test of localism, the Bureau was correct in deleting its cable systems located in the western part of Ventura County from KPXN's ADI.²⁸ Avenue TV also argues that KPXN provides no basis for its assertion that the Commission may only delete communities from a station's market if subscribers would otherwise lose access to another local, although out-of-market, station that better serves the cable communities in question.²⁹

11. In addition, Avenue TV argues that KPXN's assertion that the Bureau relied solely on the station's Grade B contour to decide this case is unfounded and contradicted by the Bureau's application of all four statutory factors.³⁰ Avenue TV adds, however, that Grade B coverage is a strong indication of where a station intends to provide local coverage, and KPXN's Grade B does not include

¹⁹ Application for Review at 4.

²⁰ *Id.* at 7, 15.

²¹ *Id.* at 9; Reply at 2.

²² Application for Review at 11.

²³ *Id.* at 13.

²⁴ See H.R. Rep. No. 628, 102d Cong., 2d Sess. at 97-98 (1992).

²⁵ Application for Review at 17; Reply at 4.

²⁶ Application for Review at 12, 18.

²⁷ Avenue TV Opposition at i, 4.

²⁸ *Id.* at 7.

²⁹ *Id.* at 8.

³⁰ *Id.* at 10.

western Ventura County and Avenue TV's service area.³¹ Avenue TV also asserts that the Bureau was correct in considering mileage and geography, such as mountainous terrain, as important determinants in this modification proceeding.³² Finally, Avenue supports the Bureau's reliance on Arbitron's bifurcation of the Ventura County to support its determination of different viewing patterns between the eastern and western portions of the county, and notes that this bifurcation was only one factor used in the Bureau's analysis.³³

12. KPXN's application for review presents no new facts or arguments requiring reversal of the *Bureau Order*.³⁴ After evaluating the statutory factors, the Bureau based its decision in this case largely on the second factor relating to local service and coverage, in combination with the terrain and distances involved, and determined that the communities in western Ventura County are sufficiently removed from KPXN so as not be deemed part of the station's television market for must carry purposes.³⁵ In cases like the one before us, the courts have upheld the Commission's reliance on the second factor -- whether a television station provides coverage or other service to a community -- along with the consideration of other factors, such as Grade B contours, distance, geography, as well as other unenumerated factors.³⁶ In this instance it is undisputed that KPXN does not provide Grade B service to the communities, that it has not been historically carried, or, that at the time when the underlying decisions were made, the station lacked an appreciable audience in the subject communities.³⁷ This is consistent with the Bureau's finding that the terrain and the distance between San Bernardino, California, KPXN's city of license, and the subject cable communities contributed to the station not being carried. Furthermore, Commission precedent supports the Bureau's recognition of the different viewing patterns established by Arbitron between the western and eastern portions of Ventura County as a result of its topography.³⁸ In addition, we do not find that KPXN's change of programming format from home shopping to an affiliate of the PAX Network is of decisional significance.³⁹ Because of KPXN's former home shopping station format, the Bureau did not give great weight to KPXN's lack of audience shares in modifying the station's market.⁴⁰ In fact, this change in format appears to weigh against KPXN because as a specialty station, its former status, it would typically attract limited audiences. Lastly, the Commission has previously rejected the same argument raised here by KPXN that the Commission may

³¹ *Id.* at ii, 14.

³² *Id.*

³³ *Id.* at 17.

³⁴ See 47 C.F.R. § 1.115(b)(2)(i)-(iii).

³⁵ See *Avenue TV Cable Service, Inc.*, 11 FCC Rcd at 4812.

³⁶ See *WLNY-TV, Inc., et al. v. FCC*, 163 F. 3d 137, 145 (2d Cir. 1998), *aff'g In re: Market Modifications and the N.Y. Area of Dominant Influence*, 12 FCC Rcd 12262, 12268 (1997).

³⁷ Commission records indicate that KPXN has filed an application (BPCT-20010131ABT) to move its transmitter site on January 31, 2001. That application is pending. In addition, the Bureau's finding with regard to viewership has not been altered because KPXN has not introduced any new audience information in this proceeding.

³⁸ See *supra* n.15. Nielsen's classification of the Los Angeles DMA no longer bifurcates Ventura County. However, KPXN has failed to show that viewing patterns, general geography (*i.e.*, topography of the area) and television reception in the county are significantly different than when the Bureau issued its decision. Moreover, at the time the Bureau's decision was made, the bifurcation of Ventura County was only one of several factors considered. The Bureau's decision was based on evaluation of the statutory factors as well as other relevant considerations.

³⁹ We have determined KPXN's current programming format from the following source - see *Television & Cable Factbook 2001*, Stations Volume No. 69 at A-18.

⁴⁰ See *Avenue TV Cable Service, Inc.*, 11 FCC Rcd at 4812.

only delete communities from a station's market if a cable system needs the channel capacity to carry the signal of an out-of-market station that demonstrably provides more local service.⁴¹

13. As demonstrated above, the *Bureau Order* does not conflict with the must carry provisions of the Cable Act. The Bureau properly modified the market of KPXN after evaluating the statutory factors, along with other relevant considerations. The Bureau did not depart from the mandate of Section 614(h) in making its determination by relying on the second statutory factor, in conjunction with Grade B coverage, distance, geography and other relevant determinants.⁴² This proceeding also does not involve a question of law or policy that has not previously been resolved by the Commission. The Commission previously determined that Section 614(h) does not limit market deletion requests only to those situations where an out-of-market station is more deserving of carriage than an in-market station.⁴³ KPXN also has not demonstrated that the denial of its carriage in the western portion of Ventura County diminishes local service, competition, and diversity in the market. KPXN has not demonstrated that the station served the relevant communities or that those communities form a part of the economic market of the station.

14. In view of the above, we conclude that the Bureau correctly analyzed Avenue TV's modification request on the basis of the record before it and, as a result, we find that the grant advances our goal of ensuring that "television stations be carried in the areas which they serve and which form their economic market."⁴⁴

IV. ORDERING CLAUSES

15. Accordingly, **IT IS ORDERED**, that the Application for Review filed by Paxson Los Angeles License, Inc. **IS DENIED**.

16. This action is taken pursuant to statutory authority found in Sections 1, 4(i), 5(c), 405 and 614(h)(1)(C) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 405, 534(h)(1)(C).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁴¹ See *In re: Market Modification and the N.Y. Area of Dominant Influence*, 12 FCC Rcd at 12269.

⁴² See *Id.*, 12 FCC Rcd at 12267; 47 U.S.C. § 534(h).

⁴³ See *supra* n.41. The Commission resolved this issue subsequent to the filing of KPXN's application for review.

⁴⁴ See H.R. Rep. 102-628, 102d Cong., 2 Sess. 97 (1992).