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APR 30 1993

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

April 30, 1993

VIA HAND DELIVERY

Donna R. Searcy, Secretary

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APR 30 1993

ORIGINAL

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of:

Implementation of the Cable Television

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docket, having been a party to Comments² filed in response to the

requested that the Commission act on it,⁷ yet the Commission did not consider Star Cable's request in its Order.

Star Cable's Petition requested that the Commission amend Section 76.51(a) of its rules to add Alvin, TX to the existing Houston, TX major market designation. According to the Petition, the following evidence (briefly summarized here) warranted the amendment to the Houston market:

1. The Alvin, TX market is created by a single UHF television station, KSHH. KSHH's Grade B contour, however, is largely coterminous with those of the six commercial Houston television stations. In fact, KSHH shares a common transmitter site with two of those stations.⁸
2. Alvin is well within the Grade B contours of the six Houston commercial television stations.⁹
3. KSHH's Grade A contour covers and extends well beyond Houston. In fact, all land covered by the KSHH predicted Grade B contour falls within the Houston ADI.¹⁰
4. The Arbitron Company lists KSHH as a station within the Houston ADL and includes Brazoria County. in which

Alvin is located, as a Houston ADI county.¹¹

5. KSHH is a specialty format station, an affiliate of the Home Shopping Network. Accordingly, KSHH's ratings are very low --it is not even significantly viewed in its home county. It is thus inappropriate to consider Alvin a separate, smaller commercial market based solely on the presence of KSHH.¹²
6. Stations within the Houston-Alvin market rely on both cities for economic support, especially KSHH, by virtue of its home shopping format.¹³
7. Alvin is less than 25 miles from downtown Houston.¹⁴
8. Exclusion of Alvin from the Houston market designation has the effect of imposing unequal copyright liabilities on cable systems located in different parts of what is actually the same market.¹⁵

As Star Cable's Petition demonstrated, these factors clearly warranted change to the Houston market.¹⁶ At minimum, the Petition clearly met the standard for consideration in the Order, i.e., that parties provide "specific evidence that change to a

¹¹Id. at 5.

¹²Id. at 5-6.

¹³Id. at 6-7.

¹⁴Id. at 8.

¹⁵Id. at 9-10.

¹⁶See Petition; Major Television Markets (Fresno-Visalia, CA), 57 RR 2d 1122 (1985); Major Television Markets (Orlando-Daytona Beach-Melbourne-Cocoa, FL), 57 RR 2d 685 (1985).

particular market is warranted."¹⁷ In addition to providing such evidence in its Petition, Star Cable specifically requested in its Comments that its Petition be incorporated by reference into this proceeding, so that the Commission could address the issue of amending Section 76.51(a) of its rules to add Alvin, TX to the Houston, TX market.¹⁸ It is respectfully submitted that the Commission's failure to address this issue, even if inadvertent, was erroneous and should be reconsidered.

CONCLUSION

For the reasons set forth above, Star Cable requests that the Commission reconsider its Order in this proceeding to add Alvin, TX to the Houston, TX major market designation. Alternatively, Star Cable requests that the Commission act upon Star Cable's Petition, which has been pending for over two years, by amending Section 76.51 to add Alvin, TX as a designated community to the Houston television market.¹⁹

¹⁷Order at ¶ 50.

¹⁸Comments at 7.

¹⁹If the Commission chooses this second option, Star Cable requests that the Commission consider this matter under the expedited rulemaking procedure provided for in the Order, whereby the Commission "will issue a notice of proposed rulemaking based on the submitted petition without first seeking public comment on whether we should do so." Order at ¶ 50.

Respectfully submitted

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May 3, 1993
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JAN - 8 1991

BEFORE THE

Federal Communications Commission
Office of the Secretary

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of)
)
Amendment of Section 76.51(a)) MM Docket No. _____
Major Television Markets) RM _____
(Houston and Alvin, TX))

To: The Commission

PETITION FOR RULEMAKING

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January 8, 1991

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SUMMARY

Star Cable Associates ("Star") herein petitions the Commission for a rulemaking to amend Section 76.51(a) of the FCC Rules to add the community of Alvin, Texas to the Houston, Texas major market designation. Alvin is the community of license of independent UHF television station KSHH. Star owns and operates a cable television system serving the community of Brazoria and portions of Brazoria County, Texas, within the Alvin 35-mile zone.

Alvin and Houston comprise a single television market. The Grade B contours of KSHH are largely coterminous with those of the six commercial television stations licensed to Houston, and KSHH actually shares a common transmitter site with two of those stations. Alvin is well within the Grade A contours of all six Houston commercial stations. Moreover, the KSHH Grade A contour covers and extends well beyond Houston. KSHH's predicted Grade B contour covers four of the counties which comprise the Houston ADI in their entirety, including Harris County, in which Houston is located. Those four counties alone contain 81% of the television households in the Houston ADI.

The Arbitron Company lists KSHH as a station within the Houston ADI, and includes Brazoria County, in which Alvin is located, as a Houston ADI county. In fact, Brazoria is the fourth largest county in the Houston ADI in terms of TV households. Five Houston television stations are significantly viewed in Alvin's home county. Thus, there can be no doubt

that Alvin and Houston constitute a single major television market, and that the stations within that market rely on both cities for viewership and economic support. Indeed, the licensee of KHSB calls itself HSN Broadcasting of Houston, Inc.

Furthermore, the factors established in prior FCC decisions amending Section 76.51 favor the addition of Alvin to the Houston market. First, Alvin is less than 25 miles from downtown Houston, closer to the designated market community than in past decisions. Second, a particularized need for the amendment exists because the exclusion of Alvin from the Houston market designation has the effect, under federal copyright law, 17 U.S.C. § 101 et seq., of imposing unequal copyright liability on cable systems located in different parts of what is actually the same market. Cable operators in the top 50 markets as defined by Section 76.51 are generally entitled to import the signals of two distant independent stations without triggering the 3.75% distant signal copyright "penalty." As a result, cable systems within the Houston designated market may carry all Houston independent stations, two distant independents, as well as the Alvin independent (which appears to cover the entire Houston 35-mile zone with its Grade B contour) without incurring the 3.75% distant signal copyright penalty. In contrast, because Alvin is a "smaller" market and the community of license of an independent television station, systems within the Alvin 35-mile zone and

outside of the Houston 35-mile zone cannot carry any distant independent stations without incurring the 3.75% copyright penalty. Given that Alvin and Houston actually comprise one television market, there is no justification for allowing only some market stations to import additional desirable signals without facing the 3.75% distant signal copyright penalty. Third, amendment of Section 76.51 of the Rules would benefit cable subscribers by enabling cable systems throughout the market to carry the same number of distant independent signals without financial penalty.

Thus, it is respectfully requested that the Commission initiate a rulemaking to amend Section 76.51 of its Rules to add the community of Alvin, Texas to the existing Houston, Texas market designation. Alternatively, the Commission might accomplish the same result without formally amending the Rules by issuing a declaratory ruling that Alvin should be considered part of the Houston market pending a more comprehensive update of Section 76.51.

Brazoria and portions of Brazoria County, Texas, within the Alvin 35 mile zone. As will be demonstrated below, Houston and Alvin constitute a single television market and the addition of Alvin to the Houston market designation will satisfy the public interest factors previously identified by the Commission for similar requests.

I. Houston and Alvin, Texas Comprise A Single Television Market

In Major Television Markets (Fresno-Visalia, CA)

("Fresno-Visalia"), 57 RR 2d 1122, 1124 (1985), the Commission concluded that the communities of Visalia and Fresno, California comprised a single market based on a number of circumstances which are also present here. The four commercial television stations licensed to Fresno covered Visalia with their predicted Grade B contours. Additionally, the Visalia station covered Fresno with a city grade signal and its Grade A contour extended beyond the Fresno city limits. The Arbitration

designation). The relevant circumstances identified in these cases compel the conclusion that Alvin and Houston also constitute one market.

There are six commercial television stations licensed to Houston, Texas.^{2/} Attachment 1 hereto, prepared for Star by the engineering firm Moffet, Larson & Johnson, Inc., is a map of the Houston area showing the predicted Grade B contours of each of these stations and KSHH. As demonstrated by Attachment 1, the Grade B contours of KSHH are largely coterminous with those of the six commercial Houston stations. Indeed, KSHH shares a common transmitter site with two of these stations, KPRC-TV and KHTV, pursuant to a 10 year lease.^{3/} Compare Fresno-Visalia, 57 RR 2d at 1125 (adding Hanford, California to the Fresno market designation, noting that the station licensed to Hanford shared a common transmitter site with three Fresno stations); Press Television Corp., 67 RR 2d 240 (1989) (waiving Section 73.658 of the rules to consider a Clermont, Florida station part of the Orlando-Daytona market for purposes of

^{2/} The stations are KHOU-TV, KHTV(TV), KPRC-TV, KRIV(TV), KTRK-TV and KTXH(TV). A construction permit has been issued for a seventh station (KZJL), which is unlicensed. See FCC FAIR Report and TV Engineering Data Base; Warren Publishing, Inc., Television and Cable Factbook, Stations Vol., No. 58 (1990) at A-1085 - A-1091. Official notice is respectfully requested of this and all material from the FCC files and trade publications cited herein.

^{3/} See KTHT-TV (now KSHH) applications for modification of construction permit, File No. BMPCT-841221LB, Exhibit E, at 2; extension of time, File No. BMPLT-851118KG, Exhibit 1, at 2; and license, File No. BLCT-860206KF, at 6. See also KHTV application for license, File No. BLCT-850731KG.

obtaining non-network programming exclusivity rights, noting that the station licensed to Clermont shares a common transmitter site with a Daytona Beach station).

Alvin is well within the Grade B contours of the six Houston commercial television stations. See Attachment 1. Indeed, the contour maps for these stations published in the current Television and Cable Factbook indicate that Alvin is well within their Grade A contours. Warren Publishing, Inc., Television And Cable Factbook, Stations Vol. No. 58 (1990) at A-1085 - A-1091.

Similarly, KSHS's Grade A contour covers and extends well beyond Houston. Attachment 1. KSHS's predicted city grade contour also covers Houston. See application for modification of construction permit, File No. BMPCT-841221LB, Exhibit E at Figure 7. In fact, all of the land area covered by the KSHS predicted Grade B contour falls within the Houston ADI. See

ADI. Id; Attachment 1 hereto.

By comparison, in Orlando-Daytona Beach, the Commission added Melbourne to the Orlando-Daytona Beach designated market despite the fact that the petitioning Melbourne station's Grade B contour did not extend to Daytona Beach, so that the station did not serve or rely economically on that part of the market. The Commission emphasized that in adopting signal carriage rules in 1972, it recognized that portions of hyphenated markets would occasionally be located beyond the Grade B contours of some market stations. 57 RR 2d at 691, citing Cable Television Report and Order, 36 FCC 2d 143, 176 (1972) (subsequent history omitted).

It is not surprising that the Arbitron Company lists KHSB as a station within the Houston ADI, and includes Brazoria County, in which Alvin is located, as a Houston ADI county. See Broadcasting Yearbook at C-159; Television and Cable Factbook at A-1; 1990-91 Arbitron Company county viewing data for Brazoria County, Texas. In fact, as of 1990, Brazoria was the 4th largest county in the Houston ADI in terms of TV households, with 65,200 of 1,453,200, or 4.5%, of all Houston ADI TV households. Broadcasting Yearbook at C-159. Five Houston television stations, KPRC-TV, KHOU-TV, KTRK-TV, KHTV and KTXH, are significantly viewed in Alvin's home county of Brazoria. See Warren Publishing, Inc., Cable and Station Coverage Atlas (1990) at 92; Public Notice, Report No. 3282, released June 6, 1990.

Unlike the Visalia station in Fresno-Visalia, however,

KHSH is not significantly viewed in Houston's own county or in any Houston ADI county. This factor is not relevant in the present case because KHSH is a specialty format station. As an affiliate of the Home Shopping Network ("HSN"), the station cannot be expected to garner the ratings of a typical independent station of mass appeal in any county. Indeed, KHSH is not even significantly viewed in its home county.^{4/} The Commission recognized the "unique nature" of the programming on HSN affiliates in 1989, when it granted HSN waivers of the dual network and prime time access rules. It concluded that "HSN is not involved in the production or acquisition of traditional entertainment programming; it offers only specialized programming." Home Shopping Network, Inc., 66 RR 2d 175, 179 (1989).^{5/} This fact alone highlights the inappropriateness of considering Alvin, Texas to be a separate, smaller commercial television market based solely on the presence of a specialty format, home shopping station.

Based on the foregoing, there can be no doubt that Alvin and Houston constitute a single major television market, and that stations within that market rely on both cities for

^{4/} See Cable and Station Coverage Atlas at 92. According to the 1990-91 Arbitron ratings for non-cable television households in the Houston ADI, KHSH(TV) receives a 1% total share and 2% afternoon day share for Fort Bend County. In contrast, KHSH does not receive a measurable share of the audience in its home county, Brazoria.

^{5/} In another case, the Commission stated its view that the HSN format was "an example of licensee experimentation." Family Media, Inc., 63 RR 2d 284, 289 (1987).

viewership and economic support.^{6/} This reality has apparently not been lost on the licensee of KSHH, which calls itself "HSN Broadcasting of Houston, Inc." (formerly "Silver King Broadcasting of Houston, Inc.").^{7/}

II. The Public Interest Favors The Addition Of Alvin To The Houston Market

In Espero Vicario, the FCC outlined four factors



55 RR 2d at 1124, citing Television Muscle Shoals, 48 RR 2d 1191 (1980), recon. denied, 87 FCC 2d 507 (1981);

Orlando-Daytona Beach, 57 RR 2d at 692. To the extent they are applicable, these factors support the amendment to Section

76 ~~51 requested herein~~

The third and fourth factors require showings of particularized need and public benefit. The exclusion of Alvin from the Houston market designation under Section 76.51 of the FCC rules has the effect, under federal copyright law, 17 U.S.C. Sec. 101 et seq., of imposing unequal copyright liabilities on cable systems located in different parts of what is actually the same market. Generally speaking, the cable television "compulsory license" imposes no copyright liability for the carriage of specific "local" television signals.^{8/} 17 U.S.C. Secs. 111(c) & (d). For purposes of royalty calculations, the Copyright Act defines local signals as those which were subject to mandatory carriage pursuant to the FCC rules in effect as of April 15, 1976. 17 U.S.C. Sec. 111(f). Certain "distant" signals may also be "imported" without copyright liability, depending on the size of the television markets (as defined by Section 76.51 of the rules) in which the system is located, based on the distant signal carriage quotas imposed under the FCC's previous rules. Carriage of distant signals beyond the former FCC quotas will subject a cable operator to a copyright "penalty" of 3.75% of gross receipts, which is over four times greater than the highest fee for "quota" independent stations. 37 C.F.R. Sec. 308.2. However, any UHF station that covers the system with its Grade B contour will not be counted against these quotas. Report and Order in

^{8/} The systems referenced in this discussion are those, like Star's, which must file a "Long Form" Statement of Account with the Copyright Office because they have semi-annual gross receipts of more than \$292,000.

Docket No. 20496, 41 RR 2d 121 (1977).

Cable operators in the Top 50 markets are generally entitled to import the signals of two distant independent

increase in carriage of desirable distant independent signals. Compare Orlando-Daytona Beach, 57 RR 2d at 692 (public benefit found in provision of independent station's non-duplicative programming to new audiences due to increased carriage rights).

The Commission has previously recognized the relevance of copyright issues with respect to amendments to Section 76.51. In Orlando-Daytona Beach, the Commission stated that it "appreciate[d] the copyright concerns" raised by cable operators filing comments in the proceeding, who feared that the Copyright Royalty Tribunal would not recognize as "local" those stations licensed to the communities added to the designated market. 57 RR 2d at 693-94. In the present case, copyright concerns are especially relevant because they demonstrate both the particularized need and public benefit of the amendment to Section 76.51 proposed herein.

III. Conclusions

Houston and Alvin constitute a single television market, in which stations rely on both cities for viewership and economic support. Moreover, addition of Alvin to the Houston designated market would fully satisfy the factors previously identified by the Commission for considering such requests. Accordingly, Star respectfully requests that the Commission initiate a rulemaking to amend Section 76.51 of its rules to add the community of Alvin, Texas to the existing Houston,

Texas market designation. 2/

Respectfully submitted,

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January 8, 1991

Attachment 1

KHSH(TV) Grade A and B Contours
Houston TVs Grade B Contours