

JUN 18 1993

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Implementation of the Cable Television)
Consumer Protection and Competition)
Act of 1992)

MM Docket No. 92-259

Broadcast Signal Carriage Issues)
Reexamination of the Effective)
Competition Standard for the)
Regulation of Cable Television)
Basic Service Rates)

MM Docket No. 90-4

Request by TV 14, Inc. to Amend)
Section 76.51 of the Commission's)
Rules to Include Rome, Georgia, in)
the Atlanta, Georgia, Television Market)
Georgia, Television Market)

MM Docket No. 92-295
RM-8016

To: The Commission

REPLY OF CYPRESS BROADCASTING, INC. TO OPPOSITION OF
GRANITE BROADCASTING CORPORATION TO PETITION FOR RECONSIDERATION

Cypress Broadcasting, Inc. ("Cypress"), by its counsel and pursuant to Section 1.429 of the Commission's Rules, replies to Granite Broadcasting Corporation's ("Granite") Opposition To Petition for Reconsideration, stating as follows:

1. Cypress' Petition for Reconsideration requested that the Commission reconsider and reverse its decision implementing the Cable Television Consumer Protection and Competition Act of 1992 (the "Cable Act") in this proceeding, to the extent that the Commission accorded must-carry rights to a television station in the station's home county when that station is assigned to an ADI which does not include the home county (the "home county exception"). This Reply responds to the issues raised in Granite's Opposition to Cypress' Petition.

II. The Decision to Create the Home County Exception
Is Contrary to the Express Language of the Cable Act

2. Cypress' Petition demonstrated that the Commission's crea-
tion of the home county exception is contrary to the express lan-
guage of the Cable Act. Cypress demonstrated that Cable Act Sec-

as its Arbitron ADI, with no provision for ad hoc expansion of a market where the home county of a station lies outside of its ADI. Thus, there is no statutory authority for the Commission to ignore the Cable Act requirement that the market of a station for must-carry purposes is to be established using Arbitron ADI's as set forth in Section 73.3555(e)(3)(i) of the Commission's Rules.

5. Granite claims that the creation of the home county exception is not inconsistent with the provisions of the Cable Act creating a mechanism for a station to seek the inclusion of additional communities within its ADI, namely, Cable Act Section 614(h)(C)(i). Granite asserts that those provisions were created for a "particular television broadcast station," while the home county exception is a "general rule." Granite Opposition at 6, n. 8.

6. Granite argues that the home county exception is a rule of general application and not a decision benefiting a particular station. However, the record shows only one station which benefits from the home county exception: KNTV, which is licensed to Granite. Granite's January 4, 1993 Comments requesting the exception only describe the plight of KNTV. The Commission's Report and Order cites only KNTV as a station assigned to an ADI which does not include its home county. Report and Order at ¶ 39, n. 108. In its Opposition, Granite fails to identify any station, other than KNTV, which could benefit from the home county exception.

7. The record in this proceeding only supports the conclusion that the home county exception provides relief to one station, or at most a very small group of stations. Granite's claim that the

home county exception is a "general rule" therefore has no factual basis. Moreover, the Commission may not adopt a "general rule" if that rule is contrary to the Cable Act.

8. The Commission's adoption of the home county exception therefore is not consistent with the provisions of the Cable Act and should be reconsidered and reversed.

III. The Commission's Adoption of the Home County Exception Fails To Meet The Cable Act's Evidentiary Requirements

9. Cypress' Petition argued that the Cable Act creates a specific process which must be followed (and which was not followed) where a station seeks treatment as a must-carry in communities outside of its market. In particular, the Cable Act requires that, for each community in which a station seeks to be treated as a must-carry, the station must demonstrate the propriety of changing the station's must-carry market, paying particular attention to the value of localism. The Cable Act (at Section 614(h)(1)(C)(ii)) directs the Commission to afford:

particular attention to the value of localism by taking into account such factors as --

- a. whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
- b. whether the television station provides coverage or other local service to such community;
- c. 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;
- d. evidence of viewing patterns in cable and noncable households within the areas served by the cable system or

systems in such community.

Cable Act Section 614(h)(1)(C)(ii).

10. Cypress' Petition demonstrated that Granite's Comments failed to provide adequate information on the four factors set forth in Cable Act Section 614(h)(1)(C)(ii). Granite claims that

deal with Santa Clara County as a whole, while the Cable Act requires that a station's request for modification of its must-carry market be handled on a community-by-community basis.

13. Finally, Granite's Opposition ignores the Commission's statement in its Report and Order on the evidence it expects to be provided along with a request for a modification of a station's must-carry market. The Commission stated that, while it was not restricting the kinds of information a station could submit with a request, "[a]s guidance to petitioners, however, we likely would find the following information to be helpful." Report and Order at ¶ 47. The Commission then repeated the four factors set forth in Cable Act Section 614(h)(1)(C)(ii). Id. Therefore, Granite cannot claim that the four factors set forth in Cable Act Section 614(h)(1)(C)(ii) are mere suggestions for how to address the issue of localism which a station can freely ignore.

14. Granite has failed to meet both the evidentiary and procedural requirements of the Cable Act for a modification of a station's must-carry market. Therefore, the Commission must reconsider and reverse its home county exception decision.

IV. The Commission Deprived Cypress Of Its Due Process Rights When It Adopted The Home County Exception

15. In its Petition, Cypress demonstrated that, in adopting the home county exception, the Commission deprived Cypress of its due process rights because the Commission gave no notice that it might adopt a home county exception.

16. Granite's Opposition concedes that the Administrative Procedure Act, 5 U.S.C. § 553(b)(3), requires a notice of proposed

rulemaking to include "...either the terms and substance of a proposed rule or a description of the subjects and issues involved." Granite admits that the U. S. Court of Appeals for the District of Columbia Circuit has held that this notice requirement is only satisfied if the content of the agency's final rule is a "logical outgrowth" of its rulemaking proposal, i.e., the parties "should have anticipated that such a requirement might be imposed." Aeronautical Radio, Inc. v. FCC, 998 F.2d 428, 445-46 (D.C. Cir. 1991) (citing Small Refiner Lead Phase-Down Task Force v. E.P.A., 705 F.2d 506, 549 (D.C. Cir. 1983)).

17. Granite claims that, since the Commission in its Notice of Proposed Rulemaking indicated (NPRM at ¶ 18) that: (a) it could make modifications it deems necessary to station's markets which the Cable Act requires to be defined in the manner provided in Section 73.3555(e)(3)(i) of the Commission's Rules, (b) "[e]ach county in the contiguous United States is assigned exclusively to one ADI," (c) "[s]ome ADIs are as small as one county[,] and others include many counties...." and (d) the Commission was seeking comments on how it should make adjustments to the basic ADI-defined

been clairvoyant to have anticipated that the Commission would adopt a home county exception based solely on a reading of the NPRM. The NPRM, by making general observations about the way in

that the Commission might

possible changes the addition of communities to a station's ADI

22. Granite claims that its unfair competitive advantage is "irrelevant" because the home county exception is consistent with the Cable Act's emphasis on "localism." Therefore, Granite argues, the home county exception is not contrary to the public interest.

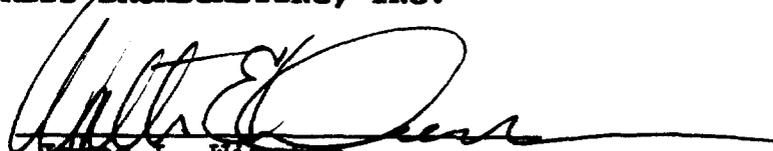
23. At the very least, there is a factual issue as to whether the home county exception will aggravate a situation where KNTV has the best of both worlds to the disadvantage of every other station in the Salinas-Monterey ADI. When this factual issue is considered with all the other factors which weigh in favor of reconsideration of the home county exception, the Commission, at the very least, should reconsider the home county exception. Once it is open to reconsideration, a multitude of factors, including public interest considerations, mandate that the home county exception be reversed.

VI. Conclusion

24. The Commission's adoption of the home county exception in its Report and Order violates both the letter and spirit of the Cable Act and should be reconsidered and reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Zilpha Owens, a secretary in the law firm of Rubin, Winston, Diercks, Harris & Cooke, do hereby certify that a copy of the foregoing "REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION" was served this 18th day of June, 1993, by first-class postage mail to the following:

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