

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

In re Petition of)	
)	
Mauna Kea Broadcasting Company,)	CSR-8658-M
Licensee of Television Station KLEI-DT,)	Docket No. 12-167
Kailua-Kona, Hawaii)	
)	CSR-8682-M
v.)	Docket No. 12-197
)	
Time Warner Entertainment Company,)	CSR-8686-A
L.P., d/b/a Oceanic Time Warner Cable,)	Docket No. 12-208
and Hawaiian Telcom, Inc., d/b/a Hawaiian)	
Telcom Services Company, Inc.)	

**PETITION FOR RECONSIDERATION OF
HAWAIIAN TELCOM SERVICES COMPANY, INC.**

Pursuant to Section 405 of the Communications Act¹ and Section 1.106 of the Commission’s rules,² Hawaiian Telcom Services Company, Inc. (“HTSC”) hereby petitions the Mass Media Bureau (the “Bureau”) to reconsider its October 19, 2012 Order (DA 12-1683) (the “Bureau Order”) denying the Petition of Time Warner Entertainment Company, L.P. (“TW”) for Special Relief³ (the “TW Petition”) seeking to modify the Honolulu Designated Market Area (“DMA”) to exclude station KLEI-TV owned by Mauna Kea Broadcasting Company (“KLEI” or “Station”), and ordering HTSC to carry KLEI-TV on channel 6 on HTSC’s Oahu system. On July 3, 2012, KLEI filed a must-carry complaint against HTSC, and HTSC filed an opposition on August 12, 2012 (CSR-8682-A; Docket No. 12-197). HTSC joined TW’s market modification

¹ 47 U.S.C. § 405.

² 47 C.F.R. § 1.106.

³ Petition of Time Warner Entertainment Company, L.P., for Modification of DMA Station KLEI-TV, Mauna Kea Broadcasting Company, Kailua-Kona, Hawaii, CSR-8686-A, MB Docket No. 12-208 (filed July 13, 2012) (“TW Petition”).

on August 16, 2012, seeking relief for the communities served by HTSC, all of which are on the island of Oahu. The Bureau Order consolidated these matters into one proceeding.⁴

The Bureau Order should be modified because the Bureau (1) failed to adequately address the statutory factors typically utilized in determining market modification decisions, most notably factor two addressing local coverage, (2) erred in granting KLEI's request for carriage on channel 6 in Honolulu, and (3) improperly rejected HTSC's argument that mandating carriage of KLEI would violate the First Amendment. As explained more fully below, and for all the reasons set forth in TW's separate Petition for Reconsideration, the Bureau Order should be reversed and HTSC's Petition for Reconsideration should be granted.

I. THE BUREAU FAILED TO ADEQUATELY ADDRESS THE STATUTORY FACTORS FOR MARKET MODIFICATIONS.

In evaluating market modification requests—to either include or exclude communities from within a station's market—the Commission must consider the following four statutory factors:⁵

(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 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

⁴ Bureau Order, ¶ 1.

⁵ Section 614(h)(1)(C) of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), 47 U.S.C. §§ 534(h)(1)(C).

(IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.⁶

As set forth more fully in TW’s Petition for Reconsideration, which HTSC supports, the record establishes that KLEI does not meet any of these statutory factors with regard to any communities not located in Hawaii County, including the communities on Oahu served by HTSC. Hawaii County is located on the island of Hawaii, which is the major island farthest away from the island of Oahu. Being on separate islands separated by such distance, the communities located in Hawaii County are quite distinct from the communities on Oahu. Although the Bureau Order fails to satisfy each of the four factors in accordance with law and precedent, HTSC will focus on the second factor, addressing local coverage.

The Bureau Order failed to adequately consider the second statutory factor—“coverage or other local service”—disregarding KLEI’s lack of coverage of communities outside Hawaii County and by incorrectly considering KLEI’s new programming in its analysis.⁷ The Bureau Order improperly relied on dozens of programming episodes, most which never aired prior to the filing of the Petition. But even if the new programming is considered, it was insufficient in nature to prove that KLEI provides adequate programming with “specific ties to the communities at issue in this matter.”⁸

Again, the focus of all of KLEI’s programming is either on topics of general or statewide interest, at best, or of events taking place in Hawaii County. Indeed, of the dozens of episodes

⁶ 47 U.S.C. § 534(h)(1)(C)(ii)(I)-(IV).

⁷ 47 C.F.R. § 76.7(c); *see also Comcast Cablevision of Danbury, Inc.*, 18 FCC Rcd 274, ¶ 11 (MB 2003) (refusing to credit programming released “near the pleading stage of a market deletion proceeding”); *id.* at 279 (explaining that programming launched near or just after the pleading stage of a proceeding is of minimal value in determining local service because it has not been “broadcast on a regular basis”).

⁸ *Greater Worcester Cablevision*, 12 FCC Rcd 17347, ¶ 19 (CSB 1997).

listed, not a single event is covered that could even tangentially be described as specific to any communities not located on the Island of Hawaii.⁹ While the programming described by KLEI includes a handful of events that took place on the Island of Hawaii where residents of other islands may have participated, this is woefully inadequate to prove that KLEI's programming actually is targeted particularly to any of those other communities. Participants also included residents of southern California and Australia, but no one would say that such participation means that KLEI's coverage of the events is locally focused to California or Australian communities.

Turning to the specific programming relied on in the Bureau Order, each example, as noted below, simply lacks any genuine local connection to any communities outside Hawaii County.

- *Eye on Hawaii*, cited as an example of locally produced programming that has interest statewide, has never covered any topic that is specific to any of the Communities. Each of the local events listed in the exhibit to the Surreply (the Mai-Tai festival, the Queen Lili'uokalanai Canoe Races, the Ironman Triathlon, the Parker Ranch Rodeo and the Billfish Challenge) occurred entirely on the island of Hawaii. While the Surreply's claim that "while many of these events may occur on the island of Hawaii, they still have significant interest for viewers throughout the state" indicates that it is possible that some viewer in one of the Communities may find such events interesting, it does prove that such programming is actually targeted to or of particular local interest to resident located in any of the Communities.
- The same utter lack of any particular local nexus is true for *Native Ways*, *Latitudes* and *Truly Pinoy*, which are general interest programming targeted to particular minority communities statewide and not in any particular community even region of the state. Indeed, most of the stories would have equal interest to the targeted minority communities located anywhere in the country. Most

⁹ TW's Petition illustrated that KLEI's programming lineup consists of mostly re-runs of syndicated programs and infomercials which accounts for over ninety percent of its programming. TW Petition at 19, Exhibit G. TW's Petition also identified that the limited local programming cited by KLEI focused completely on events, people and places located on the Island of Hawaii, as opposed to any of the relevant communities, which are all on the other islands in Hawaii.

importantly, there is no evidence in the record that any of the shows has a record of producing any content specific to any of the Communities.

- *Education Matters* and *Healthy Hawaii* are similarly general interest shows, albeit with a topical (education and health) focus. The vast majority of stories covered on each are not even specific to Hawaii. While they both may have limited statewide specific interest, again neither has developed any specific content focusing with any particularity on any of the Communities.
- *Talk Show Hawaii* and *Keiki 808* are again general interest shows with an exclusive focus on issues, events and people located on the Island of Hawaii, and have no record of ever producing any content specifically focused on any of the Communities.
- The Surreply readily acknowledges that *Olelo Hawaii* has never aired.

The requisite local connection to specific communities outside Hawaii County simply does not exist. In previous market modifications, where a station claimed that its programming or news broadcasts served the communities at issue, the Commission has conducted an exacting community-by-community analysis to determine whether specific content was offered to each area.¹⁰ Here, the record contained no logs of when particular programs ran on particular days, and contained no descriptions or logs of any news stories covered by the Station on any particular days, including any that might be described as particular to any of the non-Hawaii County communities. Without such correlating evidence, the Commission should have deemed KLEI's programming as not targeted to any location other than the Island of Hawaii and the Bureau's Order should be reversed.

¹⁰ See, e.g., *Mountain Broadcasting Corporation*, 27 FCC Rcd 2231, ¶¶ 20-26 (MB 2012); *Tennessee Broadcasting Partners*, 23 FCC Rcd 3928, ¶¶ 22-37 (MB 2008), *aff'd on recon.*, 25 FCC Rcd. 4857 (MB 2010).

II. THE BUREAU ERRED IN GRANTING KLEI MANDATORY CARRIAGE ON CHANNEL 6

Pursuant to Section 614(b)(6) of the Communications Act¹¹ and Section 76.57 of the Commission's rules,¹² commercial television stations may assert channel positioning rights, seeking carriage or positioning on a particular channel.¹³ In its must-carry complaint, Mauna Kea requested that KLEI be carried on channel 6 in Honolulu because it broadcasts on channel 6 over the air in Kailua-Kona.¹⁴ However, HTSC already carries KBFD, a full-power commercial station licensed to Oahu and serving the Oahu communities since 1985, on channel 6. Given that KLEI should be excluded from the Honolulu DMA for the reasons previously stated, and due to KBFD's service to the Oahu community, KBFD should not be forcibly displaced from being carried on channel 6, notwithstanding KLEI's request. Additionally, as demonstrated in the

¹¹ 47 U.S.C. § 534(b)(6) (providing three channel positioning options, including: (1) the channel number on which the local station is broadcast over the air, (2) the channel number on which the station was carried on July 19, 1985, or (3) the channel number on which the station was carried on January 1, 1992).

¹² 47 C.F.R. § 76.57 (noting a cable operator "shall carry [the Station's] signal on the cable system channel number on which the local commercial television station is broadcast over the air, or on the channel on which it was carried on July 19, 1985, or on the channel on which it was carried on January 1, 1992").

¹³ *Ion Media Networks, Inc. v. Charter Communications*, 24 FCC Rcd. 2461, 2463, ¶ 7 (MB 2009) [hereinafter "*Ion Media*"] (citations omitted) (noting that "the Commission's rules accord specific channel positioning options to must carry stations, including those that default to must carry status"); see also *Carriage of Digital Television Broadcast Signals: Amendment to Party 76 of the Commission's Rules*, Declaratory Order, 23 FCC Rcd. 14254, 14258, ¶ 14 (2008) ("Section 614(b)(6) of the Act generally provides that commercial television stations carried pursuant to the mandatory carriage provision are entitled to be carried on a cable system on the same channel number on which the station broadcasts over-the-air.").

¹⁴ Bureau Order ¶ 19; see also *Opposition of Hawaiian Telcom Services Company, Inc., Matter of Mauna Kea Broadcasting Company Must-Carry Complaint Regarding Television Station KLEI(DT), Kailua-Kona, Hawaii, CSR-8682-M, MB Docket No. 12-197* (filed Aug. 2, 2012) ("HTSC Opposition").

Bureau Order, KLEI has failed to deliver a quality signal,¹⁵ and therefore, HTSC is under no obligation to grant KLEI's request for carriage on channel 6.

III. MANDATING HTSC TO CARRY KLEI WOULD VIOLATE THE FIRST AMENDMENT

In its Opposition, HTSC raised a serious First Amendment challenge.¹⁶ Notwithstanding the seriousness of this allegation, the Bureau only peripherally addressed HTSC's constitutional argument, limiting its entire analysis to a single footnote in the Bureau Order.¹⁷

Congress enacted the must carry statute in order to protect over-the-air broadcasters from unfair competition by dominant cable TV operators, and prevent them from being substantially jeopardized in their ability to continue to provide free over-the-air TV to their customers. The Supreme Court has recognized that cable TV operators have First Amendment rights that cannot be abridged by the government absent a showing of an important government interest.¹⁸ Even under intermediate scrutiny, content-neutral restrictions on speech will be upheld if it can be shown that the restrictions furthers an important or substantial government interest unrelated to the suppression of free speech, provided . . . [the] restrictions did not “burden substantially more speech than is necessary to further” those interests.”¹⁹

¹⁵ Bureau Order ¶ 16 (“We concede KLEI does not appear to provide the digital equivalent of a Grade B contour coverage to the [C]ommunities.”).

¹⁶ HTSC Opposition ¶ 5.

¹⁷ Bureau Order at 2, n.6.

¹⁸ *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 185 (1997) (finding the must carry provisions under the Act “to be content-neutral restrictions on speech, subject to intermediate First Amendment scrutiny”).

¹⁹ *Id.* at 186 (quoting *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662 (1994) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)); *id.* at 189 (citing *United States v. O’Brien*, 391 U.S. 367, 377 (1968)) (“A content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.”).

The must-carry rules were upheld as against traditional dominant cable TV operators based on the government's premise that over-the-air broadcasters would be substantially jeopardized if cable TV operators were not required to carry them due to their increasing market power.²⁰ It does not matter whether the court upheld the constitutionality of the statute on some other ground, the court did not have a non-dominant operator before it when it made its ruling. Therefore, the Bureau cannot simply rely on a court order that itself relied on different factual circumstances in responding to HTSC's serious constitutional challenge. The Commission is obligated to justify why its actions constitute a substantial government interest and that its action was narrowly tailored to correct such interest in order to overcome any constitutional infirmity. *See, e.g., U.S. West, Inc. v. FCC*, 182 F.3d 3d 1224, 1234-39 (10th Cir., 1999). No such justification has been provided. Significantly, because HTSC's customers are only located on the island of Oahu, they are not able to view KLEI's over-the-air signal in any event. Thus, the government's mandate that HTSC carry KLEI is not narrowly tailored to achieve the government's interest promoted by the must carry statute.

For the reasons set forth by HTSC in its Opposition, as well as the reasons set forth by TW in its Petition for Reconsideration, any requirement to carry KLEI beyond communities in Hawaii County would violate the First Amendment, and thus the Bureau Order must be reconsidered.

CONCLUSION

Must-carry rights were given to qualified commercial television stations in order to support broadcast programming that is local in origination and focus. TW's Petition for Modification, as applied to both TW and HSTC, should be granted because it satisfies the criteria

²⁰ *Id.* at 187-88.

set forth in the 1992 Cable Act and KLEI clearly does not provide local programming service to the communities served by HTSC; HTSC is not required to carry KLEI on channel 6; and it would violate the First Amendment to apply the Bureau's must-carry provisions to HTSC. The facts demonstrated herein fall squarely within the parameters for finding that the Communities are "so far removed from a station that [they] cannot be considered part of the station's market." Therefore, the Commission should grant TW's Petition, as joined by HTSC, to exclude the communities outside Hawaii County from KLEI's DMA.

Respectfully submitted,

Steven P. Golden
Vice President, External Affairs
Hawaiian Telcom Services Company, Inc.
1177 Bishop Street
Honolulu, Hawaii 96813

By: /s/ Gregory J. Vogt
Gregory J. Vogt
Law Offices of Gregory J. Vogt, PLLC
2121 Eisenhower Ave.
Suite 200
Alexandria, VA 22314
(703) 838-0115
gvogt@vogtlawfirm.com

Date: November 19, 2012

CERTIFICATE OF SERVICE

I, Gregory J. Vogt, do hereby certify that I have on this 19th day of November 2012 caused a copy of the foregoing “Petition for Reconsideration of Hawaiian Telcom Services Company, Inc.” to be served by U.S. Mail upon the following:

William Lake
Chief, Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Arthur H. Harding
Craig A. Gilley
Edwards Wildman Palmer LLP
1255 23rd Street, N.W., Eighth Floor
Washington, D.C. 20037

Christopher Racine
Mauna Kea Broadcasting Company, Inc.
P.O. Box 143
Honolulu, HI 96810

Harry F. Cole, Esq.
David A. Kirkpatrick, Esq.
Fletcher Heald & Hildreth, PLC
1300 N. 17th Street, Suite 1100
Arlington, VA 22209

 /s/ Gregory J. Vogt
Gregory J. Vogt