

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, L.P.	)	CSR-8686-A
d/b/a Oceanic Time Warner Cable	)	Docket No. 12-208
and Hawaiian Telcom, Inc. d/b/a	)	
Hawaiian Telcom Services Company, Inc.	)	
	)	

TO: Marlene H. Dortch, Secretary

For transmission to the Chief, Media Bureau

**OPPOSITION TO PETITIONS FOR RECONSIDERATION**

Mauna Kea Broadcasting Company (“Mauna Kea”) hereby opposes the Petitions for Reconsideration filed by Time Warner Entertainment Company, L.P. (“TWC”) and Hawaiian Telcom Services Company, Inc. (“HTSC”) requesting reconsideration of the Media Bureau’s decision in the above-referenced matter (DA 12-1683 (rel. October 19, 2012), (the “Order”)). Neither Petition provides any reason for the Bureau to reconsider its well-reasoned decision finding that KLEI’s market should not be modified from that defined by Nielsen, *i.e.* the entire Honolulu, Hawaii DMA, which includes the entire state of Hawaii. The Bureau’s decision was in accordance with the terms of the Communications Act and Commission precedent, and did not in any way violate the First Amendment rights of either TWC or HTSC. Mauna Kea urges the Bureau to deny the Petitions and reaffirm the Order.

**I. THE ORDER PROPERLY ANALYZED BOTH THE ENUMERATED MARKET MODIFICATION FACTORS AND OTHER UNENUMERATED FACTORS IN EVALUATING KLEI'S LOCAL MARKET.**

Both Petitions argue that the Order was somehow deficient by not mechanically applying the four market modification factors set out in Section 614(h)(1)(C) of the Cable Television Consumer Protection and Competition Act of 1992 (the “Cable Act”),<sup>1</sup> and only those four factors.<sup>2</sup> In fact, the four factors listed in Section 614(h)(1)(C) were never intended to be, and have never been treated as, exclusive. While the Bureau’s analysis must consider each of the four enumerated factors, it is free both to give as much or as little weight as appropriate to each of those factors, as well as to consider additional unenumerated factors.<sup>3</sup> This is precisely what the Bureau did in the Order, analyzing the four statutory factors, while also considering ample other record evidence that the entire state of Hawaii constitutes a single unified market.

Under the Cable Act, a television station’s market is presumptively determined by its Designated Market Area (DMA), as defined by Nielsen Media Research. Here, Nielsen has assigned KLEI to the Honolulu, Hawaii DMA in recognition of the fact that the Hawaiian islands constitute a single unified television market. As the Bureau correctly determined, neither TWC nor HTSC have presented sufficient evidence to show that that Nielsen’s analysis was incorrect. In reaching that determination, the Bureau analyzed each of the four statutory factors, but also placed significant weight on other unenumerated factors showing that the entire state of Hawaii constitutes a single market. Among that evidence were statements from the State of Hawaii itself

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<sup>1</sup> 47 U.S.C. §534(h)(1)(C).

<sup>2</sup> *E.g.*, TW Petition at 2; HTSC Petition at 2.

<sup>3</sup> *See, e.g., Cablevision Systems Corp. v. FCC*, 570 F.3d 83, 94 (2<sup>nd</sup> Cir. 2009) (“giving little or no weight to a statutory factor, as long as the factor is expressly considered, does not violate the statute”), *citing Time Warner Entertainment Co. v. FCC*, 56 F3d 151, 175 (DC Cir. 1995); *WLNY-TV, Inc. , et. al. v. FCC*, 163 F3d 137, 145 (2<sup>nd</sup> Cir. 1998).

indicating that it considers the state to be a single market, and even representations made by TWC to the State's Department of Commerce and Consumer Affairs that it "views the whole state as one system."<sup>4</sup>

TWC disputes the Bureau's decision to give little weight to the Station's lack of historical carriage by arguing that the Bureau erred in treating KLEI in a similar manner to a new or specialty station.<sup>5</sup> TWC ignores, however, that in cases where there is a lack of historical carriage, the Bureau must evaluate the "circumstances contributing to this lack of historic carriage."<sup>6</sup> This is precisely what the Bureau did here. The Order properly considered the fact that, throughout most of its history, KLEI had been operated as a satellite of Oahu station KPXO.<sup>7</sup> Contrary to TWC's assertions,<sup>8</sup> the Order did not say that carriage of KPXO constituted carriage of KLEI, but rather that carriage of KPXO provided a compelling circumstance explaining the lack of historic carriage of KLEI. Indeed, it would have been exceedingly odd for any Oahu-based cable system to have carried KLEI's signal when the station's entire programming stream was duplicated on KPXO.

Nor is TWC correct in suggesting that change in a station's ownership cannot result in treatment as a "new" station.<sup>9</sup> The cases cited by TWC in the Petition at most state that a change in ownership does not "automatically" mean that a station will be treated as new, not that it

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<sup>4</sup> Order at 9-10.

<sup>5</sup> TWC Petition at 3-5.

<sup>6</sup> *Comcast Cablevision of Danbury*, 18 FCC Rcd 274, 277 (MB 2003).

<sup>7</sup> Order at 6.

<sup>8</sup> TWC Petition at 5.

<sup>9</sup> TWC Petition at 4.

cannot be.<sup>10</sup> In the case of a “fundamental change in a station’s ownership and programming,” as occurred in the case of KLEI’s conversion from satellite to full-service station, the Bureau was fully justified in treating KLEI as a “new” station.<sup>11</sup> Indeed, followed to its logical end, TWC’s argument would work to prevent any satellite station from ever converting to full-service, as such a station could never be considered “new,” and could be permanently denied cable carriage, despite fundamentally altering the way in which it operates.

Both TWC and HTSC also appear to continue to be operating under a misconception of when KLEI initiated its local programming, and the importance of that timing. Both Petitions claim that Mauna Kea only began producing and airing local programming after the filing of TWC’s initial Petition for Special Relief.<sup>12</sup> As Mauna Kea clearly showed in its Surreply, however, this is simply untrue.<sup>13</sup> Within a month of acquiring KLEI at the end of September 2011, Mauna Kea began producing local programming for the station. Mauna Kea initiated these programs not to respond to a petition TWC had not even filed, but simply out of a desire to better serve viewers throughout Hawaii.

Based on the true timing of the introduction of KLEI’s local programming, the cases TWC cites do not suggest that it was improper for the Bureau to consider KLEI’s local programs. In each of the decisions cited by TWC, the Commission discounted programming that was “promised” by a television station but that had not begun airing at all. In *Comcast of*

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<sup>10</sup> See TWC Petition at 4, quoting *Comcast Cable Communications, LLC*, 26 FCC Rcd 14453, ¶15 (2011).

<sup>11</sup> Order at ¶13, citing *Comcast of Danbury*, 18 FCC Rcd at 278; *CoxCom, Inc. v. KPFH*, 17 FCC Rcd 17192, 17195 (MB 2002).

<sup>12</sup> TWC Petition at 9-12; HTSC Petition at 3.

<sup>13</sup> Mauna Kea Surreply to Reply dated October 4, 2012 and attached Declaration of Dr. Christopher Racine.

*Danbury*, for example, the subject television station could point to nothing more than the fact that it was “developing an independent half-hour weekly public affairs program.”<sup>14</sup> The station could not provide a description of the program nor point to any times it had actually aired before the Bureau’s decision.<sup>15</sup> Similarly, in *TCI of Illinois*, the Bureau discounted a station’s “future programming commitments,” stating that it could not base a decision on “programming that may or may not be aired at some future date.”<sup>16</sup> *TCI of Illinois* simply says nothing about the case before the Bureau here, where programming had been produced before the filing of the Petition for Special Relief and had aired numerous episodes prior to the Bureau’s decision. In the *Flinn, Jr.* case, the station had simply failed to provide evidence that it aired any local programming at any time before the Bureau’s decision.<sup>17</sup>

All of these cases are easily distinguishable from the situation presented by KLEI. Since acquiring the station just over a year before the Bureau’s Order, Mauna Kea has worked tirelessly to produce and air significant programming serving viewers throughout Hawaii. The great majority of that programming was in production well before TWC filed its market modification Petition, and all of the programs cited in the Order had in fact aired before the Order was released. The Bureau did not need to rely on any promises of uncertain future programming from KLEI, as the programs cited have been, and continue to be, broadcast regularly on the station.

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<sup>14</sup> *Comcast of Danbury*, 18 FCC Rcd at 278-279 (internal quotation omitted).

<sup>15</sup> *Id.*

<sup>16</sup> *TCI of Illinois, Inc.*, 12 FCC Rcd 23231, 23241 (CSB 1997).

<sup>17</sup> *George S. Flinn, Jr.*, 27 FCC Rcd 9085, 9091 (MB 2012).

## II. THE ORDER WAS CONSISTENT WITH THE FIRST AMENDMENT

Both TWC and HTSC also advance First Amendment claims, arguing that the Bureau's Order somehow deprives them of their First Amendment rights. Whereas earlier in their Petitions, both HTSC and TWC take the Bureau to task for alleged deficiencies in its analysis of KLEI's local programming, HTSC and TWC also attempt to argue that any analysis of the content of the station's programming somehow triggers strict scrutiny and makes the Order unconstitutional. Over and above this apparent contradiction, the First Amendment claims of HTSC and TWC are simply misplaced. Under the must-carry regime approved by the Supreme Court in *Turner I* and *Turner II*, television stations are entitled to carriage within their economic markets – presumptively, their DMAs.<sup>18</sup> By ordering TWC and HTSC to abide by this requirement, the Bureau imposed no more burden on TWC or HTSC than necessary to further the interests underlying the Cable Act.

HTSC first attempts to reargue the misplaced First Amendment claim it initially raised in its Opposition to Mauna Kea's request for mandatory carriage.<sup>19</sup> HTSC attempts to claim that the must-carry regime is constitutional only as applied to dominant cable television operators, but not as to newer operators such as HTSC.<sup>20</sup> As Mauna Kea demonstrated in its Reply, and as the Bureau correctly held in the Order, neither the Cable Act, nor the Supreme Court decisions upholding the must-carry regime, made any distinction based on the size of a cable operator.<sup>21</sup>

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<sup>18</sup> *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (“*Turner I*”); *Turner Broadcasting Sys., Inc., v. FCC*, 520 U.S. 180 (1997) (“*Turner II*”).

<sup>19</sup> HTSC Petition at 7-8; Opposition of Hawaiian Telcom Services Company, Inc. dated August 2, 2012 at ¶ 5.

<sup>20</sup> HTSC Petition at 7-8.

<sup>21</sup> See Reply to Opposition of Hawaiian Telcom Services Company, Inc., Aug. 15, 2012 at 10-11; Order at 2, n. 6.

While the Supreme Court in *Turner II* noted as one of three separate grounds for upholding the statute the promotion of “fair competition,” the competition referred to was not competition among cable operators, but between cable operators and broadcast television stations.<sup>22</sup> Put simply, the fact that HTSC is a non-dominant cable operator has no bearing on its obligation to retransmit KLEI.

In its Petition, TWC argues that the Bureau in the Order placed too much weight on the local programming delivered by KLEI, which TWC claims makes the Order content-based and therefore subject to strict scrutiny.<sup>23</sup> This is simply incorrect. In making its argument, TWC relies on the decision of the Second Circuit Court of Appeals in *Cablevision*, which suggested, although it did not in fact need to address the issue, that deciding a market modification proceeding based solely on a “concern for localism” could trigger strict scrutiny.<sup>24</sup> What both TWC and HTSC ignore is the fact that in upholding the must-carry provisions of the Cable Act of 1992, the Supreme Court in *Turner II* relied on three governmental interests: “preserving the benefits of free, over-the-air broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the television programming market.”<sup>25</sup> To further these interests, the must-carry rules require cable television operators to carry broadcast television stations located within their local markets – presumptively their DMAs.

Recognizing that a DMA may not always accurately reflect a station’s market, the Cable Act included a mechanism for modification of markets. As discussed above, this mechanism

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<sup>22</sup> *Turner II*, 520 U.S. at 200-201.

<sup>23</sup> TWC Petition at §II(A).

<sup>24</sup> *Id.*, citing *Cablevision*, 570 F3d at 97.

<sup>25</sup> *Turner II*, 510 U.S. 180, 189.

included a non-exclusive list of four factors that the Commission was to consider, although it was free to consider other non-enumerated factors and to accord each factor varying weight depending on the specific circumstances. In the Order, the Bureau did exactly this, analyzing the Station's programming in part as an indicia of the Station's local market. The Order relied on both the Station's service to local communities throughout Hawaii, as well as record evidence regarding the geographic and cultural uniqueness of the Hawaii market to determine that the entire state does indeed represent a single television market, and that neither TWC nor HTSC had demonstrated, in the words of the *Cablevision* court, a "need to restrict a presumptive market."<sup>26</sup>

Regardless of any programming broadcast on KLEI, the Bureau also found that the unique nature of the Hawaii market means that any television station denied cable carriage would be at risk of economic failure.<sup>27</sup> To compete with other full-power stations in the Hawaii market, all of which rely on cable carriage to serve viewers outside of their islands of origin, cable carriage is a necessity.<sup>28</sup> Indeed, due to the mountainous terrain of the islands, most stations in the state of Hawaii do not even cover the majority of the islands on which they are located. Therefore, the Bureau was well-justified in determining that the governmental interest in "preserving the benefits of free, over-the-air local broadcast television" would not have been served by restricting KLEI's presumptive market, as requested by TWC.<sup>29</sup>

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<sup>26</sup> Order at 10; *See Cablevision*, 570 F3d at 97.

<sup>27</sup> Order at 11.

<sup>28</sup> *Id.* In Hawaii, that cable carriage by necessity includes carriage by TWC, which serves over 90 percent of cable viewers in the state, delivering not only cable television, but internet and telephone service that could potentially otherwise serve as competition to TWC's stranglehold on the market.

<sup>29</sup> *Turner II*, 520 U.S. at 189.

The Bureau's decision is also well-founded in "promoting the widespread dissemination of information from a multiplicity of sources."<sup>30</sup> KLEI is the only full-service television station licensed on the island of Hawaii. While significant amounts of KLEI's programming are targeted to viewers on the other Hawaiian islands, the station provides those viewers with critical information about events occurring on the island of Hawaii, information that is not provided by any other Hawaii television station, or by any cable-only channels directly under TWC's or HTSC's control. Even without looking at the specific content of KLEI's programming, it is clear that as the only full-service station on the island of Hawaii, KLEI represents a diverse source of programming of the type found to be important by the *Turner II* court. In a geographically, historically, and culturally unique market such as Hawaii, the need to preserve such diverse and antagonistic sources through cable carriage clearly represents an important governmental interest. Moreover, as the only full-service station serving the island of Hawaii, KLEI is critical to ensuring over-the-air television service to Hawaii viewers. The minimal burden placed on TWC and HTSC by requiring carriage of a single channel out of the hundreds on their systems is clearly no greater than necessary to further these government's important interests.

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<sup>30</sup> *Id.*

### III. CONCLUSION

As set forth herein, the Bureau correctly denied Time Warner Entertainment Company, L.P.'s Petition requesting modification of the must-carry market of KLEI, and properly ordered both TWC and HTSC to commence carriage of the Station. The Order properly determined that KLEI's local market included the entire state of Hawaii, and that neither TWC nor HTSC has produced evidence to demonstrate that the station's presumptive DMA market should be modified. This decision was in accord with the terms of the Cable Act and Commission precedent, and did not violate the First Amendment rights of HTSC or TWC. WHEREFORE, for the reasons stated, Mauna Kea Broadcasting Company hereby urges the Bureau to deny the Petitions for Reconsideration of the Order filed by HTSC and TWC and uphold the Order.

Respectfully submitted,



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December 18, 2012

## CERTIFICATE OF SERVICE

I, Michelle Brown Johnson, hereby certify that on this 18th day of December, 2012, I caused copies of the foregoing "Opposition to Petitions for Reconsideration" to be placed in the U.S. Postal Service, first class postage prepaid, addressed to the following persons:

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