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: The Secretary
For: Chief, Media Bureau

REPLY

Time Warner Entertainment Company, L.P., d/b/a Oceanic Time Warner Cable ("TWC"), by its attorneys, and pursuant to Section 405 of the Communications Act[1] and Section 1.106 of the Commission's rules,[2] hereby responds to the Oppositions filed by the State of Hawaii's Department of Commerce and Consumer Affairs ("DCCA") and Mauna Kea Broadcasting Company ("Mauna Kea") in response to TWC's Petition for Reconsideration asking the Mass Media Bureau (the "Bureau") to reconsider its October 19, 2012 Order (DA 12-1683) (the "Bureau Order")[3] denying TWC's Petition for Special Relief (the "Petition") seeking exclusion of TWC's cable television systems (the "Systems") serving unincorporated areas, incorporated municipalities and military installations located in Honolulu, Kauai, Kalawao, and Maui Counties (collectively, the "Communities") from the Designated Market Area ("DMA") of television station KLEI-TV, Kailua-Kona, Hawaii ("KLEI" or the "Station").

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[1] 47 U.S.C. § 405.

[2] 47 C.F.R. § 1.106.

[3] Mauna Kea Broad. Co. v. Time Warner Ent'mt Co., et al., Memorandum Opinion and Order, DA 12-1683 (rel. Oct. 19, 2012).

I. THE STATUTORY FACTORS

The Petition for Reconsideration explained that the Bureau Order improperly disregarded the undisputed facts that: 1) KLEI has never been carried in the Communities; 2) KLEI does not provide local coverage because it can not provide digital equivalent Grade B contour coverage and does not produce programming with specific focus on particularized issues and events involving the Communities; 3) other stations do provide substantial targeted local programming specific to the Communities; and 4) KLEI has no viewership in the Communities. While failing to follow clear statutory directives and unchallenged precedent mandating grant of TWC's Petition, the Bureau declined to modify KLEI's market, usurping its delegated authority by relying on a novel factor – the "unique" cultural attributes of the entire State of Hawaii.

While DCCA and Mauna Kea are correct that the statute leaves room for other considerations, this does not mean that the Bureau can ignore the four enumerated factors entirely, especially where, as here, they all overwhelmingly point to the same conclusion.[4] Indeed, there is no precedent, and the Bureau Order and the oppositions point to none, where a market modification has been denied when a station failed to satisfy any of the four statutory factors. Mauna Kea's citation to Cablevision Systems Corp. is unavailing because it merely holds that the Bureau has discretion in weighing the four factors against each other, and not, as the oppositions would have it, to ignore the four factors entirely.[5] Moreover, Cablevision Systems Corp. is distinguishable as the station there met two of the factors (technical coverage and historic carriage in the communities), so at a minimum the Bureau engaged in a balancing of factors, and not, as here, disregard of all the factors. By ignoring both express statutory directives and past precedent, the Bureau engaged in improper arbitrary and capricious decision making.

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[4] In using the words "shall afford particular attention to the value of localism by taking into account such factors as . . ." in Section 614, Congress made clear that consideration of the four enumerated factors is mandatory, and that the "value of localism" would not be served in communities where, as here, a station fails to satisfy all four factors.

[5] Cablevision Systems Corp. v. FCC, 570 F. 3d 83, 94 (2d Cir. 2009).

Historic Carriage and Viewing – While the Bureau Order readily acknowledges "that KLEI has not shown a history of cable carriage in the communities and has no measurable viewing in the communities," it then gives those facts no weight, obliquely explaining that "with new or specialty stations, failure to establish historic carriage or significant viewership is given lesser weight."[6] However, neither of those two distinctions are relevant here. As explained in the Petition for Reconsideration, the record clearly demonstrates that KLEI does not qualify as either a "new" or "specialty" station, reflective of the fact that under extensive Commission precedent such exceptions are applied narrowly.

Mauna Kea responds that the Bureau nonetheless has unconstrained discretion to delve into the "circumstances contributing to this lack of historic carriage," citing to Comcast Cablevision of Danbury. This claim is without merit. In Comcast Cablevision of Danbury, the Bureau merely found, consistent with a long line of precedent, that the station was properly a "specialty" station and thus the historic carriage factor could be discounted.[7] Taking its claims even further, Mauna Kea asserts that Comcast Cablevision of Danbury, along with CoxCom v. KPFH, stand for the proposition that the Commission has the discretion to treat KLEI as the equivalent of a "new" station due to a recent change in ownership. As explained in the Petition for Reconsideration, that argument would contravene long-standing precedent that a station absolutely must have been in operation for less than three years to be considered "new," and that subsequent changes in ownership have no bearing. And a closer look at both cases cited by Mauna Kea reveals that the key issue in each was not that the ownership of the stations changed, but instead that they had become *bona fide* "specialty" stations, thereby justifying special treatment for which KLEI fails to qualify.

Mauna Kea next asserts that the Bureau is justified in creating an entirely new exception based on the fact that KLEI had previously been operated as a satellite of Oahu station KPXO, a

[6] Bureau Order at ¶ 7.

[7] See Comcast Cablevision of Danbury, Inc., 18 FCC Rcd 274, ¶ 8 (MB 2003) ("WFUT's lack of historical carriage, therefore, is not especially relevant because of its status as a specialty station"). Similarly, the North Texas Cablevision case cited by DCCA's Opposition is just a "new" station case, again justifying discounting of the historic carriage and viewing factors. North Texas Cablevision, Ltd., 12 FCC Rcd 17528, ¶ 26 (CSB 1997).

truly local station long carried in the Communities. Notably, neither Mauna Kea nor the Bureau Order cite to any case where carriage of a parent station has ever been deemed to constitute historic carriage of its satellite. Contrary to Mauna Kea's assertion, Commission precedent denying "new" station status upon conversion from satellite to non-satellite in no way impedes the ability of such a station to gain carriage, *e.g.*, by improving its coverage or offering valuable programming that results in audience ratings – steps KLEI has failed to take.

KLEI's Programming – Mauna Kea next defends the Bureau's treatment of its program offerings as sufficiently local, despite the fact that its lineup predominately consists of re-runs of ancient syndicated programs and infomercials, with a smattering of, at best, generically Hawaiian programs (as opposed to being actually specific to any of the Communities). Further, almost all the KLEI programming that the Bureau Order identifies as "local" was first broadcast after and only in response to the filing of TWC's Petition for Special Relief, as KLEI abruptly overhauled its programming lineup to shore up its responsive arguments.

In Mauna Kea's Opposition, the Station readily concedes the opportunistic timing of its programming, never claiming or pointing to any record evidence that any of the designated programming actually aired prior to the initiation of this proceeding, and merely asserting that it aired prior to the release of the Bureau Order.[8] The Bureau Order's reliance on these programs is in error in that it ignores clear Commission precedent that *post-hoc* local programming, airing after the initiation of a market modification proceeding in an effort to alter programming lineups to demonstrate local service, is to be given no weight.[9]

The Bureau's reliance on such programming was also in error as the record demonstrates that none was truly local to the Communities as it only focused on events, people and places located on

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[8] According to the Opposition at 5, "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."

[9] See 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" as it is of minimal value in determining local service because it has not been "broadcast on a regular basis."); see also Comcast Cable Communications, LLC, 26 F.C.C.R. 14453, ¶¶ 13 & 15 (MB 2011); TCI of Illinois, Inc., 12 FCC Rcd 23231, ¶ 24 (CSB 1997).

the Island of Hawaii, and not in the relevant Communities, which are all on the other Hawaiian Islands. The Petition for Reconsideration explained that precedent uniformly requires that the programming actually be specifically tailored to the communities at issue in order to be credited. Commission practice in market modification proceedings involving, as is the case here, many communities across multiple counties, has been to analyze each program (or each news story) on its own terms, assigning credit only to programming directly focusing on specific communities, but not to programming of general interest throughout the DMA.[10] The Bureau Order, by contrast, contains no explanation how or why any of the programs were specifically tailored to any particular Community. The Oppositions do no better, providing no attempted explanation specifically linking any program to any Community. Had the Bureau conducted its standard community-by-community programming specific analysis, it would have confirmed that the programs were not local to the Communities at all. It erred in failing to do so.

Geography – The Bureau Order also improperly ignored clear Commission precedent requiring that geographical considerations be taken into account in determining a station's natural economic market. The Petition for Reconsideration explained that precedent dictates that the enormous distances and major geographic barriers involved here strongly favor exclusion of the Communities from KLEI's market. For example, the Bureau has several times found that Long Island Sound, a body of water only 23 miles across at its widest point, provides a geographic barrier warranting bifurcation of the New York City DMA.[11] But here, the Bureau treats distances over water of 66 to 294 miles as trivial, explaining away these inconveniences because Hawaii is special.

[10] See, e.g., Mountain Broadcasting Corp., 27 FCC Rcd 2231, ¶ 21 (MB 2012) ("[The station] aired the following numbers of stories (given as numbers of stories between January and July 2011/and then counted for the full year 2011) toward the following counties: New York – Nassau and Suffolk Counties (144/243); New York – Rockland, Westchester and Orange Counties (140/227); New Jersey – Monmouth and Ocean Counties (293/444); Connecticut – Fairfield County (149/247). WMBC has not put forth any story counts for Putnam, Dutchess or Ulster Counties in New York.").

[11] Cablevision Systems, 11 FCC Rcd 6453, ¶ 59 (CSB 1996), aff'd, WLNY-TV, 163 F.3d 137 (2d Cir. 1998) ("We also note that while WHAI-TV provides Grade B service to some of the Long Island communities named in the petition, the intervention of Long Island sound between these communities and the Bridgeport situs of the station appears to be a logical boundary to its market area and validates the absence of audience and historic carriage as appropriate market defining evidence.")

By failing to follow well-established precedent here, without explanation, the Bureau Order was arbitrary and capricious.

Advertising – TWC also had explained, and the Bureau has ignored, that local advertising practices also reflect a non-unified market. For example, TWC has separate local advertising sales and distribution functionality on each island, and two distinct zones just for Hawaii County (Kona and Hilo). Advertisers with Oahu based businesses advertise in the Oahu communities, advertisers with Maui based businesses advertise in the Maui communities, and advertisers with island of Hawaii based businesses advertise in Kona and Hilo.[12] This is consistent with the record here that commercial, economic, labor and shopping ties between the islands are limited, facts that the Bureau Order improperly glosses over. The fact that KLEI's programming has no measurable viewership in any of the affected communities, and that KLEI points to no advertising sales to businesses not in Hawaii County, only reinforces this fact.

Creation of A New Cultural and Geographic Uniqueness of Factor – Skirting the fact that none of KLEI's programming is tailored in any specific manner to any of the Communities, the Bureau Order instead asserts that there exists a shared and unique cultural affinity among all communities and people on all the Hawaiian islands such that what is specific to a particular island or locale is to be treated as of interest everywhere throughout the state. The Petition for Reconsideration explains that the Bureau Order's invention of this new "cultural identity" justification is an entirely arbitrary treatment that has never been recognized or applied by the Commission in any prior market modification proceeding or in any other geography or context. The Oppositions cite to no case in support of this novel "cultural uniqueness" theory. By failing to provide a reasoned analysis for such a radical departure, the Bureau Order was arbitrary and capricious.

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[12] The fact that a DMA has been divided into discrete zones for advertising purposes is yet another factor indicating that KLEI's natural economic market does not extend to islands beyond its city of license. See, e.g., Cablevision Systems, 11 FCC Rcd 6453, ¶ 45 (CSB 1996), aff'd, WLNY-TV, 163 F.3d 137 (2d Cir. 1998).

Defending the Bureau, the DCCA cites to the numerous supporting filings by state government agencies and officials proclaiming a truly shared and unique cultural Hawaiian identity that justifies "treating all of Hawaii as a unified market." It is well established that the Commission can not abdicate it responsibility to make market modification decisions to state politicians or agencies.[13] And while it is not uncommon for parochial state officials to sincerely proclaim that their state or locale is culturally and geographically "unique," uniqueness is not exclusive to Hawaii as every state has its own special circumstances and histories that could justify just the same treatment. Treating Hawaii as "special" only opens the door to undermine the entire statutory scheme, allowing each state or region to be arbitrarily defined as a "unified" market for must-carry purposes in circumstances where the enumerated statutory factors properly indicate just the opposite.

In sum, TWC's Petition clearly satisfied the statutory criteria for market modification. In holding otherwise, and by inventing a new Hawaiian specific cultural identity factor, the Bureau Order is contrary to law, is arbitrary and capricious, and should be reversed.

II. TWC'S FIRST AMENDMENT RIGHTS

The Petition for Reconsideration explained that requiring carriage of KLEI far beyond its natural market violates TWC's First Amendment rights under both strict and intermediate scrutiny. Mauna Kea initially responds citing to the Supreme Court's decisions in Turner I and Turner II upholding the must-carry regime in general, an argument that is misplaced as "the Turner cases do not foreclose the possibility of a successful as-applied First Amendment challenge to the 1992 Cable Act's market modification provisions."[14] In fact, the Court "expressly declined to decide whether a market modification order motivated by a concern for localism would be content based or content neutral."[15]

[13] See 47 U.S.C. § 544(a) ("Any franchising authority may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with this subchapter.").

[14] Cablevision 570 F.3d at 95.

[15] Id. at 97 (citing Turner Broadcasting System Inc. v. FCC, 512 U.S. 622, 644 n.6 (1994) [hereinafter "Turner I"]).

Impositions on the rights conferred by the First Amendment based upon the content of the message communicated are subject to strict scrutiny.[16] As the Bureau Order relied exclusively on a content-based analysis of KLEI's programming in denying TWC's market modification petition, strict scrutiny applies.[17] Thus, the Bureau Order fails because it is not narrowly tailored to promote any compelling government interest in requiring that TWC carry KLEI far beyond its natural market, and the Oppositions offer none.[18]

The Petition for Reconsideration also explained that the Bureau Order does not survive under intermediate scrutiny, as a *de novo* analysis of the government interests at stake[19] shows that previous justifications are no longer important government interests, and even if they were, the Bureau Order "burden[s] substantially more speech than necessary to further those interests."[20] The first of the government interests cited by the Oppositions is that of "preserving the benefits of free over-the-air local broadcast television."[21] However, the recent adoption of the "Middle Class Tax Relief and Job

[16] See Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 230 (1987); Carey v. Brown, 447 U.S. 455, 464-68 (1980); see also R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

[17] The Bureau order grants Mauna Kea government benefits – mandatory carriage of KLEI well outside its natural market – and restricts TWC's rights to air the programming of its choice based on little more than an analysis of the content of KLEI's programming.

[18] See, e.g., Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126 (1989). Though the Turner courts found that the government, at the times they were decided, had an important interest in "preserving the benefits of free, over-the-air local broadcast television" it has never been found that the government has a compelling interest in "preserving" an over-the-air broadcast far beyond where that broadcast could be received over-the-air. Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 189 (1997) [hereinafter "Turner II"]. Even granting the government's interest, as stated in the Bureau Order, in giving KLEI an opportunity to establish an audience across the entire state of Hawaii, the Bureau does not show that the means of achieving this interest are narrowly tailored, particularly when other means, such as KLEI putting its programming on the Internet, will serve the same interest.

[19] Because the Turner Courts declined to address market modification orders motivated by localism concerns, the first step in an as-applied challenge to the Bureau Order under O'Brien must be a *de novo* analysis of the government interests at stake. Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193, 203-06129 S. Ct. 2504, 2512, 2513 (2009) (citation omitted); see also Comcast Corp. v. FCC, 579 F.3d at 1, 9-10 (D.C. Cir. 2009); Radio-Television News Directors Dirs. Ass'n v. FCC, 184 F.3d 872, 882 (D.C. Cir. 1999).

[20] Turner II, 520 U.S. at 187 (citing Turner I, 512 U.S. at 665). Further, the Bureau Order "burden[s] substantially more speech than necessary to further those interests" by mandating carriage of KLEI when the station could, for example, provide its programming over the Internet. FCC Chairman Genachowski recently noted that "[o]nline ad revenues for TV stations have crossed the $1 billion-a-year mark, at $1.2 billion for 2011 up almost one-third over the last three years." Julius Genachowski, Chairman, FCC, Remarks at the NAB Show at 2 (April 16, 2012).

[21] Turner II, 520 U.S. at 189 (citing Turner I, 512 U.S. at 662).

Creation Act of 2012,"[22] incentivizing television broadcast licensees to "relinquish voluntarily some or all of [their] licensed spectrum usage rights" for other uses,[23] demonstrates that government priorities have shifted. Congress placed no limit on how many television broadcasters may auction off their licenses, indicating that the government now believes that ensuring a "base number of broadcasters survive"[24] is no longer an important government interest. Moreover, with billions in retransmission consent fees, and additional revenue through multicast streams and online video, the financial health of the television industry is no longer in question.[25] In any event, the Bureau Order does not further the interests of preserving over-the-air local broadcasts by mandating carriage of a station where it cannot be received over-the-air.

The second government interest cited is that of "promoting the widespread dissemination of information from a multiplicity of sources."[26] Reduced vertical integration in the cable industry, well below 1992 levels, and the explosion of video content available from competing MVPDs and on the Internet has led to an abundance of media voices heretofore unknown.[27] The third government interest cited is to promote fair competition in the television programming market, and preventing cable operators from using their "bottleneck" to anticompetitively deny over-the-air broadcast signals to non-cable subscribers. Today, though, competition from video programming delivered by DBS and telephone companies, as well as the rise of Internet video, has eliminated any of the bottleneck power over video programming that concerned Congress in 1992.[28]

[22] Pub. L. No. 112-96, 125 Stat. 156 (2012).

[23] 47 U.S.C. § 309(j)(8)(G)(i).

[24] Turner II, 520 U.S. at 222.

[25] In fact, FCC Chairman Julius Genachowski recently noted that "[o]nline ad revenues for TV stations have crossed the $1 billion-a-year mark, at $1.2 billion for 2011 up almost one-third over the last three years." Prepared Remarks Of FCC Chairman Julius Genachowski Federal Communications Commission NAB Show 2012 NV (April 16, 2012).

[26] Id. at 189 (citing Turner I, 512 U.S. at 662)

[27] Revision of the Commission's Program Access Rules, Notice of Proposed Rulemaking, MB Docket No. 12-68 et al., FCC 12-30 (rel. Mar. 20, 2012) at App. B, Table 1.

[28] As the D.C. Circuit recently concluded, "[c]able operators... no longer have the bottleneck power over programming that concerned Congress in 1992." Comcast Corp. v. FCC, 579, F.3d at 8 (D.C. Cir. 2009).

CONCLUSION

TWC's Petition should have been granted because it satisfies the criteria set forth in the 1992 Cable Act. KLEI has not been historically carried on the Systems and there is no record of any viewership of KLEI in the Communities. KLEI is geographically removed from the Communities, and clearly does not provide local programming service to them, in contrast to the local stations carried on the Systems. The facts demonstrated on the record 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 October 19, 2012 Bureau Order should be overturned to properly exclude the Communities from KLEI's DMA.

The undersigned verify that they have read the foregoing Reply and, to the best of their knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact, is warranted by existing law, and is not interposed for any improper purpose.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Glenda Thompson, a secretary at the law firm of Edwards Wildman Palmer LLP, hereby certify that copies of the foregoing "Reply" were served this 14th day of January, 2013 via first-class mail, postage prepaid, upon the following:

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