

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

In the Matter of Petition of)	
)	
Red River Broadcast Corp.)	CSR-4877-A
)	
For Modification of the Television)	
Market for Station KDLT)	

MEMORANDUM OPINION AND ORDER

Adopted: May 7, 1997

Released: May 13, 1997

By the Deputy Chief, Cable Services Bureau:

INTRODUCTION

1. Red River Broadcast Corp., licensee of Station KDLT (ABC, Ch. 5), Mitchell, South Dakota ("KDLT"), has filed the captioned petition which seeks to include Clay County, South Dakota in the "Area of Dominant Influence" of Station KDLT, currently served by Vermillion Cable TV ("Vermillion"). Vermillion filed an opposition to the petition and KDLT filed a reply.

BACKGROUND

2. Pursuant to §614 of the Communications Act and implementing rules adopted by the Commission in its *Report and Order in MM Docket 92-259*,¹ a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "Area of Dominant Influence," or ADI, as defined by the Arbitron Audience research organization.² For purposes of this calculation, both

¹ 8 FCC Rcd 2965-2977 (1993).

² Section 4 of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.4555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for the purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

over-the-air and cable television viewing are included.³

3. Under the Act, however, the Commission is also directed to consider changes in market areas. Section 614(h)(1)(C) provides that the Commission may:

with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the Act provides that:

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

(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 local 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

(IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable systems or systems in such community.⁴

4. The legislative history of this provision indicates that:

where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve

³ Certain counties are divided into more than one sampling unit because of the topography involved. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. Refer to Arbitron's *Description of Methodology* handbook for a more complete description of how counties are allocated.

⁴ Communications Act of 1934, as amended, §614(h)(1)(C)(ii), 47 U.S.C. §534(h)(1)(C)(ii).

and which form their economic market.

* * * * *

(This subsection) establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.⁵

5. The Commission provided guidance in its *report and Order MM Docket 92-259, supra*, to aid decision making in these matters, as follows:

For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's lineup (e.g., rate cards) for a period of years. To show that the station provides coverage or other local service to the community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.⁶

6. In adopting rules to implement this provision, the Commission indicated that requested changes should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.⁷ The rules further provide, in accordance with the requirements of the 1992 Cable Act, that a station not be deleted from carriage during the pendency of an ADI change request.⁸

7. Adding communities to a station's market generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable

⁵H.R. Rep. No. 628, 102d Cong., 2d Sess. 97 (1992).

⁶8 FCC Red at 2977 (emphasis in original).

⁷8 FCC Red at 2977 n.139.

⁸47 C.F.R. §76.59.

system operator is generally required to devote no more than one-third of the system's activated channel capacity to compliance with the mandatory signal carriage obligations,⁹ 2) the station is responsible for delivering a good quality signal to the principal headend of the system,¹⁰ and 3) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried, or the signals of more than one local station affiliated with a particular broadcast network.¹¹ If, pursuant to these requirements, a system operator elects to carry only one such duplicating signal, the operator is obliged to carry the station from the ADI whose city of license is closest to the principal headend of the cable system.¹² Accordingly, depending upon the circumstances involved, the addition of communities to a station's market may have the following consequences. It may guarantee that station's carriage in the subject communities. Should there be more must-carry stations that one-third of the system's channel capacity, it would provide the system operator with an expanded list of must-carry signals from which to choose. Should the station be a duplicating network station, it will determine which station has priority carriage in the subject communities added.

MARKET FACTS AND PETITIONER'S ARGUMENT

8. KDLT is licensed to Mitchell, South Dakota, which in turn, is located in the Sioux Falls-Mitchell, South Dakota ADI.¹³ Vermillion provides cable service to Vermillion, South Dakota, which is in the Sioux City, Iowa ADI. KDLT requests modification of the Sioux Falls-Mitchell, South Dakota ADI to include the community of Vermillion.

9. KDLT maintains that Vermillion illegally deleted KDLT from its channel lineup on October 1, 1996, after fifteen years of continuous carriage. KDLT states that Vermillion dropped its station without giving the required 30-day advance written notice to the station, in direct violation of §76.58(a) of the Commission's Rules.¹⁴ KDLT asks that the Commission order Vermillion to restore carriage of Station KDLT immediately, while its ADI modification petition is being considered. Further, KDLT presents evidence that Vermillion should be included in Station KDLT's market, when considered under the four factor test set forth in Section 614(h)(1)(C)(iii) of the Communications Act. KDLT asserts that Station KDLT was included in Vermillion's channel lineup as early as March 1, 1981, just three months after the cable franchise

⁹See 47 U.S.C. §534(b)(1)(B).

¹⁰See 47 U.S.C. § 534 (h)(1)(B)(iii).

¹¹See 47 U.S.C. §534(b)(5).

¹²8 FCC Rcd at 2981.

¹³See Arbitron's 1991-1992 Television ADI Market Guide, pp. 1259, 3304.

¹⁴The Commission's Rules require a cable system to "provide written notice to any broadcast television station at least 30 days prior to either deleting from carriage or repositioning that station." See 47 C.F.R. §76.58(a).

was granted. KDLT states that other cable systems in Clay County have carried the station for the past nine years and still do. KDLT argues that this history of carriage is entitled to substantial weight and demonstrates that Vermillion's subscribers value Station KDLT and the services that Station KDLT provides. KDLT further contends that the requested market modification would facilitate continuation of the status quo which would benefit subscribers. Further, KDLT states that loss of cable viewer access to Station KDLT would cause viewer disruption; disruption which the statutory market modification provisions were designed to prevent.

10. In addition to its long term carriage, KDLT points out the following: 1) KDLT carries local programming of interest to Vermillion's subscribers; 3) KDLT's has a high level of viewership in the community; and 4) Vermillion is currently considered by Nielsen to be in the same Designated Market Area (DMA) as Station KDLT. Further, KDLT asserts that its viewership in Clay County is demonstrated by the station's 10% total viewing hours and 45% net weekly circulation reported for Clay County.¹⁵ This data, argues KDLT, demonstrates that Station KDLT's programming, including extensive local service appeals, is watched by viewers in Clay County communities. Finally, KDLT asserts that Station KDLT's Grade B Contour completely encompasses all of Clay County.

11. Vermillion opposes KDLT's request to reinstate carriage of its signal during the pendency of this proceeding. Vermillion states that KDLT was well aware of its plans to delete the station in response to continuous subscriber complaints regarding Station KDLT's picture quality and the duplication of broadcast programming between NBC affiliates KDLT and KTIV-TV of Sioux City, Iowa. Vermillion also contends that numerous conversations between Vermillion and KDLT senior managers provided notice to KDLT of the on-going signal quality problems and Vermillion's concerns that continued carriage would affect its competitive position. Vermillion states that after two years with no improvement in the signal quality and despite continuous assurances by KDLT executives that such improvements would be made, Vermillion dropped Station KDLT from its channel lineup on October 1, 1996, after giving thirty days' advance written notice to its subscribers. While, it admits that formal written notification was not provided to KDLT, Vermillion asserts that KDLT was clearly aware of Vermillion's intent to drop the signal. Vermillion contends that without KDLT's assurance that its signal would be improved, KDLT should not be allowed to benefit from Vermillion's tolerance.

12. Vermillion states that KDLT's local programming is questionable, pointing out that bulk of KDLT's local programming is news about the University of South Dakota. While the University of South Dakota is located in Vermillion, Vermillion maintains its programming can hardly be considered "local" to the City of Vermillion. Finally, Vermillion concedes that while KDLT achieves high viewership percentages in Clay County, this does not detract from the popularity of the stations currently located in Vermillion's ADI.

¹⁵See Nielsen's 1995 Diary County/Coverage Study, p. 3305.

13. KDLT asserts in its reply that Vermillion admits that it did not provide the mandatory advance written notice to KDLT required by Section 76.58(a) before the station from its lineup. KDLT further states that Vermillion's has submitted no evidence in support of its claim that KDLT's signal quality was unsatisfactory. Had Vermillion complied with its legal obligations, KDLT points out that it would have been able to invoke its statutory rights to preserve the *status quo* by filing its ADI modification request earlier. KDLT asserts that when it called Vermillion after learning of the deletion, Vermillion stated it would now have to begin paying copyright royalty fees to carry KDLT, and it simply did not want to incur that expense. KDLT further states that it received a letter from Vermillion's counsel explaining why it was deleting Station KDLT. That letter, states KDLT, says absolutely nothing about signal quality. Instead, the letter explains why the system would have to begin paying copyright royalty fees.¹⁶

DISCUSSION

14. We shall grant KDLT's petition for market modification. The evidence the station submits, evaluated pursuant to the four statutory and other relevant factors, persuades us that Vermillion, South Dakota is properly considered part of KDLT's ADI. With regard to the first statutory factor, we note that KDLT has demonstrated a history of carriage on the cable system serving the community in question.¹⁷ A pattern of carriage, in the absence of a carriage obligation, is a strong indication of interest in a signal and of the signal's market connection to the communities in question.¹⁸ Turning to the second statutory factor, we note that KDLT places a Grade B contour of all of Clay County. We have stated previously that, as a general matter, Grade B coverage demonstrates service to cable communities and serves as a measure of a station's natural economic market.¹⁹ Moreover, KDLT's has demonstrated that it carries programming relevant to Vermillion.. Contrary to Vermillion's statements, we believe that programming about the University of South Dakota, which is located in Vermillion, is locally oriented programming. Further, it is undisputed that KDLT's signal is receivable off-the-air in Vermillion. With regard to the third statutory factor -- whether other stations eligible to be carried serve the communities -- in general, we do not believe that Congress intended this third criterion to operate as a bar to a station's ADI claim whenever other stations could also be shown to serve the communities at issue. Rather, we believe that this criterion was intended to enhance

¹⁶Nothing in the memorandum of Vermillion's counsel that was provided to KDLT provides any explanation as to why copyright payments, which are payable on a twice yearly basis, would cause the system to delete the signal of KDLT on October 1 without complying with the thirty day notice requirement.

¹⁷KDLT was apparently carried by Vermillion for approximately 15 years prior to its deletion.

¹⁸See *KTEN Television Limited Partnership*, 11 FCC Rcd 10355, 10361 (1996).

¹⁹See *Broadcast Signal Carriage Issues*, 8 FCC Rcd at 2977. See also *Amendment of Section 76.51 (Orlando-Daytona Beach-Melbourne-Cocoa, Florida)*, 102 FCC 2d at 1070 ("We believe that television stations actually do or logically can rely on the area within their Grade B contours for economic support.")

a station's claim where it could be shown that other stations do not serve the communities at issue. Under such circumstances, a denial of carriage rights to the claiming station could deprive cable viewers of any broadcast signals that might provide programming geared to their communities. In this case, although Sioux City ADI stations also service Vermillion's subscribers, this enhancement factor would not appear to be applicable. Turning to the fourth factor, that of area viewing patterns, the Nielsen data which KDLT submits indicates that the station has a significant share of viewing in Clay County which demonstrates a clear and substantial nexus between Clay County and KDLT. In fact, Nielsen's *1995 County/Coverage Study* indicates that KDLT's viewership levels exceeds all but two of the reported Sioux City stations.²⁰ Furthermore, we note that the Commission has held that the fact that a station, such as KDLT, is located in the same DMA as a subject community would be given consideration in ADI modification proceedings.²¹

15. Finally, we find that Vermillion has presented no evidence of poor signal quality to substantiate its reason for deleting carriage of KDLT from its line-up without official notification. Moreover, Vermillion has failed to present any evidence that KDLT does not meet all of the criteria pursuant to §614 of the Communications Act. We find, therefore, that Station KDLT is a qualified station entitled to carriage on Vermillion's cable system serving the community of Vermillion, South Dakota located in Clay County, South Dakota. Moreover we find that Vermillion apparently violated §§76.58(a) and 76.964 of the Commission's rules by failing to provide KDLT thirty days written notice of its intention to drop the station. In this regard, Vermillion will be ordered to disclose the full circumstances of its apparent violation of §§76.58(a) and 76.964 of the Commission's rules within 30 days of the release of this order. Additionally, Vermillion will be required to commence carriage of KDLT within twenty (20) days of the release date of this order. In this regard we will waive the notice provisions of §§76.58(a) and 76.964 of the Commission's rules

ORDERING CLAUSES

16. Accordingly, **IT IS ORDERED**, pursuant to §614(h) of the Communications Act of 1934, as amended, 47 U.S.C. §534 and §76.59 of the Commission's Rules, 47 C.F.R. §76.59, that the petition for special relief (CSR-4877-A) filed on behalf of Red River Broadcast Group **IS GRANTED**, and Vermillion Cable TV **IS ORDERED** to commence carriage of Station KDLT twenty (20) days after the release date of this **ORDER**. Station KDLT shall notify the relevant cable system in writing of its carriage and channel position election (§§ 76.56, 76.57, and

²⁰KDLT's reported shares are 10% share of total viewing hours and a net weekly circulation of 45%. The listed Sioux City stations and their respective shares are: KCAU (10% total viewing share/83% net weekly circulation); KMEG (5% total viewing share/46% net weekly circulation); KSIN (2% total viewing share/32% net weekly circulation); KTIV (15% total viewing share/77% net weekly circulation); and KXNE (only 16% share of net weekly circulation reported).

²¹ *Report and Order and Notice of Further Rulemaking*, 11 FCC Rcd. 6201 (1996).

76.64(f) of the Commission's Rules) within ten (10) days of the release date of this **ORDER**.

17. **IT IS ALSO ORDERED**, that Vermillion shall provide a full explanation, within thirty (30) days of the release date of this order, of the circumstances surrounding its dropping of station KDLT in apparent violation of §§ 76.58(a) and 76.964 of the Commission's rules

18. This action is taken pursuant to authority delegated by §0.321 of the Commission's Rules, 47.C.F.R. §0.321.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau