

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

In the Matter of:
Amendment of Section 76.51
Of the Commission's Rules
To Include Merced and
Porterville, California in the
Fresno-Visalia-Hanford-Clovis
Television Market
CS Docket No. 00-1

REPORT AND ORDER

Adopted: June 14, 2000

Released: June 20, 2000

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Before the Commission is the Notice of Proposed Rule Making ("Notice") in the captioned proceeding, issued in response to a joint petition filed by Pappas Telecasting Incorporated ("Pappas"), licensee of television station KMPH(TV), Visalia, California, Retlaw Enterprises, Inc. ("Retlaw"), licensee of television station KJEO(TV), Fresno, California, and San Joaquin Communications Corp. ("San Joaquin"), licensee of television station KSEE(TV), Fresno, California (collectively, the "Joint Petitioners"). The Notice proposes to amend Section 76.51 of the Commission's rules to add the communities of Merced and Porterville, California to the Fresno-Visalia-Hanford-Clovis hyphenated television market ("Fresno-Visalia" market). The Notice also seeks comment on the petition for amendment or waiver of Section 76.51 with respect to the community of Merced that was filed by Capital Cities/ABC, Inc. ("CC/ABC"). In response to the Notice, three comments were filed with the Commission, all of which were in favor of the action requested by the petitioners.

1 Amendment of Section 76.51 of the Commission's Rules to include Merced and Porterville, California in the Fresno-Visalia-Hanford-Clovis Television Market, Notice of Proposed Rule Making, CS Docket No. 00-1, DA 00-12 (CSB rel. Jan. 7, 2000).

2 Subsequent to the filing of the joint petition, Retlaw sold television station KJEO to Fisher Broadcasting, Inc.

3 Television station KSEE is currently owned by KSEE License, Inc.

4 47 C.F.R. § 76.51.

5 "Request for Commission Action on a Joint Petition for Rulemaking to Amend Section 76.51 of the Rules and Statement in Support of Capital Cities/ABC Application for Amendment of Section 76.51 or Waiver of Sections 76.92 and 76.151 in Merced, California" filed February 12, 1993.

## II. BACKGROUND

2. Section 4 of the Cable Television Consumer Protection and Competition Act of 1992 (the “1992 Act”)<sup>6</sup> added Section 614 to the Communications Act of 1934.<sup>7</sup> Section 614 requires that the Commission make revisions needed to update the list of top 100 television markets and their designated communities.<sup>8</sup> Section 76.51 of the Commission’s rules enumerates the top 100 television markets and the designated communities within those markets. Among other things, the top 100 market list is used to determine territorial exclusivity rights under Section 73.658(m) of the Commission’s rules<sup>9</sup> and helps define the scope of compulsory copyright license liability for cable operators.<sup>10</sup> In addition to broadcast territorial exclusivity, television stations that are part of a hyphenated market may assert network non-duplication rights<sup>11</sup> and syndicated programming exclusivity<sup>12</sup> against other television stations throughout the hyphenated market. A hyphenated television market, a television market that consists of more than one named community, is based upon the premise that stations licensed to any of the named communities therein compete with all stations licensed to such communities.<sup>13</sup> Market hyphenation “helps equalize competition” where portions of the market are located beyond the Grade B contours of some stations in the area yet the stations compete for economic support.<sup>14</sup>

3. In evaluating past requests for hyphenation of a market, the Commission has considered the following factors as relevant to its examination: (1) the distance between the existing designated communities and the community or communities proposed to be added to the designation; (2) whether cable carriage, if afforded to the subject station, would extend to areas beyond its Grade B signal coverage area; (3) the presence of a clear showing of a particularized need by the station requesting the change of market designation; and (4) an indication of benefit to the public from the proposed change. These factors help the Commission evaluate the individual market conditions consistent “with the underlying competitive purpose of the market hyphenation rule” which is to delineate areas where stations compete.<sup>15</sup>

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<sup>6</sup> Pub.L.No. 102-385, 106 Stat. 1460 (1992).

<sup>7</sup> 47 U.S.C. § 614.

<sup>8</sup> *Id.*

<sup>9</sup> 47 C.F.R. § 73.658(m). Section 73.658(m) provides that a television station may obtain territorial exclusivity against a television station licensed to another designated community in a hyphenated market specified in the top 100 market listing contained in Section 76.51.

<sup>10</sup> Copyright laws provide local signal copyright liability to stations throughout their mandatory cable carriage area, that is, throughout the “designated market areas” (“DMAs”). *See* Telecommunications Act of 1996, 47 U.S.C. § 534(h)(1)(C).

<sup>11</sup> *See* 47 C.F.R. § 76.92.

<sup>12</sup> *See* 47 C.F.R. §76.151.

<sup>13</sup> *See* CATV Non-Network Agreements, 46 FCC 2d 892, 898 (1974).

<sup>14</sup> *See Cable Television Report & Order*, 36 FCC 2d 143, 176 (1972).

<sup>15</sup> *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*, 7 FCC Rcd 8591, 8592.

### III. DISCUSSION

4. A “hyphenated market” has been described by the Commission as a television market that contains more than one major population center supporting all stations in the market, with competing stations licensed to different cities within the market area.<sup>16</sup> Market hyphenation helps to equalize competition among stations in a market where portions of the market are located beyond the Grade B contours of some stations in the area yet the stations compete for economic support.<sup>17</sup> Pappas and Fisher Broadcasting Incorporated (“Fisher”) state that the factors indicating that the communities of Merced and Porterville should be added to the Fresno-Visalia market that are cited in the original joint petition are even more true today.<sup>18</sup> At the time that the joint petition was filed, there were applications on file with the Commission to commence television service in the communities of Merced and Porterville. Subsequent to the filing of the joint petition, television station KNSO, Channel 51, was licensed to Merced and television station KPXF, Channel 61, was licensed to Porterville.<sup>19</sup> Pappas and Fischer maintain that the new stations licensed to Merced and to Porterville compete with other television stations licensed to communities in the Fresno-Visalia market. In addition, the commenters argue that advancements in technology and in alternate delivery systems make the grant of syndicated exclusivity and network non-duplication rights imperative to stations licensed to those communities.<sup>20</sup>

5. With regard to the distance between communities in the Fresno-Visalia market and the communities of Merced and Porterville, the first factor for evaluating market hyphenation requests, commenters Gary M. Cocola (“Cocola”), licensee of KGMC(TV), and Paxson Communications License Company, LLC (“Paxson”), licensee of television station KPXF, state that the communities of Merced and Porterville have long been an integral part of the Fresno-Visalia market.<sup>21</sup> Specifically, Cocola and Paxson state that the City of Fresno lies at the geographic center of the Fresno-Visalia market and that Merced is approximately 50 miles north of Fresno and that Porterville is approximately 70 miles south of Fresno.<sup>22</sup> Cocola and Paxson note that, in similar proceedings, the Commission has concluded that communities separated by greater distances can form the same television market.<sup>23</sup> The commenters argue that, because of their geographic proximity, Merced and Porterville share a common social, cultural, and economic bond with communities in the Fresno-Visalia market that is based on the local agribusiness economy. Cocola and Paxson further note that Merced and Porterville are included in Nielsen’s Fresno-Visalia “designated

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<sup>16</sup> See *Cable Television Report and Order*, 36 FCC 2d 143, 176 (1972).

<sup>17</sup> *Id.*

<sup>18</sup> Pappas and Fisher Comments at 1.

<sup>19</sup> Television station KPXF was formerly television station KKAG, see *Television & Cable Factbook*, Vol. 66, A-123 (1998).

<sup>20</sup> Pappas and Fisher Comments at 1.

<sup>21</sup> Cocola Comments at 1-2, Paxson Comments at 1-2.

<sup>22</sup> *Id.*

<sup>23</sup> Cocola Comments at 2 and Paxson Comments at 2, citing *Busse Broadcasting Corp.*, 11 FCC Rcd 6408, 6422-25 (1996) (granting market modification petition to add communities located 65 to 100 miles from the station’s community of license) and *Pappas Telecasting Inc.*, 11 FCC Rcd 6102 (1996) (granting market modification petition to add community located approximately 65 miles from television station’s community of license).

market area” or DMA and, prior to that designation, were included in Arbitron’s Fresno-Visalia “area of dominant influence” or ADI.<sup>24</sup>

6. We find that the distance between the existing designated communities and the communities of Merced and Porterville, 50 miles and 70 miles respectively, indicates that the communities are sufficiently proximate to be deemed part of the Fresno-Visalia hyphenated market. In the Notice, the Commission noted the well-defined topography of the Fresno-Visalia market including the Coast Ranges Mountains marking its western border and the Sierra Nevada Mountains marking the eastern border.<sup>25</sup> In addition, we note that the Fresno-Visalia market is bounded by the Sacramento-Stockton-Modesto television market to the north and the Bakersfield television market to the south.<sup>26</sup> Thus, the Fresno-Visalia market consists predominately of farming communities located within the central San Joaquin Valley floor which indicates commonality among the communities.<sup>27</sup>

7. With regard to the second factor for evaluating market hyphenation requests, we find that cable carriage, if afforded to television station KNSO on a hyphenated market basis, would extend beyond its Grade B signal coverage area. Merced station KNSO does not provide Grade B coverage over the communities in the Fresno-Visalia market.<sup>28</sup> In contrast, Porterville station KPXF does place a Grade B contour over the communities in the Fresno-Visalia market.<sup>29</sup> However, Joint Petitioners point out that all of the stations currently in the Fresno-Visalia market, with the exception of KMPH, place a predicted Grade B contour over Merced.<sup>30</sup> Joint Petitioners further maintain that KMPH has a significant viewership in Merced County<sup>31</sup> and that KMPH, as well as the other television stations in the market, are carried on the cable system serving Merced.<sup>32</sup> TCI Cablevision of California, which provides cable service to communities in the Fresno-Visalia market and to Merced, carries independent television station KMPH as well as the network affiliates KFSN, KJEO, and KSEE.<sup>33</sup>

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<sup>24</sup> Cocola Comments at 2 and Paxson Comments at 2, *see* 1999 Broadcasting & Cable Yearbook at B-181. Effective January 1, 2000, Section 76.55(e) of the Commission’s rules require that a commercial television station’s market be defined by Nielsen Media Research’s DMAs, prior to that time television markets were defined by Arbitron’s ADIs. *See* 47 C.F.R. § 76.55(e). The change in television market definitions did not result in any additions to or deletions from the communities which comprise the Fresno-Visalia market. *See Definition of Markets for Purposes of the Cable Television, Broadcast Signal Carriage Rules, Order on Reconsideration and Second Report and Order*, 14 FCC Rcd. 8366 (1999).

<sup>25</sup> *See* Notice at ¶ 6.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at ¶ 5.

<sup>28</sup> *See* Television & Cable Factbook, Vol. 66, A-126 (1998).

<sup>29</sup> *Id.* at A-123.

<sup>30</sup> *See* Joint Petition at 11.

<sup>31</sup> In Merced, KMPH has an average cumulative weekly share of 39 percent during prime time. *See* Nielsen Station Index County/Coverage Study, Vol. 1 at 360 (1997).

<sup>32</sup> *Id.*

<sup>33</sup> *See* Television & Cable Factbook, Cable Vol. 67, D-147.

8. Commenters maintain that the Joint Petitioners have shown a particularized need to be added to the Fresno-Visalia market because incumbent Fresno-Visalia market stations actually compete with new stations KNSO and KPXF.<sup>34</sup> Cocola and Paxson state that Merced station KNSO and Porterville station KPXF compete with stations in the Fresno-Visalia market such as KGMC(TV), a station licensed to Fresno.<sup>35</sup> The commenters further state that residents of Merced and of Porterville are served by the same television stations as residents of the named communities in the Fresno-Visalia market, namely, KFSN-TV (ABC affiliate), KJEO(TV) (CBS affiliate), and KSEE (NBC affiliate).<sup>36</sup> In addition, Cocola and Paxson state that viewers in the Fresno-Visalia market receive WB programming from Merced station KNSO and PAXTV programming from Porterville station KPXF.<sup>37</sup> Thus, commenters maintain that “for many years, television stations throughout the Fresno-Visalia Market have acquired programming with the expectation that they would serve the market that has been defined consistently by Arbitron, Nielsen, and actual viewing patterns of residents in the area.”<sup>38</sup> The addition of the communities of Merced and Porterville to the Fresno-Visalia market would permit incumbent stations to protect their investments in programming and promotion through the assertion of network non-duplication and syndicated exclusivity rights. Thus, commenters argue that the Commission’s rules should reflect market reality.<sup>39</sup>

9. It appears from the record that television stations licensed to Merced and to Porterville compete for programming, audience, and advertisers in the proposed combined market area, and that sufficient evidence has been presented to demonstrate commonality between the two communities to be added and the market as a whole. In addition, the record indicates that the addition of the two communities to the Fresno-Visalia market will benefit the public by equalizing competition among stations, which will improve advertising revenues for those stations and programming options for residents. Thus, the Commission finds that a particularized need has been demonstrated to support the unopposed addition of Merced and Porterville to the Fresno-Visalia market. Based on the facts presented here, we believe that a case for redesignation of the subject market has been set forth and that the request to add Merced and Porterville to the Fresno-Visalia market should be granted

10. This proceeding is not intended to address the specific mandatory cable carriage, syndicated exclusivity or network non-duplication obligations of individual cable systems. Redesignation of the television market reflects in the Commission’s rules the general competitive situation that exists in the local area, allowing the application of the more specific rules, including those governing market modification, to be addressed from the perspective of a properly defined market.<sup>40</sup>

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<sup>34</sup> Cocola Comments at 2 and Paxson Comments at 2.

<sup>35</sup> Cocola Comments at 2-3 and Paxson Comments at 2-3.

<sup>36</sup> Cocola Comments at 3 and Paxson Comments at 3.

<sup>37</sup> *Id.*

<sup>38</sup> Cocola Comments at 3 and Paxson Comments at 3.

<sup>39</sup> *Id.*

<sup>40</sup> See *In the Matter of Amendment of Section 76.51 of the Commission’s Rules to Include Castle Rock, Colorado in the Denver, Colorado Television Market*, 10 FCC Rcd 10616 (1995); *In the Matter of Amendment of Section 76.51 of the Commission’s Rules to Include Fayetteville, North Carolina in the Raleigh-Durham-Goldsboro Television Market*, 11 FCC Rcd 4842 (1996).

**IV. ORDERING CLAUSES**

11. Accordingly, **IT IS ORDERED** that, pursuant to Section 614 of the Communications Act of 1934, as amended, 47 U.S.C. § 614, Section 76.51 of the Commission's rules, 47 C.F.R. § 76.51, **IS AMENDED**, effective thirty [30] days after publication in the Federal Register, to include Merced and Porterville, California, as set forth in Appendix A.

12. **IT IS FURTHER ORDERED** that this proceeding **IS TERMINATED**.

13. This action is taken by the Cable Services Bureau pursuant to authority delegated by Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

## FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson  
Deputy Chief  
Cable Services Bureau

**APPENDIX A**

Part 76 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 76 – MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

1. The authority for Part 76 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Section 76.51 is amended as follows:

**§ 76.51 Major television markets.**

\* \* \* \* \*

(72) Fresno-Visalia-Hanford-Clovis-Merced-Porterville, California.