

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

In the Matter of:)	
)	
Texas Cable Partners, L.P. d/b/a)	
Paragon Cable)	CSR-5384-A
)	
For Modification of the Dallas-Ft. Worth,)	
Texas ADI)	
)	
)	

ORDER ON RECONSIDERATION

Adopted: October 24, 2000

Released: October 30, 2000

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. KTAQ-TV 47, Greenville, Texas (“KTAQ”), has requested reconsideration of the Bureau’s decision granting Texas Cable Partners, LP. d/b/a Paragon Cable’s (“Paragon”) request for modification of the Dallas-Ft. Worth, Texas area of dominant influence (“ADI”).¹ An opposition to this petition was filed on behalf of Paragon to which KTAQ replied.

II. BACKGROUND

2. In its request for modification, Paragon sought to exclude KTAQ from carriage in its cable system communities of Coppell, Grapevine, Irving and Lewisville, Texas. At the time of the *Bureau Order* and prior to the Commission’s changeover from the use of Arbitron’s ADIs to Nielsen’s designated market areas (“DMAs”), Paragon’s cable system was located within the Dallas-Ft. Worth ADI. Now, Dallas, Denton and Tarrant Counties, where Paragon’s cable system is located, are located in the Dallas DMA. KTAQ is also assigned to the Dallas market. The Bureau granted Paragon’s request, finding that based on geography, and KTAQ’s failure to meet any of the market modification criteria, exclusion of KTAQ’s signal from Paragon’s communities for must carry purposes was warranted.

III. DISCUSSION

3. In support of its petition, KTAQ argues that the *Bureau Order* is in conflict with Commission policy and precedent and that new facts and circumstances have arisen since the decision was released. KTAQ maintains that while the Commission may consider market modifications, there is a strong presumption in favor of carriage. Therefore, KTAQ asserts, a cable operator must make a compelling showing when it seeks to exclude a station from cable carriage in its own market. KTAQ states that the

¹*Texas Cable Partners, L.P. d/b/a Paragon Cable*, 14 FCC Rcd 11734 (1999)(“*Bureau Order*”).

Bureau Order never specifically explained how Paragon overcame the presumption of carriage, and did not take into account facts and arguments raised by KTAQ.

4. While the *Bureau Order* recognized that KTAQ did not have an opportunity to build a record of historical carriage, KTAQ argues that this was because Paragon refused to carry its signal.² Therefore, it maintains, its lack of historic carriage should not be controlling in the market modification analysis.³ KTAQ states that if it were, the 1992 Cable Act would effectively prevent new stations, or home shopping and specialty stations such as KTAQ, from ever being carried. KTAQ points out that while the *Bureau Order* acknowledged that other cable systems “in the general vicinity of Paragon” carry KTAQ, it concluded that “it does not appear that there is a widespread carriage pattern of KTAQ in the general area served by Paragon.”⁴ KTAQ asserts that the Bureau’s semantic difference between “general vicinity” and “general area” is an arbitrary distinction for which it provides no support. KTAQ states that in its opposition, it explained that it was carried on cable systems serving over 50 communities in the Dallas market, most of which were contiguous to or in the general area of those communities served by Paragon.⁵ KTAQ argues that the Bureau’s conclusion that there is not widespread carriage of its signal fails to account for the close geographical relationship between Paragon’s communities and those served by other cable systems which have carried KTAQ since at least 1998.⁶ KTAQ states that the Commission has held that carriage on nearby cable systems can serve as evidence to define the logical scope of a station’s market.⁷ KTAQ contends that its carriage by TCI Cable throughout Dallas County, southeastern Denton County, and eastern Tarrant County provide evidence that its market extends to the subject communities.

5. KTAQ states that the *Bureau Order* claimed that because KTAQ “broadcasts primarily in a home shopping format,” its programming could not be considered local to the subject communities and discounted the station’s programming examples.⁸ KTAQ maintains that the Bureau overlooked the 17.5 hours of local religious programming that KTAQ broadcasts each week, the majority of which consists of the locally-produced program “Miracles Today,” which includes commentaries on events occurring within the communities served by Paragon.⁹ KTAQ states that the Bureau’s claim that KTAQ’s home shopping programming could not be considered “local” conflicts with numerous Commission rulings which state that home shopping programming services are responsive to issues confronting local communities.¹⁰ KTAQ

²*Bureau Order* at 11739.

³KTAQ points out that while Paragon has not historically carried its signal, Paragon’s corporate parent, Time Warner, has carried KTAQ on its cable system serving Greenville, Texas since 1995.

⁴*Bureau Order* at 11739.

⁵Petition at 3 and Exhibit 1. KTAQ states that there are an estimated 483,000 subscribers in these communities.

⁶*Id.* at Exhibit 2.

⁷See e.g., *MediaOne of Massachusetts, Inc.*, 13 FCC Rcd 3017 (1998); *Suburban Cable TV Co., Inc.*, 13 FCC Rcd 4757 (1997); *Erie County Cablevision, Inc.*, 13 FCC Rcd 8612 (1998); and *Comcast of Central New Jersey*, 13 FCC Rcd 1656 (1997).

⁸*Bureau Order* at 11740.

⁹Petition at 5.

¹⁰See e.g., *Nationwide Communications, Inc., d/b/a EagleVision*, 10 FCC Rcd 13050, 13053 (1995), citing *Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992*, Home Shopping Station Issues, 8 FCC Rcd 5321, 5327 (1993); *Paragon Cable of Pinellas County*, 10 FCC Rcd 13133, 13137 (1995); *Paragon Cable*, 10 FCC Rcd 9462, 9466 (1995); and *Time Warner Cable*, 10 FCC Rcd 8040, 8044

(continued...)

argues that the *Bureau Order's* finding that KTAQ did not provide local service to the subject communities because the station did not provide any information regarding its intention to increase its effective radiated power was an arbitrary determination.¹¹ KTAQ states that the Commission authorized its power increase in a construction permit dated February 12, 1999, information which was provided to the Bureau in KTAQ's opposition to Paragon's petition.¹² KTAQ points out that several Commission rulings have denied cable systems' requests for exclusion based, in part, on a station's pending application to extend their Grade B service contour.¹³ In this instance, KTAQ states that its application had already been granted and it had taken affirmative steps to make the increase.

6. KTAQ states that, despite the Bureau's assertion, it stated in its opposition that it intended to increase its effective radiated power.¹⁴ Moreover, while the *Bureau Order* indicated that it was not clear from the information supplied that KTAQ's Grade B signal would cover the subject cable communities, KTAQ states that its expanded Grade B will completely encompass the communities of Coppell and Lewisville; the community of Irving appears to be partially within the contour; and the community of Grapevine is on the fringe.¹⁵ KTAQ argues that an overwhelming majority of market modification rulings have denied petitions for exclusion where communities were either within or on the fringe of a station's Grade B.¹⁶ KTAQ states that even when a station's Grade B contour does not reach a cable system's communities, the Commission has found that the station's market may still include such communities.¹⁷ In addition, KTAQ points out that several Commission rulings have denied requests for exclusion where the communities were 45-85 miles distant.¹⁸ In this instance, KTAQ states that Paragon's communities are within 41-45 miles.¹⁹

7. While the *Bureau Order* determined that Paragon's carriage of other local television stations supported its market modification request, KTAQ notes that the Commission has ruled that a cable system's carriage of other local stations is only relevant when it is clear that the station which is the subject of the modification is not providing local service to the communities.²⁰ KTAQ reiterates that it provides

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(1995).

¹¹*Bureau Order* at 11741.

¹²Petition at Exhibit 3.

¹³See e.g., *Suburban Cable*, 13 FCC Rcd at 4764, 4767; and *Maranatha Broadcasting Company, Inc. v. Comcast Cablevision of Burlington County, Inc.*, 13 FCC Rcd 1629, 1636, 1639 (1997).

¹⁴Opposition to Petition for Special Relief at 2.

¹⁵*Id.* at Exhibit 5.

¹⁶See e.g., *Suburban Cable*, 13 FCC Rcd 4757 (1997) and *Maranatha Broadcasting*, 13 FCC Rcd 1629 (1997).

¹⁷See e.g., *Jasas Corporation*, 14 FCC Rcd 6968 (1999); *Erie County Cablevision*, 13 FCC Rcd 8612 (1998); *TWI Cable, Inc.*, 12 FCC Rcd 13187, 13191-92 (1997); and *WTTE, Channel 28 Licensee, Inc.*, 11 FCC Rcd 6050, 6059 (1996).

¹⁸See e.g., *TWI Cable*, at 13192; and *West Valley Cablevision Industries, Inc.*, 12 FCC Rcd 12103, 12109 (1997).

¹⁹Petition at 8 and Exhibit 6.

²⁰See *Rifkin/Naragansett South Florida CATV, Limited Partnership, d/b/a Gold Coast Cablevision*, 11 FCC Rcd 21090 (1996).

locally-produced religious programming to communities in and around Paragon's communities and also provides home shopping programming the Commission has determined satisfies the local criterion. KTAQ points out that not only has Paragon failed to establish that it offers any programming of a similar nature, but the Bureau failed to take KTAQ's unique local religious programming into account in its analysis.

8. With regard to viewership, KTAQ argues that the Commission has acknowledged that conventional ratings are not the most appropriate method to use for stations that offer religious and home shopping programming because they typically attract limited audiences.²¹ KTAQ states that the Commission found that a more appropriate means to measure viewership for home shopping stations was to determine how many people purchased products sold by such stations.²² KTAQ maintains that sales maps it included in its opposition to Paragon's petition and revised sales maps presented here demonstrate that, in 1998 and 1999, KTAQ's home shopping programming generated hundreds of calls from residents of communities contiguous to the subject communities.²³ KTAQ points out that, despite its acknowledgement that specialty stations typically attract limited audiences, the *Bureau Order* concluded that KTAQ's "dearth of viewership was of evidentiary significance."²⁴

9. Finally, KTAQ asserts that the *Bureau Order's* conclusion that the subject communities were not part of KTAQ's market was disingenuous considering the high regulatory fees that KTAQ is required to pay for being in the Dallas ADI. As a commercial UHF station in one of the top 10 markets in the country, KTAQ states that it was required to pay the Commission \$15,500 in regulatory fees for 1999.²⁵ As a result, KTAQ contends that the Commission is acting unfairly in treating KTAQ as part of the Dallas market for fee purposes, yet refusing to enforce the must carry obligations of a cable system which is required to carry the station.

10. In opposition, Paragon argues that KTAQ's petition is procedurally defective because it does not meet the requirements for reconsideration as set forth in Section 1.106 of the Commission's rules.²⁶ Paragon argues that KTAQ has failed to show either material error or omission by the Bureau and has failed to present any additional decisionally-significant facts or evidence not previously before the Bureau. Paragon contends that, except for a statement that it has obtained a proposal for a possible power increase and the submission of a revised map showing the location of home shopping product sales in 1999, KTAQ has rehashed arguments previously presented to the Bureau.

11. Paragon states that KTAQ's only showing in support of its allegation that it was carried in numerous communities contiguous to or in the same general area as Paragon's communities was a 1999 list of cable systems in the Dallas market that carried its signal.²⁷ Paragon argues that the Bureau's

²¹See e.g., *Amendment of Part 76, Subparts A and D of the Commission's Rules and Regulations Relative to Adding a New Definition for "Specialty Stations" and "Specialty Format Programming" and Amending the Appropriate Signal Carriage Rules*, 58 FCC 2d 442, 452 (1976), *recon. denied*, 60 FCC 2d 661 (1976); and *Cablevision of Cleveland, L.P. and V Cable, Inc.*, 12 FCC Rcd 15173, 15181, 15183 (1997).

²²See *Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992, Home Shopping Stations*, 8 FCC Rcd 5321, 5322 (1993).

²³Petition at Exhibit 7.

²⁴*Bureau Order* at 11741.

²⁵Petition at Exhibit 8.

²⁶47 C.F.R. §1.106.

²⁷Petition at 6 and Exhibit 4.

characterization of KTAQ's carriage status was well-reasoned and supportable. Paragon states that KTAQ has not presented any new evidence that would justify a different conclusion. Paragon argues that, despite KTAQ's assertion, the Bureau did not state that home shopping programming cannot be considered "local," but rather that KTAQ which "broadcasts primarily in a home shopping format . . . does not air programming that could be considered local to the cable communities at issue."²⁸ Paragon maintains that this conclusion did not flow from KTAQ's status as a home shopping station but merely from the assessment that the station's "Miracles Today" program could not be deemed to have any local nexus for Paragon's subscribers.²⁹ Paragon states that KTAQ fails to provide any new evidence to rebut this conclusion.

12. Paragon states that while KTAQ does not dispute that its licensed Grade B contour falls well short of the subject cable communities, it relies instead on its authorized improvement in effective radiated power as an indicator of local service.³⁰ Paragon points out, however, that the Bureau's conclusion was based on the absence of any information regarding the station's intention to increase its power as authorized by the Commission.³¹ Paragon points out that KTAQ submitted a transmission system proposal.³² However, Paragon argues that this letter merely describes a proposed transmission system for KTAQ, and there is no indication of a binding equipment sale proposal to KTAQ nor does KTAQ assert that it has made a commitment to purchase. Paragon states that it appears that nothing has transpired between the parties since that date. As such, Paragon maintains, there is no evidence to support a reassessment of KTAQ's intentions with regard to its power increase. In any event, Paragon argues that, from the information supplied by KTAQ, the Bureau was unable to ascertain in the modification proceeding whether the station's proposed Grade B contour would encompass the subject communities. Although KTAQ relies herein on a "Predicted Coverage Contours" map, as it did in the original proceeding, Paragon notes that the map has not changed.³³ Paragon states that while the map continues to show potential Grade B coverage over Lewisville and part of Coppell, it fails to encompass both Irving and Grapevine, the site of Paragon's headend facility. Paragon points out that in several recent decisions, the Bureau has shown a willingness to disregard Grade B coverage in favor of balancing the several market modification factors.³⁴

13. Although KTAQ asserts that the Bureau erroneously credited Paragon under the factor involving carriage of other local stations, Paragon argues that KTAQ's position is based on the fallacious premise that its programming "has a distinct nexus to the communities in the general area served by Paragon."³⁵ Paragon points out, however, that such a statement concedes that KTAQ fails to provide any local programming to Paragon's cable communities. Without such a linkage, Paragon maintains that its

²⁸Bureau Order at 11740.

²⁹*Id.*

³⁰Petition at 6.

³¹Bureau Order at 11740.

³²Petition at Exhibit 4.

³³*Id.* at Exhibit 5.

³⁴See e.g., *Time Warner Entertainment Co. v. FCC*, 56 F. 3rd 151, 175 (D.C. Cir. 1995); *accord Omnipoint Corp. v. FCC*, 78 F. 3rd 620, 633-634 (D.C. Cir. 1996); and *Budd Broadcasting Company, Inc.*, 13 FCC Rcd 15462, 15469 (1998)("The provision of Grade B coverage alone, apart from the other statutory factors, is insufficient to establish the nexus necessary to warrant market modification.").

³⁵Petition at 9.

carriage of other local stations is of evidentiary weight. In addition, Paragon states that the *Bureau Order* found KTAQ's attempt to establish viewing in the communities through merchandise sales lacking.³⁶ Paragon argues that the merchandise map KTAQ submitted in its reconsideration is not convincing.³⁷ Paragon points out that the map shows no circles, triangles or squares representing KTAQ sales in or in the immediate vicinity of Lewisville, Irving or Grapevine.³⁸ Paragon asserts that the fact that KTAQ generates telephone orders for its home shopping products from viewers in certain areas of the Dallas market does not establish KTAQ's viewership in the subject communities. Finally, Paragon argues that KTAQ's claim that its cable carriage throughout its market is somehow guaranteed by its payment of regulatory fees is unsupported. While Paragon acknowledges that KTAQ is assigned to the Dallas market for all purposes, including cable carriage and regulatory fee payments, it maintains that the market modification process is predicated on the value of localism, a test which KTAQ has failed to meet with respect to the communities herein.

14. In reply, KTAQ argues that the Commission's rules require only that a reconsideration petitioner offer new facts or evidence if the Commission has denied an application for review of the matter.³⁹ In any event, KTAQ claims that it presented new evidence regarding its power increase and demonstrated that specific conclusions in the *Bureau Order* were erroneous and should be reversed. As a result, KTAQ asserts that its petition is not procedurally defective.

15. KTAQ argues that Paragon's claim that the petition for reconsideration did not produce any evidence of local programming specific to the subject communities to be in error. KTAQ points out that the locally-produced "Miracles Today" program provides programming both to Paragon's communities and adjacent communities addressing such issues as racial and political turmoil in the Dallas County school system, racial discrimination and occult practices in Tarrant County, and drug and alcohol abuse in Dallas County.⁴⁰ KTAQ states that the cases Paragon cites in support of its position only involve syndicated programming which is neither locally produced nor targeted. Further, KTAQ states that while it has not yet made a commitment to accept a proposal to increase its power, this does not undermine the evidentiary value of a letter demonstrating KTAQ's intention to do so. KTAQ asserts that it fully intends to upgrade its facilities and is continuing negotiations. KTAQ states that it submitted a letter to demonstrate that it acted on the Commission's approval of its application to increase its maximum effective radiated power. KTAQ argues that not only does Paragon not dispute that several Commission rulings have denied cable systems' market modification petitions, in part based on a station's pending application to extend its Grade B contour, but it does not provide any example of the Commission granting a modification based on a station's failure to confirm that it will act on Commission approval of its construction permit. Moreover, KTAQ asserts that Paragon's reliance on *Maranatha Broadcasting* and *Suburban Cable* was misplaced because in both those decisions neither of the stations had historic carriage, the station's proposed Grade B contours (not yet approved) did not reach the communities, other stations entitled to carriage provided better coverage and there was no measured audience. KTAQ maintains that the stations in these cases asserted weaker evidentiary grounds for carriage than did KTAQ, particularly as KTAQ's construction permit had been granted at the time of the modification petition.

³⁶*Bureau Order* at 11741.

³⁷Petition at Exhibit 7.

³⁸Paragon notes that the community of Coppell is not shown on the map.

³⁹47 C.F.R. §1.106(b)(2).

⁴⁰Reply at 4.

16. With regard to Paragon's claim that KTAQ's "Predicted Coverage Contours" map fails to indicate Grade B coverage, KTAQ states that this map is on a small scale (15 miles per inch) and each community marked on the map encompasses a larger overall area than the tiny dot designating the center of each community may appear to indicate. KTAQ claims, therefore, that all of Paragon's communities, with the possible exception of Grapevine, are either encompassed by the proposed Grade B contour or substantially intersected by it.⁴¹ KTAQ submits an additional map to better illustrate how its Grade B contour intersects Paragon's communities.⁴² KTAQ argues that Paragon's reliance on cases where Grade B coverage was not determinative is misplaced. KTAQ notes that in *Budd Broadcasting* the station at issue failed to provide any maps establishing that its Grade B contour covered the subject communities and also failed to provide evidence that it aired any local programming tailored to the communities. KTAQ points out that in *Time Warner*, the station's Grade B contour covered only 2 out of 14 communities on one cable system and no communities on the other cable system; the communities were 70-90 miles distant; and the station provided only one half hour of local public affairs programming. KTAQ asserts, on the other hand, that it provides locally-produced programming; that it intends to increase its Grade B coverage; and that short geographic distances are involved. KTAQ notes that Paragon has failed to demonstrate that it offers any other locally-produced religious programming on its systems. As a result, it maintains that this factor should be weighed in KTAQ's favor.

17. Finally, KTAQ states that Paragon does not dispute that conventional ratings are not the most appropriate method for ascertaining viewership of home shopping stations; rather it takes issue with the merchandise sales map presented by KTAQ. First, while Paragon states that there are no indications of sales in the immediate vicinity of Lewisville, Irving or Grapevine, it does not define "immediate vicinity." KTAQ states that its sales map is on a small scale (7 miles per inch) and each community market on the map encompasses a larger overall area than the tiny dot designating the center of each community may appear to indicate. It points out that each of Paragon's communities listed on the map are within an inch of at least several sales symbols, each of which represents multiple sales calls.⁴³ KTAQ contends that its map demonstrates that it receives sales calls from areas within 5 miles of all of Paragon's communities, thus proving viewership. Finally, KTAQ states that it did not claim that the payment of regulatory fees guarantees its carriage in the market, but rather that the Bureau's assertion that KTAQ is not part of the Dallas market is disingenuous given the Commission's implicit recognition, through the use of regulatory fees, that KTAQ is part of that market.

18. We do not agree with Paragon that KTAQ's petition is procedurally defective. Section 1.106(b)(1) allows any party adversely affected by any action taken by the Commission to file a petition requesting reconsideration of the action taken.⁴⁴ Only in instances where a petition for reconsideration has been filed subsequent to the denial of an earlier application for review and does not rely on new facts or circumstances shall that petition be considered defective.⁴⁵ In any event, KTAQ has plead to alleged omissions and findings of fact.

19. A review of the pleadings indicates that KTAQ has not presented sufficient evidence to

⁴¹*Id.* at 6. KTAQ states that Grapevine would be on the fringe of the new contour at no more than 5 miles.

⁴²*Id.* at Exhibit 1.

⁴³Reply at 9.

⁴⁴47 C.F.R. §1.106(b)(1).

⁴⁵47 C.F.R. §1.106(b)(3).

alter our original decision to grant Paragon's request for exclusion. The main thrust of KTAQ's arguments points to a potential change in the station's facilities which, when accomplished, will result in an enlargement of the station's predicted Grade B contour. KTAQ's submission of a letter is not, in itself, sufficient evidence that the increase in its maximum ERP, for which it was granted a construction permit by the Commission, is imminent. Moreover, KTAQ has not given any date on which it can state firmly that the increase will take place. In addition, KTAQ has suggested that its provision of religious programming increases its relevance to the cable subscribers served by Paragon and warrants a reversal of our previous decision. We do not agree. The Commission's must carry rules and its policies with regard to modification of markets are not predicated upon a station's programming content. Rather they are based upon a station's ability to serve specific communities. In this instance, while KTAQ's home shopping and religious programming may be of general interest to the Dallas market as a whole, KTAQ has not provided any new evidence that such programming is specific to the communities at issue. We note that Paragon has questioned the accuracy of the maps KTAQ submitted purporting to represent the sales of home shopping merchandise in and around the subject communities and the theoretical representation of its proposed Grade B contour. KTAQ argued that any perceived faults lie in the scale in which the maps were drawn and that any indicated representations on these maps as to sales or Grade B coverage should be assumed to be larger than that shown. We do not agree. Without accurate, fully supported representations, it is impossible to verify the information contained in these exhibits.

20. KTAQ has argued that the Bureau failed to take its carriage on other nearby systems into consideration in its decision. However, it should be noted that both in its original opposition to Paragon's petition and its petition for reconsideration herein, KTAQ merely submits a list of systems within the Dallas market which appear to be carrying its signal. There is no representation, such as a map, as to where these systems are or how far they are located geographically in relation to Paragon's communities. The information which KTAQ presents, therefore, is insufficient to make a determined analysis. Further, despite KTAQ's assertions, the *Bureau Order* clearly enumerated the four-part market modification criteria set forth in the Commission's rules and, after due deliberation of all of the information provided by both parties, set forth the reasons for KTAQ's failure to meet each criterion. While there is, as KTAQ states, a presumption of carriage for every station within its own market, the 1992 Cable Act allowed a process in which modification of the must carry requirements might be sought in those instances where it could be shown that a station either did or did not serve specific areas within its market. Paragon has met that burden here. KTAQ has failed to demonstrate that our original decision was based on an erroneous analysis of the factors which shape its television market.

21. Finally, we note that KTAQ's obligation to pay a regulatory fee for its designation as part of the Dallas market is a matter which is separate and apart from market modification proceedings. In any event, a grant to exclude KTAQ from specific communities within its market does not exclude the station from the Dallas market as whole, but only the specific communities for which modification is sought.

IV. ORDERING CLAUSES

22. Accordingly, **IT IS ORDERED** that the petition for reconsideration filed by KTAQ-TV **47 IS DISMISSED.**

23. This action is taken pursuant to authority delegated by Sections 0.321 and 1.106 of the Commission's rules.⁴⁶

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

⁴⁶47 C.F.R. §§0.321 and 1.106.