

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

In the Matter of:)	
)	
Guy Gannett Communications, Inc.)	
)	CSR-5289-A
For Modification of the Portland-Poland Spring, Maine ADI Market ¹)	
)	

ORDER ON RECONSIDERATION

Adopted: June 14, 2000

Released: June 19, 2000

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Guy Gannett Communications, Inc., licensee of Station WGME-TV (CBS, Ch. 14), Portland, Maine (“WGME-TV”), has requested reconsideration of the Bureau’s decision denying WGME-TV’s request to modify its market to include nine communities located within the Boston, Massachusetts designated market area (“DMA”).² An opposition to this request was filed on behalf of MediaOne of New Hampshire, Inc. (“MediaOne”), the cable operator serving the subject communities. WGME-TV has filed a reply.

II. BACKGROUND

2. In its request for modification, WGME-TV sought to include nine communities located in the Boston DMA within its television market in order to obtain must carry status in the communities. WGME-TV argued that it met all of the established modification criteria and that its request should be granted because it provided a vital local programming service unavailable from any of the other stations carried by the MediaOne system.

3. While acknowledging that WGME-TV met the market modification criteria for waiver, the Bureau denied WGME-TV’s request, finding that other factors overrode the showing by the station. In its analysis, the Bureau observed that the communities at issue were geographically closer to the city of license of WGME-TV than to the Boston market CBS affiliate, WBZ-TV, also carried by MediaOne. As a result, WBZ-TV’s continued carriage in the communities would be at risk should WGME-TV’s request be granted, since a cable operator is only required to carry the closest of two duplicating stations.³ In light of the fact that WBZ-TV’s viewership levels in the relevant counties, where the communities are located, were substantially higher than that of WGME-TV, the Bureau declined to interfere with the current affiliate

¹The Portland-Poland Spring, Maine ADI is now the Portland-Auburn, Maine DMA. This change in designation, however, does not affect the requested reconsideration.

²*Guy Gannett Communications, Inc.*, 13 FCC Rcd 23470 (1998).

³47 C.F.R. §76.56(b)(5).

relationship in the two markets or change the status of the stations involved.

III. DISCUSSION

4. In support of its request, WGME-TV argues that the Bureau's decision should be reversed, because its grant will authorize MediaOne to follow through on its intention to terminate WGME-TV's carriage in the subject communities, thus disrupting the local economic market. WGME-TV asserts that in its initial decision the Bureau erroneously concluded that WGME-TV is enjoying voluntary carriage on MediaOne's system to the same extent as its Portland competitors and that MediaOne did not indicate that it would alter this arrangement.⁴ However, WGME-TV points out that in its reply to the modification request, MediaOne stated that it had "already advised WGME-TV that it intends to delete the station from its systems in the Served Communities."⁵ As such, WGME-TV states that the Bureau had no basis on which to conclude that denial of the modification request would not affect its carriage status. WGME-TV argues, therefore, that by denying the requested waiver, the Bureau is permitting the very disruption it intended to avoid and WGME-TV will be forced to compete against the other Portland network affiliates on an unequal basis.⁶

5. WGME-TV argues that, while the Bureau's denial was based, in part, on the claim that WGME-TV did not provide any information that WBZ-TV or other Boston market stations failed to provide adequate local programming, it was under no obligation to provide such information.⁷ It points out that the Bureau has explicitly and repeatedly stated that even where "other stations provide local service to the communities, this fact does not act to bar a station's [DMA] claim."⁸ At most, WGME-TV states the Bureau has used this statutory factor as an "enhancement criterion" in market addition cases.⁹ In any event, WGME-TV states that it documented that it is the only affiliate, in either the Portland or Boston market, providing daily news coverage from a full-time news staff devoted to the communities and the region at issue.¹⁰

6. In addition, WGME-TV maintains that the Bureau's decision improperly speculated on the effect of a grant on WBZ-TV, the Boston CBS affiliate, due to the application of the dual network rule.¹¹ WGME-TV contends that this assumption is without support because while Section 76.56(b)(5) authorizes a cable operator to choose the closer of two network affiliates, it does not require it. WGME-TV states that the undisputed record in this case is that MediaOne has provided simultaneous carriage of both WGME-TV and WBZ-TV in the subject communities for at least ten years. Therefore, WGME-TV asserts, there is every indication that a grant of its request would not have threatened WBZ-TV's carriage

⁴*Id.* at 23479.

⁵Reply at 11, n. 31.

⁶Petition at 4, citing *Paxson Phoenix License*, 13 FCC Rcd 8555, 8562 (1998)(WGME-TV states that the Bureau held that a cable operator's decision to carry one station licensed to a community but not another can adversely affect the latter's ability to compete with the carried station.).

⁷*Guy Gannett* 13 FCC Rcd at 23479.

⁸See *Smith Television of New York, Inc.*, 11 FCC Rcd 6025, 6032 (1996).

⁹*Market Modifications and the New York Area of Dominant Influence*, 12 FCC Rcd 12262, 12266-67 (1997).

¹⁰Modification Petition at 8-9; Reply at 7-9.

¹¹47 C.F.R. §76.56(b)(5).

because its popularity would ensure that both stations would continue to be carried. Indeed, WGME-TV questions what incentive MediaOne could have for terminating WBZ-TV and raises several questions regarding evidence not in the record such as WBZ-TV's must carry/retransmission consent rights and its signal quality.¹² In any event, WGME-TV points out that WBZ-TV's failure to object to the initial modification request suggests that it was confident that a grant would not jeopardize its continued carriage.

7. MediaOne states in opposition that WGME-TV's arguments are both procedurally and substantively defective. MediaOne states that WGME-TV presents no new facts or evidence and merely rehashes arguments made and rejected in the initial proceeding. MediaOne points out that Section 1.106(c)(1) of the Commission's rules states that "[r]econsideration is appropriate only where the petitioner shows either material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to respond. Reconsideration will not be granted for the purpose of debating matters on which we have already deliberated and spoken."¹³ As a result, MediaOne maintains that WGME-TV's petition should be dismissed.

8. Beyond this, MediaOne argues that WGME-TV's petition is defective because it claimed that the Bureau overlooked evidence that MediaOne intended to discontinue carriage of WGME-TV.¹⁴ MediaOne states that WGME-TV ignored the fact that the notice to which it refers indicated an intention to drop WGME-TV in only 4 of the 9 cable communities.¹⁵ Regardless, MediaOne argues that even if the Bureau believed that carriage of WGME-TV would continue, it would be irrelevant with regard to the Bureau's denial because that denial did not depend on such continued carriage. The Bureau merely refused to "interfere with the present affiliate relationship of the relevant [DMAs]."¹⁶ In this instance, MediaOne states, the Bureau sought only to maintain the current arrangement where carriage of WGME-TV remained voluntary. Moreover, MediaOne argues that WGME-TV's claims of being at a competitive disadvantage with regard to the other Portland stations is simply wrong. MediaOne states that, like WGME-TV, neither WMTW-TV, the Poland Spring ABC affiliate, or WCSH-TV, the Portland NBC affiliate, have must carry rights in the communities and, in some instances, are not even carried in the subject communities. A reversal of the Bureau's denial could, therefore, actually give WGME-TV an unfair advantage over WMTW and WCSH.

9. MediaOne contends that while WGME-TV goes to great lengths to explain that a grant of its modification request would not jeopardize WBZ-TV's carriage because Section 76.56(b)(4)(ii) does not preclude simultaneous carriage, it is possible that future channel capacity constraints could force MediaOne to choose between WGME-TV or WBZ-TV. Under this scenario and given a literal reading of the rule, MediaOne states that it could be forced to drop WBZ-TV, notwithstanding viewer preference.¹⁷ Moreover, MediaOne states that, if WGME-TV is correct, it is advocating that the Commission effectively double the cable system's must carry burden with respect to CBS affiliates, a move which would make WBZ-TV's must carry status subordinate to that of WGME-TV. This is the result the Bureau sought to avoid. MediaOne concludes that if only one CBS affiliate is to have must carry rights in the communities

¹²Petition at 7.

¹³47 C.F.R. §1.106(c)(1).

¹⁴Petition at 4.

¹⁵Opposition at 3.

¹⁶*Guy Gannett* at 23479.

¹⁷47 C.F.R. §76.56(b)(4)(ii).

at issue, WBZ-TV should have priority since the communities have long been recognized as part of the Boston DMA.

10. Finally, MediaOne states that WGME-TV misinterprets the third statutory factor regarding adequacy of local programming in claiming that the Bureau used its failure to demonstrate other stations' lack of local programming as a factor in the denial of its request. On the contrary, MediaOne states that the Bureau considered this factor as required by statute and that WGME-TV may not claim it as an enhancement criterion.

11. WGME-TV argues in reply that MediaOne attempts to direct the Bureau away from the errors made in the initial decision by asserting that the reconsideration request was procedurally defective. However, WGME-TV states that it is clear that the Bureau overlooked MediaOne's notice that WGME-TV's carriage would be discontinued. Moreover, WGME-TV states that MediaOne is wrong in dismissing its concerns as to the effect of the initial decision on the Portland television market. WGME-TV points out that by denying its request, WGME-TV will suffer diminished ability to sell advertising time to Portland area businesses while stations WCSH-TV and WMTW-TV would continue to be able to compete with other stations, and MediaOne, for that business.¹⁸ WGME-TV argues that the Bureau has previously recognized the adverse effect that carriage decisions can have on stations when a cable operator chooses to carry one station licensed to a community, but not another.¹⁹ WGME-TV maintains that the situation herein is no different.

12. Moreover, WGME-TV argues that MediaOne is mistaken in its claim that the Bureau's references to the third statutory factor "merely show that the Bureau considered the factor as required by statute."²⁰ Had that been the case, states WGME-TV, the Bureau's decision would not have discussed the local programming issues while simultaneously delineating its reasons for denying the requested relief. In any event, WGME-TV maintains that Commission precedent clearly prevents the Bureau from using local programming against WGME-TV in this instance.²¹ Finally, WGME-TV notes that MediaOne never answered any of the critical questions it raised concerning the status of WBZ-TV, but instead assumes the defense of the station when the station itself chose not to participate in this case.

13. We are not persuaded by the arguments raised by WGME-TV herein and deny its petition for reconsideration. WGME-TV claims that the Bureau's stated intention not to upset the economic balance of the market results in exactly that outcome because it is forced to unfairly compete with the other Portland market stations. In support, it relies on the Bureau's decision in *Paxson Phoenix License*, where the Bureau held that a cable operator's decision to carry one station licensed to a community, but not another, can adversely affect the latter's ability to compete.²² We find that WGME-TV's argument as to the Bureau's intention and its reliance on *Paxson* to be misplaced. We note that the decision in *Paxson* involved an independent station and not network affiliates, as is the case here. In any instance where a network affiliate attempts to encroach into another market the potential effect can be severe and must be taken into account. In our original decision, we specifically stated that "we are especially concerned that

¹⁸Reply at 4.

¹⁹See *Paxson Phoenix License*, 13 FCC Rcd 8555 (1998).

²⁰Opposition at 8.

²¹See *Market Modifications and New York Area of Dominant Influence*, 12 FCC Rcd 12262, 12266-67 (1997).

²²13 FCC Rcd 8555, 8562.

our decision not unduly upset the economic marketplace expectations underlying the affiliation concept.”²³ Our expressed concern, therefore, was not, as WGME-TV suggests, its ability to compete with its Portland competitors, but WBZ-TV’s ability to compete within its market. Moreover, we are not convinced that WGME-TV is placed at an unfair advantage with respect to WCSH-TV and WMTW-TV, its competing Portland market stations. Like WGME-TV, neither of these two stations has must carry rights in the subject communities and are therefore equal insofar as their carriage or lack thereof.²⁴ Indeed, according to MediaOne, WCSH-TV and WMTW-TV are not even carried in some of the subject communities.²⁵

14. WGME-TV is also partially mistaken in its evaluation of the Bureau’s use of the third statutory criterion. While *Smith Television of New York*, which WGME-TV cites, states that the fact that other stations provide coverage “does not act as a bar to a station’s [DMA] claim,” it also indicates that this criterion could be used to enhance a station’s claim “where it could be shown that other stations do not serve the communities at issue.”²⁶ WGME-TV is correct in its assertion that the fact that the provision of locally-focused programming by other local stations does not negatively impact its modification request. However, the third factor allows for the submission of information which may prove that other stations eligible for carriage do not provide local programming in fulfillment of the requirements. The submission of such material by WGME-TV would have enhanced its request. While the lack of such information was noted in the Bureau’s decision, it was not a dispositive factor in our decision.

IV. ORDERING CLAUSES

15. Accordingly, **IT IS ORDERED** that the petition for reconsideration filed by Guy Gannett Communications, Inc. **IS DENIED**.

16. This action is taken pursuant to authority delegated by Sections 0.321 and 1.106 of the Commission’s rules.²⁷

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

²³*Guy Gannett*, 13 FCC Rcd 23470, 23478.

²⁴It should be noted that in two separate petitions, WCSH-TV and WMTW-TV argued that Boston market communities be included for must carry purposes, some of which were identical to the subject communities herein. In both instances, the Bureau denied their requests for modification on the same basis as the decision involving WGME-TV. See e.g., *Harron Communications Corp.*, 14 FCC Rcd 4547 (1999), and *Pacific and Southern Company, Inc.*, 14 FCC Rcd 4558 (1999).

²⁵Opposition at 4.

²⁶11 FCC Rcd 6025, 6032.

²⁷47 C.F.R. §§0.321 and 1.106.