

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

In the Matter of:)
)
Media General Cable of Fairfax County, Inc.)
) CSR-5426-A
For Modification of the Washington, D.C.)
DMA)

MEMORANDUM OPINION AND ORDER

Adopted: January 4, 2000

Released: January 7, 2000

By the Chief, Consumer Protection and Competition Division, Cable Services Bureau:

I. INTRODUCTION

1. Media General Cable of Fairfax County, Inc. ("Media General"), filed the above-captioned petition for special relief seeking to modify the Washington, D.C. designated market area ("DMA") relating to Stations WHAG-TV (NBC, Ch. 25), and WJAL-TV (Ind., Ch. 68), both in Hagerstown, Maryland. Specifically, Media General requests that WHAG-TV and WJAL-TV be excluded, for purposes of the television mandatory broadcast signal carriage rules, from the communities it serves.¹ No opposition to this request has been filed.²

II. BACKGROUND

2. Pursuant to Section 614 of the Communications Act and implementing rules adopted by the Commission in *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues* ("Must Carry Order"),³ commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "designated market area," or DMA, as defined by Nielsen Media

¹ The communities served by Media General include Vienna, City of Fairfax, Falls Church, Herndon, and unincorporated Fairfax County, Virginia.

² Media General also originally requested the exclusion of Station WWPX-TV, Martinsburg, West Virginia, but withdrew its request relative to that station when DP Media License of Martinsburg, Inc., licensee of WWPX-TV, argued in a Motion to Dismiss that Media General not only lacked standing with respect to WWPX-TV, but its alleged case against WWPX-TV was not ripe for review.

³ 8 FCC Rcd 2965, 2976-2977 (1993).

Research.⁴ A DMA is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.⁵

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.⁶

4. In considering such requests, the 1992 Cable 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 new 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 system or systems in such

⁴ Section 614(h)(1)(C) of the Communications Act, as amended by the Telecommunications Act of 1996, provides that a station's market shall be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns. *See* 47 U.S.C. §534(h)(1)(C). Until January 1, 2000, Section 76.55(e) of the Commission's rules provided that Arbitron's "Areas of Dominant Influence," or ADIs, published in the *1991-1992 Television Market Guide*, be used to implement the mandatory carriage rules. Effective January 1, 2000, however, Section 76.55(e) now requires that a commercial broadcast television station's market be defined by Nielsen Media Research's DMAs. For the must-carry/retransmission consent elections that took place on October 1, 1999, commercial television stations were required to make their elections based on DMAs. *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) ("Modification Final Report and Order").

⁵ For a more complete description of how counties are allocated, *see* Nielsen Media Research's *Nielsen Station Index: Methodology Techniques and Data Interpretation*.

⁶ 47 U.S.C. §534(h)(1)(C).

community.⁷

5. The legislative history of the provision states that:

where the presumption in favor of [DMA] carriage would result in cable subscribers losing access to local stations because they are outside the [DMA] 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 area in which they serve 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.⁸

6. Recently, in the *Modification Final Report and Order*, the Commission, in an effort to promote administrative efficiency, adopted a standardized evidence approach for modification petitions that requires the following evidence be submitted:

(A) A map or maps illustrating the relevant community locations and geographic features, station transmitter sites, cable system headend locations, terrain features that would affect station reception, mileage between the community and the television station transmitter site, transportation routes and any other evidence contributing to the scope of the market.

(B) Grade B contour maps delineating the station's technical service area and showing the location of the cable system headends and communities in relation to the service areas.

Note: Service area maps using Longley-Rice (version 1.2.2) propagation curves may also be included to support a technical service exhibit.⁹

(C) Available data on shopping and labor patterns in the local

⁷ *Must Carry Order*, 8 FCC Rcd 2965, 2976 (1993).

⁸ H.R. Rep. 102-628, 102d Cong., 2d Sess 97 (1992).

⁹ The Longley-Rice model provides a more accurate representation of a station's technical coverage area because it takes into account such factors as mountains and valleys that are not specifically reflected in a traditional Grade B contour analysis. In situations involving mountainous terrain or other unusual geographical features, Longley-Rice propagation studies can aid in determining whether or not a television station actually provides local service to a community under factor two of the market modification test.

market.

(D) Television station programming information derived from station logs or the local edition of the television guide.

(E) Cable system channel line-up cards or other exhibits establishing historic carriage, such as television guide listings.

(F) Published audience data for the relevant station showing its average all day audience (i.e., the reported audience averaged over Sunday-Saturday, 7 a.m., or an equivalent time period) for both cable and noncable households or other specific audience indicia, such as station advertising and sales data or viewer contribution records.¹⁰

Petitions for special relief to modify television markets that do not include the above evidence shall be dismissed without prejudice and may be re-filed at a later date with the appropriate filing fee. Parties may continue to submit whatever additional evidence they deem appropriate and relevant.

7. With respect to deletions of communities from a station's market, the legislative history of this provision states that:

The provisions of [this subsection] reflect a recognition that the Commission may conclude that a community within a station's [DMA] may be so far removed from the station that it cannot be deemed part of the station's market. It is not the Committee's intention that these provisions be used by cable systems to manipulate their carriage obligations to avoid compliance with the objectives of this section. Further, this section is not intended to permit a cable system to discriminate among several stations licensed to the same community. Unless a cable system can point to particularized evidence that its community is not part of one station's market, it should not be permitted to single out individual stations serving the same area and request that the cable system's community be deleted from the station's television market.¹¹

8. 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.¹² The rules further provide, in accordance with the requirements of the 1992

¹⁰ 47 C.F.R. §76.59(b).

¹¹ H.R. Rep. 102-628, 102d Cong., 2d Sess. 97-98 (1992).

¹² 8 FCC Rcd 15 2977 n. 139.

Cable Act, that a station not be deleted from carriage during the pendency of a modification request.¹³

III. DISCUSSION

9. The issue before us is whether to grant Media General's request to exclude Hagerstown television stations WHAG-TV and WJAL-TV from mandatory carriage in its cable system communities. Media General's communities are located in Fairfax County, Virginia, which is deemed to be part of the Washington, D.C. DMA. WHAG-TV and WJAL-TV are licensed to Hagerstown, Maryland, which is also considered to be part of the Washington, D.C. DMA. The market change process incorporated into the Communications Act is not intended to be a process whereby cable operators may seek relief from the mandatory signal carriage obligations apart from the question of whether a change in the market area is warranted. When viewed against this backdrop, and considering all of the relevant factual circumstances in the record, we believe that Media General's deletion petition appears to be a legitimate request to redraw DMA boundaries to make them congruous with market realities.

10. In support of its request, Media General argues that, until recently, Hagerstown and Washington, D.C. were considered to be separate ADI markets, as defined by Arbitron's *1991-1992 Television Market Guide*. Media General states that with the Commission's change of market definitions for must carry purposes from ADIs to DMAs, Hagerstown and Washington now share the same market, despite the great distance between Media General's cable communities and the stations' city of license. Media General maintains that unless WHAG-TV and WJAL-TV are excluded from carriage on its system, the stations will be able to rely on the DMA definition to expand into areas which they have never served and for which there is no market nexus.¹⁴

11. Media General states that neither WHAG-TV nor WJAL-TV meet any of the factors necessary to justify carriage on its system. First, Media General points out that WHAG-TV and WJAL-TV do not have a history of carriage in the communities at issue, despite being on-the-air since 1970 and 1987, respectively. Moreover, Media General states that not only are WHAG-TV and WJAL-TV not carried on any other cable system adjacent to Fairfax County, but neither is any other station licensed to Hagerstown.¹⁵

12. Second, Media General states that WHAG-TV and WJAL-TV do not place Grade B contours over the communities in question.¹⁶ Media General argues that this indicates that Fairfax County is not part of the "station[s'] natural economic market."¹⁷ In addition, Media General states that the stations' transmitter sites are geographically distant from the cable communities it serves. For

¹³ 47 C.F.R. §76.59.

¹⁴ Petition at 2.

¹⁵ *Id.* at Exhibits 3(A) and (B).

¹⁶ *Id.* at Exhibits 4-A(1) and 4-B(2).

¹⁷ See *Texas Cable Partners, L.P. d/b/a Paragon Cable*, 14 FCC Rcd 11734, 11740 n.30 (1999)(“As a general matter, Grade B coverage demonstrates service to cable communities and serves as a measure of a station’s natural economic market.”).

instance, it points out that WHAG-TV's transmitter is located approximately 88 kilometers (55 miles) from the closest cable community, while WJAL-TV's transmitter is at least 108.5 kilometers (77 miles) distant.¹⁸ Media General argues that these distances are comparable to or even greater than distances in previous Commission decisions which granted exclusions.¹⁹

13. Third, Media General states that, as evidenced by the stations' web sites, neither WHAG-TV nor WJAL-TV provide news coverage or other programming of interest to the residents in the subject cable communities.²⁰ Media General asserts that it is committed to providing local programming to its subscribers and currently carries numerous local stations which provide extensive local programming targeted specifically to Washington, D.C./Fairfax County communities. The addition of WHAG-TV and WJAL-TV, maintains Media General, would do nothing to enhance the programming choices of the system subscribers and would likely lead to disruption of established viewing patterns. Fourth, Media General points out that, according to the 1997 and 1998 *Nielsen Station Index, County/Coverage Study*, neither WHAG-TV nor WJAL-TV register any viewership in Fairfax County, where the communities are located.²¹

14. Media General argues that there are significant differences between Fairfax County and the Hagerstown area. It states that Fairfax County is an active commercial center with a population of 478,000 and the tenth largest labor force in the United States while Hagerstown is located in a rural area with a population of just over 127,000.²² Moreover, Media General indicates that the level of retail commerce in Fairfax County is nearly ten times that of Washington County, where Hagerstown is located.²³ Media General argues that it is therefore unlikely that Fairfax County residents travel to Hagerstown either for shopping or employment. Media General maintains that the addition of Hagerstown into the Washington DMA has made that market less homogenous than it was previously, "present[ing] a paradigmatic 'rim' case" with an urban center with separate and distinct suburban communities.²⁴ Media General asserts that, in this case, exclusion of its cable communities is appropriate, considering that WHAG-TV and WJAL-TV serve only the fringe of the industry-defined market, and do not meet any of the statutory factors which would indicate service to the communities.

15. With respect to the mandatory statutory criteria, we have carefully reviewed the information provided by Media General in the context of its request. An analysis of this evidence, as it relates to each factor, is provided below.

¹⁸ Petition at Exhibits 4-A(1b) and 4-B(2b).

¹⁹ See *Armstrong Utilities, Inc.*, 12 FCC Rcd 2498 (1997)(39 to 55 miles); *A-R Cable Services, Inc.*, 11 FCC Rcd 21080 (1996)(48 miles); and *Time Warner Cable*, 11 FCC Rcd 13149 (1996)(45-55 miles).

²⁰ Petition at Exhibits 5-A and 5-B.

²¹ *Id.* at Exhibit 6.

²² *Id.* at Exhibit 7.

²³ *Id.*

²⁴ See *WLNY-TV, Inc. v. FCC*, 163 F. 3d 137, 145 (2d Cir. 1998).

16. **Historic Carriage.** WHAG-TV and WJAL-TV began operations in 1970 and 1987, respectively. Despite being on-the-air from 12 to as much as 29 years, neither station has a history of carriage on Media General's system. Given the statutory directive, consideration must be given to this factor, bearing in mind that the objective of the Section 614(h) process is to "better effectuate the purposes" of the broadcast signal carriage scheme. Thus, with respect to the question of historical carriage patterns, attention must be paid to the circumstances from which such patterns developed. Some stations have not had the opportunity to build a record of historical carriage for specific reasons that do not necessarily reflect a judgment as to the geography of the market involved. Therefore, the historical carriage factor – to the extent such lack of carriage is reflective of factors outside of the shape of the market – is not by itself controlling in these circumstances because such an implementation of the 1992 Cable Act would, in effect, prevent weaker stations, that cable systems had previously declined to carry, from ever obtaining carriage rights. In this instance, we recognize the fact that, until recently, Hagerstown was considered to be a separate ADI market, and that this factor would have made it difficult for WHAG-TV and WJAL-TV to establish historic carriage in the subject communities. As such, the evidence relating to this statutory factor, as it pertains directly to Media General's system, weighs in favor of excluding the cable communities from WHAG-TV and WJAL-TV's market, but is not outcome determinative by itself.

17. **Grade B Coverage/Local Service.** A station's local service to cable communities is one of the relevant factors to consider in this particular case. It is not influenced by the type or age of the station involved or historical carriage. Service may be measured through geographic means: by examining the distance between the station and the cable communities subject to the deletion request and taking into account natural phenomena such as waterways, mountains and valleys which tend to separate communities. A station's broadcast of local programming, which has a distinct nexus to the cable communities, is also evidence of local service. Finally, a station's Grade A or Grade B contour coverage is an additional indicator of local service and we will weigh the presence or absence of such technical coverage accordingly.²⁵ In the instant proceeding, neither WHAG-TV nor WJAL-TV satisfies any of the local coverage elements we find important in the market modification analysis. It is undisputed that neither station airs programming that could be considered "local" to the cable communities at issue. In addition, it is evident from the Grade B contour maps of the stations, provided by Media General, that neither station's Grade B encompasses any of the communities at issue.²⁶

18. **Carriage of Other Stations.** We also believe that Media General's carriage of other local television stations provides support for the action requested. Where a cable operator is seeking to delete a station's mandatory carriage rights in certain communities, the issue of local coverage by other stations becomes a factor to which we will give greater weight than in cases where a party is seeking to add communities. In this case, we find that the Washington, D.C. stations carried by Media General have a closer nexus to the cable system herein than do WHAG-TV and WJAL-TV. These market facts,

²⁵ As a general matter, Grade B coverage demonstrates service to cable communities and serves as a measure of a station's natural economic market. *See Must Carry Order*, 8 FCC Rcd at 2977. *See also Amendment of Section 76.51 (Orlando-Daytona Beach-Melbourne, and Cocoa, Florida)*, 102 FCC 2d 1062, 1070 (1985)(“We believe that television stations actually do or logically can rely on the area within their Grade B contours for economic support.”).

²⁶ It should be noted that, in our review of the map exhibits submitted by Media General, we do not find that the petitioner's submissions accurately reflect the topographical features of the area represented. However, since terrain features were not an issue in this matter, these exhibits are not relevant to the decision herein.

coupled with the distance between the cable system and the stations, support Media General's market modification request under the third factor.

19. **Viewership.** Media General also shows that WHAG-TV and WJAL-TV have no audience in the cable communities at issue. This dearth of viewership is of evidentiary significance when tied with the lack of historical carriage and Grade B coverage.

20. After carefully considering each statutory factor in the context of the circumstances presented here, as well as other relevant information, we grant Media General's modification request. Based on geography, we believe that the cable communities herein are sufficiently removed from WHAG-TV and WJAL-TV that they ought not be deemed part of the stations' market for mandatory carriage purposes.²⁷ According to the legislative history of the 1992 Cable Act, the use of [DMA] market areas is intended "to ensure that television stations be carried in the areas which they service and which form their economic market."²⁸ Changes may be sought and granted by the Commission "to better effectuate the purposes" of the mandatory carriage requirements.²⁹ Moreover, given the evidence as to the lack of Grade B coverage, the lack of viewership in the cable communities at issue, the lack of historic carriage of WHAG-TV and WJAL-TV, and the absence of evidence indicating that WHAG-TV and WJAL-TV provide local programming, we conclude that deletion of Media General's cable communities from WHAG-TV and WJAL-TV's market for mandatory carriage purposes effectuates the purposes of Section 614 of the Communications Act.

IV. ORDERING CLAUSES

21. Accordingly, **IT IS ORDERED**, pursuant to Section 614(h) of the Communications Act of 1934, as amended (47 U.S.C. §534) and Section 76.59 of the Commission's rules (47 C.F.R. §76.59), that the captioned petition for special relief filed September 2, 1999, by Media General Cable of Fairfax County, Inc. **IS GRANTED**.

22. This action is taken pursuant to authority delegated by Section 0.321 of the Commission's rules.³⁰

FEDERAL COMMUNICATIONS COMMISSION

Deborah Klein, Chief
Consumer Protection and Competition Division
Cable Services Bureau

²⁷H.R. Rep. 102-628, 102d Cong., 2d Sess. 97-98 (1992).

²⁸*Id.* At 97.

²⁹47 U.S.C. §534(h).

³⁰ 47 C.F.R. §0.321.