

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

In the Matter of :)	
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)	
A-R Cable Services, Inc.)	CSR-4785-A
)	
)	
For Modification of the ADI of Television)	
Station WNDS (TV))	
Derry, New Hampshire)	

MEMORANDUM OPINION AND ORDER

Adopted: May 8, 2001

Released: May 17, 2001

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. CTV Derry, Inc. licensee of Station WNDS(TV), Channel 50, Derry, New Hampshire (“WNDS”), has filed a Petition for Reconsideration of the decision by the Cable Services Bureau (the “Bureau”) in *A-R Cable Services, Inc.* (the “*Order*”).¹ In the *Order*, the Bureau granted the petition for special relief filed by A-R Cable Services, Inc. (“Cablevision”)² to exclude the community of Braintree, Massachusetts from the Boston Area of Dominant Influence (“ADI”) of television broadcast station WNDS, for the purposes of the cable television mandatory broadcast signal carriage requirements. Cablevision filed an Opposition to the Petition for Reconsideration to which WNDS replied.³

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*”), commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located with the station’s market.⁴ A station’s market for this purpose is its “designated market area,” or DMA, as defined by Nielsen Media

¹11 FCC Rcd 21080 (CSB 1996).

²A-R Cable Services, Inc. is a subsidiary of Cablevision Systems Corporation.

³WNDS also filed a request to initiate forfeiture proceedings against Cablevision (CSC-371). In view of the action herein, however, we see no need to address that request.

⁴8 FCC Rcd 2965, 2976-2977 (1993).

Research.⁵ A DMA is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. 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

3. The *Order* granted Cablevision's request to exclude the community of Braintree from WNDS' market area. The Bureau concluded that Cablevision made a persuasive case based upon geography and the four modification factors set forth in the statute that Braintree was sufficiently removed from WNDS that the community should not be deemed part of the station's market for mandatory carriage purposes.⁷ The *Order* concluded that WNDS does not provide local service to the community of Braintree, that its programming was not of specific local interest or import for cable viewers in Braintree and that WNDS does not place either a Grade A or Grade B contour over the Braintree community.⁸ Moreover, the *Order* noted that several other television stations have a closer nexus to the community of Braintree, providing more focused local programming than WNDS.⁹ The Bureau further concluded that there was virtually no viewership of the station in the Braintree community and a lack of a historical carriage on the cable system.¹⁰ Grant of Cablevision's petition relieved the cable operator of the obligation under the mandatory broadcast signal carriage rules to carry WNDS' signal on their system.

III. DISCUSSION

4. In its petition for reconsideration, WNDS argues that the Bureau should reinstate Braintree as a community in WNDS' market because the Bureau decision misapplied the statutory criteria of the market modification process in several critical ways.¹¹ Under the first criterion of the Section 614 analysis regarding historical carriage, WNDS contends that the Bureau ignored WNDS' ties to Braintree and the surrounding South Boston area and that the station had received carriage on virtually every other

⁵Section 614(h)(1)(C) of the Communications Act, as amended by the Telecommunications Act of 1996, provides that a station's market 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) requires that Nielsen Media Research's DMAs define a commercial broadcast television station's market. For the must carry/retransmission consent elections that took place on October 1, 1999, commercial television stations were required to make their selections 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*").

⁶See 47 U.S.C. § 534(h)(1)(C).

⁷*A-R Cable Services, Inc.*, 11 FCC Rcd at 21088.

⁸*Id.*

⁹*Id.*

¹⁰*Id.* at 21089.

¹¹WNDS Petition at i.

cable system surrounding Cablevision's Braintree system.¹² WNDS states that the Bureau focused on the fact that WNDS's city of license, Derry, New Hampshire, is located 48 miles from Cablevision's Braintree headend when it concluded that the distance involved attenuates the local ties that the station might have to the cable community.¹³ WNDS argues that this conclusion is in contrast to that reached in *Greater Worcester Cablevision, Inc.*,¹⁴ ("*Greater Worcester*") where the Bureau rejected the request of several cable operators seeking to exclude the applicable station based on the claim that it was "geographically removed" from the relevant communities.¹⁵ WNDS points out that in *Greater Worcester* the Bureau concluded that because of the station's distant copyright status, the station never had the opportunity to build a record of historical carriage or to establish a record of significant viewership in the relevant cable communities and that such failures to satisfy the particular statutory factor did not weigh against the station.¹⁶ Therefore WNDS argues that the reasoning applied by the Bureau in *Greater Worcester* with respect to historical carriage patterns and viewership should be controlling in the instant case.¹⁷

5. WNDS further argues that the Bureau's decision should be reversed because Cablevision afforded carriage to other stations located in the same area as WNDS without sufficient justification for the disparate treatment.¹⁸ Specifically, WNDS points out that WENH (TV), located in Durham, New Hampshire, 63 miles from Braintree, has been carried, yet Cablevision's system has failed to carry WNDS although the distance separating the station and Braintree is 48 miles.¹⁹ WNDS also argues that any claims by Cablevision that WENH meets the specific local interest needs of the Braintree community are undermined because WENH's programming consists of content directed primarily toward New Hampshire residents and programming concerning educational children's material, cooking, fine arts, home improvement, and public affairs.²⁰ In further support of its claim, WNDS also argues that Cablevision imports two stations from Providence, Rhode Island, apparently on a retransmission consent basis,²¹ and that such stations are outside the Boston DMA and direct their news and public affairs programming to coverage of Rhode Island issues rather than to Cablevision subscribers in Braintree.²²

6. With regard to the station's predicted Grade B contour, WNDS contends that the Bureau's conclusion that Braintree is not encompassed by the station's Grade B must be reversed.²³

¹²*Id.* at 4.

¹³*Id.* at 5.

¹⁴10 FCC Rcd 12569 (1995). The station at issue in the *Greater Worcester* case also was WNDS and involved several communities other than Braintree.

¹⁵WNDS Petition at 5-6.

¹⁶*Id.* at 6 citing *Greater Worcester Cablevision, Inc.*, 10 FCC Rcd at 12572.

¹⁷WNDS Petition at 6.

¹⁸*Id.* at 7

¹⁹*Id.* at 9.

²⁰*Id.*

²¹WNDS states that these stations are WPRI, Channel 12, Providence (ABC affiliate), and WJAR, Channel 10, Providence (NBC affiliate).

²²WNDS Petition at 10.

²³*Id.* at 12.

WNDS states that the Bureau's decision is inconsistent with *Greater Worcester*, and that notwithstanding the "apparent shortfall" of the station's predicted Grade B contour, WNDS' actual usable signal extends to Braintree and communities even further south.²⁴ WNDS states that in *Greater Worcester*, the Bureau concluded that after considering the findings and factors weighing against deletion, it would not remove those cable communities that fell just outside of the station's Grade B contour.²⁵ WNDS argues that the Bureau should likewise refuse to remove Braintree, which appears to fall outside the station's predicted Grade B contour.²⁶ In addition, WNDS contends that while the local service requirement is satisfied if the station's predicted Grade B contour covers the community, predicted Grade B coverage alone is not the sole indicator of local coverage.²⁷ WNDS states that it actually delivers a usable signal of acceptable technical quality to Braintree and, in fact, serves the community of Braintree.²⁸ In addition, WNDS argues that Braintree forms part of the station's economic market.²⁹ Finally, WNDS asserts that the existence of other local stations serving the community is immaterial, as this is a relevant factor only in circumstances where it is clear that the station is not providing local service to the community that the cable operator seeks to delete. WNDS asserts that it is not the case that WNDS fails to provide service to the Braintree community.³⁰

7. In opposition to WNDS' petition for reconsideration, Cablevision argues that WNDS simply does not satisfy any of the statutory criteria necessary to qualify as a "local" station and has not justified reversal of the Bureau's decision regarding the statutory market modification criteria in the *Order*.³¹ Cablevision argues that its cable system has not discriminated among similarly situated stations in the same market as WNDS.³² Concerning WENH, located in Durham, New Hampshire, Cablevision argues that the decision to carry WENH on its Braintree system was based on a legitimate editorial judgment among non-local programming sources, and does not involve discrimination.³³ Cablevision also emphasizes that by carrying such station's signal it does not assert that WENH is any more local to Braintree, Massachusetts than WNDS.³⁴

8. With regard to WNDS' effort to use the circumstances in *Greater Worcester* as support, Cablevision asserts that the arguments in that case should have been raised earlier and that the instant case is distinguishable.³⁵ Cablevision points out that in *Greater Worcester* the Bureau found that WNDS placed a Grade B signal over the city of Worcester, Massachusetts, as well as other Massachusetts cable

²⁴*Id.*

²⁵*Id.* citing *Greater Worcester Cablevision, Inc.* 10 FCC Rcd at 12572-73.

²⁶WNDS Petition at 13.

²⁷*Id.* at 13.

²⁸*Id.* at 14.

²⁹*Id.*

³⁰*Id.* at 15.

³¹Cablevision Opposition at 2-3

³²*Id.* at 5.

³³*Id.* at 3 and 6.

³⁴*Id.* at 7.

³⁵*Id.* at 10.

communities served by the Worcester cable system.³⁶ Cablevision emphasizes that in the instant case WNDS provides no Grade B coverage to the Braintree community.³⁷ Moreover, Cablevision argues that in *Greater Worcester* the Bureau decided not to remove from WNDS' market area those cable communities that fell just outside the Station's Grade B contour because the communities were part of an integrated cable system.³⁸ Cablevision asserts that it operates the Braintree system as an independent cable system serving only the Braintree community, and despite WNDS' intimation, the cable systems serving Braintree and Boston are not fully integrated, but independent of one another.³⁹ Regarding its assertion that WNDS' "actual usable signal" extends to Braintree, Cablevision argues that WNDS provides no technical data, engineering reports or any other useful information to support its claim.⁴⁰

9. In reply to Cablevision's opposition, WNDS contends that the Bureau's decision in *Greater Worcester* dictates that the Bureau reconsider its application of the four statutory factors of Section 614(h) and that Cablevision's attempt to challenge WNDS' reliance on the case ignores the significant and inescapable factual parallels between *Greater Worcester* and the instant case.⁴¹ Moreover, WNDS argues that, contrary to Cablevision's assertion, its reference to the *Greater Worcester* case is not untimely, as WNDS had raised in the original proceeding below the issue of its "distant signal" status and the effect that status had on the station's history of cable carriage and its viewership in the Braintree community.⁴² WNDS adds that the Commission has permitted the citation of a previously uncited case in circumstances where the argument for which the case was cited had been presented to the earlier decision maker for consideration.⁴³

10. In addition, WNDS contends that in the underlying proceeding Cablevision conceded that the community of Braintree is fully-integrated into the Greater Boston metropolitan area.⁴⁴ It adds that the station's program service must be deemed local to Boston, and by virtue of Cablevision's concession, local to Braintree as well, notwithstanding the apparent failure of the station to place a predicted Grade B contour over Braintree proper.⁴⁵ WNDS states that Cablevision places too much reliance on the purported integration of the cable systems in *Greater Worcester*. WNDS points out that the Bureau in another case included communities served by non-integrated systems in a station's must carry market, notwithstanding the station's failure to place a predicted Grade B contour over the communities in question.⁴⁶

³⁶*Id.* citing *Greater Worcester Cablevision, Inc.*, 10 FCC Rcd at 12572.

³⁷*Id.* at 10.

³⁸*Id.*

³⁹*Id.* at 11. Cablevision states that the Boston and Braintree systems do not share a common headend, common channels, or common pricing.

⁴⁰*Id.*

⁴¹Reply at 2-3.

⁴²*Id.* at 4.

⁴³*Id.*

⁴⁴*Id.* at 6 citing Cablevision's Reply to Opposition to Petition for Special Relief at 4, filed August 15, 1996.

⁴⁵*Id.*

⁴⁶*Id.* at 6 citing *Blackstar of Ann Arbor*, 11 FCC Rcd 14992 (1996) ("*Blackstar*").

11. Regarding the carriage of WENH, WNDS argues that Cablevision's assertion that such carriage should have no bearing on whether carriage should be afforded WNDS carriage is simply wrong.⁴⁷ WNDS asserts that Cablevision's discretion to select among national programming services, such as, for example, ESPN2 or the Sci-Fi Channel, does not extend to the carriage of local over-the-air stations and the fact that WENH is a local station serving the same area as WNDS tempers Cablevision's ability to exercise editorial judgment and discretion to carry certain stations and not others.⁴⁸ WNDS states that WENH is not a national cable programmer.⁴⁹ It further adds that it is somewhat inconsistent that Cablevision professes that it carries WENH because its local subscribers value the education, informational, and culturally diverse programming WENH provides, while stating in the same document that WENH does not serve the local needs and interests of its Braintree subscribers.⁵⁰

12. A review of the pleadings indicates that WNDS has not presented sufficient evidence to alter our original decision to grant Cablevision's request for exclusion. Despite WNDS' assertions, the *Order* clearly enumerated the four-part market modification criteria and set forth the reasons for WNDS' failure to meet each criterion. WNDS has failed to demonstrate that our original decision was based on an erroneous analysis of the factors that shape its television market.

13. WNDS' principle contention is that despite the fact that the Braintree community is located outside of WNDS' Grade B signal contour, the conclusion reached in the *Greater Worcester* case should be considered as support for finding that Braintree should not be a precluded community in WNDS' television market. We distinguish the instant case from *Greater Worcester*. The significant factor considered in the evaluation process in that case was that the deletion of WNDS from the cable communities served by the cable operator would effectively remove the station from Worcester, Massachusetts, one of the ADI's primary population centers.⁵¹ The case noted that eliminating the numerous cable communities would deny WNDS an important economic market.⁵² The Bureau also concluded that WNDS provided local service to the various communities because the majority of the cable communities' population fell within the station's predicted Grade B contour.⁵³ It also concluded that WNDS' Grade B contour sufficiently encompassed the heavily populated City of Worcester and that WNDS placed a Grade B contour over various neighboring communities including West Boylston, Boylston, Holden, Northboro, Westboro, and Southboro.⁵⁴ In light of these factors and findings, the Bureau also found that cable communities falling just outside of the station's Grade B contour would not be removed from WNDS' market.⁵⁵

⁴⁷Reply at 7.

⁴⁸*Id.* at 7-8.

⁴⁹*Id.* at 9.

⁵⁰*Id.* referring to Cablevision Opposition at 8 which states that "even if WENH were carried on the Braintree system because Cablevision felt that it served local needs and interests –which it does not... ."

⁵¹*Greater Worcester Cablevision Inc.*, 10 FCC Rcd at 12572.

⁵²*Id.*

⁵³*Id.*, 10 FCC Rcd at 12572-73.

⁵⁴*Id.*

⁵⁵*Id.*

14. In the instant case, WNDS asks that Braintree be included in the station's market. However, the findings at the core in *Greater Worcester* are not found in the present case. With regard to the Grade B signal, WNDS fails to provide a Grade B signal or local service to the Braintree community, contrary to what was the case in *Greater Worcester*. We do not view *Greater Worcester* as support for WNDS' carriage arguments as the cable communities in the *Greater Worcester* case just outside the Grade B contour were considered as inter-related and effectively connected to the important Worcester economic market, and as such there was a basis for the inclusion of those communities and carriage of the station in those communities. In addition, WNDS argues that in *Greater Worcester* the lack of historical carriage and minimal viewership were factors not weighing against carriage of a station. However, given the circumstances here, including the lack of local service, the failure to place a Grade B signal over the community, as well as, the lack of historical carriage and low viewership, there is a sufficient basis for not requiring Cablevision to carry WNDS in the Braintree community.

15. The *Blackstar* case also fails to provide support for carriage of WNDS. In *Blackstar*, the Bureau granted a market modification, adding to the petitioning station's market four communities that were located outside, but on the periphery of the station's Grade B contour. The Bureau found that the station at issue, WBSX, Channel 31, Ann Arbor, Michigan, provided limited coverage over the four relevant communities. The Bureau included these communities in the station's market because they were located on the periphery of the station's Grade B contour and because there was a history of carriage by local cable systems serving these communities. The station provided engineering documentation, taking terrain and physical geography into account, that those communities which were at the periphery of the station's Grade B contour were likely to receive service. The circumstances in the instant case are different from those in *Blackstar* and do not provide support for carriage in the Braintree community.

16. We also find the WNDS has provided no evidence regarding the "actual usable" signal. No technical data or engineering analysis was filed to support WNDS' claim that signal strength and quality would not be compromised. As we have stated, whether a community is technically and geographically located within a station's Grade B signal contour is of significance but it is not the only determining factor as to carriage. Here, the absence of technical information regarding actual usable signal weighs against a finding that carriage is warranted in this particular community.

17. Finally, we do not agree that Cablevision's carriage of a noncommercial educational station from Durham, New Hampshire (WENH) or two stations from Providence are persuasive as to the scope of WNDS's market for mandatory carriage purposes. The Durham station is not licensed to the same community as WNDS but to a community some thirty miles distant. Given the fact that it is a noncommercial station, is licensed to a different community in a different part of New Hampshire, and has a carriage history dating back some twenty years, we do not find its carriage to be persuasive evidence that Braintree should be part of WNDS's market. Carriage of the two Providence stations pursuant to retransmission consent agreement is even more difficult to connect to the issues in this proceeding.

IV. ORDERING CLAUSES

18. Accordingly, **IT IS ORDERED** that the petition for reconsideration filed by CTV of Derry Inc., licensee of Station WNDS (TV) **IS DENIED**.

19. This action is taken pursuant to authority delegated by Sections 0.321 and 1.106 of the Commission's rules.⁵⁶

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief
Cable Services Bureau

⁵⁶47 C.F.R. §§ 0.321 and 1.106.