

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

In the Matter of:)	
)	
Time Warner Entertainment-Advance/)	
Newhouse Partnership d/b/a Time Warner Cable)	CSR-5675-A
)	
For Modification of the Boston,)	
Massachusetts DMA		

MEMORANDUM OPINION AND ORDER

Adopted: August 9, 2001

Released: August 13, 2001

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

I. INTRODUCTION

1. Time Warner Entertainment-Advance/Newhouse Partnership d/b/a Time Warner Cable (“Time Warner”), filed the above-captioned petition for special relief seeking to modify the Boston, Massachusetts designated market area (“DMA”) with respect to television broadcast station WWDP (Ch. 46), Norwell, Massachusetts (“WWDP”). Specifically, Time Warner requests that WWDP be excluded, for purposes of the cable television mandatory broadcast signal carriage rules, from its cable system serving the community of Athol, Massachusetts.¹ No opposition to this petition has been received.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 DMA, as defined by Nielsen Media Research.⁴ A DMA is a

¹Time Warner states that it also serves the Town of Orange, Massachusetts. However, this community is not part of this proceeding because Franklin County, in which Orange is located, is considered to be part of the Springfield-Holyoke, Massachusetts DMA.

²WWDP filed a must carry complaint against Time Warner’s Athol cable system which was granted on February 14, 2001. Due to the statutory deadlines associated with resolving must carry complaints, this petition was processed separately. See *Norwell Television, LLC v. Time Warner Cable*, DA 01-444 (released February 16, 2001).

³8 FCC Rcd 2965, 2976-1977 (1993).

⁴Section 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
(continued...)

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

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;

(IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.⁷

The legislative history of this 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

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available, commercial publications which delineate television markets based on viewing patterns. See 47 U.S.C. §534(h)(1)(C). Section 76.55(e) requires that a commercial broadcast television station's market be defined by Nielsen Media Research's 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").

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

⁶47 U.S.C. §534(h)(1)(C).

⁷*Id.*

[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

With respect to deletions of communities from a station's market, the legislative history of the 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.⁹

In adopting rules to implement Section 614(h)(1)(C), 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.¹⁰

4. 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.

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

⁹H.R. Rep. 102-628, 102d Cong., 2d Sess. 97-98 (1992).

¹⁰*Must Carry Order*, 8 FCC Rcd 2965, 2977 n. 139.

(B) Grade B contour maps delineating the station's technical service area and showing the location of the cable system headends and communities in relating 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.¹¹

(C) Available data on shopping and labor patterns in the local 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.¹²

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. The *Modification Final Report and Order* also provides that parties may continue to submit whatever additional evidence they deem appropriate and relevant.¹³

III. DISCUSSION

5. The issue before us is Time Warner's request to exclude WWDP from mandatory carriage in Athol, Massachusetts. Time Warner's petition for modification was filed subsequent to a must carry complaint filed by WWDP in October 2000 seeking carriage on Time Warner's Athol cable system. Although WWDP met the definition of a "local commercial station" in that proceeding and its complaint was granted, our action therein did not preclude Time Warner from filing the instant petition. Time Warner's cable community is located in the Massachusetts county of Worcester which is deemed to be part of the Boston DMA. WWDP is licensed to Norwell, Massachusetts, which is also considered part of the Boston DMA.

¹¹The 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.

¹²See *Modification Final Report and Order*, 14 FCC Rcd 8366 (1999); see also 47 C.F.R. §76.59(b).

¹³*Modification Final Report and Order*, 14 FCC Rcd at 8390.

6. In support of its petition, Time Warner states that the community of Athol is located on the far western reaches of Worcester County, adjacent to Franklin County which is assigned to a different market.¹⁴ Time Warner argues that, despite being on-the-air intermittently since 1986, WWDP has no history of carriage on the Athol system.¹⁵ Time Warner states that not only is this lack of carriage attributable to the fact that Athol is located outside the scope of WWDP's natural market, but it is affirmed by WWDP's failure to be carried on any other cable system adjacent to the Athol system.¹⁶ Time Warner states that Norwell, WWDP's city of license, is geographically distant from Athol at 79 miles.¹⁷ Time Warner points out that this distance is comparable to or greater than previous decisions where the Bureau granted the requested modification.¹⁸ In addition, Time Warner states that WPXB fails to provide a Grade B signal to Athol, either through the standard Grade B prediction calculation used by the Commission or the Longley-Rice model.¹⁹

7. Time Warner states that WPXB's Spanish-language programming lacks specific local interest or import for the Athol cable system's subscribers. Time Warner points out that in *Metrocast Cablevision of New Hampshire, LLC*, the Bureau found that while WWDP's Spanish-language programming might "be of potential general interest, it [had] no specific ties to the communities in question."²⁰ Time Warner states that this lack of nexus is supported by the fact that WWDP is not listed in the programming section of the *Athol Daily News*.²¹ In any event, Time Warner argues that the television stations it currently carries on the Athol system provide a wide range of news, sports, public affairs and public service programming to the residents. Finally, Time Warner asserts that WWDP has no viewership in the Athol area and, to Time Warner's knowledge, no viewership is reported in Nielsen's *2000 County/Coverage Study* for WPXB in Worcester County.²² In view of the foregoing, Time Warner requests that its request for modification should be granted.

8. With respect to the mandatory statutory criteria, we have reviewed the information provided by the parties in the context of Time Warner's petition. An analysis of this evidence, as it relates to each factor, is provided below.

9. **Historic Carriage.** WWDP originally began operation in late 1986, went dark in 1990, and returned to on-air status on December 18, 1996. Despite being on-the-air intermittently for nearly 14 years, the station has no history of carriage on Time Warner's system serving Athol. Given the statutory directive, consideration must be given to this factor, bearing in mind that the objective of the Section 614(h)

¹⁴Petition at 4.

¹⁵*Id.* at 6.

¹⁶*Id.* at 7 and Declaration of Robert N. Gagne, General Manager.

¹⁷*Id.* at Attachments 3A and 3B.

¹⁸See e.g., *Greater Worcester Cablevision, Inc.*, 12 FCC Rcd 17347 (1997)(38-61 miles); *Cablevision Systems Corporation*, 11 FCC Rcd 6453 (1996)(40-45 miles); *Continental Cablevision of Western New England, Inc.*, 11 FCC Rcd 6488 (1996)(43-69 miles); *Time Warner Cable*, 12 FCC Rcd 23249 (1997)(42 miles); *TKR Cable Company*, 12 FCC Rcd 3525 (1997)(42-75 miles); and *Cablevision of Cleveland, L.P. and V Cable, Inc.*, 11 FCC Rcd 18034 (1996)(41-85 miles).

¹⁹Petition at Attachment 5.

²⁰DA 01-577 (released March 5, 2001) at ¶17.

²¹Petition at Attachment 6.

²²*Id.* at 10.

process is to “better effectuate the purposes” of the broadcast signal carriage scheme.²³ 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 historic 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. We do not believe this to be the case here. We believe that WWDP’s failure to be carried at any point during this period reflects the lack of geographic proximity to the subject community.

10. **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.²⁴ In the instant proceeding, WWDP does not satisfy any of the local coverage elements we find important in a market modification analysis. Not only does WWDP’s predicted Grade B contour fail to encompass the community of Athol, but, with regard to programming, no evidence has been presented that WWDP provides programming which is relevant or of interest to the residents of Athol.

11. **Carriage of Other Stations.** We also believe that Time Warner’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 instance, we find that the other Boston market stations carried by Time Warner appear to have a closer nexus to the cable system at issue in this proceeding than does WWDP.

12. **Viewership.** Nielsen’s *2000 County/Coverage Study* fails to indicate any viewership for WWDP in Worcester County where the community of Athol is located.²⁵ This dearth of viewership is of evidentiary significance when tied with the lack of historical carriage and Grade B coverage.

13. After considering each statutory factor in the context of the circumstances presented here, we grant Time Warner’s modification request. We believe that the community of Athol is sufficiently removed from WWDP that it ought not be deemed part of WWDP’s market for mandatory carriage purposes. 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

²³*Must Carry Order*, 8 FCC Rcd at 2976.

²⁴As 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 Orlando-Daytona Beach-Melbourne, and Cocoa, Florida*, Report and Order, 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.”).

²⁵*See Nielsen Media Research’s Nielsen Station Index, County Coverage Study 2000, Volume 2.*

economic market.”²⁶ Changes may be sought and granted by the Commission “to better effectuate the purposes” of the mandatory carriage requirements.²⁷ 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, and the absence of evidence indicating that WWDP provides sufficient local programming, we conclude that deletion of Time Warner’s cable community from WWDP’s market for mandatory carriage purposes better effectuates the purposes of Section 614 of the Communications Act. Because of the action we take in this Order, the Bureau’s previous decision granting WWDP’s must carry complaint against Time Warner is rescinded.

IV. ORDERING CLAUSES

14. 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 petition for special relief filed by Time Warner Entertainment-Advance/Newhouse Partnership d/b/a Time Warner Cable **IS GRANTED**.

15. **IT IS FURTHER ORDERED**, in view of our action herein, that the Cable Services Bureau’s February 14, 2001 grant of WWDP’s must carry complaint against Time Warner (CSR-5611-M) **IS RESCINDED**.

16. This action is taken pursuant to authority delegated by Section 0.321 of the Commission’s rules.²⁸

FEDERAL COMMUNICATIONS COMMISSION

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

²⁶H.R. Rep. 102-628, 102d Cong., 2d Sess. 97-98 (1992).

²⁷47 U.S.C. §534(h).

²⁸47 C.F.R. §0.321.