

**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-5674-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 WPXB (Ch. 60), Merrimack, New Hampshire (“WPXB”). Specifically, Time Warner requests that WPXB 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.

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”)*,² 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.³ 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.

²8 FCC Rcd 2965, 2976-1977 (1993).

³Section 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). 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”).*

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.⁴

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.⁵

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.⁶

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 [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.

⁴For a more complete description of how counties are allocated, see Nielsen Media Research's *Nielsen Station Index: Methodology Techniques and Data Interpretation*.

⁵47 U.S.C. §534(h)(1)(C).

⁶*Id.*

* * * *

[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.⁷

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.⁸

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.⁹

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.

(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

⁷H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

⁸H.R. Rep. 102-628, 102d Cong., 2d Sess. 97-98 (1992).

⁹*Must Carry Order*, 8 FCC Rcd 2965, 2977 n. 139.

curves may also be included to support a technical service exhibit.¹⁰

(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.¹¹

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.¹²

III. DISCUSSION

5. The issue before us is Time Warner's request to exclude WPXB from mandatory carriage in Athol, Massachusetts. Time Warner's cable community is located in the Massachusetts county of Worcester which is deemed to be part of the Boston DMA. WPXB is licensed to Merrimack, New Hampshire, which is also considered to be part of the Boston DMA.

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.¹³ Time Warner argues that, despite being on-the-air for 14 years, WPXB has no history of carriage on the Athol system.¹⁴ Time Warner states that not only is this lack of carriage attributable to the fact that Athol is located outside the scope of WPXB's natural market, but affirmed by WPXB's failure to be carried on any other cable system adjacent to the Athol system and its inability to deliver a good quality

¹⁰The 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.

¹¹See *Modification Final Report and Order*, 14 FCC Rcd 8366 (1999); see also 47 C.F.R. §76.59(b).

¹²*Modification Final Report and Order*, 14 FCC Rcd at 8390.

¹³Petition at 4.

¹⁴*Id.* at 7.

signal.¹⁵ Time Warner states that Merrimack, WPXB's city of license, is geographically distant from Athol at 42 miles.¹⁶ Time Warner points out that this distance is comparable to or greater than previous decisions where the Bureau granted the requested modification.¹⁷ 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.¹⁸

7. Time Warner states that WPXB's programming, which consists exclusively of home shopping programming, lacks specific local interest or import for the Athol cable system's subscribers.¹⁹ Time Warner states that this lack of nexus is supported by the fact that WPXB is not listed in the programming section of the *Athol Daily News*.²⁰ In any event, Time Warner argues that the television stations currently carried 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 WPXB 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.²¹ In view of the foregoing, Time Warner requests that its request for modification 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.** WPXB began operation August 14, 1987. Despite being on-the-air 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) process is to "better effectuate the purposes" of the broadcast signal carriage scheme.²² 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 WPXB's failure to be carried for over 14 years reflects the lack of geographic proximity to the subject community.

¹⁵*Id.* See also Declaration of Robert N. Gagne, General Manager.

¹⁶*Id.* at Attachments 3A and 3B.

¹⁷See 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).

¹⁸Petition at Attachment 4.

¹⁹*Id.* at Attachment 5.

²⁰*Id.* at Attachment 6.

²¹*Id.* at 11.

²²*Must Carry Order*, 8 FCC Rcd at 2976.

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.²³ In the instant proceeding, WPXB does not satisfy any of the local coverage elements we find important in a market modification analysis. Not only does WPXB's predicted Grade B contour fail to encompass the community of Athol, but the Longley-Rice study provided by Time Warner appears to indicate that WPXB's signal is more oriented toward the eastern portion of the Boston market than to the western portion where Athol is located. With regard to programming, no evidence has been presented that WPXB provides programming which is relevant or of interest to Time Warner's subscribers..

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 and Springfield-Holyoke market stations carried by Time Warner provide more relevant programming to the cable system at issue in this proceeding than does WPXB.

12. **Viewership.** Nielsen's *2000 County/Coverage Study* fails to indicate any viewership for WPXB in Worcester County where the community of Athol is located.²⁴ This dearth of viewership is of evidentiary significance when tied with the lack of historical carriage and Grade B coverage. We recognize that home shopping stations, like religious and foreign-language stations, which were once referred to as specialty stations, are capable of "offer[ing] desirable diversity of programming . . . ," yet typically attract limited audiences.²⁵ Because WPXB has a specialized format catering to a niche audience, this point, by itself, is not a complete indicator of the relationship between the cable community and the market of the television station. Consequently, we do not give significant weight to this factor.

13. After considering each statutory factor in the context of the uncontested circumstances presented here, we grant Time Warner's modification request. We believe that the community of Athol is sufficiently removed from WPXB that it ought not be deemed part of WPXB'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

²³As 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*, 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.").

²⁴*See Nielsen Media Research's Nielsen Station Index, County Coverage Study 2000, Volume 2.*

²⁵*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*, First Report and Order, 58 FCC 2d 442, 452 (1976), *recon. denied*, 60 FCC 2d 661 (1976).

form their 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 WPXB provides sufficient local programming, we conclude that deletion of Time Warner’s cable community from WPXB’s market for mandatory carriage purposes better effectuates the purposes of Section 614 of the Communications Act.

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. 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.