

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

In the Matter of :)	
)	
CABLEVISION SYSTEMS CORPORATION)	
)	CSR-4819A
)	
Petition For Modification of ADI of Television)	
Station WNDS-TV Derry, New Hampshire)	
)	
)	

ORDER ON RECONSIDERATION

Adopted: September 20, 2001

Released: September 25, 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 Partial Reconsideration of the decision by the Cable Services Bureau (the “Bureau”) in *Cablevision Systems Corporation* (“*Order*”).¹ In the *Order*, the Bureau granted the petition for special relief filed by Cablevision Systems Corporation (“Cablevision”) to exclude the communities of Norwood and Westwood, 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. The *Order* denied Cablevision’s requested deletion of the community of Framingham, Massachusetts from WNDS’s market for mandatory carriage purposes.² Cablevision has filed an Opposition to the Petition for Reconsideration, to which WNDS replied.

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 within the station’s market.³ A station’s market for this purpose is its “designated market area,” or DMA, as defined by Nielsen Media

¹12 FCC Rcd 2485 (CSB 1997).

²WNDS does not seek reconsideration of that determination and portion of the *Order*.

³8 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. 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

3. The *Order* granted Cablevision's request to exclude the communities of Norwood and Westwood from WNDS'S market area.⁶ The Bureau concluded that WNDS lacked historic carriage and had no measurable audience in both the Norwood and Westwood communities.⁷ Regarding the issue of local service, the Bureau found that WNDS fails to place a Grade B contour over either Norwood or Westwood.⁸ Moreover, the *Order* noted that several other television stations have a closer nexus to the communities, providing more targeted local newcasts and public affairs programming than WNDS.⁹ Based upon the four modification factors set forth in the statute, the Bureau found that Norwood and Westwood were sufficiently removed from WNDS that the communities should not be deemed part of the station's market for mandatory carriage purposes.¹⁰ Grant of Cablevision's petition relieved the cable operator of the obligation under the mandatory broadcast signal carriage rules to carry WNDS'S signal on their system. However in the *Order* the Bureau denied Cablevision's request to exclude Framingham, Massachusetts from the Boston ADI insofar as mandatory carriage of station WNDS is concerned, concluding that WNDS places a Grade B contour over Framingham and that the station had measurable viewership in the community.¹¹

III. DISCUSSION

4. In its petition for partial reconsideration, WNDS argues that the Bureau should reinstate Norwood and Westwood as communities in WNDS' market because the Bureau decision misapplied the statutory criteria of the market modification process in several critical ways.¹² WNDS states that the *Order* failed to consider the implications that WNDS' earlier classification as a "distant signal" had on the

⁴Section 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). Effective January 1, 2000, 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).

⁵*See* 47 U.S.C. § 534(h)(1)(C).

⁶*Cablevision Systems Corporation*, 12 FCC Rcd at 2491.

⁷*Id.*

⁸*Id.*

⁹*Id.* at 2492.

¹⁰*Id.*

¹¹*Id.* at 2491.

¹²WNDS Petition at i.

station's history of cable carriage and viewership levels.¹³ Under the first criterion of the Section 614 analysis regarding historical carriage, WNDS contends that its classification as a "distant signal" prior to enactment of the Satellite Home Viewer Act ("SHVA") in 1994 precluded carriage on Cablevision's systems and that it has a history of carriage since the enactment of the SHVA on numerous other systems surrounding Cablevision's systems.¹⁴ WNDS states that the Bureau failed to address these arguments and that while the *Order* acknowledged that historical carriage was not by itself outcome determinative, the Bureau nevertheless determined that the evidence weighed in favor of excluding Norwood and Westwood from WNDS' market.¹⁵ WNDS also disagrees with the Bureau's conclusion that WNDS had no measured audience in the Norwood and Westwood communities.¹⁶ WNDS states that the Bureau ignored its ties to Norwood and Westwood and the surrounding South Boston area and that the station had received carriage on virtually every other cable system surrounding Cablevision's system.¹⁷

5. WNDS argues that this conclusion is in contrast to that reached in *Greater Worcester Cablevision, Inc.*,¹⁸ ("*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.¹⁹ WNDS notes that Westwood is 46 miles and Norwood is 48 miles from the station.²⁰ WNDS points out that in *Greater Worcester* the Bureau concluded that because of the station's past status as a "distant signal" for copyright purposes, 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 these particular statutory factors did not weigh against the station.²¹ 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.²²

6. With regard to consideration of the local service factor, WNDS states that the while the *Order* acknowledged that local service could be measured through the broadcast of local programming to the communities in question, as well as, by the relative geographic proximity of the cable community to the station, the *Order* instead needlessly focused on one factor and concluded that service as measured by the station's predicted Grade B contour was the decisive factor.²³ In addition, WNDS contends that while the local service requirement is satisfied if the station's predicted Grade B contour covers the community,

¹³*Id.* at 4.

¹⁴*Id.* at 5.

¹⁵*Id.*

¹⁶*Id.* at 6.

¹⁷*Id.*

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

¹⁹WNDS Petition at 5-6.

²⁰*Id.* at 6.

²¹*Id.* at 7, *citing Greater Worcester*, 10 FCC Rcd at 12572.

²²WNDS Petition at 6.

²³*Id.* at 8.

predicted Grade B coverage alone is not the sole indicator of local coverage.²⁴ WNDS argues that notwithstanding the apparent shortfall of the station's predicted Grade B contour, WNDS'S actual usable signal extends to the Norwood and Westwood communities.²⁵ WNDS states that it actually delivers a usable signal of acceptable technical quality to Norwood and Westwood and, in fact, serves these communities.²⁶ Moreover, WNDS argues 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.²⁷ WNDS points out that the Bureau has granted a market modification in *Blackstar of Ann Arbor*, adding to the petitioning station's market four communities that were located outside, but on the periphery of a station's Grade B contour.²⁸ WNDS argues that the Bureau should likewise refuse to remove Norwood and Westwood, which appear to fall outside the station's predicted Grade B contour.²⁹ WNDS additionally asserts that Norwood and Westwood form part of the station's economic market.³⁰ Finally, WNDS contends that the existence of other local stations serving the community is immaterial, as such information is relevant 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.³¹ WNDS asserts that it provides service to the Norwood and Westwood communities.³²

7. In opposition to WNDS' petition for partial 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*.³³ Cablevision states that the Bureau did not delete the Norwood and Westwood cable communities from WNDS' market solely because the station's predicted Grade B contour does not encompass it.³⁴ It argues that the Bureau considered each of the established four market modification criteria when it decided to delete the Norwood and Westwood communities and the Bureau was well within its discretion to consider WNDS' predicted Grade B contour when determining the station's local coverage.³⁵

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

²⁴*Id.*

²⁵*Id.* at 12.

²⁶*Id.*

²⁷*Id.*, citing *Greater Worcester*, 10 FCC Rcd at 12572-73.

²⁸See *Blackstar of Ann Arbor*, 11 FCC 14992 (CSB 1996) ("*Blackstar*")

²⁹WNDS Petition at 13-14.

³⁰*Id.* at 12.

³¹*Id.* at 14.

³²*Id.*

³³Cablevision Opposition at 2-3.

³⁴*Id.* at 7.

³⁵*Id.*

is distinguishable.³⁶ 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 communities served by the Worcester cable system.³⁷ Cablevision emphasizes that in the instant case WNDS provides no Grade B coverage to either the Norwood or Westwood communities served by Cablevision's Norwood systems.³⁸ 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.³⁹ Cablevision asserts that it operates the Norwood systems as independent cable systems, not interconnected with any cable systems that fall within WNDS' Grade B contour.⁴⁰ It states that despite WNDS' intimation, the cable systems serving Norwood and Westwood, and the system serving Boston, are not fully integrated.⁴¹

9. Regarding its assertion that WNDS' "actual usable signal" extends to the Norwood and Westwood communities, Cablevision argues that WNDS provides no technical data, engineering reports or any other record information to support its claim.⁴² In addition, Cablevision points out that in other market modification proceedings the Bureau has concluded that where the lack of historical carriage and the lack of audience is linked with other information regarding the market, the historical carriage and viewership levels become evidentially significant.⁴³ With regard to local programming, Cablevision points out that WNDS appears to equate its assertion that the station provides a signal of acceptable technical quality with the existence of local programming service to the Norwood and Westwood communities.⁴⁴ Cablevision states that WNDS makes no showing as to the existence of programming on WNDS that serves the local needs and interest of the citizens of Norwood and Westwood.⁴⁵

10. In reply to Cablevision's opposition, 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 communities.⁴⁶ In addition, WNDS argues that Cablevision's opposition relies heavily on the fact that the station's predicted Grade B contour does not encompass the Norwood and Westwood communities and asserts that certain cases have concluded that the absence of Grade B coverage does not necessarily lead to grant of a cable system's request to delete a

³⁶*Id.* at 4-5.

³⁷*Id.*, citing *Greater Worcester*, 10 FCC Rcd at 12572.

³⁸*Id.* at 5.

³⁹*Id.*

⁴⁰*Id.* at 6.

⁴¹*Id.* Cablevision states that the Boston and Norwood systems do not share a common headend, common channels, or common pricing.

⁴²*Id.*

⁴³*Id.* at 8, citing *Time Warner Entertainment - Advance/Newhouse Partnership for Modification of the ADI of Television Stations: WTBY, Poughkeepsie, NY*, 11 FCC Rcd 6541 (CSB 1996).

⁴⁴Cablevision at 8.

⁴⁵*Id.* at 8.

⁴⁶Reply at 2.

community from a station's market.⁴⁷ WNDS argues that *Maranatha Broadcasting Company Inc.*,⁴⁸ supports its position. WNDS states that, in *Maranatha Broadcasting*, a petition to delete several communities in Burlington and Gloucester Counties, New Jersey from the market of an Allentown, Pennsylvania station, WFMZ-TV, was denied.⁴⁹ WNDS asserts that the station in question had no history of cable carriage, provided no over-the-air service and had no measured audience in the subject communities.⁵⁰ WNDS states that the Commission concluded that market modification was not justified, notwithstanding that the communities were approximately 47-68 miles from WFMZ-TV's community of license, across the Delaware River, and in a different state.⁵¹ WNDS states that the factor weighing against deletion was that the station in question was carried on cable systems in adjoining communities.⁵²

11. WNDS asserts that because it is carried on numerous surrounding cable systems, Norwood and Westwood should not be excluded from its market.⁵³ Finally, in response to Cablevision's assertion that the station did not provide local programming, WNDS asserts that it indeed presented evidence in the previous proceeding that WNDS provided programming of particular local interest to residents of the Boston DMA, in which Norwood and Westwood are located, which included Massachusetts related news stories and several stories pertaining to a Norwood news event.⁵⁴

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 Norwood and Westwood communities are located outside of WNDS' Grade B signal contour, the conclusion reached in the *Greater Worcester* case should be considered as support for finding that the communities are part of WNDS' television market. We believe the facts of the instant case are distinguishable from those presented in *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 market's primary population centers.⁵⁵ The Bureau concluded that WNDS provided local service because the majority of the cable communities' population fell within the station's predicted Grade B contour.⁵⁶ It also concluded that WNDS' Grade B contour sufficiently encompassed the heavily populated City of Worcester and that WNDS placed a Grade B

⁴⁷*Id.*

⁴⁸*Maranatha Broadcasting Company, Inc.*, 13 FCC Rcd 1629 (CSB 1997) ("*Maranatha Broadcasting*").

⁴⁹Reply at 2.

⁵⁰*Id.* at 3.

⁵¹*Id.*

⁵²*Id.*

⁵³*Id.* at 3-4.

⁵⁴*Id.* at 4.

⁵⁵*Greater Worcester*, 10 FCC Rcd at 12572.

⁵⁶*Id.* at 12572-73.

contour over many of the other neighboring Massachusetts communities including West Boylston, Boylston, Holden, Northboro, Westboro, and Southboro.⁵⁷ Moreover, the cable communities that fell just outside the station's Grade B contour and the communities within the contour were part of an integrated cable system.⁵⁸ In light of these factors and findings, the Bureau concluded that cable communities falling just outside of the station's Grade B contour should not be removed from WNDS' market.⁵⁹

14. In the instant case, WNDS asks that Norwood and Westwood be included in the station's market. However, the findings at the core in *Greater Worcester* are not present in this case. With regard to the Grade B signal, WNDS fails to provide a Grade B signal to the Norwood and Westwood communities. In addition, contrary to what was the case in *Greater Worcester*, no local service is provided to the communities. WNDS asserts that it provides programming local to the Norwood and Westwood communities. WNDS, however, identifies the local programming as Massachusetts related news stories, with a few stories focusing on Norwood and no news covering the Westwood community. Moreover, we do not view *Greater Worcester* as support for WNDS' carriage arguments because 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. With respect to historic carriage, WNDS has been in operation since 1983. We believe that WNDS' failure to be carried for over 15 years reflects the lack of geographic proximity to the subject communities. 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 excluding Norwood and Westwood from WNDS's market.

15. WNDS indicates that the station receives carriage on numerous other systems surrounding Cablevision's systems. In the underlying proceeding WNDS submitted a map illustrating those systems that carry or agreed to carry WNDS. While WNDS points to a history of carriage on several nearby cable systems other than Cablevision, we note that there is no indication whether carriage on these systems continues or whether carriage arrangements have been modified due to, for example, signal deficiency problems. In addition, several of the cable systems where WNDS indicates it is carried in fact may be within the station's Grade B contour. Moreover, carriage on nearby systems is one among several factors to be considered when making a carriage determination. We also find that 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.

16. Petitioner also relies on the Bureau's *Maranatha* and *Blackstar* decisions. We think, however, that these decisions are distinguishable because in the instant case there is no history of carriage, a failure to place a Grade B signal over the communities at issue, a lack of local programming, and an absence of engineering data to support carriage. In *Maranatha Broadcasting*, the Bureau pointed out that in certain cases it is necessary to focus more heavily on factors that are not influenced by the type or age of the stations involved or on historical carriage.⁶⁰ The Bureau stated that the scope of a local station's

⁵⁷*Id.*

⁵⁸*Id.*

⁵⁹*Id.*

⁶⁰*Maranatha Broadcasting*, 13 FCC Rcd at 1639.

market may be measured through geographic means by examining the distance between the station and the cable community subject to the deletion request and by taking into account natural phenomena, such as waterways, mountains, and valleys.⁶¹ In *Maranatha Broadcasting*, the Bureau noted that station service contours/Grade B contours are relevant and are an objective measure of the scope of a station's local market.⁶² The Bureau concluded that although the station at issue, WFMZ-TV, did not provide Grade B service to the cable communities at issue, the station was in the process of improving its facilities so that it would be on the edge of its service area.⁶³ Moreover, the Bureau found that WFMZ-TV demonstrated some efforts to provide programming targeted to New Jersey, including Burlington and Gloucester Counties, the communities at issue in *Maranatha Broadcasting*.⁶⁴ It was also determined that the station's facilities had been upgraded, so that the lack of historical carriage was based on circumstances that no longer existed. In addition, the station's schedule was listed in the television listings relevant to the communities at issue and provided evidence that the market regarded the communities to be within the economic market and service area of the station. Moreover, the Bureau concluded that the distances and the geography involved were not so extreme as to suggest that no market nexus with the communities existed.⁶⁵ The above considerations and circumstances when weighed favored carriage. Based upon these considerations, we conclude the circumstances in *Maranatha Broadcasting* are distinct from those presented by the instant proceeding. There is not a sufficient nexus between WNDS and the communities of Norwood and Westwood to require mandatory carriage of WNDS's signal.

17. 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.⁶⁶ The Bureau found that the station at issue, WBSX, Channel 31, Ann Arbor, Michigan, provided limited coverage over the four relevant communities.⁶⁷ 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.⁶⁸ 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.⁶⁹ As discussed, the circumstances in *Blackstar* are different from those in the instant case. These distinct differences do not provide support for carriage of WNDS in the Norwood and Westwood communities.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ See *Blackstar of Ann Arbor*, 11 FCC at 15002.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

IV. ORDERING CLAUSES

18. Accordingly, **IT IS ORDERED** that the Petition for Partial 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.⁷⁰

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief
Cable Services Bureau

⁷⁰47 C.F.R. §§ 0.321 and 1.106.