

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

In the Matter of:)	
)	
Norwell Television, LLC)	CSR-5724-A
)	
For Modification of the Boston, Massachusetts DMA)	

MEMORANDUM OPINION AND ORDER

Adopted: December 10, 2001

Released: December 12, 2001

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Norwell Television, LLC, licensee of television broadcast station WWDP (Ch. 46), Norwell, Massachusetts (“WWDP”), filed the above-captioned petition for special relief seeking to modify the Boston, Massachusetts designated market area (“DMA”) to include the communities of Central Falls, Cumberland, East Providence, Lincoln Township, North Providence, Pawtucket, Providence, Tiverton, and Woonsocket, Rhode Island. An opposition to this petition was filed on behalf of CoxCom, Inc., d/b/a Cox Communications New England, Inc. (“Cox”), the cable system which serves the subject communities. WWDP has replied. Subsequently, Cox filed a supplement to WWDP’s reply which WWDP opposed.¹

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.² A station’s market for this purpose is its “designated market area,” or DMA, as defined by Nielsen Media Research.³ A DMA is a geographic market designation that defines each television market exclusive of

¹While this pleading is outside of the normal pleading process, the information contained therein is relevant to the case and will be accepted.

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

(continued...)

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 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.

(...continued from previous page)
(1999) (“*Modification Final Report and Order*”).

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

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.⁸

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 curves may also be included to support a technical service exhibit.⁹

(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

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

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

⁹The 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.

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

III. DISCUSSION

5. The issue before us is whether to grant WWDP's request to include the communities of Central Falls, Cumberland, East Providence, Lincoln Township, North Providence, Pawtucket, Providence, Tiverton and Woonsocket, Rhode Island, within its television market. WWDP is in the Boston, Massachusetts DMA, while Providence and Newport Counties, Rhode Island, where the communities are located, are within the Providence, Rhode Island-New Bedford, Massachusetts DMA.

6. In support of its request, WWDP argues that the subject communities should be added to its market because it is a "specialty" station which broadcasts Spanish-language programming; its predicted Grade B contour encompasses the communities; it is geographically close at no more than 19-28 miles; Cox carries other Boston market stations which are located farther away than is WWDP; and it provides coverage of issues of concern to Hispanic and other residents in the communities which is not provided by any other station Cox carries.

7. WWDP states that it began broadcasting in May 1987, left the air three years later and did not return until December 1996.¹¹ WWDP states that its current licensee, Norwell Television, acquired the station in June 2000.¹² WWDP states that under its current ownership it is a full power commercial television station which primarily broadcasts Spanish-language programming provided by Telemundo. This programming consists of news, entertainment, local public affairs, children's programming, emergency broadcasts and program-length presentations of local and national businesses and community organizations.¹³ WWDP points out that the Commission has previously deemed foreign-language stations "specialty stations" and promulgated must carry rules that provided these stations with special protections aimed at encouraging their carriage.¹⁴

8. Although WWDP notes that there is no record that Cox has ever carried its signal on its system, it argues that that is to be expected since WWDP and the subject communities are located in separate DMAs.¹⁵ WWDP states that it is also not surprising that it is not listed among the cable

¹⁰47 C.F.R. §76.59(b).

¹¹Petition at 3.

¹²*Id.*

¹³*Id.*

¹⁴*See 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 Amending the Appropriate Signal Carriage Rules, First Report and Order, 58 FCC 2d 442 (1976); recon. denied, 60 FCC 2d 661 (1976) ("Specialty Station Order").*

¹⁵Petition at Exhibit I.

communities' television listings because it is a small specialty station with a limited audience.¹⁶ While WWDP concedes that the Commission is statutorily obligated to consider historical carriage in analyzing market modification cases, WWDP notes that the Commission has determined that "the historical carriage factor is not controlling in [specialty station] circumstances because the 1992 Cable Act would, in effect, prevent home shopping and other specialty stations which cable systems had previously declined to carry, from ever being carried."¹⁷ WWDP points out that the Commission has both added to and refused to delete communities from a specialty station's market even in situations where the specialty station could not demonstrate historical carriage.¹⁸ As a result, WWDP argues that its failure to demonstrate historical carriage with regard to Cox's communities herein should not be controlling.

9. WWDP states that, as demonstrated by signal contour coverage maps, it provides a predicted Grade B signal to each of the subject communities.¹⁹ WWDP states that, as demonstrated by terrain coverage maps, there are no mountains, valleys, or waterways which degrade the reception of WWDP's signal in the communities.²⁰ WWDP states that it is also geographically close to the communities, at an average of 22.8 miles.²¹ WWDP argues that, as a general matter, Grade B coverage demonstrates local service to cable communities.²² Further, WWDP notes that in *Market Modifications and the New York Area of Dominant Influence*, the Commission held that "the Bureau's reliance on Grade B contour coverage and distance to the community, in terms of both geography and mileage, is fully supported by the [1992 Cable Act], its legislative history, and Commission precedent."²³ WWDP maintains that the economic nexus between Norwell, its community of license, and the subject communities is supported not only by the local service that WWDP provides and the station's geographic proximity, but also by similar population characteristics, work forces, economies and governments.²⁴

10. WWDP points out that, according to the 2001 edition of *Television & Cable Factbook*, Cox carries four Boston-market stations, each of which are farther away from the subject communities than is WWDP.²⁵ WWDP asserts that this demonstrates that WWDP has a closer nexus to the communities than do these more distant stations.²⁶ WWDP states that Cox's carriage of its competitors allows these stations to greatly increase their ability to compete for advertising dollars and audience in Providence and Newport Counties while, at the same time, leaving WWDP at a distinct economic disadvantage in an area in which it provides local service.²⁷ WWDP maintains that the only way correct this is to grant its

¹⁶*Id.* at 4.

¹⁷*See Nationwide Communications, Inc.*, 10 FCC Rcd 13050, 13053 (1995).

¹⁸*See e.g., Paxson San Jose License, Inc.*, 12 FCC Rcd 17520 (1997); *Nationwide Communication, Inc.*, 10 FCC Rcd 13050 (1995); *Cablevision of Cleveland*, 12 FCC Rcd 15183 (1997); and *Agape Church, Inc.*, 14 FCC Rcd 2309 (1999).

¹⁹Petition at Exhibit III.

²⁰*Id.* at Exhibit IV.

²¹*Id.* at Exhibit V.

²²*Must Carry Order*, 8 FCC Rcd 2965, 2977 (1993).

²³12 FCC Rcd 12262, 12267 (1997).

²⁴Petition at Exhibit VI.

²⁵*Id.* at 7 and Exhibit VII.

²⁶*Id.* at 8.

²⁷*Id.*

modification request.

11. WWDP concedes that it does not command high viewership ratings in the communities.²⁸ It argues, however, that its lack of ratings like its lack of historical carriage are the direct result of its status as a small specialty station. It maintains that its lack of ratings should not be determinative.²⁹ In any event, WWDP points out that the Spanish-language programming it provides is not carried by any other station available to the communities.³⁰ WWDP argues that its audience will certainly increase once Cox commences carriage of its signal because the Hispanic population in the subject communities continues to grow.³¹

12. In opposition, Cox argues that WWDP's petition should be dismissed as procedurally defective because it failed to serve local franchising authorities or provide certain information required by the Commission's rules. If not dismissed on procedural grounds, Cox asserts that WWDP's petition should be denied on the merits because it fails to satisfy the burden for altering the statutory factors adopted by Congress.

13. Cox states that the Commission's rules require parties filing market modification petitions to serve copies of such filings on all affected parties, including local franchising authorities.³² In addition, Cox states that such pleadings must include a written verification attesting that the submission is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law.³³ Cox states that WWDP's petition does not comply with either of these requirements. As a result, Cox states, the local franchising authorities of the communities, who are unlikely to regularly review the Bureau's public notices, have been deprived of the opportunity to review the petition.

14. Cox argues that the communities requested for inclusion constitute the core of the Providence television market.³⁴ Cox states that the community of Norwell, WWDP's city of license, has a population of less than 10,000 and is located away from the heightened economic activity of the communities located between Boston and Providence.³⁵ Although WWDP asserted that it operated in the same market as Providence because it shared "similar population characteristics, work forces, economies, and governments," Cox maintains that Norwell and Providence are clearly two separate markets.³⁶ Cox points out that it operates a technically-integrated cable system serving most of Rhode Island which does

²⁸*Id.* at Exhibit VIII.

²⁹*See Omnipoint Corp. v. FCC*, 78 F. 3d 620, 633-634 (D.C. Cir. 1996)(noting that when Congress directs an agency to consider certain factors, the agency simply "must reach an express and considered conclusion about the bearing of a factor, but is not required to give any specific weight to it.").

³⁰Petition at Exhibit IX.

³¹*Id.* at 9.

³²47 C.F.R. §76.7(a)(3).

³³*See 1998 Biennial Regulatory Review – Part 76 – Cable Television Service Pleading and Complaint Rules*, Report and Order, 14 FCC Rcd 418 (1999).

³⁴Opposition at 2.

³⁵*Id.*

³⁶*Id.*

not serve any area close to Norwell.³⁷ Cox states that Norwell and Providence are located in different states, represented by different local officials, Congressional representatives and Senators, and assigned to different economic and demographic markets by such entities as Nielsen (DMAs), Arbitron (radio markets), Rand McNally (Basic Trading Areas), and the U.S. Office of Management and Budget (Metropolitan Statistical Areas).³⁸ Cox argues that there is no basis on which to find that there is a market nexus between WWDP and the subject communities.

15. Cox maintains that WWDP's absence of historical carriage illustrates the lack of any market nexus between the station and the subject communities.³⁹ Cox points out that if WWDP actually operated in the same market as the communities at issue Nielsen would have assigned the station to the Providence DMA rather than the Boston DMA. Cox states that if WWDP actually offered programming with local appeal to its subscribers, as certain other Boston stations do, then Cox would have an incentive to seek a retransmission consent agreement with WWDP so that the station could be carried. Cox states that this fact, as well as the fact that no cable operator serving the subject communities has chosen to voluntarily carry WWDP at any time during its 14 years of operation, confirms that WWDP is not considered a local signal by viewers in and around the communities. Cox states that this fact is only enhanced by the fact that WWDP has no local viewership ratings.

16. Cox notes that population density in the Northeast Corridor is generally greater than other areas in the country and DMAs in that region generally are smaller than those located in other parts of the country. As a result, Cox states that it is not surprising that the signals of several Boston DMA stations can be received by viewers in adjacent television markets or that WWDP, whose transmitter is located halfway between Boston and Providence, appears to place a Grade B signal over the subject communities. However, Cox argues that, due to the high level of congestion in the area, this fact alone does not establish a nexus between WWDP and the communities it is seeking to add.⁴⁰ Cox points out that the Bureau also considers a "station's broadcast of local programming, which has a distinct nexus to the cable communities, [to be] evidence of local service."⁴¹ Cox states that WWDP fails to include any discussion of its local programming and that the program log WWDP submitted provides no evidence of any programming specifically targeted to viewers in the subject communities.⁴²

17. Cox asserts that WWDP's failure to offer local programming is not mitigated by the fact that it provides a specialized format or that it broadcasts Spanish-language programming.⁴³ Cox points out that the Bureau has stated that "[t]he fact that a station is new or of specialized appeal does not mean that its logical market area is without limits or that it should be exempt from the Section 614(h) market

³⁷*Id.* Cox notes that although WWDP only requested the inclusion of one-third of the communities served by Cox, because the cable system is technically integrated, a grant of WWDP's request would require Cox to carry WWDP in all communities served by that system. For two-thirds of those communities, Cox states, WWDP would constitute a distant signal and be subject to copyright royalty liability under the Copyright Act.

³⁸Opposition at 2-3.

³⁹*Id.* at 4.

⁴⁰*Id.* at 5.

⁴¹*See Rifkin/Narragansett South Florida, CATV Limited Partnership*, 11 FCC Rcd 21090, 21104 (1996).

⁴²Opposition at 5. *See also* Petition at Exhibit IX.

⁴³*Id.*

modification process.”⁴⁴ Cox argues that if WWDP were correct in its assumption that its programming is “local” because it targets a particular segment of the communities’ population which speaks Spanish, then the station’s programming would be “local” to every community with a Spanish-speaking resident. Cox asserts that Congress did not intend for programming of such a generalized nature to qualify as “local programming.”⁴⁵ In any event, Cox states, its subscribers already receive an abundance of programming which addresses their interests and concerns from stations which it currently carries, including Spanish-language programming from Boston DMA station WUNI-TV and low power television station, WRIW, located in the Providence DMA.⁴⁶

18. Finally, Cox argues that the communities sought for inclusion by WWDP form the core of the Providence DMA and grant of the request would threaten the integrity of the basic structure of that market.⁴⁷ Cox points out that the concern for the integrity of television markets was evident in the Bureau’s decision in *Agape Church, Inc.*, where the Bureau acknowledged that, despite Grade B or better service, “we have a countervailing factor to consider” when the petitioning station’s signal “encroaches into the core or hub” of the adjacent market.⁴⁸ Cox states that the Bureau has applied similar reasoning even in situations where the petitioning stations satisfied many market modification criteria.⁴⁹

19. In reply, WWDP states that Cox’s assertion that “WWDP already has must-carry rights throughout the Boston DMA” is incorrect.⁵⁰ WWDP maintains that the Commission has significantly limited its carriage in the Boston DMA on at least four occasions because WWDP did not provide the communities with a Grade B signal.⁵¹ WWDP states, however, that that is not the case here. WWDP states that it has proven that the subject communities are well within its Grade B contour and that there is no geographic barrier separating the station from the communities.⁵² WWDP states that Cox’s claim that Grade B coverage should be overlooked in this case because “DMAs in [the Northeast Corridor] generally are smaller than those located in the rest of the nation,” is misplaced. WWDP states that such a statement not only ignores the fact that ten of the largest DMAs in the country are in the Northeast Corridor, but that if Cox’s reasoning were followed the Commission would never grant market modification requests which seek the inclusion of communities outside of their own market.⁵³ In addition, WWDP argues that Cox’s

⁴⁴See *Continental Cablevision of Jacksonville, Inc.*, 11 FCC Rcd 14909, 14921 (1996).

⁴⁵Opposition at 6.

⁴⁶*Id.* Cox states that WRIW carries a local Spanish-language news program produced in Providence by Telemundo and carried on the system 6 p.m. weekdays and 10 a.m. weekends. WUNI-TV broadcasts programming from the Univision network.

⁴⁷*Id.* at 7.

⁴⁸14 FCC Rcd 2309 (1999).

⁴⁹See e.g., *Channel 33, Inc.*, 11 FCC Rcd 2579 (1996); *Channel 39, Inc.*, 13 FCC Rcd 3108 (1998); and *USA Station Group Partnership of Hollywood, Florida*, 14 FCC Rcd 7211 (1999).

⁵⁰See Opposition at 2.

⁵¹See e.g., *Greater Worcester Cablevision, Inc.*, 13 FCC Rcd 22220 (1998); *MetroCast Cablevision of New Hampshire, LLC*, 16 FCC Rcd 5244 (2001); *Time Warner Entertainment-Advance/Newhouse Partnership*, DA 01-1912 (released August 13, 2001); and *Frontiersvision Operating Partners, L.P.*, DA 01-2296 (released September 21, 2001).

⁵²Reply at 12.

⁵³*Id.* at 13.

claims as to Norwell's location are irrelevant in the face of the proximity of WWDP's transmitter and the station's average distance from the communities.⁵⁴ WWDP maintains that such proximity demonstrates that it has a closer nexus than the other Boston market stations the cable system carries. Further, WWDP argues that Cox's claim that its system is technically-integrated does not alter the fact that a station will be considered "local" on a technically-integrated system regardless of whether it is carried by the cable system into a community that it outside the station's market.⁵⁵ WWDP states that should any copyright issues arise at some future date concerning its carriage on Cox's system, it will fully resolve those issues according to applicable laws and regulations.

20. With regard to procedural issues, WWDP concedes that it inadvertently failed to serve the local franchising authorities at the time it filed its petition, but once it discovered the error, it immediately served them and sent notification of service to both the Bureau and Cox's counsel.⁵⁶ WWDP states that the Commission has repeatedly found that such a procedural error is not necessarily fatal and such proceedings should be decided on the merits.⁵⁷ WWDP asserts that the fact that the Commission released a public notice announcing this proceeding and WWDP's own subsequent service should resolve this matter. WWDP argues further that its petition included a signed declaration from the vice president of Norwell Television, attesting to the facts presented.⁵⁸ WWDP points out that this declaration did not expressly state that the petition was "warranted by existing law or a good faith argument for the extension, modification or reversal of existing law" because the signatory is not an attorney and he did not personally possess such knowledge.⁵⁹ WWDP argues that the fact that its counsel signed the petition on WWDP's behalf necessarily connotes that counsel believed the petition legally valid and the relief requested fully justified under Commission precedent.⁶⁰

21. WWDP states that Cox's arguments with regard to historical carriage fail to recognize that WWDP was dark six of its 14 years of operation and changed ownership and programming numerous times.⁶¹ WWDP states that when Norwell Television purchased the station it had been affiliated with PAX TV and another PAX affiliate licensed to the Providence DMA, WPXQ-TV, had superior must carry rights because of duplication.⁶² WWDP states that Cox's dismissal of WWDP's specialty station status in relation to the historical carriage factor ignores the nearly 30 years of Commission precedent in which specialty stations have received special consideration over more popular, mass-market stations.⁶³ In

⁵⁴*Id.* at 3. These distances are 23 and 22.8 miles, respectively. WWDP notes that the other Boston stations Cox carries are, on average, 38 miles distant.

⁵⁵*See Must Carry Order*, 8 FCC Rcd 2965, 2075-76 (1993).

⁵⁶Reply at 4.

⁵⁷*See e.g., Norwell Television, LLC*, DA 01-1267 (released May 23, 2001); *West Vally Cablevision, Inc.*, 42 RR 2d 1371 (1978); *KMSO-TV, Inc.*, 41 RR 2d 1241 (1977); and *Harrisclope Broadcasting Corp.*, 40 RR 2d 439 (1977), *recon. denied*, 43 RR wd 1451 (1978).

⁵⁸Petition, Declaration of Devon W. Paxson.

⁵⁹Reply at 5-6.

⁶⁰*Id.* at 6.

⁶¹*Id.*

⁶²*Id.* at 6-7.

⁶³*See e.g., Cable Television Report and Order*, 36 FCC 2d 143 (1972); and *Specialty Station Order*, 58 FCC 2d 442 (1976), *recon. denied*, 60 FCC 2d 661 (1976).

addition, WWDP points out that Section 614 of the Act specifically directs the Commission to consider whether the station, or other stations located in the same area, have been historically carried on the cable systems serving the communities sought to be added.⁶⁴ WWDP states that, as demonstrated in its petition, Cox has historically carried four stations from the Boston DMA, each of which is geographically farther from the communities than is WWDP.⁶⁵ WWDP argues that the fact that Cox delivers these stations into 79 percent of the homes in its market greatly increases the stations' ability to compete for advertising dollars and audience share, leaving WWDP at a distinct economic disadvantage since it has access only to the 21 percent of the market who do not receive cable.⁶⁶ WWDP maintains that television stations face huge economic hurdles if they must survive only on over-the-air penetration when the vast majority of viewers receive local channels through cable, a fact recognized by the Commission.⁶⁷

22. WWDP argues that the fact that Cox was negotiating with Telemundo to carry its low power Spanish-language station on its system negates any claim by Cox that WWDP's programming fails to offer local appeal to the subject communities. WWDP states that, despite Cox's assertions, it did not claim in its petition that its programming is local because it is Spanish-language. WWDP notes that Cox's reliance on *Continental Cablevision* is misplaced because in that case, where the Commission granted four cable operator's request to exclude certain communities from carriage in their communities, the station involved provided no Grade B signal, was geographically remote, had no historic carriage and no over-the-air audience.⁶⁸ Finally, WWDP asserts that grant of its petition would not threaten the basic integrity of the Providence market. In any event, WWDP points out that Cox fails to explain how the communities at issue form the core of the Providence DMA or the "expectations, relationships, and competitive dynamics" which would be threatened by the addition of a small specialty station to its cable line-up. WWDP also states that Cox fails to justify why its voluntary carriage of other Boston market stations does not cause similar problems, particularly as they have a broader appeal.⁶⁹

23. In a supplemental letter, Cox takes exception to WWDP's contention that it was negotiating with the Telemundo network to carry "Telemundo's Providence low power television station" on its system.⁷⁰ Cox asserts that it has not negotiated with Telemundo and that Telemundo does not own any television station licensed to the Providence market.⁷¹ Cox states that it has not negotiated with Telemundo regarding the carriage of any low power television station owned by a different party which is affiliated with that network.⁷² Cox states that, as fully disclosed in its opposition, it already carries the local Spanish-language newscast of WRIW-LP, a low power station owned by a third party and affiliated with Telemundo.⁷³ However, Cox states that it does not carry any other Telemundo national programming

⁶⁴47 U.S.C. §534(h)(1)(C)(ii)(I).

⁶⁵Petition at 7-8 and Exhibit VII.

⁶⁶Reply at 9.

⁶⁷See *Channel 39, Inc.*, 13 FCC Rcd 3108, 3115 (1998).

⁶⁸14 FCC Rcd 14909 (1996).

⁶⁹Reply at 15.

⁷⁰*Id.* at 11.

⁷¹Supplement at 1.

⁷²*Id.*

⁷³Opposition at 6.

broadcast by that station.⁷⁴ Cox states that WWDP was in error in alleging that Cox was discriminating against WWDP by excluding it from carriage when it carried nine other Boston-market stations.⁷⁵ Cox maintains that of the 20 stations licensed to the Boston market, it voluntarily carries only two which broadcast programming with a local appeal to its subscribers – WSBK-TV and WUNI. The third Boston station it carries, WGBH-TV, is an NCE station it carries pursuant to must carry regulations.

24. WWDP's response argues that Cox's supplement should be stricken, but should it be considered WWDP maintains that it has not knowingly misrepresented the facts in this case. WWDP states that Telemundo informed WWDP that it had been negotiating for full-time carriage on Cox's system and there was no reason to believe the statement inaccurate.⁷⁶ WWDP states that it never claimed that Cox carried nine Boston-market stations. Instead, based upon information from the 2001 *Television & Cable Factbook*, WWDP states it noted that Cox carried four other Boston-market stations.⁷⁷

25. With respect to the mandatory statutory criteria, we have carefully reviewed the information provided by Cox and WWDP in the context of its request. An analysis of this evidence indicates that WWDP meets only one of the four market modification criteria – Grade B coverage. It fails to meet the historic carriage factor, has no evident viewership in the communities and provides no programming targeted specifically to the subject communities. WWDP has argued that, given its status as a foreign-language specialty station, its lack of historic carriage and viewership should be overlooked. We agree that Commission precedent has found that, for specialty stations, such factors as lack of historic carriage and viewership are not, by themselves, controlling in market modification cases. However, the fact that they are not controlling does not mean that they can be totally ignored. In this instance, we note that no other cable system in the Providence DMA appears to be carrying WWDP. WWDP has also argued that because it broadcasts Spanish-language programming provided by the Telemundo Network, its programming is relevant to Cox's subscribers, many of whom are Hispanic. In this case, however, WWDP cites no examples of any programming specifically directed to the subject communities. We are not convinced that such programming, while of potential general interest, is the kind that suggests that the subject communities are a particular focus of the station or are in any sense served in manner that establishes a specific market connection.

26. Moreover, despite WWDP's assertions, the fact that it has been denied carriage on systems within its own market does not automatically justify the requested additions in an adjacent market. WWDP is carried on systems located within the core of the Boston market and it therefore competes with its own market stations in the most populous portion of that market. Further, no evidence has been presented that the fact that Cox carries a limited number of Boston market stations on its system unduly upsets WWDP's overall ability to compete with its competitors or that these stations should be considered to be within the same area as Norwell for purposes of applying the Section 614(h)(1)(C)(I) statutory criteria.

27. While WWDP has requested the inclusion of ten communities within its market, Cox has stated, and official Commission records confirm, that Cox operates one technically-integrated cable system which serves approximately 34 communities throughout the Providence market.⁷⁸ Therefore, grant of

⁷⁴Supplement at 1. Cox points out that mandatory carriage rights for WWDP may adversely affect WRIW-LP's contractual right to continue to rebroadcast such programming.

⁷⁵Reply at 8 & 15.

⁷⁶Reply to Supplement at 2.

⁷⁷Petition at 7-8; Reply at 2,3, 8 & 15.

⁷⁸Opposition at 2. *See also* Cumulative Leaking Information (CLI) maintained by the Technical Services (continued...)

WWDP's request would effectively grant the station carriage throughout the Providence market because Cox has stated that it would not be able to limit the signal's carriage solely to the communities requested and because Cox provides service throughout most of Rhode Island which makes up the entire western (more distant) portion of the market. The evidence indicates that Cox's remaining system communities all fall outside of WWDP's service area.

28. The only market modification criterion on which WWDP can specifically rely with regard to the requested communities is Grade B coverage. Given the fact that the communities Cox serves are located within core counties in the Providence market DMA, we believe that the outcome of granting WWDP's request would be an effective elimination of the distinction between the Boston and Providence markets for purposes of WWDP's cable carriage, a situation that appears to exceed the type of change contemplated under Section 614(h)(1)(C). Therefore, we find that a grant of WWDP's request would not be appropriate at this time.

IV. ORDERING CLAUSES

29. 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 (CSR-5724-A), Norwell Television, LLC **IS GRANTED**.

30. This action is taken pursuant to authority delegated by Section 0.321 of the Commission's rules.⁷⁹

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson, Deputy Chief
Cable Services Bureau

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Division, Cable Services Bureau.

⁷⁹47 C.F.R. §0.321.