

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

In the Matter of:
MetroCast Cablevision of New Hampshire, LLC
For Modification of the Boston, Massachusetts
DMA
Complaint of Norwell Television, LLC v.
MetroCast Cablevision of New Hampshire, LLC
CSR-5638-A

MEMORANDUM OPINION AND ORDER

Adopted: March 2, 2001

Released: March 5, 2001

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

I. INTRODUCTION

1. MetroCast Cablevision of New Hampshire, LLC. ("MetroCast") filed the above-captioned petition for special relief seeking to modify the Boston, Massachusetts DMA relative to television broadcast station WWDP (Ch. 46) ("WWDP" or the "Station"), Norwell, Massachusetts. Specifically, MetroCast petitions to modify WWDP's designated market area ("DMA") to exclude certain communities served by MetroCast's cable systems located in New Hampshire (the "Cable Communities") for purposes of the cable television mandatory broadcast signal carriage rules.1 An opposition to this petition was filed on behalf of Norwell Television, LLC, ("Norwell"), licensee of Station WWDP. In addition, Norwell has filed a must carry complaint against MetroCast for its failure to carry WWDP's signal on its Rochester and Belmont/Laconia cable systems. MetroCast has filed an opposition to this complaint and Norwell has replied. We are consolidating these cases in order to determine the signal carriage rights of WWDP in the communities in question.

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

1 The New Hampshire cable systems at issue are located in Franklin (CUID 0008), Gilford (CUID 0009), Laconia (CUID 0010), Northfield (CUID 0011), Tilton (CUID 0012), Rochester (CUID 0069), Belmont (CUID 0070), Meredith (CUID 0073), Farmington (CUID 0084), Pittsfield (CUID 0090), Center Harbor (CUID 0091), Milton (CUID 0096), Epsom (CUID 0120), Alton (CUID 0122), Northwood (CUID 0136), New Durham (CUID 0158), Strafford (CUID 0162 and 0244), Barrington (CUID 0163), Barnstead (CUID 0197), Deerfield (CUID 0212), Sanbornton (CUID 0236), and Gilmanton, (CUID 0239). See Petition at Exhibit A.

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 DMA, as defined by Nielsen Media Research.³ A DMA is a 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 viewings 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

4. 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 factor 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.

² 8 FCC Rcd 2965, 2976-2977 (1993).

³ Section 614(h)(1)(C) of the Communications Act, as amended by the Telecommunications Act of 1996, provides that a station's market be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns. See 47 U.S.C. § 534(h)(1)(C). Until January 1, 2000, Section 76.55(e) of the Commission's rules provided that Arbitron's "Areas of Dominant Influence," or ADIs, published in the *1991-1992 Television Market Guide*, "be used to implement the mandatory carriage rules." Effective January 1, 2000, however, Section 76.55(e) requires that Nielsen Media Research's DMAs define a commercial broadcast television station's market. For the must carry/retransmission consent elections that took place on October 1, 1999, commercial television stations were required to make their selections based on DMAs. See *Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, Order on Reconsideration and Second Report and Order, 14 FCC Rcd 8366 (1999) ("Modification Final Report and Order").

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

⁵ 47 U.S.C. § 534(h)(1)(C).

- (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.⁶

5. 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.

* * * *

[this section] 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 intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.⁷

6. Recently, 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(ies) 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 relation 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.⁸

⁶ *Must Carry Order*, 8 FCC Rcd 2965, 2976 (1993).

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

⁸ The 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 station actually provides local service to a community under factor two of the market modification test.

- (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.⁹

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. Parties may continue to submit whatever additional evidence they deemed appropriate and relevant.

7. With respect to deletion 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.¹⁰

8. 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.¹¹ The rules further provide, in accordance with the requirements of the 1992 Cable Act, that a station not be deleted from carriage during the pendency of a modification request.¹²

⁹ 47 C.F.R. § 76.59(b).

¹⁰ H.R. Rep. 102-628, 102d Cong., 2d Sess. 97-98 (1992).

¹¹ *Must Carry Order*, 8 FCC Rcd 2965, 2977 n. 139.

¹² 47 C.F.R. § 76.59.

III. DISCUSSION

A. Market Modification

9. The issue before us is MetroCast's request to exclude Norwell television Station WWDP from mandatory carriage in the subject Cable Communities. The New Hampshire counties of Belknap, Merrimack, Rockingham and Strafford, the location of the Cable Communities, are classified as part of the Boston DMA. WWDP is licensed to Norwell, Massachusetts which is also part of the Boston, Massachusetts DMA.

10. In its petition, MetroCast maintains that an analysis of the four statutory factors governing market modification requests supports the deletion of the Cable Communities from WWDP's market. With regard to the first statutory factor, historic carriage, MetroCast indicates that while WWDP has been broadcasting on and off since approximately December 1986, the Station has never been carried on any of the MetroCast systems.¹³ Thus, MetroCast asserts that WWDP fails to meet the statutory requirement of having a record of historical carriage on its cable system.¹⁴

11. In opposition, WWDP points out that three years after the Station began broadcasting it left the air and remained off the air for six years until December 1996.¹⁵ WWDP contends that because the Station has been on the air less than half the time it has been licensed, and because Norwell has only recently acquired the Station, WWDP in essence is a new station that has not had an opportunity to establish itself.¹⁶ WWDP states that it is, therefore, not surprising that MetroCast historically has not carried WWDP on its systems.¹⁷ WWDP also argues that MetroCast does have a long history of carrying Boston area stations, except for WWDP, and notes that cable systems are prohibited from discriminating against a station serving the same area as other stations it carries.¹⁸ In reply, MetroCast maintains that WWDP should not be treated as a "new station" because there have been changes to its format and ownership during the nearly 14 years since it went on the air.¹⁹ Moreover, MetroCast argues that contrary to WWDP's assertion, the system does not carry all other stations in the Boston DMA.²⁰

12. MetroCast next argues that with regard to the second statutory factor, local service, WWDP does not satisfy any of the three criteria by which the Commission evaluates local service.²¹ The Bureau has stated that local service may be measured by (1) "examining the distance between the station and the cable communities subject to the deletion request and taking into account natural phenomena such as

¹³Petition at 4. MetroCast indicates that according to the 2000 Television & Cable Factbook, WWDP began broadcasting on December 6, 1986, then left the air in 1990 and returned to broadcasting on December 18, 1996.

¹⁴Petition at 4.

¹⁵Opposition at 1.

¹⁶*Id.* at 4.

¹⁷*Id.*

¹⁸*Id.* at 5.

¹⁹Reply at 3.

²⁰Reply at 5. MetroCast asserts that the Cable Communities served by the Rochester headend do not carry WGBH, Boston, MA or WHUB, Marlborough, MA, both of which are Boston DMA stations.

²¹Petition at 5-7.

waterways, mountains and valleys which tend to separate communities;" (2) "[a] station's broadcast of local programming, which has a distinct nexus with the cable communities;" and (3) "a station's Grade A or Grade B contour coverage" ²² MetroCast argues that many of the stations it carries provide local news coverage on a daily basis, unlike WWDP, and that the station does not provide any programming that has a distinct nexus with the Cable Communities. ²³ WWDP conversely asserts that it provides complete coverage of issues of concern to the Hispanic residents in the Cable Communities. ²⁴ It also states that if WWDP is deprived of its must carry rights in the communities served by MetroCast the Hispanic residents and Spanish-speaking residents in the Cable Communities will lose their only opportunity to access Spanish-language television programming. ²⁵

13. With regard to the third statutory factor, local programming by other television stations, MetroCast asserts there are a number of television stations that provide local coverage of the Cable Communities. ²⁶ It states that Metrocast's systems carry 16 to 17 television stations from communities licensed to the states of Massachusetts, Maine and New Hampshire and that every one of those stations is closer to the Cable Communities than WWDP. ²⁷ WWDP provides a different view and states that it complies with the third factor set forth by Congress because it is the only station that currently has the opportunity to provide complete coverage of issues of concern to the Hispanic residents in the Cable Communities. ²⁸ In reply, MetroCast states that while WWDP refers to the growing Hispanic population in the Boston area, such information is irrelevant to the issue of the carriage of WWDP in central New Hampshire. It maintains that WWDP's arguments digress from the intent of the third statutory factor, which is whether other stations provide programming of local interest to the Cable Communities. ²⁹ Moreover, MetroCast asserts that WWDP has not presented evidence to refute evidence that other stations provide local coverage to the Cable Communities. ³⁰ In connection with the distance factor, MetroCast asserts that the Cable Communities are between 82 and 119 miles from the Station's transmitter and maintains that the Cable Communities are so far removed from WWDP that WWDP does not provide coverage to the Cable Communities. ³¹ WWDP does not dispute that the Station is distant from the Cable Communities, but argues that there are several stations carried by MetroCast systems that are even farther than WWDP, as much as five miles farther away. ³²

14. With regard to the fourth statutory factor, viewership in cable and noncable households, MetroCast asserts that WWDP's lack of viewership is evident from the fact that residents of the Cable Communities are unable to receive the Station's signal over-the-air, and the fact that there has never been

²²See *Media General Cable of Fairfax County, Inc.*, 15 FCC Rcd 149, 155 (2000).

²³Petition at 5 and 7.

²⁴Opposition at 8.

²⁵*Id.* at 6.

²⁶Petition at 7.

²⁷*Id.* See Petition at Exhibit C.

²⁸Opposition at 8.

²⁹Reply at 9-10.

³⁰*Id.*

³¹Petition at 6. See Petition at Exhibit D.

³²Opposition at 5. See Petition at Exhibit D.

carriage on the cable systems in the Cable Communities.³³ Moreover, Metrocast points out as further evidence of the lack of market share that local television listings do not include WWDP.³⁴ In opposition, WWDP states that it acknowledges that the distances between WWDP and the Cable Communities work against the Station and its efforts to increase viewership in the Cable Communities.³⁵ It asserts, however, that assessing demerits against WWDP for lack of viewership is patently unfair, as several of the Boston area stations likely would have no viewership if it were not for the fact that MetroCast carries them on its systems.³⁶ In reply, MetroCast states that the Commission is required to consider “evidence of viewing patterns in cable and noncable household within the areas served by the cable system or systems in such community,” and WWDP has conceded that it has no viewership in the Cable Communities.³⁷

15. As an initial matter, we note that, 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 economic market.”³⁸ The DMA market change process incorporated into the Communications Act, however, is neither intended to be a process whereby cable operators may seek relief from the mandatory signal carriage obligations apart from the question of whether a change in the market area is warranted, nor is it a vehicle for broadcast stations to reach service areas that otherwise could not serve. When viewed against this backdrop, and considering all of the relevant factual circumstances in the record, we believe that MetroCast’s exclusion petition appears to be a legitimate request to redraw DMA boundaries to make them more harmonious with market realities. MetroCast’s actions do not reflect an intention to skirt its signal carriage responsibilities under the Communications Act and the Commission’s rules, nor do they evidence a pattern of discriminatory conduct against WWDP.

16. **Historic Carriage.** As stated, WWDP began operation in late 1986. Despite operating since 1986, admittedly broadcasting on an intermittent basis, the Station nevertheless has no history of carriage on MetroCast’s cable systems. In this regard, we disagree with WWDP’s argument that the Bureau should give no weight to this criterion. Historical carriage is a factor that the enabling statute requires the Commission to consider when giving value to localism.³⁹ Therefore, it cannot be ignored or waived by a simple request that the Commission give credit for “voluntary carriage” that is not there. However, with respect to the question of historical carriage patterns, attention must be paid to the circumstances from which such patterns developed. Some stations like WWDP, may not have had the opportunity to build a record of historical carriage for specific reasons that do not necessarily reflect a judgment as to the geography of the market involved. In this instance, it appears that WWDP’s distance from the communities at issue has played a part in it not being carried, despite the on and off nature of its service. Consequently, we will give this factor some weight in making our determination. MetroCast’s failure to carry the Station demonstrates a lack of nexus between WWDP and the subject Cable Communities.

³³Petition at 8.

³⁴*Id.*

³⁵Opposition at 5.

³⁶*Id.* at 5-6.

³⁷Reply at 12.

³⁸ H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

³⁹ 47 U.S.C. § 534(h)(1)(C)(ii)(I).

17. **Grade B Coverage/Local Service.** A station's local service to cable communities is one of the relevant factors to consider. The type or age of the station involved or historical carriage does not influence consideration of this factor. 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 evidence of local service. Also, 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.⁴⁰ In the instant case, WWDP does not satisfy any of the local coverage elements we find important in the market modification analysis. We find that although the Station's programming may be of potential general interest, it has no specific ties to the communities in question. It is true that WWDP offers Spanish programming. That programming, however, is also not specifically addressed to the communities in total. WWDP cites no examples of programming specifically directed to the subject communities, but instead contends that its Spanish-language format provides valuable programming services to the communities.

18. Thus, we find that WWDP's programming does not serve the communities in a manner that establishes a specific market connection. Without that local market connection, being in the same DMA is not enough to require MetroCast to begin carrying WWDP in the cable systems at issue. In that regard, we note WWDP's Grade B contour barely covers the city of Boston. MetroCast points out that WWDP is approximately 100 miles from most of the Cable Communities and that where a station is so far removed the argument for exclusion is strong. In the instant case, WWDP is in fact distant from the Cable Communities at issue. The Bureau has observed that "the broadcast signal carriage rules were not intended to transform an otherwise local station into a regional 'super station' that must be automatically carried in every single community in a [DMA]" and such is the case here.⁴¹

19. **Carriage of Other Stations.** We also believe that MetroCast'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 case, we find that the stations MetroCast carries have a closer nexus to the cable systems herein than does WWDP. As we have stated, although the Station's Spanish-language programming may be of potential general interest, it has no specific ties to the communities in question. These market facts, coupled with the distance between the cable systems and WWDP, support MetroCast's modification under the third factor.

20. **Viewership.** Although viewership is generally not relevant to specialty stations, the dearth of viewership is of evidentiary significance when tied with the lack of historical carriage, lack of local service and Grade B coverage. Consequently, we believe this further buttresses the evidence before us.

⁴⁰ As 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 76.5d1 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.")

⁴¹ *Time Warner Entertainment-Advance/Newhouse Partnership*, 11 FCC Rcd 6541, 6553-6554 (1996).

21. After carefully considering each statutory factor in the context of the circumstances presented here, as well as other relevant information, we grant MetroCast's petition for market modification. The Commission may make changes to market areas "to better effectuate the purposes" of the mandatory carriage requirements.⁴² Given the evidence as to the lack of Grade B coverage, the lack of viewership in the Cable Communities at issue, the lack of historical carriage, and the absence of evidence indicating that WWDP provides local programming, we believe that the Cable Communities at issue are sufficiently removed from WWDP that they ought not to be deemed part of WWDP's market for mandatory carriage purposes. We conclude that deletion of the Cable Communities from WWDP's market for mandatory carriage purposes effectuates the purposes of Section 614 of the Communications Act.

B. Must Carry Complaint

22. In view of our decision in the instant petition, the arguments raised by MetroCast and Norwell in reference to the above-described must carry complaint are now moot. As such, Norwell's must carry complaint is dismissed.

IV. ORDERING CLAUSES

23. 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-5638-A), filed by MetroCast Cablevision of New Hampshire, LLC **IS GRANTED**.

24. **IT IS FURTHER ORDERED**, that the must carry complaints (CSR-5612M and CSR 5615M) filed October 26, 2000 and October 27, 2000 respectively, on behalf of Norwell Television, Inc. **ARE DISMISSED**.

25. These actions are taken pursuant to authority delegated by Section 0.321 of the Commission's rules.⁴³

FEDERAL COMMUNICATIONS COMMISSION

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

⁴² 47 U.S.C. § 534(h).

⁴³ 47 C.F.R. § 0.321.