

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

In the Matter of:)	
)	
Adelphia Cable Partners, L.P. d/b/a)	
Adelphia Cable Communications)	CSR-5609-A
)	
For Modification of the Miami-Ft.)	
Lauderdale, Florida DMA)	

MEMORANDUM OPINION AND ORDER

Adopted: March 8, 2001

Released: March 9, 2001

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

I. INTRODUCTION

1. Adelphia Cable Partners, L.P., d/b/a Adelphia Cable Communications (“Adelphia”), filed the above-captioned petition for special relief seeking to modify the Miami-Ft. Lauderdale, Florida DMA with respect to television broadcast station WWTU (Channel 8), Key West, Florida.¹ Specifically, Adelphia requests that WWTU be excluded, for purposes of the cable television mandatory broadcast signal carriage rules, from the communities served by its South Dade County, Key Biscayne, and North Dade County cable systems.² An opposition to this petition was filed on behalf of Hispanic Keys Broadcasting Corp., licensee of WWTU, to which Adelphia has 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*

¹Formerly WWFD-TV. Adelphia notes that the Cable Services Bureau earlier granted a must carry complaint (CSR-5565-M) filed on behalf of WWTU against Adelphia for carriage in the subject communities. However, Adelphia states that this grant is not in effect due to its pending modification request. *See Hispanic Keys Broadcasting Corp. v. Adelphia Cable Partners, L.P., d/b/a Adelphia Communications*, 15 FCC Rcd 15061 (2000) (“*WWTU Complaint*”).

²Adelphia’s South Dade County system serves South Dade County and the communities of Homestead and Florida City. The Key Biscayne system serves only Key Biscayne. The North Dade County system serves an unincorporated area of North Dade County known as Liberty City from a headend owned and operated by AT&T Corp.

1992, *Broadcast Signal Carriage Issues (“Must Carry Order”)*,³ commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station’s market. A station’s market for this purpose is its “designated market area,” or DMA, as defined by Nielsen Media Research.⁴ 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 viewing are included.⁵

3. Under the Act, however, the Commission is also directed to consider changes in market areas. Section 614(h)(1)(C) provides that the Commission may:

with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station’s television market to better effectuate the purposes of this section.⁶

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 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;

³8 FCC Rcd 2965, 2976-1977 (1993).

⁴Section 614(h)(1)(C) of the Communications Act, as amended by the Telecommunications Act of 1996, provides that a station’s market shall be determined by the Commission by regulation or order using, where 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) now requires that a commercial broadcast television station’s market be defined by Nielsen Media Research’s DMAs. For the must-carry/retransmission consent elections that took place on October 1, 1999, commercial television stations were required to make their elections 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*”).

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

⁶47 U.S.C. §534(h)(1)(C).

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

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 subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.⁸

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 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

⁷*Must Carry Order*, 8 FCC Rcd 2965, 2976 (1993).

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

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.

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

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.¹¹

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.¹²

¹⁰See *Modification Final Report and Order*, 14 FCC Rcd 8366 (1999). See also 47 C.F.R. §76.59(b).

¹¹H.R. Rep. 102-628, 102d Cong., 2d Sess. 97-98 (1992).

¹²*Must Carry Order*, 8 FCC Rcd 2965, 2977 n. 139.

III. DISCUSSION

9. 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.”¹³ Changes may be sought and granted by the Commission “to better effectuate the purposes” of the mandatory carriage requirements.¹⁴ The market change process incorporated into the Communications Act, however, is not 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 involved is warranted. When viewed against this backdrop, and considering all of the relevant factual circumstances in the record, we believe that Adelphia’s deletion petition appears to be a legitimate request to redraw DMA boundaries to make them congruous with market realities. Adelphia’s action do not reflect an intention to skirt its signal carriage responsibilities under the 1992 Cable Act and the Commission’s rules, nor do they evidence a pattern of discriminatory conduct against the station.

10. Adelphia’s cable systems are located in Dade County, Florida, and are part of the Miami-Ft. Lauderdale, Florida DMA. Key West, the city of license of WWTU, is also part of the same DMA and is approximately 106 miles from Florida City, the closest of Adelphia’s cable communities.

11. In support of its request, Adelphia argues that WWTU and its city of license, Key West, are not only geographically remote, but the station fails to provide any programming which is tailored to the local needs and interests of the subject communities. Adelphia points out that in numerous, factually-similar cases, the Commission has found that WWTU, and another Key West station, WEYS, did not provide local service to various cable systems in the northern portion of the Miami market and granted the stations’ exclusion.¹⁵ Adelphia maintains that it is therefore not singling WWTU out from other Key West stations for exclusion, as it has also successfully petitioned the Commission to exclude WEYS.¹⁶ Adelphia states that its South Dade and Key Biscayne systems do not currently carry WWTU and have never done so.¹⁷ Adelphia acknowledges that its Liberty City system does receive the signal, due to the fact that the programming provided to these subscribers is purchased from AT&T’s cable system in the Florida Keys.¹⁸ Adelphia notes, however, that this system’s receipt of WWTU has been for less than one year and that previous Commission decisions support the fact that such limited carriage does not qualify as historic carriage.¹⁹

12. Adelphia points out that WWTU admits that it is unable to deliver a good quality signal to

¹³H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

¹⁴47 U.S.C. §534(h).

¹⁵See e.g., *Rifkin/Narragansett South Florida, CATV Limited Partnership, d/b/a Gold Coast Cablevision*, 11 FCC Rcd 21090 (1996), *recon. denied*, 14 FCC Rcd 13788 (1999); *Adelphia Cable Partners, L.P., d/b/a Adelphia Cable Communications*, 13 FCC Rcd 4047 (1997), *recon. denied*, 14 FCC Rcd 13788 (1999); and *Dynamic Cablevision of Florida, et.al.*, 11 FCC Rcd 9880 (1996), *recon. denied*, 14 FCC Rcd 13783 (1999).

¹⁶*Adelphia Cable Partners*, 13 FCC Rcd 4047 (1997).

¹⁷Petition at 4. Adelphia states that, as confirmed by the 2000 Television and Cable Factbook, no other nearby Dade County cable system carries WWTU. *Id.* at 5.

¹⁸*Id.* at 4, n. 12.

¹⁹See *Dynamic Cablevision*, 11 FCC Rcd 9880 (1996); *Northstar Television of Providence, Inc.*, 11 FCC Rcd 1736 (1996); and *Comcast Cablevision of Santa Maria, Inc.*, 13 FCC Rcd 24192 (1998).

the cable systems' headends.²⁰ Adelphia states that WWTU's lack of service is further emphasized by the station's failure to provide a Grade B contour which encompasses the communities at issue.²¹ Adelphia points out that the Bureau found in previous Miami market cases involving Key West stations that lack of a Grade B contour was an important factor in determining that stations did not provide local service.²² In addition, Adelphia states that WWTU is geographically distant, with the station's transmitter anywhere from 106 to 129 miles from the instant cable systems' principal headends.²³ Adelphia indicates that the legislative history of the 1992 Cable Act has concluded 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."²⁴ Adelphia states that that is the case here.²⁵

13. Adelphia argues that, in addition to geographic distance, WWTU and the subject communities are separated by geographic features (i.e., a series of islands surrounded by water) which results in a lack of business and economic connections between WWTU's market and the cable systems at issue. Adelphia states that few, if any, residents in the subject communities either shop in or commute to Key West. Adelphia indicates that as a result, it has had no requests to carry advertising from any Key West business, nor, to its knowledge, do Key West businesses advertise with the South Miami, Dade or Homestead/Florida City Chambers of Commerce.

14. Adelphia states that it is understandable, given the great distance and geographic attenuation, that WWTU does not provide any local programming targeted to the subject communities. Adelphia states that WWTU's program listing indicates that the station offers generic religious, music, and children's programming.²⁶ Adelphia argues that such generic programs cannot be considered to be specifically focused on the subject communities and the Commission has, in the past, rejected general interest programming as insufficient to satisfy the local programming factor.²⁷ Similarly, in a more recent decision, Adelphia notes that the Bureau held that a 24-hour religious format does not constitute local programming services targeted to a community.²⁸ Adelphia asserts that its cable systems' truly local broadcast stations are those licensed to nearby Miami, Fort Lauderdale and Hollywood, Florida, all of which provide either a City Grade or Grade B signal.²⁹ Adelphia states that these stations provide a multitude of news and weather updates throughout the day as well as features of local community interest. Adelphia points out that these stations are listed in the local newspaper serving the communities, the *Miami*

²⁰WWTU Complaint at 3. Adelphia states that it confirmed this fact in signal quality tests it conducted of WWTU's signal.

²¹Id. at Exhibit D.

²²See *Rifkin/Narragansett* at 21105; *Adelphia Cable* at 4057; and *Dynamic Cablevision* at 9889.

²³Petition at 7.

²⁴House Report at 97.

²⁵Petition at Exhibit F.

²⁶Id. at Exhibit G.

²⁷See e.g., *Greater Worcester Cablevision*, 12 FCC Rcd 17347 (1997); *TKR Cable Company*, 12 FCC Rcd 8414 (1997), recon. denied, 14 FCC Rcd 9603 (1999); and *Home Link Communications of Princeton, L.P.*, 13 FCC Rcd 1578 (1997).

²⁸See *Comcast Cablevision*, 15 FCC Rcd 7922 (2000).

²⁹Petition at Exhibit C and 12, n. 36..

Herald, and the local edition of *TV Guide*.³⁰ Adelphia states that neither of these publications lists WWTU.

15. Further, Adelphia states that a report conducted by a marketing and research consulting firm indicates that WWTU has no viewership in the subject communities.³¹ Adelphia points out that the Bureau has stated that “the clear absence of any viewing . . . lends strong support toward the requested market modification request.”³² In view of the above, Adelphia maintains that the Bureau should grant its requested modification.

16. In opposition, WWTU argues that Section 614 of the Communications Act creates an affirmative duty for every cable operator to carry the signals of local commercial television stations located in those systems’ markets. While the 1992 Cable Act did include a market modification exception, WWTU maintains that Congress made clear that there was a presumption in favor of DMA carriage.³³ WWTU states that an analysis of Adelphia’s petition reveals that it does not support the requested exclusion because Adelphia has failed to make a proper showing under the four factor statutory test for modification. WWTU argues that, contrary to Adelphia’s suggestion, the absence of historical carriage and lack of viewership in the subject communities does not necessarily defeat WWTU’s right to carriage. WWTU points out that it is a relatively new station, commencing operations in 1996, and the Commission has repeatedly held that lack of historical carriage of new stations is of little or no relevance in a modification case because, otherwise, such stations would be prevented from ever gaining carriage.³⁴ WWTU states that the Commission has found that some stations have not 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.³⁵ Also, WWTU states that ratings data cannot serve to define its market because Congress could not have intended for stations to have cable communities deleted from their markets simply because their audience shares were not as significant as those of other competing stations.³⁶ In any event, WWTU states that it has been carried on Adelphia’s North Dade County system for at least four years, and not the one year or less contended by petitioner.³⁷ Moreover, WWTU states that it is carried on systems throughout Broward and Dade counties; systems which serve hundreds of thousands of subscribers. WWTU indicates that these systems are close to Adelphia’s and, in some cases, located farther from Key West.³⁸

³⁰*Id.* at Exhibit H.

³¹*Id.* at Exhibit K.

³²See *TCI Cablevision of Colorado*, 11 FCC Rcd 6109, 6115 (1996).

³³H.R. Rep. No. 628, 102d Cong., 2d Sess. 97 (1992).

³⁴See e.g., *Time Warner Entertainment Co., L.P.*, 12 FCC Rcd 22069 (1977); *Horizon Broadcasting Corporation*, 12 FCC Rcd 11634 (1977); *Time Warner Cable*, 11 FCC Rcd 8047, (1996).

³⁵See e.g., *Cablevision Systems Corporaiton*, 11 FCC Rcd 6453, 6473 (1996); and *Nationwide Communications, Inc.*, 10 FCC Rcd 13040, 13043 (1995).

³⁶See *Cablevision Systems Corporation*, 11 FCC Rcd at 6473.

³⁷Opposition at 9.

³⁸*Id.* at n.28.

17. WWTU contends that it does satisfy the local service criterion. While WWTU concedes that it does not provide Grade B service to the communities, it argues that its failure to do so is not dispositive.³⁹ WWTU asserts that Grade B service is but one indicia of local service and that both the 1992 Act and its legislative history make it clear that “Grade B contours are not to be used as any absolute measure of a scope of a station’s market.”⁴⁰ WWTU points out that since it began broadcasting four years ago, it has provided coverage of local Miami sport teams – professional, college and high school.⁴¹ WWTU states that the Commission has held that sports programming may be considered local service to cable communities.⁴² Additionally, WWTU states that it has provided local radar weather information to the entire Miami area, including the subject communities.⁴³ WWTU asserts that the fact that its programming is broadcast from a location some distance from the subject communities does not automatically negate its local service to those communities. WWTU admits that it has had to recently cut back on providing much of its local public interest programming, but that this has only been because it has been unable to obtain parity with other Miami DMA stations. At the end of February 2000, however, WWTU states that it will adopt a new format which will consist of local Hispanic programming which will be specifically targeted to Dade County.

18. Further, while Adelphia points to its carriage of other local stations, WWTU argues that this does not obviate Adelphia’s statutory obligation to carry its signal. WWTU points out that only in a situation where an exclusion is requested and it is clear that the station is not providing local service to the communities does the issue of coverage by other stations become a factor.⁴⁴ In this instance, WWTU argues that it is far from clear that it is not providing local service to the subject communities. Finally, WWTU maintains that geographical remoteness does not constitute a recognized basis for modification and that Congress expressly rejected the mileage-based must carry standard which Adelphia seeks to enact.⁴⁵ In any event, WWTU asserts that such an argument is undercut by the fact that WWTU is presently carried on numerous cable systems in the area, including one of Adelphia’s. WWTU concludes that it is a Miami DMA station, both geographically and economically, and it therefore requests denial of Adelphia’s petition.

19. In reply, Adelphia states that it demonstrated that the Commission has previously modified the Miami DMA to exclude both WWTU and WEYS from nearby cable communities and that the facts in this case are virtually identical to those in previous decisions.⁴⁶ Adelphia asserts that at no point in its opposition does WWTU describe how it specifically serves the instant communities. While WWTU

³⁹WWTU states that it is presently carried on, and has recently become the licensee of low power television station W21AX, Miami, Florida and that this station does provide local over-the-air service to Adelphia’s communities. See Declaration of Robert Thompson.

⁴⁰47 U.S.C. §534(h)(1)(c)(ii). See also *Chronicle Publishing*, 10 FCC Rcd 9474, 9483 n. 27 (1995); *Time Warner Cable*, 11 FCC Rcd 2902 (1996); and *Greenville Television*, 10 FCC Rcd 6491, 6492-93 (1995).

⁴¹Opposition at 11.

⁴²See e.g., *Reading Broadcasting, Inc.*, 12 FCC Rcd 8376, 8381 (1997); and *Time Warner Cable*, 10 FCC Rcd 962, 964 (1995).

⁴³Opposition at 11. See also Declaration of Robert Thompson.

⁴⁴See e.g., *Time Warner Cable*, 11 FCC Rcd at 8055, n. 32; *Kansas City Cable*, 10 FCC Rcd at 3809, n. 14.

⁴⁵H.R. Rep. No. 628, 102d Cong., Sess. At 97 (1992).

⁴⁶See e.g., *Rifkin/Narragansett*, 11 FCC Rcd 21090 (1996), *recon. denied*, 14 FCC 13788 (1999); and *Adelphia Cable Partners, L.P.*, 13 FCC Rcd 4047 (1997), *recon. denied*, 14 FCC Rcd 13788 (1999).

speculates that it plans to provide “local” service to the communities in the future, Adelphia points out that the station provides no specifics to support such statements. Adelphia maintains WWTU does not currently provide local service and has no nexus to the communities.

20. Adelphia states that WWTU’s contention that television stations are automatically entitled to carriage throughout their market ignores the statute, legislative history and numerous Commission and Bureau decisions which have made it clear that a station’s carriage rights are not set in stone. Adelphia states that WWTU attempts to downplay the four market modification criteria, or simply ignore them altogether. Adelphia points out that WWTU provided no evidence to support its claim that it was carried on systems throughout Broward and Dade counties. According to the 2000 Television & Cable Factbook, however, Adelphia states that WWTU is only listed as being carried on two AT&T systems in Broward County and, for a brief period, on an AT&T system in portions of Dade County.⁴⁷ Moreover, although WWTU claims that it has been carried on the Liberty City system since it began operation in 1996, Adelphia states that it provided evidence that WWTU had only been carried for less than one year and WWTU provided no information to refute this.⁴⁸ Adelphia notes that at the same time as it was claiming historic carriage, WWTU also attempted to argue that it was a “new” station to which the historic carriage factor didn’t apply.⁴⁹ Adelphia argues that WWTU cannot have it both ways.⁵⁰

21. Adelphia notes that WWTU does not refute the fact that it fails to place a Grade B contour over the communities or that it is geographically distant. Instead, it merely states that there is no mileage-based test for carriage of DMA television stations.⁵¹ While mileage is not the sole factor involved, Adelphia argues that the Commission has recognized that where DMAs span very large geographic distances, “the broadcast signal carriage rules were not intended to transform a station with a restricted market and service area into a regional ‘super station’ that must be automatically carried in every single community in an [DMA], particularly one as large as Miami.”⁵² In addition, Adelphia argues that WWTU’s recent use of low power station W21AX to extend its over-the-air coverage beyond its natural market is irrelevant to the issue as to whether WWTU itself provides programming targeted to the needs and interests of the subject communities. Adelphia points out that the Bureau has ruled that while a station “may use a low power television station to deliver its signal to cable communities, its presence does not lessen the relevance, in a market modification proceeding, of the principal station’s failure to place a Grade B contour over the subject communities as Grade B coverage is indicative of the station’s natural market. Low power television stations are secondary service stations that are explicitly not entitled to carriage in their own right.”⁵³ Adelphia asserts that its petition involves WWTU and not W21AX and WWTU’s reliance on a low power station to extend its signal only underscores the extreme distance and lack of

⁴⁷Reply at Exhibit A.

⁴⁸*Id.*

⁴⁹Opposition at 8.

⁵⁰Adelphia states that it understands that AT&T receives WWTU via fiber. It notes that the Commission has determined that mandatory carriage under such circumstances does not qualify for purposes of satisfying the historic carriage prong of the market modification test. See e.g., *Dynamic Cablevision* at 9889; *Rifkin/Narragansett* at 21105.

⁵¹Opposition at 4-5.

⁵²See *Rifkin/Narragansett* at 21104.

⁵³See e.g., *TCI of Illinois, et al.*, 12 FCC Rcd 23231, 23243 (1997); and *Time Warner Entertainment-Advance/Newhouse Partnership dba American Cablevision of St. Louis*, 12 FCC Rcd 3558, 3565 (1997).

nexus.

22. Adelphia argues that WWTU also does not refute the evidence that it does not provide programming which is tailored to the subject communities. While WWTU does offer a few examples of programming, most were more than two years old and the sporting events coverage does not name either specific schools or locations. Adelphia maintains that such examples are, at best, *de minimis* and cannot be used to conclude that WWTU meets the local programming standard. Further, with regard to WWTU's claim that it will shortly be adopting a new, undescribed Hispanic-language programming format, Adelphia states that the Bureau has indicated in similar modification cases that "the station's plans to air ethnic or minority programming in the future are too speculative and as such, do not count in the present market modification analysis."⁵⁴ In any event, Adelphia points out that WWTU has not shown how such programming will be targeted to its communities. Finally, Adelphia states that WWTU has failed to downplay the local programming it already receives or to refute its total lack of viewership in the communities. Despite WWTU's assertions, Adelphia maintains that both of these factors are relevant and should be considered.

23. We now turn to the market modification analysis.⁵⁵ At the outset, we note that WWTU has no history of carriage on two of Adelphia's systems and only a limited history of carriage on the North Dade County system (factor I), has virtually no over-the-air audience in the cable communities (factor IV), and provides none of the cable communities with service as measured by its Grade A or Grade B service contours (factor II). Given the statutory directive, weight must be given to these factors, but that must be done bearing in mind that the objective of the Section 614(h) process is to "better effectuate the purposes" of the broadcast signal carriage scheme. 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 historical carriage for specific reasons that do not necessarily reflect a judgment as to the geography of the market involved. Thus, this 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. As such, the evidence relating to this statutory factor does weigh in favor of excluding Adelphia's cable systems' communities from WWTU's market but is not outcome determinative by itself.

24. Adelphia has also shown that WWTU does not provide local service to the subject communities. First, WWTU is geographically distant from the subject cable systems with the Key Biscayne, South Dade and North Dade headends 126, 106 and 129 miles away, respectively. Second, WWTU does not place either a Grade A or Grade B contour over the cable communities.⁵⁶ While we recognize that the low power station which retransmits WWTU's signal may cover some of the cable communities in question, low power stations have limited carriage rights under Section 614, and given the circumstances here, do not evidence that the subject cable systems are within the station's natural market,

⁵⁴See *Time Warner New York City Cable Group*, 12 FCC Rcd 13094 at para. 20 (1996), *recon. denied*, 12 FCC Rcd 12262 (1997), *recon. denied*, *WLNY-TV, Inc. v. FCC*, 163 F. 2d 137 (2d Cir. 1998).

⁵⁵We note that there is currently a pending case before the 11th Circuit Court filed by WEYS Television Corp. which involves issues related to those raised herein. See *WEYS Television Corp. v. FCC*, 11th Cir. No. 99-13499 (filed September 17, 1999). Due to the statutory deadline imposed on Adelphia's petition, however, our decision herein cannot be delayed until resolution of that case.

⁵⁶We have held that the local service requirement is satisfied if the station's Grade B contour covers the community. See 8 FCC Rcd at 2981.

especially in the densely populated areas in this case.⁵⁷ Third, WWTU has not provided sufficient evidence to conclude that it currently provides local programming specifically directed to the subject communities. WWTU, which originally signed on-the-air in May 1996 under the call letters WWFD-TV, currently broadcasts a combination of religious, music and children's programming, but apparently intends to alter its programming at some point to a Hispanic programming format.⁵⁸ While the programming that it does offer can be considered to be of general interest to the DMA as a whole, it does not appear to be specifically relevant to Adelphia's systems. Moreover, WWTU has not shown that the programming format it intends to adopt at some future date has any specificity to Adelphia's systems. In any event, modification criteria cannot be based on future intent.

25. We also believe that Adelphia's carriage of other local television stations provides support for the action requested in this particular case. 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. Here, Adelphia carries a number of stations which have a closer economic nexus, cast City Grade or Grade B signals over the cable communities, and provide more focused local programming than WWTU. These market facts, coupled with the distance between the cable communities and WWTU, support Adelphia's arguments under the third factor.

26. WWTU also has no significant reported audience share in the communities in question. The study Adelphia commissioned from Media Strategies shows that WWTU does not achieve any viewership in the subject communities. This information is confirmed by Nielsen's 2000 *County/Coverage Study* which does not list WWTU among those stations which have viewership in Miami or Dade Counties. We recognize, however, that as a relatively new station, which went on-the-air in 1996, WWTU may not have had as much time as other stations to build an audience. Consequently, we will take this factor into consideration, but it will not be given great weight.

27. We also recognize that a station's lack of carriage could also explain why its ratings are low in the relevant communities. Considering the above, the task in this proceeding is how to reflect the statutory factors in our decision while at the same time recognizing the difficulties of applying these factors to stations of recent origin or more specialized formats such as WWTU. A decision based strictly on the four statutory modification factors – historical carriage, service, other stations' presence, and audience information – would simply exclude Adelphia's communities from WWTU's market. However, even taking into account the difficulties of applying these factors to new stations and those with specialized formats, it is hard to find supporting evidence to conclude that Adelphia's communities are part of WWTU's television market. The fact that a station is new or of specialized appeal does not mean that its logical market area is without limits. Thus, the problem here is where logical market boundaries may properly be established between the extremes. Given the difficulty of direct reliance on the statutory factors (which demonstrate only limited connections between the cable communities and WWTU), we focus more heavily on basic geography and technical features, mileage and Grade B contour, that provide a clearer picture and the best available alternative evidence of the market boundaries of the station subject to deletion here. Given the state of evidence in this proceeding, no other alternative appears to be available to accomplish the objective of Section 614(h).

⁵⁷47 U.S.C. §534(h)(1)(B)(i).

⁵⁸We note that when it first went on the air, WWTU broadcast the programming of SUR Corporation, a signal originating in South America and which broadcast a mix of foreign-language, sports and general entertainment programming.

28. In view of the foregoing, based on geography and other relevant information, Adelphia's request to delete WWTU from its DMA for the purposes of the broadcast signal carriage rules is fully consistent with previous decisions involving the Miami market and is granted.⁵⁹ Adelphia has shown that WWTU fails to meet the market modification factors. WWTU lacks historic carriage on the South Dade County and Key Biscayne systems. While WWTU does have some history of carriage on the North Dade County, the length of such carriage is apparently in dispute and the receipt of WWTU's signal is apparently not through Adelphia's efforts, but simply because Adelphia's programming for this system is purchased through an AT&T system which did carry the signal. Further, while WWTU has claimed carriage on systems which are both near to Adelphia's and farther in distance from Key West, there is some conflict in the evidence presented by both parties as to which systems in actual fact carry WWTU's signal. In addition, WWTU lacks measured audience (cable and non-cable) in the communities and there is no hard evidence to indicate that WWTU's programming is specifically tailored to meet the needs and interests of Adelphia's subscribers. It is also generally undisputed that the cable communities receive an abundance of local news, sports and public affairs broadcasts from other, closer stations. Finally, it is uncontested that WWTU fails to provide a Grade B signal, except through its retransmission via a low power station, and is located more than 100 miles from the nearest of Adelphia's communities. Given the evidence as to the statutory factors, the obvious lack of evidence concerning service to the communities in question, and the lack of specific programming service to these communities, we conclude that it is logical and consistent with the objective of Section 614 of the Communications Act to delete Adelphia's communities from WWTU's market for mandatory carriage purposes.

⁵⁹See e.g., *Adelphia Cable Partners, L.P. d/b/a Adelphia Cable Communications*, 13 FCC Rcd 4047 (1997); *Rifkin/Narragansett South Florida CATV Limited Partnership, d/b/a Gold Coast Cablevision*, 11 FCC Rcd 21090 (1996); *Cable TV Fund 14-A, Ltd. d/b/a Jones Intercable, Inc.*, 12 FCC Rcd 17398 (1997); *Gulf & Pacific Communications L.P.*, 12 FCC Rcd 21986 (1997); *Continental Cablevision of Jacksonville, Inc. d/b/a Continental Cablevision of Broward County, Inc. et al.*, 11 FCC Rcd 14909 (1996); and *Advocate Communications, Inc. d/b/a Cable TV of Coral Springs*, 11 FCC Rcd 14923 (1996).

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-5609-A), filed by Adelphia Cable Partners, L.P. d/b/a Adelphia Cable Communications **IS GRANTED**.

30. This action is taken pursuant to authority delegated by Section 0.321 of the Commission's rules.⁶⁰

FEDERAL COMMUNICATIONS COMMISSION

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

⁶⁰47 C.F.R. §0.321.