

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

In the Matter of:
Paxson Portland License, Inc.
v.
Metrocast Cablevision of New Hampshire, LLC
For Carriage of WMPX-TV, Waterville, Maine, in
Sanford, Shapleigh, and Acton, Maine.
In the Matter of:
Metrocast Cablevision of New Hampshire, LLC
Petition for Modification of Television Market of
Television Station WMPX-TV, Waterville Maine
CSR 5843-M
CSR-5864-A

MEMORANDUM OPINION AND ORDER

Adopted: June 6, 2002

Released: June 12, 2002

By the Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Paxson Portland License, Inc. ("Paxson"), licensee of television station WMPX-TV ("WMPX"), Waterville, Maine, filed the above captioned complaint for carriage of WMPX-TV in the communities of Sanford, Shapleigh, and Acton, Maine (the "Communities"), on the cable system of Metrocast Cablevision of New Hampshire, LLC ("Metrocast"). Metrocast filed an answer to the complaint as well as a petition to modify the market of WMPX-TV by excluding the Communities from the station's market. Paxson filed a reply to Metrocast's answer to the complaint. Paxson also filed an opposition to the petition, to which Metrocast filed a reply. Because the issues raised by the complaint and the petition are interrelated and involve the same parties, both matters are considered here. We address the petition first.

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"),¹ commercial television broadcast stations

¹ 8 FCC Red 2965, 2976-2977 (1993).

are entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its DMA, as defined by Nielsen Media Research.² 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.³

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.⁴

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 news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and

² Section 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").

³ For a more complete description of how counties are allocated, *see* Nielsen Media Research's *Nielsen Station Index: Methodology Techniques and Data Interpretation*.

⁴ 47 U.S.C. §534(h)(1)(C).

(IV) evidence of viewing patterns in cable and non-cable households within the areas served by the cable system or systems in such community.⁵

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 that 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.⁶

6. 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 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.⁷

⁵ *Must Carry Order*, 8 FCC Rcd 2965, 2976 (1993).

⁶ H.R. Rep. 102-628, 102d Cong., 2d Sess 97 (1992).

⁷ 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 television 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 guides.

(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.⁸

7. 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.

8. With respect to deletions of communities from a station's market, the legislative history of this provision states that:

The provisions of [this subsection] reflect 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.⁹

9. 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.¹⁰ The rules further provide, in accordance with the requirements of the 1992

⁸ 47 C.F.R. §76.59(b).

⁹ H.R. Rep. 102-628, 102d Cong., 2d Sess. 97-98 (1992).

¹⁰ 8 FCC Rcd 15 2977 n. 139.

Cable Act, that a station not be deleted from carriage during the pendency of a modification request.¹¹

III. DISCUSSION

A. The Market Modification Petition

10. Station WMPX is located in the Portland-Auburn DMA as are the Communities served by Metrocast's cable system at issue. Metrocast requests that the Commission modify WMPX's television market by excluding the Communities served by the Metrocast cable systems from WMPX's television market. In support of this request, Metrocast asserts that WMPX historically has not been carried on the cable system, is geographically distant from the cable system, does not provide Grade B signal coverage of the Communities, does not broadcast programming of specific interest to residents of the Communities, and achieves no measurable viewing audience in the counties where the cable systems are located.¹² Metrocast provided information showing that the distance from Waterville, Maine, WMPX's community of license, to the Communities is over 90 miles.¹³ Metrocast asserts further that other stations it carries, which are licensed to communities in the Portland-Auburn DMA, are located more than 40 miles closer to the Communities and provide the Communities abundant local services.¹⁴ As evidence of WMPX's lack of market presence, Metrocast also provided published local television listings for the communities that do not include WMPX.¹⁵ Metrocast argues that requiring the carriage of WMPX in the Communities served by its cable system would constitute an unwarranted extension of its viewership beyond the area it reaches with its over-the-air signal.

11. Paxson, in opposition, provided no evidence to contradict Metrocast's claims. Instead, Paxson contends that WMPX must compete for viewers and advertisers with the five other commercial stations licensed to the Portland-Auburn DMA. Paxson notes that the Communities are located in York County, the second most populous county in the DMA with approximately 70,000 households, or nearly 20%, of the 362,000 television households in the DMA. It notes further that the town of Sanford, the second largest municipality in York County, with a population greater than 20,000, is the ninth largest city or town in Maine.¹⁶ Paxson asserts that these demographics make York County an important part of the station's economic market.

12. Paxson states further that, although Waterville is in the northern portion of the DMA, its transmitter site is more centrally located within the DMA and approximately 60 miles from the Communities. From this transmitter site, Paxson asserts that the Communities are located on the "fringe" of the station's predicted Grade B contour.¹⁷ Paxson's evidence nonetheless depicts the Communities as located beyond the station's Grade B signal contour.¹⁸ Paxson asserts that WMPX has attained carriage on other cable systems serving more than 41,000 of the 51,000 cable subscribers in York County. More

¹¹47 C.F.R. §76.59.

¹² Petition at 3-6.

¹³ *Id.* at 4-5 & Exhibit B.

¹⁴ *Id.* at 5-6 & Exhibits D & E.

¹⁵ *Id.* at 6 & Exhibit F.

¹⁶ Opposition at 1-3.

¹⁷ *Id.* at 2 & Exhibit C.

¹⁸ *Id.*

particularly, Paxson states that cable systems serving Alfred, Waterloo, North Berwick, Wells, Ogunquit and York Village, Maine, are carrying WMPX. Paxson notes that Alfred, the county seat of York County, is only four miles from Sanford; that Waterloo is approximately 6 miles from Shapleigh; and that North Berwick, Wells, Ogunquit and York Village are more distant from WMPX and further south in York County than the Communities served by Metrocast.¹⁹

13. Paxson argues that Metrocast's carriage of the other five commercial stations licensed to communities within the DMA supports a finding that the Communities are an integral part of WMPX's economic market. Paxson notes that the Commission has determined that community service by other stations was not intended to support market deletion determinations, but instead that lack of service by other stations may support a station's claim for inclusion within a market.²⁰ Paxson argues further that Metrocast's carriage of all of WMPX's marketplace competitors in the Communities is a strong indication that a common market exists between the stations involved, including WMPX, and the Communities at issue. Paxson contends that the exclusion of these Communities from WMPX's market would deny the station the opportunity to compete for viewers and advertising revenues in the portion of the DMA served by Metrocast and compound any advantage the five other stations have over WMPX in that portion of the DMA.²¹

14. Paxson maintains that the Commission should discount the impact of low ratings for WMPX, which has been in operation only since August 1999 and is in the process of establishing viewing patterns. Paxson argues that for these same reasons the absence of historic carriage of WMPX on Metrocast's cable systems also must be discounted. Paxson argues that Metrocast has failed to distinguish the Communities from other communities in the DMA or distinguish WMPX from the other stations in the DMA that receive carriage. According to Paxson, grant of the petition would deprive cable subscribers in the Communities of their ability to receive PaxTV network programming and run counter to the Commission's goal of encouraging new national networks.²² In reply, Metrocast reiterates the points made in its petition and distinguishes the cases cited by Paxson.

15. Section 614(h)(1)(C) of the Communications Act requires the Commission to include additional communities within a television station's market, or exclude communities from a station's market, to better effectuate the purposes of the statutory provision, which is ensuring that a television station is carried in the areas which it serves and which form its economic market. Section 614(h)(1)(C)(i) specifically and unambiguously directs the Commission, in considering requests for market modification, to afford particular attention to the value of localism by taking such matters into account. Clearly, too, the must carry 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]...."²³ WMPX is a commercial television station licensed to Waterville, Maine, within the Portland-Auburn DMA. Waterville is located approximately 90 miles from the nearest Communities served by Metrocast. Although these Communities are also in the Portland-Auburn DMA, WMPX has no history of cable carriage in the Communities, despite being in operation since April of 1999. The station has no measurable audience viewership, the station does not place a grade B signal contour over the

¹⁹ *Id.* at 3-5.

²⁰ *Citing Erie County Cablevision, Inc.*, 13 FCC Rcd 6403,6410-11 (1998).

²¹ *Id.* at 6-7.

²² *Id.* at 7-8.

²³ *See Time Warner Entertainment-Advance Newhouse Partnership*, 11 FCC Rcd 6541 (CSB 1996).

Communities at issue, and its transmitter site is over 60 miles distant.

16. Another factor considered in market deletion cases is the availability of other broadcasters in the market. Section 614(h)(1)(C)(ii)(I) specifically provides that, in considering market modification requests, the Commission shall take into account factors such as the carriage of other local stations by a cable operator serving the communities at issue.²⁴ We have also stated, and reiterate here, that where a cable operator is seeking to delete a station's mandatory carriage rights in certain communities within its DMA, and the station is providing only minimal local service to those 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.²⁵ Carriage of other local stations may be used as evidence supporting a cable operator's deletion request when other evidence shows the communities at issue to be outside of the station's market.²⁶ In the present case, Metrocast carries five other stations licensed to communities in the Portland-Auburn DMA.

17. Citing Metrocast's carriage of the other five market stations, Paxson claims that Metrocast's failure to carry WMPX, as a result of the market modification request, would put it at a competitive disadvantage.²⁷ We reject this argument. Although WMPX and the five stations carried by Metrocast are all within the Portland-Auburn DMA, WMPX is not licensed to the same community as are those other stations. Waterville, Maine, WMPX's community of license, is in Kennebec County, Maine, which is separated by Androscoggin and Cumberland Counties from the York County Communities at issue here.²⁸ Moreover, the five other stations provide Grade B signal coverage of the Communities served by Metrocast, while WMPX does not.²⁹ Further, the five market stations carried by Metrocast are located considerably closer to the Communities at issue. The inability of WMPX to reach the Communities at issue and compete with the other five stations in that distant portion of the DMA stems from factors other than non-carriage on Metrocast's cable system.³⁰ We reject Metrocast's argument suggesting that regardless of the Section 614(h) process WMPX is essentially guaranteed the right to carriage throughout the DMA. The statute specifically provides that the Commission may exclude communities from a station's market to better effectuate the purposes of the carriage provisions.³¹ The legislative history notes that when making its market determinations, 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 to be part of the station's market.³²

18. Finally, Paxson has presented no evidence establishing that WMPX has viewership in the Communities served by Metrocast. In view of the distance from the station to the Communities, the absence of Grade B signal coverage of the Communities, and the absence of programming directed

²⁴ See 47 U.S.C. § 534(h)(1)(C)(ii)(I).

²⁵ See for example, *Marcus Cable Associates, LLC*, 14 FCC Rcd 1(CSB 1998).

²⁶ *Id.*

²⁷ Opposition at 6-7.

²⁸ Petition, Exhibit C.

²⁹ Metrocast Reply at 6.

³⁰ See *WTLK-TV, Rome, Georgia, supra*, n. 16.

³¹ See 47 U.S.C. § 534(h)(1)(C)(i); see also *WTLK-TV, Rome, Georgia, supra*, n. 16.

³² H.R. Rep. No. 628, 102d Cong., 2d Sess. at 97-98.

toward the needs of the Communities, we decline to discount the lack of WMPX viewership or cable carriage in the Communities on the grounds of the station's commencement of operations in 1999.

19. We have carefully considered each statutory factor in the context of the circumstances presented here. We conclude that the record demonstrates that the requested exclusion of the communities served by Metrocast's cable systems from WMPX's television market will better effectuate the must carry statutory provisions' purpose of ensuring that television stations are carried in areas which they serve and which form their economic market. We conclude that WMPX's economic market does not include, and that WMPX does not serve the Communities at issue. Station WMPX does not place a Grade B signal over the Communities, it provides no programming directed toward the relevant Communities, nor has it established any viewership in those Communities. Moreover, the station is located approximately 90 miles from the Communities and its transmitter is 60 miles from those Communities. Additionally, WMPX has never been carried on the cable systems serving the Communities at issue. Furthermore, the fact that other cable systems in the DMA carry WMPX does not mandate a particular resolution of this market modification case, as Paxson suggests. Lastly, Paxson's contention that Metrocast's carriage of the five other stations in the DMA places it at a competitive disadvantage is misplaced. Under Section 614(h), our role in this proceeding is to consider whether KMPX's television market encompasses the Communities at issue.³³ We find that it does not and grant Metrocast's petition.

B. The Must Carry Complaint

20. In view of our decision in the instant petition, the arguments raised by Paxson and Metrocast in reference to the above described must carry complaint are moot. As such, Paxson's must carry complaint is dismissed.

IV. ORDERING CLAUSES

21. Accordingly, **IT IS ORDERED**, pursuant to Section 614(h) of the Communications Act of 1934, as amended (47 U.S.C. §534(h) and §76.59), that the petition for special relief filed on behalf of Metrocast Cablevision of New Hampshire, LLC **IS GRANTED**, and the communities of Sanford, Shapleigh, and Acton, Maine, **ARE HEREBY EXCLUDED** from the television market of television station WMPX, Waterville, Maine.

22. **IT IS FURTHER ORDERED**, pursuant to authority delegated by Section 0.283 of the Commission's rules,³⁴ that the complaint of Paxson Portland License, Inc. for carriage of WMPX in the communities of Sanford, Shapleigh, and Acton, Maine, **IS DISMISSED**.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Murphy
Chief, Policy Division, Media Bureau

³³ The Bureau is under no obligation to give particular weight to any of the enumerated statutory factors. See *Time Warner Entertainment Co. v. FCC*, 56 F.3d 151, 175 (D.C. Cir. 1995); accord *Omnipoint Corp. v. FCC*, 78 F.3d 620, 633-634 (D.C. Cir. 1996) (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").

³⁴ 47 C.F.R. §0.283.