

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

In the Matter of:)	
)	
Frontiersvision Operating Partners, L.P.)	CSR-5756-A
)	
Martha’s Vineyard Cablevision, L.P.)	CSR-5774-A
Adelphia Cablevision Corporation)	
Chelsea Communications, LLC)	
Adelphia Cablevision Associates, L.P.)	
)	
Educational Public TV Corporation)	CSR-5779-M
v.)	
Martha’s Vineyard Cablevision, L.P.)	
Adelphia Cablevision Corporation)	
Chelsea Communications, LLC)	
Adelphia Cablevision Associates, L.P.)	
)	
Petition for Reconsideration)	

ORDER ON RECONSIDERATION

Adopted: April 16, 2004

Released: April 21, 2004

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. Educational Public TV Corporation, licensee of non-commercial educational television station WYDN, Worcester, Massachusetts (“WYDN”), filed a petition for reconsideration of the Media Bureau’s decision granting the market modification requests of Frontiersvision Operating Partners, L.P. (“Frontiersvision”) and Martha’s Vineyard Cablevision, L.P., Adelphia Cablevision Corporation, Chelsea Communications, LLC and Adelphia Cablevision Associates, L.P. (“Adelphia”) to exclude WYDN from the communities served by their respective cable systems.¹ An opposition to this petition was filed on behalf of Frontiersvision and Adelphia to which WYDN replied.

¹*Frontiersvision Operating Partners, L.P. et al.*, 17 FCC Rcd 9332 (2002) (“*Bureau Order*”). The *Bureau Order* also dismissed the must carry complaint WYDN filed against Adelphia.

II. BACKGROUND

2. In their requests for modification, Frontiersvision and Adelpia sought to modify the Boston, Massachusetts DMA to exclude WYDN from carriage in the communities served by their respective cable systems. WYDN argued that, despite the petitioners' showings, a majority of the communities at issue received WUNI, another station licensed to the same community as WYDN, and that such carriage demonstrated that the community of Worcester was not outside the Boston DMA. The *Bureau Order* granted the petitioners' requests, finding that Frontiersvision and Adelpia had adequately demonstrated that the communities at issue were sufficiently removed from WYDN that they should not be deemed part of WYDN's market for mandatory carriage purposes.² The *Order* found that the cable systems' carriage of WUNI did not weigh against the modification because WUNI, unlike WYDN, provided Grade B coverage and its transmitter was geographically closer to the communities than was WYDN's transmitter. The *Order* also noted that WUNI, as the Boston market's only Spanish-language station, had historically been carried outside of its natural market.

III. DISCUSSION

3. In support of its request, WYDN states that, pursuant to the Communications Act and the Commission's rules, the basic premise is that every commercial television station is entitled to carriage on every cable system in the same DMA so long as the station delivers a good quality signal to the cable system's principal headend.³ WYDN argues that this is true regardless of whether the station encompasses the cable system community with a City Grade, Grade A or Grade B signal or not, so long as the station's signal is delivered to the headend by some means other than off-air reception.⁴ WYDN asserts that the Commission's authority to delete communities from a station's market cannot be used to discriminate among the stations licensed to the same community and that the Commission, in granting exclusions, must point to particularized evidence that the station singled out is different from the other stations licensed to that community that are carried on the cable system. WYDN maintains that the Bureau has failed to comply with this requirement.

4. WYDN argues that the *Bureau Order's* acknowledgement that WUNI was carried outside of its natural market was based primarily on WUNI's Spanish-language programming. WYDN maintains that, given that fact that WUNI provides no "local" programming, this reasoning appears to conclude that "generic" Spanish-language programming is preferable to WYDN's "generic" Christian programming.⁵ WYDN maintains that the Bureau's attempts to differentiate between WUNI and WYDN are meaningless. First, the fact that WUNI's transmitter is marginally closer to the communities is irrelevant because the rule only requires that a station deliver a good quality signal. WYDN states that its signal would be delivered by satellite and would be just as good, or better, than that delivered by WUNI.⁶ Second, WYDN argues that WUNI's history of carriage is immaterial. WYDN states that all historic carriage begins at some point and WYDN could have had at least three years of carriage by now if the

²For a detailed discussion of the market modification statutory provisions and procedures, *See Bureau Order*, 17 FCC Rcd at 9334-35.

³Reconsideration at 2.

⁴*Id.*

⁵*Id.* at 3.

⁶*Id.*

cable systems had begun carrying its signal in 1999 when it first went on-the-air.⁷ Third, WYDN argues that Grade B coverage, or the lack of it, is irrelevant for must carry purposes if the station provides the system a good quality signal.⁸ WYDN points out that the *Bureau Order*, even after stating that WUNI was carried outside of its natural market, acknowledged that WUNI did not provide Grade B service to all of the communities at issue.⁹ It failed, however, to provide any further explanation of the local service provided by WUNI that would distinguish it from WYDN.¹⁰ WYDN states that, apparently, the failure to provide local programming is not a barrier to carriage. WYDN argues further that a great many other cable systems in the same area as the communities at issue either presently carry WYDN or have promised to carry the station.¹¹ WYDN states that, in some instances, the communities where it is carried are even more distant than those at issue here.¹² WYDN also maintains that its lack of viewership is directly attributable to the fact that the Boston DMA is more than 85 percent cabled.¹³ WYDN concludes that the petitioners' case for exclusion might be stronger if it were not for their carriage of WUNI. However, the attempts to distinguish that carriage from WYDN's only underscores the discrimination that is being perpetrated against WYDN by both the cable systems and the Bureau.¹⁴

5. In opposition, Frontiersvision and Adelpia argue that WYDN has failed to demonstrate that the Bureau's decision was erroneous. They assert that the *Bureau Order* correctly determined that WYDN and WUNI are not similarly situated by pointing out, among other factors, the difference in location between the two stations' transmitters and WUNI's substantial Grade B coverage to WYDN's lack of Grade B coverage.¹⁵ Frontiersvision and Adelpia argue that WYDN, in claiming that the provision of Grade B service is irrelevant for must carry purposes, is confusing a must carry proceeding with a market modification proceeding.¹⁶ They note that the Commission has repeatedly stated that the lack of Grade B coverage is an important factor in the market modification context and that its absence suggests a lack of local connection.¹⁷ In addition, Frontiersvision and Adelpia state that WYDN's contention that the *Bureau Order* favors WUNI over WYDN with regard to programming is misplaced.¹⁸ Frontiersvision and Adelpia assert that it is not WUNI's programming that is at issue, but whether WYDN airs locally-focused programming. They maintain that they fully demonstrated that WYDN airs generalized programming that is designed for a national audience rather than programming that is targeted specifically to the interests of the communities at issue.¹⁹ Frontiersvision and Adelpia point out the Commission correctly focuses, not on programming content, but on whether the station serves particular

⁷*Id.*

⁸*Id.* at 3-4.

⁹*Id.*, citing *Bureau Order*, 17 FCC Rcd at 9342.

¹⁰*Id.*

¹¹*Id.* at 4; *see also* Declaration of Marcus Lamb.

¹²*Id.* WYDN points out that it is also carried throughout the Boston DMA on DBS.

¹³*Id.* at 4.

¹⁴*Id.* at 4-5.

¹⁵Opposition at 2-3.

¹⁶*Id.* at 3.

¹⁷*Id.*, citing Modification Petition at 3 n.40 (citing *Must Carry Order*, 8 FCC Rcd at 2977).

¹⁸*Id.* at 4, citing *Bureau Order*, 17 FCC Rcd at 9342.

¹⁹*Id.*

communities by providing programming that covers local news and events of interest to those communities.²⁰

6. Frontiersvision and Adelphia argue that, even if WYDN and WUNI were to be considered similarly situated, the Bureau correctly determined that this factor was outweighed by the other market modification factors.²¹ Frontiersvision and Adelphia argue that, even as a relatively new station, WYDN is not exempt from analysis under the historic carriage factor.²² Moreover, Frontiersvision and Adelphia argue that, with the exception of the community of Scituate, the communities where WYDN claims it is being carried are west and south of the communities at issue and thus located closer to Worcester than are the subject cable systems.²³ On the other hand, Frontiersvision and Adelphia state that WYDN's possible carriage in other communities in the same counties as the systems herein is too speculative to count in its favor.²⁴ They also note that WYDN failed to refute the Bureau's finding that it aired no local news, sports or community events targeted to the communities.²⁵ Finally, Frontiersvision and Adelphia argue that WYDN's dismissal of the cable systems' carriage of other local stations and its lack of viewership is misplaced. The third modification factor regarding carriage of other stations has been analyzed by the Commission in virtually every market modification proceeding and, indeed, is given greater weight in situations, such as here, where a cable system seeks to exclude a station from carriage.²⁶ As to lack of viewership, Frontiersvision and Adelphia argue that WYDN cannot blame the cable operators. Other Boston market stations have been able to achieve ample viewership, despite the high cable penetration in the market.²⁷

7. In reply, WYDN maintains that both Frontiersvision and Adelphia and the Bureau have simply recited the supposed differences between the carriage of WUNI and WYDN without explaining the significance of those differences.²⁸ WYDN notes that Congress warned that the authority to delete communities from a market could not be used as a means to discriminate against individual stations serving the same area.²⁹ In this instance, WYDN states, the cable systems are carrying a station serving the same area as WYDN and licensed to the same community. Moreover, WYDN states, WUNI does not provide any local programming that is specifically targeted to the communities.³⁰ WYDN asserts that the Commission cannot ignore the fact that Frontiersvision's and Adelphia's carriage of one station and not the other competing station violates Congressional intent. WYDN states that, in light of its decision, the Bureau is also complicit in this discrimination. WYDN points out that the Court of Appeals has

²⁰*Id.* at 5.

²¹*Id.*

²²*Id.* at 6.

²³*Id.* at 7. Frontiersvision and Adelphia note that WYDN's carriage in these communities is very recent and thus would not qualify as historic carriage.

²⁴*Id.*, citing *Greater Worcester Cablevision, Inc., et al.*, 13 FCC Rcd 22220, 22228 (1998).

²⁵*Id.* at 9.

²⁶*Id.* at 10-11.

²⁷*Id.* at 11.

²⁸Reply at 2.

²⁹*Id.*

³⁰*Id.*

previously ruled that the Commission must explain its reasons for disparate treatment and not simply enumerate factual differences.³¹

8. Although WYDN is correct that, in general, every commercial television station licensed to a community in a particular market is entitled to carriage on every cable system in that same market as long as it meets the qualifications for carriage, it is misplaced in its belief that its failure to provide Grade B coverage has no effect in market modification cases.³² Petitioners seeking market modification, whether to include or exclude a station for must carry purposes, are required to show how that station meets or fails to meet the market modification criteria contained in the rules.³³ The four factors that comprise these criteria apply strictly to market modification requests and differ from the qualifications that a station must meet in order to be considered a “qualified” local commercial television station eligible for must carry treatment.³⁴ Thus, a station that is located in the same DMA as a cable system and is therefore eligible for mandatory carriage may not meet the market modification criteria and be subject to deletion. In their market modification requests, Frontiersvision and Adelphia adequately demonstrated that modification of WYDN’s market to eliminate the systems at issue better effectuated the purposes of the mandatory carriage requirements. On reconsideration, WYDN has not provided any information that refutes this conclusion.

9. WYDN argues that its failure to meet the market modification criteria should be overlooked because the cable systems carry WUNI, a station licensed to the same community as WYDN. WYDN maintains that the *Bureau Order* not only compounds the discrimination against WYDN already practiced by Frontiersvision and Adelphia in their attempts to exclude WYDN from carriage, but fails to give a thorough analysis of the differences between WUNI and WYDN. We disagree. First, in analyzing Frontiersvision’s and Adelphia’s requests to exclude WYDN, the Bureau was only required to determine whether WYDN met the market modification criteria. An analysis of WUNI’s qualifications in this regard, therefore, would have been inappropriate, not only because we did not have the information before us that would have been necessary to make such a determination, but also because WUNI did not participate in this proceeding. In its opposition to the market modification requests, WYDN relied on the decision in *Fouce Amusement Enterprises, Inc.* to support its argument that carriage of WUNI also justified WYDN’s carriage.³⁵ The *Bureau Order* adequately explained the differences between the action in *Fouce Amusement* and the situation here. Although carriage of WUNI on the systems at issue may have mildly weighed in favor of WYDN with regard to one of the four factors, the Bureau concluded that WYDN soundly failed to meet any of the other factors. Moreover, the Bureau also identified two differences between the stations that accounted for WUNI’s carriage – historic carriage and the fact that WUNI provided substantial Grade B coverage while WYDN did not provide Grade B coverage to any of the communities at issue.

³¹*Id.*, citing *Melody Music, Inc. v. FCC*, 345 F. 2d 730 (D.C. Cir. 1965).

³²47 C.F.R. § 76.55(c); 47 U.S.C. § 534(h)(1)(A).

³³47 C.F.R. § 76.59(b).

³⁴47 C.F.R. § 76.55(c).

³⁵*See* WYDN Opposition at 3, citing 10 FCC Rcd 668 (1995).

IV. ORDERING CLAUSES

10. Accordingly, **IT IS ORDERED**, that the petition for reconsideration filed by Educational Public TV Corporation **IS DENIED**.

11. This action is taken pursuant to authority delegated by Sections 0.283 and 1.103 of the Commission's rules.³⁶

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief
Media Bureau

³⁶47 C.F.R. §§ 0.283 and 1.103.