

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

In the Matter of:)	
)	
Board of Water, Light & Sinking Fund)	CSR-6341-A
Commissioners of the City of Dalton, Georgia)	
)	
Petition For Modification of the Atlanta,)	
Georgia DMA)	
)	
Sarkes Tarzian, Inc.)	CSC-394
)	
Petition for Order to Show Cause)	

MEMORANDUM OPINION AND ORDER

Adopted: October 4, 2004

Released: October 6, 2004

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. The Board of Water, Light & Sinking Fund Commissioners of the City of Dalton, Georgia (“Dalton Utilities”), operator of a municipally-owned cable system serving the City of Dalton, Georgia and the unincorporated portions of Whitfield County, Georgia, filed the above-captioned petition for special relief to modify the Atlanta, Georgia designated market area (“DMA”) to include the City of Dalton and Whitfield County within the market of television broadcast station WXIA (Ch. 11), Atlanta, Georgia (“WXIA”). Sarkes Tarzian, Inc., licensee of station WRCB-TV (Ch. 3), Chattanooga, Tennessee (“WRCB-TV”) filed an opposition to the modification petition as well as a petition for order to show cause against Dalton Utilities for the cable system’s failure to provide nonduplication protection to WRCB-TV. Dalton Utilities filed an answer with a request that the proceedings be consolidated to which WRCB-TV filed a reply. For the reasons discussed, we deny Dalton Utilities’ request to include its system communities within WXIA’s market.

II. BACKGROUND

2. Pursuant to Section 614 of the Communications Act and implementing rules adopted by the Commission in *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Broadcast Signal Carriage Issues (“*Must Carry Order*”), commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station’s market.¹ A station’s market for this purpose is its “designated market area,” or DMA, as defined by Nielsen Media

¹8 FCC Rcd 2965, 2976-2977 (1993).

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 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

III. DISCUSSION

3. In the instant case, Dalton Utilities is attempting to use the market modification procedures to obtain what is, essentially, a network nonduplication waiver. The market modification process is governed by Section 76.59 of the Commission's rules.⁵ Network nonduplication requirements are contained in Section 76.92 of the Commission's rules.⁶ These two sections are not related. Section 614 of the Act, through which the authority for seeking market modification was enacted, deals expressly with the must carry requirements regarding the carriage of local commercial television signals.⁷ Section 76.92 of the rules oversees the protection of contractual rights granted to television broadcast stations for the broadcast of network programming.⁸ Therefore, a grant of market modification to Dalton Utilities could not effect the system's obligation to comply with the network nonduplication requirements. As a result, we will treat Dalton Utilities' petition as a request for waiver of the network nonduplication rules and not a petition for market modification.

4. In support of its request, Dalton Utilities states that it currently carries both WXIA and WRCB-TV pursuant to retransmission consent agreements.⁹ On April 12, 2004, WRCB-TV notified Dalton Utilities that it intended to file a complaint with the Commission if the cable system did not afford WRCB-TV network nonduplication protection against WXIA by discontinuing the carriage of WXIA's NBC programming.¹⁰ Dalton Utilities concedes that Section 76.92 of the Commission's rules allows a television broadcast station, such as WRCB-TV, to protect its rights to network programming exclusivity within a 35-mile area and that its system is located within WRCB-TV's 35-mile zone.¹¹ Despite this,

²Section 614(h)(1)(C) of the Communications Act, as amended by the Telecommunications Act of 1996, provides that a station's market shall be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns. See 47 U.S.C. § 534(h)(1)(C). Section 76.55(e) requires that a commercial broadcast television station's market be defined by Nielsen Media Research's DMAs. See 47 C.F.R. § 76.55(e).

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

⁴47 U.S.C. § 534(h)(1)(C).

⁵47 C.F.R. § 76.59.

⁶47 C.F.R. § 76.92.

⁷47 U.S.C. § 534.

⁸47 C.F.R. § 76.92.

⁹Petition at Exhibits A and B.

¹⁰*Id.* at Exhibit C.

¹¹*Id.* at 2-3; see also 47 C.F.R. § 76.92.

however, Dalton Utilities wants to waive the application of the nonduplication rules, as well as the presumptive priority preference that the rules give to the closer duplicate network signal.¹² Dalton Utilities maintains that, in this instance, rigid enforcement of the nonduplication rules would serve to deprive programming of local and regional interest to a significant portion of the community.¹³ Dalton Utilities states that, despite their proximity to the Tennessee border, the residents of Dalton and Whitfield County have a greater affinity with the City of Atlanta and much of the local economy has ties to the business community centered around Atlanta.¹⁴ Dalton Utilities notes that 100 percent of the advertisements viewed on WXIA were either national in scope or concerned with Georgia compared to WRCB-TV where only one percent of the advertisements specifically concerned the Georgia market.¹⁵ Dalton Utilities states that WXIA provides more of the Georgia-focused programming of interest to its subscribers than is provided by WRCB-TV.¹⁶ For instance, during the week of May 12-17, 2004, 45 percent of WXIA's news coverage related to Georgia issues as opposed to only 17 percent of WRCB-TV's coverage.¹⁷ Finally, Dalton Utilities states that it commissioned Nielsen Media Research to conduct a study of the cable and noncable viewership of WXIA in Whitfield County.¹⁸ Specifically, the study examined Nielsen "diary" data for all households in Whitfield County for a sweeps week in November 2003 and a sweeps week in February 2004 with averages combined.¹⁹ Dalton Utilities states that the study found the average cumulative viewership for the two periods to be 10.48 percent for WXIA for all households.²⁰

5. In opposition, WRCB-TV argues that Dalton Utilities' continued carriage of WXIA's NBC programming is a violation of copyright law and a violation of the Commission's rules and regulations.²¹ Moreover, WRCB-TV states, Dalton Utilities fails to provide a valid basis for its failure to provide network nonduplication protection to WRCB-TV as required in these circumstances.²² As a result, WRCB-TV asserts that Dalton Utilities should be ordered to immediately come into compliance with the Commission's network nonduplication rules. WRCB-TV states that it has had numerous communications with Dalton Utilities over the past year attempting to make it clear that WRCB-TV's grant of retransmission consent to the cable system was expressly conditioned upon the provision of network nonduplication protection and that WRCB-TV intended to enforce both its contractual rights with regard to NBC programming and its regulatory rights against WXIA.²³ WRCB-TV states that the

¹²Petition at 3-4; *see also* 47 C.F.R. §§ 76.7 and 76.59.

¹³Petition at 3-4.

¹⁴*Id.* at 8-9. Dalton Utilities states that the vast majority of Whitfield County residents commute to a work location in Georgia, rather than Tennessee. *See* www.census.gov/population/www/cen2000/commuting.html.

¹⁵Petition at 9.

¹⁶*Id.* at 10.

¹⁷*Id.* at 10-11. Dalton Utilities also notes that a sizable portion of the sports-minded population in Dalton and Whitfield County follow Georgia and not Tennessee teams.

¹⁸*Id.* at Exhibit J.

¹⁹*Id.*

²⁰*Id.* Dalton Utilities states that this study also shows that satellite subscribers have a 19.68 percent viewership of WXIA in Whitfield County.

²¹Opposition at 2.

²²*Id.*

²³*Id.* at 3 and Attachments A, B and C. WRCB-TV states that it is not immediately apparent how long
(continued...)

Commission has made it clear that network nonduplication protection is based on the contractual relationships between a television network and its various affiliated broadcast stations.²⁴ WRCB-TV states that the Commission's rules do not permit or contemplate a role for cable systems in determining the programming exclusivity protection that is to be afforded individual television stations; their only role is to comply with the regulations.²⁵ In this instance, WRCB-TV states that NBC granted it the right to network nonduplication protection within the 35-mile "specified zone" permitted by the Commission's rules, an area which includes the subject communities.²⁶

6. In its request for order to show cause, WRCB-TV basically reiterates the attempts described in its opposition to induce Dalton Utilities to provide network nonduplication protection against WXIA. WRCB-TV therefore requests that the Commission immediately order such compliance and, to the extent deemed appropriate, fine Dalton Utilities for its admitted violation of the network nonduplication rules.²⁷

7. In reply, Dalton Utilities argues that WRCB-TV's request for the Commission to issue a forfeiture and immediately order the system to cease carriage of WXIA is contrary to law, inconsistent with the Commission's practices, and incompatible with the public interest.²⁸ Dalton Utilities states that it filed its petition because a huge number of its subscribers want to continue to have a choice between WXIA and WRCB-TV.²⁹ Moreover, requiring Dalton Utilities to stop showing WXIA altogether, or show only a disjointed patchwork of programming as WRCB-TV suggests, would be highly disruptive.³⁰ Dalton Utilities therefore urges the Commission to deny WRCB-TV's request.

8. WRCB-TV argues in a further response that Dalton Utilities' claim that it is permitted by "right of statute" to violate WRCB-TV's network nonduplication rights while its waiver request is pending before the Commission is without basis.³¹ WRCB-TV maintains that, if there is any merit to Dalton Utilities' request, it should be fully addressed in a notice and comment rulemaking of general applicability, not in an adjudicative proceeding.³²

9. We find that Dalton Utilities has not provided justification for a waiver of the network

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Dalton Utilities has been in violation of the network nonduplication rules as it is unclear when the system crossed the 1000-subscriber threshold, prior to which it would have been exempt from the requirements. In a March 1, 2004 news report, Dalton Utilities states that it had 1,273 customers, but it did not provide the required threshold notification to the Commission until May 25, 2004 and such notification did not indicate a specific date when that threshold was passed. *See id.* at 4 n.2.

²⁴*Id.* at 4, citing *Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, 3 FCC Rcd 5299, 5319 (1988) ("Program Exclusivity").

²⁵*Id.* at 5.

²⁶*Id.*

²⁷Show Cause at 3.

²⁸Reply at 1-2.

²⁹*Id.* at 3.

³⁰*Id.* at 3-4.

³¹Further Response at 2.

³²*Id.* at 3 n.2.

nonduplication rules. The arguments presented by Dalton Utilities were focused on obtaining a market modification and do not present a basis for waiver of the network nonduplication rules. The Commission does provide a means by which a petitioner may seek an exception to the Commission's network nonduplication rules contained in Section 76.92(f) of the Commission's rules.³³ This exception is based upon audience viewership of the subject station. However, the viewership data supplied by Dalton Utilities does not meet the criteria for such a finding.³⁴ It should be noted that either Dalton Utilities or WXIA could file a petition for declaratory ruling with the Commission seeking to establish that WXIA is significantly viewed in either Whitfield County or the City of Dalton according to the criteria established pursuant to Sections 76.54(b) and (d).³⁵ If WXIA were determined to be significantly viewed, WRCB-TV would be unable to assert its network nonduplication rights against WXIA and Dalton Utilities would then be able to carry the station in its entirety.

10. Finally, with regard to WRCB-TV's request for a forfeiture, the Bureau will make a separate determination as to whether a forfeiture in this instance is warranted. Dalton Utilities will be required to provide further information in this regard. Further, we do not believe that an Order to Show Cause is appropriate at this juncture. We have no reason to believe that Dalton Utilities will not provide the required network nonduplication protection to WRCB-TV upon the release of this Order.

IV. ORDERING CLAUSES

11. 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-6341-A), filed by Board of Water, Light & Sinking Fund Commissioners of the City of Dalton, Georgia **IS DENIED**

12. **IT IS FURTHER ORDERED** that the order to show cause (CSC-394) filed by Sarkes Tarzian, Inc. **IS DENIED** and Dalton Utilities **IS ORDERED** to comply with the Commission's network nonduplication requirements as they apply to WRCB-TV.

³³47 C.F.R. § 76.92(f).

³⁴The study performed by Nielsen includes only county-wide data, does not cover surveys taken over a two-year period, is missing noncable data and includes no standard error.

³⁵47 C.F.R. §§ 76.54(b) and (d). For stations that were in operation prior to 1972, significant viewing surveys pursuant to Section 76.54(b) are required and status can only be obtained on a community-specific or system-specific basis. Stations that commenced operations after 1972 may submit county-wide surveys pursuant to Section 76.54(d) and the surveys must be within the station's first three years of operation.

13. **IT IS FURTHER ORDERED** that Dalton Utilities is required to provide to the Commission, and serve a copy on WRCB-TV, within thirty (30) days of the release date of this order, an explanation regarding its apparent failure to comply with the network nonduplication requests of WRCB-TV. In addition, Dalton Utilities shall inform the Commission on what date it exceeded 1000 subscribers.

14. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules.³⁶

FEDERAL COMMUNICATIONS COMMISSION

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³⁶47 C.F.R. §0.283.