

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

In the Matter of:
Hispanic Broadcasters of Philadelphia, L.L.C.
v.
Service Electric Cable TV, Inc. & Service Electric
Cablevision Inc.
For Carriage of WWSI(TV), Atlantic City, New
Jersey
In the Matters of:
Service Electric Cable TV, Inc.
Petition for Modification of Television Market of
Television Station WWSI(TV), Atlantic City
Service Electric Cablevision Inc.
Petition for Modification of Television Markets of
Television Stations WWSI(TV), Atlantic City and
WUVP(TV), Vineland, New Jersey
CSR 6263-M
CSR-6244-A
CSR 6246-A

MEMORANDUM OPINION AND ORDER

Adopted: February 10, 2004

Released: February 13, 2004

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Hispanic Broadcasters of Philadelphia, L.L.C. ("Hispanic"), licensee of television station WWSI(TV) ("WWSI"), Atlantic City, New Jersey, filed the above captioned complaint for carriage of WWSI in the communities listed on Attachment A (the "Communities"), on the cable systems of Service Electric Cable TV, Inc. and Service Electric Cablevision Inc. (separately or collectively, "Service"). Service filed an answer to the complaint as well as separate petitions to modify the markets of WWSI and WUVP(TV), Vineland, New Jersey by excluding from the stations' markets those Communities served by their respective cable systems.<sup>1</sup> Hispanic filed a reply to Service's answer to the complaint. Hispanic and

<sup>1</sup> Attachment A lists the Communities served by Service.

Univision Philadelphia LLC (“Univision”), licensee of WUVP(TV), filed oppositions to the petitions, to which Service filed replies. Service subsequently filed a motion to dismiss that portion of the petition that seeks exclusion of certain communities from the market of Station WUVP. Because the issues raised by the complaint and the petitions are interrelated, both matters are considered here. We address the petitions 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”)*,<sup>2</sup> 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 (“DMA”), as defined by Nielsen Media Research.<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup>

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, has 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

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<sup>2</sup> 8 FCC Rcd 2965, 2976-2977 (1993).

<sup>3</sup> 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). Section 76.55(e) of the Commission’s rules requires that a commercial broadcast television station’s market be defined by Nielsen Media Research’s DMAs. 47 C.F.R. § 76.55(e); *Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, 14 FCC Rcd 8366 (1999)(“*Modification Final Report and Order*”).

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

<sup>5</sup> 47 U.S.C. §534(h)(1)(C).

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

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

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.<sup>7</sup>

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.<sup>8</sup>

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<sup>6</sup> *Must Carry Order*, 8 FCC Rcd 2965, 2976 (1993).

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

<sup>8</sup> 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 (continued....)

- (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.<sup>9</sup>

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 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.<sup>10</sup>

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

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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.

<sup>9</sup> 47 C.F.R. §76.59(b).

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

<sup>11</sup> 8 FCC Rcd 2977 n. 139.

<sup>12</sup> 47 C.F.R. §76.59.

### III. DISCUSSION

#### A. Dismissal of the Petition with Respect to WUVP(TV)

9. Service filed a motion seeking dismissal of that portion of the requesting modification of the market of WUVP(TV). A petition filed pursuant to Section 76.7 of the Commission's rules may be dismissed without prejudice as a matter of right prior to any final action by the Commission.<sup>13</sup> Accordingly, Service's motion for partial dismissal of the petition with respect to WUVP(TV) will be dismissed without prejudice.

#### B. Modification of The Market of WWSI

10. Station WWSI is located in the Philadelphia DMA as are the Communities served by Service's cable systems at issue. In their petitions, Service requests that the Commission modify WWSI's television market by excluding the Communities served by its cable systems from WWSI's television market. In support of this request, Service provided information showing that WWSI historically has not been carried on the cable systems,<sup>14</sup> is geographically distant from the cable systems,<sup>15</sup> does not provide Grade B signal coverage of the Communities,<sup>16</sup> does not broadcast programming of specific interest to residents of the Communities,<sup>17</sup> and achieves no measurable viewing audience in the counties where the cable systems are located.<sup>18</sup> Service asserts further that other stations carried on its systems that are licensed to the Philadelphia DMA provide the Communities with abundant local services.<sup>19</sup> As evidence of WWSI's lack of market presence, Service also provided copies of published local television listings for the Communities that contain no listings for WWSI.<sup>20</sup> Service argues that requiring the carriage of WWSI in the Communities served by its cable systems would constitute an unwarranted extension of the station's operations beyond the area reached or served by the station's over-the-air signal.

11. Hispanic, in opposition, provided no evidence relevant to the market modification factors that conflicts with that submitted by Service. Instead, Hispanic contends essentially that WWSI's presentation of Spanish language programming obtained from Telemundo overrides the evidence submitted by Service in the latter's effort to show that the statutory market modification factors are satisfied. Hispanic argues that the Commission should discount the impact of WWSI's low ratings in the Communities and the absence of WWSI's historic carriage on Service's cable systems, because the station has been in operation for only two years. According to Hispanic, grant of the petition would deprive cable subscribers in the Communities of their ability to receive WWSI's Spanish language programming and run counter to the Commission's goal of encouraging the establishment of new and specialty stations.

12. Other than to state that WWSI carries Telemundo programming, Hispanic made no attempt to define the extent of such programming.<sup>21</sup> We note further that Hispanic failed to demonstrate that the Spanish language programming obtained from Telemundo had been designed to serve the cable system

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<sup>13</sup> See 47 C.F.R. § 76.7(a)(4)(iii).

<sup>14</sup> Petition at 5-6.

<sup>15</sup> The distances from Atlantic City, New Jersey, WWSI's community of license, to the Communities range from 83 to 112 miles. *Id.* at 6-8.

<sup>16</sup> *Id.* at 9-10.

<sup>17</sup> *Id.* at 10-11.

<sup>18</sup> *Id.* at 11-12.

<sup>19</sup> *Id.* at 10-11.

<sup>20</sup> *Id.* at 10 & Exhibits 4 & 5.

<sup>21</sup> Opposition at 8-10.

Communities served by Service.<sup>22</sup> On this record, we conclude that WWSI's presentation of an undefined quantity of Spanish language programming should not be deemed to outweigh the evidence presented by Service that otherwise demonstrates satisfaction of the statutory market modification factors.<sup>23</sup> We have consistently rejected the notion that evidence directly relevant to the statutory factors should be given little weight, merely because a station provided foreign language programming that may have general appeal to speakers of such language throughout the DMA and the communities at issue.<sup>24</sup>

13. 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]..."<sup>25</sup> WWSI is a commercial television station licensed to Atlantic City, New Jersey, within the Philadelphia DMA. Although the Communities are also in the Philadelphia DMA, WWSI is shown to have no history of cable carriage in the Communities, no measurable audience viewership, does not place a predicted grade B signal contour over the Communities at issue, and Atlantic City, the station's city of license, is 83 miles or more from each of the Communities.

14. 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.<sup>26</sup> 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 if any 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.<sup>27</sup> 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.<sup>28</sup> In the present case, Service carries several other television stations licensed to communities in the Philadelphia DMA.<sup>29</sup>

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<sup>22</sup> Neither the letters of five Allentown service organizations or the petition with 32 signatures provided by Hispanic defines the quantity of Spanish language programming carried by WWSI or demonstrates that such programming had been designed to serve the cable system Communities at issue. Opposition at Exhibit 2.

<sup>23</sup> The Bureau has 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").

<sup>24</sup> *See Mediacom of California LLC For Modification of the Los Angeles, California DMA*, 18 FCC Rcd 16206 (MB 2003), and cases cited therein.

<sup>25</sup> *See Time Warner Entertainment-Advance Newhouse Partnership*, 11 FCC Rcd 6541 (CSB 1996).

<sup>26</sup> *See* 47 U.S.C. § 534(h)(1)(C)(ii)(I). *Advance Newhouse Partnership*, 11 FCC Rcd 6541 (CSB 1996).

<sup>27</sup> *See Marcus Cable Associates, LLC*, 14 FCC Rcd 1 (CSB 1998).

<sup>28</sup> *Id.*

<sup>29</sup> Among such stations, Service Electric Cablevision, Inc. carries WUVP(TV), which also broadcasts Spanish language programming, on its cable systems serving twenty eight (28) of the Communities listed on Attachment A. (continued...)

15. We reject the thrust of Hispanic's argument that regardless of the Section 614(h) market modification process WWSI 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.<sup>30</sup> 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.<sup>31</sup> Under Section 614(h), our role in this proceeding is to consider whether WWSI's television market encompasses the Communities at issue. Based on the record reviewed herein, we find that it does not and grant the petitions.

### C. The Must Carry Complaint

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

## IV. ORDERING CLAUSES

17. Accordingly, **IT IS ORDERED**, pursuant to Section 614(h) of the Communications Act of 1934, as amended,<sup>32</sup> and authority delegated by Section 0.283 of the Commission's rules,<sup>33</sup> that the petitions for special relief filed by Service Electric Cable TV, Inc. & Service Electric Cablevision Inc. in File Nos. CSR 6244-A and CSR 6246-A **ARE GRANTED**, and the Communities listed on Attachment A, **ARE HEREBY EXCLUDED** from the television market of television station WWSI, Atlantic City, New Jersey.

18. **IT IS FURTHER ORDERED** that motion of Service Electric Cablevision Inc. for partial dismissal of the petition with respect to WUVP(TV) **IS DISMISSED WITHOUT PREJUDICE**.

19. **IT IS FURTHER ORDERED**, that the complaint of Hispanic Broadcasting of Philadelphia LLC in File No. 6232-M for carriage of station WWSI in the Communities listed on Attachment A **IS DISMISSED**.

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broecker, Deputy Chief,  
Policy Division, Media Bureau

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WUVP(TV) broadcasts from the same antenna Tower as does seven other stations of the DMA carried on these cable systems. Univision Opposition at 5-6, 13-15.

<sup>30</sup> See 47 U.S.C. § 534(h)(1)(C)(i).

<sup>31</sup> H.R. Rep. No. 628, 102d Cong., 2d Sess. at 97-98.

<sup>32</sup> 47 U.S.C. §534(h).

<sup>33</sup>47 C.F.R. §0.283.

## ATTACHMENT A

## COMMUNITIES SERVED BY SERVICE ELECTRIC

Pennsylvania Communities DeletedFile No. CSR 6244-A

Bethlehem	Alburtus
Easton	Coopersburg
Lower Saucom	Catasauqua
Hanover	Hellertown
Glendon	Fountain Hill
Stockertown	Pen Argyl
West Easton	Wind Gap
Wilson	Tinicum
Bangor	Freemasonsburg
East Bangor	Weisenburg
Roseto	Nockamixon
Nazareth	Bath
Riegelsville	Durham
Tatamay	Coplay
Emmaus	Longswamp
Macungie	North Catasauqua
Pórtland	
Allentown	
Chapman	
Hereford	

Pennsylvania Communities DeletedFile No. CSR 6246-A

Birdsboro	Topton
Fleetwood	Maxatawny
St. Lawrence	Warwick
Kutztown	Oley
Elverson	