

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

In the Matter of:)	
)	
Withers Broadcasting Company of West Virginia, Licensee of WDTV(TV), Weston, West Virginia)	CSR-6981-A
)	
Petition For Modification of the Clarksburg- Weston, West Virginia DMA)	

MEMORANDUM OPINION AND ORDER

Adopted: May 23, 2006

Released: May 25, 2006

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. Withers Broadcasting Company of West Virginia, licensee of television broadcast station WDTV(TV) (Ch. 5), Weston, West Virginia (WDTV), filed the above-captioned petition for special relief. WDTV seeks to modify the Clarksburg-Weston, West Virginia designated market area to include communities served by Adelphia/Century Huntington Cable (Adelphia) in Monongalia County, West Virginia (cable communities)¹ for the purposes of the Commission's cable television mandatory broadcast signal carriage rules. Oppositions to the petition were filed by broadcast stations WPGH and KDKA, Pittsburgh, Pennsylvania, and WDTV submitted a reply. For the reasons discussed below, we grant WDTV's petition.

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.² A station's market for this purpose is its "designated market area," or DMA, as defined by Nielsen Media

¹WDTV lists the cities of Morgantown and Westover, the towns of Blacksville, Granville, Osage and Star City, and "All Unincorporated Areas Within Monongalia County" served by Adelphia as areas it seeks to include in the Clarksburg-Weston, West Virginia DMA. Petition at 1. WDTV previously submitted a petition requesting this market modification. This petition was dismissed without prejudice because it did not provide adequate information. 20 FCC Rcd 17890 (2005). WDTV is now resubmitting its petition with additional information. See *infra* n. 12 and accompanying text (Commission procedure when a petition to modify a market contains inadequate information).

²8 FCC Rcd 2965, 2976-1977 (1993).

Research.³ 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.⁴

3. The Act also directs the Commission to consider changes in market areas in the interest of localism, and provides statutory factors to guide the Commission when it considers modifying a market. 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.⁵

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 requirement 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;

(IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.⁶

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

³Section 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. 47 C.F.R. §76.55(e); see *Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, 14 FCC Rcd 8366 (1999) ("Modification Final Report and Order").

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

⁵47 U.S.C. §534(h)(1)(C).

⁶*Id.*

with Congress' objective to ensure that television stations be carried in the area 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.⁷

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.⁸

4. The Commission, moreover, in its *Modification Final Report and Order*, adopted rules⁹ to promote administrative efficiency by requiring standardized evidence in petitions to modify markets. The following evidence is required to be submitted:

(1) 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.

(2) 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 to Paragraph (b)(2): Service area maps using Longley-Rice (version 1.2.2) propagation curves may also be included to support a technical service exhibit.¹⁰

(3) Available data on shopping and labor patterns in the local market.

(4) Television station programming information derived from station logs or the local edition of the television guide.

(5) Cable system channel line-up cards or other exhibits establishing historic carriage, such as television guide listings.

(6) Published audience data for the relevant station showing its

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

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

⁹*Supra* n. 3, 47 C.F.R. §76.59(b).

¹⁰The 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.

average all day audience (i.e., the reported audience averaged over Sunday-Saturday, 7 a.m.-1 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.¹¹

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 with a filing fee.¹² The *Modification Final Report and Order* provides that parties may continue to submit additional evidence that they deem appropriate.

III. DISCUSSION

5. The issue before us is whether to grant WDTV's request to include the cable communities in its television market. Inclusion of these communities in its market would allow it to assert mandatory carriage rights on Adelphia's cable system serving the cable communities.¹³ WDTV is licensed to Weston, West Virginia, which is in the Clarksburg-Weston DMA. The cable communities, including Morgantown, are located north of Weston in Monongalia County, West Virginia, near the Pennsylvania border. Monongalia County is in the Pittsburgh, Pennsylvania DMA.¹⁴

6. In support of its petition, WDTV asserts that it has been carried on the cable television system serving Morgantown since 1965, and on cable systems serving Monongalia County since 1973.¹⁵ WDTV further explains that it provides local service because its Grade B contour covers the cable communities, and it broadcasts programming directed to the County. WDTV provides a list of representative programming. This programming, according to WDTV, covers the "goings-on" in the cable communities such as local politics, crimes, high school and college sports, and news in general. WDTV states it provides significant coverage of the most popular sports organization in the region, the West Virginia University Mountaineers, who play their home games in Monongalia County. WDTV indicates that it has a news reporter with appropriate news gathering equipment assigned full-time in Monongalia County. WDTV, moreover, claims that it aggressively sells advertising in the cable communities, and that they provide about 20 percent of its local advertising revenue.¹⁶

7. With regard to audience data, WDTV indicates that it has viewership in Monongalia County. In support of this, WDTV presents rating data for most years between 1986 and 2005. For example, in 2005, it had a 4 share for the Sunday-Saturday, 7 am – 1 am time period for cable and noncable households.¹⁷

¹¹47 C.F.R. §76.59(b); see e.g., *Time Warner Entertainment-Advance/Newhouse Partnership*, 20 FCC Rcd 5213 (2005).

¹²47 C.F.R. §76.59(c). WDTV previously submitted a petition requesting the same market modification. This petition was dismissed without prejudice because WDTV did not provide sufficient evidence and information to enable the Commission to adequately evaluate its request. 20 FCC Rcd 17890 (2005). WDTV's current petition is a resubmission of that petition with additional information.

¹³Petition at 2-3, 6.

¹⁴*Id.* at 2.

¹⁵*Id.* at 8.

¹⁶*Id.* at 5, 8-10, and Exhibits B, G, and H.

¹⁷*Id.* at 11, and Exhibit K.

8. WDTV argues that since there are only nine VHF television stations licensed in West Virginia that they are entitled to have West Virginia communities served by them included in their local DMA market. WDTV also claims that the Pittsburgh stations provide little if any local news to the cable communities. WDTV points out that compared to television stations in the Pittsburgh DMA, its studio and transmitter are closer to Morgantown, the county seat of Monongalia County and the location of Adelphia's cable headend.¹⁸ WDTV provides a map of northern West Virginia and Western Pennsylvania showing relevant community locations, geographic features, major roads, and transmitter sites for all commercial television stations, and the location of Adelphia's cable headend. The map includes a table which shows that WDTV's transmitter near Weston is 72.904 km (about 45 miles) from Adelphia's headend and its studio north of Weston is 46.540 km (about 29 miles) away. By comparison, the map indicates that the closest transmitter site for a station in the Pittsburgh DMA is WTAE, which is 74.623 km from Adelphia's headend, while KDKA is 97.457 km away.¹⁹

9. Concerning shopping and labor patterns in the area, WDTV explains that its city of license, Weston, and Morgantown are connected by highway I-79, which is known as the I-79 high tech corridor. WDTV indicates that the economic development of these two cities and the area in-between is promoted by the I-79 Development Council. Members of the Council include local businesses, educational institutions, hospitals, high tech firms, and chambers of commerce.²⁰ WDTV also attaches West Virginia commuting pattern tables from 2000 indicating that a small percentage of workers in Monongalia County commute from Lewis County where WDTV is located, and vice versa.²¹

10. Finally, WDTV argues that Commission precedent supports its position, and cites *Brazos Broadcasting Company (KBTX-TV)*.²² WDTV indicates that in *Brazos* the station successfully altered its market based on similar facts such as historic cable carriage; signal coverage; and local programming, viewers and advertisers.²³

11. In its Opposition, KDKA explains that its station and WDTV are CBS network affiliates. KDKA argues that if WDTV's market modification petition were granted, it could lose its must carry rights on Adelphia's cable system in the cable communities, and that the Commission looks with disfavor on this result. KDKA explains that this might occur because the Commission's rules exempt cable operators from carrying duplicating affiliates of the same network, and if one were carried, it must be the station closest to the cable system's principal headend. KDKA acknowledges that WDTV is closer to Adelphia's headend. Thus, according to KDKA, if WDTV's petition were granted, KDKA's must carry rights would be compromised within its own market.²⁴

12. KDKA further argues that although the Commission has occasionally granted market

¹⁸*Id.* at 13-14.

¹⁹*Id.* at 2-3, and Exhibit A.

²⁰*Id.* at 4-5, and Exhibit F.

²¹*Id.* at 4, and Exhibit E (compiled by the WVU Bureau of Business and Economic Research).

²²10 FCC Rcd 8759 (CSB 1995).

²³Petition at 14-15.

²⁴KDKA Opposition at 2-5, citing 47 C.F.R. §§76.56(b)(4)(ii) and (5); *Young Broadcasting of Lansing, Inc.*, 18 FCC Rcd 24889 (2003); *Guy Gannett Communications, Inc.*, 13 FCC Rcd 23470 (1998), *recon denied*, 15 FCC Rcd 10762 (2000); *Pacific and Southern Company, Inc.*, 14 FCC Rcd 4558 (1999).

modifications involving the above circumstances, namely, two stations with the same network affiliation, special factors existed in those cases that do not exist in WDTV's situation. For example, KDKA asserts that WDTV is not substantially closer to the cable system than KDKA, WDTV does not place a Grade A signal over the cable communities, WDTV is not significantly viewed whereas KDKA is, and ratings do not favor WDTV over KDKA.²⁵ With regard to the *Brazos* decision, which WDTV claims supports its position, KDKA states that factors not present in WDTV's situation caused the Commission to alter the market as requested by the station, and, therefore, the *Brazos* decision does not apply to WDTV. KDKA explains that, in *Brazos*, the Commission looked with favor on the fact that the petitioning station's Grade A contour encompassed the relevant cable communities; its audience share exceeded the in-market affiliate's share; and perhaps most importantly, its transmitter was located in a county it was seeking to include in its market.²⁶

13. WPGH also submitted an Opposition to WDTV's market modification petition. WPGH argues that WDTV has been correctly included in the Clarksburg-Weston DMA for at least 34 years, and Monongalia County has been properly included in the Pittsburgh DMA for about 50 years based on decades of local television viewing data.²⁷ WPGH further asserts that the statutory modification factors that the Commission considers in reviewing petitions to alter DMAs confirm that Monongalia County should not be included in WDTV's market, and that WDTV fails to provide information in its petition to support inclusion.²⁸

14. For example, WPGH states that WDTV's employment figures indicate that "fewer than 1%" of the residents in WDTV's county work in Monongalia County, and "only .1%" of Monongalia County residents are employed in WDTV's home county. Thus, commuting patterns demonstrate no nexus between WDTV and the cable communities.²⁹ WPGH also explains that, although WDTV is carried by the cable television operator serving the cable communities, so is every television station in the Pittsburgh DMA, and substantially more people in the cable communities watch Pittsburgh stations than stations in the Clarksburg-Weston DMA.³⁰ With regard to Grade B signal coverage of Monongalia County, WPGH claims that based on Longley-Rice signal coverage analysis, all of the Pittsburgh stations cover much or all of the County with their analog signals, and this coverage will improve as the stations convert to digital television. By contrast, argues WPGH, WDTV's proposed digital signal will provide less coverage to Monongalia County than its current analog signal.³¹ WPGH also objects to WDTV's information regarding its programs directed to local issues in the cable communities. WPGH states that WDTV "simply lists what appears to be a randomly selected hodgepodge of generalized subjects that have no obvious connection to viewers in the Communities," and that WDTV failed to indicate "whether

²⁵*Id.* at 2-3, 5-8, citing *Young Broadcasting of Lansing, Inc.*, 18 FCC Rcd 24889 (2003); *Seal Rock Broadcasting, LLC*, 18 FCC Rcd 16262 (2003); *Ackerley Media Group, Inc.*, 18 FCC Rcd 16199, 16204-5 (2003); *Duhamel Broadcasting Enterprise*, 15 FCC Rcd 4965 (2000); *Brazos Broadcasting Company*, 10 FCC Rcd 8759 (1995).

²⁶*Id.* at 8-9.

²⁷WPGH Opposition at 2.

²⁸*Id.* at 3.

²⁹*Id.* at 3-4.

³⁰*Id.* at 4-5.

³¹*Id.* at 5-6, and Exhibits 2 and 3.

any of the examples provided were more than a few seconds of coverage.”³² WPGH also claims that contrary to WDTV’s assertion, the Pittsburgh stations provide an abundant amount of local programming to the cable communities.³³ WPGH, moreover, argues that audience data provided by WDTV indicates “a low level of viewership of WDTV in Monongalia County, particularly when compared to the significant level of viewing enjoyed in the county by” Pittsburgh stations.³⁴ Finally, WPGH argues, for similar reasons to those articulated by KDKA, that the *Brazos* decision does not support WDTV’s position.³⁵

15. WDTV in its reply claims that, for the reasons explained in its petition, it has established that it meets the statutory criteria used by the Commission as a guide in considering requests to modify markets, and, therefore, its petition should be granted.³⁶ WDTV also addresses KDKA’s argument that the Commission looks with disfavor on market modifications that might result in a station with a network affiliation losing its existing must carry rights on a cable system because it has the same affiliation as the station seeking the modification. WDTV asserts that blind application of this rationale would result in preventing most market modification requests by network affiliates in small markets. Instead, WDTV urges the Commission to consider these requests on a case-by-case basis, especially when the station seeking the modification, such as WDTV, is in the same economic market and state as the cable communities, and is closer to the cable communities than the other affiliated station.³⁷

16. After reviewing the record in this proceeding and taking into consideration and weighing all factors, we conclude that the statutory factors previously discussed favor granting WDTV’s petition to include the cable communities in its television market.³⁸ The first statutory factor that we are required to address is whether WDTV has been carried on cable systems in the cable communities. WDTV indicates it has been carried on the cable television system serving Morgantown, the county seat of Monongalia County and the location of Adelphia’s cable headend, since 1965, and on cable systems serving Monongalia County since 1973.³⁹ We therefore find that WDTV conclusively qualifies under the first factor.

17. Regarding the second statutory factor, coverage and local service, we also find that WDTV satisfies this factor. WDTV’s predicted Grade B analog contour clearly covers the cable communities, and they are near its Grade A contour.⁴⁰ WDTV also provides local service to the cable

³²*Id.* at 6.

³³*Id.* at 7-8.

³⁴*Id.* at 8.

³⁵*Id.* at 8-9.

³⁶Reply at 4-7. WDTV, in explaining that its market modification request should be granted because it satisfies the statutory factors, cites in support *Eagle II Broadcasting*, 16 FCC Rcd 798 (CSB 2001). In this case, a network affiliate sought to modify its market because another station with the same network affiliation threatened to replace it on a cable system. The Bureau granted the market modification because it found that the request complied with the statutory factors, including historic carriage in most communities, Grade B coverage, and local programming.

³⁷*Id.* at 2-4.

³⁸*See supra* nn. 5 and 6, and accompanying text (discussing the market modification statutory factors).

³⁹Petition at 8 and 14.

⁴⁰*Id.* at 8, and Exhibit B. *See also Warren Communications News, Television & Cable Factbook 2005*, A-2277. WPGH in its opposition, while providing Longley-Rice signal coverage analysis for Pittsburgh stations, does
(continued...)

communities with some local news, events, and sports programs. WDTV's petition includes over twelve pages listing by date of broadcast such recent programs as Morgantown government (stance on combined govt), body found (body found in Scott's Creek), metro government status (interview w/fire chief), and women's health awareness (event at WVU).⁴¹

18. The third statutory factor, namely, whether any other television station that is eligible to be carried by a cable system in the cable communities provides local news, sports and other events. We believe that Congress did not intend this factor to bar a request to modify a DMA when other stations could be shown to serve the communities at issue. Rather, we believe this criterion was intended to enhance a station's claim when other stations do not serve the communities.⁴² Thus, this factor is not relevant in WDTV's situation.

19. Regarding the fourth statutory factor concerning evidence of viewing patterns, WDTV indicates that it has ratings in the cable communities. While WDTV's ratings reflect that it does not have a large share of the audience in the cable communities, its ratings are similar to KDKA's ratings, which is the other CBS network affiliate carried on Adelphia's cable system. Indeed, WDTV's ratings are also similar to WPGH's ratings, the other Pittsburgh station opposing WDTV's petition, as well as a number of other Pittsburgh stations.⁴³ We also note that the cable communities are in the same state as WDTV; are on the edge of WDTV's market, the Clarksburg-Weston DMA; and Monongalia County, where the cable communities are located, is only one of two counties in West Virginia in the Pittsburgh DMA.

IV. ORDERING CLAUSES

20. Accordingly, **IT IS ORDERED**, pursuant to Section 614(h) of the Communications Act of 1934, as amended, and Section 76.59 of the Commission's rules,⁴⁴ that the petition for special relief, filed by Withers Broadcasting Company of West Virginia, licensee of television station WDTV, **IS GRANTED**. The cable communities are included in the television market of station WDTV(TV), Weston, West Virginia.

21. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules.⁴⁵

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not provide this analysis for WDTV.

⁴¹Petition at 5, 9-10, and Exhibits G and H.

⁴²See, e.g., *Great Trails Broadcasting Corp.*, 10 FCC Rcd 8629 (1995); *Paxson San Jose License, Inc.*, 12 FCC Rcd 17520 (1997).

⁴³Petition at 11, and Exhibit K. Several Pittsburgh stations appear to have ratings significantly lower than WDTV's ratings, and one appears to have ratings significantly higher.

⁴⁴47 U.S.C. §534(h), 47 C.F.R. §76.59(c).

⁴⁵47 C.F.R. §0.283.

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