

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

In the Matter of:)
Gray Television Licensee, Inc.) CSR-7007-A
For Modification of the Harrisonburg,
Virginia DMA)

MEMORANDUM OPINION AND ORDER

Adopted: July 28, 2006

Released: August 4, 2006

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Gray Television Licensee, Inc., licensee of station WHSV-TV (ABC), Harrisonburg, Virginia ("WHSV-TV"), filed the above-captioned petition for special relief seeking to modify the Harrisonburg, Virginia designated market area ("DMA") to include the communities of Berryville, Boyce, Frederick, Middletown, Stephens City, Winchester, Front Royal and Warren, Virginia. An opposition was filed on behalf of ACC Licensee, Inc., licensee of station WJLA-TV (ABC), Washington, D.C. ("WJLA-TV"). A joint opposition was also filed on behalf of Washington, D.C. broadcasters: NBC Telemundo License Co., licensee of station WRC-TV; Fox Television Stations, Inc., licensee of stations WTTG and WDCA; Detroit Free Press, Inc., licensee of WUSA; and WBDC Broadcasting, Inc., licensee of station WBDC-TV (collectively ("DC Broadcasters")). WHSV-TV filed a reply to these oppositions. For the reasons stated above, we grant its request.

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 Research.³ A DMA is a geographic market designation that defines each television market exclusive of

²8 FCC Rcd 2965, 2976-1977 (1993).

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").

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 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

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

⁵47 U.S.C. §534(h)(1)(C).

⁶*Id.*

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 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

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.

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

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 WHSV-TV's request to include the cable communities to its television market. Inclusion of these communities in its market would allow it to assert mandatory carriage rights on Adelphia's cable systems serving the cable communities.¹³ WHSV-TV is licensed to Harrisonburg, Virginia, which is in the Harrisonburg, Virginia DMA. The cable communities are located in Clarke, Frederick and Warren Counties, Virginia, and are located in the Washington, D.C. DMA.¹⁴

5. The first statutory factor we must consider is "whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community."¹⁴ WHSV-TV asserts that it has been carried on the cable systems serving the communities on its over-the-air channel, Channel 3, since the inception of cable service in the area.¹⁵ WHSV-TV states that the Commission has consistently concluded that history of carriage "demonstrates that the relevant cable subscribers value the station and that the subscribers in these communities have been associated with the market of the station as viewers for a considerable period of time."¹⁵ WHSV-TV argues that the requested market modification is necessary to ensure that cable subscribers in the subject communities have continued access to a station to which they have become accustomed. Finally, WHSV-TV notes that Adelphia also carries another station licensed to the Harrisonburg DMA, WVPT (PBS, Ch. 15), Staunton, Virginia.¹⁶ WHSV-TV argues that such carriage further demonstrates that both Adelphia and its subscribers consider the subject communities to be part of their market.¹⁷

6. Second, we consider "whether the television station provides coverage or other local service to such community."¹⁸ WHSV-TV states that it places a predicted Grade A or Grade B signal

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.

¹³Modification at 1.

¹⁴*Id.* at 2.

¹⁴47 U.S.C. § 534(h)(1)(C).

¹⁵Modification at 5. WHSV-TV notes that the Commission's 1972 list of significantly viewed signals lists WHSV-TV as significantly viewed in Warren County, where two of the cable communities are located.

¹⁵*Id.* at 6, citing *News Press and Gazette*, 10 FCC Rcd 10331, 10333 (1995); *News Press and Gazette*, 10 FCC Rcd 10-327, 10329 (1995).

¹⁶*Id.* at Exhibit 2.

¹⁷*Id.*, citing *MediaOne of Ohio, Inc.*, 14 FCC Rcd 9346, 9355-56 (1999) (order denying request to delete communities where the cable operator voluntarily carried several other stations located near the station at issue).

¹⁸47 U.S.C. § 534(h)(1)(C).

over the communities at issue.¹⁹ Moreover, WHSV-TV states that a Longley-Rice analysis confirms that its signal provides coverage to all of the communities, despite the generally mountainous terrain in the Shenandoah Valley region.²⁰ In addition, WHSV-TV states that it airs a wide variety of programming of local interest to the subject communities.²¹ WHSV-TV points out that its commitment to local service will be increasing dramatically through a new Winchester-based daily news service created by WHSV-TV in partnership with Shenandoah University.²² Further, WHSV-TV argues that it is geographically proximate to the communities as all are located within 47 miles of WHSV-TV's transmitter site and are situated along the Interstate 81 corridor.²³ WHSV-TV asserts that these distances are well within the range that the Commission has found acceptable in adding communities to stations' markets.²⁴ WHSV-TV also states that Rockingham County, where its city of license is located, is geographically and economically linked to the cable communities via the Interstate 81 corridor and other major highways.²⁵ Moreover, WHSV-TV states that counties in the Harrisonburg DMA and Winchester are linked by common community characteristics, history and demographics.²⁶ Finally, WHSV-TV states that its station is listed in major television viewing guides that are distributed in the communities, including *The Winchester Star* (serving Frederick County), the *Northern Virginia Daily* (serving Frederick, Clarke and Warren Counties), and Zap2it.com, a popular Internet site that contains local broadcast listings.²⁷

7. The third statutory factor we must consider is "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 provide carriage or coverage of sporting events of interest to the community."²⁸ WHSV-TV argues that it need not establish that other stations carried on cable systems serving the communities fail to provide local programming.²⁹ It points out that the Commission has found that "this criterion was intended to enhance a station's claim where it could be shown that other stations do not serve the communities at issue" and is relevant only in proceedings where the station seeking modification does not provide any local service.³⁰

¹⁹Modification at Exhibit 6.

²⁰*Id.*; see also *Mid-Hudson Cablevision, Inc.*, 15 FCC Rcd 5011, 5014 n.8 (2000); *Paxson Atlanta License, Inc.*, 13 FCC Rcd 20087, 20103 (1998); *MediaOne of Los Angeles, Inc. and MediaOne Group, Inc.*, 15 FCC Rcd 19386 (2000).

²¹Modification at 8-12 and Exhibits 4, 7, and 8-12.

²²*Id.*

²³*Id.* at Exhibits 14 and 15.

²⁴*Id.* at 14, citing *KNTV License, Inc.*, 16 FCC Rcd 6785 (2001) (35-55 miles); *Paxson Atlanta License, Inc.*, 13 FCC Rcd 20087 (1998) (50 miles); *Burnham Broadcasting, Inc.*, 10 FCC Rcd 7117 (1997) (48 miles).

²⁵*Id.* at Exhibit 15.

²⁶*Id.* at Exhibit 16.

²⁷*Id.* at Exhibit 17.

²⁸47 U.S.C. § 534(h)(1)(C).

²⁹Modification at n.45.

³⁰*Id.*, citing *Pappas Telecasting, Inc.*, 11 FCC Rcd 6102, 6107 (1996); *Bradenton Broadcast Television*, 11 FCC Rcd 21044, 21049 (1996); *Good Companion Broadcasting, Inc.*, d/b/a *Channel 68 Broadcasting, Inc.*, 11 FCC Rcd 4826, 4835-36 (1996); *Smith Television of New York, Inc.*, 10 FCC Rcd 7127, 7130 (1995).

8. The fourth statutory factor concerns “evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.”³¹ WHSV-TV argues that Nielsen data confirms that residents in Clarke and Frederick Counties turn to WHSV-TV as a source of local programming.³² WHSV-TV maintains that this data far exceeds viewership figures that the Commission has previously found sufficient to weigh in favor of a grant of market modification.³³

9. WJLA-TV argues in opposition that WHSV-TV’s petition seeks to circumvent marketplace realities by stripping the must carry rights of WJLA-TV in communities that clearly constitute part of WJLA-TV’s natural economic market.³⁴ WJLA-TV states that the Media Bureau has made it clear that the market modification process cannot be used in this manner except in very rare instances presenting exceptional circumstances; none of which are present here. WJLA-TV points out that in *Guy Gannett Communications, Inc., Pacific and Southern Company, Inc., and Harron Communications Corp.*,³⁵ the Bureau denied Portland stations’ requests to add Boston DMA communities to their market, despite the fact that, respectively, the stations met all of the market modification criteria.³⁶ WJLA-TV states that the petitions were denied because the Portland stations’ communities of license were geographically closer to the subject communities than were the in-market Boston affiliates already carried on the cable systems and a grant would have stripped the Boston affiliates of their must carry rights.³⁷ WJLA-TV asserts that the *Portland Decisions* govern this proceeding. WHSV-TV’s community of license - Harrisonburg, Virginia – is closer to the two headends of the Adelphia cable systems that serve the subject communities than WJLA-TV’s community of license – Washington, D.C.³⁸ Moreover, WJLA-TV states that, unlike the *Portland Decisions*, the communities sought for inclusion are not even contiguous to WHSV-TV’s DMA; WHSV-TV has not historically maintained a local bureau in the requested communities; or broadcast the extent of targeted local programming considered in the *Portland Decisions*.³⁹ Finally, WJLA-TV argues that factors supporting exceptions to the *Portland Decisions* are not present here -- WHSV-TV does not provide a Grade A signal to all of the cable communities.⁴⁰

³¹ 47 U.S.C. § 534(h)(1)(C).

³² Modification at Exhibit 13. WHSV-TV states that Nielsen data for viewers in Clarke and Frederick Counties in 2003, 2004 and indicate that, between 7 a.m. and 1 a.m. Sunday-Saturday, WHSV-TV achieved average weekly cumes of 13 (Frederick) and 6 (Clarke), 13 and 11, and 17 and 21, respectively.

³³ *Id.* at 13, citing *Seal Rock Broadcasters, LLC*, 18 FCC Rcd 16262 (2003); *Ackerley Media Group, Inc.*, 18 FCC Rcd 16199 (2003); *KSBW License, Inc.*, 11 FCC Rcd 2368, 2371 (1996).

³⁴ WJLA-TV Opposition at 1.

³⁵ 13 FCC Rcd 23470 (1998), *recon. denied*, 15 FCC Rcd 10762 (2000) (“*Guy Gannett*”); 14 FCC Rcd 4558 (1999) (“*Pacific and Southern*”); 14 CC Rcd 4547 (1999) (“*Harron*”) (collectively, the “*Portland Decisions*”).

³⁶ WJLA-TV Opposition at 2-3.

³⁷ *Id.* at 3.

³⁸ *Id.* at 4. Adelphia’s Winchester headend is 64 miles from Harrisonburg and 66 miles from Washington, while the Front Royal headend is 48 miles from Harrisonburg and 64 miles from Washington.

³⁹ *Id.* at 5.

⁴⁰ According to WJLA-TV, WHSV-TV’s predicted Grade A contour appears to reach about one-half of Warren County, but not Clarke or Frederick Counties. The Longley-Rice analysis of WHSV-TV’s signal indicates that the station provides a Grade A signal to just 2 of the 6 incorporated cable communities. The great majority of Frederick County, as well as portions of Clarke and Warren Counties receive at best a Grade B signal from WHSV-

(continued...)

10. WJLA-TV argues further that no significant circumstances favor WHSV-TV over WJLA-TV. For instance, the relative distances between the stations and the cable communities in this case fit squarely into the *Portland Decisions* precedent because WHSV-TV is not appreciably closer to any of the communities at issue than is WJLA-TV.⁴¹ None of the cable communities at issue are located on the “fringe” of the Washington, D.C. DMA nor are the communities adjacent to the Harrisonburg DMA.⁴² Indeed, WJLA-TV notes that Warren and Clarke Counties are designated by Nielsen as “Metro Counties” for the Washington, D.C. DMA.⁴³ Moreover, WJLA-TV states that, unlike WHSV-TV, it is significantly viewed in all three counties involved in this petition.⁴⁴ In addition, WJLA-TV argues that objective viewership levels in the cable communities do not demonstrate a preference for the out-of-market affiliate.⁴⁵ WJLA-TV states that viewership comparisons demonstrate that cable subscribers in the subject communities prefer both WJLA-TV’s newscasts and its programming to that of WHSV-TV.⁴⁶ Finally, WJLA-TV notes that while WHSV-TV makes much of its future plans to create a local news program devoted to the Winchester/Berryville and Front Royal areas, this programming is not yet in place and cannot be relied upon as a basis upon which to grant the requested market modification.⁴⁷

11. The DC Broadcasters argue that WHSV-TV’s petition is an inappropriate attempt to use the market modification procedure to carve up the Washington, D.C. television market and threaten its integrity for all the stations in that market.⁴⁸ The DC Broadcasters state that WHSV-TV proposes to create two separate, noncontiguous must carry markets for itself by trying to include communities that lie more than 30 miles from the border of the Harrisonburg DMA.⁴⁹ The DC Broadcasters argue that WHSV-TV’s evidence that the cable communities and Harrisonburg are part of the same business, geographic and economic market is incomplete and unpersuasive.⁵⁰ If anything, the DC Broadcasters assert, the subject communities’ nexus is with the Washington, D.C. market and, as the Washington D.C. metro area continues to expand westward, the communities at issue will be even more fully integrated into that market.⁵¹ Indeed, a comparison of commuting patterns in the communities indicates that far more people commute to Washington, D.C. than to Harrisonburg.⁵² Moreover, the United States Census Bureau includes Frederick, Clarke and Warren Counties as part of the Washington-Baltimore-Northern

(...continued from previous page)

TV, while significant portions of Frederick County receive less than a Grade A signal. See WJLA-TV Opposition at 7, citing Modification at Exhibit 6, and Opposition at 8 (Figure 1).

⁴¹*Id.* at 9-10.

⁴²*Id.* at 10.

⁴³*Id.*, citing *Broadcasting and Cable Yearbook 2006* at B-211 (2005).

⁴⁴*Id.* at 11.

⁴⁵*Id.* at 12.

⁴⁶*Id.* at 12-14.

⁴⁷*Id.* at 14.

⁴⁸DC Broadcasters’ Opposition at 1.

⁴⁹*Id.* at 2.

⁵⁰*Id.* at 3.

⁵¹*Id.*

⁵²*Id.* at 3-4.

Virginia Combined Statistical Area.⁵³ The DC Broadcasters argue further that the local residents in the subject communities still overwhelmingly look to Washington, D.C. television stations, and not WHSV-TV, for their local news and other programming.⁵⁴ The DC Broadcasters conclude, therefore, that WHSV-TV's petition should be denied.

12. In a reply to both oppositions, WHSV-TV argues that it is a station that satisfies all of the statutory criteria for market modification and none of the essential facts demonstrating WHSV-TV's local service to the communities has been contested.⁵⁵ Moreover, despite WJLA-TV's claims, WHSV-TV states that grant of its request would simply maintain the *status quo* in the cable communities by ensuring that WHSV-TV can continue to deliver its services to communities it has served without interruption for decades.⁵⁶ WHSV-TV asserts that both WJLA-TV and the DC Broadcasters attempt to characterize the instant request as a dangerous and "unprecedented" intrusion into the Washington, D.C. market, relying primarily upon the *Portland Decisions* in support of their contentions.⁵⁷ WHSV-TV argues, however, that the outcome of one market modification request does not compel the same outcome in another proceeding as, by law, each case must be judged on its own merits.⁵⁸ WHSV-TV maintains that the apparent "prohibition" set forth in the *Portland Decisions* is belied by the Commission's decision in *Diversified Broadcasting, Inc.*, which granted a request from an ABC affiliate in Gainesville to add communities located in a different DMA.⁵⁹ In granting *Diversified*, WHSV-TV states that the Bureau expressly rejected the Tallahassee affiliate's argument that its carriage on local cable systems would be endangered since Gainesville was closer to the cable headends than Tallahassee.⁶⁰ Efforts by the Tallahassee station to overturn *Diversified* were rejected by the Commission which held in *Media Ventura Management, Inc.* that "[a]though the must carry status of network affiliates within their markets is a factor to be considered in market modification proceedings, this consideration does not preclude modifications where the underlying factors warrant such action."⁶¹

13. WHSV-TV argues further that, although WJLA-TV claims that the *Portland Decisions* are controlling in this instance, the fundamental facts and policy considerations that were present in those cases are not present here.⁶² For instance, in each of the Portland cases, the Bureau found that the in-

⁵³*Id.* at 5.

⁵⁴*Id.* at 5-7. The DC Broadcasters note that in Warren County, WHSV-TV earns no measurable ratings and in both Frederick and Clarke Counties, WHSV-TV's ratings are dwarfed by those of the Washington, D.C. stations.

⁵⁵Reply at 2.

⁵⁶*Id.* at 3.

⁵⁷*Id.* at 8.

⁵⁸*Id.*

⁵⁹*Id.* at 8-9, citing 13 FCC Rcd 22331 (1998). WHSV-TV notes that, much like the case here, the Gainesville station generally provided Grade B coverage to the added communities (with the exception of 2). However, in that instance, the Gainesville station was not significantly viewed and there was no evidence that either the local residents preferred the Gainesville station over the Tallahassee station or that Gainesville was located substantially closer to the cable communities than was Tallahassee.

⁶⁰*Id.* at 9, citing 13 FCC Rcd at 22339.

⁶¹*Id.* at 10, citing *Media Venture Management, Inc.*, 15 FCC Rcd 24552 (2000); *app for rev denied*, 18 FCC Rcd 16065, 16067-68 (2003).

⁶²*Id.* at 12.

market affiliate's coverage of the communities was equal to or greater than the coverage provided by the out-of-market affiliate.⁶³ In this instance, however, WHSV-TV maintains that its coverage of the communities is superior to WJLA-TV's coverage, which is nearly nonexistent because of terrain barriers.⁶⁴ Because of the terrain, WHSV-TV states that it is the only source of over-the-air ABC programming in the entire tri-county region.⁶⁵ Again, unlike the *Portland Decisions*, substantial geopolitical boundaries separate WJLA-TV from the communities in the form of the Blue Ridge Mountains which completely bisect the Washington, D.C. DMA, forming eastern and western political boundaries.⁶⁶ WHSV-TV notes that the Commission has long recognized that such geopolitical boundaries can form a natural barrier separating specific communities from a station's economic market.⁶⁷ In addition, WHSV-TV points out that the two major population centers in the tri-county area are substantially closer to its facilities than to WJLA-TV's facilities.⁶⁸ While the *Portland Decisions* were premised on the potential for an out-of-market station to adversely affect competition among the in-market stations, WHSV-TV argues that that is not the situation here.⁶⁹ The Washington DMA spans 33 counties in four states and contains more than 2.2 million households.⁷⁰ WHSV-TV states that it seeks to add only 54,590 households (little more than 2 percent) of all the market households and it is inconceivable that such an insignificant number of households could adversely impact WJLA-TV or the DC Broadcasters' ability to compete.⁷¹ Finally, WHSV-TV points out that, unlike Portland, it is the only commercial station licensed to the Harrisonburg DMA.⁷²

14. WHSV-TV also disagrees with WJLA-TV's argument that the Commission must give preference to "network-affiliate relations" over the specific market modification criteria set forth by Congress.⁷³ WHSV-TV states that, by statute, the Commission is directed to "afford particular attention to the value of localism" and this view is supported in the Commission's decision in *Media Venture Management*.⁷⁴ WHSV-TV finds it telling that, in a review of WJLA-TV's reported local programming,

⁶³*Id.*, citing *Guy Gannett*, 13 FCC Rcd at 23478; *Pacific and Southern*, 14 FCC Rcd at 4556; *Harron*, 14 FCC Rcd at 4566.

⁶⁴*Id.* at 12-14. WHSV-TV states that while Longley-Rice indicates that it provides at least Grade B service to substantially all of Frederick, Warren and Clarke Counties, in addition to some City Grade and Grade A coverage, WJLA-TV's signal effectively "drops dead" along the entire length of the Blue Ridge mountains.

⁶⁵*Id.* at 15.

⁶⁶*Id.* at 16 n.29.

⁶⁷*Id.*, citing *Comcast Cable Communications, Inc.*, 19 FCC Rcd 5245, 5252 (2004); *Avenue TV Cable Service, Inc.*, 18 FCC Rcd 23823, 23830-31 (2003); *Lone Pine Television, Inc.*, 18 FCC Rcd 23955, 23962 (2003); *Frontier, A Citizens Communications Company*, 18 FCC Rcd 9589, 9596 (2003); *Cablevision Corporation et al.*, 17 FCC Rcd 9332, 9342-43 (2002); *Avenue TV Cable Service, Inc.*, 16 FCC Rcd 16436 (2001).

⁶⁸*Id.* at 17. WHSV-TV states that Winchester is 51 km from WHSV-TV's transmitter and 96 km from WJLA-TV's. Front Royal is 71 km from WHSV-TV's facilities and 93 km from WJLA-TV's.

⁶⁹*Id.* at 18.

⁷⁰*Id.* at n.35.

⁷¹*Id.*

⁷²*Id.*

⁷³*Id.* at 19.

⁷⁴*Id.*, citing 15 FCC Rcd at 24557.

the majority of its focus was on communities in or near the core of the Washington DMA.⁷⁵ Indeed, WHSV-TV states that it could find only one story related to one of the communities at issue between April 2002 and December 2005.⁷⁶ Moreover, WHSV-TV argues that there is no evidence that WJLA-TV has ever elected must carry on the cable systems in the tri-county area nor, apparently, on any cable system located anywhere in the Washington DMA.⁷⁷ In any event, WHSV-TV asserts, it is unlikely that a major network affiliate such as WJLA-TV is at risk of being removed from the cable systems serving the communities. Those cable systems have carried WJLA-TV for years and there is nothing that remotely suggests that it would not continue to be carried in the future.⁷⁸ To eliminate any possible concern about WJLA-TV's future status, however, WHSV-TV states that it consents to a waiver of Section 76.55(b)(5) of the Commission's rules that requires a cable operator to carry the closer of two duplicating stations, leaving it up to the cable operator to choose which affiliate to carry.⁷⁹

15. In a response to WHSV-TV's reply, WJLA-TV argues that the *Diversified* decisions are factually and legally inapposite to the situation here and do not support WHSV-TV's market modification request.⁸⁰ WJLA-TV states that, unlike the situation here, *Diversified* involved the expansion of an ABC affiliate into communities on the very fringe of its market whose cable systems had ceased carrying their in-market ABC affiliate.⁸¹ WJLA-TV has always been carried in the communities at issue and the communities are not on the fringe of the DC market.⁸² In any event, WJLA-TV maintains, the *Media Venture* decision, which attempted to overturn *Diversified*, did not overturn the *Portland Decisions* as the circumstances involved in *Media Venture* and *Diversified* were totally dissimilar.⁸³ WJLA-TV argues that, although WHSV-TV expresses surprise that WJLA-TV, or any of the DC stations, would be concerned over the potential loss of must carry rights within their own market, it should be pointed out that it was the Bureau, and not the Boston stations in the *Portland Decisions* which expressed concern over the possible upset to the Boston DMA's network/affiliate relationships.⁸⁴ Moreover, despite WHSV-TV's claims, WJLA-TV argues that it is abundantly clear that it currently serves the communities herein, in contrast to WHSV-TV's vague future promises.⁸⁵

16. WHSV-TV argues in a surreply that *Media Venture* and *Diversified* are on point and

⁷⁵*Id.* at 21. WHSV-TV states that the reports also included numerous stories related to communities in several other nearby DMAs as well.

⁷⁶*Id.*

⁷⁷*Id.* at 23. WHSV-TV states that it reviewed copies of the must carry/retransmission letter for the election periods in 1996, 1999, 2002, and 2005 from WJLA-TV's public inspection file. Every letter indicates that WJLA-TV invoked its right to bar retransmission of its signal on cable systems in the Washington, DC DMA, without express written consent.

⁷⁸*Id.*

⁷⁹*Id.* at 24-25.

⁸⁰Response at 1-2.

⁸¹*Id.* at 2, citing *Diversified Broadcasting, Inc.*, 13 FCC Rcd 22331, 22338 (1998).

⁸²*Id.* at 2.

⁸³*Id.* at 3.

⁸⁴*Id.*

⁸⁵*Id.* at 4 and Attachment 1.

support the situation at issue here.⁸⁶ Indeed, WHSV-TV states that in an even more recent case, *Withers Broadcasting Company of West Virginia*, the Bureau granted a West Virginia CBS affiliate's request to add communities from the Pittsburgh DMA, despite the objections of the Pittsburgh CBS affiliate, which also cited the *Portland Decisions*.⁸⁷ WHSV-TV maintains that the *Withers* case was consistent with the Commission-level decision in *Diversified*.⁸⁸ Finally, WHSV-TV argues that the programming logs supplied by WJLA-TV as evidence of its commitment to serving the subject communities lists only 2 news reports over a two-year period that related to Frederick County, Virginia, while none are listed for either Clarke or Warren County.⁸⁹

17. 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 WHSV-TV's petition to include the subject communities in its television market. WHSV-TV has a long history of carriage on the cable systems serving the communities. WHSV-TV provides predicted Grade A service to a number of the communities at issue and predicted Grade B coverage to the remainder despite the fact that the communities at issue are not immediately contiguous to the Harrisonburg DMA. WHSV-TV has shown that it provides local programming to the communities and is taking steps to increase that coverage. Finally, WHSV-TV attains a significant level of viewership in the communities.

18. While both WJLA-TV and the DC Broadcasters have argued that WHSV-TV's market modification request will severely impact the Washington DMA network affiliate agreements and the must carry rights of WJLA-TV in particular, we do not agree.⁹⁰ WJLA-TV has been carried on the cable systems serving the communities for at least as long as WHSV-TV. It is evident from WJLA-TV's long-term carriage that its programming is vitally important to the communities. It is true that WHSV-TV's city of license is geographically closer to some of the communities than is WJLA-TV, but upon review it appears that WHSV-TV and WJLA-TV are, in general, equidistant from the communities herein, with some slightly closer to Washington and others slightly closer to Harrisonburg. In any event, WHSV-TV has offered to waive any advantage it might have with regard to carriage rights, should the issue ever arise. Further evidence of WJLA-TV's importance to the communities lies in the fact that, according to Nielsen's 2005 County/Coverage Survey, WJLA-TV's viewership far exceeds that of WHSV-TV in all three counties where the communities are located.⁹¹

19. It is apparent that WHSV-TV has a strong presence in the communities at issue, despite the fact that it is in a neighboring DMA. It is also apparent from the evidence that WJLA-TV, the in-market network affiliate, has a strong presence. However, given the size of the Washington, D.C. DMA, as well as the geographical boundaries separating WJLA-TV and the communities, WHSV-TV is in a unique position to provide programming focused narrowly on the Shenandoah Valley area. Given the relatively small number of subscribers affected by this request, when compared to total number of subscribers within the Washington, D.C. DMA, and WHSV-TV's history of long-term carriage, we

⁸⁶*Id.* at 2-3.

⁸⁷*Id.* at 4, citing DA 06-1089 (rel. 5/25/06).

⁸⁸*Id.* at 5.

⁸⁹*Id.* at 7-8.

⁹⁰None of the DC Broadcasters argued that their carriage on the cable systems was in jeopardy.

⁹¹For Clarke County, WJLA-TV's viewership numbers are 7/67 while those of WHSV-TV are 0/21. WJLA-TV attains a viewership of 15/62 in Frederick County as opposed to WHSV-TV's viewrship of 4/17. And in Warren County, WJLA-TV's viewership is 0/49 as compared to that of WHSV-TV which is 0/0.

believe that the market modification factors favor a grant of WHSV-TV's request.

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 Gray Television Licensee, Inc., licensee of station WHSV-TV, to include the communities of Berryville, Boyce, Frederick, Middletown, Stephens City, Winchester, Front Royal and Warren, Virginia **IS GRANTED**.

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

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Deputy Chief, Policy Division
Media Bureau

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

⁴⁵47 C.F.R. §0.283.