

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

In the Matter of:)	
)	
Time Warner Cable Inc.)	CSR-8107-A
)	
For Modification of the Television Market for)	
WMUR-TV/DT, Manchester, New Hampshire)	

MEMORANDUM OPINION AND ORDER

Adopted: May 1, 2009

Released: May 1, 2009

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Time Warner Cable Inc. ("Time Warner"), the operator of a cable television system serving the communities of Effingham and Freedom, New Hampshire (the "cable communities"), filed the above-captioned petition for special relief seeking to modify the market of Station WMUR-TV/DT, Manchester, New Hampshire ("WMUR-TV/DT" or the "Station"), analog channel 9 and digital channel 59, to include the cable communities.¹ WMUR-TV/DT is licensed to Hearst-Argyle Properties, Inc., which filed a motion supporting Time Warner's petition for special relief. No opposition has been received. For the reasons discussed below, we grant Time Warner'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 Research.³ A DMA is a geographic market designation that defines each television market exclusive of

¹The cable communities are located in in Carroll County, New Hampshire.

²8 FCC Rcd 2965, 2976-2977 (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. Under the Act, however, the Commission is also directed to consider changes in market areas. Section 614(h)(1)(C)(i) 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.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 requirements 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 in which they serve and which form their economic market.

* * * *

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)(i).

⁶47 U.S.C. §534(h)(1)(C)(ii).

[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

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.⁸

4. 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:

(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.⁹

(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

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

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

⁹The 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 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.

cable and noncable households or other specific audience indicia, such as station advertising and sales data or viewer contribution records.¹⁰

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. The *Modification Final Report and Order* provides that parties may continue to submit whatever additional evidence they deem appropriate and relevant.

5. In *Carriage of Digital Television Broadcast Signals First Report and Order* (“*DTV Must Carry Report and Order*”), the Commission concluded that under Section 614(a) of the Act, a digital-only television station has mandatory carriage rights, and amended the rules accordingly.¹¹ The Commission has established a framework for analyzing market modifications for digital television stations.¹² The Commission stated that Nielsen’s market designations, publications, and assignments for the analog television market should continue to be binding on broadcast stations transitioning to digital television broadcasting. The presumption is that the market of the station’s digital signal is coterminous with the station’s market area for its analog signal during the transition period.¹³ The Commission also found that the statutory factors in Section 614(h), the current process for requesting market modifications, and the evidence needed to support such petitions, will be applicable to digital television modification petitions during the transition period when television stations broadcast both an analog signal and a digital signal.¹⁴ The Commission recognized that the technical coverage area of a digital television signal may not exactly replicate the technical coverage area of the analog television signal. Therefore, in deciding DTV market modification cases, the Commission stated that it would take into consideration changes in signal strength and technical coverage because of new digital television channel assignments and power limits. It concluded that all other matters concerning the modification process for digital television signals will be decided on a case-by-case basis.¹⁵

III. DISCUSSION

6. The issue before us is whether to grant Time Warner’s request to include the communities of Effingham and Freedom, New Hampshire, within the Station’s television market. WMUR-TV/DT is an affiliate of the ABC television network, and is licensed to Manchester, New Hampshire, which is in the Boston-Manchester DMA, while the cable communities are located in the Portland, Maine DMA. Considering the relevant facts in the record, we believe that Time Warner’s

¹⁰47 C.F.R. §76.59(b).

¹¹See 16 FCC Rcd 2598, 2606 (2001); 47 C.F.R. §76.64(f)(4). The Commission has held that a television station may elect to have its digital signal carried in an analog format by local cable systems. The Commission concluded that for purposes of supporting the conversion to digital signals and facilitating the return of the analog spectrum, a television station may demand that one of its high definition digital (“HDTV”) or standard definition digital (“SDTV”) television signals be carried on the cable system for delivery to subscribers in an analog format. *DTV Must Carry Report and Order*, 16 FCC Rcd at 2630.

¹²See *id.* at 2635-36.

¹³We note that in adopting technical rules for the digital transmission of broadcast signals, the Commission attempted to insure that a station’s digital over-the-air coverage area would replicate as closely as possible its current over-the-air analog coverage area. See *Sixth DTV Report and Order*, 12 FCC Rcd 14588, 14605 (1997).

¹⁴See *DTV Must Carry Report and Order*, 16 FCC Rcd at 2636.

¹⁵*Id.*

market modification petition has carried its burden of proof with regard to its modification request for the cable communities of Effingham and Freedom, New Hampshire.

7. The first statutory factor 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.”¹⁶ Time Warner asserts that WMUR-TV/DT has been continuously carried on the Effingham and Freedom cable system since it became operational in 1990.¹⁷ Time Warner states that it currently delivers the Station’s analog and HD signal to subscribers in the cable communities pursuant to a voluntary retransmission consent agreement with the Station’s licensee.¹⁸ Time Warner also explains that it carries in the cable communities other stations located in the Boston-Manchester DMA.¹⁹ Specifically, the cable system serving Effingham and Freedom has carried educational station WENH-TV, Durham, New Hampshire since at least 1992, and it has carried WBZ-TV and WHDH-TV/DT, both licensed to Boston and both “major network stations,” since 2004.²⁰

8. The second statutory factor is “whether the television station provides coverage or other local service to such community.”²¹ Time Warner contends that, based on the engineering signal broadcast maps prepared by du Treil, Lundin & Rackley, Inc., WMUR-TV’s analog Grade B contour covers the southern portion of Effingham and reaches within five miles of Freedom, and WMUR-DT’s 36 dBu contour reaches within four miles of Effingham and 10 miles of Freedom.²² Time Warner states that an analysis based on the Longley-Rice methodology for determining signal coverage indicates that there are several pockets of analog and digital coverage in the cable communities.²³ Time Warner argues that signal strength tests at central locations in the cable communities indicate that residents of the cable communities are able to view the Station off-air.²⁴ In addition, Time Warner points out the geographic proximity between the Station and the cable communities. According to Time Warner, Effingham and Freedom are located on the fringe of the Boston-Manchester DMA.²⁵ The Station’s city of license, Manchester, New Hampshire, is located 56 miles from Effingham and 61 miles from Freedom, which Time Warner argues is within the distance range that the Commission has found acceptable in adding communities to stations’ must-carry markets.²⁶ Time Warner notes that the Station’s city of license and the cable communities are not separated by any geographical features, such as mountain ranges, urban environments, or large bodies of water.²⁷

¹⁶47 U.S.C. §534(h)(1)(C)(ii)(I).

¹⁷Petition at 3-4, and Exhibit A.

¹⁸*Id.* at 4.

¹⁹*Id.*

²⁰*Id.* at 4-5.

²¹47 U.S.C. §534(h)(1)(C)(ii)(II).

²²Petition at 5-6, and Exhibits C and D.

²³*Id.* at 6, and Exhibits C and D.

²⁴*Id.* at 6, and Exhibit E.

²⁵*Id.* at n. 12.

²⁶*Id.* at 6, and Exhibit F.

²⁷*Id.* at 6-7.

9. Moreover, Time Warner asserts that there is also a strong economic nexus between Manchester and the cable communities, which is aided by the major highways between the cable communities and Manchester, whereas there are no comparable interstate connections between the cable communities and the Portland metropolitan area.²⁸ The highways enable residents of the cable communities to access Manchester's popular tax-free shopping.²⁹ Furthermore, Time Warner states that more residents of Carroll County, the county in which the cable communities are located, commute for work to communities surrounding Manchester than to communities in Maine.³⁰ Also, Time Warner argues that the Station and its city of license are located in the same Rand-McNally Basic Trading Area ("BTA") as Carroll County.³¹ Time Warner argues that "[t]he Commission has officially recognized the validity of the BTA designation for defining economic areas of influence and interconnectedness."³²

10. Time Warner also contends that WMUR-TV/DT offers unique local service to New Hampshire generally, and to the cable communities specifically.³³ The Station is the only major network affiliated commercial station that is licensed to New Hampshire, its main transmitters in Manchester provide all of central and southern New Hampshire with over the air service, and its two translators provide most of the remainder of the state with over the air service.³⁴ The only portions of New Hampshire that do not receive the Station over the air are a few areas that Time Warner characterizes as remote and unpopulated.³⁵ Since no other television station provides this level of coverage to New Hampshire, "the Station is considered by most residents as New Hampshire's local television station."³⁶ Time Warner states that the three other commercial television stations licensed to New Hampshire do not provide comprehensive daily local news coverage, whereas the Station provides at least five hours of local news programming each weekday, an additional seven hours of local news programming each weekend, and it has a "fully functioning news department" that regularly covers news and events pertaining to the cable communities.³⁷ According to Time Warner, the Station's broadcasts and website cover topics that are of particular local interest to the cable communities such as local weather, school closings, ski conditions, airport advisories and closings, a New Hampshire-focused public affairs program entitled "Close Up," nearby NASCAR events, Kennett High School football, and New Hampshire local, state, and national elections.³⁸ WMUR-TV/DT is listed in television guides distributed

²⁸*Id.* at 12-13.

²⁹*Id.* at 13.

³⁰*Id.* at 12, and Exhibit O. Time Warner provides data from the New Hampshire Economic and Labor Market Information Bureau indicating that in the year 2000, approximately 1,983 residents of Carroll County commuted for work to the four counties surrounding Manchester, whereas only 422 residents commuted to the state of Maine.

³¹*Id.* at 11-12.

³²*Id.* at n. 46, citing *Amendment of the Commission's Rules to Establish New Personal Communications Services*, Second Report and Order, 8 FCC Rcd 7700, 7732 at ¶ 73 (1993).

³³*Id.* at 7.

³⁴*Id.* at 7, and Exhibit G.

³⁵*Id.*

³⁶*Id.*

³⁷*Id.* at 8, and Exhibit H. Specifically, the Station has covered news events in Effingham and Freedom such as missing persons, local crimes, and public interest stories. *Id.* at 8, and Exhibit I.

³⁸*Id.* at 9, and Exhibit J. Time Warner emphasizes that the Station tracks weather patterns in all of New

(continued...)

in the cable communities, including Carroll County's main newspaper, *The Conway Daily Sun*, which was previously found to be a relevant consideration.³⁹ Furthermore, letters from the Effingham Board of Selectmen and the Freedom Board of Selectmen describe the invaluable services that the Station provides to their towns.⁴⁰

11. The third statutory factor 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 provides carriage or coverage of sporting and other events of interest to the community."⁴¹ In general, we believe that Congress did not intend this third criterion to operate as a bar to a station's DMA claim whenever other stations could also be shown to serve the communities at issue. Rather, we believe 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.⁴² In this case, because other stations appear to serve the communities in question, this enhancement factor does not appear applicable.

12. The fourth statutory factor is "evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community."⁴³ Nielsen reports significant cable and non-cable viewing of the Station in Carroll County.⁴⁴ Time Warner states that, according to the Station, WMUR-TV/DT is the most watched off air and cable channel in Carroll County during all dayparts except primetime, with its non-primetime daypart shares usually ranging from 20 to 50 percent of television households.⁴⁵ When the Station airs New Hampshire-focused local news during the 4 p.m. to 7 p.m. and 11 p.m. time slots, more Carroll County households watch the Station than watch all of the Portland DMA stations combined, and almost half of all television viewing in Carroll County during the 11 p.m. time slot is held by the Station.⁴⁶ Time Warner notes that this far exceeds viewing patterns that the Commission previously found significant under the fourth factor.⁴⁷

13. Finally, Time Warner argues that it would serve the public interest to expand the Station's market to include Effingham and Freedom, in that it would ensure residents' access to New

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Hampshire, including the cable communities, as they move from west to east, whereas stations in Maine generally do not provide sufficient advance notice of incoming weather. *Id.*

³⁹*Id.* at 10, and Exhibit M, citing *Comcast of Central New Jersey*, 13 FCC Rcd 1656, 1666 at ¶ 26 (CSB 1997).

⁴⁰*Id.* at 11, and Exhibit N. The Effingham Board of Selectmen wrote, for example, that during a recent ice storm, the Station was "the only source of information for shelter locations and progress on the restoration of power by specific area." *Id.*

⁴¹47 U.S.C. §534(h)(1)(C)(ii)(III).

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

⁴³47 U.S.C. §534(h)(1)(C)(ii)(IV).

⁴⁴Petition at 6.

⁴⁵*Id.* at 14.

⁴⁶*Id.*

⁴⁷*Id.* Nielsen's 2005 County Coverage Study indicates that the Station achieves an 11 percent share of total viewing hours and a net weekly circulation of 51 percent in Carroll County.

Hampshire focused local programming while furthering the congressional goal of promoting localism.⁴⁸

14. In granting Time Warner's petition to modify WMUR-TV/DT's DMA to include the cable communities, we find that the Station meets the mandatory statutory criteria for market modification. With regard to the first of the four statutory factors, the Station has a long history of continuous carriage on Time Warner's system serving the cable communities, which "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."⁴⁹ We also note that other stations located in the same DMA as WMUR-TV/DT are carried on Time Warner's system serving the cable communities. Secondly, Time Warner has demonstrated that although the Station's analog Grade B contour does not encompass the cable communities, it covers the southern portion of Effingham and reaches within five miles of Freedom, its digital 36 dBu contour reaches within four miles of Effingham and 10 miles of Freedom, and the Longley-Rice methodology shows several pockets of analog and digital coverage in the cable communities. In addition, Time Warner presented evidence regarding the Station's close proximity to the cable communities, and its local service to and economic nexus with those communities. With regard to the third statutory factor, Time Warner showed that WMUR-TV/DT provides significant local programming to the cable communities, but since other stations serve the communities at issue to some degree, Time Warner's claim is not enhanced. Concerning the fourth factor, viewing patterns, Time Warner's petition indicates that WMUR-TV/DT has significant viewership in Effingham and Freedom. In addition, Time Warner's petition is unopposed. For the reasons discussed above, we hereby grant Time Warner's request to modify WMUR-TV/DT's television market to include Effingham and Freedom, New Hampshire.

IV. ORDERING CLAUSES

15. 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-8107-A), filed by Time Warner Cable Inc. **IS GRANTED**.

⁴⁸*Id.* at 15.

⁴⁹*News Press and Gazette*, 10 FCC Rcd 10331, 10333 ¶ 12 (CSB 1995).

16. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules.⁵⁰

FEDERAL COMMUNICATIONS COMMISSION

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⁵⁰47 C.F.R. §0.283.