

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

In the Matter of:	)	
	)	
Southeastern Ohio Television System	)	CSR-8119-A
	)	
For Modification of the Television Market for WHIZ-TV, Zanesville, Ohio	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: May 28, 2009**

**Released: May 28, 2009**

By the Deputy Chief, Policy Division, Media Bureau:

**I. INTRODUCTION**

1. Southeastern Ohio Television System, licensee of NBC-affiliate Station WHIZ-TV, Zanesville, Ohio, digital channel 40 (“WHIZ”), filed the above-captioned petition for special relief seeking to modify the must-carry television market of WHIZ to include all townships, municipalities and unincorporated places located within the Columbus, Ohio DMA in Perry County (the “cable communities”).<sup>1</sup> Commission data shows that at least 10 of the listed cable communities are registered to the cable system operated by Time Warner Cable Inc. (“Time Warner”) serving Perry County, Ohio.<sup>2</sup> No opposition has been received. For the reasons discussed below, we grant in part and deny in part WHIZ’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.<sup>3</sup> A station’s market for this purpose is its “designated market area,” or DMA, as defined by Nielsen Media Research.<sup>4</sup> A DMA is a geographic market designation that defines each television market exclusive of

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<sup>1</sup>See Petition at 4. WHIZ is seeking to add the following communities: the townships of Bearfield, Clayton, Coal, Harrison, Hopewell, Jackson, Madison, Monday Creek, Monroe, Pike, Pleasant, Reading, Salt Lick, and Thorn; the municipalities of Corning, Crooksville, Glenford, Hemlock, Junction City, New Lexington, New Straitsville, Rendville, Roseville, Shawnee, Somerset, and Thornville; and the unincorporated communities of Bristol, Milligan, Mount Perry, Moxahala, Rehoboth and San Toy. See Petition at 2-3.

<sup>2</sup>See Petition at 4.

<sup>3</sup>8 FCC Rcd 2965, 2976-2977 (1993).

<sup>4</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.

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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>5</sup>

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.<sup>6</sup>

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.<sup>7</sup>

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

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§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").

<sup>5</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>6</sup>47 U.S.C. §534(h)(1)(C)(i).

<sup>7</sup>47 U.S.C. §534(h)(1)(C)(ii).

form their economic market.

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[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.<sup>8</sup>

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>9</sup>

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.<sup>10</sup>

(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.

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<sup>8</sup>H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

<sup>9</sup>*Must Carry Order*, 8 FCC Rcd at 2977 n.139.

<sup>10</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 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.

(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.<sup>11</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. 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.<sup>12</sup> The Commission has established a framework for analyzing market modifications for digital television stations.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup>

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<sup>11</sup>47 C.F.R. §76.59(b).

<sup>12</sup>See 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.

<sup>13</sup>See *id.* at 2635-36.

<sup>14</sup>We 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).

<sup>15</sup>See *DTV Must Carry Report and Order*, 16 FCC Rcd at 2636.

<sup>16</sup>*Id.*

### III. DISCUSSION

6. The issue before us is whether to grant WHIZ's request to include the cable communities within the Station's television market. WHIZ is an affiliate of the NBC television network, and is licensed to Zanesville, Ohio, which is in the Zanesville, Ohio DMA, while the cable communities are located in the Columbus, Ohio DMA. Time Warner sent WHIZ a letter on December 2, 2008, indicating that Time Warner would cease carrying WHIZ on its Perry County cable system on or after January 14, 2009, because the area served by the cable system is outside of the Station's DMA.<sup>17</sup> The letter referenced Thornville and the "Somerset Hub," but according to WHIZ, the letter is unclear as to which other communities would be affected by the cessation of carriage of WHIZ.<sup>18</sup> For that reason, WHIZ requests modification of its DMA to include all Perry County townships, municipalities, and unincorporated places.<sup>19</sup> Considering the relevant facts in the record, we believe that WHIZ's market modification petition has carried its burden of proof with regard to those cable communities in Perry County which are served by the applicable Time Warner cable system.<sup>20</sup> We deny WHIZ's market modification petition with regard to other cable communities in Perry County because we do not grant market modifications on a county-wide basis.

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."<sup>21</sup> WHIZ has been carried on the cable system serving some of the cable communities since 1974.<sup>22</sup>

8. The second statutory factor is "whether the television station provides coverage or other local service to such community."<sup>23</sup> Perry County is adjacent to Muskingum County, in which Zanesville is located, and Perry County's county seat of New Lexington is located 21 miles southwest of Zanesville, demonstrating the close proximity between the cable community of New Lexington and WHIZ's city of license.<sup>24</sup> The Station states that WHIZ is located within 35 miles of the cable communities,<sup>25</sup> and that the central headend of the Time Warner cable system serving Perry County is located in Columbus and serves several counties including Muskingum.<sup>26</sup> A 1985 contour map for WHIZ, as it operated on analog Channel 18, demonstrates that the Station had City Grade coverage over approximately half of Perry

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<sup>17</sup>Petition at 2, and Attachment A.

<sup>18</sup>*Id.* at 4.

<sup>19</sup>*Id.*

<sup>20</sup>The Station states that the Commission's community records data identifies the following 10 communities as being registered for Time Warner in Perry County: Crooksville, Junction City, Mount Perry, New Lexington, Pike, Reading, Roseville, Somerset, Thorn, and Thornville. *Id.* The Station also states that Pleasant Village is served by the applicable Time Warner cable system. *Id.* at 3.

<sup>21</sup>47 U.S.C. §534(h)(1)(C)(ii)(I).

<sup>22</sup>Petition at 3.

<sup>23</sup>47 U.S.C. §534(h)(1)(C)(ii)(II).

<sup>24</sup>Petition at 2. Additionally, the eleven other incorporated municipalities in Perry County are located between 10 and 28 miles from Zanesville. *See* Supplement to Petition for Special Relief, filed April 28, 2009, at 2 ("Supplement").

<sup>25</sup>Petition at 6.

<sup>26</sup>*Id.* at 3-4.

County, Grade A coverage over most of Perry County, and Grade B coverage over the entire county.<sup>27</sup> WHIZ currently operates in digital only, and its digital contour demonstrates that all of Perry County is within the Station's City Grade contour.<sup>28</sup>

9. WHIZ asserts that, since it commenced operation more than 50 years ago, it has been locally-owned and managed.<sup>29</sup> WHIZ states that it tries to differentiate itself from stations in the larger Columbus market by providing programming, including public service announcements and news coverage, aimed at smaller communities in counties such as Perry County, whose local events do not receive much coverage from Columbus stations.<sup>30</sup> In 2008, WHIZ aired more than 100 news stories directly related to Perry County.<sup>31</sup> The WHIZ program "Live@Noon" provides Perry County groups with an opportunity to promote their events and programs on-air.<sup>32</sup> The Station covers high school events in counties outside the Zanesville DMA including Perry County.<sup>33</sup> Perry County is part of the Station's EAS coverage plan, and WHIZ airs Amber Alerts to Perry County.<sup>34</sup> According to WHIZ, no other station carried on the Time Warner system, including the Columbus NBC affiliate WCMH-TV ("WCMH"), provides as much local programming to Perry County communities.<sup>35</sup>

10. Additionally, it is worth noting that the Zanesville DMA only includes one county, Muskingum County, and is surrounded by counties that are part of the Columbus DMA.<sup>36</sup> In a 1993 Petition for Special Relief involving a situation similar to WHIZ's instant Petition, WHIZ made a similar showing and the petition was ultimately granted.<sup>37</sup> One of the cable communities currently at issue,

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<sup>27</sup>Supplement at 1, and Attachment.

<sup>28</sup>Petition at 6, and Attachment E.

<sup>29</sup>*Id.* at 2.

<sup>30</sup>*Id.* at 6-7.

<sup>31</sup>*Id.* at 7, and Attachment F. For example, WHIZ aired news stories on Somerset's water conservation needs, the Perry County Relay for Life, the evacuation of Roseville residents due to a partial building collapse, Perry County Elections, and the arrest of a Crooksville man. *Id.*

<sup>32</sup>*Id.* at 9.

<sup>33</sup>*Id.* at 10. WHIZ's coverage of Perry County high schools includes the following: (1) the program "Best of the Class," which discusses the accomplishments of certain students, with appearances by five Perry County students representing all four of the county's high schools in 2008; (2) the "High School Honor Society" quiz program, which has been carried on the Station for more than 40 years, with three out of the four Perry County high schools having quiz teams on the program in 2008; and (3) local high school football and basketball games, including several involving Perry County teams, which are not carried by any other television station. *Id.* at 10-11.

<sup>34</sup>*Id.* at 6.

<sup>35</sup>*Id.* at 12. Even if WHIZ's programming largely duplicates that of WCMH, residents of Perry County have made it clear that they do not want to lose access to WHIZ. The Executive Director of the Perry County Chamber of Commerce (the "Chamber") wrote letters explaining the negative impact that the loss of WHIZ would have on Perry County residents. *Id.* at 9, and Attachment G. Emails and letters to the Station from Perry County residents, and from representatives of organizations that receive coverage from WHIZ, expressed concern over losing the local coverage it provides. *Id.* at 10, and Attachments H and I. A petition calling for continued carriage of WHIZ by Time Warner includes more than 550 signatures collected at various locations in Perry County. *See* Supplement to Petition for Special Relief, filed January 28, 2009.

<sup>36</sup>Petition at 1.

<sup>37</sup>*Id.* at 12.

Thornville, is only four to 12 miles from some of the communities that were added to the Station's Area of Dominant Influence (since replaced by Nielsen's DMAs) in that proceeding.<sup>38</sup> In granting the 1993 petition, the Bureau stated, "In view of the foregoing and considering the unusual nature of the Zanesville ADI in relation to the Columbus ADI in that Zanesville is located near the center of the Columbus market and virtually surrounded by its sister market, we find that grant of WHIZ-TV's petition is in the public interest."<sup>39</sup>

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."<sup>40</sup> 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.<sup>41</sup> 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."<sup>42</sup> Nielsen reports substantial cable and non-cable viewing of the Station in Perry County.<sup>43</sup> Nielsen's 2008 County Coverage Study indicates that the Station achieves a six percent share of total viewing hours and a net weekly circulation of 24 percent in Perry County.<sup>44</sup> According to WHIZ, this means that WHIZ reaches nearly a quarter of Perry County's 13,020 households, for a total of approximately 3,255 homes on an unduplicated weekly basis.<sup>45</sup>

13. In granting in part WHIZ's petition to modify the Station'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 the Time Warner system serving Perry County. Second, WHIZ has demonstrated that all of Perry County is within the Station's digital City Grade contour, and the Station is in close proximity to the cable communities and provides them with local programming. With regard to the third statutory factor, WHIZ showed that it provides local programming to the cable communities, but since other stations serve the communities at issue to some degree, the third factor does not carry any weight in the present analysis. Concerning the fourth factor, viewing patterns, the Station's petition indicates that WHIZ has significant viewership in the cable communities. In addition, no opposition has been received. We note that although WHIZ is a competing NBC network affiliate to WCMH, the NBC affiliate licensed to the

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<sup>38</sup>*Id.*

<sup>39</sup>*Id.*, quoting *Southeastern Ohio Broadcasting Co.*, 11 FCC Rcd 2372, at ¶ 14 (CSB 1996).

<sup>40</sup>47 U.S.C. §534(h)(1)(C)(ii)(III).

<sup>41</sup>*See Great Trails Broadcasting Corp.*, 10 FCC Rcd 8629 (CSB 1995); *Paxson San Jose License, Inc.*, 12 FCC Rcd 17520 (CSB 1997).

<sup>42</sup>47 U.S.C. §534(h)(1)(C)(ii)(IV).

<sup>43</sup>Petition at 11, and Attachment J.

<sup>44</sup>*Id.* at Attachment J.

<sup>45</sup>*Id.* at 11.

Columbus DMA in which the cable communities are located, WCMH has not opposed this request. In any event, because WCMH's community of license is geographically closer to the cable system's principal headend, there is no danger that WCMH will be dropped by the cable system in favor of WHIZ.<sup>46</sup> In view of the foregoing, we find that grant of WHIZ's petition with respect to those communities that the Station has stated are served by Time Warner's Perry County cable system is in the public interest.<sup>47</sup>

14. Although the Station has fulfilled the mandatory statutory criteria, we note that WHIZ only identifies 10 of the 32 listed cable communities as being registered for Time Warner in Perry County,<sup>48</sup> and it identifies one additional community as being served by the applicable cable system.<sup>49</sup> The Station states that Time Warner's December 2008 letter was "unclear as to how many other communities" may be affected if Time Warner ceased carriage of WHIZ.<sup>50</sup> Thus, WHIZ "specifically seeks modification of its DMA for must carry purposes to include all of the townships, municipalities and unincorporated places in Perry County."<sup>51</sup> We remind the Station that we consider market modifications on a community-by-community basis, rather than on a county-by-county basis. Hence, we deny WHIZ's petition with regard to those 21 cable communities that the Station has not shown to be served by the Time Warner system serving Perry County.

#### 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-8119-A), filed by Southeastern Ohio Television System **IS GRANTED IN PART** and **IS DENIED IN PART** to the extent indicated herein.

16. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules.<sup>52</sup>

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert  
Deputy Chief, Policy Division  
Media Bureau

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<sup>46</sup>See 47 C.F.R. §76.56(b)(5).

<sup>47</sup>WHIZ's petition is granted with respect to the 10 Perry County cable communities that the Station states are registered for Time Warner's system with the identifier PSID 003566: Crooksville, Junction City, Mount Perry, New Lexington, Pike, Reading, Roseville, Somerset, Thorn and Thornville. The petition is also granted with respect to Pleasant Village, which WHIZ states is also served by the applicable Time Warner cable system.

<sup>48</sup>Petition at 4.

<sup>49</sup>*Id.* at 3 (stating that the applicable cable system "serves communities such as...Pleasant Village...").

<sup>50</sup>*Id.* at 4.

<sup>51</sup>*Id.*

<sup>52</sup>47 C.F.R. §0.283.