

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

In the Matter of)	
)	
Complaint for Carriage by)	CSR-8757-M
Western Pacific Broadcast, LLC)	Docket No. 13-14
v.)	
Service Electric Cable Television, Inc.)	
and Service Electric Cablevision, Inc.)	
)	
Petition for Modification of Philadelphia, PA)	CSR-8772-A
Designated Market Area With Regard to)	Docket No. 13-68
Television Station WACP, Atlantic City, NJ)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: July 23, 2013

Released: July 23, 2013

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Western Pacific Broadcast, LLC, licensee of commercial broadcast television station WACP-DT, Atlantic City, NJ (“WACP”) filed a must carry complaint pursuant to Sections 76.7 and 76.61(a)(1) of the Commission’s rules,¹ seeking carriage on certain cable systems operated by Service Electric Cablevision, Inc. (“SE Cablevision”) in the Philadelphia, Pennsylvania designated market area (“DMA”).² Subsequently, WACP sought to add Service Electric Cable Television Inc. (“SE Cable TV”) to its complaint as a party-in-interest or respondent,³ an action opposed by SE Cable TV,⁴ and WACP has subsequently sought to dismiss SE Cablevision from its Petition.⁵ Prompted by these actions, SE Cable TV filed a separate petition to modify WACP’s mandatory carriage market pursuant to Sections 76.59 of our rules⁶ to exclude the station from the SE Cable TV communities in which it sought carriage.⁷ Given

¹47 C.F.R. §§ 76.7 & 76.61(a)(1).

² Complaint of Western Pacific Broadcast, LLC, against Service Electric Cablevision, Inc. (CSR-8757-M; Docket No. 13-14), filed Dec. 14, 2013 (“WACP Complaint”).

³ Clarification, Supplement and Correction of Record to Dec. 14, 2012 Petition for Special Relief by WACP, filed Jan. 9, 2013 (“Motion to Clarify”).

⁴ Opposition to Motion to Clarify and Motion to Dismiss Unauthorized Pleading by SE Cable TV, filed Feb. 11 and officially refiled on Mar. 5, 2013 (“Opp. to Motion to Clarify”). WACP filed a reply to this pleading. *See* Reply to Opposition to Motion to Clarify by WACP, filed Feb. 26, 2013 (“Reply to Opp. to Motion to Clarify”).

⁵ *See* WACP Partial Dismissal of Petition for Special Relief, filed February 14, 2013 (“WACP Motion to Dismiss”).

⁶ 47 C.F.R. §§ 76.59.

⁷ Petition for Special Relief of Service Electric Cable Television, Inc., filed Feb. 11, 2013 (“SE Cable TV Petition”). An opposition, reply, surreply to this petition, as well as multiple additional motions, were filed by WACP and SE Cable TV. *See* Opposition to Petition for Special Relief of WACP, filed April 8, 2012 (“WACP Opposition”); Reply to Opposition of SE Cable TV, filed April 18, 2013 (“SE Cable TV Reply”); Motion to Strike and Limited Surreply of WACP, filed May 2, 2013; Opp. to Motion to Strike of SE Cable TV, filed May 16, 2013; Reply to Opp.

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their interrelatedness, and for administrative convenience, the Bureau is consolidating these two matters into one proceeding. We deny WACP's carriage complaint but grants its request to dismiss SE Cablevision, Inc. from its complaint. Finally, we grant the market modification petition of SE Cable TV as to all but 14 communities in Pennsylvania.

II. BACKGROUND

2. Pursuant to Section 614 of the Communications Act of 1934, as amended (the "Act"), and implementing rules adopted by the Commission, commercial television broadcast stations, such as WACP, are entitled to assert mandatory carriage rights on cable systems located within their market.⁸ A station's market for this purpose is its "designated market area," or DMA, as defined by the Nielsen Company.⁹ The term DMA is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Pursuant to the Commission's must carry rules, cable operators have the burden of showing that a commercial station located in the same DMA is not entitled to carriage.¹⁰ A cable operator can show that a station's signal, which would otherwise be entitled to carriage, does not provide a good quality signal to a cable system's principal headend or is too distant from that headend.¹¹ Should a station fail to provide the requisite over-the-air signal quality to a cable system's principal headend, it still may obtain carriage rights because under the Commission's rules a station may provide a cable operator with specialized equipment, at the station's expense, which will improve the station's signal to an acceptable quality at a cable system's principal headend.¹² Particularly important for this case however are the must carry notification procedures and the requirement that a must

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to Motion to Strike of WACP, filed May 23, 2013. The Pennsylvania communities from which SE Cable TV seeks to delete WACP are (CUIDs are used to distinguish duplicate names): Bethlehem (CUID# PA0092), Easton, Forks, Glendon, Palmer (CUID# PA0108), Plainfield (CUID# PA0109), Stockertown, West Easton, Williams (CUID# PA0117), Wilson, Bangor, East Bangor, Roseto, Lower Nazareth, Nazareth, Williams (CUID# PA0252), Riegelsville, Tatamy, Upper Nazareth, Bridgeton, Emmaus, Macungie, Lower Macungie (CUID #PA0291), Salisbury (CUID# PA0293), Upper Milford, Portland, Allentown, Bethlehem (CUID# PA0479), Alburtis, Coopersburg, Salisbury (CUID# PA0856), Whitehall, South Whitehall, Upper Macungie, Upper Saucon, Catasauqua, Lower Macungie (CUID# PA0862), Hellertown, Lower Saucon, Hanover (CUID# PA0865), Springfield, Fountain Hill, Upper Mount Bethel, Pen Argyl, Washington, Wind Gap, Plainfield (CUID# PA0924), Tincum, Bushkill, Palmer (CUID# PA0952), Freemansburg, Lower Milford, Bethlehem (CUID# PA1341), East Allen, Moore, Weisenberg, Low Hill, North Whitehall, Lower Mt Bethel (CUID# PA0109), Hanover (CUID# PA1674), Nockamixon, Bath, Durham, Coplay, Haycock, Lynn, Greenwich, Allen, Richland, Longswamp, North Catasauqua, Hereford, Lower Mt Bethel (CUID# PA2964), Chapman, Milford, and Northampton.

⁸ See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, MM Docket No. 92-259, Report and Order, 8 FCC Rcd 2965, 2975-77 ¶¶ 41-46 (1993) ("*Must Carry Order*"). The Commission has subsequently extended mandatory carriage rights to digital television stations under Section 614(a) of the Act and has amended its rules accordingly. See *Carriage of Digital Television Broadcast Signals First Report and Order*, See 16 FCC Rcd 2598, 2606 ¶¶ 15-16, 2610 ¶ 28 (2001) ("*DTV Must Carry Order*"); see also 47 C.F.R. §76.64(f)(4).

⁹ Section 614(h)(1)(C) of the Communications Act, as amended by the Telecommunications Act of 1996, provides that a station's market shall be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns. See 47 U.S.C. § 534(h)(1)(C). Section 76.55(e)(2) of the Commission's rules specifies that a commercial broadcast television station's market is its Designated Market Area as determined by The Nielsen Company. 47 C.F.R. § 76.55(e)(2).

¹⁰ See *Must Carry Order*, 8 FCC Rcd at 2990 ¶ 102.

¹¹ 47 C.F.R. § 76.55(c)(3).

¹² *Must Carry Order*, 8 FCC Rcd at 2991 ¶ 104.

carry complaint must be filed within 60 days of a cable operator's denial of a carriage demand.¹³

3. With respect to SE Cable TV's market modification claim, under the Act, the Commission may consider requests to modify market areas. Section 614(h)(1)(C) provides that the Commission may:

with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's market to better effectuate the purposes of this section.¹⁴

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.¹⁵

4. 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.¹⁶ In the *Modification Final Report and Order*, the Commission, in an effort to promote administrative efficiency, adopted a standardized evidence approach for modifications 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 maps¹⁷ delineating the station's technical service

¹³ See 47 C.F.R. § 76.61(a)(5).

¹⁴ 47 U.S.C. § 534(h)(1)(C).

¹⁵ *Id.*

¹⁶ *Must Carry Order*, 8 FCC Rcd 2965, 2977 n.139.

¹⁷ Service area maps using Longley-Rice (version 1.2.2) propagation curves may also be included to support a technical service exhibit. 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

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area¹⁸ and showing the location of the cable system headends and communities in relation to the service areas.

- (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.¹⁹

5. 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.

6. In the *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, digital-only television stations had mandatory carriage rights, and amended its rules to reflect this.²⁰ The Commission also clarified its framework for analyzing market modifications for digital television stations.²¹ It found that the statutory factors in Section 614(h), the current process for requesting market modifications, and

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in a traditional Grade B contour analysis. In situations involving mountainous terrain or other unusual geographic 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.

¹⁸ While the Grade B contour defined an analog television station's service area, *see* 47 C.F.R. § 73.683(a), with the completion of the full power digital television transition on June 12, 2009, there are no longer any full power analog stations. Instead, as set forth in Section 73.622(e), a station's DTV service area is defined as the area within its noise-limited contour where its signal strength is predicted to exceed the noise-limited service level – which for VHF stations is 28 dBu. *See* 47 C.F.R. § 73.622(e). Accordingly, the Commission has treated a digital station's noise limited service contour as the functional equivalent of an analog station's Grade B contour. *See Report To Congress: The Satellite Home Viewer Extension and Reauthorization Act of 2004; Study of Digital Television Field Strength Standards and Testing Procedures*, 20 FCC Rcd 19504, 19507 ¶ 3, 19554 ¶ 111 (2005); *Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004, Implementation of Section 340 of the Communications Act*, Report and Order, 20 FCC Rcd 17278, 17292 ¶ 31 (2005). *See also Lenfest Broadcasting, LLC*, 19 FCC Rcd 8970, 8974 ¶ 7 n.27 (2004) (“For digital stations operating on channels 14-69 [UHF stations], for market modification purposes the 41 dBu DTV service area contour is the digital equivalent of an analog station's Grade B contour.”).

¹⁹ 47 C.F. R. § 76.59(b).

²⁰ *See* 16 FCC Rcd 2598, 2606 ¶ 15, 2610 ¶ 28 (2001); 47 C.F.R. § 76.64(f)(4).

²¹ *See* 16 FCC Rcd at 2635-36 ¶¶ 84-85. The Commission affirmed that for digital signal carriage issues, it would continue to rely on the Nielsen Company's market designations, publications, and assignments it used for analog signal carriage issues. *See id.* at 2636 ¶ 85.

the evidence needed to support such petitions, would be applicable to digital television modification petitions.²² While the Commission presumed the market of a station's digital signal would be coterminous with that station's market area for its prior analog signal, it recognized that the technical coverage area of a digital television signal may not exactly replicate the technical coverage area of its former analog television signal.²³ Therefore, in deciding DTV market modifications, the Commission would take changes in signal strength and technical coverage into consideration, on a case-by-case basis.

III. DISCUSSION

A. Procedural History

7. The pleading and procedural history of this proceeding is, in a word, tortured. The following paragraphs set forth the complex procedural and pleading history of this proceeding with as much clarity as possible.

8. WACP commenced broadcast operations in June 2012 and on June 6th it sent a letter electing mandatory carriage on the cable system of "Service Electric Cablevision, Inc." ("SE Cablevision"); it did not name "Service Electric Cable TV Inc." ("SE Cable TV") in this letter.²⁴ However, a list of communities included with this election letter included those with physical system identification numbers ("PSID") of 001704, associated with SE Cablevision, as well as those with PSID 001711 associated with SE Cable TV,²⁵ and WACP's election letter was also addressed to two different addresses – one for SE Cablevision and one for SE Cable TV.²⁶ Thereafter, on September 14, 2012, WACP sent a must carry demand letter once again addressed to "Service Electric Cablevision Inc." and using the two separate addresses used in the June 6th election letter, one of which was an address for SE Cable TV.²⁷ This demand letter was received by SE Cablevision on September 19, 2012, and it was received by SE Cable TV on September 20, 2012.²⁸

9. In a letter dated October 1, 2012, Joseph G. Macus, Vice President of SE Cable TV, responded to WACP's demand letter, provided the coordinates for a headend located in Bethlehem,

²²See *DTV Must Carry Report and Order*, 16 FCC Rcd at 2636 ¶ 85.

²³ See *id.* In adopting technical rules for the digital transmission of broadcast signals, the Commission attempted to ensure that a station's digital over-the-air coverage area would replicate as closely as possible its former analog coverage area. See *id.* at 2636 ¶ 85 n.254, citing *Sixth DTV Report and Order*, 12 FCC Rcd 14588, 14605 ¶ 29 (1997).

²⁴ WACP Complaint at Exh. 3, Letter from M. Scott Johnson, et al., counsel for WACP to Mr. Donald Brandt, Service Electric Cablevision, Inc., 4949 Liberty Lane, Allentown, PA & President and CEO, Service Electric Cablevision, Inc., 1045 Hamilton Street, Allentown, PA, at 1, Jun. 6, 2012 ("WACP Election Letter"). (Stating that WACP was electing mandatory carriage "on all cable systems operated by any one or more of Service Electric Cablevision Inc. or its direct or indirect subsidiaries or affiliates to the extent they serve the Philadelphia, PA [DMA], including...those community units listed on Exhibit A hereto.")

²⁵ This can be verified by checking these PSIDs in our Cable Operations and Licensing System. See COALS, <https://apps.fcc.gov/coals/forms/search/cableSearchNf.cfm> (last visited May 16, 2013).

²⁶ See WACP Election Letter at 1.

²⁷ See WACP Complaint at Exh. 3, Letter from M. Scott Johnson, et al., Counsel for WACP to Mr. Donald Brandt, Service Electric Cablevision, Inc., 4949 Liberty Lane, Allentown, PA & President or CEO, Service Electric Cablevision, Inc., 1045 Hamilton Street, Allentown, PA, at 1, Sept. 14, 2012 ("WACP Carriage Demand Letter") (stating "This letter is a demand for carriage under FCC Rule 76.61(a)(1)").

²⁸ See *id.* at Exh. 4, Certified Mail Receipts.

Pennsylvania, and noted that “WACP is over 72 miles from the system’s principal headend.”²⁹ The letter also stated that engineers of the cable system had twice been unable to obtain WACP’s signal at the system’s principal headend, and that “[i]f [WACP] wish[ed], [SE Cable TV] would be happy to discuss [WACP’s] payment of the cost to deliver a signal consistent with Section 76.55(c)(3), however, given the distance between the station’s transmitter and [SE Cable TV’s] headend, it is highly unlikely that WACP will be able to deliver a qualified signal.”³⁰ While we have substituted SE Cable TV in the sentence above, the letterhead of this letter was actually “Service Electric Cable TV & Communications,” addressed at 2260 Avenue A, Bethlehem, Pennsylvania, which is listed with the Pennsylvania Department of State as a “fictitious name” or d/b/a owned by “Service Electric Cable TV Inc.”³¹

10. Subsequently, WACP’s September 14th carriage demand letter was met with a firm denial letter dated October 16, 2012 from counsel for SE Cablevision.³² This letter stated WACP was not eligible for carriage on SE Cablevision’s cable systems because it was not a “local commercial television station” within the meaning of section 76.55(c), by virtue of failing to deliver a good quality signal to SE Cablevision’s headend, as demonstrated by “voluminous” signal tests that could be provided on request.³³

11. WACP filed its first mandatory carriage complaint against SE Cablevision on December 14, 2012, but filed a motion on January 9, 2013, in which it also sought to add SE Cable TV as a party-in-interest. Believing that SE Cable TV “had been served without objection, responded to the carriage demand, and ha[d] not opposed its addition as a party,” the Bureau granted WACP’s motion to add SE Cable TV.³⁴ SE Cable TV responded on February 11, 2013, strongly opposing such addition to WACP’s complaint pending against SE Cablevision or to being forced to carry the station, and it asserted that SE Cablevision and SE Cable TV were “wholly separate entities with no common ownership or control.”³⁵ We note that the website for SE Cable TV d/b/a Service Electric Cable TV & Communications lists SE Cablevision as an “affiliate,”³⁶ and SE Cablevision’s website also lists SE Cable TV as an “affiliate.”³⁷ Either way, SE Cable TV admitted it had been served by WACP’s June 6th letter as well as by its September 14th letter – both at its official addresses at 1045 Hamilton Street,³⁸ and it asserted it had responded to WACP on October 1st, rejecting WACP’s demand and advising it that SE Cable TV “would not carry WACP because it was too far from Cable TV’s principal headend...and because the station did

²⁹ See *id.* at Exh 5, Letter from Joseph G. Macus, Vice President, Service Electric Cable TV & Communications, to M. Scott Johnson, *et al*, Counsel for WACP, at 1, Oct. 1, 2012. (“SE Cable TV Oct. 1st Letter”) (also providing coordinates to locate SE Cable TV’s principal headend, which placed it at or near Bethlehem, Pennsylvania).

³⁰ See *id.*

³¹ Pennsylvania Department of State Business Entity Record Search, *available at* <https://www.corporations.state.pa.us/corp/soskb/Corp.asp?1837148> (go to the Pennsylvania Department of State website, follow the “Corporations” hyperlink, then follow “Search” hyperlink, then type “SERVICE ELECTRIC CABLE TV AND COMMUNICATIONS” into search field) (last visited May 17, 2013).

³² See *id.* at Exh. 6, Letter from Gary S. Lutzker, counsel for Service Electric Cablevision, Inc. to M. Scott Johnson, *et al.*, counsel for WACP, Oct. 16, 2012.

³³ See *id.* at 1 (also providing coordinates to locate SE Cablevision’s principal headend, which placed it nearer Reading, Pennsylvania, different from those in SE Cable TV’s Oct. 1st letter).

³⁴ Bureau Letter Order, Jan. 31, 2013.

³⁵ Opp. to Motion to Clarify at 1 & n.1.

³⁶ Service Electric Cable TV & Communications, “Our Partners and Affiliates,” <http://www.sectv.com/aspPartners.aspx?strSystem=LV> (last visited May 17, 2013).

³⁷ Service Electric Cablevision, About CATV, Our Partners and Affiliates, http://www.secv.com/catv/partners_catv.html (last visited May 17, 2013).

³⁸ See Opp. to Motion to Clarify at 1.

not deliver a qualified signal.”³⁹

12. When WACP filed its petition against SE Cablevision on December 14th, SE Cable TV asserts it was not included as a defendant or served.⁴⁰ As a result, SE Cable TV has argued, any subsequent attempt to add it to the complaint or file against it were untimely under Section 76.61(a)(5)(i) of our rules, because such attempt was 60 days after a denial by SE Cable TV of WACP’s carriage rights.⁴¹ To make this argument, SE Cable TV argues its October 1, 2012, letter was a rejection letter that denied WACP’s carriage claim on the basis of distance by giving the coordinates of its cable system headend and stating “given the distance between the station’s transmitter and our headend, it is highly unlikely that WACP will be able to deliver a qualified signal.”⁴² In addition, SE Cable TV argues it stated in the letter that it attempted to receive a signal from WACP at its principal headend on two occasions and was unable to do so.⁴³ Therefore, given the October 1st date of its letter, WACP’s complaint against it was untimely filed 74 days later and not on December 3rd, as it should have been.⁴⁴

13. WACP agrees its complaint should have been filed on December 3rd, *if* SE Cable TV’s October 1st letter was a valid rejection letter, but it argues the letter was not a “denial,” to use the language of of Section 76.61(a)(5)(i) of the rules, as it lacked the words “denial,” “rejection” or “refusal,” or any variant or synonym of such.⁴⁵ WACP argues this letter was not a rejection, as evidenced with the fact that it coupled the statement that SE Cable TV made some attempt to receive a signal – “an attempt of unknown formality, unknown effort and unknown compliance (if any) with FCC measurement requirements” – with a resulting opinion that it is “unlikely” a good quality signal can be received.⁴⁶ WACP argues the letter does not say that a good quality signal cannot be received at the principal headend, but instead opines as to ‘likelihood’, which should not be taken as an implied denial.⁴⁷ Nor does the letter contain the required elements for denial based on failure to receive a good quality signal as specified in Section 76.61(a)(3) of the rules.⁴⁸ Furthermore, WACP argues even applicable precedent finds such letter was an ineffective denial.⁴⁹

14. Alternatively, SE Cable TV argues that even if its October 1st letter is discounted as a rejection, WACP’s complaint against SE Cable TV was still untimely because SE Cable TV would have had until October 20th to respond with its rejection after it received WACP’s carriage demand on September 20th, at which point WACP would have had to file its complaint against it within 60 days, or by December 19th, which WACP failed to do. SE Cable TV argues that WACP’s motion to clarify – which sought to add SE Cable TV as a party on January 9, 2013, the Media Bureau’s grant of that motion on January 31st, and WACP’s Bureau ordered service of the complaint on SE Cable TV on February 7,

³⁹ Opp. to Motion to Clarify at 1.

⁴⁰ Opp. to Motion to Clarify at 1-2.

⁴¹ *Id.* at 2.

⁴² *Id.* & Exh. 1, SE Cable TV Oct. 1st Letter.

⁴³ *See id.* at Exh. 1.

⁴⁴ *See id.*

⁴⁵ Reply to Opp. to Motion to Clarify at 2-3.

⁴⁶ *See id.* at 3.

⁴⁷ *See id.*

⁴⁸ *See id.* at 3 & n.3.

⁴⁹ *See id.* at 4 & nn.4-6 (citing *In re Complaint Against Cablevision Systems Corp.*, 11 FCC Rcd 2362, 2366, ¶ 20 (CSB 1996)).

2013 – all of these dates exceed the 60 day deadline.⁵⁰ SE Cable TV argues the Commission should not waive its strict filing deadline given the important public interest purpose it serves.⁵¹ WACP retorts that SE Cable TV’s alternative line of argument elevates form over substance because SE Cable TV was aware that it was the subject of WACP’s complaint; it received both WACP’s carriage election and carriage demand letters, and the complaint itself included a list of CUIDs and PSIDs that corresponded to SE Cable TV’s systems.⁵²

15. SE Cable TV has also informed the Bureau that it erred in adding it as a party to this matter without allowing it sufficient time to object, thereby violating its due process rights.⁵³ In response to a preliminary objection to such addition,⁵⁴ the Bureau informed the parties, however, that it would reconsider any arguments SE Cable TV wanted to raise to its addition as a named party in its formal objection to WACP’s Motion to Clarify, and we now consider its arguments *de novo*.⁵⁵ SE Cable TV also argues that a motion to add a named party-in-interest or respondent is an improper motion under Section 76.7 of our rules because the Bureau does not accept additional motions or pleadings except when a showing of “extraordinary circumstances” is made, which typically does not occur, it argues, unless the Commission requests such pleadings.⁵⁶ Yet, SE Cable TV argues, WACP has not provided the Bureau with an extraordinary circumstance for allowing its supplement; it has merely stated it was “confused” about the corporate ownership of the cable system operating under PSID # 001711.⁵⁷ SE Cable TV argues it is “puzzling” that WACP served both its election and carriage demand letters on SE Cable TV at its correct address, and yet WACP was unable to connect the correct identity of SE Cable TV with the addresses it was using for it – information available in the Commission’s COALS database.⁵⁸ Furthermore, SE Cable TV argues WACP has not explained why it failed to serve SE Cable TV with its complaint if it evidently knew SE Cable TV’s address.⁵⁹ Accordingly, SE Cable TV argues WACP should not now be permitted to use its “confusion” as the basis to justify its noncompliance with the time limits imposed by 76.61(a)(5).⁶⁰

16. In response, WACP argues that it had assumed SE Cablevision and SE Cable TV were one company, but it argues that SE Cable TV did not endeavor to disabuse it of this misperception and may in fact have reinforced it through its actions.⁶¹ For example, WACP notes that the two companies’ websites refer to each other as “affiliates.”⁶² It also notes that the strong carriage denial letter it received from Counsel for SE Cablevision on October 16, 2012, stated in its reference line at the top that it concerned WACP’s demand for carriage “on Service Electric Cablevision, Inc. Cable Television Systems Serving

⁵⁰ Opp. to Motion to Clarify at 3.

⁵¹ *See id.* at 6-7.

⁵² Reply to Opp. to Motion to Clarify at 9.

⁵³ *See id.* at 3-4.

⁵⁴ Opp. to Motion to Clarify, Exh. 3, Email from Mark Palchik, Counsel for SE Cable TV, to the Media Bureau, Policy Division, Federal Communications Commission, Feb. 4, 2013.

⁵⁵ mail from the Media Bureau to Counsel for both sides, Jan. 31, 2013.

⁵⁶ *See id.* at 4, citing 47 C.F.R. §§ 76.7(d) & (e).

⁵⁷ *See id.* at 4.

⁵⁸ *See id.* at 4-5 & n.18.

⁵⁹ *See id.* at 6.

⁶⁰ *See id.* at 6.

⁶¹ *See* Reply to Opp. to Motion to Clarify at 7.

⁶² *See id.* at 7; *see also supra* ¶ 10 & nn.38 & 39.

the Counties of Berks, Bucks, Chester, Lehigh and Northampton, Pennsylvania.”⁶³ WACP notes this list of counties is significant, because from the five listed, two – Lehigh and Northampton – are only served by SE Cable TV, but are represented as falling under SE Cablevision;⁶⁴ and furthermore, counsel referred to himself as acting on behalf of SE Cablevision “and its subsidiaries,” when, WACP argues, the only possible subsidiary was SE Cable TV, the affiliate.⁶⁵ WACP asserts these factors led it to believe that one headend – listed in counsel’s October 16th letter – was the principal headend for both affiliates, and it argues it did not discover that the two entities were not one company, but instead “identical twins,” until after it filed its carriage complaint.⁶⁶

17. With respect to carriage rights, SE Cable TV states that, in any event, signal tests were taken on July 18, September 25, 2012, and February 5, 2013, and at no time was any discernible signal detected from WACP.⁶⁷ Furthermore, SE Cable TV argues WACP’s programming is duplicated by a station already carried on its cable system, and cable operators are not required to carry the signal of any local commercial television station that substantially duplicates the signal of another local commercial television station that is carried on a system.⁶⁸

18. Finally, SE Cable TV argues that the prioritization of broadband in the National Broadband Plan argues in favor of keeping WACP off its system because if it is forced to take WACP and reserve 6 MHz of analog channel space to it, it will not have sufficient remaining capacity to switch to DOCSIS 3, and it will not have the capacity to upgrade its subscribers high speed internet speeds of 50 megabits per second.⁶⁹

B. Mandatory Carriage Notice Issues

19. We conclude that WACP was not timely in serving SE Cable TV with its mandatory carriage complaint and that as a result its carriage complaint against SE Cable TV must be dismissed. As we noted above, no must-carry complaint filed pursuant to paragraph Section 76.61 of our rules will be accepted if filed more than sixty days after the denial by a cable television system operator of a request for carriage.⁷⁰ To determine whether WACP properly notified SE Cable TV that it elected and then demanded carriage on its cable systems, we apply a reasonableness approach that takes the circumstances

⁶³ See *id.* at 8 & n.17, citing WACP Complaint, Exh. 6, SE Cable TV Oct. 16 Letter.

⁶⁴ See *id.* at 8.

⁶⁵ See *id.* at 7 & n.16, quoting WACP Complaint, Exh. 6, SE Cable TV Oct. 16 Letter.

⁶⁶ See *id.* at 8.

⁶⁷ See Opp. to Motion to Clarify at 6 & n.27, citing Exh. 2, “Service Electric Cable TV Inc. Signal Test for WACP TV 4.1”. WACP attaches a single report of a signal measurement taken in the presence of WACP engineer, Greg Kraft, on February 5, 2013, and stating that “Mr. Kraft was satisfied that we could not pick up WACP as stated in our previous test in October of 2012.” See *id.* Although this test makes mention of an October test, it does not mention the alleged test in July, or attach the measurements and other necessary documentation pertaining to those two prior tests.

⁶⁸ See *id.* at 6, citing 47 C.F.R. § 76.56(b)(5)). SE Cable TV states it currently carries WTVE, Reading, Pennsylvania (Ch. 51), which carries paid or commercial length programming in a majority of its schedule, and while SE Cable TV states it has been unable to get definitive information about WACP’s programming, the primary programming on the station also appears to be paid or commercial length programming. See *id.* We don’t believe this is sufficient information, without more, for us to determine that WACP substantially duplicates WTVE’s programming.

⁶⁹ See *id.* at 7.

⁷⁰ See 47 C.F.R. § 76.61(a)(5); see also *Friendly Bible Church, Inc. v. Viacom Cable*, 9 FCC Rcd 7907 ¶ 3 (CSB 1994).

surrounding the parties' communications into account.⁷¹ WACP used an effective address available in COALS for SE Cable TV in both its carriage election and demand letters, and someone from SE Cable TV received and signed for both letters at that address. WACP also attached the list of communities on which it sought carriage to both letters. SE Cable TV admits it received both letters and has even argued it rejected WACP's carriage demand on October 1st.⁷² Under these facts, SE Cable TV could not argue that it was not informed of WACP's intentions to seek carriage on its systems.

20. The September 14, 2012 carriage demand letter sent by WACP to both the addresses of SE Cablevision and SE Cable TV was received by SE Cable TV on September 20th; the letter states "[t]his letter is a demand for carriage under FCC Rule 76.61(a)(1)."⁷³ We also find that SE Cable TV's response of October 1st, was not an effective rejection or denial of this demand under Section 76.61(a)(2) as it did not contain an affirmative statement that SE Cable TV was not obligated to carry WACP. We typically look for an affirmative denial or rejection by a cable operator.⁷⁴ In the letter, an entity named "SE Cable TV & Communications (SE Cable TV)" merely cited the distance between its headend and WACP's transmitter, and gave the coordinates of its headend without concluding that these factors influenced its decision to deny carriage to WACP. Furthermore, SE Cable TV's statement that its engineers had twice attempted to receive WACP's signal also failed to provide the necessary information to function as a denial on the basis of poor signal quality; SE Cable TV did not provide in its response "a list of equipment used to make the measurements, the point of measurement and a list and detailed description of the reception and over-the-air signal processing equipment used, including sketches such as block diagrams and a description of the methodology used for processing the signal at issue."⁷⁵ While the letter concluded that "it is highly unlikely that WACP will be able to deliver a qualified signal," this did not result in a stated conclusion that SE Cable TV would therefore not carry WACP; instead this statement was conjoined with another that "[i]f [WACP] wish[ed], [SE Cable TV] would be happy to discuss [WACP's] payment of the cost to deliver a signal consistent with Section 76.55(c)(3)," and it concluded that SE Cable TV "look[ed] forward to hearing from...the station's engineers."⁷⁶ This type of language has been found not to form a firm denial in the past.⁷⁷

21. Therefore, under this view of the facts, as the parties concede, WACP's carriage complaint would have had to be filed 60 days after October 20th – the date by which SE Cable TV would have had

⁷¹ See *Long Comms v. HPI Acquisition, Corp., LLC*, 21 FCC Rcd 10499, 10501 ¶ 6 & n.22 (MB 2006), citing *Entravision Hlds, LLC v. Echostar Comms Corp.*, 18 FCC Rcd 19268 (2003). *Entravision* made clear that in the context of must carry notice obligations, a reasonableness standard based upon the circumstances would apply. 18 FCC Rcd at 19271 ¶ 3, citing *In re Ho'Ana'Aua'o Cmty TV, Inc. v. Echostar Communications Corp.*, 18 FCC Rcd 2487 (MB 2003).

⁷² Opp. to Motion to Clarify at 2.

⁷³ See WACP Complaint at Exh. 3, WACP Carriage Demand Letter.

⁷⁴ See *Johnson Broad., Inc. v. Prime Cable of Ft. Bend, L.P.*, 9 FCC Rcd 3574, ¶ 6 (CSB 1994).

⁷⁵ 47 C.F.R. 76.61(a)(2). WACP correctly notes that while SE Cable TV claimed it conducted tests of WACP's signal on July 18, 2012, September 25, 2012, and February 5, 2013, and it cites Exhibit 2 to its Opposition as proof that such tests were conducted, that Exhibit contains only a test conducted February 5th with a reference to a previous test in October, with no mention or evidence of any test in July. WACP Reply at 16, citing SE Cable TV Opposition at 6 & n.27 (citing Exh. 2). Accordingly, WACP is correct that SE Cable TV did not meet its burden of showing WACP that it failed to deliver a good quality signal and that its argument on this ground was an ineffective rejection.

⁷⁶ WACP Complaint at Exh. 5, SE Cable TV Oct. 1st Letter.

⁷⁷ See *Telecino, Inc. v. Cablevision of Puerto Rico*, 12 FCC Rcd 17493, 17495 ¶ 7 (CSB 1997; see also *SAH Acquisition Corp., v. Adelphia Cablevision Assocs, L.P.*, 13 FCC Rcd 22306, 7 ¶ 4 &, 9 ¶ 8 (CSB 1998).

to respond – or by December 19, 2012.⁷⁸ Unfortunately, WACP did not file its complaint against SE Cable TV by this date. We understand WACP’s argument that it did not file a complaint against SE Cable TV because it was laboring under a false assumption or a “mistake of fact” that SE Cablevision and SE Cable TV were one entity and that certain actions by these entities may in fact have reinforced this assumption.⁷⁹ However, WACP concedes that SE Cablevision and SE Cable TV are “related yet separate legal entities” and are not one entity but “identical twins,” and it does not argue that these are in fact one company or that the corporate distinction between them is a sham that should be disregarded.⁸⁰ Because it acknowledges the corporate separation of these entities, WACP was required to file a specific complaint against SE Cable TV by December 19th, and its arguments to the contrary are largely limited to factors which should excuse its mistake.⁸¹ We understand WACP’s position, but the 60 day filing deadline for complaints under Section 76.61(a)(5) serves as a bright line rule.⁸² Accordingly, we must dismiss WACP’s carriage complaint against SE Cable TV as untimely filed. Finally we note that WACP has sought to dismiss SE Cablevision from its Petition,⁸³ and we grant this petition, thereby dismissing WACP’s carriage complaint as to SE Cable TV and SE Cablevision.

C. Market Modification Analysis

22. SE Cable TV has also filed to exclude WACP from the communities it serves in the Philadelphia DMA on the grounds that its cable system communities are outside the station’s market. WACP retorts that it had only been on the air for 7 months when SE Cable TV filed this petition and that granting it would place it at a severe disadvantage in relation to the other 15 “entrenched” Philadelphia DMA stations.⁸⁴

23. As a preliminary matter, WACP argues SE Cable TV failed to provide the standardized evidence necessary for processing its petition under Section 76.59(b) of our rules, and so must face

⁷⁸ See Opp. To Motion to Clarify at 3; see also Reply to Opp. to Motion to Clarify at 8-10.

⁷⁹ Reply to Opp. to Motion to Clarify at 7-8.

⁸⁰ See Motion to Clarify at 2 (“[WACP] has labored under what it just recently discovered to be a mistake of fact...[and that] SE Cablevision and SE Cable TV are related yet separate legal entities.”); Reply to Opp. to Motion to Clarify at 8 (stating that “[n]ot until after the PSR was filed was it revealed to [WACP] that SE Cable TV and SE Cablevision were not one company, but identical twins operating in the same geographic area.”).

⁸¹ See Reply to Opp. to Motion to Clarify at *Summary* page i.

⁸² See 47 C.F.R. § 76.61(a)(5); see also *Must Carry Order*, 8 FCC Rcd at 2995 ¶ 124 (“With respect to commercial stations, no complaints will be accepted if filed more than 60 days after the date of the response from the cable operator was due.”); see also *Long Commc’ns v. HPI Acquisition, Corp., LLC*, 21 FCC Rcd 10499, 10501 ¶ 7 n.25 (citing cases) (“As we have said previously, time limits for filing must-carry complaints are necessary to balance the interest of broadcasters in asserting carriage rights with the interest of cable operators in having certainty in their carriage obligations.”).

⁸³ See WACP Partial Dismissal of Petition for Special Relief, filed February 14, 2003.

⁸⁴ WACP Opposition at 1. WACP further argues we have discretion not to consider SE Cable TV’s market modification petition, and it argues the Bureau should forbear at this time from removing any communities it finds could be removed, particularly because SE Cable TV is using market modification as a collateral attack on its carriage complaint, a stance the Commission has repeatedly warned against. WACP Opp. at 20 & 6 n.11, citing *KTNC Licensee*, 18 FCC Rcd 16269, 16277-78 ¶ 15 (MB 2003) (“The DMA market change process incorporated into the Communications Act, however, is [not] intended to be a process whereby cable operators may seek relief from the mandatory signal carriage obligations apart from the question of whether a change in the market is warranted...”). We note, however, that WACP provides no precedent where the Bureau exercised its discretion to refuse to consider a matter on the grounds that the station subject to a deletion request by a cable system had been in operation for too short a time and would be placed at a competitive disadvantage vis-à-vis other stations.

dismissal under subsection 76.59(c).⁸⁵ At the time SE Cable TV's petition was filed, WACP argued for the petition's dismissal on the grounds that the Petition (i) had no maps showing the location of any of the communities at issue and the headend was not clearly marked on any map; (ii) did not provide the mileage between the communities and WACP's transmitter site (or community of license); (iii) did not provide area transportation routes; (iv) failed to provide detailed terrain maps showing more than just a fraction of the terrain; and (v) did not explain the relation of the communities to the station's noise limited contour or explain which communities lie inside or outside of it.⁸⁶ However, SE Cable TV's Reply pleading attached the evidence it lacked in its original petition. While it is true that in instances where an incomplete market modification is filed, we may dismiss an action without prejudice to a party's refiling and attaching the appropriate evidence,⁸⁷ WACP and SE Cable TV have now had numerous opportunities to argue the relevance of any late filed evidence and assertions,⁸⁸ and we will not dismiss this matter.

24. As noted above, our market modification analysis involves four nonexclusive statutory factors we explicitly consider, in addition to other relevant evidence.⁸⁹ The first statutory factor concerns whether WACP, or other stations licensed to its community, have been historically carried on SE Cable TV's cable systems.⁹⁰ SE Cable TV asserts WACP fails this factor because it has never been carried on its system serving the communities, and accordingly, no viewing patterns would be disrupted through removing it from the market; and, it notes that no other New Jersey station has been carried on its system besides two Spanish language stations.⁹¹ WACP responds that it is essentially a "new" station since it only commenced operations in June of 2012.⁹² It is true that with new stations, failure to establish either historic carriage or significant viewership is given lesser weight, and we typically rely more on a station's Grade B contour to delineate its market.⁹³ However, SE Cable TV correctly notes that the historic carriage and significant viewership factors are not entirely discounted for new stations, nor are such stations exempt from the market modification process.⁹⁴

⁸⁵ WACP Opposition at 3, citing 47 CFR § 76.59(b) & (c); *see also supra* at ¶¶ 3-4.

⁸⁶ WACP Opposition at 3-6.

⁸⁷ *See Sagamore Hill Broad. Of Wyoming/North. Colorado, LLC*, 22 FCC Rcd 12944 (MB 2007).

⁸⁸ WACP filed a motion seeking to strike SE Cable TV's late filed evidence and arguing that certain points were inappropriately raised at the reply stage to obtain a litigation advantage; SE Cable TV opposed this motion, and WACP filed yet another response to this opposition. *See Motion to Strike and Limited Surreply of WACP*, filed May 2, 2013 ("WACP Surreply"); *Opposition to Motion to Strike and Limited Surreply by SE Cable TV*, filed May 16, 2013; *Reply to Opposition to Motion to Strike and Limited Surreply by WACP* filed May 23, 2013.

⁸⁹ *See supra* ¶ 2.

⁹⁰ This statutory factor is typically evidenced by "cable system channel line-up cards or other exhibits establishing historic carriage, such as television guide listings." 47 C.F.R. § 76.59(b)(6).

⁹¹ SE Cable TV Petition at 6-7.

⁹² WACP Opposition at 6.

⁹³ *Avenue Cable TV Service, Inc.*, 16 FCC Rcd 16436, 16445 ¶ 22 (MB 2001). Without accommodating new or 'specialty stations' in our analysis of historic carriage, "weaker or newer stations that cable systems had previously declined to carry, [would be prevented] from ever being carried." *Time Warner*, 22 FCC Rcd at 13649, ¶ 14 & n.63, citing *Paragon*, 10 FCC Rcd at 9466, ¶ 12. *See also NY ADI Order*, 12 FCC Rcd 12262, 12267, ¶ 10 & 12271, ¶ 17 (1997) ("[G]rade B contour coverage, in the absence of other determinative market facts ... is an efficient tool to adjust market boundaries because it is a sound indicator of the economic reach of a particular television station's signal."); *see also WRNN II*, 21 FCC Rcd at 5959, ¶ 14 & n.49 (2006). However, signal coverage does not in and of itself necessarily entitle a specialty station to carriage. *See KTNC Licensee, LLC*, 18 FCC Rcd 16269, 16278 ¶ 17 (2003).

⁹⁴ *See SE Cable TV Petition* at 7 n.18. Lack of historical carriage and dearth of audience shares is of evidential significance when linked with other information regarding the market, including lack of Grade B coverage, (continued...)

25. WACP further argues that it satisfies the historic carriage portion of this analysis by virtue of being carried by competing cable providers throughout the area, including in some of the very communities at issue⁹⁵ and in other cases, in surrounding or proximate communities.⁹⁶ It asserts it is carried in almost all of the communities at issue in Lehigh and Northampton Counties by RCN because it has overbuilt SE Cable TV in these areas.⁹⁷ In addition, WACP also argues that SE Cable TV carries station WWSI to all of its subscribers in the communities, and WWSI like WACP, is licensed to Atlantic City, New Jersey, even though WWSI's contour, unlike that of WACP, falls well short of the communities.⁹⁸ SE Cable argues that carriage of WWSI should not factor in favor of WACP's claims because it does not carry WWSI as an "in-market" station,⁹⁹ and it does not receive the station's signal over the air but only via satellite.¹⁰⁰ We agree with WACP that the method of delivery of WWSI's signal to SE Cable TV's headend is not relevant to our consideration,¹⁰¹ and also agree with WACP and deem it relevant that the *WWSI Decision* did not remove all the communities from WWSI's market that it shares in common with WACP, and some of these communities have relevance to us today.¹⁰²

26. SE Cable TV also responds that WACP's carriage in any proximate communities or on competing cable systems of RCN, SE Cablevision and Verizon by virtue of mandatory carriage should not count toward fulfillment of this factor because the Commission has stated that carriage as a result of must-carry does not count toward a history of carriage.¹⁰³ While we have stated that a history of carriage cannot be proven via carriage mandated by the rules, this principle was applied to discount the relevance of a short history of carriage in instances where stations with a long history of operations had become

(...continued from previous page)

geographic distance, and the absence of noncable audience share in relevant communities. *In re Cablevision*, 11 FCC Rcd 9314, 9322-23 (1996); *see also U.S. Cablevision Corp.*, 12 FCC Rcd 21144, 21152 (CSB 1997)(another factor to consider could be the availability of other more local television stations in the relevant communities).

⁹⁵ WACP Opp. at 13-15. Historical carriage of the station by other overlapping cable systems in the communities at issue is a strong indicator we are meant to consider under the statute. *See* 47 U.S.C. § 534(h)(1)(C)(ii)(I). For example, the Commission has previously found overlapping carriage by Verizon's FiOS system to lend support to the historic carriage factor. *See WRNN License Co., LLC v. Cablevision Sys. Corp.*, 22 FCC Rcd 21054, 21056 ¶ 4 & n.15 (Nov. 29, 2007).

⁹⁶ WACP Opp. at 11-13 & Exh. K, Communities by overbuilders RCN Telecom Services (Lehigh) LLC and Blue Ridge Cable Technologies, & Exh. L, Lehigh and Northampton Counties Overbuild Chart showing coverage of communities by Service Electric, RCN and Verizon. While carriage on nearby cable systems is not a factor specified in the statute, such carriage does serve to demonstrate the belief of both stations and cable systems involved that there is a market nexus between the broadcast station and the communities where the station is carried and it thus provides evidence as to the scope of a station's market. *See Paxson Atlanta License, Inc.*, 13 FCC Rcd 20087, 20100 ¶ 35 (1998).

⁹⁷ WACP Opp. at 13-14 & Exh. Lm Lehigh and Northampton Counties Overbuild Chart.

⁹⁸ WACP Opp. at 16-17. The Commission has previously found that "[c]arriage by a cable system of a co-located station is frequently a reflection that these stations are part of the cable system's market." *See Ackerley Media Group, Inc.*, 18 FCC Rcd 16199, 16203, ¶ 9 (2003 MB).

⁹⁹ SE Cable TV removed WWSI from some of its Pennsylvania communities in a prior market modification decision. *See In re Hispanic Broad. Of Philadelphia, LLC v. Service Electric Cable TV, Inc., et al.*, 19 FCC Rcd 2609 (MB 2004) ("*WWSI Decision*").

¹⁰⁰ SE Cable TV Reply at 9-10.

¹⁰¹ WACP Motion to Strike at 15.

¹⁰² *See* WWSI Reply to Opp. to Motion to Strike at 4; *see also WWSI Decision*, 19 FCC Rcd at 2616, Attachment A.

¹⁰³ SE Cable TV Reply at 11 & n.30 (citing cases).

carried only by virtue of passage of the 1992 Cable Act.¹⁰⁴ Furthermore, we agree with WACP that it would not be logical to state that no station carried via must-carry can ever accumulate a history of carriage, as this would render certain instances of “historical carriage” meaningless.¹⁰⁵ WACP is carried by Comcast in the communities, although it was not subject to a must carry complaint.¹⁰⁶ Moreover, if anything, other operators’ decisions to carry WACP are meaningful because they could have fought the addition of the station to their systems, but instead, chose not to do so.¹⁰⁷ Accordingly, we will consider as favorable evidence WACP’s carriage in, and proximate to, the communities on competing systems.

27. The second statutory factor asks “whether the television station provides coverage or other local service to such community.”¹⁰⁸ SE Cable TV argues the Philadelphia DMA is the fourth largest in the country, with 2,993,370 households and 18 counties in three states.¹⁰⁹ It notes that Atlantic City, WACP’s city of license, and Bethlehem, PA (the approximate location of the subject cable system’s headend) are at the extreme Southeastern and Northwestern edges of this DMA, and are separated by a mountain range.¹¹⁰ The cable system communities are also at an average distance of 50 to 75 miles from WACP’s transmitter and 78 to 106 miles from Atlantic City.¹¹¹

28. Furthermore, SE Cable TV argues WACP fails to place a reliable signal over the communities at issue,¹¹² and that it fails to air programming having a distinct nexus to the communities.¹¹³ WACP responds that its noise-limited service contour covers all of SE Cable TV’s communities in Bucks County and the community of Hereford in Berks County.¹¹⁴ SE Cable TV responds that WACP’s programs are predominantly infomercials, and what little is available from the station’s issues/programs lists shows that they are not oriented to the communities,¹¹⁵ and WACP does not contest that it does not provide local programming, but it argues its programming should not be “of decisional significance” given that it has “had no chance of obtaining any lucrative network affiliation” because it was the 16th

¹⁰⁴ See *TKR Cable Co., Sussex and Morris Counties, NJ*, 12 F.C.C.R. 8414, 8422 ¶ 16 (CSB 1997) (“[C]arriage patterns that have developed coincident with changes in the statutory carriage obligation provide only equivocal information as to the connection of these communities with [the station]...”); see also *Comcast Cablevision of Monmouth*, 11 FCC Rcd 6426, 6435 ¶ 25 (CSB 1996).

¹⁰⁵ See WACP Motion to Strike at 11. WACP argues that all stations may have a period of mandatory carriage as part of their history, and if we were only to consider carriage pursuant to retransmission consent as probative of carriage history, that would leave only a subset of stations, and only those which the cable operator has agreed by contract to carry.

¹⁰⁶ See *id.* at 9.

¹⁰⁷ WACP notes that its complaints against the other operators, RCN, SE Cablevision and Verizon, were placeholder filings made to ensure that it would not forfeit its carriage rights, and not one of these operators opposed its carriage demand on the record and all commenced carriage of the station after the process of ensuring a good quality signal was concluded. See WACP Reply to Opp. to Motion to Strike at 3.

¹⁰⁸ 47 U.S.C. § 534(h)(1)(C)(ii)(II).

¹⁰⁹ SE Cable TV Petition at 4.

¹¹⁰ SE Cable TV Petition at 4.

¹¹¹ SE Cable TV Petition at 7.

¹¹² SE Cable TV Petition at 7.

¹¹³ SE Cable TV Petition at 5 & 8.

¹¹⁴ WACP Opp. a 8-9.

¹¹⁵ SE Cable TV Petition at 5 n.13, citing Exh. D, WACP issues programs list, *available at* https://stations.fcc.gov/station-profile/wacp/more-public-files/browse-%3Eissues_and_programs_lists.

entrant in the market.¹¹⁶

29. In its reply, SE Cable TV attaches maps showing the location of its cable system communities in relation to WACP's noise-limited or 28 dbμ contour, and it argues that of the 76 communities it seeks to remove from WACP's DMA, all but 14 were outside the WACP's contour.¹¹⁷ We find that WACP covers the communities of Coopersburg, Haycock, Hellertown, Hereford, Milford, Lower Milford, Richland, Riegelsville, Upper Saucon, and Tincum with its noise-limited contour line and WACP is carried by a competing provider in all such communities. While WACP also covers the communities of Bridgeton, Durham, Nockamixon, and Springfield with its contour, the station is not carried in these communities by a competing provider based on the evidence provided. However, there is no provider other than SE Cable TV serving these latter four communities, they are surrounded by, and are immediately proximate to, the communities where WACP is carried and which we have retained in its market, and there is no possibility for WACP to have built a history of carriage in these communities because it had been in operation for less than a year when the petition to remove it from these communities was filed. We decline to add WACP to any other communities because it lacks a demonstrated combination of both Grade B equivalent or noise-limited coverage and carriage in these latter communities.

30. 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."¹¹⁸ SE Cable TV argues the Commission gives greater weight to the carriage of other stations where a cable operator is seeking to delete a station's mandatory carriage rights – as is the case here, and when it is clear that the station is not providing a local service to those communities.¹¹⁹ It argues the DMA contains 15 other stations and that its system carries substantial amounts of local service from these other media outlets to the communities, including KYW (CBS), WPHL, WTXF (Fox), WPVI (ABC), WCAU (NBC), WHYI (PBS), and WPSG – all from Philadelphia, as well as WLVT (PBS) and WFMZ both from Allentown. In particular, WFMZ (dubbed "News 69") devotes a substantial portion of its broadcast day to news and information directly relevant to the communities – with 10 hours of news, much of it local, and a half-hour in Spanish.¹²⁰ We acknowledge SE Cable TV's points, but note the Bureau has previously stated that local coverage by other stations is given little weight within the Grade B contour of the station subject to the market modification.¹²¹

31. 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."¹²² SE Cable TV argues WACP likely has no share in the communities as it fails to provide a noise-limited contour to them,¹²³ and WACP does not contest it garners no ratings, but responds that as a new station, viewership

¹¹⁶ See WACP Opp. at 19 & 21-22.

¹¹⁷ SE Cable TV Reply at 7 & Exh. 2. WACP has argued that this exhibit should be struck from the record because it is untimely. See WACP Motion to Strike at 8. However, we decline to do so because the exhibit actually provides a benefit to WACP in that it affirms its contour coverage of some communities.

¹¹⁸ 47 U.S.C. § 534(h)(1)(C)(ii)(III).

¹¹⁹ SE Cable TV Petition at 9.

¹²⁰ SE Cable TV Petition at 4, 6 & 9, citing the on-air schedule of WFMZ, available at <http://www.locatetv.com/listings/wfmz#23-May-2013>.

¹²¹ See *Mediaone of Mass., Inc.*, 13 FCC Rcd 3017, 3025 ¶ 21 (CSB 1998).

¹²² 47 U.S.C. § 534(h)(1)(C)(ii)(IV).

¹²³ SE Cable TV Petition at 9.

values should not weigh against the station's claims to retain these communities.¹²⁴

32. SE Cable TV also raises several non-enumerated economic factors that it asserts argue in favor of its petition.¹²⁵ In particular, in its Reply SE Cable TV raised for the first time that communities within WACP's contour represent only 11 percent of its subscribers, but that it is not technically capable of delivering WACP to just a few communities on its technically integrated system. Therefore, granting even partial carriage WACP would give it carriage beyond that to which it would be entitled.¹²⁶ Although we could choose to disregard this factual argument raised for the first time on reply, we address the argument in order to note that it has no relevance to our market modification determination.¹²⁷ Furthermore, WACP has submitted evidence showing that SE Cable TV may be capable of separating the signals on its system.¹²⁸

33. In this matter, WACP has no history of carriage in the communities at issue, provides no programming oriented toward them, and obtains no audience viewership values therein – although it is presently carried in several of these communities by competing providers. However, WACP is a new station and its viewership and historical carriage may be discounted in our analysis, though not entirely ignored. In a case such as this, to define the current limit of WACP's market, we typically rely on a station's service area in conjunction with other factors, and given that WACP provides no programming service, we rely on the limit of its Grade B contour taken together with other factors - its carriage by competing providers in the communities at issue, its carriage on proximate systems, and SE Cable TV's carriage of a co-located station, WWSI, in some of the communities. These factors weigh in favor of

¹²⁴ WACP Opp. at 19.

¹²⁵ SE Cable TV argues the U.S. Census Bureau does not consider Atlantic City (Atlantic County) to be part of the Philadelphia-Camden-Wilmington PA-JN-DE-MD Metro Area in its Economic Census Local Business Snapshot. SE Cable TV Petition at 8 & n.27, citing Exhibit I, Economic Census, Philadelphia-Camden-Wilmington, Pa-NJ-DE-MD List Metro Area, Metro Definition, http://www.census.gov/econ/census/snaphsots_center/phila.html (last visited May 30, 2013). It further notes, the Census Bureau reports that the vast majority of the residents of Bucks, Lehigh and Northampton Counties work in their own county or nearby counties, as opposed to Atlantic County. SE Cable TV Petition at 5 & n.11, citing U.S. Census Bureau, County-to-County Worker Files, available at <http://www.census.gov/population/www/cen2000/commuting/index.html#NJ>. SE Cable TV further notes that Bethlehem, PA and Atlantic City are separated by approximately 130 road miles (a two and a half hour drive). SE Cable TV Petition at 4.

¹²⁶ WACP Reply at 8.

¹²⁷ This is not an instance in which the majority of the communities sought for inclusion or retention are part of an integrated cable system, the majority of which stretches beyond the DMA itself or serves the core of another DMA. See e.g., *In re Armstrong Utilities, Inc.*, 21 FCC Rcd 13475, 13485-86 ¶ 16 (MB 2006), citing *In re Norwell Television, LLC*, 16 FCC Rcd 21970 (MB 2001); cf. *In re Tennessee Broad. Partners*, 23 FCC Rcd 3928, 3957 ¶ 75 (MB 2008) (declining to add the communities of Fulton, Murray and Mayfield to a station's market, when among other factors, these communities "exist[ed] on a cable system stretching further north into the Paducah DMA"), *rev'd* 25 FCC Rcd 4857, 4861 ¶ 9 (MB 2010) (adding these communities back into station's market). Finally, as WACP notes, it would be considered "local" as to any communities outside its market which SE Cable TV was unable to isolate. See *Must Carry Order*, 8 FCC Rcd at 2976 ¶ 41 ("[I]f the cable system is not able to alter its channel line-up on a community-by-community basis and the system straddles two ADIs, all broadcast stations in both ADIs will be considered "local" for must carry purposes."); WACP Motion to Strike at 17 & n.33, citing *Family Stations v. Viacom Cable*, 12 FCC Rcd 19682, 19685 ¶7 (CSB 1997) ("It should be noted that in instances where the carriage of a station from another ADI creates copyright costs for the cable operator, the television station will be required to negotiate a copyright indemnification agreement with the cable system. Consequently, Viacom's carriage of KFTL will result in copyright liability for which KFTL must indemnify Viacom."). WACP also argues we should deny the Petition because WACP's carriage in another market as a result of the integrated system will result in its incurring copyright fees. We decline to dismiss this matter purely on this ground.

¹²⁸ See WACP Reply to Opp. to Motion to Strike at 5-6 and attachments.

granting SE Cable TV's request to modify WACP's market to remove all the communities it sought except Bridgeton, Durham, Coopersburg, Haycock, Hellertown, Hereford, Milford, Lower Milford, Nockamixon, Richland, Riegelsville, Upper Saucon, Springfield, and Tinicum.¹²⁹ However, given the unusual circumstances of this case, we will not bar WACP from seeking carriage in the current election cycle on the SE Cable TV systems remaining in its market due to our market modification decision.

IV. ORDERING CLAUSES

34. Accordingly, **IT IS ORDERED**, that pursuant to Section 614(h) of the Communications Act of 1934, as amended, 47 U.S.C. § 534, and Sections 76.7, 76.61, 76.59, of the Commission's rules, 47 C.F.R. §§ 76.7, 76.61 and 76.59, the above captioned petition for special relief (CSR-8757-M) and its subsidiary Motion for Clarification, Supplement and Correction of Record, all by Western Pacific Broadcast, LLC, licensee of commercial broadcast television station WACP-DT, Atlantic City, NJ **ARE DENIED**, though its Partial Dismissal of Petition for Special Relief By Order of Carriage, **IS GRANTED**.

35. **IT IS FURTHER ORDERED** that the Petition for Special Relief (CSR-8772-A) filed by Service Electric Cable Television, Inc. **IS GRANTED IN PART** and **DENIED IN PART** as discussed above.

36. This action is taken under authority delegated by Section 0.283 of the Commission's rules.¹³⁰

FEDERAL COMMUNICATIONS COMMISSION

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

¹²⁹ As a result, the following communities are removed from WACP's market: Bethlehem (CUID# PA0092), Easton, Forks, Glendon, Palmer (CUID# PA0108), Plainfield (CUID# PA0109), Stockertown, West Easton, Williams (CUID# PA0117), Wilson, Bangor, East Bangor, Roseto, Lower Nazareth, Nazareth, Williams (CUID# PA0252), Tatamy, Upper Nazareth, Emmaus, Macungie, Lower Macungie (CUID #PA0291), Salisbury (CUID# PA0293), Upper Milford, Portland, Allentown, Bethlehem (CUID# PA0479), Alburtis, Salisbury (CUID# PA0856), Whitehall, South Whitehall, Upper Macungie, Catasauqua, Lower Macungie (CUID# PA0862), Lower Saucon, Hanover (CUID# PA0865), Fountain Hill, Upper Mount Bethel, Pen Argyl, Washington, Wind Gap, Plainfield (CUID# PA0924), Bushkill, Palmer (CUID# PA0952), Freemansburg, Bethlehem (CUID# PA1341), East Allen, Moore, Weisenberg, Low Hill, North Whitehall, Lower Mt Bethel (CUID# PA0109), Hanover (CUID# PA1674), Bath, Coplay, Lynn, Greenwich, Allen, Longswamp, North Catasauqua, Lower Mt Bethel (CUID# PA2964), Chapman, and Northampton.

¹³⁰ 47 C.F.R § 0.283.