

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

In re:	)	
	)	
Continental Cablevision of Jacksonville, Inc.	)	CSR-4762-A
d/b/a Continental Cablevision of Broward	)	
County, Inc.,	)	
Comcast of Broward County, Inc.,	)	
Dynamic Cablevision of Florida, Ltd., and	)	
Advocate Communications, Inc. d/b/a Coral	)	
Springs Cable TV	)	
	)	
For Modification of the Miami-Ft.	)	
Lauderdale, Florida ADI	)	
	)	
Complaints of Hispanic Keys Broad-	)	CSR-4805-M
casting Corp.	)	CSR-4806-M
	)	CSR-4807-M
	)	CSR-4808-M
	)	
Requests for Carriage	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 6, 1996**

**Released: November 12, 1996**

By the Deputy Chief, Cable Services Bureau:

**INTRODUCTION**

1. Continental Cablevision of Jacksonville, Inc., d/b/a Continental Cablevision of Broward County, Inc., Comcast of Broward County, Inc., Dynamic Cablevision of Florida, Ltd., and Advocate Communications, Inc., d/b/a Coral Springs Cable TV (hereinafter "Petitioners"), filed the above-captioned petition seeking to modify the Miami-Ft. Lauderdale, Florida Area of Dominant Influence ("Miami ADI") of Station WWFD-TV (Channel 8), Key West, Florida. Specifically, Petitioners request that WWFD-TV be excluded from the Miami ADI relative to the communities served by the Petitioners<sup>1</sup> for the purposes of the cable television mandatory

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<sup>1</sup>Continental Cablevision of Jacksonville serves the communities of Deerfield Beach, Hillsboro Beach, Lauderhill, Lazy Lake, Lighthouse Point, Oakland Park, Plantation, Pompano Beach, Sunrise, Tamarac, Wilton Manors and unincorporated areas of Broward County, Florida. Comcast of Broward County serves the communities of Ft. Lauderdale, Broward, Lauderdale By The Sea, Oakland Park, Hallandale, and Sea Ranch Lakes, Florida. Dynamic Cablevision serves the communities of Coral Gables, Hialeah, Hialeah Gardens, Medley, Miami Springs, Sweetwater, Virginia Gardens, West Miami and the unincorporated areas of Dade County, Florida. Advocate Communications

broadcast signal carriage rules. WWFD-TV has filed an opposition to this petition to which Petitioners have replied.

### BACKGROUND

2. Pursuant to §614 of the Communications Act [Act] and implementing rules adopted by the Commission in its *Report and Order in MM Docket 92-259*,<sup>2</sup> a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience research organization.<sup>3</sup> An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.<sup>4</sup>

3. Under the Act, however, the Commission is also directed to consider changes in ADI 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 television market to better effectuate the purposes of this section.

In considering such requests, the 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

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serves the communities of Coral Springs and the surrounding unincorporated areas of Broward County, Florida.

<sup>2</sup>8 FCC Rcd 2965, 2976-2977 (1993).

<sup>3</sup>Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

<sup>4</sup>Because of the topography involved, certain counties are divided into more than one sampling unit. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. For a more complete description of how counties are allocated, see Arbitron's *Description of Methodology*.

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; and

(IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.<sup>5</sup>

4. The legislative history of this provision indicates that:

where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI 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 areas in which they serve and which 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>6</sup>

5. The Commission provided guidance in its *Report and Order in MM Docket 92-259, supra*, to aid decision making in these matters, as follows:

For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (e.g., rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The

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<sup>5</sup>Communications Act of 1934, as amended, §614(h)(1)(C)(ii), 47 U.S.C. §534(h)(1)(C)(ii).

<sup>6</sup>H.R. Rep. No. 628, 102d Cong., 2d Sess 97 (1992).

final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.<sup>7</sup>

6. As for deletions of communities from a station's ADI, the legislative history of this provision indicates that:

The provisions of [this subsection] reflect a recognition that the Commission may conclude that a community within a station's ADI may be so far removed from the station that it cannot be deemed part of the station's market. It is not the Committee's intention that these provisions be used by cable systems to manipulate their carriage obligations to avoid compliance with the objectives of this section. Further, this section is not intended to permit a cable system to discriminate among several stations licensed to the same community. Unless a cable system can point to particularized evidence that its community is not part of one station's market, it should not be permitted to single out individual stations serving the same area and request that the cable system's community be deleted from the station's television market.<sup>8</sup>

7. In adopting rules to implement this provision, the Commission indicated that changes requested 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> The rules further provide, in accordance with the requirements of the Act, that a station not be deleted from carriage during the pendency of an ADI change request.<sup>10</sup>

#### MODIFICATION ARGUMENTS

8. Petitioners systems are located in Broward and Dade Counties, Florida and are part of the Miami-Ft. Lauderdale, Florida ADI. Key West, the city of license of WWFD-TV is also

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<sup>7</sup>8 FCC Rcd at 2977 (emphasis in original).

<sup>9</sup> H.R. Rep. 102-628, 102d Cong., 2d Sess. 97-98 (1992).

<sup>10</sup>8 FCC Rcd at 1977 n. 139. Viewership information cited herein is county data rather than community-specific data. However, absent evidence that such data is not fairly reflective of viewing in the actual communities in question, we accept such data as probative in cases of this type.

<sup>10</sup>47 C.F.R. §76.59.

part of the same ADI and is approximately 124 miles from the closest of the Petitioners' communities.

9. In support of their modification request, Petitioners argue that WWFD-TV should be excluded from carriage on their systems because the station does not satisfy any of the four statutory market modification factors. First, the station has no record of historic carriage. Petitioners state that since they have never carried the station, there would be no disruption of established viewing patterns nor would the station be deprived of any existing audience. Secondly, Petitioners aver that WWFD-TV does not provide local coverage to their systems due to the following: a) WWFD-TV is geographically remote; Petitioners' cable systems are in the northeastern part of the Miami ADI while WWFD-TV is in the southwestern most tip; b) WWFD-TV's Grade B contour is more than 100 miles from Coral Gables, the closest of the cable communities, and more than 150 miles from Coral Springs, the farthest community, and the station is not generally viewable off-the-air in either cable or noncable homes;<sup>11</sup> and c) Petitioners have not been able to identify any of WWFD-TV's programming<sup>12</sup> including any programming providing "local coverage" of the systems' communities. Third, Petitioners assert that local programming is already being provided by the Miami market stations they currently carry,<sup>13</sup> all of which provide local news, sports and community programming. In addition, all of the systems carry two 24-hour local Spanish-language stations, WSCV and WLTV, which include daily local news and programming relevant to the cable communities.<sup>14</sup> Finally, Petitioners assert that the station has no audience in Dade or Broward Counties. WWFD-TV is not even listed in the 1995 *Nielsen Station Index*. The fact that the station's viewership is too low to be reported is buttressed by its absence in the listings of the southern Florida edition of *TV Guide*. In conclusion, Petitioners maintain that requiring carriage of WWFD-TV on their systems would limit their ability to provide the programming and services desired by their customers.

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<sup>11</sup>Petitioners state that they are unsure as to whether WWFD-TV will be able to deliver a signal to the their systems even by nonbroadcast means. In letters requesting carriage, continue Petitioners, WWFD-TV stated that it went on the air on May 1, 1996 and will deliver its signal by fiber to the systems' principal headends on July 1, 1996. However, Petitioners state that they have been unable to locate a license application for WWFD-TV in FCC records.

<sup>12</sup>Petitioners states that all WWFD-TV has stated in its requests for carriage is that it is a Spanish-language station.

<sup>13</sup>The local stations carried by the systems include: WPBT (PBS), WFOR (CBS), WTVJ (NBC), WSVN (FOX), WBFS (Ind.), WPLG (ABC), WSCV (Ind.), WLTV (Ind.), WCTD (Ind.), WXEL (ETV), WYHS (Ind.), WLRN (ETV), WHFT (TBN), WDZL (Ind.), WPTV (NBC), WPEC (ETV), and WFLX (FOX). In addition, Continental carries locally-produced Community TV which offers public, educational and government access programming; Comcast carries local TV-3 and a government access channel; and Dynamic carries local programming on Miavision (Variedad), Metro-Dade Television (WDTV), Cable TAP 36 and Cable TAP 37, a Local Information/City Access channel, the Sunshine Network and the Sports Channel (both of which offer regional sports coverage), and Dynamic Illustrated, a television classified service. Subscribers in Coral Gables also receive University of Miami programming.

<sup>14</sup>Among the daily local news shows provided on these two stations is "Noticias: which is broadcast from 7-7:30 a.m., 6-6:30 p.m. and 11-11:30 p.m. Monday-Friday.

10. In opposition, WWFD-TV states that pursuant to the Cable Television Consumer Protection and Competition Act of 1992 [92 Act]<sup>15</sup> and the Commission's *Report and Order, supra*, it is entitled to assert mandatory carriage rights on every cable system located within the Miami ADI. Also, Section 614 of the Act creates an affirmative duty for every cable operator in an ADI to carry the signals of the local commercial television stations in its market. Stations such as WWFD-TV, it continues, represent precisely the kind of station Congress intended to have must carry rights. While modification of ADI markets are allowed, WWFD-TV argues that there is a heavy burden of proof on petitioners who move to exclude communities from a station's market. In the instant case, WWFD-TV maintains that Petitioners have not met this burden. WWFD-TV states that it provides a valuable program service which caters specifically to the communities served by Petitioners. It points out that its programming is produced by SUR Corporation, which is the only "Latin American television cable programmer" serving the Miami market 24-hours a day.<sup>16</sup> WWFD-TV states that the majority of the Hispanic residents of the Miami ADI have migrated from various Latin American countries and that their various interests and needs are not being met by the more traditional Spanish-language programming services offered by the Petitioners. Moreover, it maintains that as an international city, Miami, and indeed the entire southern Florida region (i.e. the Miami ADI), is tied together in a geopolitical sense with the Latin American countries. Thus, daily knowledge of Latin American news is of crucial local importance to the residents and businesses in the Miami market. WWFD-TV states that as proof that its programming occupies a special niche in the community and is not duplicated anywhere in the market, it should be noted that numerous individuals in Petitioners' communities who are extremely upset regarding the potential unavailability of its signal have petitioned the Commission for relief from this exclusion.<sup>17</sup>

11. WWFD-TV argues further that no showing has been made that Petitioners' cable systems would lose a local station already carried, or contemplated to be carried, in the event its request is not granted or that there is insufficient channel capacity to accommodate WWFD-TV's carriage. WWFD-TV maintains that Petitioners' attempts to limit must carry rights to specific coverage areas is misplaced given that Congress adopted an economic market approach, as designated by the ADI, rather than using distance or Grade B coverage to determine carriage rights. WWFD-TV points out that Petitioners ignore the fact that its signal is already being carried by multiple cable systems in Dade and Broward Counties<sup>18</sup> despite having recently

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<sup>15</sup>Pub. L. No. 102-385, 106 Stat. 1460 (1992).

<sup>16</sup>According to WWFD-TV, the programming produced by SUR Corporation includes live newscasts, political and journalistic programs, comedy and popular entertainment shows from leading broadcast networks of over 12 Latin American countries, local and special sports programming (like World Cup Soccer), a one-hour talk show broadcast 6 days a week from Miami, "Jaime Bailey en Vivo," consisting of interviews with major Hispanic personalities (who either reside in or have ties to the Miami area), and a one-hour local religious program each week.

<sup>17</sup>WWFD-TV submits the translation of a radio editorial and various letters regarding the loss of SUR programming.

<sup>18</sup>These systems have a combined total of 600,000 subscribers.

gone on-the-air.<sup>19</sup> Moreover, WWFD-TV states that it has attracted a substantial amount of business from advertisers located in Dade and Broward Counties who clearly see WWFD-TV as part of their economic market. In addition, WWFD-TV argues that its station can scarcely have ratings or carriage history since it only began carriage in May, 1996. In any event, it avers, the Commission has held that low ratings and lack of historic carriage are of limited relevance in petitions seeking exclusion. While WWFD-TV admits that it does not provide Grade B service to the systems' communities, it states that the Commission has specified that Grade B contours are "not to be used as any absolute measure of the scope of a station's market."<sup>20</sup> Further, the carriage of other local stations by Petitioners does not lessen the communities' need of WWFD-TV's programming or obviate Petitioners' statutory obligations.<sup>21</sup> Finally, WWFD-TV maintains that geographical remoteness is not a recognized basis for modification and is an argument that is undercut by the fact that WWFD-TV is currently carried on cable systems throughout the ADI which not only surround Petitioners' systems but are equally distant. WWFD-TV concludes that since stations licensed in Dade and Broward Counties are historically carried in Key West, it is only seeking reciprocal treatment as a station in the same market.

12. In reply, Petitioners state that WWFD-TV offers little evidence to counter their petition's arguments. While WWFD-TV argues for reciprocity in light of the fact that Dade and Broward County stations are carried on Key West systems, such carriage only shows that these stations and Key West communities share a common ADI. Petitioners contend, however, that such a common link does not justify compelling their cable systems herein to carry a station on the opposite side of an ADI, particularly when that station does not even claim a local nexus to the systems' communities. Petitioners state that the Commission has specifically rejected WWFD-TV's argument that requires a petitioner to show that a "local" station would have to be dropped if the market modification is not granted.<sup>22</sup> Moreover, WWFD-TV's reliance on the Commission's language in its *Report and Order* that a cable operator's must carry obligation takes priority over carriage of cable programming services ignores the clear intention that such priority should be given "to the carriage of local broadcast signal" (emphasis supplied).<sup>23</sup> Petitioners do not dispute that the Act presumes must carry rights throughout a station's ADI, however, WWFD-TV ignores the section which states that market modification provisions "reflect a recognition that . . . a community within a station's ADI may be so far removed from the station that it cannot be deemed part of the station's market."<sup>24</sup> They also add that a cable operator's must carry

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<sup>19</sup>WWFD-TV points out that, despite Petitioners' assertions, it is listed in cable guides throughout the Miami ADI.

<sup>20</sup>See *Chronicle Publishing*, 10 FCC Rcd 9474, 9483 n. 27 (1995).

<sup>21</sup>See *Time Warner Cable*, 11 FCC Rcd 8047 (1996).

<sup>22</sup>See *Dynamic Cablevision of Florida, Ltd., et al.*, DA 96-1291, para. 20-22, (released August 20, 1996).

<sup>23</sup>See *Report and Order in MM Docket 92-259*, 8 FCC Rcd at 2988.

<sup>24</sup>H.R. Rep. No. 628, 102d Cong., 2d Sess. 97 (1992).

obligation may be excused where a cable system "can point to particularized evidence that its community is not part of one station's market. . . ." <sup>25</sup>

13. Petitioners re-state that WWFD-TV fares poorly under the four statutory criteria, the primary reason being that the station fails to establish any nexus with the communities served by the systems. While WWFD-TV implies that somehow the statutory criteria do not apply here, <sup>26</sup> Petitioners argue that it is entirely appropriate for the Commission to consider these factors in its analysis. They state that the only evidence offered by WWFD-TV to establish a local nexus is its "unique programming" resulting from its recent affiliation with Latin American programmer, Canal SUR. Petitioners note, however, that the Commission recently ruled in a virtually identical case <sup>27</sup> that this programming is not "local programming specifically directed to the subject communities." Thus, Petitioners maintain that while WWFD-TV's programming may be of general interest to both Hispanic and non-Hispanic alike, the fact remains that its "local coverage" consists of only one locally-produced talk show. Indeed, they aver, WWFD-TV's arguments in this regard only serve to highlight its misunderstanding of the underlying goals of the must carry rules where the relevant question is not whether programming is of general interest, but whether it covers local matters. In addition, WWFD-TV's list of advertisers, it is said, is meaningless for purposes of establishing local coverage as there is no evidence that any of these advertisers are from the systems' communities or are targeting those communities. Further, Petitioners argue that WWFD-TV ignores the fact that all of Petitioners' systems carry two local Spanish-language channels; this evidence rebuts WWFD-TV's assertion that it is the only 24-hour source for Spanish-language programming in the ADI. The radio editorials and letters of concern from residents referenced by WWFD-TV, which petitioners suggest were obviously solicited by purposes of this pleading, actually address the potential loss of Canal SUR's programming as a result of its decision to switch its affiliation from WEYS to WWFD-TV, and not by any action of Petitioners. Moreover, its carriage on other cable systems in the market, it is argued, says absolutely nothing about WWFD-TV's coverage of the specific communities served by the systems herein.

14. In a supplement to its opposition, WWFD-TV submits copies of hundreds of complaints registered by local cable subscribers to Petitioners' systems regarding their decision not to carry WWFD-TV. It argues that since it has already demonstrated in its opposition that three of the four statutory factors don't apply here, the only remaining applicable factor is local service. WWFD-TV maintains that its lack of Grade B service is immaterial given the reality that it provides programming of specific local interest and import to viewers in the relevant communities. This interest is demonstrated, it continues, by the following factors: a) the unusually high amount of carriage for a new station on surrounding cable systems; b) the large

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<sup>25</sup>Id. at 98.

<sup>26</sup>In essence claiming that the absence of historical carriage and local viewing are irrelevant and avoiding the issue of lack of local coverage by downplaying its lack of Grade B coverage and geographical distance.

<sup>27</sup>See, *Dynamic Cablevision of Florida, Ltd, supra*, at para. 20.



number of local advertisers; c) the ongoing controversy created by Petitioners' failure to carry WWFD-TV which is reflected in radio editorials, letters to the *Miami Herald Spanish Edition*, and the hundreds, if not thousands of complaint letters by subscribers unable to obtain WWFD-TV. WWFD-TV submits that the Commission cannot ignore this outpouring of local sentiment. In addition, WWFD-TV avers that the Commission's decision in *Dynamic Cablevision of Florida, Ltd., supra*, should not be held as an example here since the Commission has stated that it "judge[s] the merits of market modifications on a case-by-case basis."<sup>28</sup> In any event, WWFD-TV states, the evidence provided by WEYS in *Dynamic* was different in substance and magnitude than that of the evidence which was presented herein.<sup>29</sup> WWFD-TV argues that the key to the case is found in Congress' stated "objective to ensure that television stations be carried in the areas in which they serve and which form their economic market."<sup>30</sup> Given the fact that there are substantially more Hispanic residents in the particular cable communities served by Petitioners than in either Key West or all of Monroe County,<sup>31</sup> WWFD-TV maintains that it is clear that its Spanish-language programming is directed to Petitioners' residents and that those same residents perceive this to be true.

15. Petitioners request in reply that WWFD-TV's supplement be stricken as it not permitted by the Commission's rules and the station did not file for leave to accept an authorized pleading. In any event, Petitioners state that the complaint letters contained therein are irrelevant to this proceeding. Almost all, they continue, are undated form letters which do not show any nexus between the station's programming and the systems' communities nor is there any proof that they come from subscribers to Petitioners' systems.<sup>32</sup> Moreover, such letters should not be given any weight since as the Commission no longer regulates program format, which can be changed by the station at will,<sup>33</sup> it is irrelevant what type of format is being advocated by WWFD-TV's form letters. Finally, WWFD-TV's argument that it satisfies the local programming factor because there are more Hispanics residing in Broward and Dade Counties than in Key

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<sup>28</sup>See *Time Warner Cable*, 10 FCC Rcd 8040, 8043, n.20 (1995).

<sup>29</sup>Certainly, states WWFD-TV, WEYS did not document that hundreds and thousands of local subscribers viewed its programming.

<sup>30</sup>H.R. Rep. 628, 102d Cong., 2d Sess. at 97.

<sup>31</sup>WWFD-TV states that the U.S. Census Reports for 1990 show that Key West had a Hispanic population of 5,909 out of a total population of 23,137, while Monroe County had a Hispanic population of 9,580 out of a total of 78,024. In contrast, Dade County had a Hispanic population of 953,427 out of a total population of 1,937,092 and Broward County a Hispanic population of 108,439.

<sup>32</sup>According to Petitioners' estimates, even if the letters do come from their subscribers, the approximately 450 letters supplied by WWFD-TV in Attachment C to its supplement represent less than 0.6% of Dynamic's 84,067 subscribers, 0.1% of Comcast's subscribers, 0.06% of Coral Springs's subscribers and 0.1% of Continental's subscribers.

<sup>33</sup>See *In the Matter of Development of Policy Re: Changes in the Entertainment Formats of Broadcast Stations*, 60 FCC 2d 858 (1976), *aff'd sub nom. FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981).

West is similarly irrelevant since such demographics fail to address whether WWFD-TV offers local programming to the specific communities herein.

16. WWFD-TV notes in reply that in a recent decision<sup>34</sup> the Commission denied a Motion to Strike a supplement "noting, *inter alia*, that the information provided in the Supplement was not available prior to the earlier filing deadline and that there was a lack of any apparent injury to the adversary." In this case, WWFD-TV states that the information in its supplement was not available earlier. Therefore, the Commission should accept it in order to obtain as complete a record as possible for this proceeding.

#### MUST CARRY ARGUMENTS

17. In the complaints filed by WWFD-TV, it requests the Commission to order the Petitioners' systems to carry its signal for the following reasons: a) Its complaints were timely filed. WWFD-TV states that it requested carriage on the various cable systems by letters dated May 13, 1996 in which it notified the operators that it would deliver a broadcast quality signal to the systems' headends by July 1, 1996. All of the cable operators failed to respond to this letter, but instead jointly filed their market modification petition to exclude WWFD-TV from their systems. WWFD-TV states that it filed its complaints within 60 days of Petitioners' waiver request and the July 1st delivery date of its signal.<sup>35</sup> b) As a commercial television station operating within the same ADI market as Petitioners' systems, WWFD-TV is entitled to carriage pursuant to Section 614 of the Communications Act and the Commission's Rules.<sup>36</sup> c) WWFD-TV has fully complied with all of the requirements for mandatory carriage of its signal on the various systems -- all of the systems are devoting less than one-third of their channel capacities to mandatory signal carriage, WWFD-TV delivers a good quality signal to the cable systems' headends via fiber optic cable, and no other currently-carried television stations substantially duplicates its programming.

18. In their oppositions, Petitioners incorporate by reference the arguments raised in their market modification request and argue that the complaints herein cannot be resolved until such request is resolved. They state, however, that should their modification request be denied, they will fully comply with their must carry obligations in this regard.

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<sup>34</sup>See *Busse Broadcasting Corporation*, DA 86-809 (released May 31, 1996).

<sup>35</sup>§76.7(c)(4)(iii)(B).

<sup>36</sup>See *Report and Order in MM Docket No. 92-259*, 8 FCC Rcd 2965, 2972-74 (1993).

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**DISCUSSION**

19. We will grant Petitioners' modification request.<sup>37</sup> Based on geography and other relevant information, we believe that the cable systems herein are sufficiently removed from WWFD-TV that their communities ought not be deemed part of the station's market for mandatory carriage purposes.<sup>38</sup>

20. As an initial matter, we note that, according to the legislative history of the 1992 Cable Act, the use of ADI market areas is intended "to ensure that television stations be carried in the areas which they service and which form their economic market."<sup>39</sup> Changes may be sought and granted by the Commission "to better effectuate the purposes" of the mandatory carriage requirements.<sup>40</sup> The 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 area involved is warranted. When viewed against this backdrop, and considering all of the relevant factual circumstances in the record, we believe that the instant Petitioners' deletion petition appears to be a legitimate request to redraw ADI boundaries to make them congruous with market realities. Petitioners' actions do not reflect an intention to skirt their signal carriage responsibilities under the 1992 Cable Act<sup>41</sup> and the Commission's Rules, nor do they evidence a pattern of discriminatory conduct against the station.

21. We now turn to the market modification analysis. At the outset, we note that WWFD-TV has no history of carriage in the cable communities in question (factor I), has virtually no over-the-air audience in the cable communities (factor IV), and provides none of the cable communities with service as measured by its Grade A or Grade B service contours (factor II). Given the statutory directive, weight must be given to these factors, but that must be done bearing in mind that the objective of the Section 614(h) process is to "better effectuate the purposes" of the broadcast signal carriage scheme. Thus, with respect to the question of historical carriage patterns, attention must be paid to the circumstances from which such patterns developed. Some stations have not had the opportunity to build a record of historical carriage for specific reasons that do not necessarily reflect a judgment as to the geography of the market involved. Thus, the historical carriage factor -- to the extent such lack of carriage is reflective of factors outside of the shape of the market -- is not by itself controlling in these circumstances

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<sup>37</sup>We will accept WWFD-TV's late-filed supplement and treat it as an informal pleading in view of the fact that the Petitioners would not be prejudiced by its acceptance.

<sup>38</sup>H.R. Rep. 102-628, at 97-98.

<sup>39</sup>H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

<sup>40</sup>47 U.S.C. §534(h).

<sup>41</sup>As noted in paragraph 18 above, all of the cable systems have stated that they will comply with the mandatory carriage request from WWFD-TV should their petition be denied.

because such an implementation of the 1992 Cable Act would, in effect, prevent weaker stations, that cable systems had previously declined to carry, from ever obtaining carriage rights. As such, the evidence relating to this statutory factor does weigh in favor of excluding Petitioners' cable system communities from the WWFD-TV's market but is not outcome determinative by itself.

22. With regard to viewership, we recognize that, as a newer station, WWFD-TV has not had as much time as other stations to build an audience.<sup>42</sup> As noted in paragraph 5 above, viewing patterns and/or significantly viewed surveys to be relied upon in ADI requests are ideally to be conducted on a community-by-community basis. The methodology inherent in such surveys is considerably stricter and a better indication of actual viewing patterns in individual communities. In any case, even when we accept county-wide surveys, it should be taken into account that stations can take up to three years to establish their viewing patterns. That is why §76.54 of our rules allows viewership data from the first three years of operation.<sup>43</sup> Congress could not have intended for such stations to have cable communities deleted from their market solely because their audience shares are not as significant as those of several other stations with which they compete. If this were the case, the 1992 Cable Act would have designated a ratings mechanism, rather than ADIs, as the primary determinant for broadcast signal carriage.

23. On the other hand, a station's local service to cable communities is one of the relevant factors to consider in this particular case that is not influenced by the type or age of the station involved or historical carriage. Service may be measured through geographic means: by examining the distance between the station and the cable communities subject to the deletion request and taking into account natural phenomena such as waterways, mountains and valleys which tend to separate communities. A station's broadcast of local programming, which has a distinct nexus to the cable communities, is also evidence of local service. Finally, a station's Grade A or Grade B contour coverage is an additional indicator of local service and we will weigh the presence or absence of such technical coverage accordingly.<sup>44</sup>

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<sup>42</sup>We recognize that WWFD-TV, which broadcasts foreign-language programming, could be categorized as a specialty station under the Commission's former signal carriage rules and is capable of "offer[ing] desirable diversity of programming," that typically attract limited audiences (*First Report and Order in Docket 20553*, 58 FCC 2d 442, 452 (1976), *recon. denied*, 60 FCC 2d 661 (1976)). We also note that the two Spanish-language stations presently carried by Petitioners garner significant ratings in the ADI. According to the 1996 *Nielsen Station Index*, WSCV achieves a 7% share and a 27% net weekly circulation in Dade County and an unreported share and a 3% net weekly circulation in Broward County. WLTV achieves a 13% share and a 35% net weekly circulation in Dade County and a 1% share and a 5% net weekly circulation in Broward County. In any event, due to the fact that WWFD-TV broadcasts Spanish-language programming in an area which has a high proportion of Hispanic residents, the logic of the "specialty station" analysis is questionable.

<sup>43</sup>For instance, since WWFD-TV went on-the-air in May 1996, it could use data through May 1999 to establish significantly-viewed status in particular counties.

<sup>44</sup>As a general matter, Grade B coverage demonstrates service to cable communities and serves as a measure of a station's natural economic market. See *Broadcast Signal Carriage Issues*, 8 FCC Rcd at 2977. See also *Amendment of Section 76.51 (Orlando-Daytona Beach-Melbourne, and Cocoa, Florida)*, 102 FCC 2d at 1070 ("We believe that television stations actually do or logically can rely on the area within their Grade B contours for

24. The availability of other broadcasters in the market is another factor to consider in market deletion cases such as this one. Where a cable operator is seeking to delete a station's mandatory carriage rights in certain communities within its ADI, and it is clear that the station is not providing local service to those communities, the issue of local coverage by other stations becomes a factor which we will give greater weight than in cases where a party is seeking to add communities.<sup>45</sup> Here, the Miami affiliates, as well as the Spanish-language stations WSCV and WLTV, which have a closer economic nexus and cast a City Grade signal over the cable communities, provide subscribers residing in the cable communities with targeted local newscasts and public affairs programming.

25. Considering the above, the task in this proceeding is how to reflect the statutory factors in our decision while at the same time recognizing the difficulties of applying these factors to stations of recent origin or more specialized formats. A decision based strictly on the four statutory modification factors -- historical carriage, service, other stations' presence, and audience information -- would simply exclude the Petitioners' communities from WWFD-TV's market. However, even taking into account the difficulties of applying these factors to new stations and those with specialized formats, it is hard to find supporting evidence and to conclude that Petitioners' communities warrant inclusion. The fact that a station is new or of specialized appeal does not mean that its logical market area is without limits or that it should be exempt from the Section 614(h) market modification process. Given the difficulty of direct reliance on the statutory factors (which demonstrate only limited connections between the cable communities and WWFD-TV), we focus here more heavily on basic geographic and technical features, mileage and Grade B contour, that provide the best available alternative evidence of the market boundaries of the station subject to deletion here.

26. WWFD-TV, which signed on-the-air May 1996, broadcasts the programming of SUR Corporation, a signal originating in South America, which broadcasts a mix of foreign-language, sports and general entertainment programming. The station's city of license is Key West, Florida. It lacks measured audience (cable and non-cable) and historic carriage in all of the cable communities that Petitioners have requested be deleted and all of the communities involved are outside of WWFD-TV's Grade B contour. While the programming offered by WWFD-TV can be considered to be of general interest to the ADI's Hispanic population as a whole, neither it nor the locally-produced programming WWFD-TV cites in its opposition, can be considered to be specifically relevant to Petitioners' communities. It is also generally undisputed that each of the cable communities receives an abundance of local news, sports, and public affairs broadcasts from other closer stations. Further, the communities served by

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economic support.").

<sup>45</sup>*Accord, Petition of Time Warner Cable*, 10 FCC Rcd 8625 (1995) (taking into account the proximity of television stations licensed to Hagerstown, MD and surrounding communities in granting the operator's request to delete Arlington, VA station WTMW from the Washington, DC ADI with regard to its cable systems serving Martinsburg, WV and Chambersburg, PA).

Petitioners's systems are all more than 100 miles outside of WWFD-TV's predicted Grade B contour. WWFD-TV is on average 152 miles away from Continental Cablevision's communities, 126 miles away from Dynamic's communities, 150 miles away from Comcast's communities and 160 miles away from Advocate's communities. Finally, it should be noted that while WWFD-TV submitted a list of the cable systems on which it is carried, it did not provide a list of the specific communities served by each system. In addition, the list of advertisers provided by WWFD-TV fails to establish a specific connection to Petitioners' communities.

27. Given the evidence as to the statutory factors, the obvious lack of evidence concerning service to the communities in question, and the lack of specific programming service to these communities, we conclude that it is logical and consistent with the objective of Section 614 of the Communications Act to delete Petitioners' cable communities from the WWFD-TV market for mandatory carriage purposes.

#### ORDERING CLAUSES

28. Accordingly, **IT IS ORDERED**, pursuant to §614(h) of the Communications Act of 1934, as amended, 47 U.S.C. §534, and §76.59 of the Commission's Rules, 47 C.F.R. §76.59, that the petition for special relief (CSR-4762-A) filed on behalf of Continental Cablevision of Jacksonville, Inc. d/b/a Continental Cablevision of Broward County, Inc., Comcast of Broward County, Inc., Dynamic Cablevision of Florida, Ltd., and Advocate Communications, Inc., d/b/a Coral Springs Cable TV **IS GRANTED**.

29. **IT IS FURTHER ORDERED**, that WWFD-TV's complaints filed August 12, 1996 (CSR-4805-M, CSR-4806-M, CSR-4807-M and CSR-4808-M) against the above-listed cable systems **ARE DISMISSED** as moot.

30. This action is taken pursuant to authority delegated by §0.321 of the Commission's Rules, 47 C.F.R. §0.321.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson  
Deputy Chief, Cable Services Bureau