

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

In re:)	
)	
Advocate Communications, Inc. d/b/a)	CSR-4777-A
Cable TV of Coral Springs)	
)	
For Modification of the Miami-Ft.)	
Lauderdale, Florida ADI)	

MEMORANDUM OPINION AND ORDER

Adopted: November 6, 1996

Released: November 12, 1996

By the Deputy Chief, Cable Services Bureau:

INTRODUCTION

1. Advocate Communications, Inc. d/b/a Cable TV of Coral Springs ("Advocate"), in the captioned proceeding requests the Commission to modify the Miami-Ft. Lauderdale, Florida Area of Dominant Influence ("Miami ADI") of television broadcast station WEYS (CBC, Ch. 22), Key West, Florida. Specifically, Advocate requests that WEYS be excluded from the Miami ADI relative to its system serving the City of Coral Springs and the unincorporated areas of Broward County, Florida, for the purposes of the cable television mandatory broadcast signal carriage rules. WEYS filed an opposition to this petition to which Advocate replied.

BACKGROUND

2. Pursuant to §4 of the Cable Television Consumer Protection and Competition Act of 1992 ["1992 Cable Act"]¹ and implementing rules adopted by the Commission in its *Report and Order in MM Docket 92-259*,² 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.³ An ADI is a geographic market designation that defines each television

¹Pub. L. No. 102-385, 106 Stat. 1460 (1992).

²*Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, 2976-2977 (1993).

³Section 4 of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. 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*

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.⁴

3. Under the Act, however, the Commission is also directed to consider changes in market areas. Section 4 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 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 new 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.

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

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⁴Certain counties are divided into more than one sampling unit because of the topography involved. 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. Refer to Arbitron's *Description of Methodology* handbook for a more complete description of how counties are allocated.

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.

* * * *

[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.⁵

5. The Commission provided the following guidance in the *Report and Order* to aid decision making in these matters:

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 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.⁶

6. As for deletions of communities from a station's market, 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

⁵H.R. Rep. 102-628, 102d Cong., 2d Sess 97 (1992).

⁶8 FCC Rcd at 2977 (emphasis in original).

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.⁷

7. In adopting rules to implement this provision, the Commission indicated that requested changes should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.⁸ The rules further provide, in accordance with the requirements of the 1992 Cable Act, that a station not be deleted from carriage during the pendency of an ADI change request.⁹

MODIFICATION ARGUMENTS

8. Advocate's cable system is located in Coral Springs, Florida, Broward County, and is part of the Miami-Ft. Lauderdale, Florida ADI. Key West, the city of license of WEYS, is also considered to be part of the same ADI and is approximately 160 miles from Coral Springs, Florida.

9. In support of its petition, Advocate argues that WEYS should be excluded from carriage on its system because the station does not satisfy any of the four statutory market modification factors. First, the station has no record of historic carriage. Advocate states that since it has never carried the station, there would be no disruption of established viewing patterns nor would the station be deprived of any existing audience. Secondly, Advocate avers that WEYS does not provide local coverage to its system due to the following: a) WEYS is geographically remote; Advocate's cable system is in the northeastern part of the Miami ADI while WEYS is in the southwestern most tip; b) WEYS' Grade B contour is more than 150 miles from Coral Springs and the station is not generally viewable off-air in either cable or noncable homes; and c) WEYS offers programming which originates almost entirely from South America and provides no programming covering local issues. Third, Advocate asserts that the

⁷H.R. Rep. 102-628, 102d Cong., 2d Sess. 97-98 (1992).

⁸8 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. See, e.g., *RKZ Television, Inc.*, 8 FCC Rcd 8008, 8010 (1993).

⁹47 C.F.R. §76.59.

programming offered by WEYS is already being provided by the local Miami stations it carries,¹⁰ all of which provide local news, sports and community programming. In addition, its system already carries two 24-hour local Spanish-language stations, WSCV and WLTV, which include daily local news and programming relevant to the cable communities.¹¹ Finally, Advocate asserts that the station has no audience in Broward County. According to the 1995 *Nielsen Station Index*, WEYS is "reportable in the Daypart section only" with virtually no ratings in any of the other ratings sections. 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, Advocate maintains that requiring carriage of WEYS on its system would limit its ability to provide the programming and services desired by its customers.

10. In opposition, WEYS states that it is located in Key West (Monroe County) which is legitimately a part of the Miami ADI.¹² It argues that no showing has been made that Advocate's cable system 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 WEYS' continued carriage. WEYS maintains that cable operators' 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. To demonstrate that Broward County herein is part of WEYS' economic market, the station points out that: a) it airs a substantial number of advertisements place by Dade and Broward Counties' businesses; and b) the station can be viewed off-the-air by a significant portion of the total population and by a majority of the Hispanic population. WEYS argues that Advocate mistakenly relies on the fact that it has never carried the station since this is an argument that has been rejected as a matter of policy. Further, Advocate ignores the fact that WEYS has been historically carried by other cable systems in the Miami ADI since it went on the air on June 15, 1993.¹³ In a technical report on WEYS' coverage area,¹⁴ it was noted that out of the total population of the Miami ADI,¹⁵ the combined Grade B

¹⁰The local stations carried by Advocate include WPBT (PBS), WLTV (Ind.), WTVJ (NBC), WFOR (CBS), WSVN (FOX), WSCV (Ind.), WDZL (Ind.), WPLG (ABC), WBFS (Ind.), WLRN (PBS), WCTD (Ind.), WXEL (PBS), WYHS (HSN II), WFLX (FOX), and WHFT (Ind.).

¹¹Among 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.

¹²WEYS states that not only is it included in the Miami ADI by Arbitron, but it is also included by Nielsen in the Miami DMA.

¹³WEYS states that it has been carried on the Gold Coast cable system of Dade County since November 1994 and the Dynamic Cablevision of Dade County, Continental Cablevision of Jacksonville and Comcast of Broward County systems since December 1994. As a percentage of its total time on the air, WEYS avers that it can be said to have a long history of carriage.

¹⁴WEYS commissioned its technical report from the engineering firm of DuTreil, Lundin & Rackley. This report examined the signal of WEYS plus the signal of the two translator stations owned by the related corporation of Cayo Hueso Television -- Station W21BD, Channel 21, Pompano Beach, Florida (Broward County), and Station W55BV,

contours of WEYS and its associated translators¹⁶ cover a total population of 1,527,941.¹⁷ Out of this number, WEYS reaches approximately 841,391 subscribers, 682,086¹⁸ of whom are Hispanic.

11. WEYS further argues that Advocate mischaracterizes the relevance of the ADI's Hispanic population and ignores the ties the station has with this group. WEYS asserts that its programming cannot be considered "foreign" because Hispanics make up a significant percentage of the overall population in the Miami ADI, and the station serves these Hispanics with exclusive Latin American programming 24-hours a day.¹⁹ With regard to audience shares, WEYS states that it garners significant ratings during the period when locally-produced programming is being shown.²⁰ The fact that its viewership is not as significant as those of the traditional networks or independents should not diminish its importance since, as a foreign-language specialty station, it is "capable of offer[ing] desirable diversity of programming" yet typically attracts limited audiences. Finally, WEYS argues that the licensee regulatory fee assessed by the Commission

Channel 55, Miami, Florida (Dade County). These translator stations are licensed to a separate company but by agreement between WEYS, the translator company and the program supplier, WEYS' signal is broadcast through the ADI/DMA. While WEYS states that it is not seeking must carry status for these translators, it argues that §74.731(a) of the Commission's Rules authorizes the use of translators as an acceptable method to provide service.

¹⁵According to the 1990 Census, the total population of the Miami ADI is 3,270,541, 1,071,414 of which is Hispanic.

¹⁶See footnote 14 above.

¹⁷According to the technical report supplied by WEYS, after FCC approval of translators W21BD and W55BV's switch from a non-directional antenna system to a circularly polarized directional antenna system, WEYS' signal can be expected to cover a total population of 3,270,541, 731,793 of whom are Hispanic.

¹⁸This equals 46.7% of the entire ADI, 63.7% of the Hispanic population, with off-air reception of WEYS' signal in all three counties. The expected coverage after the translator upgrades (see footnote 23 above) will equal 65% of the total ADI and 68.3% of the Hispanic population.

¹⁹WEYS states that up until July 31, 1996, it broadcast the programming by SUR Corporation (a Hispanic network), which at the time WEYS was affiliated with it, the only Latin American television cable programmer serving the Miami ADI. SUR re-transmits live daily newscasts and the most popular shows from the leading networks from South and Central America. Its programming also includes public opinion, talk shows, comedy, children and sports program. Two program, "Jaime Bayly en Vivo" and "Viva La Comedia" are produced in Miami. On August 1, 1996, WEYS states that it changed its affiliation from SUR to CBS TeleNoticias, a 24-hour, worldwide, continuously-update Spanish-language news service. In addition, WEYS produces its own locally-produced, Spanish-language community affairs program "Desde Los Cayos" which features guests and topics of interest to residents of Monroe, Dade and Broward Counties.

²⁰The referenced Nielsen data shows that between 8 p.m. to 11 p.m. WEYS is viewed throughout the ADI by 2% of the households and during 10 p.m. to 11 p.m. it is viewed by 4% of the households.

is an additional factor that weighs against granting the deletion requests.²¹ It avers that since it is required to pay a fee in the amount of \$15,950 as part of the Miami ADI, it would be unfair and inappropriate to remove it as a must carry station in part of that same ADI.

12. In reply, Advocate states that WEYS offers little evidence to counter its petition's arguments. While Advocate argues that it does not claim that WEYS is not part of the Miami ADI, it contends that such a common link does not justify compelling it to carry a station on the opposite side of its ADI, particularly when that station does not even claim a local nexus to the system communities. Advocate discounts WEYS' arguments that a community can never be excluded from an ADI unless doing so leads to the additional carriage of more local stations. It argues that the 1992 Cable Act provides that market modifications may "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."²² It also adds that a cable operator's must carry obligation may be excused where a cable system "can point to particularized evidence that its community is not part of one station's market"²³

13. Advocate re-states that WEYS fares poorly under the four statutory criteria. First, WEYS provides no evidence of historic carriage, but instead attempts to "borrow" a history of carriage from other cable systems serving other communities. Advocate avers that this does not obscure the fact that WEYS has never been carried on its system. Second, WEYS' use of translators²⁴ to deliver its signal in certain areas cannot overcome its geographic remoteness since its coverage must be determined solely by its own location and signal transmission.²⁵ According to Advocate, translators have no independent carriage rights so they cannot be used to establish a "local presence" for purposes of local coverage.²⁶ Third, while WEYS' programming²⁷ 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. Fourth, WEYS' list of advertisers is meaningless for purposes of establishing local coverage as this list fails to show that those advertisers reach or expect to reach the system's residents. Fifth, WEYS ignores the fact that

²¹Section 1.1153 of the Commission's Rules requires that commercial television stations are assessed a fee based upon the size of the Arbitron market in which they are listed.

²²H.R. Rep. No. 628, 102d Cong., 2d Sess. 97 (1992).

²³Id at 98.

²⁴Advocate points out that although WEYS claims the translators are owned by a related corporation, Cayo Hueso Television, the 1996 Television Factbook indicates that W55BV is owned by Dacom Company.

²⁵Advocate points out that WEYS is silent regarding its own over-the-air coverage independent of the translators.

²⁶See, e.g., *Time Warner New York City Cable Group*, 11 FCC Rcd 6528 (1996).

²⁷While WEYS claims that it switched its programming affiliate from SUR to CBS Telenoticias to "further strengthen its program offerings," it does not demonstrate specifically how this fact has enhanced its local offerings.

Advocate's system carries two local Spanish-language channels; this evidence rebuts WEYS' statement that the cable operator does not provide programming for the market's Hispanic population and contradicts the station's statement that it is the only 24-hour source for Spanish-language programming in the ADI. Sixth, while WEYS attacks Advocate's use of Nielsen data for the entire ADI, it uses that same data to support its claim that it has "[v]ery significant viewing throughout the ADI. . . ." However, the station does not state that it has any appreciable viewership in the specific cable communities herein. Finally, Advocate argues that the existence of regulatory fees is irrelevant in the market modification analysis; if WEYS feels it is saddled with an unfair fee, it should seek a waiver of that requirement.

14. In a subsequent submission,²⁸ WEYS incorporates by reference exhibits attached to its petition for reconsideration in *Dynamic Cablevision of Florida, Ltd.*²⁹ These exhibits reflect: a) The changes in WEYS' programming since August 1, 1996 -- WEYS is now transmitting the programming of CBS TeleNoticias, an around-the-clock Spanish-language news service headquartered in Hialeah, Florida.³⁰ b) The competitive posture of the Key West stations in the Miami ADI -- without carriage throughout the ADI, it is not possible for the Key West stations to compete with the larger market stations. c) The strong economic link between Key West stations and the communities in Dade and Broward Counties -- according to the station's operations manager, approximately 90% of WEYS' advertising revenues have been obtained through local advertisers seeking to reach Spanish-speaking communities in those two counties.

DISCUSSION

15. We will grant Advocate's request. Based on geography and other relevant information, we believe that the system's communities are sufficiently removed from WEYS that they ought not be deemed part of the station's market for mandatory carriage purposes.³¹

16. 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."³² Changes may be sought and granted by the Commission "to better effectuate the purposes" of the mandatory

²⁸WEYS filed this submission pursuant to Rule 1.65.

²⁹DA 96-1291 (released August 20, 1996).

³⁰The declarations of Julio Rumbaut, a consultant from Rumbaut & Company, and Oscar Ibarra, operations manager of WEYS, indicate that under its new programming WEYS broadcast the first debate between a leader of South Florida's Cuban Exile Community and a member of the Castro government. They indicate that this program achieved high ratings in the Miami market. Mr. Rumbaut and Mr. Ibarra also indicate that WEYS provided the only Spanish-language coverage of the national political conventions.

³¹H.R. Rep. 102-628, at 97-98.

³²H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

carriage requirements.³³ 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 operator's deletion petition appears to be a legitimate request to redraw ADI boundaries to make them congruous with market realities. Advocate's action does not reflect an intention to skirt its signal carriage responsibilities under the 1992 Cable Act and the Commission's Rules nor does it evidence a pattern of discriminatory conduct against the station.

17. We now turn to the market modification analysis. With regard to historic carriage, we note that WEYS has no history of cable carriage on Advocate's cable system despite being on the air since 1993. While we recognize that several other market cable systems may currently be carrying WEYS, we note that all of these cable systems³⁴ have filed ADI modification requests to delete WEYS from their systems. All but one of these petitions, that of Gold Coast, have been granted.³⁵ Further, it should be noted that all of these systems have stated in their market modification requests that they commenced carriage of WEYS only after a mandatory carriage request was presented pursuant to the 1992 Cable Act. Therefore, the fact that some Miami ADI systems may carry WEYS when mandated by law is not highly probative of establishing a history of carriage for our purposes here.

18. Advocate has also shown that WEYS does not provide local service to the communities in question. WEYS is geographically distant from the subject cable system with Coral Springs, site of the system headend, 160 miles away. WEYS does not place either a Grade A or Grade B contour over the cable communities.³⁶ While we recognize that the translators which retransmit WEYS' signal may encompass some of the cable communities in question, translators do not have carriage rights under Section 614 and given all the circumstances here do not evidence that the cable communities are within the station's natural market, especially in densely populated areas. We also note that the two translators that retransmit WEYS' programming, are by WEYS' own admission, owned by another entity and not by WEYS itself. We also do not find that WEYS currently provides local programming specifically directed to the subject communities. While the programming that it does offer can be considered to be of

³³47 U.S.C. §534(h).

³⁴See footnote 13 above.

³⁵The market modification requests of Dynamic Cablevision of Florida, Ltd. (CSR-4722-A) and Continental Cablevision of Jacksonville, Inc. d/b/a Comcast of Broward County, Inc. and Continental Cablevision of Broward County, Inc. (CSR-4707-A) were granted on August 9, 1996. See, *Dynamic Cablevision of Florida, Ltd., supra*. The petition filed by Rifkin/Narragansett South Florida, CATV Limited Partnership, d/b/a Gold Coast Cablevision (CSR-4776-A) is currently pending.

³⁶We have held that the local service requirement is satisfied if the station's Grade B contour covers the community. See 8 FCC Rcd at 2981.

general interest to the ADI's Hispanic population as a whole, neither it nor the locally-produced programming WEYS cites in its opposition, is claimed to be specifically relevant to Advocate's system. Further, it should be noted that the list of advertisers provided by WEYS fails to establish a specific connection to Advocate's communities. While the station's operations manager alleges that 90% of the station's revenue comes from these same advertisers, he does not provide any figures in support of this allegation.

19. We also believe that Advocate's carriage of other local television stations provides support for the action requested in this particular case. Where a cable operator is seeking to delete a station's mandatory carriage rights in certain 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. Here, Advocate carries two other Hispanic stations, WLTV (Ch. 23), Miami, Florida, and WSCV (Ch. 51), Ft. Lauderdale, Florida, which have a closer economic nexus, cast a City Grade signal over the cable communities, and provide more focused local programming, than WEYS. Their carriage also belies WEYS' contention that one of Advocate's motives in requesting deletion was a bias against its Hispanic programming. These market facts, coupled with the distance between the cable communities and WEYS, supports Advocate's arguments under the third factor.

20. It is also apparent that WEYS has no significant reported audience share in the communities in question. While WEYS may have reportable ratings during certain dayparts in the ADI as a whole, we do not find such evidence rises to a level sufficient to satisfy the fourth market modification factor, particularly when, according to the 1995 *Nielsen Station Index*, WEYS is not even listed for Broward County. Moreover, WEYS' reliance on its "specialty station" status as an explanation of its failure to establish significant ratings is contradicted by the high ratings achieved by the other two Spanish-language stations, WLTV and WSCV.³⁷ In any event, to the extent an area is involved that has a high proportion of Hispanic residents, the logic of the "specialty station" analysis is questionable.

21. Finally, WEYS' payment of a regulatory fee pursuant to §1.1153 of the Commission's rules is irrelevant in this context. We agree with Advocate that WEYS should seek relief under the Commission's fee rules if such payment is believed to be unfair or unduly burdensome.

ORDERING CLAUSES

22. 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,

³⁷According to the 1995 *Nielsen Station Index*, WSCV achieves a 7% share of total viewing hours and a 27% net weekly circulation in Dade County, while in Broward County it achieves a 0% share of total viewing hours and a 3% net weekly circulation. WLTV garners a 13% share of total viewing hours and 35% net weekly circulation in Dade County, and a 1% share of total viewing hours and 5% net weekly circulation in Broward County.

that the petition for special relief filed on behalf of Advocate Communications, Inc. IS **GRANTED**.

23. 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