

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

In the Matter of)	
)	
CABLEVISION SYSTEMS CORPORATION)	CSR-4666-M
)	
Petition for Declaratory Ruling)	
)	
U.S. CABLE TELEVISION GROUP, L.P.)	CSR-4791-N
)	
Petition for Waiver of the Network Program Nonduplication Rules)	
)	
U.S. CABLE TELEVISION GROUP, L.P.)	CSR-4792-A
)	
For Modification of the ADIs of Stations WAVY-TV and WITN-TV)	

MEMORANDUM OPINION AND ORDER

Adopted: November 6, 1996

Released: November 21, 1996

By the Deputy Chief, Cable Services Bureau:

INTRODUCTION

1. Cablevision Systems Corporation ["Cablevision"] has filed the captioned petition (CSR-4666-M) seeking a ruling that Cablevision need not honor the retransmission consent elections of Stations WOOD-TV (NBC, Channel 8), Grand Rapids, Michigan, and WAVY-TV (NBC, Channel 10), Portsmouth, Virginia. Both WOOD-TV and WAVY-TV have opposed Cablevision's petition, and Cablevision has replied. Subsequently, U.S. Cable Television Group, L.P. ["U.S. Cable"], a subsidiary of Cablevision, filed both a petition for special relief (CSR-4791-N) seeking a waiver of the Commission's network program nonduplication rules vis-a-vis WAVY-TV, and also a petition for modification of the markets of Stations WAVY-TV and WITN-TV (NBC, Channel 7), Washington, North Carolina (CSR-4792-A). WAVY-TV has opposed U.S. Cable's petitions, and Cablevision has replied.¹ Because these cases arise from interrelated fact patterns involving the same parties, we are consolidating them.

¹ The Commission has also received several letters from area residents concerning U.S. Cable's petitions.

2. These cases arise from carriage disputes between Cablevision and its subsidiary U.S. Cable on the one hand, and WOOD-TV and WAVY-TV on the other. Although WOOD-TV had been carried on Cablevision's systems pursuant to retransmission consent agreements, these agreements expired in January 1996. Shortly after the expiration of the agreements, Cablevision filed its petition for declaratory ruling, which seeks Commission agreement with Cablevision's claim that, for various reasons, the retransmission consent elections of WOOD-TV and WAVY-TV are invalid, and that the stations have therefore defaulted to must-carry status with respect to Cablevision's and U.S. Cable's systems. In addition, because WAVY-TV has been asserting its rights to network program nonduplication protection on U.S. Cable's systems, U.S. Cable is required to black out the duplicating network programming of WITN-TV. U.S. Cable has filed two petitions in response, one (CSR-4791-N) to waive its obligation to provide nonduplication protection to WAVY-TV, and another (CSR-4792-A) to modify the markets of both WAVY-TV and WITN-TV, removing the communities served by U.S. Cable from WAVY-TV's market and placing them into the market of WITN-TV. Should U.S. Cable succeed in its petitions, it would no longer be obligated either to carry WAVY-TV or to provide the station with nonduplication protection.

BACKGROUND

3. *Retransmission Consent.* Pursuant to §325 of the Communications Act and implementing rules adopted by the Commission in its *Report and Order in MM Docket 92-259*,² no commercial television broadcast signal may be retransmitted without the express authority of the originating station. This authority may be expressed by a station's election of mandatory carriage rights pursuant to §614 of the Act, or by negotiating with a cable television system the right to retransmit the station's signal. The choice between retransmission consent and must-carry rights was initially made by commercial stations by June 17, 1993, to be effective October 6, 1993 through December 31, 1996.³ Subsequent elections have been made by October 1, 1996, to take effect January 1, 1997; and will be made every three years thereafter. Television stations having must-carry rights who fail to make an election by the specified deadline are deemed to have elected must-carry status for the subject three-year period.⁴

4. *Market Modifications.* Should a commercial television broadcast station opt to assert mandatory carriage rights, it may do so 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

² 8 FCC Rcd 2965 (1993).

³ 47 C.F.R. §76.64(f)(1), (2). New television stations are to make their initial election between 60 days prior to commencing broadcast and 30 days after commencing broadcast, to take effect 90 days following the date the election is made. 47 C.F.R. §76.64(f)(4).

⁴ 47 C.F.R. §76.64(f)(3).

defined by the Arbitron audience research organization.⁵ 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.⁶

5. Under the Act, however, the Commission is also directed to consider changes in 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 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 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

⁵ Section 4 of the Cable Television Consumer Protection and Competition Act of 1992 ["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 Guide*.

⁶ Certain 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.

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

6. The legislative history of 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 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.⁷

7. The Commission provided guidance in its *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

⁷ H.R. Rep. No. 628, 102d Cong., 2d Sess. 97 (1992).

surveys may need to be supplemented with additional data concerning viewing in cable homes.⁸

8. As for deletion 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 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.⁹

9. 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.¹⁰ The rules further provide, in accordance with the requirements of the Act, that a station not be deleted from carriage during the pendency of a market area change request.¹¹

10. *Network Program Nonduplication Protection.* The Commission's rules also protect the distribution rights that may be afforded to network programming. A network program is defined as "any program delivered simultaneously to more than one broadcast station regional or national, commercial or noncommercial."¹² Television broadcast station licensees are entitled to protect the network programming for which they have contracted in a particular market by exercising blackout rights against more distant television broadcast stations carried on a local cable system that serves more than 1000 subscribers. Stations may assert these rights regardless of whether their signals are carried by the cable system in question. A cable operator need not

⁸ 8 FCC Rcd at 2977 (emphasis in original).

⁹ H.R. Rep. No. 628, 102d Cong., 2d Sess. 97-98 (1992).

¹⁰ 8 FCC Rcd at 2977 n.139. Viewership data 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.

¹¹ 47 C.F.R. §76.59.

¹² 47 C.F.R. §76.5(m).

delete the network programming of a station that is "significantly viewed" within the cable community in question.¹³

PETITION FOR DECLARATORY RULING (CSR-4666-M)

Summary of Pleadings

11. We turn first to Cablevision's petition for declaratory ruling. Cablevision seeks a ruling that, because of perceived deficiencies in the retransmission consent elections of WOOD-TV and WAVY-TV, Cablevision may carry the signals of these stations as must-carry signals. With respect to WOOD-TV, Cablevision notes that its subsidiary, Cablevision of Michigan, holds franchises to serve the communities of Comstock Township, Cooper Township, Kalamazoo, Kalamazoo Township, Oshtemo Township, Parchment, Pavilion Township, and Portage, Michigan. These communities are located in the Grand Rapids-Kalamazoo-Battle Creek, Michigan ADI. Cablevision states that on June 17, 1993, WOOD-TV elected carriage by retransmission consent on Cablevision's systems serving Cooper Township, Kalamazoo, Oshtemo Township, and Parchment. Cablevision states that WOOD-TV made no carriage elections on Cablevision's Comstock Township, Kalamazoo Township, Pavilion Township, and Portage cable systems. Cablevision therefore claims for these four systems that WOOD-TV has acquired must-carry status by default. Although Cablevision has entered into various retransmission consent agreements with WOOD-TV over the past years, the last agreement expired on January 15, 1996, at which time Cablevision ceased carriage of WOOD-TV at the station's request. Cablevision states that it subsequently became aware of WOOD-TV's incomplete carriage elections which, in Cablevision's opinion, render WOOD-TV's elections of retransmission consent invalid as inconsistent with its defaulted must-carry status. Accordingly, Cablevision states that it recommenced carriage of WOOD-TV on January 24, 1996, and filed the instant petition for declaratory ruling the next day.¹⁴

¹³ 47 C.F.R. §76.92(f).

¹⁴ Cablevision also argues that WOOD-TV has made inconsistent carriage elections in Kalamazoo, because WOOD-TV elected carriage by retransmission consent on Cablevision's Kalamazoo system, but also elected to be carried as a must-carry signal on the cable system serving the campus of Western Michigan University [WMU], a state university located in Kalamazoo. WOOD-TV contends that WMU is a separate franchise area from Kalamazoo. WOOD-TV has subsequently noted in a letter dated October 10, 1996 that it has elected carriage by retransmission consent on both systems for the period January 1, 1997 through December 31, 1999. Accordingly, we find this portion of Cablevision's petition for declaratory ruling to be moot. We also note that WOOD-TV has submitted a letter from Don M. Schmidt, City Attorney for Kalamazoo, stating that no franchise is needed from Kalamazoo for the WMU system because the system crosses no right-of-way. Pursuant to the 1996 Act, "the term 'cable system' . . . does not include . . . a facility that serves subscribers without using any public right-of-way . . ." 47 U.S.C. §522(7). Thus, there is a question as to whether the school facility is in fact a cable system with respect to which a common election is required. Finally, we note that on November 6, 1996, Cablevision filed a supplemental pleading arguing that in September 1996 WOOD-TV made inconsistent carriage elections in Comstock Township, electing retransmission consent with respect to Cablevision's Kalamazoo system which serves Comstock Township, but electing must-carry status on another system serving Comstock Township operated by Adelphia Cablevision

12. Cablevision also notes that among the North Carolina communities served by Cablevision's subsidiary U.S. Cable, while WAVY-TV elected retransmission consent in several franchise areas served by U.S. Cable's Colerain, Conway, Edenton, and Rich Square, North Carolina cable systems, WAVY-TV failed to make complete franchise-by-franchise carriage elections. Cablevision states that, with respect to U.S. Cable's Colerain system -- serving Colerain and Powellsville -- WAVY-TV only made an election for Powellsville. With respect to the Conway system -- serving Conway, Jackson, Seaboard, and Severn -- WAVY-TV only made an election for Conway. With respect to the Edenton system -- serving Edenton, Chowan County, Hertford, Perquimans County, and Winfall -- WAVY-TV only made elections for Edenton and Chowan County. With respect to the Rich Square system -- serving Rich Square, Bertie County, Kelford, Lewiston, Northampton County, Roxobel, and Woodland -- WAVY-TV only made elections for Rich Square, Bertie County, Kelford, Lewiston, and Roxobel. Cablevision argues that although WAVY-TV elected retransmission consent with respect to each system, the station's failure to make complete community-by-community elections for each of the relevant communities has caused WAVY-TV to default to must-carry status in each community of U.S. Cable's systems for which the station did not make a specific election. Cablevision therefore raises the question of how such technically integrated systems are to carry a station's signal when part of a system is subject to must-carry and part to retransmission consent with respect to the same signal. Cablevision contends that Commission policy with respect to technically integrated cable systems that serve communities in more than one ADI allows a signal that is eligible for must-carry status in only one of the ADIs to be carried as a must-carry signal throughout the technically integrated cable system, and also notes that the Commission has determined that the technical consolidation of two cable systems subject to different elections from the same broadcaster allows the broadcaster to re-elect its status should a retransmission consent agreement not be obtainable.¹⁵ Cablevision maintains that as it is the Commission's strong view that the "default status" for a station that fails to make a carriage election is must-carry status, this should also be the status of a station that fails to make an accurate and complete election, citing *Gannon University Broadcasting, Inc.* ["Gannon"].¹⁶

13. In opposition, WOOD-TV and WAVY-TV note that Cablevision operates only one cable system in Michigan, providing service from a single headend to the several communities in Kalamazoo County noted above. The stations note that Cablevision itself, in a letter to WOOD-TV dated May 26, 1993, informed WOOD-TV that Cablevision's "system" was carrying WOOD-TV, and that in a subsequent conversation the communities served were identified as Cooper, Kalamazoo, Oshtemo, and Parchment. Accordingly, WOOD-TV states that it made

Associates, L.P. [Adelphia]. However, the copy of the Comstock franchise for Adelphia submitted by Cablevision specifically states that the franchise area for Adelphia is only "the portion of [Comstock] Township not serviced by . . . Cablevision . . ." Accordingly, we cannot find that Cablevision has demonstrated that WOOD-TV has made inconsistent elections for overlapping franchise areas on the evidence presented.

¹⁵ 47 C.F.R. §76.64(j).

¹⁶ 10 FCC Rcd 8619 (1995).

retransmission consent elections with respect to these communities. Similarly, WAVY-TV states that it made its retransmission consent elections with respect to North Carolina systems identified to it by Cablevision.

14. The stations argue that Cablevision's carriage of WOOD-TV violates the 1992 Cable Act and the Commission's signal carriage rules, and that Cablevision should be sanctioned for these violations and for abusing the Commission's processes. The stations note that Cablevision accepted WOOD-TV's and WAVY-TV's carriage elections, raising no question concerning or objection to their validity for nearly three years. The stations further argue that a court settlement of a complaint filed by Cablevision against WOOD-TV arising from a dispute over Cablevision's carriage of WOOD-TV without the station's consent "acknowledged the validity of the retransmission consent election made by WOOD-TV and released all claims related to that election."¹⁷ The stations additionally maintain that Cablevision's failure to make a timely objection to the stations' carriage elections has waived Cablevision's right to object today, particularly as Cablevision either had actual knowledge of the alleged defects or could have discovered them through the exercise of ordinary diligence. The stations contend that the Commission has recognized that cable operators are responsible for accessing information in stations' public files that could affect the operators,¹⁸ and that no public interest justification exists to allow cable operators to sleep on their rights.

15. The stations deny that *Gannon* is precedential, for in that case the election notice in question was untimely and not sent pursuant to the rules, and the cable system immediately notified the station of its failures. The stations maintain that in the present case the election notices sent by WOOD-TV and WAVY-TV met the requirements of the rules: the notices were timely, and sent by certified mail to the cable system in question. The stations note that the rules only require notice on a "system-by-system basis," citing §76.64(h) of the Commissions Rules and the *Report and Order in MM Docket 92-259*.¹⁹ The stations contend that the fact that the notices which the stations sent failed to cover each specific franchise area served by Cablevision's systems is not evidence of a choice of a franchise-by-franchise election method that was incomplete. WOOD-TV and WAVY-TV state that the notices they sent in response to information supplied by Cablevision were fully consistent with the station's system-based carriage elections. The stations argue that there is no reason for the Commission to adopt a "default must-carry" policy that would penalize stations that make extra efforts, and to do so would create uncertainty and disputes. The stations maintain that the fact that the Commission's rules allow for a new election by a broadcaster in the case of the technical consolidation of two cable

¹⁷ The complaint cited is *Cablevision of Michigan, Inc. v. LCH Communications, Inc. d/b/a WOOD 8 Television*, Case No. E-93-3078-CP (Cir. Ct. for the County of Kalamazoo, filed October 18, 1993, dismissed April 13, 1994). The stations also argue that Cablevision stipulated not to raise claims related to this dispute in the future, and thus should be estopped from claiming now that WOOD-TV's retransmission consent election was defective.

¹⁸ See *MM Docket 92-259*, 8 FCC Rcd at 3003.

¹⁹ *Id.* at 2966.

systems subject to different elections from the same broadcaster (should a retransmission consent agreement not be obtainable) demonstrates that the Commission seeks to protect broadcasters' timely affirmative elections.

16. In reply, Cablevision notes that it only recently discovered the alleged deficiencies in the stations' carriage elections. Cablevision maintains that failure to raise objections to the stations' elections prior to this time cannot constitute grounds to waive its right to object, because this would contravene statutory policy.²⁰ Cablevision states that the dismissal order in *Cablevision of Michigan, Inc. v. LCH Communications, Inc. d/b/a WOOD 8 Television, supra*, cannot estop Cablevision from raising these issues today because the validity of WOOD-TV's carriage elections was not at issue in that case. Cablevision describes WOOD-TV and WAVY-TV as sophisticated broadcasters that should be held to strict compliance with carriage election requirements. Cablevision disputes the stations' interpretation of §76.64(h) of the Commission's Rules, and contends that the stations, having chosen to make carriage elections on a franchise-by-franchise basis, bear the responsibility of making such elections in a complete manner. Cablevision denies that there is any basis for sanctions to be imposed upon it.

Decision

17. Initially we note that we are not persuaded by WOOD-TV's and WAVY-TV's argument that the court settlement in *Cablevision of Michigan, Inc. v. LCH Communications, Inc. d/b/a WOOD 8 Television, supra*, is binding upon the issues before us as *res judicata*. That complaint arose specifically from allegations by Cablevision of a campaign by WOOD-TV to encourage Cablevision subscribers to terminate their cable service, and the dismissal order in the case -- a copy of which is submitted by the Stations -- specifically states that "this Order shall have no effect on the rights and obligations of the parties under their separate agreement related to the retransmission of Channel 8's signal."²¹ Accordingly, we turn to a resolution of the issues raised by Cablevision.

18. Cablevision argues that the carriage elections of WOOD-TV and WAVY-TV are incomplete and invalid because the elections failed to identify or be made with respect to every specific community served by Cablevision's systems. We disagree. As we stated in *MM Docket 92-259*, "television broadcasters on a *system-by-system* basis must make a choice once every three years whether to proceed under the mandatory carriage rules or to govern their relationship with cable operators by the retransmission consent requirement."²² We note, too, that §76.64(g) of the

²⁰ Cablevision cites *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 704 (1944) and *Nashoba Communications Limited Partnership No. 7 d/b/a Nashoba Cable Services v. Town of Danvers*, 703 F.Supp. 161, 165 (D.Mass. 1988). WOOD-TV and WAVY-TV note that this latter case was reversed on appeal: *Nashoba Com. Ltd. Partnership No. 7 v. Town of Danvers*, 893 F.2d 435 (1st Cir. 1990).

²¹ *Cablevision of Michigan, Inc. v. LCH Communications, Inc. d/b/a WOOD 8 Television, supra* n. 19, at 2.

²² 8 FCC Rcd at 2966 (emphasis added).

Commission's Rules refers to "one or more franchise areas served by a cable system," demonstrating an understanding in this context that a cable system -- to which notification of a carriage election is to be directed -- may serve more than one franchise area. Accordingly, we do not believe that either WOOD-TV or WAVY-TV was required to serve individual notices of carriage election on each community unit served by Cablevision's systems. Nor do we believe that the fact that WOOD-TV and WAVY-TV chose to do so in some cases required them to do so in each and every case. We note that the Commission has previously addressed the question of adequacy of system-by-system notification in the context of a request for declaratory ruling concerning the adequacy of certain sports program blackout notifications. We stated at that time that "parties may use principal community, or headend, or any other method reasonably likely to identify communities in which . . . protection is sought. If system identification by principal community . . . is chosen, this identification should suffice to identify the affected community units not encompassed in a community-by-community listing."²³ In the circumstances of the present case, we believe that WOOD-TV's and WAVY-TV's carriage election notifications were valid, and provided adequate identification of the affected community units.

19. With respect to WAVY-TV's and WOOD-TV's request that we impose sanctions upon Cablevision, we do not believe that Commission intervention in this fashion is warranted at this time, given the circumstances in which this question comes to us. We note that Cablevision did bring before the Commission a request for a ruling on this issue, and we find no indication that Cablevision is not willing to abide by our ruling in this matter. However, we caution Cablevision that, in the future, any confusion it may perceive in a station's documents concerning carriage elections and other matters can likely quickly be cleared up with a simple letter or telephone call, particularly in a situation as in the instant case, in which Cablevision did not question WAVY-TV's and WOOD-TV's carriage elections until more than two and a half years had passed since the elections were made.²⁴ We continue to expect a high degree of cooperation and good faith between cable television operators and parties seeking to exercise

²³ *Memorandum Opinion and Order in RM-4098*, 96 FCC 2d 1226, 1228 (1984).

²⁴ We are not unsympathetic with WOOD-TV's and WAVY-TV's concern that Cablevision did not raise any question concerning the validity of the stations' carriage elections until over two and a half years after the fact. Nevertheless, we note that the Supreme Court has held that "[w]here a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate." *Brooklyn Savings Bank v. O'Neil*, 324 U.S. at 704 (footnote omitted). Absent a specific legislative policy to allow for waivers of rights in a situation such as is before us, *see, e.g., U.S. v. Mezzanato*, 115 S.Ct. 797, 804 n. 4 (1995), we decline to find Cablevision estopped from raising its questions.

their rights under our rules.²⁵ In addition, should Cablevision not promptly comply with §76.64(a) of our rules, we will consider the imposition of appropriate sanctions.²⁶

PETITION FOR ADI MARKET MODIFICATION (CSR-4792-A)

20. Having addressed Cablevision's request for declaratory ruling, we turn next to U.S. Cable's petitions. We first address U.S. Cable's market modification petition, which, if successful, would eliminate WAVY-TV's ability to demand carriage on U.S. Cable's systems, and allow WITN-TV to claim such rights.

Summary of Pleadings

21. In support of its petition to modify the ADIs of WAVY-TV and WITN-TV, U.S. Cable contends that deletion of the communities served by its Camden County, Currituck County, and Edenton, North Carolina cable systems from the Norfolk-Portsmouth-Newport News-Hampton, Virginia ADI of WAVY-TV, and adding these communities to the Greenville-New Bern-Washington, North Carolina ADI of WITN-TV would better effectuate the purposes of the 1992 Cable Act.²⁷ U.S. Cable contends that this is because WAVY-TV provides no local news, public affairs, sporting, or other local programming for the communities, nor does it participate in local nonbroadcast activities related to the needs of U.S. Cable's subscribers, focusing instead on the needs and interests of the station's Virginia viewers. U.S. Cable asserts that many of the communities lie at the southern edge of WAVY-TV's Grade B contour, and are geographically distant from Portsmouth, Virginia, WAVY-TV's city of license.²⁸ U.S. Cable further states that Portsmouth is separated from U.S. Cable's communities by the Dismal Swamp National Wildlife Refuge and surrounding wetlands, which form a natural barrier between WAVY-TV and the communities in question. U.S. Cable argues, citing *Cablevision Systems Corporation*,²⁹ that this natural barrier, coupled with WAVY-TV's being licensed to a different state and its lack of

²⁵ See, e.g., *Memorandum Opinion and Order in RM-4098*, 92 FCC 2d 1058, 1064 (1982), *aff'd on recon. in pertinent part*, 96 FCC 2d 1226 (1984).

²⁶ See, e.g., *Continental Cablevision of New Hampshire, Inc.*, 53 RR 2d 747 (1983), *review denied*, 96 FCC 2d 926, *recon. denied*, 56 RR 2d 1360 (1984); *Retel TV Cable Co.*, 58 FCC 2d 975 (1976).

²⁷ These communities are Camden, Shiloh, and South Mills, North Carolina [Camden County system]; Aydlette, Barco, Coinjock, Currituck County, Grandy, Harbinger, Jarvisburg, Maple, Moyock, Point Harbor, Poplar Branch, Powells Point, Shawboro, and Tulls Bay, North Carolina [Currituck County system], and Chowan County, Edenton, Hertford County, Perquimans County, and Winfall, North Carolina [Edenton system].

²⁸ U.S. Cable states that the average distance of its communities from Portsmouth is over 43 miles, while Point Harbor lies as much as 60 miles away from Portsmouth. In addition, Portsmouth is approximately 57 miles from the Edenton system's principal headend, 47 miles from the Currituck County system's principal headend, and 36 miles from the Camden County system's principal headend.

²⁹ 11 FCC Rcd 6453 (1996).

service to the communities, warrants deletion of the communities from WAVY-TV's ADI. U.S. Cable claims that, though some of the communities may be relatively near to WAVY-TV's city of license, it is neither technically nor financially feasible to fragment U.S. Cable's small systems by deleting only these communities from the ADI. U.S. Cable acknowledges that it did carry WAVY-TV on its systems until October 6, 1993, and again from February 3, 1994 through January 15, 1996. U.S. Cable maintains, however, that this should not preclude the requested ADI modification in view of WAVY-TV's lack of service to the communities. U.S. Cable asserts that although WAVY-TV has some viewership in the communities served by the systems, this is attributable to the station's carriage of network programming, and not programming serving the local communities. U.S. Cable asserts that because it has dropped the station, deletion of the communities from WAVY-TV's ADI would not disrupt current viewing patterns, nor would it deprive WAVY-TV of existing cable audience in the communities. U.S. Cable states in addition that its subscribers receive a variety of programming of local interest from other stations.³⁰

22. U.S. Cable further argues that were it not for WAVY-TV's assertion of nonduplication protection, the systems' subscribers would receive programming of interest from WITN-TV. In addition, U.S. Cable notes that WITN-TV participates in eastern North Carolina fundraising and educational efforts, and that U.S. Cable's systems have carried WITN-TV for at least ten years. U.S. Cable notes that most of the Edenton system communities are encompassed by WITN-TV's Grade B contour, and the Camden County and Currituck County communities -- though beyond the station's Grade B contour -- can receive WITN-TV off-air. Still, U.S. Cable argues, WITN-TV's local programming and service more than compensates for any relative distance between the communities and the station, citing *Corporation for General Trade*.³¹ U.S. Cable states that WITN-TV is viewed on the cable systems serving the communities in question, and in those served by the Edenton system WITN-TV achieves higher average cumulative Nielsen ratings than does WAVY-TV. Accordingly, U.S. Cable contends that the communities served by the Camden County, Currituck County, and Edenton cable systems should be included in the ADI of WITN-TV.

23. In opposition to U.S. Cable, WAVY-TV argues that an evaluation of the station according to the statutory criteria for market modification does not support deletion of U.S. Cable's communities from the station's ADI. With respect to historic carriage, WAVY-TV notes that with the exception of a few months in late 1993 and early 1994, it was carried on U.S. Cable's Edenton system since August 1, 1981; on the Currituck County system since July 1, 1985; and on the Camden County system since September 1, 1985, until it was dropped from all

³⁰ U.S. Cable states that its Camden County, Currituck County, and Edenton systems carry Stations WVEC-TV (ABC, Channel 13) and WHRO (PBS, Channel 15), Hampton, Virginia; WTKR-TV (CBS, Channel 3) and WTVZ (Fox, Channel 33), Norfolk, Virginia; WGNT (Ind., Channel 27), Portsmouth, Virginia; and WUND-TV (PBS, Channel 2), Columbia, North Carolina, as well as cable local origination programming. In addition, the Edenton system carries Stations WRAL-TV (ABC, Channel 5), Raleigh, North Carolina; WNCT-TV (CBS, Channel 9), Greenville, North Carolina; and WCTI (ABC, Channel 12), New Bern, North Carolina.

³¹ DA 96-793 (released May 28, 1996).

three systems in January 1996. WAVY-TV notes that this period of carriage was predominantly prior to the imposition of must-carry rules pursuant to the 1992 Cable Act, indicating that the station's programming was valued and desired by U.S. Cable and its subscribers. Turning to the question of local service, WAVY-TV contends that many local markets encompass communities from two states that share common interests. In particular, WAVY-TV states that "many northeastern North Carolina residents commute daily to southeastern Virginia for work, shopping, entertainment and cultural activities." WAVY-TV notes that the U.S. Census Bureau recently included Currituck County in the Norfolk-Virginia Beach-Newport News Metropolitan Statistical Area [MSA], and Currituck County recently voted to join the Hampton Roads Chamber of Commerce. In addition, WAVY-TV notes that Nielsen recently moved Chowan County to the Norfolk-Portsmouth-Newport News, Virginia Designated Market Area [DMA] from the New Bern-Washington, North Carolina DMA. WAVY-TV states that its Grade B contour covers all of the communities at issue, which is sufficient to demonstrate local service to the communities. WAVY-TV also states that it is closer than is WITN-TV to the majority of the communities in question. WAVY-TV notes that Washington, North Carolina -- WITN-TV's city of license -- is separated from U.S. Cable's communities by Albemarle Sound and the East Dismal Swamp, while North Carolina residents regularly travel along highways through the Great Dismal Swamp to Virginia for work, shopping, and entertainment.

24. WAVY-TV cites specific examples of its programming to the area communities, including its hurricane and severe weather coverage,³² area news stories, basketball game broadcasts, and educational and informational programs. WAVY-TV also states that it participates in programs at North Carolina elementary schools and civic events. Given WAVY-TV's local service to the communities, the fact that other stations provide local coverage is not relevant to U.S. Cable's request to delete communities from WAVY-TV's ADI. WAVY-TV contends that local viewing patterns, which demonstrate viewer preference for WAVY-TV in the communities, are a significant factor in support of retaining the communities in their present ADI. Despite U.S. Cable's claim that WAVY-TV's viewership is due to its network programming, WAVY-TV states that its local 5:30 pm, 6:00 pm, and 11:00 pm newscasts garner significant viewership in Currituck County (13-20% share of total households), Camden County (24-34%), Chowan County (4-10%), and Perquimans County (11-27%). Similarly, states WAVY-TV, its 1995-96 over-the-air total viewing share of noncable homes in these counties ranged from 15% to 49%. In contrast, contends WAVY-TV, in Currituck and Camden Counties, WITN-TV has little -- if any -- reported audience share, including for its local news broadcasts, while in Chowan and Perquimans Counties (served by U.S. Cable's Edenton system) WAVY-TV either has similar viewing to WITN-TV or exceeds WITN-TV's viewership.

25. Turning to the question of adding the communities to WITN-TV's ADI, WAVY-TV notes that WITN-TV is on average 81.3 miles from the Currituck County communities

³² WAVY-TV notes in particular that it has invested in its own Collins-Doppler Radar, unlike WITN-TV, and that the U.S. Weather Service does not send weather warnings concerning Camden County, Currituck County, and Edenton to WITN-TV because of the station's distance from the communities.

(compared with WAVY-TV's 42.6 miles), 73.7 miles from the Camden County communities (compared with WAVY-TV's 35 miles), and 52 miles from the Edenton communities (compared with WAVY-TV's 49.4 miles). WAVY-TV argues that U.S. Cable has produced no evidence that WITN-TV serves communities in northeastern North Carolina, as opposed to providing general North Carolina programming. Viewing patterns, maintains WAVY-TV, show that there is little if any affinity between WITN-TV and U.S. Cable's communities. Given that U.S. Cable seeks to modify the ADIs only of WAVY-TV and WITN-TV, rather than all stations in WAVY-TV's market -- all of which U.S. Cable carries save for WAVY-TV and one other³³ -- WAVY-TV contends that it appears that U.S. Cable is utilizing its market modification petition to skew its retransmission consent negotiations with WAVY-TV, which is not the purpose for such petitions.

26. In reply, U.S. Cable argues that it is consistent with Commission precedent to consider in-state political, government, and public affairs coverage to be local service to communities within a given state. U.S. Cable maintains that the programming cited by WAVY-TV as local service to U.S. Cable's subscribers focuses on Virginia employers, the U.S. Navy, and traffic conditions to and from Virginia, and thus are of little concern to residents of eastern North Carolina. In addition, U.S. Cable argues that WAVY-TV's general regional weather stories are not of specific concern to residents of the communities served by U.S. Cable. U.S. Cable describes the amount of traffic between eastern North Carolina and southeastern Virginia cited by WAVY-TV as "at best a trickle," and states that Currituck County still belongs to the Outer Banks, North Carolina Chamber of Commerce. U.S. Cable denies that the inclusion of Currituck County in the Norfolk-Virginia Beach-Newport News MSA is relevant because this MSA is overbroad. U.S. Cable argues that while Grade B coverage may be probative of localism, other evidence such as that presented by U.S. Cable may overcome such an inference.

Decision

27. We shall deny U.S. Cable's petition for market modification. The evidence U.S. Cable submits, evaluated pursuant to the four statutory and other relevant factors, does not persuade us that the communities in question are not properly allocated to the Norfolk-Portsmouth-Newport News-Hampton, Virginia ADI. With regard to the first statutory factor, we note that U.S. Cable concedes that it has carried the signal of WAVY-TV on its cable systems for years. We further note that this history of carriage includes significant periods during which no mandatory carriage rules existed and thus no obligation to carry WAVY-TV was imposed on U.S. Cable. A pattern of carriage, in the absence of any carriage obligation, is a strong indication of interest in a signal and of the signal's market connection to the communities in question.³⁴ Nevertheless, U.S. Cable argues throughout its pleadings that WAVY-TV does not serve U.S. Cable's subscribers as well as does WITN-TV, a claim strongly disputed by WAVY-TV. Insofar

³³ This is Television Broadcast Station WJCB (Ind., Channel 49), Norfolk, Virginia.

³⁴ See *KTEN Television Limited Partnership*, 11 FCC Rcd 10355, 10361 (1996). We note as well that U.S. Cable has not sought to modify the Norfolk-Portsmouth-Newport News-Hampton, Virginia ADI with respect to any other station in that ADI, most of which stations are carried by U.S. Cable.

as this impacts upon the third statutory criterion -- whether other local stations serve the communities -- in general, we do not believe that Congress intended this third criterion to operate as a bar to a station's ADI claim whenever other stations could also be shown to serve the communities at issue. Rather, we believe that this criterion was intended to enhance a station's claim where it could be shown that other stations do not serve the communities at issue. Under such circumstances, a denial of carriage rights to the claiming station could deprive cable viewers of any broadcast signals that might provide programming geared to their communities. In this case, as other stations do serve the communities in question to varying extents, this enhancement factor would not appear to be applicable.

28. U.S. Cable's arguments are predominantly devoted to attempting to demonstrate that WAVY-TV does not actually provide local service to U.S. Cable's communities, and that geographic factors demonstrate that these communities are separate from WAVY-TV's market. U.S. Cable concedes that the communities in question are encompassed by WAVY-TV's Grade B contour. Many, in fact, are encompassed by the station's Grade A contour. This is normally sufficient to demonstrate that a station provides local service to a community.³⁵ U.S. Cable argues, however, that an examination of WAVY-TV's programming demonstrates that the station in fact does not provide coverage or other local service to the communities. We disagree. WAVY-TV has provided examples of such programming, including hurricane and severe weather coverage -- which includes U.S. Weather Service warnings not provided to WITN-TV -- as well as area news, sports, educational, and information programming. While U.S. Cable questions the community specificity of WAVY-TV's programming, it appears to be no less specific -- and in some cases more specific, including coverage of events in Camden County and Moyock -- than that of WITN-TV cited by U.S. Cable as being of interest to residents of "eastern North Carolina" and North Carolina in general. With respect to U.S. Cable's geographic arguments, we note that most of the communities in question are closer to WAVY-TV than to WITN-TV, and that WAVY-TV has demonstrated several indicia of affinity between its ADI and the communities in question. Though U.S. Cable places great reliance on the presence of the Dismal Swamp National Wildlife Refuge as a natural market barrier, it appears that area traffic is not impeded by this, and that Albemarle Sound, which borders the ADI and the communities in question to the south forms a significant natural barrier between U.S. Cable's communities and the remainder of eastern North Carolina to its south.

29. Turning to the fourth factor, that of area viewing patterns, it is clear that WAVY-TV garners considerable viewership in the communities in question, similar to or exceeding that of WITN-TV. In Camden and Currituck Counties, for example, Nielsen records no viewing of WITN-TV, while in Camden County WAVY-TV garners a 21 total share and a 90 total cume.³⁶ In Currituck County WAVY-TV garners a total share of 12 (a 10 share in cable households and

³⁵ *E.g.*, *MM Docket 92-259*, 8 FCC Rcd at 2977.

³⁶ These and the other figures in this paragraph are from Nielsen Station Index, *1995 County/Coverage Study: County Summary*, v. 2. Cume is the number of unduplicated homes that view the station at least once for 5 minutes during the measured period.

a 21 share in noncable households), as well as an 81 total cume and a 67 noncable cume. In counties in which Nielsen reports viewing for WITN-TV, WAVY-TV exceeds WITN-TV's viewership levels in Hertford and Perquimans County, and WAVY-TV exceeds WITN-TV's off-air viewership levels in Chowan County. In Hertford County, WAVY-TV achieves a 14 total share (a 13 share in cable households and an 18 share in noncable households) and an 82 total cume (an 84 noncable cume), while WITN-TV garners only a 6 total share (a 7 share in cable households and a 5 share in noncable households) and a 45 cume (a 33 noncable cume). In Perquimans County, WAVY-TV also achieves a 14 total share (a 9 share in cable households and a 15 share in noncable households) and a 72 total cume (a 76 noncable cume), while WITN-TV garners only a 2 total share (an 8 share in cable households and less than an 0.5 share in noncable households) and an 18 total cume (a 3 noncable cume). In Chowan County, though WITN-TV's total share is 11 and WAVY-TV's total share is 9, WAVY-TV's noncable share is 19 and WITN-TV's is 17 (WITN-TV's cable share is 7 and that of WAVY-TV is 2). Similarly, though WITN-TV's total cume in Chowan County is 58 and that of WAVY-TV is 41, WAVY-TV's noncable cume is 66 while WITN-TV's is 62. In all counties in question, WAVY-TV achieves much greater levels of viewership off-air than does WITN-TV. Contrary to U.S. Cable's claim, WAVY-TV's viewership appears equally attributable to the station's local programming as to the station's network programming.

30. Turning to the question of whether the communities served by U.S. Cable should be added to the ADI of WITN-TV, we find U.S. Cable's arguments to be unpersuasive. Although U.S. Cable demonstrates a history of carriage of WITN-TV on U.S. Cable's systems, we do not find, given the record as a whole presented to us, any sufficiently compelling justification to include the communities in the ADI of WITN-TV as well as that of WAVY-TV. As noted above, viewership data clearly indicates that WITN-TV garners significantly less viewing than WAVY-TV in the areas in question, with the exception of Chowan County. Even so, in Chowan County, WITN-TV's off-air viewership is clearly inferior to that of WAVY-TV, suggesting that WITN-TV's audience is boosted by cable carriage in this county. The third statutory factor, as other stations clearly serve the communities in question, is not applicable in the instant case. Finally, with respect to the question of local service, as noted above, WITN-TV's programming is described as being of interest to residents of North Carolina -- or at best eastern North Carolina -- in general, with no specificity to the communities in question. We note, too, that U.S. Cable concedes that most of the communities in question lie beyond WITN-TV's Grade B contour, and at relatively significant distances from the station (between 52 miles and 81.3 miles on average). In addition, Albemarle Sound provides a natural barrier between the communities served by U.S. Cable and the Greenville-New Bern-Washington, North Carolina ADI. Based upon the totality of the circumstances presented, we are not persuaded that these communities should be considered to be part of WITN-TV's ADI. As we found in *Cablevision Systems Corporation, supra*, the presence of such a barrier coupled with relatively significant distances between the station and the communities in question are strong arguments in favor of finding no relationship with the market in question.

PETITION FOR NETWORK NONDUPLICATION WAIVER (CSR-4791-N)*Summary of Pleadings*

31. In support of its petition to waive the Commission's network program nonduplication rules, U.S. Cable claims that WAVY-TV has manipulated its nonduplication rights in order to coerce U.S. Cable to enter into a retransmission consent agreement with WAVY-TV with respect to U.S. Cable's systems serving Currituck and Camden, North Carolina.³⁷ Because WAVY-TV has asserted its nonduplication rights, U.S. Cable notes that it has had to delete from its Currituck system the duplicating programming of WITN-TV, a North Carolina station which, U.S. Cable asserts, carries program of greater interest to U.S. Cable's subscribers than does WAVY-TV, which is a Virginia licensee. U.S. Cable states that it is financially incapable of carrying only WITN-TV's nonduplicative programming on the Camden system, and is not likely to be able to continue to afford to carry only this portion of WITN-TV's programming on the Currituck system. Accordingly, U.S. Cable claims that its subscribers are likely to lose all programming from WITN-TV. U.S. Cable argues that neither Congress nor the Commission intended for stations to manipulate the network nonduplication rules and the retransmission consent rules in order to obtain carriage in communities that are not local to a station and which do not wish to receive a station's signal. Rather, maintains U.S. Cable, citing the 1992 Cable Act and Commission documents implementing the Act,³⁸ the underlying premise of the signal carriage requirements is the preservation of local television service and local public interest programming. U.S. Cable maintains that it has demonstrated in its contemporaneously-filed petition to modify the ADI markets of WAVY-TV and WITN-TV (CSR-4792-A) that it is WITN-TV that is truly local to U.S. Cable's systems, and not WAVY-TV. Accordingly, U.S. Cable requests that the Commission grant a waiver exempting the communities served by U.S. Cable's Camden and Currituck systems from the application of WAVY-TV's network program nonduplication rights.

32. In opposition to U.S. Cable, WAVY-TV argues that U.S. Cable seeks to deny WAVY-TV its rights to network program nonduplication protection because U.S. Cable cannot reach a retransmission consent agreement with the station. WAVY-TV notes that in adopting the 1992 Cable Act, Congress intended for television broadcast stations to be able both to elect retransmission consent authority as well as to assert network nonduplication rights.³⁹ WAVY-TV

³⁷ U.S. Cable states that WAVY-TV also asserted nonduplication protection on U.S. Cable's Edenton, North Carolina system, a request U.S. Cable rejected because Edenton lies beyond WAVY-TV's zone of protection. U.S. Cable notes that it also rejected WAVY-TV's demand for protection on U.S. Cable's Camden system because that system serves fewer than 1000 subscribers, and §76.95(a) of the Commission's rules exempts systems serving fewer than 1000 subscribers from compliance with nonduplication requests. U.S. Cable states, however, that the Camden system is only 50 subscribers away from reaching the 1000-subscriber mark, at which time the system will no longer be exempt from WAVY-TV's demand.

³⁸ *Memorandum Opinion and Order in MM Docket 92-259*, 9 FCC Rcd 6723, 6747 (1994); *Report and Order in MM Docket 93-8*, 8 FCC Rcd 5321, 5326 (1993).

³⁹ WAVY-TV cites S. Rep. No. 92, 102d Cong., 1st Sess. 38 (1991).

contends that its assertion of its nonduplication rights is consistent with the Commission's rules and the 1992 Cable Act, and U.S. Cable's dissatisfaction with its retransmission consent negotiations does not constitute grounds for Commission intervention. WAVY-TV notes that its city of license "is only 36 and 47 miles from the Camden and Currituck county systems, respectively. In contrast, [WITN-TV's city of license] is a whopping 73 miles and 81 miles from the Camden and Currituck county systems." WAVY-TV further notes that Camden and Currituck counties are largely within the station's Grade A contour, and entirely within the station's Grade B contour, and lie entirely outside of WITN-TV's Grade B contour. In addition, WAVY-TV states that it achieves high viewership in these counties, while U.S. Cable's own documentation shows that WITN-TV achieves no reportable audience share in the counties. WAVY-TV states that it provides local programming, weather coverage, events coverage, and sports telecasts, while U.S. Cable simply claims that WITN-TV is local to the counties because they are in the same state. WAVY-TV contends that U.S. Cable, as a subsidiary of Cablevision, should be able to afford to carry WITN-TV's local programming, and offers no evidence to support its assertion that it cannot do so.

33. In reply, U.S. Cable denies that it is abusing the Commission's processes, and argues that Commission intervention is warranted to allow U.S. Cable to carry WITN-TV's programming, which U.S. Cable maintains is truly local to eastern North Carolina.

Decision

34. We shall deny U.S. Cable's petition for waiver of the network program nonduplication rules. In adopting the current nonduplication rules, the Commission noted its concern that the rules "operate to foster competition among the various program providers and promote a greater diversity of programming for viewers."⁴⁰ Nothing submitted by U.S. Cable suggests to us that our rules are not operating as contemplated in this instance. WAVY-TV, which is a local signal to U.S. Cable's communities, has legitimately asserted its right to network program nonduplication protection. U.S. Cable is not prohibited by WAVY-TV's exercise of these rights from carrying nonduplicative programming from WITN-TV or any other source. U.S. Cable, a subsidiary of Cablevision, offers nothing more than its own bare assertion that it cannot afford to carry such WITN-TV programming. This has long been held to be insufficient justification for waiver.⁴¹

⁴⁰ *Report and Order in Gen. Docket 87-24*, 3 FCC Rcd 5299, 5320 (1988), *on recon.*, 4 FCC Rcd 2711 (1989).

⁴¹ *See, e.g., Robin Cable Systems, L.P., d/b/a Palmetto Cablevision*, 10 FCC Rcd 6670 (1995); *Chambers Cable of Oregon, Inc.*, 5 FCC Rcd 5640, 5641 (1990); *Teleprompter of Quincy*, 83 FCC 2d 431, 438 (1980).

ORDERING CLAUSES

35. In view of the foregoing, we find that grant of Cablevision's petition and that grant of U.S. Cable's petitions is not in the public interest.

36. Accordingly, IT IS ORDERED, That the petition for special relief (CSR-4666-M) filed January 25, 1996 by Cablevision Systems Corporation IS DISMISSED AS MOOT to the extent indicated in footnote 14, *supra*, and in all other respects IS DENIED.

37. IT IS FURTHER ORDERED, That cablevision Systems Corporation SHALL COMPLY with §76.64(a) of the Commission's rules.

38. IT IS FURTHER ORDERED, That the petition for special relief (CSR-4791-N) filed July 12, 1996 by U.S. Cable Television Group, L.P. IS DENIED.

39. IT IS FURTHER ORDERED, That the petition for special relief (CSR-4792-A) filed July 12, 1996 by U.S. Cable Television Group, L.P. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau