

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

In re:)	
)	
Gulf & Pacific Communications L.P.)	CSR-5101-A
)	
For Modification of the Miami-Ft. Lauderdale, Florida ADI)	
)	
Complaint of Hispanic Keys Broad- casting Corp.)	CSR-5085-M
)	
Request for Carriage)	

MEMORANDUM OPINION AND ORDER

Adopted: December 17, 1997

Released: December 19, 1997

By the Deputy Chief, Cable Services Bureau:

INTRODUCTION

1. Gulf & Pacific Communications L.P. ("Gulf & Pacific") 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, Gulf & Pacific requests that WWFD-TV be excluded from the Miami ADI relative to the community of Weston, Florida, for the purposes of the cable television mandatory broadcast signal carriage rules. WWFD-TV has filed an opposition to this petition to which Gulf & Pacific has replied. In a separate but related proceeding, WWFD-TV filed a must carry complaint against Gulf & Pacific for carriage on the operator's Weston cable system. We will jointly consider these cases to resolve the signal carriage rights of WWFD-TV on Gulf & Pacific's cable system.

BACKGROUND

2. Pursuant to §614 of the Communications Act and implementing rules adopted by the Commission in its *Report and Order in MM Docket 92-259*,¹ 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.² 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

¹8 FCC Rcd 2965, 2976-2977 (1993).

²Section 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*.
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viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.³

3. 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

(IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.⁴

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.

³Because 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*.

⁴Communications Act of 1934, as amended, §614(h)(1)(C)(ii), 47 U.S.C. §534(h)(1)(C)(ii).

* * * *

[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 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 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 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

⁵H.R. Rep. No. 628, 102d Cong., 2d Sess 97 (1992).

⁶8 FCC Rcd at 2977 (emphasis in original).

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

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.⁸ 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.⁹

MODIFICATION ARGUMENTS

8. Gulf & Pacific's system is located in Broward County, Florida and is part of the Miami-Ft. Lauderdale, Florida ADI. Key West, the city of license of WWFD-TV is also part of the same ADI and is approximately 135 miles from the cable system's headend.

9. In support of its modification request, Gulf & Pacific argues that WWFD-TV 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. Gulf & Pacific 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, Gulf & Pacific maintains that WWFD-TV does not provide local coverage to the communities its system serves due to the following: a) WWFD-TV is geographically remote; Gulf & Pacific's cable system is 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 Broward County, and more than 135 miles from Weston, Gulf & Pacific's headend site, c) the station is not generally viewable off-the-air in either cable or noncable homes; and d) WWFD-TV does not carry any programming providing "local coverage" of the systems' communities.¹⁰ Third, Gulf & Pacific asserts that local programming is already being provided by the Miami market stations it currently carries,¹¹ all of which provide local news, sports and community programming. Finally, Gulf & Pacific argues that the station has no audience in Broward County.¹² The fact that the station's viewership is too low to be reported is buttressed by its absence in the listings of the *Herald*, a local newspaper and the southern Florida edition of *TV Guide*. In conclusion, Gulf & Pacific maintains that requiring carriage of WWFD-TV on its system would limit its ability to provide the programming and services desired by its customers.

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.

⁹47 C.F.R. §76.59.

¹⁰Gulf & Pacific states that it is aware that WWFD-TV now broadcasts English-language programming which consists primarily of syndicated programming (i.e., reruns).

¹¹The local stations carried by the system include: WPBT (PBS), WFOR (CBS), WPTV (NBC), WTVJ (NBC), WSVN (FOX), WBFS (Ind.), WPLG (ABC), WPEC (CBS), WLTV (Ind.), WDZL (Ind.), WLRN (PBS), WCTD (Ind.), WXEL (PBS), WHFT (Ind.), WSCV (Ind.), and WFLX (FOX).

¹²Gulf & Pacific submits a study conducted by Media Strategies which could find no ratings for WWFD-TV in either cable or non-cable homes in Broward County.

10. In opposition, WWFD-TV states that pursuant to the Cable Television Consumer Protection and Competition Act of 1992¹³ 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 Gulf & Pacific has not met this burden. WWFD-TV states that it provides a valuable program service which caters specifically to the community served by Gulf & Pacific. It points out programming such as "This Morning in South Florida," which covers events in Broward County as well as the entire ADI, and coverage of local news, weather and sports (professional, college and high school).¹⁴ WWFD-TV maintains that Gulf & Pacific's 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 Gulf & Pacific ignores the fact that its signal is already being carried by multiple cable systems in Broward County¹⁵ with some communities even farther from Key West than Gulf & Pacific's community. In addition, WWFD-TV argues that its station can scarcely have ratings or carriage history since it only began service in May, 1996. In any event, it maintains, 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 system's community, 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."¹⁶ Further, the carriage of other local stations by Gulf & Pacific does not lessen the community's need of WWFD-TV's programming or obviate Gulf & Pacific's statutory obligations.¹⁷ 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 Gulf & Pacific's system but are equally distant. WWFD-TV concludes, therefore, that Gulf & Pacific's petition should be denied.

11. In reply, Gulf & Pacific states that WWFD-TV offers little evidence to counter its petition's arguments. Gulf & Pacific does not dispute that the Act presumes must carry rights throughout a station's ADI, however, Gulf & Pacific argues that WWFD-TV ignores the section of the legislative history 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

¹³Pub. L. No. 102-385, 106 Stat. 1460 (1992).

¹⁴WWFD-TV states that it also broadcasts a one hour sports program, "Sportslook," which covers local sports and celebrities and it provides local radar weather information. It indicates that it has installed automated weather source centers not only in Key West but in Homestead, Ft. Lauderdale and Miami's South Beach.

¹⁵These systems are: TCI Cablevision of Florida, Inc., TCI of Hollywood, Inc., TCI of South Florida, Inc., Miami Tele-Communications, Inc., and TCI of South Dade, Inc.

¹⁶See *Chronicle Publishing*, 10 FCC Rcd 9474, 9483 n. 27 (1995).

¹⁷See *Time Warner Cable*, 11 FCC Rcd 8047 (1996).

station's market."¹⁸ 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. . . ." ¹⁹ Gulf & Pacific states 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.²⁰ Gulf & Pacific re-states that WWFD-TV fares poorly under the four statutory criteria, the primary reason being that the station fails to establish any nexus with the community served by the system. While WWFD-TV implies that somehow the statutory criteria do not apply here,²¹ Gulf & Pacific argues that it is entirely appropriate for the Commission to consider these factors in its analysis. It states that the programming examples offered by WWFD-TV to establish a local nexus are general in nature and lack details to indicate that they specifically target Gulf & Pacific's system community. Indeed, it maintains, 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. Gulf & Pacific points out that the in *Time Warner Cable*,²² the Commission found that anecdotal evidence of programming insufficient to satisfy the local coverage factor in situations where the station otherwise failed to meet any of the other statutory factors. Finally, Gulf & Pacific concludes that WWFD-TV's carriage on other cable systems within the ADI says nothing about the station's coverage of the specific community herein.

MUST CARRY ARGUMENTS

12. In the complaint filed by WWFD-TV, it requests the Commission to order the Gulf & Pacific system to carry its signal for the following reasons: a) Its complaint was timely filed. WWFD-TV states that it requested carriage on Gulf & Pacific's cable system by letter dated July 1, 1997. Gulf & Pacific failed to respond to this letter and WWFD-TV states that it filed its complaints within 60 days of Gulf & Pacific's failure to respond.²³ b) As a commercial television station operating within the same ADI market as Gulf & Pacific's system, WWFD-TV is entitled to carriage pursuant to Section 614 of the Communications Act and the Commission's Rules.²⁴ c) WWFD-TV has fully complied with all of the requirements for mandatory carriage of its signal on the system -- Gulf & Pacific's system is devoting less than one-third of its channel capacities to mandatory signal carriage, WWFD-TV will deliver a good quality signal to the cable system's principal headend via fiber optic cable, and no other currently-carried television stations substantially duplicates its programming.

¹⁸H.R. Rep. No. 628, 102d Cong., 2d Sess. 97 (1992).

¹⁹Id. at 98.

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

²¹In 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.

²²DA 97-1009 (released May 13, 1997).

²³§76.7(c)(4)(iii)(B).

²⁴See *Report and Order in MM Docket No. 92-259*, 8 FCC Rcd 2965, 2972-74 (1993).

13. In its opposition, Gulf & Pacific incorporates by reference the arguments raised in its market modification request and argues that the complaint herein cannot be resolved until such request is resolved. It states, however, that should its modification request be denied, it will fully comply with its must carry obligations in this regard assuming that WWFD-TV provides a signal of good quality to its principal headend.

14. In reply, WWFD-TV states that it is committed to providing Gulf & Pacific a signal of good quality using specialized equipment at the station's expense. Therefore, it has fully satisfied the criteria for carriage.

DISCUSSION

15. We will grant Gulf & Pacific's modification request. Based on geography and other relevant information, we believe that the cable system herein is sufficiently removed from WWFD-TV that its community ought not be deemed part of the station's market for mandatory carriage purposes.²⁵

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."²⁶ Changes may be sought and granted by the Commission "to better effectuate the purposes" of the mandatory carriage requirements.²⁷ 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 Gulf & Pacific's deletion petition appears to be a legitimate request to redraw ADI boundaries to make them congruous with market realities. Gulf & Pacific's actions do not reflect an intention to skirt its signal carriage responsibilities under the 1992 Cable Act²⁸ and the Commission's Rules, nor do they evidence a pattern of discriminatory conduct against the station.

17. We now turn to the market modification analysis. At the outset, we note that WWFD-TV has no history of carriage in the cable community in question (factor I), has virtually no over-the-air audience in the cable community (factor IV), and fails to provide the cable community 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 such as here. 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

²⁵H.R. Rep. 102-628, at 97-98.

²⁶H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

²⁷47 U.S.C. §534(h).

²⁸As noted in paragraph 13 above, Jones has stated that it will comply with the mandatory carriage request from WWFD-TV should its petition be denied.

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 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 Gulf & Pacific's cable system community from WWFD-TV's market but is not outcome determinative by itself.

18. 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. 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. 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.²⁹ 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.

19. 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.³⁰

20. 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.³¹ Here, the Miami affiliates,

²⁹For 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.

³⁰As 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 economic support.").

³¹*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).

which have a closer economic nexus and case a City Grade signal over the cable communities, provide subscribers residing in the cable community herein with targeted local newscasts and public affairs programming.

21. 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 Gulf & Pacific's community from WWFD-TV's market. However, even taking into account the difficulties of applying these factors to new stations and those with specialized formats, there is no supporting evidence demonstrating that Gulf & Pacific's community warrants 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.

22. WWFD-TV, which signed on-the-air May 1996, now apparently broadcasts English-language syndicated programming. The station's city of license is Key West, Florida. As a new station, it lacks measured audience (cable and non-cable) and historic carriage in Weston, the cable community that Gulf & Pacific has requested be deleted. This community is outside of WWFD-TV's Grade B contour. The community served by Gulf & Pacific's system is more than 135 miles outside of WWFD-TV's predicted Grade B contour. While the programming offered by WWFD-TV can be considered to be of general interest to the ADI as a whole, neither it nor the locally-produced programming WWFD-TV cites in its opposition, can be considered to be specifically relevant to the community of Weston. It is also generally undisputed that Weston receives an abundance of local news, sports, and public affairs broadcasts from other closer stations. Moreover, although WWFD-TV claims carriage in several Broward County cable systems with communities farther in distance than Weston,³² we are unable to verify either the carriage or the specific distances involved as WWFD-TV failed to provide the relevant cable communities and their locations.

23. 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 Gulf & Pacific's system from the WWFD-TV market for mandatory carriage purposes.

³²See footnote 15.

ORDERING CLAUSES

24. 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-5101-A) filed on behalf of Gulf & Pacific Communications L.P. **IS GRANTED**.

25. **IT IS FURTHER ORDERED**, that WWFD-TV's complaint filed August 20, 1997, (CSR-5085-M) against the above-listed cable system **IS DISMISSED** as moot.

26. 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