

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

In re:	)	
	)	
Harron Cablevision of Massachusetts, d/b/a Harron Communications Corp.	)	CSR-5043-A
	)	
For Modification of the Boston, Massachusetts ADI	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: December 17, 1997**

**Released: December 19, 1997**

By the Deputy Chief, Cable Services Bureau:

**INTRODUCTION**

1. Harron Cablevision of Massachusetts, d/b/a Harron Communications Corp. ("Harron"), filed the above-captioned petition seeking to modify the Boston, Massachusetts Area of Dominant Influence ("Boston ADI") of television broadcast station WGOT (Ch. 60), Merrimack, New Hampshire. Specifically, Harron requests that WGOT be excluded from the Boston ADI relative to the communities of Pembroke, Halifax, Plympton, Abington, and Rockland, Massachusetts, for the purposes of the cable television mandatory broadcast signal carriage rules. WGOT has filed an opposition to this petition to which Harron has replied.

**BACKGROUND**

2. Pursuant to §614 of the Communications Act [Act] and implementing rules adopted by the Commission in its *Report and Order in MM Docket 92-259*,<sup>1</sup> a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience research organization.<sup>2</sup> An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.<sup>3</sup>

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<sup>1</sup>8 FCC Rcd 2965, 2976-2977 (1993).

<sup>2</sup>Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

<sup>3</sup>Because of the topography involved, certain counties are divided into more than one sampling unit. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. For a more complete description of how counties are allocated, see

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.<sup>4</sup>

4. The legislative history of this provision indicates that:

where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas in which they serve and which form their economic market.

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[This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular

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Arbitron's *Description of Methodology*.

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

station's market.<sup>5</sup>

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

For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (e.g., rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable and noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.<sup>6</sup>

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

The provisions of [this subsection] reflect a recognition that the Commission may conclude that a community within a station's ADI may be so far removed from the station that it cannot be deemed part of the station's market. It is not the Committee's intention that these provisions be used by cable systems to manipulate their carriage obligations to avoid compliance with the objectives of this section. Further, this section is not intended to permit a cable system to discriminate among several stations licensed to the same community. Unless a cable system can point to particularized evidence that its community is not part of one station's market, it should not be permitted to single out individual stations serving the same area and request that the cable system's community be deleted from the station's television market.<sup>7</sup>

7. In adopting rules to implement this provision, the Commission indicated that changes requested should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common

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

<sup>6</sup>8 FCC Rcd at 2977 (emphasis in original).

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

to all stations in the market.<sup>8</sup> The rules further provide, in accordance with the requirements of the Act, that a station not be deleted from carriage during the pendency of an ADI change request.<sup>9</sup>

### MODIFICATION ARGUMENTS

8. Harron's system is located in Plymouth County, Massachusetts and is part of the Boston, Massachusetts ADI. Merrimack, New Hampshire, the city of license of WGOT is also part of the same ADI and is approximately 59 miles from the closest of Harron's communities.

9. In support of its modification request, Harron argues that WGOT should be excluded from carriage on its systems because the station does not satisfy any of the four statutory market modification factors. First, Harron states that it has never carried the station on any of its systems despite the fact that the station has been on-the-air nearly ten years. Secondly, Harron maintains that WGOT does not provide local coverage to its systems due to the fact that it is geographically remote. Harron points out that the closest of its communities is approximately 59 miles from WGOT's city of license while the farthest is approximately 72 miles away. Moreover, Harron states that WGOT does not place either a Grade A or Grade B contour over any of the communities. Harron argues that recent decisions have granted similar requests for exclusion where the distances were even less than here.<sup>10</sup> Third, Harron states that WGOT does not carry any programming providing a specific appeal to its subscribers. Harron indicates that a recent sampling of the station's daytime programming falls under the category of "infomercials" or paid programming. Harron asserts that local programming is already being provided by the Boston market stations it currently carries,<sup>11</sup> all of which provide local news, sports and community programming. Finally, Harron argues that the station has no audience in Plymouth County. While ratings data for Plymouth County was not available to Harron, it argues that, due the fact that the station fails to provide a viewable off-air signal, it can't have achieved any significant viewership. The fact that the station's viewership is too low to be reported is buttressed by its absence in the listings of such local newspapers as the *Brockton Enterprise*, *Patriot Ledger* and *The Boston Globe*, as well as the Boston edition of *TV Guide*. In conclusion, Harron requests that the Bureau grant the requested relief.

10. In opposition, WGOT states that pursuant to the Cable Television Consumer Protection and Competition Act of 1992 [92 Act],<sup>12</sup> Harron has failed to demonstrate that denying WGOT its must carry rights in the instant communities would promote local broadcast service and foster diversity and competition in the Boston ADI. Moreover, WGOT argues that Harron's effort to avoid its must carry

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

<sup>9</sup>47 C.F.R. §76.59.

<sup>10</sup>See *Cablevision Systems Corporation*, 11 FCC Rcd 6453 (1996); *Continental Cablevision of Western New England, Inc.*, 11 FCC Rcd 6488 (1996); and *Time Warner Entertainment-Advance/Newhouse Entertainment*, 11 FCC rcd 6541 (1996).

<sup>11</sup>The local stations carried by the systems include, among others: WBZ (CBS), WCVB (ABC), WLNE (CBS), WFXT (FOX), WHDH (NBC), WNAC (FOX), WJAR (NBC), WPRI (CBS).

<sup>12</sup>Pub. L. No. 102-385, 106 Stat. 1460 (1992).

obligations expressly contradicts the Supreme Court's decision in *Turner Broadcasting System, Inc. et al. v. FCC et al.*,<sup>13</sup> which upheld the constitutionality of the must carry rules. Stations such as WGOT, it continues, represent precisely the kind of station Congress intended to have must carry rights. While modification of ADI markets are allowed, WGOT 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, WGOT maintains that Harron has not met this burden. WGOT states that it provides a unique program format which combines program-length presentations by local and national businesses and community organizations with religious and local public affairs programming.<sup>14</sup> In addition, despite Harron's assertions, WGOT argues that, not only has it aired programming of interest to subscribers in the instant communities, but it is listed in *The Boston Globe*, which has substantial circulation in Harron's communities. WGOT argues further that no showing has been made that Harron's cable systems would lose a local station already carried, or contemplated to be carried, in the event its request is not granted or that its systems or WGOT are not both located within the same ADI market. WGOT maintains that Harron'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. WGOT states that Harron ignores the fact that WGOT is currently carried on MediaOne's cable system serving Dedham, Massachusetts, which is "closely proximate" to Harron's systems. Further, it maintains that the Commission has held that low ratings and lack of historic carriage are of limited relevance in petitions seeking exclusion. Finally, WGOT argues that the carriage of other local stations by Harron does not lessen the cable system's statutory obligations<sup>15</sup> or obviate the need for WGOT to be treated equally with its competitors in the Boston ADI.

11. In reply, Harron states that WGOT's narrow construction of the market modification criteria providing a guaranteed right of carriage for a station throughout its ADI is at odds with the stated intent of Congress and the Commission and was expressly rejected by the Commission in *Market Modifications and the New York Area of Dominant Influence*.<sup>16</sup> While WGOT attempts to minimize the importance of the statutory factors supporting modification, Harron maintains that they are relevant in evaluating a station's localism and service to communities and it is entirely appropriate for the Commission to consider these factors in its analysis. It states that the programming examples offered by WGOT to establish a local nexus are general in nature and lack details to indicate that they specifically target Harron's communities. Finally, while WGOT claims that its carriage by MediaOne is "closely proximate" to the instant cable systems, Harron points out that the MediaOne system is located in Suffolk County and is substantially closer to WGOT's city of license than are Harron's headend sites in Pembroke and Rockland. Moreover, Harron indicates that WGOT is not carried by any other cable systems serving communities in the same immediate area as its own systems.

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<sup>13</sup>117 S. Ct. 1174 (1997).

<sup>14</sup> It points out programming such as "Focus on New England" which concerns local issues and features local public service organizations operating throughout the Boston ADI.

<sup>15</sup>See *Nationwide Communications, Inc.*, 10 FCC Rcd 13050 (1995).

<sup>16</sup>FCC 97-285 (released August 13, 1997).

## DISCUSSION

12. We will grant Harron's modification request. Based on geography and other relevant information, we believe that the cable systems herein are sufficiently removed from WGOT that the communities ought not be deemed part of the station's market for mandatory carriage purposes.<sup>17</sup>

13. As an initial matter, we note that, according to the legislative history of the 1992 Cable Act, the use of ADI market areas is intended "to ensure that television stations be carried in the areas which they service and which form their economic market."<sup>18</sup> Changes may be sought and granted by the Commission "to better effectuate the purposes" of the mandatory carriage requirements.<sup>19</sup> The market change process incorporated into the Communications Act, however, is not intended to be a process whereby cable operators may seek relief from the mandatory signal carriage obligations apart from the question of whether a change in the market area involved is warranted. When viewed against this backdrop, and considering all of the relevant factual circumstances in the record, we believe that Harron's deletion petition appears to be a legitimate request to redraw ADI boundaries to make them congruous with market realities. Harron's actions do not reflect an intention to skirt its signal carriage responsibilities under the 1992 Cable Act and the Commission's Rules, nor do they evidence a pattern of discriminatory conduct against the station.

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

15. 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

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<sup>17</sup>H.R. Rep. 102-628, at 97-98.

<sup>18</sup>H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

<sup>19</sup>47 U.S.C. §534(h).

broadcast of local programming, which has a distinct nexus to the cable communities, is also evidence of local service. Finally, a station's Grade A or Grade B contour coverage is an additional indicator of local service and we will weigh the presence or absence of such technical coverage accordingly.<sup>20</sup>

16. The availability of other broadcasters in the market is another factor to consider in market deletion cases such as this one. Where a cable operator is seeking to delete a station's mandatory carriage rights in certain communities within its ADI, and it is clear that the station is not providing local service to those communities, the issue of local coverage by other stations becomes a factor which we will give greater weight than in cases where a party is seeking to add communities.<sup>21</sup> Here, the Boston affiliates, which have a closer economic nexus and cast a City Grade signal over the cable communities, provide subscribers residing in the cable communities with targeted local newscasts and public affairs programming.

17. 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 specialized formats. A decision based strictly on the four statutory modification factors -- historical carriage, service, other stations' presence, and audience information -- would simply exclude Harron's communities from WGOT's market. However, even taking into account the difficulties of applying these factors to those with specialized formats, there is no supporting evidence demonstrating that Harron's communities warrant inclusion. The fact that a station is 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 WGOT) 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.

18. WGOT signed on-the-air March 20, 1989, and broadcasts primarily infomercials and paid-programming. The station's city of license is Merrimack, New Hampshire. It lacks measured audience (cable and non-cable) and historic carriage in all of the cable communities that Harron has requested be deleted and all of the communities involved are outside of WGOT's Grade B contour. The communities served by Harron's system are all from 59 to 72 miles away from WGOT's city of license. Moreover, a search of Commission records confirms that no other Plymouth County cable system presently carries WGOT. While the programming offered by WGOT can be considered to be of general interest to the ADI as a whole, neither it nor the locally-produced program WGOT cites in its opposition, can be considered to be specifically relevant to Harron's communities. It is also generally undisputed that each of the cable

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<sup>20</sup>As a general matter, Grade B coverage demonstrates service to cable communities and serves as a measure of a station's natural economic market. See *Broadcast Signal Carriage Issues*, 8 FCC Rcd at 2977. See also *Amendment of Section 76.51 (Orlando-Daytona Beach-Melbourne, and Cocoa, Florida)*, 102 FCC 2d at 1070 ("We believe that television stations actually do or logically can rely on the area within their Grade B contours for economic support.").

<sup>21</sup>*Accord, Petition of Time Warner Cable*, 10 FCC Rcd 8625 (1995) (taking into account the proximity of television stations licensed to Hagerstown, MD and surrounding communities in granting the operator's request to delete Arlington, VA station WTMW from the Washington, DC ADI with regard to its cable systems serving Martinsburg, WV and Chambersburg, PA).

communities receives an abundance of local news, sports, and public affairs broadcasts from other closer stations.

19. Given the evidence as to the statutory factors, the 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 Harron's cable communities from the WGOT market for mandatory carriage purposes.

#### ORDERING CLAUSES

20. 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-5043-A) filed on behalf of Harron Cablevision of Massachusetts, d/b/a Harron Communications Corp. **IS GRANTED**.

21. 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