

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

In the Matter of:
Definition of Markets for Purposes of the
Cable Television Broadcast Signal Carriage
Rules
CS Docket No. 95-178

ORDER ON RECONSIDERATION

Adopted: February 22, 2001

Released: March 2, 2001

By the Commission:

I. INTRODUCTION

1. Before the Commission are petitions seeking reconsideration of the Second Report and Order on Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules ("Second Report and Order") filed by WEYS Television Corporation ("WEYS"), licensee of WEYS (TV) Key West, Florida and Costa de Oro Television, Inc. ("Costa"), licensee of station KJLA (TV) Ventura, California. National Cable Television Association ("NCTA") filed an Opposition to the petitions of Costa and WEYS. Time Warner Cable ("Time Warner") and collectively CoxCom, Inc. and Comcast Cable Communications, Inc. ("Comcast") filed Oppositions to the Costa Petition. Costa filed a Reply.

II. BACKGROUND

2. Pursuant to Section 614 of the Communications Act ("the Act") and implementing rules adopted by the Commission in its Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Issues ("Must Carry Order"), a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within a station's market. Until recently, a station's market was defined by its "area of dominant influence" or ADI, a designation that delineates each television market based on measured viewing patterns. Essentially, each county in the United States is allocated to a discrete market based on which home-market stations receive a preponderance of total viewing hours in the county. 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, consider individual requests for changes in market designations, and 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

1Second Report and Order, 14 FCC Rcd 8366 (1999).

28 FCC Rcd 2965 (1993).

effectuate the purposes of this section.³ 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

3. In the *First Report and Order and Further Notice of Proposed Rulemaking* (“*Report and Order*”) in this proceeding, the Commission revised the market definitions for purposes of the cable television signal carriage and retransmission consent rules governing the carriage of local broadcast signals from ADIs to Nielsen Media Research designated market areas (“DMAs”) because Arbitron ceased its market designation and publication of ADI market areas.⁵ While the decision was made to switch to a new market definition, the transition to market designations based on Nielsen DMAs was delayed to allow the Commission to resolve possible conflicts that could disrupt the orderly provision of local television service to subscribers. During this period, the Commission continued to use Arbitron’s 1991-1992 ADI market lists.⁶

4. The *Second Report and Order* addressed possible conflicts and designed procedures for determining markets to ease the transition from an ADI to a DMA-based market structure for broadcasters and cable operators, as well as subscribers.⁷ In particular, we addressed concerns about the effect of changing to a DMA market definition on previous market modification decisions and petitions pending before the Commission. We clarified the evaluation factors and considerations for determining markets in market modification cases to address instances where issues may be raised as to which market a cable community should be associated.⁸ Of particular importance in the rules and policies adopted is serving the interests of localism by ensuring that cable subscribers are able to receive local news, information and programming, while reducing the possibility of channel line-up disruptions and subscriber confusion.

³47 U.S.C. § 534(h)(1)(C).

⁴Section 614(h)(1)(C)(ii), 47 U.S.C. § 534(h)(1)(C)(ii).

⁵See *Definition of Markets for Purposes of the Cable Television Mandatory Television Broadcast Signal Carriage Rules*, CS Docket 95-178, 11 FCC Rcd 6201 (1996) (“*Report and Order*”). An ADI as defined by the Arbitron audience research organization is a geographic market designation that defines each television market based on measured viewing patterns. There are differences between DMA and ADI market areas, but both listings are intended to serve roughly the same purposes in the sales of broadcast station advertising time and programming. See *Notice of Proposed Rule Making*, 11 FCC Rcd 1904, 1905 (1996).

⁶*Report and Order*, 11 FCC Rcd at 6224. The Commission postponed the switch to Nielsen DMAs until the 1999 must-carry/retransmission consent election, which became effective January 1, 2000.

⁷*Second Report and Order*, 14 FCC Rcd 8366 (1999).

⁸*Id.* at 8382.

5. The Commission adopted a policy whereby a cable system within a television station's ADI (but outside its DMA) that had carried the station on its channel line-up could continue to carry the station, without being subject to copyright liability, even after the transition to DMAs to minimize programming disruptions.⁹ Regarding the market modification process, we concluded that market modification requests filed prior to the effective date of the change from ADI to DMA, including petitions, petitions for reconsideration, and applications for review would be processed under Arbitron's ADI market definitions.¹⁰ Moreover, we decided to leave intact final market modification cases that have not been appealed and cases that have been subject to final Commission review so as to avoid disturbing settled expectations.¹¹ Where the Commission had previously decided to delete a community from a station's ADI market, we also concluded that the deletion would remain in effect after the conversion to DMAs.¹² In addition, we adopted a standardized evidence approach with regard to market modification petitions to bring greater uniformity and certainty to the decision-making process and emphasized that petitions not providing the evidence required by the rule would be dismissed.¹³ Petitioners are required to include in their filings specific evidentiary requirements, such as appropriate maps, ratings data, and carriage records to prevent dismissal and to support their market modification petitions under Section 614(h) of the Act.¹⁴ Petitioners were also encouraged, but not mandated, to provide a specific technical coverage showing through the submission of service coverage prediction maps that take terrain into account by using the Longley-Rice prediction methodology.¹⁵ In situations involving mountainous terrain or other unusual geographical features, the Commission concluded that Longley-Rice propagation studies would be considered in determining whether or not a television station actually provides local service to a community.¹⁶

III. DISCUSSION

6. WEYS and Costa filed petitions for reconsideration of the *Second Report and Order* generally arguing that certain findings regarding the transition from ADIs to designations based on DMAs, and the market modification process, should be changed to ensure that carriage obligations are maintained. We address each petition in turn.

⁹*Id.* at 8381.

¹⁰*Id.* at 8384.

¹¹*Id.*

¹²*Id.*

¹³*Id.* at 8387; *see* Section 76.59(b) &(c).

¹⁴*Id.*

¹⁵*Id.* at 8388.

¹⁶*Id.*

A. WEYS Petition

7. WEYS, licensee of commercial television station WEYS, Channel 22, is located in Monroe County in Key West, Florida and was considered part of the Miami ADI. It also has been subject to the market modification process as a result of several petitions filed by cable operators pursuant to Section 614(h) of the Act.¹⁷ Because of its location at the southwestern tip of the Miami ADI, some operators questioned whether WEYS provided local service to the communities served by their cable systems. In these particular cases, the Commission granted the requests of the cable operators and excluded WEYS from carriage after concluding that the cable operators satisfied the statutory market modification factors.¹⁸

8. In the present proceeding, WEYS argues that the Commission erroneously defined the word “pending” in the market modification context in the *Second Report and Order* by concluding that a case is not considered pending for Section 614(h) purposes if it is before a court.¹⁹ WEYS asks the Commission to reconsider the decision and find that Section 614(h) precludes a cable operator from deleting the signals of a commercial television station until the market modification proceeding is no longer subject to review by the Commission and the courts.²⁰

9. In opposition to the petition, NCTA asserts that WEYS’s argument relates to a matter not decided in the *Second Report and Order*, but to a totally separate proceeding decided more than two years ago.²¹ NCTA points out that in the *Dynamic Cablevision* reconsideration, in which WEYS’s right to carriage was at issue, the Commission determined that a Commission proceeding is not pending within the meaning of Section 614(h)(1)(C)(iii) while it is before a court of appeals.²² That decision, NCTA emphasizes, was not revisited in the *Second Report and Order* but merely cited in passing in discussing a different issue, and therefore WEYS’s petition is not appropriately an issue for reconsideration of the *Second Report and Order*, but actually an untimely request for reconsideration of the Commission’s 1997 *Dynamic Cablevision* decision.²³

10. WEYS’s request for reconsideration presents an issue that is not properly before the Commission in this proceeding. The correct interpretation of the term “pending” in the Section 614(h) context was addressed by the Commission in *Dynamic Cablevision*, a proceeding in which WEYS fully participated. The discussion that WEYS focuses on in the *Second Report and Order*, dealt with the effect that the conversion to DMAs would have on carriage rights. The *Second Report and Order* merely

¹⁷See *Dynamic Cablevision of Florida, Ltd. and Continental Cablevision of Jacksonville, Inc., d/b/a Comcast of Broward County, Inc. and Continental Cablevision of Broward County, Inc.* Memorandum Opinion and Order, 11 FCC Rcd 9880 (CSB 1996); *recon. denied*, 12 FCC Rcd 9952 (1997); *Adelphia Cable Partners, L.P. d/b/a Adelphia Cable Communications*, 13 FCC Rcd 4047 (CSB 1997). Specifically, Continental, Comcast, Dynamic, and Adelphia requested that WEYS be excluded for the purposes of mandatory carriage from the Miami ADI relative to the communities served by their systems in Broward and Dade Counties, Florida.

¹⁸*Id.*

¹⁹WEYS Petition at 3-4.

²⁰*Id.*

²¹NCTA Opposition at 6.

²²*Dynamic Cablevision*, 12 FCC Rcd at 9960, *appeal pending on other grounds sub nom. WEYS Television Corp. v. FCC*, Case No. 99-13499C (11th Cir. filed July 20, 2000).

²³NCTA Opposition at 6-7.

referenced Section 614(h)(1)(C)(iii) which provides that a “cable operator may not delete a commercial television station from carriage during the pendency of a market modification proceeding.”²⁴ This statement did not represent a new decision, nor was it an invitation to revisit an issue previously settled. WEYS’s petition for reconsideration, in this regard, concerns an issue not before the Commission in the *Second Report and Order*. Accordingly, WEYS’s petition is denied.

B. Costa Petition

1. Longley-Rice Prediction Methodology in Market Modification Proceedings

11. As part of the standardized evidence approach adopted in the *Second Report and Order*, the Commission encouraged petitioners to include in market modification petitions service coverage prediction maps that take terrain into account, particularly maps using the Longley-Rice prediction method.²⁵ Costa asserts that encouraging the use of Longley-Rice evidence will produce a kind of map-shopping in which a cable system will put forth as evidence the map, be it Grade B or Longley-Rice, that most favors its attempt to remove the broadcast station from its cable system.²⁶ Grade B contour maps best serve the goal of determining the geographical boundary of a station’s market, Costa asserts, because the Grade B contour describes the area to which a television station can look for economic support.²⁷ Moreover, Costa suggests that utilizing Longley-Rice maps might harm UHF stations disproportionately by reintroducing the UHF handicap. It asserts that the change in policy allows cable systems to avoid carriage obligations and therein might specifically threaten the economic viability of UHF stations.²⁸ Costa proposes that the Commission should determine whether such problem might result from the change to the Longley-Rice model.²⁹

12. NCTA argues that the Longley-Rice methodology should not be excluded because it is relevant for deciding market modification proceedings and Costa failed to indicate that the methodology is flawed as a predictor of the area actually served by a broadcast station.³⁰ Moreover, NCTA states that nothing would preclude a broadcaster from submitting another map to counter a cable operator’s showing if one map indicates that a station’s signal is viewable in a community, while the other suggests that it is not.³¹ NCTA also points out that the Commission already concluded in the *Second Report and Order*³² that using Longley-Rice evidence would not pose an unreasonable burden and would be important information in processing market modification filings.³³

²⁴*Second Report and Order*, 14 FCC Rcd at 8385; see 47 U.S.C. § 534 (h)(1)(C)(iii).

²⁵*Second Report and Order*, 14 FCC Rcd at 8388.

²⁶Costa Petition at 5. Reply to Oppositions at 4.

²⁷Costa Petition at 5-6.

²⁸*Id.* at 7. “UHF handicap” relates to the difficulty that UHF stations had in accessing all of their potential audience over the air because of the inferior signal propagation characteristic of the UHF band.

²⁹Costa Petition at 7.

³⁰NCTA Opposition at 4-5.

³¹*Id.* at 4.

³²*Second Report and Order*, 14 FCC Rcd at 8388.

³³NCTA Opposition at 5.

13. We affirm our original conclusion that the Longley-Rice method can provide a more accurate service area map particularly where terrain is a factor in signal reception. It provides a showing that takes into account mountains, valleys, and other geographic features to provide a meaningful representation of a coverage area. No single factor, however, is intended to be exclusive in determining a particular station's television market, and we will continue to consider all factors in our market modification decisions. With regard to Costa's other concerns, we do not believe that utilizing Longley-Rice analysis will present an unreasonable financial burden to parties, nor does it reintroduce the so-called "UHF handicap." While that particular issue was raised in the comments in response to the *Report and Order*, we believed that such concerns were misplaced and had no bearing on our decision regarding the market modification process.³⁴

14. The *Second Report and Order* encourages parties to provide maps using the Longley-Rice methodology. They are not required to do so. Parties may submit traditional Grade B contour maps in addition to, or instead of, Longley-Rice maps and may explain why they believe Grade B analysis is more relevant.³⁵ It is frequently important in the market modification process to find as precisely as possible the contours formed by the station's signal.³⁶ The availability of Longley-Rice maps better enables the Commission to achieve this purpose. Accordingly, Costa's petition on this issue is denied.

2. Leaving Market Modification Determinations Intact

15. The Commission also determined that it would leave intact final market modification decisions made pursuant to Section 614(h) in order to avoid disturbing settled expectations, and that decisions to delete a community from a market would remain in effect after the conversion to DMA market definitions.³⁷ Costa asserts that decisions made utilizing ADI market definitions should not be binding where a change from an ADI to a DMA market definition results in a new market for a station.³⁸ Under the ADI market definition, KJLA's market was Santa Barbara. However, KJLA's market is now in Los Angeles under the DMA market definition. Costa argues that the decisions which failed to take into account the change of its market from Santa Barbara to Los Angeles should have no effect and if followed, would leave KJLA in a must-carry "no man's land."³⁹

16. Several commenters argue that the Commission's conclusion not to disturb final market modification cases to reflect conversion from ADI to DMAs is fully justified.⁴⁰ Comcast states that not only would the expectations of parties based on final Commission determinations be changed, the

³⁴See *Second Report and Order*, 14 FCC Rcd at 8377.

³⁵See *Channel 39 Inc.*, 13 FCC Rcd 3108, 3116 (1998)(for purposes of market modification determination Grade B contour analysis and engineering study utilizing Longley-Rice propagation model were filed).

³⁶Section 614(h)(1)(C)(ii) and (iii).

³⁷*Second Report and Order*, 14 FCC Rcd at 8384.

³⁸Costa Petition at 8. Reply to Oppositions at 2.

³⁹Costa Petition at 9-10. Costa further argues that collateral estoppel and *res judicata* are inapplicable in light of a change in market definition. The Commission is not relying on the doctrine of collateral estoppel and *res judicata* to support its decision regarding its treatment of previous Section 614(h) decisions. Rather, we recognize that statutory factors and other relevant facts aid in accurately determining a station's true market and that there should be reliance on such determinations and evidence.

⁴⁰Time Warner Opposition at 5, Comcast Opposition at 2-3, and NCTA Opposition at 2-3.

Commission would be forced to relitigate the very same issues that had already been determined in earlier ADI modification proceedings.⁴¹ NCTA asserts that Costa's request smacks of "two bites of the apple" and contravenes the factual determination that was the core of an earlier modification decision.⁴² Time Warner further argues that the assignment of KJLA to the Los Angeles DMA was argued by Costa, and considered and rejected by the Bureau in deciding that KJLA failed to meet the relevant market modification criteria to obtain carriage.⁴³ Time Warner contends that no useful purpose would be served by allowing the parties to relitigate the same issues in a DMA market modification proceeding.⁴⁴

17. As a general matter, we continue to believe that the reasoned determinations reached in market modification proceedings should not be upset as a result of the conversion to the DMA standard. In the *Second Report and Order* we stated that decisions would be left intact to avoid disturbing settled expectations. We remain convinced that decisions reached in ADI-based market modification proceedings should not be affected by the transition to DMAs and that the deletion of a community from a market or addition of a community to a market should remain in effect notwithstanding the conversion to DMAs. Moreover, while Costa refers to KJLA as being in a must-carry "no man's land," we emphasize that such characterization is inaccurate because KJLA is assured carriage rights on various systems in Los Angeles and Ventura.⁴⁵ Such rights were acquired as a result of decisions reached in market modification proceedings, as well as through the market designation process. Finally, we note that Costa requested reconsideration of KJLA's market modification case.⁴⁶ The specific issues relating to Costa's reconsideration are appropriately addressed in that proceeding.⁴⁷

18. After careful consideration of the pleadings filed in this proceeding, we find that the parties have presented no new arguments or facts that cause us to change our prior determinations. Reconsideration is warranted only if the petitioner cites material error of fact or law or presents new or previously unknown facts and circumstances which raise substantial or material questions of fact that were not considered and that otherwise warrant Commission review of its prior action.⁴⁸

IV. ORDERING CLAUSES

19. Accordingly, **IT IS ORDERED**, that the petitions for reconsideration filed by WEYS Television Corporation and Costa de Oro Television, Inc. **ARE DENIED**.

⁴¹Comcast Opposition at 2.

⁴²NCTA Opposition at 3.

⁴³Time Warner at 5, citing *Costa de Oro Television, Inc.*, 13 FCC Rcd 4360 (CSB 1998); *In the Matter of Costa de Oro Television, Inc. against Time Warner Cable*, 14 FCC Rcd 12127 (CSB 1999).

⁴⁴Time Warner at 5.

⁴⁵We note that various cable systems in Santa Barbara can continue to carry the station if they so desire.

⁴⁶*See Costa de Oro, Television, Inc.*, 13 FCC Rcd 4360 (CSB 1998).

⁴⁷*Id., recon. denied in part and granted in part*, (CSB, rel. July 10, 2000).

⁴⁸*See, e.g., 800 Data Base Access Tariffs and the 800 Service Management System Tariff and Provision of 800 Services*, 12 FCC Rcd 5188, 5202 n. 84 (1997) ("The standard for reconsideration of a Commission Order is that reconsideration is appropriate 'where the petitioner shows either a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters.'"), quoting *In re Applications of D.W.S., Inc.*, 11 FCC Rcd 2933, 2933 (1996).

20. This action is taken pursuant to statutory authority found in Section 1, 4(i), and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), and 405.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary