

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

In the Matter of:)	
)	
Modification of Market of Television Station)	CSR-4970-M
WTLK-TV, Rome, Georgia)	
)	
Application for Review of)	
Paxson Atlanta License, Inc.)	CSR-4991-A
)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: April 8, 2002

Released: April 30, 2002

By the Commission:

I. INTRODUCTION

1. Before the Commission is an application seeking review of a market modification and must carry order adopted by the Cable Services Bureau ("Bureau"), pursuant to delegated authority, which involves the broadcast signal carriage obligations of Monroe Water, Light and Gas Commission ("Monroe") within the Atlanta-Rome, Georgia ADI.¹ The order,² adopted pursuant to the processes set forth in Section 614(h) of the Communications Act, granted the request of Monroe to delete the communities served by its Walton County system from the market of WTLK-TV, Channel 14, Rome, Georgia, which is licensed to Paxson Atlanta License, Inc. ("Paxson").³ The *Bureau Order* also dismissed WTLK's must carry complaint against Monroe.

2. Section 614(h)(1)(C)(i) of the Communications Act of 1934, as amended (the "Act"), provides in relevant part: "[F]ollowing a written request, 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."⁴ When

¹ Section 614(h)(1)(C) of the Communications Act provides that a station's market shall be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns. See 47 U.S.C. § 534(h)(1)(C). Section 76.55(e) requires that a commercial broadcast television station's market be defined by Nielsen Media Research's DMAs. See *Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, 14 FCC Rcd 8366 (1999) ("Modification Final Report and Order"). Prior to the changes instituted by the *Modification Final Report and Order*, which were effective as of the January 1, 2000, must carry/retransmission consent election cycle, the market of a commercial broadcast station was defined by Arbitron's ADIs. *Id.* at 8367.

² See *Paxson Atlanta License, Inc.*, 13 FCC Rcd 5735 (1997) ("Bureau Order").

³ WTLK, which signed on-the-air in 1988, broadcasts from a transmitter located in Waleska, Georgia. The station's studio is located in Marietta, Georgia. Since the *Bureau Order* was adopted, WTLK changed its call sign to WPXA. For clarity, we will continue to refer to the station by its former call sign.

⁴ See 47 U.S.C. § 534(h)(1)(C)(i).

deletion requests are denied, cable operators must, if all other applicable conditions are complied with, carry the broadcast station signals involved.⁵ When deletion requests are granted, cable operators are relieved of their obligations to carry the broadcast signals involved. Paxson requests that the Commission reverse the order granting Monroe's petition to delete certain communities in the Atlanta-Rome ADI with regard to WTLK and require Monroe to carry WTLK on Monroe's Walton County system. In its application for review, Paxson argues that the order is at odds with the intent of Congress and the purposes of the Act's must carry provisions, and criticizes the Bureau's factual analysis of the relevant statutory factors enumerated in Section 614(h)(1)(C)(ii).

3. In considering market modification 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.⁶

We subsequently refer to the four factors listed in Section 614(h)(1)(C)(ii) as factors I through IV. For the reasons discussed below, we deny WTLK's application for review.

II. DISCUSSION

4. The facts, applicable law, arguments of the parties, and the Bureau's detailed analysis are fully set forth in the underlying decision and will not be repeated here. Having reviewed the arguments in the application for review, we conclude that the arguments presented here were raised and properly resolved by the Bureau in the first instance.⁷ Accordingly, we affirm the Bureau's conclusions. We find the Bureau's

⁵See 47 U.S.C. § 534(a) ("Each cable operator shall carry, on the cable system of that operator, the signals of local commercial television stations and qualified low power stations as provided by this section."); 47 U.S.C. § 534(h)(1)(A) ("[T]he term 'local commercial television station' means any full power television broadcast station, other than a qualified noncommercial educational station within the meaning of section 615(l)(1), licensed and operating on a channel regularly assigned to its community by the Commission that, with respect to a particular cable system, is within the same television market as the cable system.").

⁶See 47 U.S.C. § 534(h)(1)(C).

⁷As Paxson noted in its application for review, many of the same arguments raised by Paxson relating to Congressional intent and the purposes of the must carry provisions were also being considered by the Second Circuit Court of Appeals in another proceeding at the time Paxson filed its application for review in this matter. See Application at n.4, citing *Market Modifications and the NY Area of Dominant Influence*, 12 FCC Rcd 12262 (1997) ("NY ADP") and the associated pending appeal. Since that time, the Second Circuit affirmed the Commission and the Bureau in their interpretation of the four factors in Section 614(h)(1)(C)(ii), as well as their consideration of additional factors in their market analysis. See *WLNY-TV, Inc. v. FCC*, 163 F.3d 137 (2d Cir. 1998) ("WLNY"). As such, many of the same arguments Paxson raises in its application for review have already been considered and rejected

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rationales with regard to historic carriage (factor I), coverage or other local service to the communities by WTLK (factor II), news coverage or other local service to the communities by other stations entitled to carriage (factor III) and audience share (factor IV), are consistent with the applicable statutory provisions and associated Commission rules.⁸

5. In its initial decision, the Bureau noted that WTLK had no history of carriage in the cable communities in question. The Bureau gave minimal weight to this factor. The Bureau stated that historical carriage is not by itself controlling in these circumstances because such an interpretation of the Act would, in effect, prevent weaker stations, that cable systems had previously declined to carry, from ever obtaining carriage rights. The Bureau noted that some stations may have not had an “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.”⁹ As to local service, the Bureau concluded that WTLK did not provide coverage to the cable communities since its Grade B contour fell short of their boundaries. The Bureau deemed the programming offered by WTLK to be of general interest to the Atlanta market and not specifically tailored to the cable communities. However, the Bureau also found no evidence in the record of other Atlanta stations providing local programming to the communities. Finally, the Bureau found that WTLK had virtually no over-the-air audience in the cable communities at issue.

6. In general, the Bureau recognized the difficulties of applying the four statutory factors since, in certain circumstances, they could limit the carriage rights of stations even within their local market area. To remedy the situation, in the absence of historic carriage or audience ratings, the Bureau relied more heavily on the station’s Grade B coverage area, basic geographic and political features, and recognized marketing facts as the best available alternative evidence of the market boundaries of WTLK. The Bureau also found that Atlanta, with its transportation and population congestion, served as a natural boundary to WTLK’s market.¹⁰

7. We find that the Bureau's reliance on Grade B contour coverage and distance to the community, in terms of both geography and mileage, is fully supported by precedent.¹¹ The Bureau also properly interpreted the statute's legislative history indicating that the four enumerated factors are not intended to be exclusive in determining a particular station's television market, and other factors also can be considered in the analysis.¹²

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by the Second Circuit. As discussed above, for the reasons described in *NY ADI* and *WLNY*, we reject these same arguments Paxson has once again raised in this matter.

⁸ The Bureau was under no obligation to give particular weight to any of the enumerated statutory factors. See *Time Warner Entertainment Co. v. FCC*, 56 F.3d 151, 175 (D.C. Cir. 1995); accord *Omnipoint Corp. v. FCC*, 78 F.3d 620, 633-634 (D.C. Cir. 1996) (when Congress directs an agency to consider certain factors, the agency simply "must reach an express and considered conclusion about the bearing of a factor, but is not required to give any specific weight to it").

⁹ *Bureau Order*, 13 FCC Rcd at 5746.

¹⁰ The Atlanta market was, at the time of the *Bureau Order*, the tenth largest market in the US. It is 170 miles long and 150 miles wide, and it covers 52 counties in three states. *Id.* at 5743.

¹¹ See *WLNY*, 163 F.3d at 145; *NY ADI*, 12 FCC Rcd at 12267-68.

¹² “Subsection (h)(3)(B) 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. . . . The provisions of subsection (h)(3)(B) [also] 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.” H.R. Rep. No. 628, 102d Cong., 2d Sess. at 97; see also *WLNY*, 163 F.3d at 145.

8. With respect to local service issues, we first affirm the Bureau's holding that the station's failure to place a Grade B contour over the subject cable communities is one indication of the station's local market. We reject the argument of WTLK suggesting that regardless of the Section 614(h) process, it is essentially guaranteed the right to carriage throughout the ADI. The statute specifically provides that the Commission may exclude communities from a station's market to better effectuate the purposes of the carriage provisions.¹³ The legislative history notes that when making its market determinations, 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 to be part of the station's market.¹⁴ Despite the hyphenation of the Atlanta-Rome ADI and Paxson's argument that WTLK directly competes with Atlanta stations, the Bureau correctly noted that the issue is not whether WTLK serves Atlanta, but whether it serves communities on the "opposite side of the Atlanta urban area."¹⁵ Consistent with this language, the Bureau properly examined the station's distance to the cable communities as measured by geography as well as by mileage. It duly noted the importance of geographic features, such as the interposition of Atlanta in the center of the market with its congested infrastructure, that act to remove communities on opposite sides of the ADI from one another. The Bureau took these factors into consideration and reasoned that the distance and terrain between the cable communities and WTLK indicates that the station does not serve the local viewing audience from either a programming or technical perspective.¹⁶

9. WTLK also argues that the only circumstance in which deletion of a local station would enhance localism is where a cable system is unable, in the absence of a deletion, to carry the signal of another "out-of-the-market" station that provides demonstrably more local service. WTLK asserts that such a showing is required under the statutory language which indicates the market deletion provisions are to be used only when deletion of a station's must carry rights is found to "better effectuate" the purposes of the Act. We find this interpretation of Section 614(h) and the Commission's implementing rules to be too restrictive and without textual basis.¹⁷ The statute, on its face, does not limit market deletion requests only to those situations in which an out-of-the market station is more deserving of carriage than an in-market station. There also is no language in either the legislative history of Section 614(h) or the Commission's rules directly supporting the station's position. To the contrary, Congress provided that either broadcasters or cable operators may ask for market modifications so that a station's ADI may better reflect the areas which they serve and which form the economic market at hand.¹⁸ In any event, the purpose of the must carry provisions is advanced by the Bureau's decision to the extent that it ensures that WTLK will be carried in areas in which it provides service and that cable subscribers in other areas are able to view programming assembled by their cable operator for their specific economic market.

10. The station stresses the value of its various programming efforts targeted at the Atlanta market as a whole. Programming is considered in the context of Section 614(h), however, only insofar as it serves to demonstrate the scope a station's actual market and service area. Section 614(h)(1)(C)(ii)(II) requires the Commission to evaluate "whether the television station provides coverage or other local

¹³See 47 U.S.C. § 534(h)(1)(C)(i); see also *WLNY*, 163 F.3d at 144-45.

¹⁴H.R. Rep. No. 628, 102d Cong., 2d Sess. at 97-98.

¹⁵*Bureau Order*, 13 FCC Rcd at 5746.

¹⁶ The cable communities lie 94 miles from Rome, WTLK's community of license, and 65 miles from the station's transmitter site in Waleska. *Id.* at 5743.

¹⁷47 C.F.R. § 76.59; see also *WLNY*, 163 F.3d at 146.

¹⁸H.R. Rep. No. 628, 102d Cong., 2d Sess. at 97.

service to such community."¹⁹ The community in this particular case is Monroe, GA. The Bureau Order noted that WTLK-TV did not support its allegation that it provided a local service to this particular community, but instead provided programming of a general nature that was of interest to the entire Atlanta market. We have never held, and do not so hold here, that a station should be considered "local," as Congress intended that term in Section 614, for any particular area within a market solely by airing a few hours of programming geared towards the market as a whole, particularly a market as large and diverse as the Atlanta market.²⁰

11. Monroe's carriage of another Paxson managed station, WNGM-TV, Channel 34, Athens, GA, was an additional consideration the Bureau weighed in its analysis.²¹ WTLK challenges the Bureau's finding that the duplication of programming on the two stations, and WNGM's carriage on Monroe's system, indicate that the stations operate in different markets. In its application for review, Paxson submits that WNGM no longer airs the *inTV* Infomall programming lineup that WTLK continues to transmit. As such, Paxson argues that the Bureau's consideration of this issue is both immaterial and irrelevant to a determination of WTLK's market. In response, Monroe contends that the *inTV* Infomall lineup was only a portion of the duplicative programming offered by WNGM.

12. The Commission's records indicate that, since the order's release, the licensee of WNGM has changed, making it unclear whether the station continues to carry any programming duplicative of that broadcast by WTLK. Nonetheless, we find that the Bureau properly considered the programming carried by WNGM at that time as one of several factors relevant in determining the local market of WTLK. Indeed, the duplicative programming was considered merely suggestive of WTLK's limited reach in the Atlanta market, and was not determinative in the Bureau's analysis. Moreover, we independently find that even in the absence of any indication of duplicative programming, the record supports exclusion of the communities at issue. As such, the subsequent elimination of some or all of the duplication fails to undermine the Bureau's overall finding.

13. In sum, the Bureau appropriately evaluated the four statutory factors in Section 614(h)(1)(C)(ii) and other relevant considerations in its market analysis regarding WTLK. As a result, the Bureau's grant of Monroe's market modification request, and its dismissal of WTLK's must carry complaint, were proper. Paxson's application for review is hereby denied.

¹⁹ See 47 U.S.C. § 534(h)(1)(C)(ii)(II).

²⁰ See, e.g., *NY ADI*, 12 FCC Rcd at 12270. Paxson also emphasizes its commitment to provide locally oriented programming in the future. However, we previously have found that the absence of actual, targeted programming weighs against a station in the market modification analysis. *Id.*

²¹ Since the *Bureau Order* was adopted, WNGM changed its call sign to WUVG and the station is currently licensed to Univision Partnership of Atlanta. For clarity, we refer to the station by its former call sign.

III. ORDERING CLAUSES

14. Accordingly, **IT IS ORDERED**, that the captioned application for review **IS DENIED**.

15. This action is taken pursuant to statutory authority found in Sections 1, 4(i), 5(c), 405, and 614(h)(1)(C) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 405, 534(h)(1)(C).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary