

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

In the Matter of:	)	
	)	
Media Venture Management, Inc. v.	)	CSR-5449-M
Time Warner Cable	)	
	)	
Request for Carriage	)	
	)	
Media Venture Management, Inc.	)	CSR-5579-A
	)	
Petition for Modification of the Gainesville, Florida DMA	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 23, 2003**

**Released: July 30, 2003**

By the Commission:

**I. INTRODUCTION**

1. Media Venture Management, Inc., licensee of Station WTXL-TV (ABC, Ch. 27), Tallahassee, Florida (“WTXL-TV”) filed an application for review of the former Cable Services Bureau’s (the “Bureau”) decision denying its request for market modification to exclude the community of Live Oak, Florida from the market of Station WCJB (ABC, Ch. 20), Gainesville, Florida (“WCJB”).<sup>1</sup> WTXL-TV has also filed an application for review of the Bureau’s decision which denied the must carry complaint it filed against Time Warner Cable (“Time Warner”) for its failure to carry WTXL-TV on its cable system serving Live Oak, Florida.<sup>2</sup> Time Warner and WCJB filed oppositions to both petitions, to which WTXL-TV replied.<sup>3</sup> We are consolidating action on these two petitions because the issues are

<sup>1</sup> *Media Venture Management, Inc.*, 15 FCC Rcd 24552 (2000) (“*Modification Order*”).

<sup>2</sup> *Media Venture Management, Inc. v. Time Warner Cable*, 15 FCC Rcd 4689 (2000) (“*Complaint Order*”). By letter dated July 3, 2000, the Commission’s Office of the Secretary accepted as timely filed WTXL-TV’s must carry application for review in light of logistical difficulties with entry to the Commission’s Portals II Building on April 3, 2000. See Letter from Magalie Roman Salas, Secretary, FCC, to Lewis J. Paper, Dickstein, Shapiro, Morin & Oshinsky LLP (July 3, 2000).

<sup>3</sup> WTXL-TV also submitted a supplement to its modification application, which was opposed by Time Warner and replied to by WTXL-TV. WTXL-TV’s supplement cited recent Commission decisions that, *inter alia*, accepted evidence of carriage on neighboring cable systems in instances where a station lacked historical carriage in the community at issue. See *Comcast of Central New Jersey*, 16 FCC Rcd 10803 (2001); *Comcast Cablevision of Burlington County*, 16 FCC Rcd 10809 (2001). WTXL-TV then provided, for the first time in the instant proceeding, evidence of its carriage on two other cable systems in Suwanee County, where the community of Live Oak is located. Contrary to WTXL-TV’s implication, Commission precedent accepting evidence of carriage on neighboring cable systems predates both its modification petition and application. See, e.g., *Comcast of Central* (continued...)

closely related. After examining the record, we affirm the Bureau's decisions and deny the applications for review filed by WTXL-TV.

## II. BACKGROUND

2. Pursuant to Section 614 of the Communications Act and implementing rules adopted by the Commission in *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station's market.<sup>4</sup> A station's market for this purpose is its "designated market area" or DMA, as defined by Nielsen Media Research.<sup>5</sup> A DMA 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. Section 614(h)(1)(C) of the Act also directs the Commission to consider changes in market areas with respect to particular television broadcast stations.<sup>6</sup> These changes may either add additional communities to a station's television market or exclude communities from a station's television market to better effectuate the purposes of this section.<sup>7</sup>

3. Pursuant to the Bureau's market modification decision in *Diversified Broadcasting, Inc. ("Diversified")*, WCJB added Live Oak to its market in 1998.<sup>8</sup> As a result, WCJB gained must carry status on cable systems serving Live Oak, including Time Warner's system, even though WCJB is part of the Gainesville, Florida DMA and Live Oak lies within the Tallahassee, Florida DMA. In 2000, WTXL-TV sought carriage on Time Warner's Live Oak system on the basis that the station is part of the Tallahassee DMA. Time Warner refused to carry WTXL's signal based on the fact that WCJB was the closer of two duplicating network stations.<sup>9</sup> WTXL filed a must carry complaint against Time Warner

---

(...continued from previous page)

*New Jersey*, 13 FCC Rcd 1656 (1997); *Comcast Cablevision of Burlington County*, 13 FCC Rcd 1629 (1997). In light of our resolution of the modification petition herein where we find that WTXL-TV has improperly focused on changes in its level of service to Live Oak, we need not consider WTXL-TV's supplement as it similarly concentrates on WTXL's historical carriage on neighboring cable systems.

<sup>4</sup> 8 FCC Rcd 2965, 2976-77 (1993).

<sup>5</sup> Section 614(H)(1)(C) of the Communications Act, as amended by the Telecommunications Act of 1996, 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) of the Commission's rules requires that a commercial broadcast television station's market be defined by Nielsen Media Research's DMAs. 47 C.F.R. § 76.55(e); see *Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, 14 FCC Rcd 8366 (1999).

<sup>6</sup> 47 U.S.C. § 534(h)(1)(C).

<sup>7</sup> *Id.*

<sup>8</sup> 13 FCC Rcd 22331 (1998) (*"Diversified"*). In its request for market modification in *Diversified*, WCJB sought the inclusion of communities from 5 surrounding counties, of which only Suwanee County was located within WTXL-TV's market. Moreover, although WCJB sought the inclusion of Live Oak, Branford and the surrounding unincorporated areas of Suwanee County within its market, WTXL-TV's subsequent must carry and market modification petitions have only referred to the community of Live Oak.

<sup>9</sup> See 47 C.F.R. § 76.56(b)(5).

maintaining that the cable operator had violated applicable law and that the Commission's market modification process should not deprive a local station of its carriage rights. In essence, WTXL-TV sought to reverse the Bureau's market modification decision in *Diversified* through the must carry process. The Bureau denied WTXL-TV's complaint ("*Complaint Order*"), stating that a must carry complaint was not the proper venue in which to seek a reversal of a market modification ruling. Moreover, the Bureau found that Time Warner had acted in compliance with Section 76.56(b)(5) of the Commission's rules when it chose to carry the closer of two duplicating stations.<sup>10</sup>

4. WTXL-TV also challenged the *Diversified* decision through its own market modification petition. In its petition, WTXL-TV asserted that the Commission's grant of WCJB's earlier modification request undermined WTXL-TV's ability to be carried on Time Warner's cable system. WTXL-TV contended that the Bureau's action in *Diversified* was premised on a condition that the grant of WCJB's request would not threaten WTXL-TV's carriage on the Live Oak system. On this basis, WTXL-TV alleges that it chose not to seek reconsideration of *Diversified* at that time. However, once Time Warner denied WTXL's carriage request, the station felt it was necessary to file a market modification petition seeking the deletion of Live Oak from WCJB's market and the effective reversal of *Diversified*. The Bureau denied WTXL-TV's request ("*Modification Order*"), citing inconsistencies with the information provided by WTXL-TV in this proceeding versus that previously provided in its must carry complaint and in opposition to WCJB's initial market modification petition.<sup>11</sup> The Bureau concluded that the record submitted by WTXL-TV was insufficient to overturn the *Diversified* decision.

### III. DISCUSSION

#### A. Must Carry Complaint

5. WTXL-TV argues that: (1) Commission precedent requires reversal of the *Complaint Order*; (2) the prior condition in the *Diversified* decision intended to protect WTXL-TV from harm caused by WCJB's carriage in Live Oak must be honored; and (3) WTXL-TV's waiver request should have been granted.

6. WTXL-TV first argues that Commission precedent requires reversal of the Bureau's decision in view of the principles of localism and the preservation of a network affiliate's status within its DMA.<sup>12</sup> WTXL-TV asserts that the Bureau previously enunciated its concern that market modification decisions "not unduly upset the economic marketplace expectations underlying the affiliation concept" and not "jeopardize the must-carry status of a network affiliate within its own [DMA] market, a situation not intended or envisioned by the Cable Act."<sup>13</sup> Although the must carry status of network affiliates within their markets is a factor to be considered in market modification proceedings, this consideration does not preclude modifications where the underlying factors warrant such action. As indicated in the *Complaint Order*, WTXL-TV remained free to pursue its own market modification proceeding to exclude Live Oak from WCJB's market based on an allegation of changed circumstances.<sup>14</sup> As such, WTXL-

<sup>10</sup> 47 C.F.R. § 76.56(b)(5).

<sup>11</sup> *Modification Order*, 15 FCC Rcd at 24561.

<sup>12</sup> WTXL-TV Must Carry Application at 8-9.

<sup>13</sup> *Id.*, citing *Guy Gannett Communications*, 13 FCC Rcd 23470, 23478 (1999); *accord Pacific and Southern Company, Inc.*, 14 FCC Rcd 4558, 4565 (1999); *Harron Communications Corp.*, 14 FCC Rcd 4547, 4556-57 (1999).

<sup>14</sup> *Complaint Order*, 15 FCC Rcd at 4692.

TV's must carry complaint was deemed the inappropriate forum to adjudicate WCJB's carriage status in Live Oak.<sup>15</sup>

7. WTXL-TV next asserts that, based upon a representation from WCJB disavowing any intent to supplant WTXL-TV on cable systems in Live Oak, the earlier *Diversified* decision conditioned WCJB's must carry status in Live Oak upon the fact that carriage of WCJB would result in no harm to WTXL-TV.<sup>16</sup> WTXL-TV criticizes WCJB for its apparent change in position by later supporting Time Warner in its refusal to carry WTXL-TV once the station asserted its must carry rights in Live Oak.<sup>17</sup> WCJB counters that it had no intent to guarantee WTXL-TV's carriage on Time Warner's system and indeed had no authority to do so.<sup>18</sup> WCJB argues that its statement in the *Diversified* proceeding merely reflected the fact that its carriage in Live Oak would not legally preclude WTXL-TV from asserting its own must carry rights or prevent Time Warner from carrying WTXL-TV.<sup>19</sup>

8. The relevant language from *Diversified* states in pertinent part:

Moreover, we disagree with WTXL-TV's objections that the grant of must carry status to WCJB for the communities located within the Tallahassee ADI will endanger WTXL-TV's carriage in the Suwanee County communities herein. WCJB has been carried for a number of years in these communities pursuant to retransmission consent agreements without apparent harm to WTXL-TV's status and the total number of subscribers on the Live Oak and Branford cable systems (2293) is relatively low.<sup>20</sup>

Rather than placing a condition upon WCJB's carriage rights in Live Oak, the referenced language indicates that the station's historical carriage in that community caused no apparent harm to WTXL-TV's must carry status. Although the record at the time of *Diversified* was unclear, WTXL-TV was not then being carried on Time Warner's Live Oak system, a fact which ultimately strengthens the Bureau's modification of WCJB's market.<sup>21</sup> Regardless of whether WTXL-TV was actually carried on the Live Oak system, the *Diversified* decision did not change WTXL-TV's must carry status.<sup>22</sup> WTXL-TV had and continues to have must carry rights within the Tallahassee DMA. However, must carry rights themselves do not guarantee cable carriage, as stations must satisfy certain conditions in order to qualify for carriage.<sup>23</sup> Indeed, even qualified local commercial television stations may not gain carriage where the number of such stations exceeds the number of signals a cable system is required to carry, or as in the

---

<sup>15</sup> *Id.*

<sup>16</sup> WTXL-TV Must Carry Application at 9-11.

<sup>17</sup> *Id.* at 10.

<sup>18</sup> WCJB Must Carry Opposition at 4.

<sup>19</sup> *Id.*

<sup>20</sup> See *Diversified*, 13 FCC Rcd at 22339-40.

<sup>21</sup> WTXL-TV Modification Application at 10.

<sup>22</sup> Whether or not the Bureau was mistaken in the assumption that the grant of must carry status to WCJB will not "endanger" WTXL-TV's carriage, that Bureau decision was not appealed and is now final. 47 C.F.R. §§ 1.104, 1.115.

<sup>23</sup> See 47 C.F.R. § 76.55(c).

instant case where there are substantially duplicating network affiliates.<sup>24</sup> By modifying WCJB's market to include Live Oak, *Diversified* made both WCJB and WTXL-TV eligible for mandatory carriage in Live Oak. WTXL-TV remained free to pursue its carriage rights, as it did in the above-captioned must carry and market modification proceedings. Time Warner also remained free to decide whether to carry both stations, or to opt to only carry the closest station pursuant to Section 76.56(b)(5) of the Commission's rules. Such decisions are properly left to the marketplace. As such, we concur with WCJB that the station is not accountable for Time Warner's decision to deny carriage to WTXL-TV. As the ABC affiliate historically carried by Time Warner in Live Oak, WCJB was entitled to oppose WTXL-TV's petition.

9. As noted by WTXL-TV, the *Complaint Order* erroneously indicated in its review of the *Diversified* language that WTXL-TV had been carried in Live Oak pursuant to retransmission consent.<sup>25</sup> WTXL-TV contends that the Bureau also incorrectly concluded that WTXL-TV had neither asserted its must carry rights in Live Oak, nor previously expressed the intent to do so.<sup>26</sup> WTXL-TV maintains that its opposition to WCJB's market modification request in *Diversified* reflected a desire to assert WTXL-TV's must carry rights in Live Oak.<sup>27</sup> While we agree that the Bureau was incorrect in its statement regarding WTXL's carriage status in Live Oak, this factual assertion was not central to the Bureau's must carry analysis. WTXL-TV's carriage status on Time Warner's Live Oak system, as well as its failure to affirmatively assert its must carry rights until 1999, were cited by the Bureau in order to demonstrate that *Diversified* did not place a condition on WCJB's carriage rights and merely put "WCJB on an equal footing with WTXL-TV with regard to carriage on Time Warner's system."<sup>28</sup>

10. Finally, WTXL-TV asserts that the Bureau erred by not acting on the station's request for waiver of Section 76.56(b)(5) in its must carry proceeding.<sup>29</sup> WTXL-TV states that neither opponent challenges the fact that the Bureau is obligated to give waiver requests a "hard look."<sup>30</sup> Further, WTXL-TV argues that, given the unique circumstances of this case, a waiver was warranted and that no justification supporting a denial of its waiver request has been advanced.<sup>31</sup> Time Warner states in opposition that WTXL-TV's application for review in this must carry proceeding ignores the Bureau's clear directive in the *Complaint Order* that WTXL-TV should use market modification procedures in seeking to remove Live Oak from WCJB's market.<sup>32</sup> As a result, Time Warner maintains that WTXL-TV's application for review should be summarily denied.<sup>33</sup> We agree that because WTXL-TV's waiver request was predicated upon an action taken in a market modification proceeding, the proper venue for

---

<sup>24</sup> *Id.* at § 76.56(b).

<sup>25</sup> WTXL-TV Must Carry Application at 2.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Complaint Order*, 15 FCC Rcd at 4692.

<sup>29</sup> WTXL-TV Must Carry Application at 11-13. In its underlying must carry complaint, WTXL-TV sought "a waiver of Section 76.65(b)(5) ... to exclude Live Oak from the Gainesville ADI for purposes of WTXL-TV's carriage." WTXL-TV Must Carry Complaint at 3.

<sup>30</sup> WTXL-TV Must Carry Application Reply at 3.

<sup>31</sup> *Id.*

<sup>32</sup> Time Warner Must Carry Opposition at 3, citing *Complaint Order*, 15 FCC Rcd at 4692.

<sup>33</sup> *Id.*

such a request was and remains the market modification process. The Bureau appropriately declined to address WTXL-TV's waiver request in the *Complaint Order* and suggested in its place a market modification action, an option of which WTXL-TV has availed itself.

11. Notwithstanding this procedural determination, we believe that WTXL-TV's request fails to overcome the necessary standard for waivers. WTXL-TV's request largely relies on the station's reading of the *Diversified* case and a balancing of equities in the instant situation – WTXL-TV argues that its carriage in Live Oak would be appropriate in light of WTXL-TV's investment in upgraded equipment to improve its service to Live Oak and since its carriage would cause no undue hardship on Time Warner.<sup>34</sup> As discussed above, however, *Diversified* did not condition the modification of WCJB's market upon no resulting harm to WTXL-TV. We also believe that WTXL-TV's equitable arguments are foreclosed by Congress' clear edict that cable operators may not be required to carry signals of more than one station affiliated with the same television network.<sup>35</sup> On this basis, we are unable to require Time Warner to carry both WCJB and WTXL-TV. As to WTXL-TV's suggestion that the Bureau could have required Time Warner to delete WCJB in favor of WTXL-TV, the record in both this must carry proceeding and in the market modification proceeding discussed below fails to demonstrate that Live Oak is not a part of WCJB's market. We therefore conclude that the Bureau properly determined that Time Warner's denial of WTXL-TV's carriage request was in accord with Section 76.56(b)(5) of the Commission's rules.<sup>36</sup>

## B. Market Modification Petition

12. After reviewing the record in this and the underlying proceeding, we are ultimately not persuaded that the Bureau erred in denying WTXL-TV's market modification petition. The *Modification Order* acknowledged that WTXL-TV's petition was "not a traditional modification request .... WTXL-TV is claiming, in essence, that it has lost its must carry rights in Live Oak due to the Commission's prior decision in *Diversified* which granted WCJB's request to include within its market ... Live Oak."<sup>37</sup> The specific relief sought by WTXL-TV is to exclude Live Oak from WCJB's market.<sup>38</sup> In order to do so, WTXL-TV must establish that WCJB's local nexus to Live Oak has substantially changed by virtue of the factors identified in Section 614(h)(1)(C) of the Act and the types of evidence enumerated in Section 76.59(b) of the Commission's rules.<sup>39</sup>

13. WTXL-TV's modification petition and application, as well as the *Modification Order*, incorrectly focus on evidence associated with changes in WTXL-TV's level of service to Live Oak.<sup>40</sup>

---

<sup>34</sup> WTXL-TV Must Carry Application at 12-13.

<sup>35</sup> See 47 U.S.C. § 614(b)(5).

<sup>36</sup> See 47 C.F.R. § 76.56(b)(5).

<sup>37</sup> *Modification Order*, 15 FCC Rcd at 24560-61.

<sup>38</sup> Modification Petition at 1.

<sup>39</sup> 47 U.S.C. § 534(h)(1)(C); 47 C.F.R. § 76.59(b).

<sup>40</sup> Since *Diversified*, WTXL-TV indicates that it has increased its transmitting power such that it now covers Live Oak with a Grade A contour, resulting in increased viewership in the community. See Modification Petition at 10-11, 13-15; Modification Application at 8-10, 12-13. The *Modification Order* determined that while WTXL-TV's increased power did provide Live Oak with Grade B coverage, the station's viewership data did not conform to established methods for the submission of viewership data in market modification cases. See *Modification Order*, 15 FCC Rcd at 24561.

However, the issue is not WTXL-TV's market – as a station assigned to the Tallahassee DMA, WTXL-TV's market includes Suwanee County and the community of Live Oak. WTXL-TV undeniably has must carry rights with respect to Time Warner's Live Oak system. The relevant issue in this proceeding is WCJB's relation to Live Oak. Apart from viewership data reflecting relatively small decreases in WCJB's Suwanee County ratings in 1999,<sup>41</sup> none of the evidence presented in WTXL-TV's modification petition or application demonstrate that Live Oak is not a part of WCJB's market.

14. Section 614(h)(1)(C) of the Act specifically authorizes the Commission to determine that particular communities are part of more than one television market.<sup>42</sup> In such instances, where both television stations are affiliated with the same television network, the cable operator may decline to carry duplicating signals and is obligated to carry the station whose community of license is closest to the cable system's principle headend.<sup>43</sup> As is its right, Time Warner declined in the instant case to carry duplicating signals, and it is obliged to carry WCJB on its Live Oak system as the nearer of the two affiliates. Therefore, while we do not concur with the Bureau's underlying analysis in the *Modification Order*, we affirm the Bureau's denial of WTXL-TV's market modification petition and leave the prior holding in *Diversified* undisturbed.

#### IV. ORDERING CLAUSES

15. **IT IS ORDERED**, pursuant to Section 614(h) of the Communications Act, as amended, 47 U.S.C. §534, and Sections 76.61 and 1.115 of the Commission's rules, 47 C.F.R. §§76.61 and 1.115, that the application for review filed by Media Venture Management, Inc. of its must carry complaint (CSR-5449-M) **IS DENIED**.

16. **IT IS FURTHER ORDERED**, pursuant to Section 614(h) of the Communications Act, as amended, 47 U.S.C. §534, and Sections 76.59 and 1.115 of the Commission's rules, 47 C.F.R. §§76.59 and 1.115, that the application for review filed by Media Venture Management, Inc. of its petition for modification (CSR-5579-A) **IS DENIED**.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

---

<sup>41</sup> Modification Petition at 13-15.

<sup>42</sup> See 47 U.S.C. § 534(h)(1)(C).

<sup>43</sup> See 47 C.F.R. § 76.56(b)(5).