

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

In the Matter of:)
Time Warner Cable) CSR-5835-A
Petition For Modification of the DMA Market of)
Television Broadcast Station WWRS-TV)
Mayville, Wisconsin)

MEMORANDUM OPINION AND ORDER

Adopted: May 23, 2002

Released: May 24, 2002

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Time Warner Cable (“TWC”) filed the above-captioned Petition for Special Relief seeking to modify the designated market area of Station WWRS-TV, Mayville Wisconsin to delete the communities located in the Counties of Kenosha, Racine and Walworth, Wisconsin (“TWC Communities”). WWRS-TV filed an Opposition to which TWC replied. After examining the record, we grant TWC’s request.

II. BACKGROUND

2. Pursuant to Section 614 of the Communications Act and the rules adopted by the Commission in *Implementation of the Cable Television Consumer Protection and Competition Act of 1992* ("Must Carry Order"), commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station's market.¹ A station's market for this purpose is its "designated market area," or DMA, as defined by Nielsen Media Research.² 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

¹⁸ FCC Rcd 2965, 2976-2977 (1993).

²Section 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) 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").

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.⁴

In considering such requests, the 1992 Cable 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;
- (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.⁵

The legislative history of the provision states that:

where the presumption in favor of [DMA] carriage would result in cable subscribers losing access to local stations because they are outside the [DMA] 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 area in which they serve and which form their economic market.

* * * *

[This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which

³For a more complete description of how counties are allocated, see Nielsen Media Research's *Nielsen Station Index: Methodology Techniques and Data Interpretation*.

⁴47 U.S.C. §534(h)(1)(C).

⁵*Id.*

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.⁶

In adopting rules to implement this provision, the Commission indicated that requested changes 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.⁷

4. In the *Modification Final Report and Order*, the Commission, in an effort to promote administrative efficiency, adopted a standardized evidence approach for modification petitions that requires the following evidence be submitted:

(A) A map or maps illustrating the relevant community locations and geographic features, station transmitter sites, cable system headend locations, terrain features that would affect station reception, mileage between the community and the television station transmitter site, transportation routes and any other evidence contributing to the scope of the market.

(B) Grade B contour maps delineating the station's technical service area and showing the location of the cable system headends and communities in relating to the service areas.

Note: Service area maps using Longley-Rice (version 1.2.2) propagation curves may also be included to support a technical service exhibit.⁸

(C) Available data on shopping and labor patterns in the local market.

(D) Television station programming information derived from station logs or the local edition of the television guide.

(E) Cable system channel line-up cards or other exhibits establishing historic carriage, such as television guide listings.

(F) Published audience data for the relevant station showing its average all day audience (i.e., the reported audience averaged over Sunday-Saturday, 7 a.m., or an equivalent time period) for both cable and noncable households or other specific audience indicia, such as station advertising and sales data or viewer contribution records.⁹

⁶H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

⁷*Must Carry Order*, 8 FCC Rcd at 2977 n. 139.

⁸The Longley-Rice model provides a more accurate representation of a station's technical coverage area because it takes into account such factors as mountains and valleys that are not specifically reflected in a traditional Grade B contour analysis. In situations involving mountainous terrain or other unusual geographical features, Longley-Rice propagation studies can aid in determining whether or not a television station actually provides local service to a community under factor two of the market modification test.

Petitions for special relief to modify television markets that do not include the above evidence shall be dismissed without prejudice and may be re-filed at a later date with the appropriate filing fee. The *Modification Final Report and Order* provides that parties may continue to submit whatever additional evidence they deem appropriate and relevant.

III. DISCUSSION

5. WWRS-TV is an independent broadcast station that operates as a commercial religious television station.¹⁰ TWC's systems serve 31 communities located south and southwest of Milwaukee, Wisconsin. In support of its request, TWC argues that, although its cable system operates in the Milwaukee, Wisconsin DMA which includes WWRS-TV, the statutory factors considered in market modification requests, when applied to this case, support deletion of the TWC Communities from WWRS-TV's DMA.

6. TWC states that WWRS-TV has never been carried on its cable system.¹¹ Further, TWC asserts that none of the TWC Communities are within 50 miles of Mayville, the town where WWRS-TV's transmitter is located. The average distance between Mayville and the communities is 63 miles.¹² In addition, none of the TWC Communities lies within the station's Grade B coverage contour, even considering the station's recently authorized power increase.¹³

7. TWC states that WWRS-TV is an affiliate of Trinity Broadcasting Network. TWC offers the station's program schedule as evidence that the station's programming is identical to the Trinity Broadcast Network's national feed and does not include any programming local to the TWC Communities.¹⁴ In addition, the local print sources do not list WWRS-TV in their television station listings for residents of the TWC Communities.¹⁵ TWC states that it carries many other television stations that serve the TWC Communities with local programming, including local news, sports, and public affairs programming.¹⁶ It also points out that WWRS-TV failed to meet the minimum reporting standards to be included in Nielsen's 2001 report of viewers in the Milwaukee DMA.¹⁷

8. In opposition to the Request for Modification, National Minority TV Inc., licensee of WWRS-TV, does not challenge the fact that it has never been carried on TWC's systems. It instead asserts that because of its recent increase in power from 10 kW to 5000 kW, it should be treated as a new

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⁹47 C.F.R. §76.59(b).

¹⁰WWRS-TV began operating on February 1, 1999.

¹¹TWC Petition at 5.

¹²*Id* at 6.

¹³*Id* at 7.

¹⁴*Id* at 8.

¹⁵*Id.*

¹⁶*Id* at 9.

¹⁷*Id.*

station and be permitted to establish itself as a true full power station.¹⁸ In addition, although not disputing TWC's evidence of the distances between its facilities and the TWC Communities, it maintains that TWC's assertions that such distances disqualify it from carriage are incorrect. Although admitting that the communities do not fall within its Grade B contour, it states that the communities border the contour.¹⁹ Further, it argues that TWC carries other stations within the Milwaukee DMA as well as five stations in the Chicago DMA that are farther away than WWRS-TV.²⁰ WWRS-TV disputes TWC's assertion that the station provides no local programming, asserting that its two hour per week Public Report program focuses on local issues.²¹ The station states that it plans to expand local programming offerings in the future. It also argues that its religious programming is unique in the Milwaukee market and that, as a specialty station, its lack of viewers should not have evidentiary significance.²² WWRS-TV claims that TWC is discriminating against it because it is a religious station.²³

9. In reply, TWC counters that it is not discriminating against WWRS-TV's religious character. It states that it has added WWRS-TV to the Milwaukee system's metro, western and northern channel lineup and is only seeking deletion with respect to the distant southern communities.²⁴ In addition, TWC states that, unlike WWRS-TV, stations that it carries in the Milwaukee DMA all provide a Grade B or higher signal to the TWC Communities.²⁵ TWC carries no other stations licensed in the Mayville area and argues that the fact it also chooses to carry Chicago stations is irrelevant to this petition. TWC disputes the fact that WWRS-TV's Grade B contour borders the TWC Communities and also challenges the relevance of WWRS-TV's local program schedule.²⁶

10. After considering the statutory factors as applied to the facts of this case, we grant TWC's modification request. Since it began operating in 1999, WWRS-TV has not been carried in the TWC Communities. In considering this statutory factor, we must determine the circumstances contributing to this lack of historic carriage. We find that WWRS-TV has not been carried because it is not in geographic proximity to the TWC Communities. Even with its increase in power, WWRS-TV's Grade B contour does not include any of the TWC Communities and does not approach even the border of the communities. Further, the distance between the station's transmitter and the communities ranges from 53 to 75 miles. Although WWRS-TV argues that the Commission has denied requests to delete stations further away than 53 miles, in this case, the geographic separation coupled with the other evidence that the station does not have a local nexus with the TWC Communities supports our conclusion.

11. Although the station states that it provides some "local" programming, as TWC points

¹⁸WWRS-TV Opposition at 3.

¹⁹*Id* at 6.

²⁰*Id* at 4.

²¹*Id* at 7.

²²*Id* at 8.

²³*Id* at 10.

²⁴ TWC Reply at 3.

²⁵ *Id* at 5.

²⁶TWC Reply at 8. According to TWC, the coverage map indicates an 18 miles gap between the Grade B contour and the closest TWC community. TWC Petition at 7 n. 25.

out, there is nothing in the record to show that this programming has any specific interest to viewers in the TWC Communities. Thus the existence of this programming is insufficient to counter the lack of geographic proximity, especially when other stations carried by TWC provide local news, sports and public affairs programming of interest to the TWC Communities. WWRS-TV's lack of nexus with the TWC Communities is further demonstrated by the failure of local print sources to list WWRS-TV in the television listing for the communities. Although, as a specialty station offering religious programming a lack of viewers is not determinative,²⁷ WWRS-TV's lack of viewers, taken into consideration with the other statutory factors, weighs in favor of granting TWC's Petition. Furthermore, although WWRS-TV maintains that it will increase its local service in the future, our decision in this proceeding must be based on the record before us.

12. The use of DMA market areas is intended "to ensure that television stations be carried in the areas which they service and which form their economic market."²⁸ Changes in these market areas are warranted "to better effectuate the purposes" of the mandatory carriage requirements.²⁹ In light of the evidence presented here regarding lack of historic carriage, lack of Grade B coverage, significant geographic distance between the station and the TWC Communities, together with the lack of evidence that the station carries programming of interest specifically to the TWC Communities, we conclude that deletion of the TWC Communities from WWRS-TV's market for mandatory carriage purposes reflects the purposes of Section 614 of the Communications Act.

IV. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED**, pursuant to Section 614(h) of the Communications Act of 1934, as amended (47 U.S.C. §534) and Section 76.59 of the Commission's rules (47 C.F.R. §76.59), the captioned petition for special relief (CSR-5835-A) filed by Time Warner Cable **IS GRANTED**.

14. This action is taken by the Deputy Chief, Policy Division, Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission's rules.³⁰

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Deputy Chief, Policy Division
Media Bureau

²⁷See e.g. *Paxson San Jose License, Inc.*, 12 FCC Rcd 17520 (1997).

²⁸ H.R. Rep. 102-628, 102d Cong., 2d Sess. 97-98 (1992).

²⁹ 47 U.S.C. Section 534(h).

³⁰47 C.F.R. §0.283.