

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

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| In the Matter of: |) | |
| |) | |
| CSC TKR, Inc. |) | |
| |) | CSR-5602-A |
| For Modification of the New York, |) | |
| New York DMA |) | |

MEMORANDUM OPINION AND ORDER

Adopted: June 14, 2001

Released: June 18, 2001

By the Chief, Consumer Protection and Competition Division, Cable Services Bureau:

I. INTRODUCTION

1. CSC TKR, Inc., d/b/a Cablevision of Elizabeth and Cablevision of Hamilton (“Cablevision”), filed the above-captioned revised petition for special relief seeking to modify the New York, New York designated market area (“DMA”) with respect to Station WRNN-TV (Ch. 62), Kingston, New York (“Revised Petition”).¹ Specifically, Cablevision requests that WRNN-TV be excluded, for purposes of the cable television mandatory broadcast signal carriage rules, from the communities served by its Elizabeth and Hamilton, New Jersey cable systems.² An opposition to this petition was filed on behalf of WRNN-TV to which Cablevision replied.

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 (“Must Carry Order”)*,³ commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station’s market. A station’s market for this purpose is its DMA, as defined by Nielsen Media Research.⁴ A DMA is a

¹Cablevision’s previous submission of this petition (CSR-5542-A)(“Original Petition”) was dismissed without prejudice for petitioner’s failure to provide the exhibits required to process its request. *See CSC TKR, Inc.*, 15 FCC Rcd 14868 (2000).

²Cablevision of Elizabeth serves only the community of Elizabeth, New Jersey. Cablevision of Hamilton serves the communities of Hamilton, Allentown, Washington Township, Hightstown, Windsor, Trenton, Mercerville, Yardville, and Robbinsville, New Jersey.

³8 FCC Rcd 2965, 2976-1977 (1993).

⁴Section 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.

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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.⁵

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.⁶

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 new 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.⁷

4. The legislative history of this 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

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§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*, Order on Reconsideration and Second Report and Order, 14 FCC Rcd 8366 (1999) ("Modification Final Report and Order").

⁵For a more complete description of how counties are allocated, *see* Nielsen Media Research's *Nielsen Station Index: Methodology Techniques and Data Interpretation*.

⁶47 U.S.C. §534(h)(1)(C).

⁷*Id.*

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 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.⁸

With respect to deletions of communities from a station's market, the legislative history of the provision states that:

The provisions of [this subsection] reflect a recognition that the Commission may conclude that a community within a station's [DMA] 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.⁹

5. Recently, 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.¹⁰

⁸H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

⁹H.R. Rep. 102-628, 102d Cong., 2d Sess. 97-98 (1992).

- (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.¹¹

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. Parties may continue to submit whatever additional evidence they deem appropriate and relevant.¹²

In adopting rules to implement Section 614(h)(1)(C), 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.¹³

III. DISCUSSION

6. In support of its Revised Petition, Cablevision argues that the market modification factors favor deletion of the subject communities from WRNN-TV's market. First, Cablevision states that WRNN-TV has never been carried on either its Elizabeth or Hamilton, New Jersey cable systems, despite being on-the-air for fifteen years. Therefore, its exclusion would not disrupt long-established viewing patterns. Cablevision notes that WRNN-TV has also not been carried by cable systems serving many neighboring communities in central and northern New Jersey.¹⁴ Second, Cablevision points out that, at distances of 100-119 miles from Elizabeth and Hamilton, WRNN-TV's city of license, Kingston, New York, is geographically remote from the subject communities and the station provides no predicted Grade B

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¹⁰The 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.

¹¹See *Modification Final Report and Order*, 14 FCC Rcd 8366 (1999); see also 47 C.F.R. §76.59(b).

¹²*Modification Report and Order*, 14 FCC Rcd at 8390.

¹³*Must Carry Order*, 8 FCC Rcd 2965, 2977 n. 139.

¹⁴Original Petition at 9.

contour coverage.¹⁵ Cablevision points out that these geographic distances are far more than in previous decisions where the Bureau granted exclusions.¹⁶ Moreover, Cablevision states, the Commission has looked to Grade B coverage as a significant “objective measure of the scope of a station’s local market.”¹⁷

7. Cablevision argues that while WRNN-TV claims to be a regional news station for the entire New York market, it does not focus its attention on programming that is specifically responsive to the needs and interests of Elizabeth and Hamilton viewers. Indeed, Cablevision states that program listings for WRNN-TV indicate that not only is no New Jersey-specific news coverage identified, but the main focus of its programming appears to be the Hudson Valley area.¹⁸ Cablevision states that other stations it currently carries provide a significant amount of coverage of news and events of concern to the subject communities’ residents, as does News 12 New Jersey, a cable channel which is available to subscribers to the Elizabeth cable system.¹⁹ Cablevision states that, as evidenced by county coverage surveys, WRNN-TV has no viewership in the subject communities.²⁰ Moreover, shopping and labor data for the subject communities demonstrate that neither Elizabeth nor Hamilton residents are likely to travel to the Kingston area for shopping or employment.²¹

8. Cablevision states that in a previous decision the Bureau granted its request to delete WRNN-TV from its Bayonne, Newark, Monmouth and Riverview, New Jersey systems, as well as its Bronx and Brooklyn, New York systems.²² Cablevision argues that the communities in that instance were located even closer to WRNN-TV’s city of license than are the subject communities. In addition, Cablevision points out that the Bureau’s decision to grant the requests of other New York market cable systems to exclude WRNN-TV from carriage on their systems was supported by the full Commission and affirmed by the Court of Appeals for the Second Circuit.²³ Cablevision states that the Court of Appeals found that, in excluding WRNN-TV from certain communities, the Commission properly relied on “basic geographic and political features and recognized marketing facts as the best alternative evidence of the market boundaries of the stations subject to deletion.”²⁴ Moreover, Cablevision states that this decision noted that the New York market presents “a paradigmatic ‘rim’ case” with Kingston a classic “spoke” community whose natural market is for viewers north of New York City.²⁵ Indeed, Cablevision argues, WRNN-TV itself has emphasized its service to upstate New York in other proceedings.²⁶ Cablevision

¹⁵Original Petition at 9-10 and Revised Petition at Exhibit 5.

¹⁶See e.g., *Comcast Cablevision of Danbury, Inc.*, 1997 FCC Lexis 821 (1997)(42 miles); *Cablevision Systems Corporation*, 11 FCC Rcd 6453, 6477 (1996)(40-42 miles); and *Comcast Cablevision of Monmouth County, et al.*, 11 FCC Rcd 6440, 6443 (1996)(90 miles).

¹⁷See *WRNN-TV Associates Limited Partnership*, 14 FCC Rcd 13453, 13469 (1999).

¹⁸Original Petition at Exhibit 6.

¹⁹*Id.* at 4 and 13-14.

²⁰Revised Petition at Exhibit 8.

²¹*Id.* at Exhibit 9.

²²See *Cablevision Systems Corp.*, 11 FCC Rcd 6453 (1996).

²³See e.g., *Market Modifications and the New York Area of Dominant Influence*, 12 FCC Rcd 12262 (1997); and *WLNY-TV, Inc. v. FCC*, 163 F. 3d 137 (2d Cir. 1998).

²⁴See *WLNY-TV v. FCC*, 163 F. 2d at 145.

²⁵*Id.*

²⁶See *WRNN-TV Associates*, 14 FCC Rcd at 13456.

concludes that given the above, denial of its request would only cause disruption to the established viewing patterns in the subject communities for a station which has no nexus to the area.

9. In opposition, WRNN-TV argues that Cablevision's revised petition fails to cure the procedural defects of its initial petition and should be dismissed on that account.²⁷ WRNN-TV argues that the map provided by Cablevision in Exhibit 5 of its revised petition fails to indicate any of the subject cable communities other than, purportedly, the location of the Elizabeth and Hamilton cable systems' headends. WRNN-TV states that this is clearly insufficient, as Section 76.59(b)(1) of the rules requires the delineation of each relevant community.²⁸

10. Should the Bureau consider the revised petition, however, WRNN-TV maintains that Cablevision provides no basis for the requested relief. WRNN-TV argues that as a regional news station, it is dedicated to local programming, including programming directed to the subject communities. WRNN-TV states that Cablevision's revised petition ignores the fact that in the 6 months since the filing of its original petition, WRNN-TV has aired approximately 180 shows focusing on issues of interest to viewers in New Jersey, 25 of which were focused specifically on the communities in question.²⁹ WRNN-TV asserts that Cablevision's motives for not wanting to carry its signal have more to do with its carriage of News 12 New Jersey, Cablevision's news service which directly competes with WRNN-TV. WRNN-TV states that misuse of the market modification process to reduce competition was what the must carry rules were expressly enacted to prevent. Further, WRNN-TV states that the revised petition fails to recognize that WRNN-TV is carried on cable systems both adjacent to and surrounding the Elizabeth cable system, as well as on systems even farther away than Cablevision's systems at issue in this proceeding.³⁰ WRNN-TV maintains, therefore, that deletion of the subject communities would create a glaring gap in coverage and disrupt the configuration of WRNN-TV's natural market. WRNN-TV states that its carriage in these areas is supported by the fact that various sources of programming information directed to television viewers in the area list WRNN-TV.³¹

11. In reply, Cablevision argues that WRNN-TV fails to provide any new evidence which would justify denial of its request for modification. Instead, Cablevision maintains that WRNN-TV falls back on procedural arguments in its attempt to have the subject petition dismissed. Cablevision states that the map it provides in its revised petition clearly illustrates the relevant community locations. The placement of the headend markers for the cable systems was determined by the consulting engineers who used the exact coordinates of those headends. Cablevision states that this map also clearly shows WRNN-TV's Grade B contour in relation to the communities and its accompanying table the distance between WRNN-TV's transmitter site and the cable system headends.

12. Cablevision states that, as it did in its original opposition, WRNN-TV continues to devote

²⁷We note that WRNN-TV raised the issue of Cablevision's failure to comply with the service requirements of Section 76.7(a)(3) of the Commission's rules. 47 C.F.R. §76.57(a)(3). However, since Cablevision filed an amended certificate of service, this matter is now moot.

²⁸47 C.F.R. §76.59(b)(1).

²⁹Opposition at Exhibit 1.

³⁰*Id.* WRNN-TV notes that in June 1995 TKR, the previous owner of the Elizabeth, New Jersey cable system had agreed to carry its signal prior to the system's sale to Cablevision. See Exhibit 3 to WRNN-TV's opposition to Cablevision's original petition, Letter from Darren Belick, General Manager, TKR.

³¹*Id.* at 4-5.

its arguments entirely to the Elizabeth cable system, while failing to provide any evidence that it provides programming relevant to the communities served by the Hamilton cable system. Thus, Cablevision contends, it appears that WRNN-TV is conceding that it does not serve the Hamilton system viewers. With regard to the news stories purportedly directed at Elizabeth, Cablevision notes that only 7 appear to be directly targeted and WRNN-TV still does not indicate the length of any of the stories. Cablevision argues that even if one assumes that all 25 stories were targeted to Elizabeth, as WRNN-TV claims, it is still an insignificant amount over a 6-month period. Cablevision argues that the fact that WRNN-TV may provide some minimal coverage of New Jersey issues does not justify granting the station must carry status in that area when its primary focus is on the Hudson Valley. Finally, while WRNN-TV again points to its carriage on certain cable systems surrounding the Elizabeth system, it ignores its deletion from carriage on numerous nearby cable communities, many of which are closer to WRNN-TV's transmitter than is Elizabeth.³²

13. With respect to the mandatory statutory criteria, we have reviewed the information provided by the parties in the context of Cablevision's petition. An analysis of this evidence, as it relates to each factor, is provided below.

14. **Historic Carriage.** WRNN-TV began operation December 15, 1985. Despite being on-the-air for 15 years, the station has no history of carriage on Cablevision's Elizabeth or Hamilton systems.³³ Given the statutory directive, consideration must be given to this factor, bearing in mind that the objective of the Section 614(h) process is to "better effectuate the purposes" of the broadcast signal carriage scheme.³⁴ 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 historic carriage for specific reasons that do not necessarily reflect a judgment as to the geography of the market involved. Therefore, 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. We do not believe this to be the case here. We believe that WRNN-TV's failure to be carried for over 15 years reflects the lack of geographic proximity to the subject communities. Furthermore, while WRNN-TV points to carriage in several nearby cable systems, we note that there are a larger number of cable systems directly adjacent to both the Elizabeth and Hamilton cable systems which do not carry WRNN-TV because they were granted modifications to exclude the station.³⁵ Moreover, for one of the cable systems on which WRNN-TV indicates carriage, Cablevision of Bergen, an Order was issued which overturned the Bureau's initial grant of carriage in *Cablevision Systems Corporation* because the station was unable to cure signal deficiency problems.³⁶ With regard to the remaining systems where WRNN-TV is carried, several appear

³²Reply at 4.

³³WRNN-TV has indicated that the previous owner of the Elizabeth cable system evinced a desire to carry its signal. See Opposition at 4. Since this apparently occurred in 1995, however, it has no relevance to the present proceeding.

³⁴*Must Carry Order*, 8 FCC Rcd at 2976.

³⁵See e.g., *Cablevision Systems Corporation*, 11 FCC Rcd 6453 (1996); *Homes Link Communications of Princeton, L.P. and ComVideo Systems, Inc.*, 13 FCC Rcd 1578 (1997); and *Comcast Cablevision of Monmouth County et al.*, 11 FCC Rcd 6440 (1996).

³⁶See *WRNN-TV Associates Limited Partnership v. Cablevision Systems Corporation*, 13 FCC Rcd 12654 (1998).

to be within the station's Grade B contour.

15. **Grade B Coverage/Local Service.** A station's local service to cable communities is one of the relevant factors to consider in this particular case. It 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 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.³⁷ In the instant proceeding, WRNN-TV does not satisfy any of the local coverage elements we find important in a market modification analysis. Not only does WRNN-TV's predicted Grade B contour fail to encompass any of the subject communities, but WRNN-TV's city of license is geographically remote from Cablevision's Elizabeth and Hamilton systems at a minimum of 100 miles distance. With regard to programming, we note that out of the 207 New Jersey news stories cited by WRNN-TV, only 7 refer to Elizabeth and none appear to be directed to the Hamilton system. We are not convinced that the programming examples referencing the Elizabeth system are sufficient to establish a specific market connection. Moreover, it is clear from the lack of evidence that WRNN-TV has no nexus to the Hamilton system communities.

16. **Carriage of Other Stations.** We also believe that Cablevision's carriage of other local television stations provides support for the action requested. Where a cable operator is seeking to delete a station's mandatory carriage rights in certain communities, the issue of local coverage by other stations becomes a factor to which we will give greater weight than in cases where a party is seeking to add communities. In this instance, we find that the other New York stations carried by Cablevision have a closer nexus to the cable systems at issue in this proceeding than does WRNN-TV. Moreover, despite WRNN-TV's assertions, we find no evidence that Cablevision's waiver request was motivated in any way by its carriage of cable channel News 12 New Jersey.

17. **Viewership.** Nielsen's 2000 *County/Coverage Study* fails to indicate any viewership for WRNN-TV in the counties in which the subject cable communities are located.³⁸ This dearth of viewership is of evidentiary significance when tied with the lack of historical carriage and Grade B coverage.

18. After considering each statutory factor in the context of the circumstances presented here, we grant Cablevision's modification request. We believe that the cable communities herein are sufficiently removed from WRNN-TV that they ought not be deemed part of WRNN-TV's market for mandatory carriage purposes. According to the legislative history of the 1992 Cable Act, 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."³⁹ Changes may be sought and granted by the Commission "to better

³⁷As a general matter, Grade B coverage demonstrates service to cable communities and serves as a measure of a station's natural economic market. *See Must Carry Order*, 8 FCC Rcd at 2977. *See also Amendment of Section 76.51 Orlando-Daytona Beach-Melbourne, and Cocoa, Florida*, Report and Order, 102 FCC 2d 1062, 1070 (1985)("We believe that television stations actually do or logically can rely on the area within their Grade B contours for economic support.").

³⁸*See Nielsen Media Research's Nielsen Station Index, County Coverage Study 2000, Volume 3.*

³⁹H.R. Rep. 102-628, 102d Cong., 2d Sess. 97-98 (1992).

effectuate the purposes” of the mandatory carriage requirements.⁴⁰ Moreover, given the evidence as to the lack of Grade B coverage, the lack of viewership in the cable communities at issue, the lack of historic carriage, and the absence of evidence indicating that WRNN-TV provides sufficient local programming, we conclude that deletion of Cablevision’s cable communities from WRNN-TV’s market for mandatory carriage purposes better effectuates the purposes of Section 614 of the Communications Act.

IV. ORDERING CLAUSES

19. 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, that the petition for special relief filed by CSC TKR, Inc. **IS GRANTED**.

20. This action is taken pursuant to authority delegated by Section 0.321 of the Commission’s rules.⁴¹

FEDERAL COMMUNICATIONS COMMISSION

Deborah Klein, Chief
Consumer Protection and Competition Division
Cable Services Bureau

⁴⁰47 U.S.C. §534(h).

⁴¹47 C.F.R. §0.321.