

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

In the Matter of:	)	
	)	
Armstrong Utilities, Inc.	)	CSR-7037-A
	)	
Petition For Modification of the Philadelphia, Pennsylvania DMA	)	
	)	
	)	
	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 17, 2006**

**Released: November 20, 2006**

By the Deputy Chief, Policy Division, Media Bureau:

**I. INTRODUCTION**

1. Armstrong Utilities, Inc. (“Armstrong”) filed the above-captioned petition for special relief seeking to modify the Philadelphia, Pennsylvania designated market area (“DMA”) with respect to station WFMZ-TV (Ind., Ch. 46), Allentown, Pennsylvania (“WFMZ-TV”).<sup>1</sup> Specifically, Armstrong requests that WFMZ-TV be excluded, for purposes of the cable television mandatory broadcast signal carriage rules, from 11 communities it serves on its cable system located in the Philadelphia DMA.<sup>2</sup> An opposition to this petition was filed on behalf of Maranatha Broadcasting Company, Inc., licensee of WFMZ-TV, to which Armstrong replied.<sup>3</sup> For the reasons stated below, we grant Armstrong’s request.

**II. BACKGROUND**

2. Pursuant to Section 614 of the Communications Act and implementing rules adopted by

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<sup>1</sup>We note that WFMZ-TV filed a must carry complaint against Armstrong on September 1, 2006, which was conditionally granted by the Commission on June 29, 2006. See *Maranatha Broadcasting Company v. Armstrong Utilities, Inc.*, 21 FCC Rcd 7140 (2006).

<sup>2</sup>The communities are: East Nottingham Township, Elk Township, Highland Township, Londonderry Township, Lower Oxford Township, Oxford, Upper Oxford Township, West Fallowfield Township, and West Nottingham Township, Pennsylvania; and Cecil and Rising Sun, Maryland. We note that, in its opposition, WFMZ-TV points out that its must carry complaint did not include the communities of Cecil and Rising Sun, Maryland because they are not part of the Philadelphia DMA. As a result, WFMZ-TV argues that Armstrong’s petition with respect to these two communities should be moot.

<sup>3</sup>We note that WFMZ-TV filed a surreply to Armstrong’s reply to which Armstrong filed a motion to strike. Given the fact that the surreply was filed more than a month after Armstrong’s reply and the fact that it does not raise any issues that were not already discussed in the original pleadings, we will grant Armstrong’s motion.

the Commission in *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues ("Must Carry Order")*, 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.<sup>6</sup>

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.<sup>7</sup>

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.<sup>8</sup>

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<sup>4</sup>8 FCC Rcd 2965, 2976-2977 (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) 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*, Order on Reconsideration and Second Report and Order, 14 FCC Rcd 8366 (1999) ("Modification Final Report and Order").

<sup>6</sup>For a more complete description of how counties are allocated, see Nielsen Media Research's *Nielsen Station Index: Methodology Techniques and Data Interpretation*.

<sup>7</sup>47 U.S.C. §534(h)(1)(C).

<sup>8</sup>*Id.*

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.

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[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.<sup>9</sup>

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.<sup>10</sup>

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:

(1) 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.

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

Note to Paragraph (b)(2): Service area maps using Longley-Rice (version 1.2.2) propagation curves may also be included to support a technical service exhibit.<sup>11</sup>

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<sup>9</sup>H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

<sup>10</sup>*Must Carry Order*, 8 FCC Rcd 2965, 2977 n.139.

<sup>11</sup>The 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  
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- (3) Available data on shopping and labor patterns in the local market.
- (4) Television station programming information derived from station logs or the local edition of the television guide.
- (5) Cable system channel line-up cards or other exhibits establishing historic carriage, such as television guide listings.
- (6) 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.-1 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.<sup>12</sup>

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. The issue before us is whether to grant Armstrong's request to exclude WFMZ-TV from mandatory carriage on the subject cable system. All of the communities at issue (the "Oxford system") are located in the Philadelphia DMA, as is WFMZ-TV, which is licensed to Allentown, Pennsylvania.<sup>13</sup> Considering all of the relevant factual circumstances in the record, we believe that the market modification petition is a legitimate request to redraw DMA boundaries to make them congruous with market realities.

6. In support of its petition, Armstrong states that although WFMZ-TV has been on-the-air since 1976, it has never been carried on the Oxford system.<sup>14</sup> Armstrong states that it also does not carry any other television station licensed to Allentown.<sup>15</sup> Armstrong points out that the Commission has repeatedly emphasized that failure to provide Grade B coverage is a central factor in a market modification analysis.<sup>16</sup> In this instance, Armstrong argues that none of the subject communities lie

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service to a community under factor two of the market modification test.

<sup>12</sup>47 C.F.R. §76.59(b).

<sup>13</sup>Modification at 2 and Exhibit 1. Armstrong states that there are approximately 5300 subscribers served by its Oxford cable system and that all of the communities are located in Chester County, Pennsylvania and Cecil County, Maryland in the southwestern corner of the Philadelphia DMA.

<sup>14</sup>Modification at 2 and Exhibit 3.

<sup>15</sup>*Id.* at 4.

<sup>16</sup>*Id.* at 5, citing *Rancho Palos Verdes Broadcasters, Inc.*, 18 FCC Rcd 9589 (2003); *Paxson Atlanta License, Inc.*, 13 FCC Rcd 4341 (1998).

within WFMZ-TV's Grade B contour.<sup>17</sup> Indeed, Armstrong states that the nearest edge of any of the communities is at least 3.7 miles outside WFMZ-TV's predicted Grade B contour and only one subscriber is served at the far edge of that community.<sup>18</sup> Armstrong notes further that the Commission has stated that a community can be "so far removed that it cannot be deemed part of the station's market."<sup>19</sup> Armstrong states that Allentown, WFMZ-TV's city of license, is 51.4 miles from the closest edge of Highland Township, the nearest of the communities at issue.<sup>20</sup> Armstrong notes that in *Suburban Cable TV Co., Inc. and Lenfest Atlantic, Inc.*, the Commission previously excluded WFMZ-TV from communities within its market where the distance was comparable to those here.<sup>21</sup> In addition, Armstrong asserts that WFMZ-TV fails to provide any programming that is local to the communities.<sup>22</sup> Armstrong states that the vast majority of WFMZ-TV's programming appears to be general interest programming such as nationally-syndicated series, game shows and infomercials.<sup>23</sup> Armstrong argues that the Commission not only routinely finds that general interest programming is not "local" when analyzing market modification petitions, but the lack of actual, targeted programming weighs against a station in such circumstances.<sup>24</sup>

7. Armstrong argues further that many other stations carried on its system provide programming that covers Chester County news and sports.<sup>25</sup> Moreover, unlike WFMZ-TV, these stations' programming schedules are listed in the local paper for Chester County – the *Daily Local News*.<sup>26</sup> Armstrong also notes that Nielsen shows no viewership ratings for WFMZ-TV in Chester County for either cable or noncable households.<sup>27</sup> In addition, no other local papers carry listings of WFMZ-TV's programming.<sup>28</sup> Finally, Armstrong argues that there is a lack of any economic connection between WFMZ-TV and the communities.<sup>29</sup> Armstrong states that the 82-mile drive from Oxford to Allentown over secondary roads takes almost 2 hours.<sup>30</sup> Armstrong maintains that this distance and the lack of interstate highways connecting the two areas precludes economic and business connections such as shopping and labor. For instance, Armstrong points out that the communities' local newspapers list

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<sup>17</sup>*Id.* at Exhibit 7.

<sup>18</sup>*Id.*

<sup>19</sup>*Id.* at 5, citing *Dynamic Cablevision of Florida*, 11 FCC Rcd 9889, 9883 (1992); *recon. denied*, 14 FCC Rcd 13783 (1999).

<sup>20</sup>*Id.* Armstrong notes that Cecil, Maryland, the farthest of the communities, is 85.5 miles from Allentown.

<sup>21</sup>*Id.* at 6, citing 13 FCC Rcd 4757 (1997), *recons. denied*, 16 FCC Rcd 10790 (2001) (61 miles) ("*Suburban Decision*").

<sup>22</sup>*Id.* at Exhibit 8.

<sup>23</sup>*Id.* Armstrong states that the only programming produced by WFMZ-TV is news programming, a half-hour of which is devoted to Berks County news each evening. There is no equivalent Chester County news program.

<sup>24</sup>*Id.* at 6-7, citing *Greater Worcester Cablevision, Inc.*, 13 FCC Rcd 22220 (1998); *Market Modifications and the New York Area of Dominant Influence*, 12 FCC Rcd 12262, 12270 (1997).

<sup>25</sup>*Id.* at 7.

<sup>26</sup>*Id.* at Exhibit 9.

<sup>27</sup>*Id.* at Exhibit 10.

<sup>28</sup>*Id.*

<sup>29</sup>*Id.* at 8.

<sup>30</sup>*Id.* at Exhibit 11.

numerous job postings for Chester County and Philadelphia, but few relating to Allentown businesses.<sup>31</sup> Moreover, Armstrong states, the communities and WFMZ-TV are assigned to different Metropolitan Statistical Areas (“MSAs”).<sup>32</sup>

8. In opposition, WFMZ-TV argues that a mechanical application of the four market modification factors to bar its carriage in the subject communities would not “better effectuate the purposes” of Congress, as the statute directs because Armstrong’s subscribers have a substantial First Amendment-protected interest in securing access to WFMZ-TV’s extensive news and public affairs coverage.<sup>33</sup> WFMZ-TV maintains that just because it has not previously sought carriage on Armstrong’s cable system is no reason to conclude that it should not now be entitled to carriage.<sup>34</sup> Indeed, in *Time Warner Cable (Avenal, California)*, the Commission recognized that reliance on some of the factors to exclude communities where a station, such as WFMZ-TV is seeking carriage for the first time, would be a non sequitur: by definition, such stations would have no history of cable carriage in the subject community.<sup>35</sup> WFMZ-TV states, however, that it has been carried on other Chester County cable systems since December 1999 and a number of those cable communities (*i.e.*, New London and Atglen) are contiguous to the areas within which Armstrong operates.<sup>36</sup> WFMZ-TV states that it is also carried by DIRECTV and Dish Network which together reach 19.4 percent of the total TV households in Chester County.<sup>37</sup> In addition, despite Armstrong’s assertions, WFMZ-TV argues that it provides a significant programming service directed to Chester County and the communities at issue.<sup>38</sup> WFMZ-TV states that it broadcasts 59 live local newscasts each week, including coverage of local, regional and national news, elections and events.<sup>39</sup> Indeed, WFMZ-TV points out that, during an 18-month period between February 2005 and July 2006 it broadcast at least 223 news stories focused on Chester County.<sup>40</sup> WFMZ-TV states that, in addition to news, it provides coverage of local elections, sporting events, weather and emergency weather alerts to Chester County.<sup>41</sup>

9. WFMZ-TV argues further that while Armstrong emphasizes the distance between Allentown and its communities, that allegation is exaggerated by the inclusion of two Maryland communities where WFMZ-TV has not even sought carriage.<sup>42</sup> Moreover, WFMZ-TV asserts that

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<sup>31</sup>*Id.* at Exhibit 12. Armstrong notes that fewer than 300 people commuted from Chester County to Lehigh County as opposed to 25,673 people commuting from Chester County to Montgomery County. *See id.* at 9 n.34.

<sup>32</sup>*Id.* at 9.

<sup>33</sup>*Id.* at 6.

<sup>34</sup>*Id.* at 7.

<sup>35</sup>*Id.* at 6, citing 11 FCC Rcd 8047, 8053-54 (1996).

<sup>36</sup>*Id.* at 7 and Attachment A.

<sup>37</sup>*Id.*

<sup>38</sup>*Id.* at 8.

<sup>39</sup>*Id.* WFMZ-TV states that five of those newscasts are the only daily local half-hour Spanish-language newscasts in the Philadelphia market. It notes that, according to the U.S. Census (2000), more than 16 percent of the population of Oxford Borough, the largest community in the Armstrong system, is Hispanic.

<sup>40</sup>*Id.* at Attachment B.

<sup>41</sup>*Id.* at 8-9.

<sup>42</sup>*Id.* at 10. WFMZ-TV argues that two cases cited by Armstrong (*Paxson Atlanta License, Inc.*, 13 FCC Rcd 4341 (1998), and *Dynamic Cablevision of Florida*, 11 FCC Rcd 9880 (1992)) concerned communities at far  
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Armstrong's reliance on the *Suburban Decision* appears to be premature as there is still an outstanding petition for reconsideration.<sup>43</sup> In any event, the cable operator in that decision has commenced carriage of WFMZ-TV in all but one of the communities at issue.<sup>44</sup> WFMZ-TV argues that, despite the distances, the marketplace has determined that these communities are part of WFMZ-TV's local television market. Therefore, WFMZ-TV maintains that the fact that it may not place a Grade B contour over all of Armstrong's communities is not dispositive, as evidenced by the Commission's decision in *Ventura County Cablevision*.<sup>45</sup> In any event, WFMZ-TV argues that the location of the subject communities a few miles beyond WFMZ-TV's theoretical Grade B contour is far outweighed by the station's strong record of locally-focused programming.<sup>46</sup> Indeed, WFMZ-TV notes that while Armstrong claims that a number of other stations carry programming that covers Chester County, it fails to show that such coverage is so unique or exhaustive that there would be no public interest in providing their subscribers with information from another source.<sup>47</sup> WFMZ-TV maintains that, apart from the Philadelphia affiliates, none of the stations carried by Armstrong provide the regional news coverage WFMZ-TV provides.<sup>48</sup> Further, despite the significant Hispanic population, Armstrong's channel line-up does not include either of the Philadelphia DMA's Spanish-language stations, WWSI (Telemundo) or WUVP (Univision).<sup>49</sup> WFMZ-TV states that its carriage would help fill that void in Armstrong's local service. Finally, WFMZ-TV states that its program schedule is listed in the *Philadelphia Inquirer* which has a greater circulation in Chester County than the *Daily Local News* cited by Armstrong.<sup>50</sup>

10. WFMZ-TV argues that reference to viewing patterns in cable households is particularly inappropriate when deciding whether a particular station, for the first time, should have access to a cable system's customers.<sup>51</sup> WFMZ-TV points out that Chester County has at least an 82 percent cable penetration rate.<sup>52</sup> Where three-quarters or more of the potential viewers are connected to cable, WFMZ-TV argues that the viewership factor is virtually indistinguishable from the historic carriage factor.<sup>53</sup> As a result, WFMZ-TV asserts that limited viewing surveys have no relationship to the question as to whether there is a public interest in making WFMZ-TV's programming available to Armstrong's customers.

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greater distances than those involved here (93-126 miles, respectively). As a result, WFMZ-TV asserts that they have no precedential value in this situation.

<sup>43</sup>We note that WFMZ-TV appears to be in error. A final order was released on May 18, 2001, which resolved reconsideration petitions filed by both WFMZ-TV and Suburban. See 16 FCC Rcd 10790 (2001).

<sup>44</sup>*Id.* at 10 n.8.

<sup>45</sup>*Id.*, citing 10 FCC Rcd 9474 (1995) ("the replacement of Grade B contours with ADIs as a must-carry standard in Section 614 indicates that Grade B contours are not to be used as any absolute measure of the scope of a station's market").

<sup>46</sup>*Id.* at 11.

<sup>47</sup>*Id.*

<sup>48</sup>*Id.*

<sup>49</sup>*Id.* at 12.

<sup>50</sup>*Id.* at Attachment F.

<sup>51</sup>*Id.* at 12.

<sup>52</sup>*Id.* at Exhibit 10.

<sup>53</sup>*Id.*, citing *Ventura County Cablevision*, 10 FCC Rcd 9474, 9481-82 (1995).

Notwithstanding this, WFMZ-TV states that it has achieved viewership in Chester County that is comparable to or greater than a number of television stations currently carried on Armstrong's system.<sup>54</sup> Lastly, WFMZ-TV contends that Armstrong's arguments regarding a lack of economic connection could apply equally to the Philadelphia stations' market as well, yet the petitioner is not suggesting that those stations should be excluded.<sup>55</sup> Moreover, while it may be true that the communities and WFMZ-TV are in different MSAs, it is also true that there are seven different MSAs in the Philadelphia DMA.<sup>56</sup> However, there is only one television market and one set of must carry rules.<sup>57</sup>

11. In reply, Armstrong argues that WFMZ-TV not only fails to rebut the evidence presented in its market modification petition, but the evidence it presents is often misleading or incorrect.<sup>58</sup> For instance, Armstrong states that the requested modification of Armstrong's market does not implicate the First Amendment as claimed by WFMZ-TV.<sup>59</sup> Armstrong states that, by its terms, the First Amendment applies only to governmental restriction of speech.<sup>60</sup> Moreover, Armstrong states that it is well-established that it is Armstrong, and not WFMZ-TV, that has the First Amendment interest at issue under the must carry laws.<sup>61</sup> In any event, Armstrong states that modification of WFMZ-TV's market will not restrict the subscribers' ability to receive the station as it will still be available over-the-air or it could be carried via retransmission consent.<sup>62</sup>

12. Armstrong also argues that, in citing *Time Warner Cable Avenal*, WFMZ-TV unsuccessfully attempts to delete the historic carriage factor from the statute.<sup>63</sup> Armstrong argues, however, that this case is inapplicable to the situation faced by the station in *Time Warner Avenal*, which had only been on-the-air four years, was considered a "new" station and thus the historic carriage factor was given less weight.<sup>64</sup> In the situation here, WFMZ-TV has been on-the-air for 30 years and is not considered either a "new" station or a "specialty" station. Armstrong states that the Commission has consistently found in such situations that failure to be carried for such a long time is compelling evidence

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<sup>54</sup>*Id.* at Attachment G.

<sup>55</sup>*Id.* at 14.

<sup>56</sup>*Id.*

<sup>57</sup>*Id.* WFMZ-TV notes that it pays the same annual regulatory fee as every other commercial UHF television station licensed to a community in the Philadelphia DMA. It argues that the FCC assessment of uniform regulatory fees contains an implicit presumption of the ability to generate revenue through the sale of advertising throughout the market, and access to the viewers necessary to support those advertising sales.

<sup>58</sup>Armstrong also claims that WFMZ-TV's opposition was untimely and should be stricken from the record. Upon review, however, we find that WFMZ-TV filed a timely request for extension of time to respond to Armstrong's petition and subsequently filed its opposition within the allotted time.

<sup>59</sup>Reply at 3, citing Opposition at 6.

<sup>60</sup>*Id.*, citing *Dominion Video Satellite, Inc. v. Echostar Satellite L.L.C.*, 430 F.3d 1269, 1276 (10<sup>th</sup> Cir. 2005); *Loce v. Time Warner Entertainment Advance/Newhouse Partnership*, 191 F.3d 256, 266 (2<sup>nd</sup> Cir. 1999); *Bilby v. Board of Regents of University of Nebraska at Lincoln*, 340 F.Supp.2d 1031, 1034 (D.Neb.2004).

<sup>61</sup>*Id.* at 4, citing *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. 622, 636 (1994).

<sup>62</sup>*Id.*

<sup>63</sup>*Id.*, citing Opposition at 6.

<sup>64</sup>*Id.* at 4-5.



that a station is not local, particularly if the cable system has also never carried stations from the broadcaster's city of license.<sup>65</sup> Armstrong argues further that WFMZ-TV's claims of DBS and cable carriage in Chester County are also not persuasive. DBS operators are statutorily mandated to carry all broadcast stations in a DMA, and the markets are not subject to modification as are cable markets. Thus, Armstrong states, DBS carriage is not persuasive evidence of historic carriage nor can it outweigh WFMZ-TV's lack of cable carriage for nearly 30 years.<sup>66</sup> In addition, Armstrong argues that Comcast's carriage of WFMZ-TV in the communities of Atglen, Cochranville and New London, Pennsylvania do not support historic carriage because these communities are at the extreme southern and western edges of Comcast's technically-integrated Coatesville system whose headend and a significant percentage of communities are all inside WFMZ-TV's predicted Grade B contour.<sup>67</sup> In contrast, Armstrong states that its Oxford system is entirely outside WFMZ-TV's Grade B contour and over half the subscribers served by the system are outside the Philadelphia DMA as well.<sup>68</sup> Armstrong argues, therefore, that because it is technically unable to prevent Philadelphia DMA programming from being cablecast throughout its system, denying the requested modification would effectively extend WFMZ-TV's market into a second DMA.<sup>69</sup>

13. Armstrong asserts further that WFMZ-TV does not provide any evidence of coverage or meaningful local service to the communities at issue.<sup>70</sup> While it is uncontested that WFMZ-TV fails to place a Grade B contour over any of the communities, WFMZ-TV claims that this failure is "not dispositive."<sup>71</sup> Armstrong argues, however, that such failure weighs heavily in its favor. Moreover, WFMZ-TV's claim that it provides Spanish-language programming to the communities that is unavailable elsewhere on Armstrong's channel line-up is unsupported by fact.<sup>72</sup> Armstrong states that its Oxford system carries a significant number of Spanish-language stations including Telemundo, Mun2, HBO Latino, and music channels Salsa y Merenque, Rock 'En Espanol, Pop Latino, and Mexicana.<sup>73</sup> In addition, Armstrong argues that WFMZ-TV's news programming has virtually no connection to the communities at issue.<sup>74</sup> Armstrong points out that many of the news transcripts provided by WFMZ-TV are duplicative or identical.<sup>75</sup>

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<sup>65</sup>*Id.* at 5, citing *Comcast Cablevision of New Mexico, Inc.*, 15 FCC Rcd 7922, 7929 (2000); *Cablevision Systems Corporation*, 16 FCC Rcd 17031, 17037 (2001).

<sup>66</sup>*Id.*

<sup>67</sup>*Id.* at 6.

<sup>68</sup>*Id.* The additional communities are located in the Baltimore, Maryland DMA.

<sup>69</sup>*Id.*, citing *Norwell Television, LLC*, 16 FCC Rcd 21970 at para. 27 (2001) (denying station's petition to include communities in its market where the cable system at issue was technically integrated, and the inclusion of the requested communities would result in the integrated system delivering the station's signal to additional out-of-market communities).

<sup>70</sup>*Id.*

<sup>71</sup>*Id.* at 6-7, citing Opposition at 8 and 12.

<sup>72</sup>*Id.* at 7.

<sup>73</sup>*Id.*, citing Modification at Exhibit 5.

<sup>74</sup>*Id.*

<sup>75</sup>*Id.* at 8-9.

14. Armstrong argues that WFMZ-TV's argument that its lack of viewership should be disregarded due to the high cable penetration rate in Chester County is also illogical.<sup>76</sup> Other Philadelphia DMA stations achieve significant over-the-air ratings in Chester County despite the cable penetration rate.<sup>77</sup> Armstrong states that, considering its failure to provide Grade B coverage, it is not surprising that WFMZ-TV has no viewership in Chester County. Moreover, Armstrong argues that the fact that some stations carried by the cable system have lower viewership than WFMZ-TV is irrelevant with regard to the situation here.<sup>78</sup> Finally, Armstrong states that WFMZ-TV fails to provide any precedent for either 1) its contention that that because there are seven MSAs in the Philadelphia DMA, that somehow negates the fact that WFMZ-TV and the Oxford cable system are in different MSAs; or 2) that because it pays the same regulatory fees as other commercial stations in the market, it should be entitled to carriage throughout the market.

15. Section 614(h)(1)(C) of the Communications Act authorizes the Commission to include or exclude particular communities from a television station's market for the purpose of ensuring that a television station is carried in the areas which it serves and which form its economic market.<sup>79</sup> Section 614(h)(1)(C)(i) specifically and unambiguously directs the Commission, in considering requests for market modification, to afford particular attention to the value of localism by taking such matters into account.<sup>80</sup> Based on our analysis of the evidence relating to the four statutory and other relevant factors, we agree with Armstrong and will grant its request. This is not the first time that carriage of WFMZ-TV has been a matter of contention. In four previous decisions, the Bureau denied market modification requests to delete WFMZ-TV's signal: *Garden State Cablevision, L.P.*,<sup>81</sup> *Comcast of Central New Jersey*,<sup>82</sup> *Comcast Cablevision of Burlington County, Inc. & Comcast Cablevision of Gloucester County, Inc.*,<sup>83</sup> and the *Suburban Decision* cited by WFMZ-TV herein.<sup>84</sup> In all of the above decisions, the Bureau

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<sup>76</sup>*Id.* at 10.

<sup>77</sup>*Id.* at 10-11, citing *Frontiersvision Operating Partners, L.P., et al.*, 17 FCC Rcd 9332, 9343 (2002) (rejecting broadcaster's argument that cable penetration rate affected viewership where other stations in market had measurable viewership despite high cable penetration).

<sup>78</sup>*Id.* at 11.

<sup>79</sup>47 U.S.C. § 534(h)(1)(c).

<sup>80</sup>47 U.S.C. § 534(h)(1)(C)(i).

<sup>81</sup>13 FCC Rcd 1616 (1997); *recon. granted in part*, 16 FCC Rcd 10816 (2001). Garden State sought to delete WFMZ-TV from carriage in 58 communities located in Burlington, Camden, Gloucester, Ocean and Salem Counties, New Jersey. Initially, the Bureau denied Garden State's request in its entirety, primarily citing the fact that it appeared that WFMZ-TV's imminently-expanded Grade B contour would encompass the majority of the communities. The Bureau granted Garden State's reconsideration, in part, when it was shown that of the five separate cable systems, only the communities in two fell within WFMZ-TV's Grade B contour.

<sup>82</sup>13 FCC Rcd 1656 (1997); *recon. denied*, 16 FCC Rcd 10803 (2001). Comcast sought to delete WFMZ-TV from carriage in the communities of East Windsor Township, Hightstown Borough and West Windsor Township, New Jersey. Comcast's market modification was denied because of the communities' location on the edge of WFMZ-TV's Grade B contour.

<sup>83</sup>13 FCC Rcd 1629 (1997); *recon. denied*, 16 FCC Rcd 10809 (2001). Comcast sought to exclude WFMZ-TV from carriage in 27 communities located in Burlington and Gloucester Counties, New Jersey. Moreover, in at least one of these three systems, Suburban carried another station licensed to Allentown, WFMZ-TV's city of license. Comcast's market modification request was denied because of the communities' location on the fringe of WFMZ-TV's expanded Grade B contour.

<sup>84</sup>13 FCC Rcd 4757 (1997); *recon. denied*, 16 FCC Rcd 10790 (2001). Suburban sought to exclude  
(continued...)

denied the petitioners' requests where WFMZ-TV's Grade B contour, or its expanded Grade B contour, encompassed at least a portion of the system communities while the remaining system communities fell just outside the Grade B contour. Because of this demonstrable coverage, WFMZ-TV's lack of historic carriage and its marginal local programming were given less emphasis. In the situation here, there are no similar factors that override WFMZ-TV's failure to meet the market modification criteria. None of the Oxford system communities are encompassed by WFMZ-TV's predicted Grade B contour, and the great majority are not on-the-fringe of WFMZ-TV's Grade B contour. In addition, unlike one instance in *Suburban Cable*, the Oxford system does not carry another Allentown television station. While WFMZ-TV points to a cable system served by Comcast that apparently carries WFMZ-TV in communities located in Chester County, the same county referenced herein, it appears that these communities are the same communities referenced in the *Suburban Decision* as the Coatesville system.<sup>85</sup> As a result, Comcast is carrying WFMZ-TV pursuant to Commission order. Moreover, all of the Comcast communities are located at the northern end of Chester County, closest to Allentown. In comparison, the Oxford system communities are at the extreme southern end of Chester County near the border between Pennsylvania and Maryland. Given the greater distance and the terrain of the region, it is doubtful that WFMZ-TV's signal can be received over-the-air. With regard to programming, WFMZ-TV has shown that it makes some effort to provide generalized local programming to Chester County as a whole.<sup>86</sup> However, the majority of the examples shown do not appear to be focused exclusively on the communities at issue.<sup>87</sup> Moreover, the WFMZ-TV web site reveals that it broadcasts in Spanish for only one-half hour, four days a week.<sup>88</sup> We are not convinced, therefore, that such programming, while of potential general interest to the residents of Chester County, is the kind that suggests that the subject communities, in total, are a particular focus of the station or are in any sense served in a manner that establishes a specific market connection.<sup>89</sup>

16. Finally, another difference is that the Oxford cable system serves areas that are located outside of WFMZ-TV's television market. Armstrong has stated that its cable system is technically integrated and that it is unable to block out WFMZ-TV's signal from the out-of-market communities. A check of Commission records has confirmed that the Oxford cable communities are one physical system.

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(...continued from previous page)

communities served by four cable systems located in Bucks, Chester, Delaware and Lancaster Counties, Pennsylvania and Atlantic, Camden and Gloucester Counties, New Jersey. Suburban's request was denied for three of the cable systems because the communities either lay within WFMZ-TV's Grade B contour or were on-the-fringe. Deletion was granted for the remaining system because those communities lay completely outside of WFMZ-TV's Grade B and were not on-the-fringe.

<sup>85</sup>Apparently, at some point since the *Suburban Decision*, Comcast assumed ownership of this cable system.

<sup>86</sup>Many of the examples provided by WFMZ-TV in its opposition refer to Berks, Montgomery and Schuylkill Counties, Pennsylvania. While WFMZ-TV apparently has filed a supplementary showing with regard to programming in response to Armstrong's reply, the showing has not been received and is not part of our analysis.

<sup>87</sup>A review of the information provided by WFMZ-TV indicates stories relating to only three of the subject communities: Oxford, Lower Oxford Township, and Nottingham Township. For Oxford and Lower Oxford Township, there is essentially only one story with a few subsequent follow-ups. Several of the examples provided, however, appear to be duplicative. For Nottingham Township there was only one story, duplicated twice.

<sup>88</sup>See WFMZ-TV's web page at: <http://www.wfmz.com>

<sup>89</sup>See *Comcast Cablevision of New Mexico, Inc.*, 15 FCC Rcd 7922 (2000); *recon. denied*, 16 FCC Rcd 12440 (2001); *app. for rev. denied*, 19 FCC Rcd 16771 (2004).

Moreover, Armstrong notes that more than one-half of the subscribers on the relevant cable system are located outside the Philadelphia DMA and are located in a different MSA. In addition, there is more than a two-hour drive time between the Oxford cable system and Allentown. These factors are even more relevant given the mountainous terrain that separates the subject communities and Allentown. In a similar situation in *Norwell Television*, the Commission found that ordering a technically integrated cable system to carry a station, when part of that system was located outside of the subject station's television market was inconsistent with the purposes underlying the market modification process.<sup>90</sup> In essence, the station would be given free carriage beyond that which it would normally be entitled. WFMZ-TV is aware of these communities and has declared the instant petition moot with regard to them. However, in this instance, they cannot be overlooked since they contain more than one-half the subscribers served by Armstrong on the subject cable system.

17. We have carefully considered each statutory and other relevant factors in the context of the circumstances presented here and, on balance, we find that Armstrong has demonstrated that the subject communities lack a sufficient nexus with WFMZ-TV and thus warrant deletion of these communities from the station's DMA.<sup>91</sup>

#### IV. ORDERING CLAUSES

18. 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 captioned petition for special relief (CSR-6037-A), filed by Armstrong Utilities, Inc. **IS GRANTED**.

19. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules.<sup>92</sup>

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert  
Deputy Chief, Policy Division  
Media Bureau

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<sup>90</sup>See *supra* n.69 above.

<sup>91</sup>We are under no obligation to give particular weight to any one of the several statutory factors. See *Time Warner Entertainment Co. v. FCC*, 36 FCC F. 3d 151, 175 (D.C. Cir. 1995); accord, *Omnipoint Corp. v. FCC*, 78 F. 3d 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.").

<sup>92</sup>47 C.F.R. §0.283.