

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

In the Matter of)
)
Petition for Modification of Dayton, OH) CSR-8824-A
Designated Market Area With Regard) MB Docket No. 13-201
to Television Station WHIO-TV, Dayton,)
OH)

MEMORANDUM OPINION AND ORDER

Adopted: September 18, 2018

Released: September 19, 2018

By the Commission:

I. INTRODUCTION

1. Block Communications, Inc., Lima Communications Corporation, and West Central Ohio Broadcasting Corporation (together, BCI) have filed an application for review (AFR) of a market modification and must carry order issued by the Media Bureau (Bureau) regarding cable communities in the Lima, OH Designated Market Area (DMA).¹ The Media Bureau's order (*WHIO Order*) granted in part and denied in part a petition filed by Cox Media Group (CMG), licensee of station WHIO-TV (WHIO), that sought to add a total of 42 communities in the Indianapolis, IN DMA and Lima DMA to WHIO's market.² The Bureau denied the portion of the petition that sought to add Ohio's Allen County to WHIO's market.³ The Bureau granted those portions of the petition that sought to add Indiana's Wayne County and Ohio's Auglaize County to WHIO's market.⁴ In its AFR, BCI challenges only that portion of the *WHIO Order* that relates to the Auglaize County communities of the Lima, OH DMA.⁵ BCI requests that the Commission reverse the Bureau's decision to include Auglaize County in WHIO's market. For the reasons stated herein, we deny BCI's AFR.

II. BACKGROUND

2. Each year, the Nielsen Company assigns communities to geographic television markets based on measured viewing patterns within those communities. These geographic television markets are termed "designated market areas," or DMAs.⁶ Section 614 of the Communications Act of 1934, as amended (the Act),

¹ *Petition for Modification of Dayton, OH Designated Market Area With Regard to Television Station WHIO-TV, Dayton, OH*, Memorandum Opinion and Order, 28 FCC Rcd 16011 (MB 2013) (*WHIO Order*).

² *WHIO Order*, 28 FCC Rcd at 16011 ¶ 1.

³ *WHIO Order*, 28 FCC Rcd at 16021-22 ¶ 28.

⁴ *WHIO Order*, 28 FCC Rcd at 16017, 16019 ¶¶ 17, 27.

⁵ Application for Review of Petition for Modification, received in the Commission's electronic comment filing system (ECFS) on Dec. 23, 2013 (AFR).

⁶ 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

entitles commercial television broadcast stations within those markets to assert mandatory carriage (“must carry”) rights on the cable systems located within their respective DMAs.⁷

3. WHIO, licensed to CMG, is a CBS-affiliated television station assigned to the Dayton, OH DMA. BCI has two subsidiaries, both of which operate in the Lima, OH DMA. The first subsidiary, West Central Ohio Broadcasting Corporation, is the licensee of ABC/CBS-affiliate WOHL-CD. The second subsidiary, Lima Communications Corporation, is the licensee of WLIO, a Lima-based NBC affiliate.⁸ In 2012-13, Nielson assigned the Auglaize County communities to the Dayton DMA. In 2013, however, Nielsen assigned the communities of Ohio’s Auglaize County to the Lima DMA based on local viewing patterns.⁹ Not wanting to lose the ability to assert must carry rights in the Auglaize County communities, WHIO subsequently petitioned the Commission to have Auglaize County returned to its local market again.¹⁰ In this same petition, WHIO also sought to add Ohio’s Allen County and Indiana’s Wayne County to its local market.¹¹

4. Section 614(h)(1)(C)(i) of the Act grants the Commission the authority to modify a television broadcaster’s market and thus alter the must carry rights of that broadcaster with respect to cable systems located within the market: “Following a written request, the Commission may, with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station’s television market to better effectuate the purposes of this section.”¹² In considering a broadcast station’s request to add a certain community to its market area, thereby allowing the station to assert must carry rights in that community, the Act provides that:

the Commission shall afford particular attention to the value of localism by taking into account such factors as --

- (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community or on the satellite carrier or carriers serving such community;
- (II) whether the television station provides coverage or other local service to such community;

(Continued from previous page) _____
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)(2) of the Commission’s rules specify that a commercial broadcast television station’s market is its Designated Market Area as determined by The Nielsen Company. 47 CFR § 76.55(e)(2).

⁷ See 47 U.S.C. § 534(h)(1)(C). See also *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, MM Docket No. 92-259, Report and Order, 8 FCC Rcd 2965, 2975-77 ¶¶ 41-46 (1993).

⁸ *WHIO Order*, 28 FCC Rcd at 16014, 16019 ¶¶ 7, 21 & n.68, 23 & n.75.

⁹ *WHIO Order*, 28 FCC Rcd at 16014-15 ¶ 7; see also *Petition for Special Relief of Miami Valley Broad. Corp.*, filed Aug. 12, 2013, at ii-iii (Petition).

¹⁰ *Id.*

¹¹ Petition at ii, iv.

¹² See 47 U.S.C. § 534(h)(1)(C).

- (III) whether modifying the market of the television station would promote consumers' access to television broadcast station signals that originate in their State of residence;¹³
- (IV) 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 or other events of interest to the community; and
- (V) evidence of viewing patterns in households that subscribe and do not subscribe to the services offered by multichannel video programming distributors within the areas served by such multichannel video programming distributors in such community.¹⁴

Below, we refer to the five factors set forth in Section 614(h)(1)(C) as factors (I) through (V).

5. After considering WHIO's petition and weighing the aforementioned factors, the Bureau declined to add Allen County to WHIO's market, but it granted WHIO's petition to add Auglaize County and Wayne County.¹⁵ The effect of this market modification was that CBS affiliate WHIO could assert must carry rights with respect to the cable system that served the communities of Auglaize County, whereas before the modification, the communities of Auglaize County were not part of WHIO's television market for mandatory carriage purposes.

6. On December 23, 2013, BCI filed this AFR, arguing that the Bureau erred in adding the Auglaize County communities to WHIO's market. BCI objects to the Bureau's weighing of the statutory factors, arguing that superior coverage of local events by Lima station WOHL-CD should have been given more consideration.¹⁶ Additionally, BCI argues that by allowing WHIO, another CBS affiliate, to assert must carry rights in these communities, the Bureau has weakened BCI's ability to negotiate carriage agreements.¹⁷ BCI maintains that this weakened position undermines its economic expectations, which should have been given more consideration in the *WHIO Order*.¹⁸ We find these arguments unpersuasive and affirm the Bureau's decision to add the Auglaize County communities to WHIO's market.

III. DISCUSSION

7. The facts of this proceeding and the applicable law are fully set forth

¹³ Congress added this factor in 2014, when it amended the Act by passing the STELA Reauthorization Act of 2014. See STELA Reauthorization Act of 2014, H.R. 5728, 113th Congress, § 102 (2014) (STELAR).

¹⁴ 47 U.S.C. § 534(h)(1)(C).

¹⁵ *WHIO Order*, 28 FCC Rcd at 16021 ¶¶ 27, 28.

¹⁶ AFR at ii, 8-11, 14-20.

¹⁷ AFR at 22-23.

¹⁸ AFR at 21.

in the underlying decision and need not be repeated here.¹⁹ Having reviewed the arguments in BCI's AFR, we conclude that the relevant statutory factors weigh in favor of WHIO's petition to add Auglaize County to its market. We find that the Bureau gave appropriate weight to factors (I), (II), and (V), and that factor (III) supports the grant. We also find that factor (IV) was properly given neutral weight and does not weigh against WHIO's petition.

8. Factor (I) concerns "whether the station, or other stations in the same area, have been historically carried on the cable system or systems within such community."²⁰ In its AFR, BCI argues that the Bureau reached a "clearly erroneous" finding as to factor (I) by failing to consider that BCI's station WOHL-CD has historically been carried by the cable systems in Auglaize County.²¹ In doing so, BCI urges the Commission to employ a comparative analysis, suggesting that the Bureau's examination of WHIO's historical carriage should be considered in relation to the carriage of other stations. This argument relies on a single paragraph in the 1995 *Group W Television, Inc. (Group W Television)* decision, in which the former Cable Services Bureau, on delegated authority, found that historical carriage alone is only "of marginal assistance" when a cable system has historically carried signals from multiple markets.²²

9. However, the mere fact that BCI's station WOHL-CD has, for many years, been carried in Auglaize County communities does not mitigate the significance of WHIO's past carriage. When evaluating whether a station has historically been carried in a community, factor (I) is concerned with the historical carriage of the station in question and other stations located in the same area as the station in question, and not with comparing the historical carriage of that station against the carriage of other stations located in a different area, such as WOHL-CD. Generally, past decisions have taken historical carriage to indicate "that the relevant cable subscribers value the station and that the subscribers in these communities have been associated with the market of the station as viewers for a considerable period of time."²³ The historic relationship between a station and a community of subscribers is not undermined simply because another station has also been historically carried within that particular community. This is especially true when, as is the case with Auglaize County, the community is located at the geographic boundary of a particular DMA.²⁴ Therefore, after reviewing

¹⁹ See *supra* n.1.

²⁰ 47 U.S.C. § 534(h)(1)(C)(ii)(I).

²¹ AFR at 9.

²² *Group W Television, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 2737, 2741 ¶ 21 (CSB 1995).

²³ See, e.g., *News Press and Gazette Wilmington, North Carolina For Modification of Station WECT-TV's ADI*, Memorandum Opinion and Order, 10 FCC Rcd 10331, 10333 ¶ 12 (CSB 1995) (*News Press and Gazette Wilmington*).

²⁴ See, e.g., *Commonwealth Broadcasting Group, Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 213, 221-2 ¶ 15 (MB 2010) (*Commonwealth Broadcasting Group*) (agreeing that "at the geographic boundaries of DMAs, communities may naturally be part of two economic markets.").

Section 614²⁵ and our past applications of factor (I), we conclude that the paragraph of *Group W Television* upon which BCI relies is inconsistent with Commission precedent and disavow it.

10. Even if the Bureau had engaged in a comparative analysis, however, it still would have been correct to weigh factor (I) in favor of including Auglaize County. As CMG points out in its Opposition to the AFR, Nielsen had assigned Auglaize County to the Dayton DMA for 38 out of the 46 years prior to the *WHIO Order*.²⁶ These decades of carriage indicate that the Auglaize County communities “have been associated with the [Dayton] market as viewers for a considerable period of time,” which has historically been significant for the purposes of factor (I).²⁷ By contrast, Auglaize County was only assigned to the Lima DMA for 8 years over the same period.²⁸ Furthermore, WHIO-TV can demonstrate that it has been carried in five Auglaize County communities since at least 1972, with four more added in 1992, two added in 2003, and three added in 2009.²⁹ This history of carriage weighs in favor of adding these communities to its market. The AFR points out, however, that there is no record as to when WHIO service began in nine other Auglaize County communities.³⁰ In its petition, CMG acknowledges that while WHIO is currently carried in these nine communities, it is “unable . . . to determine when service was extended” to them.³¹ Although there is an absence of evidence as to when service began, it remains the case that the entire County has been assigned to WHIO’s Dayton DMA for the vast majority of the past half century. Therefore, we affirm the Bureau’s analysis with respect to factor (I).

11. Factor (II) concerns “whether the television station provides coverage or other local service to such community.”³² Accordingly, the relevant inquiry here is not whether WHIO provides *greater* coverage than BCI’s Lima stations, which is the focus of BCI’s argument.³³ Rather, the issue is whether the television station in question, *i.e.*, WHIO, “provides locally-focused programming that is of significant interest to the residents in the communities.”³⁴ We agree with the Bureau that it does.

12. First, the Bureau recognized that all Auglaize County communities receive Grade B coverage from WHIO and that the station is, on average, 56.6

²⁵ 47 U.S.C. § 534(h)(1)(C)(ii)(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”).

²⁶ See CMG Opposition to AFR, n. 9 (“Since 1967, Nielsen has assigned Auglaize County to the Dayton DMA 38 times and to the Lima DMA eight times”). See also Reply to Oppositions to Petition for Special Relief at 9 (Reply).

²⁷ *News Press and Gazette Wilmington*, 10 FCC Rcd at 10333 ¶ 12.

²⁸ See CMG Opposition to AFR, n. 9.

²⁹ Petition at 22.

³⁰ AFR at 9.

³¹ Petition at 22.

³² 47 U.S.C. § 534(h)(1)(C)(ii)(II).

³³ AFR at 7.

³⁴ *Commonwealth Broadcasting Group, Inc.*, 25 FCC Rcd at 225 ¶ 20.

miles from all Auglaize County communities.³⁵ This is sufficient to establish that WHIO can and does reach all the communities it seeks to add. That BCI stations are closer to these communities and capable of providing Grade A signal coverage is not disputed.³⁶ However, given that the relevant inquiry concerns WHIO's coverage and not that of BCI stations, the Bureau's factor (II) analysis did not require additional consideration of BCI's evidence.

13. Second, the Bureau considered evidence of WHIO's coverage of news, weather, and high school sports. From September 2010 through the end of 2012, for example, WHIO aired 65 news segments and 210 weather advisories that directly affected Auglaize County.³⁷ This evidence, which indicates that WHIO provides local programming for Auglaize County communities, is the only evidence that the Bureau was required to consider in its factor (II) analysis. BCI's evidence, which concerns the frequency and quality of its own local programming, was not relevant to the Bureau's evaluation of WHIO's programming, and the Bureau was correct to focus its attention on evidence regarding WHIO. Accordingly, we find that the Bureau correctly weighed factor (II) in favor of CMG.

14. Statutory factor (III) concerns "whether modifying the market of the television station would promote consumers' access to television broadcast station signals that originate in their State of residence."³⁸ As discussed above, Congress added this factor in 2014, when it amended the Act by passing the STELA Reauthorization Act of 2014 (STELAR).³⁹ Therefore, the Bureau did not have an opportunity to decide whether factor (III) weighed in favor of market modification because STELAR was enacted in 2014⁴⁰, and the Commission's implementing rule was adopted in 2015,⁴¹ after the Bureau issued the WHIO Order in 2013. As a general matter, an administrative agency must apply the law in effect at the time it renders its decision unless there is some indication to the contrary in the statute or its legislative history or unless the new statute or rule would have retroactive effect.⁴² STELAR lacks an express directive that Section 534(h)(1)(C)(ii)(III) applies to pending cases and the legislative history provides no definitive guidance on the provision's temporal reach.⁴³ Further, we find that consideration of factor

³⁵ *WHIO Order*, 28 FCC Rcd at 16018 ¶ 20. As that Order explains, all full-power television stations are now broadcasting in digital, and "the Commission has treated a digital station's noise limited service contour as the functional equivalent of an analog station's Grade B contour." *Id.* at 16013, n. 15.

³⁶ AFR at 11.

³⁷ *WHIO Order*, 28 FCC Rcd at 16018 ¶ 20.

³⁸ 47 U.S.C. § 534(h)(1)(C)(ii)(III).

³⁹ See STELA Reauthorization Act of 2014, H.R. 5728, 113th Congress, § 102 (2014).

⁴⁰ *Id.*

⁴¹ *Amendment to the Commission's Rules Concerning Market Modification; Implementation of Section 102 of the STELA Reauthorization Act of 2014*, MB Docket No. 15-71, Report and Order, 30 FCC Rcd 10406 (2015) (*STELAR Report and Order*).

⁴² *Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268, 281-82 (1969) (as a general rule, an administrative agency acting pursuant to legislative authorization must apply the law in effect at the time it renders its decision).

⁴³ 47 U.S.C. § 534(h)(1)(C)(ii)(III). There was no final Report issued to accompany the final version of the STELAR bill (H.R. 5728, 113th Cong.) as it was enacted. Because the relevant section of the STELAR was added from the Senate predecessor bill (S. 2799, the

(III) in the present case would not have retroactive effect. Courts have found that there are three ways in which a rule can be retroactive: “if it ‘impair[s] rights a party possessed when he acted, increase[s] a party’s liability for past conduct, or impose[s] new duties with respect to transactions already completed.’”⁴⁴ None of these concerns apply here. To the contrary, factor (III) is simply an additional piece of information the Commission must consider in its evaluation of whether modifying a market will fulfill Congress’s objective to promote consumer access to local programming – the same goal that has been in place in the cable context since 1993.⁴⁵ For this reason, we find it appropriate to consider factor (III) in our evaluation of WHIO’s market modification request.

15. A petitioner will be afforded credit for satisfying factor (III) simply by showing that the involved station is licensed to a community within the same state as the new community, but the factor will weigh more heavily in favor of modification if the petitioner shows that the involved station provides programming specifically related to subscribers’ state of residence, and may be given even more weight if subscribers in the new community have little (or no) access to such in-state programming.⁴⁶ Here, WHIO is afforded credit for satisfying factor (III) because it is licensed to a community within the same state as the new community, *i.e.*, Ohio, and the factor weighs more heavily in favor of modification because WHIO provides programming specifically related to Ohio.⁴⁷

16. Statutory factor (IV) concerns “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 or other events of interest to the community.”⁴⁸ Past applications of this factor have held that if a community’s local needs are unserved by other stations, the absence will weigh in favor of adding the community to the petitioning station’s market.⁴⁹ By contrast, if other stations do serve the community’s local needs, then this factor is to be given

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Satellite Television Access and Viewer Rights Act (STAVRA)), we therefore look to the Senate Report No. 113-322 (dated December 12, 2014) accompanying the predecessor bill for the relevant legislative history of this provision. *See* Report from the Senate Committee on Commerce, Science, and Transportation accompanying S. 2799, 113th Cong., S. Rep. No. 113-322 (2014).

⁴⁴ *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 825-26 (D.C. Cir. 1997) (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)). *See also* *Mobile Relay Associates v. FCC*, 457 F.3d 1, 11 (D.C. Cir. 2006) (“an agency order that ‘alters the future effect, not the past legal consequences’ of an action” “or that ‘upsets expectations based on prior law’ is not retroactive”).

⁴⁵ 1993 *Report and Order*, 8 FCC Rcd at 2975-76 ¶¶ 41, 42.

⁴⁶ *STELAR Report and Order*, 30 FCC Rcd at 10420 ¶ 20.

⁴⁷ Petition at 13-16, 24-27, and 33-35. WHIO’s claims of providing substantial amounts of Ohio-specific programming are undisputed. There is, however, no evidence that Auglaize residents would “have little (or no) access” to Ohio-focused programming absent service from WHIO, so we decline to give this factor additional positive weight.

⁴⁸ 47 U.S.C. § 534(h)(1)(C)(ii)(IV).

⁴⁹ *WTNH Broadcasting, Inc.*, 22 FCC Rcd 19761, 19768 ¶ 13 (MB 2007).

neutral weight and will not weigh against the petitioning station.⁵⁰ BCI has submitted ample evidence that it provides locally-focused news coverage and coverage of other events in the Auglaize County communities.⁵¹ CMG concedes this point in its Reply.⁵² Therefore, the Bureau was correct to give neutral weight to factor (IV) in its analysis.

17. Statutory factor (V) concerns “evidence of viewing patterns in households that subscribe and do not subscribe to the services offered by multichannel video programming distributors within the areas served by such multichannel video programming distributors in such community.”⁵³ The Bureau correctly considered CMG’s evidence that WHIO’s programs are popular in the Auglaize County communities. In 2012, for instance, WHIO was the highest-rated television station in Auglaize County.⁵⁴ CMG’s evidence of strong and longstanding ties between WHIO and local advertisers in Auglaize County serves as a further indication that the station has garnered meaningful viewership shares in the communities it wishes to add.⁵⁵ Therefore, we find that the Bureau correctly weighed factor (V) in favor of CMG.

18. Finally, the Bureau considered BCI’s argument that adding the Auglaize County communities would upset BCI’s economic expectations because these communities are core communities of the Lima DMA.⁵⁶ As stated above, BCI’s station WOHL-CD is a CBS affiliate in Lima. BCI claims that has “bargained for and pays consideration for the right to be the CBS affiliate in the Lima DMA and to receive the economic benefits of that affiliation.”⁵⁷ According to BCI, in the absence of another CBS affiliate in the DMA, BCI is in a stronger position to sell advertising and compete for carriage.⁵⁸ BCI argues that allowing an out-of-market CBS affiliate to assert must carry rights would upset its economic expectations.⁵⁹ As the Bureau has observed, the degree to which a proposed modification would “unduly upset . . . economic marketplace expectations” is a relevant factor for consideration.⁶⁰ However, given that Auglaize County had only been assigned to the Lima DMA in 8 out of the 46 years prior to WHIO’s petition,⁶¹ we are not convinced that BCI had legitimate economic expectations here. In fact, 2013 was the first time in three years that Auglaize County had been assigned to the Lima

⁵⁰ *Id.*

⁵¹ AFR at 15.

⁵² Reply at 15.

⁵³ 47 U.S.C. § 534(h)(1)(C)(ii)(V).

⁵⁴ See CMG Opposition to AFR at 4. See also Reply at 7.

⁵⁵ CMG Opposition to AFR at 4. See also Petition at 29-30.

⁵⁶ See *WLNY-TV, Inc. v. FCC*, 163 F.3d 137, 144-45 (2d Cir. 1998) (observing that the statutory factors “are not exclusive”).

⁵⁷ See Opposition to Petition for Special Relief at 25 (BCI Opposition).

⁵⁸ See BCI Opposition at 25-6.

⁵⁹ See BCI Opposition at 26.

⁶⁰ See also *Free State Communications, LLC; For Modification of the Topeka, Kansas DMA*, 24 FCC Rcd 7339, 7348 ¶ 22 (MB 2009).

⁶¹ Reply at 9.

DMA.⁶² Therefore, we are skeptical that adding these communities to WHIO's market upset any genuine expectations on BCI's part, and we find that the Bureau afforded this argument little weight.

19. In conclusion, we find that the Bureau appropriately evaluated all relevant factors in its analysis of whether to add the Auglaize County communities to WHIO's market.⁶³ As a result, the Bureau's partial grant of WHIO's market modification request was proper. BCI's application for review is hereby denied.

IV. ORDERING CLAUSE

20. **IT IS ORDERED**, pursuant to Section 614(h) of the Communications Act of 1934, as amended, 47 U.S.C. § 534, and Sections 76.59 and 1.115 of the Commission's rules, 47 CFR §§ 76.59 and 1.115, that the application for review filed by Block Communications, Inc. of Cox Media Group's petition for modification (CSR-8824-A) **IS DENIED**.

FEDERAL COMMUNICATIONS

COMMISSION

Marlene H. Dortch
Secretary

⁶² Reply at Attachment A.

⁶³ We note that even if the Commission were to disregard factor (III) here, evaluation of the remaining factors supports the Bureau's decision to add Auglaize County communities to WHIO's market, given that factors 1, 2, and 5 weigh in favor of market modification and factor 4 is given neutral weight.