

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

In the Matter of)	
)	
George S. Flinn, Jr.)	CSR-8608-M
)	Docket No. 12-87
v.)	
)	
Comcast Cable Communications, LLC, on behalf of its subsidiaries and affiliates))	CSR-8625-A Docket 12-114
To: Chief, Media Bureau)	

Petition for Reconsideration

George S. Flinn, Jr. ("Flinn"), by his attorney and pursuant to Section 1.106 of the Commission's rules and regulations, hereby respectfully submits a Petition for Reconsideration with respect to the Commission's Memorandum Opinion and Order (DA-12-1265; hereinafter referred to as the "MO &O") released on August 3, 2012 in the above-referenced proceeding(s). In support thereof, the following is shown:

A. Background

Flinn is the licensee of WFBD, a full power commercial television broadcast station licensed to Destin, Florida. WFBD has been on the air for less than seven years (i.e., the station commenced operation on September 5, 2005).

On September 19, 2011, Flinn served timely notice on Comcast that WFBD was electing mandatory carriage on Comcast's cable system(s) serving the Mobile, AL-Pensacola (Ft. Walton Beach), FL DMA for the three year election cycle beginning January 1, 2012 and ending December 31, 2014.

Comcast failed to either (a) implement carriage of WFBD or (b) respond to Flinn's

September 19, 2011 carriage request . As such, on February 9, 2012, Flinn forwarded another detailed letter to Comcast delineating why carriage of WFBD was appropriate.

In addition, Flinn's February 9, 2012 letter stated:

As noted in Flinn's initial September 19, 2011 carriage election notice to Comcast, [p]lease be advised that in the event you are unable to receive a good quality WFBD signal (as defined by the FCC's rules) at all of your principal headends in the DMA, WFBD agrees to be responsible for the costs of delivering to those systems a good quality signal via alternative means pursuant to 47 C.F.R. 76.55(c)(3).

Consistent with the foregoing (and in the event that Comcast preliminarily determines that there is an insufficient over-the-air WFBD signal at the head-end), WFBD has arranged for the employment of a fiber feed to ensure a "good quality" signal at the Comcast headend.

In a letter dated March 9, 2012, Comcast denied Flinn's carriage request, citing signal measurements which preliminarily indicate "that WFBD does not deliver a good quality over-the-air signal to either of Comcast's principal headend facilities in the DMA". Comcast's March 9, 2012 letter completely ignored Flinn's affirmative representation that "should Comcast be unable to receive a good quality WFBD signal (as defined by the FCC's rules) at all of Comcast's principal headends in the DMA, WFBD agrees to be responsible for the costs of delivering to those systems a good quality signal via alternative means pursuant to 47 C.F.R. 76.55(c)(3)".

On March 28, 2012, Flinn timely filed a Complaint demonstrating that Comcast has improperly failed to carry WFBD, Destin, Florida on its cable television system(s) serving the Mobile, AL-Pensacola (Ft. Walton Beach), Florida DMA and respectfully requesting (a) that a determination be rendered by the Commission that Comcast has failed to meet its must-carry obligations with respect to carriage of WFBD and (b) that

the Commission order Comcast, within 45 days of such order, to commence carriage of WFBD, Destin, Florida.

In its Opposition to Flinn's carriage Complaint, Comcast admitted that it should be carrying WFBD. However, rather than commence carriage of WFBD, Comcast filed a "Petition for Special Relief" seeking to modify the Mobile, AL-Pensacola, FL market to exclude WFBD from the communities of Chickasaw, Mobile, Prichard, Saraland, Dauphin Island and the immediately surrounding areas of unincorporated Mobile County.

Instead of granting Flinn's carriage Complaint and processing Comcast's "Petition for Special Relief" on a separate track, the Commission chose to bundle both proceedings. In its MO & O, the Commission (a) granted Comcast's "Petition for Special Relief" to modify WFBD's market so as to remove the communities of Chickasaw, Mobile, Prichard, Saraland, Dauphin Island and the immediately surrounding areas of unincorporated Mobile County from WFBD's market and (b) denied Flinn's mandatory carriage Complaint in light of the Commission's market modification decision.

B. Analysis of MO & O

1. Congress and the FCC have long recognized that stations in their DMA possess a presumption of carriage (see, e.g., Gray Television Licensee, Inc. [CSR-7007-A], Memorandum Opinion and Order, DA 06-1566, released August 4, 2006).

2. As the Commission noted in its MO & O:

Under the Act, the Commission may consider requests to modify 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 market to better effectuate the purposes of this section.

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.

3. As the subject case starkly illustrates, the Commission's request that petitioners (such as Comcast) submit "standardized evidence" does nothing to militate against the subjective nature of the analysis itself. As noted hereinabove, the Commission has traditionally reviewed four factors as part of its consideration of market modification requests but has never definitively defined how the factors should be "weighted" or comparatively analyzed. Arguing that various "factors" are part of a comprehensive analysis is simply another way of stating that the analysis is highly subjective.

4. For example, the MO & O affords weight to the fact that WFBD has never been historically carried on Comcast's cable systems in the Mobile area, yet glosses

over the fact that this is due to Comcast's historic and steadfast refusal to carry WFBD despite repeated requests (and the filing of an FCC Complaint). It is bad behavior being rewarded. Comcast denies carriage of a station (in this case WFBD) and then boldly claims to have prevailed under Factor "I" since the station has never been carried on its system. Using the converse of Comcast's position as to Factor "I", if Comcast had in good faith carried WFBD when it first sought carriage years ago, Flinn (and not Comcast) would prevail in an analysis of historical cable carriage. Comcast is estopped by virtue of the doctrine of unclean hands from (a) erecting viewership hurdles and affirmatively blocking carriage of WFBD and (b) then claiming a lack of carriage/market presence. It is simply bad policy to encourage cable systems to deny stations carriage so that said cable systems can prevail in a market modification analysis.

5. The Commission attempts to skirt the issue of historical cable carriage when it states in the MO & O that "even if WFBD were treated as a new or specialty station, we would nevertheless modify its market because of its failure to cover any of the communities with a Grade B signal and its failure to substantiate any claim that it provides locally-oriented programming to the communities". In one single line, the truth of the matter is exposed. WFBD's failure to cover the communities in question with a Grade B signal is wholly dispositive.¹

6. Flinn does not dispute that the current Grade B signal of WFBD over the

¹ While the Commission states that Flinn has failed to demonstrate that it provides local programming to the communities, Flinn noted in its "Opposition to Petition for Special Relief" that, even in a subjective analysis, WFBD's programming cannot be any less relevant locally than shows such as "Genie Bra", "Ab Rocket Twister", "Tummy Tuck Slimming System" and "Brazil Butt Lift Workout" (carried on Comcast's Mobile systems; see Exhibit 15 to Comcast's Petition for Special Relief).

communities in question is not as strong as those of other stations from Destin/Pensacola (i.e., which are being carried by Comcast). As Flinn demonstrated in its “Opposition to Petition for Special Relief”, this temporary signal impairment is directly related to the fact that there is currently a processing freeze in place with respect to any TV channel changes (see Public Notice, DA 11-959, released May 31, 2011) while the FCC considers issues related to the Broadband Plan and channel repacking. It is now clear that WFBD will be forced from its Channel 48 location as part of a repack. In its “Opposition to Petition for Special Relief”, Flinn submitted an engineering showing demonstrating that once the freeze is lifted, WFBD will be in a position to immediately file for a new channel (such as Channel 5) which will alleviate any of the Grade B, over-the-air signal issues raised by Comcast. The Commission stated in the MO & O that:

While WFBD’s future channel location may impact its coverage of the Mobile communities, we cannot take potential future or hypothetical events into consideration as factors on which to base the current scope of a station’s market – we only look to historic facts and the circumstances presently before us.

7. While Flinn appreciates the philosophical underpinnings of such a view, it drops WFBD into yet another bureaucratic vortex: WFBD is being punished for not providing a Grade B signal over the communities in question, yet is being denied any opportunity to rectify the problem.

8. The Commission’s position (though cloaked in subjective analyses of other “factors”) that Grade B coverage to cable communities in question is dispositive raises a troubling reality. The FCC’s position is directly at odds with Section 76.55(c)(3) of the Commission’s Rules and Regulations, wherein stations are expressly permitted to use alternative delivery methods to reach a cable head-end. Since by definition such a

remedy would only be necessary in cases where there is a weak or impaired over-the-air signal (usually due to distance from the head-end), Comcast's pattern of challenging stations (i.e., with market modification requests) which seek to employ alternative signal delivery is a back-door challenge to Section 76.55(c)(3). In short, the Commission's subjective assessment in the MO & O that "we would nevertheless modify [WFBD's] market because of its failure to cover any of the communities with a Grade B signal" is wholly inconsistent with the Commission's long-sanctioned use of alternative signal delivery methods pursuant to Section 76.55(c)(3) to reach head-ends and communities not covered by a station's Grade B contour. The result has been the insertion of yet more uncertainty into the already subjective standard of review.

9. In its analysis of Factor "II" in the MO & O (i.e., "whether the television station provides coverage or other local service to such community"), the Commission completely ignored the fact that WFBD is being carried by DISH, DIRECTV and Mediacom in Mobile. Rather than acknowledging this significant reality, the MO & O inexplicably focused (again) upon (a) WFBD's Grade B contour issues (already discussed hereinabove) and (b) the various driving distances between WFBD and the communities in question. As Flinn noted in his "Opposition to Petition for Special Relief":

Comcast places much emphasis on the driving distances and geographic separation between communities in the DMA. What Comcast fails to adequately discuss is the nature of the DMA itself. The Mobile, AL-Pensacola (Ft. Walton Beach), FL DMA is a hybrid DMA which can best be described as an extended rectangle. Any communities in the eastern or western portions of the DMA are going to be relatively distant from each other simply by virtue of the layout of the DMA. The paring of outlying DMA communities simply because the DMA is not traditionally shaped runs counter to the purposes of the market modification rule.

10. WFBD “provides coverage” (i.e., via DISH, DIRECTV and Mediacom) to the communities in question. Why this important fact did not result in a positive assessment of Factor “II” in favor of Flinn is, again, due to the fact that it is the Commission’s position that Grade B coverage (or lack thereof) to the cable communities in question is dispositive.

11. Finally, regarding Factors “III” and “IV”, the Commission’s MO & O focuses on the fact that WFBD, as a fledgling, independent station with a new programmer, promulgates programming that Comcast deems less important to the local citizenry than (as Comcast notes) that provided by the major network affiliates. Just because a station provides more targeted programming than the more well-heeled players such as NBC (Comcast), CBS, ABC and Fox does not mean that by definition a station can never (or more accurately, should never) prevail under Factors “III” and “IV”. While Comcast claimed in its “Petition for Special Relief” that several stations provide some local content, Flinn pointed out that many of the more relevant stations (i.e., stations similar to WFBD as opposed to the major network affiliates) were marginally local. Specifically, in his “Opposition to Petition for Special Relief”, Flinn stated:

In the case at hand, four out of the eight over-the-air stations carried by Comcast (see Exhibit 16 to Comcast’s Petition for Special Relief) hover around a 1 share (and a few hundred households).

12. Again, with respect to Factors “III” and “IV”, WFBD’s “failures” can all be traced back to WFBD’s Grade B contour issues.

C. Comcast’s Position as a Content Gatekeeper

13. The Commission’s MO & O failed to address what is the proverbial elephant in the room: Comcast’s size, power and role as content gatekeeper. As Flinn noted in

his “Opposition to Petition for Special Relief”:

In establishing that other local programming in a market could be considered by the FCC in assessing a station’s market impact, implicit therein was the requirement that there be channel scarcity. No such scarcity exists in this case. Further, nowhere was it contemplated that a cable provider would become a content gatekeeper. In fact, in granting the Comcast/NBCU merger (See, *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc., Memorandum Opinion and Order*, MB Docket 10-56, released January 20, 2011, the exact opposite was the case. Despite serious concerns expressed by commenting parties in the proceeding regarding the power the new cable and programming behemoth would yield, the FCC granted the merger based upon its belief that the Commission would examine any future programming and carriage complaints with an eye toward the new market realities and Comcast’s actions generally.

Comcast’s actions in this case cannot reasonably be considered content neutral. By their own admission in Exhibit 6, Comcast has chosen to carry preferred stations and other secondary channels in lieu of carrying WFBD. Again, Comcast is in the unique position of (a) being able to erect viewership hurdles and suppress market acceptance of WFBD and (b) prevent the compilation of realistic, empirical data supporting WFBD’s historical market acceptance and reach. This is particularly true when there is no “bright line” test to determine what constitutes proof of market acceptance. In the case at hand, four out of the eight over-the-air stations carried by Comcast (see Exhibit 16 to Comcast’s Petition for Special Relief) hover around a 1 share (and a few hundred households). Hardly the local powerhouses Comcast would like us to believe.

In an interesting twist, the fact that Comcast is carrying a large number of stations with small market shares actually supports WFBD’s arguments. In a fast-changing and fragmented multi-platform world, how the FCC analyzes market modifications must similarly evolve. Analysis of ratings numbers in a vacuum will not yield a true picture of the program diversity and niche focus which now marks the communications industry. Television and cable viewership ratings are no longer dispositive indicia of success or market importance. As the local community tapestry evolves, what constitutes locally responsive programming is not as simple as “does the station supply sports or hourly news”. As Comcast concedes in its Exhibit 16, even a station serving just 123 households (out of 23,000 or more) is deserving carriage. Programming diversity is to embraced, not mocked. Niche programming may only appeal to a discrete number of viewers but it may be critically important to that particular group of local citizens.

D. Conclusion

The Commission's MO & O ignores the essential position expressed by both Congress and the FCC that stations in their DMA possess a presumption of carriage (see, e.g., Gray Television Licensee, Inc. [CSR-7007-A], Memorandum Opinion and Order, DA 06-1566, released August 4, 2006). Further, it is clear from the MO & O that Grade B coverage to the cable communities in question is dispositive in any analysis. Not only does such a position create its own "presumption" (i.e., against station carriage) but it also puts it directly at odds with Section 76.55(c)(3) of the Commission's Rules and Regulations.

Due to the lack of a truly objective test, any market modification analysis is by definition highly subjective. It has been over twenty years since Congress set forth the market modification remedy. By keeping the "factors" vague, the reasonable assumption is that Congress intended for the FCC to tweak the process as market realities change. Comcast has become a huge, multi-platform communications gatekeeper. Changes in overall channel capacity, the existence of a processing freeze (which will probably remain in effect for several more years), the evolving broadband plan (and related repack) and the fragmented nature of both the television and cable industries require that the Commission tweak its subjective market modification analyses. All the "factors" cannot directly (and indirectly) be tied to how strong a station's Grade B signal is. The default presumption should return to "carriage" as opposed to "noncarriage". Absent a showing of cable channel scarcity, any procedural mechanism which encourages more diverse programming and more "voices" is clearly in the public interest.

Wherefore, based on the foregoing, it is respectfully requested that the subject Petition for Reconsideration be granted; that Comcast's "Petition for Special Relief" be denied; and, that Flinn's mandatory carriage Complaint be granted.

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of the foregoing document was this 6th day of September, 2012 sent by First Class U.S. mail, postage prepaid, to the following:

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