

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of:)	
)	
Service Electric Cable Television, Inc.)	Docket No. 13-68
)	File No. CSR-8772-A
For Modification of the Philadelphia, PA)	
Designated Market Area of Local)	
Commercial Television Station WACP,)	
Licensed to Atlantic City, New Jersey)	
 Directed to: The Chief, Media Bureau		

**OPPOSITION TO
PETITION FOR SPECIAL RELIEF**

WESTERN PACIFIC BROADCAST LLC

M. Scott Johnson
Thomas J. Dougherty, Jr.
Its Counsel

FLETCHER, HEALD & HILDRETH, PLC
1300 North 17th Street, Suite 1100
Arlington, VA 22209
(703) 812-0400

April 8, 2013

TABLE OF CONTENTS

- I. Introduction and Summary.....1

- II. The Petition Must Be Dismissed Under Rule 76.59(c)
Because Service Electric Has Failed to Provide That Evidence
Which It Is Required to Supply by Rule 76.59(b).....3

- III. Assuming the Petition Is Reviewed on the Merits, It Does Not Show
That the Public Interest Favors Any Modification of WACP’s Television
Market
 - (a) WACP Is a New Station, Having Been on the Air Only 7 Months,
Whose Market Must Include All Communities Within Its
Noise-limited Contour, Regardless of Evidence of Programming
or Audience Share.....6
 - 1. Bucks County.....8
 - 2. Berks County.....8
 - 3. Lehigh and Northampton Counties.....9

 - (b) Service Electric Communities May Not be Deleted From
WACP’s Market Because WACP Is Carried by Competing
Cable Systems as Well as Adjacent Cable Systems.....10
 - 1. WACP Is Carried Throughout the Disputed Counties by
the Other Cable Operators Serving These Counties.....11
 - A. Extensive Carriage in Berks County.....11
 - B. Extensive Carriage in Bucks County.....12
 - C. Extensive Carriage in Lehigh County.....12
 - D. Extensive Carriage in Northampton County.....13

 - 2. WACP Is Carried in Almost All of the Service Electric
Communities in Lehigh and Northampton
Counties By RCN Who Has Overbuilt Service Electric
in Those Counties.....13

 - 3. WACP Is Carried in Each of the Three Service Electric
Communities in Berks County By Another Cable
Operator Serving the Same Community.....14

 - 4. WACP Is Carried in a Majority of the Nine Service
Electric Communities in Bucks County By Another
Cable Operator Serving the Same Community.....15

(c)	Carriage by Service Electric of Stations that Compete With WACP Requires that Service Electric Carry WACP in Each of These Service Electric Communities, Even If the Community Is Outside of WACP’s Noise-limited Contour.....	16
(d)	The Distance of Any Service Electric Community From the WACP Noise-limited Contour Cannot Be a Factor Because Service Electric Defaulted in the Requirement to Provide This Information and WACP and Its Competitors Are Carried Throughout the Challenged Area.....	17
(e)	Evidence of Programming and the Results of a Bogus Signal Test Are Not Relevant to the Analysis of the Local Market of a New Station.....	19
IV.	The Bureau Has the Discretion to Refuse to Entertain the Petition, and Should Exercise That Discretion to Rebuff Service Electric’s Attempt to Use the Market Modification Process as a Defense to Carriage.....	20
V.	Conclusion.....	22
	Exhibit List.....	23

*Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554*

In the Matter of:)
)
Service Electric Cable Television, Inc.) Docket No. 13-68
) File No. CSR-8772-A
For Modification of the Philadelphia, PA)
Designated Market Area of Local)
Commercial Television Station WACP,)
Licensed to Atlantic City, New Jersey)

Directed to: The Chief, Media Bureau

**OPPOSITION TO
PETITION FOR SPECIAL RELIEF**

Western Pacific Broadcast, LLC (“Western Pacific”), pursuant to Rule 76.7, hereby respectfully opposes the petition for special relief (the “Petition”) filed by Service Electric Cable Television, Inc. (“Service Electric”) for modification of the television market of WACP (“WACP”) to exclude certain named communities located with Berks, Bucks, Lehigh and Northampton Counties, PA¹ which are within WACP’s television market of the Philadelphia, PA DMA (the “DMA”).

I. Introduction and Summary

The result of granting the Petition would be that WACP, which has been on the air just 7 months, would be denied cable carriage in half of the Pennsylvania counties located in its DMA. The Petition would place WACP, which is new and must struggle to survive against 15 other entrenched commercial television stations, at a severe competitive disadvantage. The Petition is against both established precedent and the public interest and should be denied promptly.

¹ A list of the communities appears as Attachment A of the Petition.

As shown below, the Petition is fatally defective and must be dismissed under Rule 76.59(c).

If it is nonetheless considered in whole or in part, whether WACP should be carried should be decided based upon the Bureau's precedent for determining whether to delete communities from a "new" station's DMA. That analysis gives greatest weight to the location of the WACP noise-limited contour, and less weight to audience surveys, but still considers actual carriage patterns. That contour encompasses all of Service Electric's Bucks County communities, and encompasses or is near to two of three of its Berks County communities and extends into Lehigh and Northampton Counties.

But, in this case, the limit of that contour should not be a limit on carriage. For five separate and independently sufficient reasons, there is no basis for deleting any Service Electric communities from WACP's market, even any communities that are outside of the WACP noise-limited contour.

First, in satisfaction of the most important market modification factor, WACP is carried in almost all of Service Electric's Lehigh and Northampton County communities by RCN, who operates as an overbuilder of almost the entirety of Service Electric's cable plant in those communities.

Second, WACP is widely carried throughout all four counties.

Third, a station collocated with WACP, and having a shorter contour toward the challenged communities, is carried in all of these communities by Service Electric.

Fourth, Service Electric has defaulted in observing the absolute requirement that it show the location of these communities, requiring that the Bureau not delete any of these communities.

Fifth, the Bureau should exercise its discretion to dismiss the Petition. Petition is a preemptive collateral attack against a must carry proceeding brought by Western Pacific against Service Electric and, thus, the Petition is inconsistent with Congressional intent which clearly states that market modification policy was not provided as a means for cable systems to avoid their must carry obligations. In addition, it is simply not fair to shrink the market of a station just 7 months old who must compete against 15 other, entrenched commercial stations to build an audience.

II. The Petition Must Be Dismissed Under Rule 76.59(c) Because Service Electric Has Failed to Provide That Evidence Which It Is Required to Supply by Rule 76.59(b)

Before addressing the merits of the Petition, Western Pacific urges the Bureau to focus upon Service Electric's failure to comply with Rule 76.59(b), which governs market modification petitions. Under Rule 76.59(b), a petition for market modification must contain certain listed information or, under subsection (c), it "shall be dismissed...." Service Electric has failed to provide much of the required evidence and, hence, the Petition must be dismissed as procedurally defective.

Section 76.59(b) lists six categories of evidentiary showings that must appear in a petition for market modification. The first category of evidence listed in Rule 76.59(b) is:

- (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

The Petition has no maps showing community locations, and shows only one station transmitter site. While the headend is plotted on a map, the map is of such large scale that the haphazard ink

² Rule 76.59(b)(1).

spot supposedly indicating the headend location is of no use at all. Indeed, the geographic coordinates of the headend are not provided and, as the Bureau is aware, the place where that information is available is the cable operator's local public file. Nor does the Petition provide mileages between the communities in question and the WACP transmitter site. The Petition does not show transportation routes. While Exhibit C purports to be a terrain map, it is both largely illegible and shows a very small fraction of the terrain between the headend and the WACP transmitter site, rendering it useless.

The second category of evidence listed in Rule 76.59(b) is:

(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.³

The Petition provides, as explained above, a map with a useless and inaccurate ink-spot plot of the headend. The Petition does not map any of the communities, or otherwise tell the reader the location of any community in relation to the WACP noise-limited contour. No geographic coordinates are provided, or anything else that might allow even a remotely accurate determination of distances of communities to contours or of community locations. While one map plots the WACP noise-limited contour on a county map, that map depicts only counties and no communities, yet it is communities and not counties that count in a market modification proceeding;⁴ indeed, the Petition lists all of the communities it desires to exclude from WACP's market and asks the Bureau to exclude those communities and not any counties.⁵

³ Rule 76.59(b)(2) (footnotes omitted).

⁴ 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. *KTNC Licensee*, 18 FCC Rcd 16269, at ¶ 3 (2003).

⁵ Petition, at 1.

The sixth and final required evidentiary showing is:

(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.⁶

The Petition admittedly contains absolutely none of this audience evidence, even though the Petition says that it is available to Service Electric if Service Electric would pay for it (which it has elected not to do).⁷

In this case, Service Electric has the burden of providing the locations and distances of communities from WACP and the noise-limited contour of WACP, as well as providing the distance between the headend and WACP. Service Electric plotted none of the communities in question on any map, let alone one also showing the WACP noise-limited contour. Indeed, Service Electric did not even say which communities were outside of that contour, if any. Moreover, WACP did not provide information on the terrain between the station and the challenged communities, other than a largely illegible map showing just a portion of what appears to be the terrain along a part of the imaginary line between the WACP transmitter and the headend. This information is easily within its grasp, but Service Electric did not provide it. Indeed, the Petition actually lists these categories of evidence as evidence that it, as the petitioner who has the burden of proof, must supply.⁸

⁶ Rule 76.59(b)(6).

⁷ Petition, at 6.

⁸ Petition, at 3. Rule 76.7(a)(4)(i), which is made applicable to Rule 76.59 market modification requests by Rule 76.59(b), states that the “petition...shall state fully and precisely all pertinent facts and considerations relied on to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest.”

Rule 76.59(b) and (c) provide that if the petitioner's evidentiary showing lacks any of the evidence within the 6 enumerated categories of evidence, the petition "shall be dismissed...."⁹ To ensure that Service Electric does not use its right to respond to dismissal by filing another, duplicative market modification petition that will further delay carriage of WACP, WACP respectfully requests that the Bureau dismiss the Petition and grant WACP's petition for an order of carriage on Service Electric's cable system¹⁰ simultaneously, and to not entertain any subsequent market modification petition until after deciding WACP's petition for an order of carriage on Service Electric's cable system.¹¹

III. Assuming the Petition Is Reviewed on the Merits, It Does Not Show That the Public Interest Favors Any Modification of WACP's Television Market

(a) WACP Is a New Station, Having Been on the Air Only 7 Months, Whose Market Must Include All Communities Within or Near Its Noise-limited Contour, Regardless of Evidence of Programming or Audience Share

The Petition omits the most crucial fact that guides the Bureau in reviewing a market modification petition filed against a station such as WACP. That is, as a new station, several of the normal factors guiding the Bureau's decision are either ignored or weighted differently. WACP was put on the air for the first time in June of 2012. For purposes of market modification

⁹ Rule 76.59(c).

¹⁰ Docket No. 13-14; CSR-8757-M.

¹¹ This ability to use serial petitions to delay carriage should be nipped in the bud, as the Bureau has made very clear that the market modification process is not "intended to be a process whereby cable operators may seek relief from the mandatory signal carriage obligations." *KTNC Licensee, supra*, at ¶15. While dismissal of the Petition would enable WACP to be carried by Service Electric, WACP fears that Service Electric will respond to a dismissal by simply re-filing its petition, perhaps with some or all of the missing information. The result will be delay in carrying WACP, which is ultimately the object of the Petition.

petitions, a station on the air less than 3 years is considered a new station.¹² WACP, being just 7 months old at the time the Petition was filed, is thus considered a new station for the purposes of this proceeding.

As recently stated by the Bureau:

“[w]ith new or specialty stations, failure to establish either historic carriage or significant viewership is given lesser weight, and we typically rely more on a station’s Grade B contour to delineate its market.”¹³

As explained by the Bureau:

Without accommodating ‘specialty stations’ in our analysis of historic carriage, “weaker or newer stations that cable systems had previously declined to carry, [would be prevented] from ever being carried.” *Time Warner*, 22 FCC Rcd at 13649, ¶ 14 & n.63, citing *Paragon*, 10 FCC Rcd at 9466, ¶ 12. *See also NY ADI Order*, 12 FCC Rcd 12262, 12267, ¶ 10 & 12271, ¶ 17 (1997) (“[G]rade B contour coverage, in the absence of other determinative market facts...is an efficient tool to adjust market boundaries because it is a sound indicator of the economic reach of a particular television station’s signal.”); *see also WRNN II*, 21 FCC Rcd at 5959, ¶ 14 & n.49 (2006).¹⁴

WACP’s service contour is the strongest indicator of its local market, although WACP believes that this contour provides only a *lower limit* on a market size that extends naturally beyond this contour based upon actual carriage of WACP and other stations as explained below in Subsections III(b) and III(c).

¹² *Avenue Cable TV Service, Inc.*, 16 F.C.C.R. 16436, 16445 ¶ 22 (2001) (Stations normally take up to 3 years to build viewership within their licensed areas.); *George S. Flinn, Jr. v. Comcast Cable Communications, LLC*, DA 12-1265, at 4 ¶10 n.32 (rel. Aug. 3, 2012).

¹³ *George S. Flinn, supra*, at 3, ¶10 (footnote repeated below).

¹⁴ *Id.* at 3 n.29; *see, also, DeSoto Broadcasting*, 78 RR2d 44, (1995)..

1. Bucks County

As shown by the noise-limited contour of WACP shown on the coverage map attached as Exhibit A of both the Petition and this Opposition,¹⁵ all of Bucks County is within the service area of WACP. Hence, all of Service Electric's Bucks County communities are within that noise-limited contour. Accordingly, there is no basis for excluding any of Service Electric's communities in Bucks County from WACP's market.

2. Berks County

Turning to Berks County, the Petition does not even discuss it. Accordingly, there is no basis for excluding any of Service Electric's communities in Berks County from WACP's market. Western Electric has shouldered Service Electric's burden by commissioning a map showing Berks County communities relative to the WACP noise-limited contour. In deciding the guidance the Commission should use in deciding these cases, the Commission stated:

“parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage.”¹⁶

As shown on the map prepared by Western Pacific, the Service Electric cable community of Hereford [CUID PA2754] is almost entirely within the WACP noise-limited contour, while its Longswamp community [CUID PA2662] is approximately a 1 mile from that contour.¹⁷ Given WACP's status as a “newer” station, these two Berks County cable communities should not be removed from WACP's market. Although the third of Service Electric's Berks County communities, Greenwich [CUID PA2305] is somewhat farther from that contour, it and the two

¹⁵ There no longer is a “Grade B” contour. Instead, the Bureau considers the noise-limited contour of a digital TV station to be the equivalent of the Grade B contour. *Mountain Broadcasting Corp.*, 27 FCC Rcd 2231, at 3 n.9 (2012).

¹⁶ *Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, 2977 (1993).

¹⁷ Exhibit B contains a map of Berks County showing the location of the WACP noise-limited contour.

Berks County communities discussed above are surrounded by communities served by its affiliate, Service Electric Cablevision, or by Comcast who also is carrying WACP to its Berks County communities.¹⁸ This adjacent community carriage is a significant indicator of WACP's market, as explained below in Subsection III(b). Moreover, as explained below, all three of Service Electric's Berks communities are also served by another cable system.

3. *Lehigh and Northampton Counties*

Looking once again at the WACP noise-limited contour, it is apparent that, of the remaining counties subject to the Petition – Lehigh and Northampton -, part of each county is within the contour and part of it is outside of the contour. Western Pacific would name those communities that are within WACP's noise-limited contour and thus must categorically remain within the WACP television market but, because Service Electric did not bother to plot the communities upon a map also showing the noise-limited contour as explicitly required by Rule 76.59(b)(2), the Petition provides nothing to make that determination. As providing that mapped information was Service Electric's explicit responsibility, neither Western Pacific nor the Bureau should be forced to do Service Electric's work of retrieving secondary sources and attempting to classify the communities as either within or without the noise-limited contour. The Bureau

¹⁸ The map appears in Exhibit B. The Service Electric Cablevision and Comcast communities in Berks County are indicated by underscoring. The Service Electric cable communities are designated with asterisks. Western Pacific used the Commission's CUID list to determine the presence of these cable operators in the indicated communities. Each community is a township. In Pennsylvania, all counties are subdivided into townships. Service Electric Cablevision's channel lineup showing carriage of WACP appears in Exhibit E and Comcast's channel lineup showing carriage of WACP appears in Exhibit D. The map was created by Lohnes & Culver. Fletcher Heald & Hildreth inserted the underscoring and the asterisks on the map.

should find that Service Electric is stopped from claiming that any of these communities is outside of the WACP noise-limited contour.¹⁹

(b) *Service Electric Communities May Not Be Deleted From WACP's Market Because WACP Is Carried by Competing Cable Systems as Well as Adjacent Cable Systems*

Although the Bureau's market modification cases for new stations emphasize the location of service contours, the absence of predicted coverage, standing alone, is not determinative when the cable system in question is carrying stations in communities where those stations have no predicted coverage. Indeed, "whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community" is the first among four of the primary factors used for judging localism.²⁰ This adjacent community carriage is a significant indicator of WACP's market:

"While carriage on nearby cable systems is not a factor specified in the statute, such carriage serves to demonstrate the belief of both the stations and systems involved that there is a market nexus between the broadcast station and the communities where the station is carried and thus provides evidence as to the scope of a station's market." See *Paxson Atlanta License, Inc.*, 13 FCC Rcd 20087, ¶ 35 (1998).

Even though WACP is a "newer" station, the Bureau has stated that it will give weight to the historical carriage of the station.²¹

Evidence that a "newer station," like WACP has not been historically carried is "not outcome determinative" because the station has not had a chance to build a record of historical

¹⁹ Any attempt by Service Electric to provide the location of the communities in its reply should be flatly rejected as a violation of Rule 76.59(b), as unfair to Western Pacific and as not conducive to the prompt dispatch of the Commission's business.

²⁰ *George S. Flinn, Jr. v. Comcast Cable Communications, LLC*, DA 12-1265, at 3 ¶4 (rel. Aug. 3, 2012)(emphasis added).

²¹ *George S. Flinn, Jr., at* ¶10.

carriage.²² Still, the fact of such carriage does support WACP’s case. WACP is being carried throughout all four of the counties in dispute by other cable systems.

1. WACP Is Carried Throughout the Disputed Counties by the Other Cable Operators Serving These Counties

As Western Pacific shows below, WACP is carried by other cable systems operating within areas in the disputed counties that are outside of the WACP noise-limited contour. While Western Pacific understands that the Bureau focuses upon communities in reviewing historical carriage, adjacent community carriage should be relevant to the definition of the local market for WACP, as all of the cable systems involved – including Service Electric’s cable system – are wide-area systems serving many communities within a county and not mere stand-alone systems identified with any particular community. Indeed, the designation of communities in the event of such systems (something none of these systems does in advertising or its websites) is more an administrative convenience than a window on a station’s local market.

A. Extensive Carriage in Berks County

There are a 96 cable communities in Berks County, PA.²³ Service Electric is the operator for just 3 of those communities.²⁴ Of the 93 remaining community units, WACP is carried in 89 of them. WACP is carried by Comcast and its affiliates in 67 of the Berks County cable communities.²⁵ Service Electric’s affiliate, Service Electric Cablevision, Inc., carries WACP in 22 of the Berks County cable communities.²⁶ As explained above, Service Electric’s Berks County communities are surrounded by communities served either by its affiliate, Service

²² *Avenue Cable TV Service, Inc., supra*, at ¶19.
²³ Exhibit C.
²⁴ Exhibit C.
²⁵ Exhibit D.
²⁶ Exhibit E.

Electric Cablevision, or Comcast, both of whom carry WACP to all of their Berks County cable communities. The majority of this county is outside of the WACP noise-limited contour.

B. Extensive Carriage in Bucks County

There are a 104 cable communities in Bucks County, PA.²⁷ Service Electric is the operator for just 9 of those communities.²⁸ Of the 95 remaining community units, WACP is carried in all of them. WACP is carried by Comcast and its affiliates in 46 of the Bucks County cable communities,²⁹ by Verizon in 46 of those communities³⁰ and by RCN in its single Bucks County community.³¹ All of Bucks County, and hence the 9 Service Electric communities in this county, is within the WACP noise-limited contour.³²

C. Extensive Carriage in Lehigh County

There are a 47 cable communities in Lehigh County, PA.³³ Service Electric is the operator for 23 of those communities.³⁴ Of the 24 remaining community units, WACP is carried in 20 of them. WACP is carried by RCN in 19 of the Lehigh County cable communities,³⁵ and by Verizon in its single community (the largest city in the County, Allentown).³⁶ The majority of this county is outside of the WACP noise-limited contour, but, as shown below, WACP is carried by an overbuilder (RCN) in almost all of the Service Electric cable communities in Lehigh County.

²⁷ Exhibit F.
²⁸ Exhibit F.
²⁹ Exhibit D.
³⁰ Exhibit G.
³¹ Exhibit H.
³² Exhibit A.
³³ Exhibit I.
³⁴ Exhibit I.
³⁵ Exhibit H.
³⁶ Exhibit J.

D. Extensive Carriage in Northampton County

There are a 79 cable communities in Northampton County, PA.³⁷ Service Electric is the operator for 41 of those communities.³⁸ Of the 38 remaining community units, WACP is carried in 35 of them. WACP is carried by RCN in 35 of the Northampton County cable communities.³⁹ The majority of this county is outside of the WACP noise-limited contour, but once again, as shown below, WACP is carried by an overbuilder (RCN) in almost all of the Service Electric cable communities in Northampton County.

These instances of actual carriage, by cable systems covering 75% of the communities in the 4 disputed counties, show that the local market is not at the edge of or limited by the noise-limited contour, but extends beyond it.

2. *WACP Is Carried in Almost All of the Service Electric Communities in Lehigh and Northampton Counties By RCN Who Has Overbuilt Service Electric in Those Counties*

It is also relevant to deciding a station's local market under the historical carriage criterion if competing cable systems carry the station in the communities served by the cable operator seeking to exclude the communities from the station's market.⁴⁰ The first and primary statutory factor in a market modification analysis is "whether the station, or other stations located in the same area, have been historically carried on the cable system *or systems within such community*."⁴¹ As shown in Exhibit L, RCN competes with Service Electric in almost all of

³⁷ Exhibit K.

³⁸ Exhibit K.

³⁹ Exhibit H.

⁴⁰ The Bureau has found that overlapping carriage lends support with respect to the historic carriage factor. *WRNN License Co., LLC v. Cablevision Sys. Corp.*, 22 FCC Rcd 21054, 21056 ¶¶ 4 & n.15 (2007).

⁴¹ 47 USC 534(h)(1)(C)(I)(emphasis added).

Service Electric's Lehigh County and Northampton County communities and, as stated above, RCN carries WACP in all of these communities.

Western Pacific believes that great weight should be given to the competing carriage of WACP in almost all of Service Electric's Lehigh and Northampton communities by RCN. As shown in Exhibit L, WACP is available from RCN throughout these counties. This is an expansive local *competitive* presence that perhaps has not been presented before in a market modification case. This is not just an instance of the station being carried in an adjacent community, this is the case of the station being available on one strand of cable mounted on the same pole or the same or adjacent duct as the cable system plant of the operator that refuses to carry the signal. Given this carriage by a competitor, there is no basis for excluding any of Service Electric's Lehigh or Northampton County communities from WACP's market.

3. *WACP Is Carried in Each of the Three Service Electric Communities in Berks County By Another Cable Operator Serving the Same Community*

Each of three Berks County communities served by Service Electric is also served by another cable operator. Service Electric's Greenwich community [CUID PA2305] is also served by Comcast [PA2809]. Service Electric's Longswamp community [CUID PA2662] is also served by Service Electric's affiliate, Service Electric Cablevision [CUID PA2670]. Service Electric's Hereford community [CUID PA2745] is also served by Comcast [CUID PA1564]. As stated above, both Comcast and Service Electric Cablevision carry WACP throughout their Berks County communities, including these three communities. Although the Bureau should find that Hereford and Longswamp communities must remain in WACP's market because they are within or quite near the WACP noise-limited contour, this evidence of competing carriage in Greenwich should resolve the issue in favor of continued inclusion of it in the WACP market.

4. *WACP Is Carried in a Majority of the Nine Service Electric Communities in Bucks County By Another Cable Operator Serving the Same Community*

As explained above, all of Bucks County is within the WACP noise-limited contour. While Western Pacific believes that fact should end the analysis of WACP's market for Bucks County, especially given that WACP is only 7 months old as of the date of the Petition, that factor can be bolstered by the actual carriage of WACP by cable competitors to Service Electric in the same communities. Service Electric's Reigelsville community [CUID PA0253] is also served by overbuilder RCN [CUID PA3751]. Service Electric's Tinicum community [CUID PA0948] is also served by Comcast [CUID PA3244]. Service Electric's Haycock community [CUID PA2176] is also served by overbuilder Verizon [CUID PA3809] and Comcast [CUID PA3946]. Service Electric's Richland community [CUID PA2658] is also served by Comcast [CUID PA0880 & 1563]. Service Electric's Milford community [CUID PA3452] is also served by overbuilder Verizon [CUID PA3661] and Comcast [CUID PA0881]. Service Electric's Springfield Township community [CUID PA0866] is also served by Comcast's Sellersville system [CUID PA1383] and overbuilder Verizon's Sellersville system [CUID PA3695].⁴² These are 2/3rds of Service Electric's Bucks County communities, and WACP is carried by each of these competing cable operators in their Bucks County communities. The remaining three communities are quite small,⁴³ and are adjacent to the six Bucks County communities identified above where either Comcast, Verizon or RCN carries WACP.

⁴² <http://xfinitytv.comcast.net/tv-listings#> (information for Zip Code 18951). Sellersville is a borough within Springfield Township. It encompasses the vast majority of the population of the township having, according to the 2010 census, a population of 4,249 out of the 5,035 persons recorded for that census for the entire township.

⁴³ Bridgeton, with a 2010 census population of 1,277; Nockamixon, with a 2010 census population of 3,441; and Durham, with a 2010 census population of 1,144.

**(c) Carriage by Service Electric of Stations that Compete
With WACP Requires that Service Electric Carry
WACP in Each of These Service Electric Communities, Even If
the Community Is Outside of WACP's Noise-limited Contour**

A station can also buttress its claim to a local market by showing historical carriage in the disputed area of other stations: “whether the station, **or other stations located in the same area**, have been historically carried on the cable system or systems within such community.”⁴⁴

The most relevant example is WWSI which, like WACP, is licensed to Atlantic City, NJ. The carriage of this station is highly relevant to the determination of WACP's local market. As stated by the Bureau when considering stations having the same community of license:

“We also note that Falcon carries KSMS which is licensed to Monterey, KION's city of license. Carriage by a cable system of a colocated station is frequently a reflection that these stations are part of the cable system's market.”

Ackerley Media Group, Inc., 18 FCC Rcd 16199, 16203, 9 (2003).

As shown by comparing WACP's service contour to that of WWSI,⁴⁵ you will see that WWSI's service contour falls well short of the counties of Berks, Bucks, Lehigh and Northampton, which are the location of the vast majority of Service Electric's communities and subscribers in the DMA. In contrast, WACP's contour completely encompasses or extends into all 4 of those counties. Nonetheless, Service Electric carries WWSI to all of its subscribers in those 4 counties but excludes carriage of WACP to those subscribers. In addition, WWSI is carried by RCN on channel 23 of its system in Lehigh and Northampton Counties, and that system overlays Service Electric's system in those 2 counties.⁴⁶ Finally, Verizon carries WWSI

⁴⁴ *George S. Flinn, Jr., supra*, at ¶4 (emphasis added).

⁴⁵ The contours both appear on Exhibit A.

⁴⁶ Exhibit H is the RCN channel lineup and Exhibit L is a list of overlapping RCN and Service Electric communities in those 2 counties.

in the largest community in the 4 disputed counties, Allentown.⁴⁷ To quote the Bureau, this carriage of the collocated WSSI in areas outside of its noise-limited contour reflects “that these stations are part of the cable system’s market.”

(d) The Distance of Any Service Electric Community From the WACP Noise-limited Contour Cannot Be a Factor Because Service Electric Defaulted in the Requirement to Provide This Information and WACP and Its Competitors Are Carried Throughout the Challenged Area

There are some Bureau market modification decisions that consider the distance of challenged communities from the station’s transmitter site, among other factors. If distance were to be a factor in this case, it was incumbent upon Service Electric’s Petition (and not its reply) to provide the information on distances specifically required by Rule 76.59(b). While the Petition quotes the exact requirement, Service Electric offered none of the required distances. Indeed, one cannot determine from reading the Petition and reviewing its exhibits whether any particular community is inside or outside of the WACP noise-limited contour, nor the distance from the contour for those communities that may be outside of the contour. Service Electric has eschewed its burden of providing this distance information and should be precluded from now raising distances in support of its Petition.⁴⁸ Indeed, Service Electric does not explain why these distances could even matter in the analysis, and, as further elaborated above in Subsection III(c) when it already carries other TV stations throughout its system that having noise-limited contours that are farther away from the communities than the contour of WACP.⁴⁹ Thus, failing

⁴⁷ This is shown on the second page of the channel lineup in Exhibit J.

⁴⁸ The Petition only goes so far as providing a general allegation that the communities are between 49 and 74 miles from the WACP transmitter site, and offers no information by which even this general claim might be verified. Petition, at 7.

⁴⁹ See discussion, *supra*, in Section II.

in its burden of proof, the Petition provides no basis to use distances to exclude specific communities from WACP's television market.

But, if it did, would it help Service Electric's case? Western Pacific believes it cannot. The significance of any particular distance is difficult to determine unless one looks at how distances have effected actual carriage. As explained above, WACP and similar stations are carried by other cable operators throughout the counties where the disputed communities are located, and similar stations are carried in all of Service Electric's Lehigh and Northampton County communities, even though noise-limited contours of the similar stations reach no farther toward the communities than the WACP contour, or reach less far than the WACP contour.

In fact, of the 15 other commercial TV station licensed to the DMA, Service Electric carries all but WMCN and WMGM. But, WMCN is an outlier as its service contour comes nowhere near the cable communities served by Service Electric.⁵⁰ And WMGM, as a NBC affiliate licensed to Wildwood, NJ, substantially duplicates the signal of NBC affiliate WCAU licensed to Philadelphia, which under Rule 76.56(b)(5), results in its not being carried. Moreover and more importantly, WMGM's service contour is confined to southeast, coastal New Jersey and lower Delaware and does not even come near to Pennsylvania.⁵¹ As a result, the Service Electric communities are not and could not be within its intended or available market.

Competitive advantage, we believe, should be a very large factor in this case. As a new station among 15 other commercial stations licensed to this quite large DMA, WACP has to struggle to find attractive programming and can only hope for some modest share of a very divided advertising revenue pie. In fact, only three DMAs in the entire United States have more

⁵⁰ Exhibit A shows a comparison on this contour with the WACP contour.

⁵¹ Exhibit M. This exhibit contains a page from the 2012 TV & Cable Factbook, A-832.

commercial television stations than the Philadelphia DMA.⁵² In this circumstance, efforts to preserve the viability of this station – *which was purchased at FCC auction* – should counsel avoiding the competitive imbalance that will arise if WACP is denied a significant percentage of cable homes that all of its competitors have.

Rather than present evidence on distances, the Petition focuses upon programming and a flawed signal test. But, as a new station – and one on the air only 7 months when the Petition was filed – WACP’s programming is not of decisional significance. In market modification cases, viewership is considered but, in a case like this in which the station has been operated for less than year, it is not considered against the station.⁵³ Indeed, the Petition provides no viewership information.

(e) Evidence of Programming and the Results of a Bogus Signal Test Are Not Relevant to the Analysis of the Local Market of a New Station

The Petition devotes pages and pages to evidence of programming. But that evidence is irrelevant in an analysis of the local market of a new station. As stated by the Bureau:

The third statutory factor we must consider is “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.” In general, we believe that Congress did not intend this third criterion to operate as a bar to a station’s DMA claim whenever other stations could also be shown to serve the communities at issue. Rather, we believe this criterion was intended to enhance a station’s claim where it could be shown that other stations do not serve the communities at issue. In this case, because other stations serve the communities in question, this

⁵² The three DMAs with more commercial television stations are Los Angeles (DMA rank 2), San Francisco (DMA rank 6) and Salt Lake City (DMA rank 33). This determination was made by counting commercial stations, as shown in the *Broadcasting & Cable Yearbook, 2010*. We excluded satellite stations from the count as they just duplicate the programming of another station.

⁵³ *Avenue Cable TV Service, Inc., supra*, at ¶22.

enhancement factor does not appear applicable.⁵⁴

And the signal test is evidence of no more than Service Electric's boldness in ignoring Commission requirements. We do not want to re-litigate the merits of the must carry proceeding here, and it is Service Electric's Petition, and not Western Pacific, that has raised that proceeding once again. But, it is worth noting that this signal test Service Electric touts as so terrible in result shows only that no WACP signal was received – at 50 feet AGL--, while there are receiver antennas for other TV stations much, much higher on a collocated 300 foot receiver tower!

IV. The Bureau Has the Discretion to Refuse to Entertain the Petition, and Should Exercise That Discretion to Rebuff Service Electric's Attempt to Use the Market Modification Process as a Defense to Carriage

Ultimately, the decision of the Bureau on whether to grant a market modification petition is not a mandatory decision, but a discretionary decision. As stated in Section 614 of the Act, the Commission “may” change a station's television market.⁵⁵ In the event that the Bureau believes that the evidence presented in the Petition may favor the exclusion of one or more communities from the WACP market, we urge the Bureau to exercise its discretion to forbear from that action at this time. There are several reasons for the Bureau to forbear.

First, it is the apparent that Service Electric is improperly using this market modification vehicle as a preemptive collateral attack against Western Pacific's must carry complaint filed against Service Electric. The Petition was filed during the pendency of a proceeding brought by Western Pacific to obtain an order of carriage against Service Electric (the “Must Carry Proceeding”).⁵⁶ In fact, the Petition was filed along with Service Electric's opposition to the

⁵⁴ *KTNC Licensee*, supra, at 16276-77 ¶12 (footnotes omitted); *Act III Broadcasting of Nashville, Inc.*, 74 RR2d 761, 764 ¶14 (1993).

⁵⁵ 47 USC § 534(h)(1)(C).

⁵⁶ Docket No. 13-14; CSR-8757-M.

must carry complaint.⁵⁷ Service Electric knows that this market modification proceeding will delay the order of carriage requested by Western Pacific. Moreover, the facts alleged in the Must Carry Proceeding show that Service Electric will go to extremes to avoid its duty to carry WACP, including conducting a bogus signal strength test with a test antenna located at 50 feet AGL, rather than using the 300 foot AGL TV station receiver tower situated over that antenna. The deficiencies of the Petition also support this conclusion that the Petition is improper. As explained in Section II, above, Service Electric provided none of the more important factual information that is required by Rule 76.59; information which is shown in this pleading to be against the case Service Electric attempts to make in the Petition.

Instead of focusing on facts relevant to the legal precedents of carriage, the Petition—repeatedly – harps on WACP as an infomercial station. In fact, WACP, as the 16th commercial station in the market, had no chance of obtaining any lucrative network affiliation. Even such relatively unknown networks such as MyNetwork TV and LiveTV were already taken in the market. And this circumstance is not new to the Bureau. In a similar case, in which the cable system carried one station with the same community of license of the infomercial station it declined to carry, the Bureau made some very relevant observations:

“The 1992 Cable Act was adopted, however, in part to cure past discriminatory signal carriage practices. ... [C]arriage patterns are useful insofar as they provide insight into structure of the market involved. Here, the carriage pattern appears, **based upon petitioner’s own comments**, to be related to judgments as to the value of the station’s programming, than to its location in the market.”

“[The cable operator] has not sufficiently demonstrated why it is necessary to remove itself from its own [DMA], vis-avis [the station], yet remain in the same market with regard to the station’s competitors. We find that [the cable operator’s] petition is inconsistent with Congressional intent which clearly states

⁵⁷ The must carry complaint appeared on a public notice entitled Special Relief and Show Cause Petitions, Rep. No. 0389 at 2 (rel. Jan. 22, 2013).

that market modification policy was not provided as a means for cable systems to avoid their must carry obligations.⁵⁸

The Petition is an abuse of the market modification process and should be dismissed for that reason.

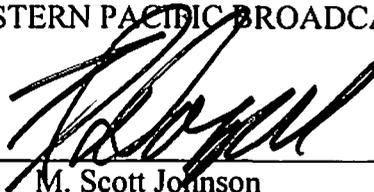
Moreover, WACP is a brand new station, purchased a considerable expense at a FCC auction, operating in a large DMA having more TV stations than all but three of the Nation's DMAs. WACP has had a difficult time finding programming, as can be expected when there are so many competing stations and competing multicast channels that not even the most unattractive programming is available. WACP deserves more than the mere 7 months that it has been on the air before the filing of the Petition to develop the station's markets and reach within the DMA's communities.

V. Conclusion

WHEREFORE, the foregoing premises considered, Western Pacific Broadcast, LLC hereby respectfully requests that the Bureau dismiss or deny the Petition.

Respectfully submitted,

WESTERN PACIFIC BROADCAST LLC

By: 

M. Scott Johnson
Thomas J. Dougherty, Jr.
Its Counsel

FLETCHER, HEALD & HILDRETH, PLC
1300 North 17th Street, Suite 1100
Arlington, VA 22209
(703) 812-0400

April 8, 2013

⁵⁸ *American Cablevision of Kansas City*, 77 RR 2d 1403, 1406, ¶¶13, 16 (1995)(emphasis added).

Exhibit List

- A..... WACP, WWSI and WMCN Noise-limited Contours Map
- B..... Berks County Community Chart with WACP Contour
- C..... List of Berks County Cable Communities
- D..... Comcast Channel Lineup showing WACP carriage
- E..... Service Electric Cablevision Channel Lineup Showing WACP
- F..... List of Bucks County Cable Communities
- G..... Verizon Fios Bucks Channel Lineup Showing WACP Carriage
- H..... RCN Channel Lineup Showing WACP Carriage
- I..... List of Lehigh County Cable Communities
- J..... Verizon Fios City of Allentown Channel Lineup Showing WACP Carriage
- K..... List of Northampton County Cable Communities
- L..... Lehigh and Northampton Counties Overbuild Chart
- M..... Map showing WMGM Contour