

**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

**MOTION TO STRIKE
AND LIMITED SURREPLY**

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TABLE OF CONTENTS

I. Introduction and Summary.....1

II. Extraordinary Circumstances Exist for the Acceptance of This Motion.....2

III. Evidence and Arguments that Should Be Stricken From the Record

(a) The Reply Does Not Present Any Excuse for Noncompliance with Rule 76.59(b).....5

(b) The Reply Cannot Provide the Rule 76.59(b) Evidence as a “Clarification” as One Cannot “Clarify” that which Has Not Been Previously Presented.....6

(c) Exhibit 1 of the Reply Should Be Stricken.....7

(d) Exhibit 2 of the Reply Should Be Stricken8

(e) The Reply’s Discussion of the Historical Carriage of WACP Should Be Stricken8

(f) The Reply’s Discussion of the Historical Carriage of Other Stations Located in the Same Area as WACP Should Be Stricken.....13

IV. The Technical Integration of the Cable System Raises Obvious Carriage Issues, Should Have Been Addressed in the Petition and Requires the Denial of the Petition15

V. Conclusion.....19

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Western Pacific Broadcast, LLC (“Western Pacific”), licensee of commercial television station WACP (“WACP”), pursuant to Rule 76.7(d), hereby respectfully moves the Bureau to strike certain facts and arguments first appearing in the April 18, 2013 reply (the “Reply”) of Service Electric Cable Television, Inc. (“Service Electric”) to Western Pacific’s opposition (the “Opposition”) to the above-captioned petition for special relief (the “Petition”), and to consider the arguments presented in this Motion against those newly submitted facts and arguments. The Petition seeks modification of the television market of WACP (“WACP”) by the wholesale exclusion of all of Service Electric’s cable communities located with Berks, Bucks, Lehigh and Northampton Counties, PA from WACP’s television market of the Philadelphia, PA DMA (the “DMA”).

I. Introduction and Summary

Service Electric has back-loaded its direct case into its Reply to deprive Western Pacific of its opportunity to meaningfully address Service Electric’s case for modifying WACP’s market. Service Electric chose to file a Petition that did not contain several important factual

demonstrations required by Rule 76.59(b) and Rule 76.7(a)(4)(i), and to then make these demonstrations in a Reply that ends the procedural cycle. Compounding the transgression, Service Electric's Reply raises entirely new material issues in violation of Rule 76.7(c)(1). As a result, Western Pacific has been denied its right to address Service Electric's direct case, and the Bureau has been left with the task of resolving this case with a factual and analytical record that is unchallenged, not because it is correct, but because the pleading cycle is closed. In these circumstances, Rules 76.59(c) and 76.7(a)(4)(i) require the complete dismissal of the Petition.

In the event that, rather than dismiss, the Bureau decides nonetheless to waive those requirements for good cause (and Western Pacific can discern no good cause for rewarding those who purposely flaunt the procedural rules for unfair litigation advantage), then Western Pacific requests that the Bureau take the following actions in the interest of justice, fair play and the public interest in making well-reasoned decisions. First, the Bureau should strike from the record those showings made in the Reply that were required by Rule 76.7(a)(4)(i) or Rule 76.59(c) to be made in the Petition. Second, the Bureau should strike from the record the portions of the Reply that raise new issues. Western Pacific believes that the Bureau should make one exception to these actions. That exception is that the Bureau should consider the issues surrounding the claim – first raised in the Reply – that the cable system is “technically integrated” so that it cannot carry the WACP signal to any one or more communities in the DMA without carrying them to all communities in the DMA.

II. Extraordinary Circumstances Exist for the Acceptance of This Motion

Under Rule 76.7(c), the pleading cycle in a market modification proceeding ends after the filing of the petition, the opposition, and the reply to the opposition. Rule 76.7(d), however,

provides an exception allowing additional pleadings in the event of “extraordinary circumstances.”

Those circumstances are present in this case. Rule 76.59(b) controls market modification petitions. It states with detailed specificity exactly which evidence must be submitted in a market modification petition. So important is adherence to these requirements that subsection (c) says that a petition missing any of “such evidence shall be dismissed....”¹ Service Electric’s Petition quoted the exact evidentiary requirements of Rule 76.59(b), yet excluded much of this important evidence, including evidence that is fatal to its Petition.

The Petition’s noncompliance with this evidentiary requirement was so extreme that Western Pacific devoted four pages of its Opposition to describing this noncompliance.² Western Pacific could not understand why the Petition would actually quote the procedural requirements and then openly ignore them unless Service Electric had adopted the unfair and abusive pleading tactic of withholding material evidence and arguments until after the opposition is filed and then presenting them in the reply to have the first and only word on the evidence and arguments that are presented late. That suspicion was so strong that Western Pacific stated in its Opposition that: “it was incumbent upon Service Electric’s Petition (and not its reply) to provide the information....”³

Service Electric’s Reply does not disappoint. It serves as the vehicle for several of those categories of evidence and arguments that should have been presented in the Petition. Rule 76.59(b) is specific and leaves no room for interpretation: “Such requests for modification of a television market shall be submitted in accordance with § 76.7, petitions for special relief, shall

¹ *Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, 14 FCC Rcd 8366, 8387 (1999).

² Opposition, at 3-6.

³ Opposition, at 17.

include the following evidence....” A reply is not the petition and cannot be the vehicle for the presentation of the evidence Rule 76.59(b) requires to be in the “petition.” That direction is reinforced by Rule 76.7(c)(1) which provides that replies “shall not contain new matters.” That the Reply is, in effect, a new petition that flaunts these requirements of fundamental fairness and promotion of well-reasoned orders, provides those “extraordinary circumstances” required by Rule 76.6(d) for the acceptance of this Motion. The Bureau has accepted motions to strike under Rule 76.7(d) in these circumstances.⁴

In describing the terms “extraordinary circumstances” as applied to the almost identical programming complaint proceeding rules, the Commission has observed that the purpose of requiring a showing of such circumstances to justify an unauthorized pleading is so as “to avoid delay and allow the Commission to resolve program access complaints in an expeditious manner.”⁵ In this case, whatever delay may result, if any, will not harm Service Electric. Service Electric is not carrying WACP so delay in the resolution of this proceeding does no harm to Service Electric.

Moreover, on several occasions the Bureau has considered surreplies under Rule 76.7(d) simply to allow for a decision based upon a “complete record.”⁶ Certainly, considering the arguments and evidence presented as a surreply below will provide a more complete record in this proceeding.

⁴ *Charter Communications Entertainment I LLC*, DA 11-697, at ¶2 (rel. Apr. 18, 2011).

⁵ *Wizard Programming, Inc. v. Superstar/Netlink Group, L.L.C. and Tele-Communications, Inc.*, CSR-5039-P, DA 97-2693, ¶24 (rel. Dec. 24, 1997).

⁶ *Mediacom Delaware LLC*, DA 11-448, at ¶9 (rel. Mar. 9, 2011); *Comcast Cable Communications, LLC*, DA 11-237, at n.45 (rel. Feb. 10, 2011).

III. Evidence and Arguments that Should Be Stricken From the Record

(a) The Reply Does Not Present Any Excuse for Noncompliance with Rule 76.59(b)

The Reply contends that the requirement of Rule 76.7(a)(4)(i) that a petition “state fully and precisely all pertinent facts and considerations relied on to demonstrate the need for the relief requested...” somehow excuses Service Electric from complying with the evidentiary requirements of Rule 76.59(b). But, Rule 76.7(a)(4)(i) is no exception to the requirements of Rule 76.59(b). To the contrary, Rule 76.59(b) requires adherence to both Rule 76.59 and Rule 76.7:

“Such requests for modification of a television market shall be submitted in accordance with § 76.7, petitions for special relief, *and* shall include the following evidence....” (emphasis added)

There is no conflict between the two requirements. A petitioner can and must meet both requirements. And, were a conflict to be somehow perceived, the resolution is guided by NOTE 4 to Rule 76.7, which states:

“To the extent a conflict is perceived between the general pleading requirements of this section, and the procedural requirements of a specific section, the procedural requirements of the specific section should be followed.”

A Rule 76.59 market modification petition is not a type of petition in which all the petitioner must do to satisfy procedural requirements is, as argued by Service Electric, “to submit the evidence that it feels will justify the relief it seeks.”⁷ The statute is specific that the Bureau must “tak[e] into account” four listed “factors...”⁸ The proponent of the requested modification has the burden of proof and must provide the evidence required for the Bureau to make rational determinations on all four factors. It is for that reason that Rule 76.59(b) lists several showings

⁷ Reply, at 4 n.11.

⁸ 47 USC § 534(h)(1)(C)(ii).

that absolutely must appear in a petition for market modification, regardless of how the petitioner “feels” about it. The statute also allows the Bureau to consider other factors that are pertinent,⁹ and once again it is the petitioner who has the burden of proof and who must raise these factors in its petition. Viewed against this backdrop, the requirement of Rule 76.7(a)(4)(i) to “state full and precisely all pertinent facts and considerations relied on to demonstrate the need for the relief requested...” is a requirement to make every showing the Bureau must consider to grant the requested relief, as well as all other “pertinent facts and considerations....”

The Reply seeks to minimize the importance of compliance with Rule 76.59(b) by citing to a case in which a market modification petition was dismissed because it omitted several showings required by Rule 76.59(b).¹⁰ Western Pacific does not understand how this case helps Service Electric, as it shows that Rule 76.59(c) will be enforced. To quote that subsection, petitions missing the required information “shall be dismissed....”

(b) The Reply Cannot Provide the Rule 76.59(b) Evidence as a “Clarification” as One Cannot “Clarify” that which Has Not Been Previously Presented

The Reply seeks to sneak some of the missing showings into record by offering such showings for the first time with the reasoning that they will “further clarify” something that was not previously submitted by Service Electric (describing why the Bureau should accept a list of the community coordinates and distances, when this information was omitted from the Petition),¹¹ or because they will provide “greater clarity” of facts not previously disclosed

⁹ The language in Section 614(h)(1)(C)(ii) allowing a broader inquiry is “by taking account of such factors as....”

¹⁰ Opposition, at 3 n.10.

¹¹ Reply, at 4.

(describing why the Bureau should accept a map of the communities relative to the WACP noise-limited contour, when this information was omitted from the Petition).¹²

The Reply, however, does not “clarify” or add “clarity” to any of these evidentiary showings, and could not do so, as these evidentiary showing simply were not made in the Petition. There is no Commission Rule or decision that would allow a petitioner to file information out of time under some puzzling and irrational notion of a made-up exception for “clarifying” information which, until that point, had been withheld.

(c) Exhibit 1 of the Reply Should Be Stricken

Rule 76.59(b)(2) requires the petition to include “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 area.” This showing for a “newer station” is the most important showing. Yet, the Petition provided neither the geographic coordinates of any cable community, nor the location of any cable community relative to the WACP noise-limited contour, even though the Petition quotes Rule 76.59(b)(2) which requires these showings. Anticipating that Service Electric would attempt to slip in this information in its Reply, Western Pacific’s Opposition made the following observation:

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.¹³

Accordingly, Western Pacific urges the Bureau to strike Reply Exhibit 1 from the record of this proceeding.

¹² Reply, at 5.

¹³ Opposition, at 17.

(d) Exhibit 2 of the Reply Should Be Stricken

Rule 76.59(b)(2) explicitly requires the contour map that Service Electric now submits as Exhibit 2 of its Reply, but did not include in its Petition. It should be stricken for the same reason that Exhibit 1 should be stricken.

(e) The Reply's Discussion of the Historical Carriage of WACP Should Be Stricken

Service Electric's Petition dismissed the required showing of the "historical carriage" of WACP by simply asserting that WACP is not historically carried in the DMA. Clearly, as shown in the Opposition, WACP is being carried and has been carried by several different cable operators in the four counties at issue. Admittedly, carriage of WACP is less than a year old. But, considering that "historical" means "past," and not necessarily old, this carriage is "historical," hence relevant, and should have been revealed and discussed in the Petition. To show this carriage, Western Pacific used the Internet to access publicly-available channel lineups.¹⁴

¹⁴ The Reply upbraids Western Pacific for not submitting declarations to support these print outs from websites and recitation of facts from the FCC website. A declaration was provided for all exhibits that involved work product or knowledge of Western Pacific or its advisors that was not from a third party source that would normally be relied upon by the Bureau. Thus, a declaration was provided for Exhibits A, B and M, which were created by Lohnes & Culver, PE. The channel lineups appearing as Exhibits D, E, G, H and J are just printouts of publications from web pages that anyone can access, and the Bureau regularly relies upon that third party information without a supporting declaration as there is no reason to believe that a cable operator would absurdly attempt to mislead its subscribers as to what channels it is showing. Declarations state matters of personal knowledge and there is no personal knowledge of anyone within the Western Pacific organization of these channel lineups that could be the subject of a declaration. Exhibits C, F, I and K are lists of CUIDs organized by county. These CUIDs are no invention of Western Pacific, but just a list of cable communities maintained by the Bureau which can be verified without the need for the assurance of their veracity of a declaration. Similarly, Exhibit L just reorganizes the CUID list maintained by the Bureau to place Service Electric and RCN CUIDs side-by-side to show that RCN overbuilt Service Electric. There is nothing original in this Exhibit that would warrant a declaration, and its veracity can be determined by simply reviewing the Bureau's list of CUIDs.

Service Electric was required by Rule 76.59(b)(5) to reveal and discuss this carriage and its implications for the requested market modification. If Western Pacific's Opposition had not revealed the historical carriage of WACP by Comcast (who was not subject to any must carry complaint), RCN, Service Electric Cablevision and Verizon, the Bureau would have been misled into thinking no system carried WACP in any of the four disputed counties. Had Service Electric performed its duty under Rule 76.59(b)(5), Western Pacific's Opposition would have addressed those arguments that Service Electric now makes in its Reply. This attempt to have the last say on the matter in violation of Rule 76.59(b)(5) should be met by striking all of the arguments that Service Electric's Reply makes on the historical carriage of WACP.

Moreover, the Reply's discussion of the historical carriage of WACP is a good example of why the topic should have been raised and thoroughly addressed in the Petition. Were the Bureau to accept Western Pacific's argument on historical carriage of WACP in isolation from critique, the Bureau would be accepting a baseless argument. Specifically, Service Electric asserts for the first time in the Reply that, based upon citations to four cases, the "Commission has consistently held that where a station is carried as a result of a must carry demand there can be no finding of historical carriage."¹⁵ Of course, by saving this assertion for the Reply, Service Electric would expect this assertion to escape Western Pacific's critique of the assertion.

There are two problems with that assertion. First, the four cases Service Electric relies upon for the assertion are at least 16 years old and do not even remotely support the assertion.¹⁶

The first of these cases, *Home Link*, does not even discuss the issue of whether carriage under must carry is relevant to a station's market.¹⁷ It involved stations that had not been carried.

¹⁵ Reply at 11, Section V.

¹⁶ These cases appear in note 30 of the Reply.

Two of these four cases involved stations that were licensed before the 1992 Act and were not voluntarily carried before carriage was mandated by the 1992 Act, which offers a pre- and post-regulatory contrast that cannot apply to a station like WACP which was not licensed until long after the 1992 Act mandated carriage. *Comcast Cablevision of Monmouth*,¹⁸ involved a station that had not been carried, even though it had been on the air for 11 years, 7 of which preceded enactment of the 1992 carriage law. Thus, in discussing the issue for a station that bridges the time before and after the law was enacted, the Bureau would only go so far as to say that “*carriage patterns that have developed coincident with changes in the statutory carriage obligation* provide only equivocal information as to the connection of these communities with WLIG in terms of the market participants understanding of the scope of the market.”¹⁹ And that is the same set of facts the Bureau faced in *TKR Cable Company*,²⁰ in which the Bureau found carriage of a station licensed long before the law was enacted, when such carriage began after the law was enacted, “not highly probative of establishing a history of carriage for our purposes here, particularly when, as in this instance, WLNY has been operating for over a decade.”²¹

The fourth and final case relied upon by Service Electric’s Reply, *Rifkin/Narragansett*,²² involved circumstances which are not present in this case. In that case, the cable system only commenced carriage of the station after the passage of the 1992 Act, even though the station had been licensed long before that time, and three other nearby cable systems had recently deleted

¹⁷ The Reply’s footnote 30 cites to paragraph 17 of *Home Link Communications of Princeton*, 13 FCC Rcd 1578 (CSB 1997).

¹⁸ The Reply’s footnote 30 cites to paragraph 25 of *Comcast Cablevision of Monmouth*, 11 FCC Rcd 6426 (CSB 1996).

¹⁹ *Id.* at ¶25, 6435 (emphasis added).

²⁰ The Reply’s footnote 30 cites to paragraph 16 of *TKR Cable Company, Sussex and Morris Counties, New Jersey*, 12 FCC Rcd 8414 (CSB 1997).

²¹ *Id.* at ¶16, 8422.

²² The Reply’s footnote 30 cites to paragraph 30 of *Rifkin/Narragansett, South Florida*, 11 FCC Rcd 21090 (CSB 1996).

the station's signal pursuant to requests the Bureau granted to modify the station's market.²³ In *Rifkin/Narragansett*, the Bureau once again had evidence of how the enactment of the must carry scheme affected carriage of a station, while in the case of WACP that evidence cannot exist. And like the other three case cited by Service Electric's Reply, *Rifkin/Narragansett* has no language that could even remotely be interpreted to support Service Electric's assertion that the "Commission has consistently held that where a station is carried as a result of a must carry demand there can be no finding of historical carriage."²⁴ Rather, the Bureau only went so far as to say that the historical carriage of the subject station was "not highly probative of establishing a history of carriage for our purposes here." Thus, the Bureau did not conclude that it was not probative.

The second problem with Service Electric's assertion is that it effectively eliminates the statutorily-required historical carriage factor from market modification proceedings. All stations carried under the mandatory carriage rules make triennial carriage demands and, hence, all are carried by "must carry demand." Thus, assuming *arguendo* the validity of Service Electric's argument, no station carried under the mandatory carriage regime can ever be found to have been historically carried. That would leave just the stations carried by retransmission consent, but a cable operator would not have standing to modify the scope of carriage to which it has agreed. Thus, Service Electric's argument, if accepted, would render the 1st statutory factor – historical carriage – meaningless. Indeed, for any station first licensed after 1992 when the must carry law was enacted, Service Electric's argument would mean that the Bureau would never consider the historical carriage of any such station, even though the statute treats such stations no differently than stations first licensed before the 1992 Act took effect. Established rules of statutory

²³ *Id.* at ¶30, 21105.

²⁴ Reply at 11, Section V.

construction will not allow these results. The fact is that cable operators have the market modification vehicle at their finger tips if they believe that a station should not be considered local to a cable community, and the carriage of a station by a cable system indicates the belief that the cable system accepts the station as local to the areas carried.

Service Electric suggests, without supporting authority, that Western Pacific's use of must carry complaints (all of which have been settled) against certain cable operators somehow is inconsistent with the notion of historical carriage. The fact that a must carry complaint has been filed, standing alone, is meaningless. As shown in the oppositions to several of the complaints, the normal issue of a "good quality" signal was the focus of the failure to grant immediate carriage. None of the oppositions was based upon issues as to the local market, and Bureau records demonstrate that several were resolved without any opposition from the cable operator. That a complaint might be filed was due in several instances to the fact that the time required to resolve the technical complexities of arranging for the receipt of a signal at the system headend was so long that a complaint had to be filed just to preserve the ability of the Bureau to enforce WACP's carriage rights. The fact that these cable operators could have responded to Western Pacific by filing market modification requests, but did not, indicates that these operators regard these counties as a natural part of WACP's market. And, once again, Service Electric's use of the Reply to raise these matters provides an incomplete factual picture. While the Reply mentions several of the Western Pacific must carry complaints, the Reply neglects to mention that the largest cable operator in the DMA – Comcast – willingly carries WACP and was never the subject of a must carry complaint.

(f) The Reply's Discussion of the Historical Carriage of Other Stations Located in the Same Area as WACP Should Be Stricken

Rule 76.59(b)(5) not only required Service Electric's Petition to address the past carriage of WACP, it also required the Petition to address past carriage of "other stations located in the same area." Rule 76.7(a)(4) also required Service Electric to address the carriage of these other stations in its Petition because Section 614(h)(1)(C)(ii) of the Act states that the Bureau cannot grant a modification petition without "taking into account such factors as – (I) whether ... other stations located in the same area, have been historically carried on the cable system or systems within such community."²⁵ The Petition totally ignored these requirements.

In fact, there is another commercial station licensed to the same community of license as WACP -- Atlantic City. That station is WWSI. Thus, WWSI is "located in the same area," even though its transmitter site and noise-limited contour (as explained in the Opposition and shown on Exhibit A to the Opposition) are significantly farther away from the four disputed counties than the WACP's transmitter site and contour. The Petition made no mention of the carriage of WWSI by Service electric or by any of the other cable systems operating in the four disputed counties. The result of Service Electric's failure to discharge its duty to raise the existence and carriage of WWSI would be to tend to lead the Bureau to believe that there are no "other stations located in the same area" which are carried in the same cable communities and whose carriage would require that these communities remain within WACP's television market under the anti-discrimination requirement of the market modification statute.²⁶

²⁵ Rule 76.7(a)(4) states that "[t]he petition ... shall state fully and precisely all pertinent facts and conditions 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."

²⁶ "Further, this section is not intended to permit a cable system to discriminate among several stations licensed to the same community. Unless a cable system can point to particularized evidence that its community is not part of one station's market, it should not be

Western Pacific should not have had to bear the burden it voluntarily took in developing and presenting this information in its Opposition, as this burden is on Service Electric and Western Pacific has nothing to gain through this market modification process. If Service Electric had revealed the carriage of this station and its arguments for diminishing the importance of that carriage in the Petition, Western Pacific would have addressed those arguments in its Opposition. Service Electric's attempt to stand the pleading cycle on its head should be met by striking all of the arguments that Service Electric's Reply makes to diminish the importance of the historical carriage of WWSI.

Once again, an evaluation of Service Electric's argument in its Reply underscores the importance of requiring that it discuss nearby station carriage in its Petition so that whatever arguments Service Electric makes to attempt to diminish the importance of this carriage can be addressed by Western Pacific in the normal pleading cycle. In its Reply, Service Electric attempts to paint its carriage of WWSI as a purple cow that it is not. Service Electric does so with incorrect facts and absurd arguments, thus demonstrating even more the importance of Western Pacific's request to strike these facts and associated arguments. For one, Service Electric says that it "does not dispute that the WWSI and WACP transmitters are located on the same tower."²⁷ But, as Commission records and Exhibit A of the Opposition clearly show, WWSI and WACP are not on the same tower. WWSI is on a tower located near Atlantic City, while WACP is located on a tower approximately 30 miles west of there.²⁸

permitted to single out individual stations serving the same area and request that the cable system's community be deleted from the station's television market." H.R. Rep. No. 102-628, at 98, *reprinted at* The 1992 Cable Act Law & Legislative History at 360 (Pike & Fischer 1992).

²⁷ Reply, at 9 (Section IV).

²⁸ WWSI as a construction permit to move its transmitter about 30 miles west (which would be about 30 miles closer to the Service Electric headend) to the WACP transmitter site, but it has

Service Electric points to its receipt of the WWSI signal by satellite, as though that means of feeding the signal into the headend rendered WWSI other than another Philadelphia DMA station it is. How a cable system receives a TV station signal is irrelevant. Stations entitled to mandatory carriage or carriage by agreement may be received at the headend over-the-air, by TV translator, by microwave radio, by fiber optic transmission or by satellite. It simply does not matter how a station's signal gets to the headend; all that matters is that it is carried.

Service Electric attempts to further diminish the importance of this carriage by a tortured claim that it “does not carry WWSI as an in-market station ... it entered into a retransmission consent agreement.”²⁹ The fact is that WWSI is licensed to Atlantic City and Atlantic City is within the Philadelphia DMA. WWSI is an “in-market” station. And the use of retransmission consent to carry a station does not affect the station's market. Were Service Electric's logic applied to other Philadelphia stations carried by retransmission consent – such as the Big-4 network affiliates – then one would have to conclude that these stations are not within the DMA. That simply makes no sense.

IV. The Technical Integration of the Cable System Raises Obvious Carriage Issues, Should Have Been Addressed in the Petition and Requires the Denial of the Petition

The Reply raises for the first time that Service Electric's cable system serving the four disputed counties is obsolete and “technically-integrated,” so that Service Electric cannot show WACP to any one or more of the communities within those counties without showing WACP in all communities within those counties.³⁰ If this is in fact the case, then Service Electric should

not made the move and has been carried as a station located at its existing site which is next to the ocean.

²⁹ Reply at 10.

³⁰ Reply, at 8.

have raised this fact in its Petition so that Western Pacific would have had the opportunity to address its implications in the Opposition.

Service Electric had to know that, by not telling the Bureau of this technical integration challenge, a grant of the Petition as to some but not all communities (which would be the best possible outcome Service Electric could hope to achieve) would actually result in no carriage of WACP in any of these communities remaining in WACP's market. This result, which is not discussed in either the Petition or the Reply, is the consequence of the copyright royalty scheme. Specifically, WACP would not be a local station for copyright purposes in any of the communities that are deleted by the Bureau.³¹ WACP could retain its must carry status as to the Service Electric communities remaining within its market only by indemnifying Service Electric for its increased copyright royalties resulting from WACP being carried in the deleted communities as a distant signal.³²

This particular issue is a clear example of why the Bureau should not allow a petitioner to raise a new issue in the last pleading authorized in a pleading cycle. The copyright liability implications of this particular issue could easily escape notice. In the usual case, the proper treatment of Service Electric's attempt to raise this issue in its Reply would be to strike the discussion of the issue. But, that action would have the unintended consequence of rendering any partial grant of the Petition the unintended *de facto* full grant of the Petition due to the copyright liability issue, even though the public interest and the law would favor the carriage of the station in some of the markets.

³¹ See Copyright Office Form SA3, at General Instructions, Page (v), under the heading "Local Service Area of Primary Transmitter." A copy of this page is attached at Exhibit A.

³² WACP is entitled to carriage on the system due to its must carry election. WACP will only qualify as a must carry station as to any system if, among other things, it agrees to indemnify the system against any distant signal royalties the system must pay to the US Copyright Office as a result of carrying the station's signal. Rule 76.55(c)(2).

The challenges posed by the technical integration of the cable system if WACP's market is modified at Service Electric's request should be the burden of the moving party -- Service Electric -- and not the station or the viewing public. The clear policy is that if a "cable system is not able to alter its channel line-up on a community-by-community basis," those communities served by the cable system that would otherwise fall outside of the station's market are considered "local" for must carry purposes.³³ "Congress' objective to ensure that television stations be carried in areas which they serve and which form their economic market"³⁴ cannot take a back seat to Service Electric's technical system issue which arises from its choice³⁵ and requires that Service Electric carry WACP to all of its system's communities if the system cannot select which communities receive the station.

Service Electric has not presented any reason or Bureau decision that would support a different result. Contrary the Reply's claim, the Commission has not found that a station should be denied carriage within that part of its home DMA that will remain after its market is contracted by market modification just because a technically obsolete cable system could not segregate the signal between the deleted and retained communities.

³³ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, 2976 (1993); *see also Complaint of Family Stations, inc. Against Viacom Cable*, DA-97-2468, ¶7 (rel. Nov. 26, 1997).

³⁴ H.R. Rep. No. 102-628, at 97, *reprinted at* The 1992 Cable Act Law & Legislative History at 359 (Pike & Fischer 1992).

³⁵ "It appears that cable operator's choice of a central technical facility is simply a matter of convenience and that it is technically possible to accommodate these requirements in most cases." *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, 2976 (1993) (discussing a requirement to carry a station in adjoining ADIs, even though one is not within the market of the station, if the cable system cannot be configured to preclude carriage in the non-home ADI).

The two cases cited by Service Electric are inapposite. The first case, *Norwell Television LLC*,³⁶ involved a request by a TV station to modify its market to add communities located within a DMA adjacent to its home DMA.³⁷ This was not a case, as here, of whether the station should preserve any part of its home DMA. In the unique facts of *Norwell Television*, expanding the TV station's market from its home DMA of Boston to several communities in the neighboring Providence DMA would have the effect of granting the station carriage "throughout the Providence market" because of the technically-integrated nature of the cable system.³⁸ The attempted land-grab in *Norwell Television* was naturally rebuffed by the Bureau. The second case *Armstrong Utilities*,³⁹ mentioned the technical integration of the system as just one of several factors, a factor that was not necessary for the Bureau to consider to reach the conclusion it reached in that case, and one mentioned almost in passing. Moreover, unlike the case here, in *Armstrong Utilities* none of the disputed communities were within the station's Grade B contour and the cable system did not carry another TV station having the same city of license (WWSI) as the subject TV station.

It is important that the Bureau recognize that Service Electric is asking for the extraordinary relief of not having to carry WACP. In this circumstance, a partial grant of the Petition would burden WACP with copyright fee liability just to be carried in communities that remain within its market. That result would cause Western Pacific to should an unfair burden on the exercise by Western Pacific of its statutory right to in-market carriage, would serve to tax in-market carriage and would reward Service Electric's choice in using an obsolete cable system technology. This financial burden on in-market carriage should not be on WACP. Accordingly,

³⁶ 16 FCC Rcd 21970 (2001).

³⁷ *Id.* at ¶1.

³⁸ *Id.* at 27.

³⁹ 21 FCC Rcd 13475 (2006).

the fact that Service Electric cannot segregate its channel line-ups requires that the Petition be denied as to all of the Service Electric cable communities.

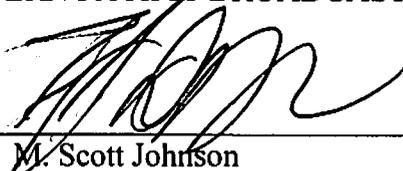
V. Conclusion

WHEREFORE, the foregoing premises considered, Western Pacific Broadcast, LLC hereby respectfully requests that the Bureau strike the portions of the reply discussed above and consider the other matters raised in this Motion.

Respectfully submitted,

WESTERN PACIFIC BROADCAST LLC

By: _____



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

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May 2, 2013

Exhibit A

- **Network station:** A primary stream of a television broadcast station that is owned or operated by, or affiliated with, one or more of the television networks in the United States providing nationwide transmissions, and that transmits a substantial part of the programming supplied by such networks for a substantial part of the primary stream's typical broadcast day.

The term network station also applies to a multicast stream on which a television broadcast station transmits all or substantially all of the programming of an interconnected program service that is owned or operated by, or affiliated with, one or more of the television networks described above and offers programming on a regular basis for 15 or more hours per week to at least 25 of the affiliated television licensees of the interconnected program service in 10 or more states.

- **Independent station:** A primary stream or multicast stream of a television broadcast station that is not a network station or a noncommercial educational station. For purposes of determining a station's type-value this category includes all specialty, Canadian and Mexican stations.
- **Noncommercial educational station:** A primary or multicast stream of a television broadcast station that is a noncommercial educational broadcast station which is owned and operated by a public agency or nonprofit private foundation, corporation, or association; or owned and operated by a municipality and which transmits only noncommercial programs for educational purposes.

-
- **Local Service Area of a Primary Transmitter:** In general, the 'local service area of a primary transmitter', in the case of both the primary stream and any multicast streams transmitted by a primary transmitter that is a television broadcast station, comprises the area where such primary transmitter could have insisted upon its signal being retransmitted by a cable system pursuant to rules, regulations, and authorizations of the FCC in effect on April 15, 1976. Effective July 1, 1994, a station's local service area also includes the station's television market as defined in section 76.55(e) of title 47, *Code of Federal Regulations* (as in effect on September 18, 1993), or any modifications to such television market made on or after September 18, 1993, pursuant to section 76.55(e) or 76.59 of title 47 of the *Code of Federal Regulations* or within the noise-limited contour as defined in 73.622(e)(1) of title 47, *Code of Federal Regulations*. For the full definition see Section 111 (f) of the Copyright Act.

Basis of Carriage of Distant Stations. In column 5 of space G you are asked to identify the basis on which you carried the signals of distant television stations during the accounting period. The *three* categories are as follows:

LAC Part-Time Carriage Because of Lack of Activated Channel Capacity. In referring to this category, the Copyright Act speaks of "a station carried on a part-time basis where full-time carriage is not possible because the cable system lacks the activated channel capacity to retransmit on a full-time basis all signals which it is authorized to carry."

A cable system can only claim lack of activated channel capacity (LAC) in column 5, space G if (a) all of its activated television channels are used exclusively for the secondary transmission of television signals, and (b) the number of primary television transmitters secondarily transmitted by the cable system exceeds the number of its activated television channels.

"E" Exempt for Multicast Stream. This category covers the retransmission of a multicast stream that is the subject of a written agreement entered into on or before June 30, 2009, between a cable system or association representing the cable system and a primary transmitter or an association representing the primary transmitter. This category also covers simulcast streams.

"O" Any other basis of carriage. This category covers all distant television stations you carried, including full-time stations, *except:*

- those identified in category LAC above;
- those identified in category "E" above;
- those carried only on a substitute basis (see the general instructions regarding the use of space I); and
- those carried only on a part-time network basis under former FCC rules cited in space G of the form.

Note: Simulcast streams are not subject to a royalty payment.

THREE POINTS TO REMEMBER IN CONNECTION WITH COLUMN 5 OF SPACE G:

- 1 Due to changes in FCC rules, it is no longer possible for cable systems to specify part-time carriage of specialty and late-night programming. Carriage by your cable system on either of those bases must now be included in category "O" cited above.
- 2 The "basis of carriage" to be identified in column 5 does not include *substitute carriage*. If a station was carried only on a substitute basis, you need not list it in space G but you must list it in space I. A station carried on a substitute basis, and also on some other basis, must be logged in space G and space I.
- 3 A part-time carriage log (space J) must be provided for stations carried on a LAC basis.

Distant Signal Equivalent:

The distant signal equivalent (DSE) is the value assigned to the secondary transmission of any non-network television programming carried by a cable system in whole or in part beyond the local service area of the primary transmitter. The DSE is computed by assigning a value of one to each primary stream and to each multicast stream (other than a simulcast) that is an independent station, and by assigning a value of one-quarter to each primary stream and to each multicast stream (other than a simulcast) that is a network station or a noncommercial educational station.

CERTIFICATE OF SERVICE

I, Michelle Brown Johnson, hereby certify that on this 2nd day of May, 2013, I caused a copy of the foregoing "Motion to Strike and Limited Surreply " to be served via U.S. mail, postage prepaid, and email upon the following persons shown below and on the cable franchising authorities shown on the attachment:

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Borough of Glendon
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**City of Bethlehem
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Lower Mount Bethel Township
Route 611
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