

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

In the Matter of)
Miami Valley Broadcasting Corporation) MB Docket No. 13-201
)
For Modification of the Television Market) CSR No. CSR-8824-A
For WHIO-TV-TV, Dayton, Ohio)
) Facility Id. No. 41458
To: Office of the Secretary
Attn: Chief, Policy Division, Media Bureau

SURREPLY

Lima Communication Corporation, licensee of WLIO, Lima, Ohio and West Central Ohio Broadcasting Corporation, licensee of WOHL-CD, Lima, Ohio, subsidiaries of Block Communications, Inc. (“BCI”),¹ file this Surreply to the Reply to Oppositions to Petition for Special Relief (“Reply”) filed by Miami Valley Broadcasting Corporation and its parent Cox Media Group, licensee of WHIO-TV, Dayton, Ohio (“WHIO-TV”).²

As explained in BCI’s Opposition to Petition for Special Relief (“Opposition”), WHIO-TV’s Petition for Special Relief (“Petition”) fails the well-established evidentiary tests under which market modification petitions are evaluated.³ WHIO-TV’s Reply offers new arguments in

¹ BCI is the ultimate parent company of the two licensed broadcast stations, WLIO and WOHL-CD, which are operated as one entity under the leadership of the Lima Communications Corporation. See BCI Opposition at 2. By leveraging digital multicasting technologies, BCI is able to carry the signals of the four major national television networks, ABC, CBS, FOX, and NBC, on two transmitters, full-power WLIO channel 8 (8.1 NBC and 8.2 FOX) and low power WOHL-CD channel 35 (35.1 ABC and 35.2 CBS). For ease of reference herein, the licensed stations’ four channels will be referred to collectively as the “BCI Lima Stations,” and singly, for example, as the “BCI Lima CBS.”

² *Miami Valley Broadcasting Corporation For Modification of the Television Market For WHIO-TV, Dayton, Ohio*, MB Docket No. 13-201, Reply to Oppositions to Petition for Special Relief (filed Sept. 18, 2013) (“Reply”).

³ *Miami Valley Broadcasting Corporation For Modification of the Television Market For WHIO-TV, Dayton, Ohio*, MB Docket No. 13-201, Petition for Special Relief (filed July 26, 2013) (“Petition”); *Miami Valley Broadcasting Corporation For Modification of the Television Market For WHIO-TV, Dayton, Ohio*, MB Docket No. 13-201, Opposition to Petition for Special Relief (filed Sept. 3, 2013) (“Opposition”).

an attempt to shore-up its request to add the Auglaize and Allen County Cable Communities to its market. The purpose of this brief filing is to respond to arguments raised for the first time in WHIO-TV's Reply. To make a well-informed decision on as full and complete a record as possible, the Media Bureau must consider this Surreply. We address each new point in turn below.

Nielsen Assignments of Auglaize County.

In its Petition, WHIO-TV submitted Nielsen designated market area ("DMA") assignments for Auglaize County for a 14-year period from 1999/2000 through 2012/2013. The Petition claimed this information supported permanently assigning the Cable Communities in Auglaize County to WHIO-TV's market.⁴ In its Reply, WHIO-TV now expands the 14 year historical ratings window by 33 years. WHIO-TV claims the Bureau should now consider a 47-year period of ratings information, running from November 1967-November 2012.

WHIO-TV's reliance on a 47-year period of DMA assignments is directly contrary to Commission precedent, including the rationale for adopting the Nielsen DMA assignments for use in determining must carry status.⁵ When promulgating the must carry rules in 1993 the Commission recognized that a county's "local" television market might change over time as markets changed and thus established a process whereby the "Areas of Dominant Influence" would be designated for 3 year periods.⁶ The Commission again acknowledged that television markets might change when adopting the use of Nielsen DMA assignments, noting that "we

⁴ Petition at 2; Petition, Exhibit C.

⁵ See *Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules; Implementation of Section 301 (d) of the Telecommunications Act of 1996*, CS 95-178, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 6201 ¶39 (1996) ("*Market Designation Order*").

⁶ See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Broadcast Signal Carriage Issues; Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates Request by TV 14, Inc. to Amend Section 76.51 of the Commission's Rules to Include Rome, Georgia, in the Atlanta, Georgia, Television Market*, MM Docket No. 92-259, Report and Order, 8 FCC Rcd 2965 ¶39 (1993) ("*1993 Must Carry Rules Order*").

continue to believe that our 1993 decision to use updated market designations for each election cycle to account for changing markets is appropriate. Nielsen provides the only generally recognized source for information on television markets that would permit us to retain this policy.”⁷ Thus the Commission concluded “we believe the DMA market designations, updated for each election cycle, provide the best method of ensuring local stations access to the consumers they are licensed to serve and to provide cable subscribers with the stations best suited to their needs and interests.”⁸

WHIO’s new argument that a 47-year period is somehow relevant only underscores the soundness of the Commission’s recognition of the need to adapt to a changing television market. Nielsen assigns counties to television markets based on the market whose stations receive the largest share of viewing in the county.⁹ For the period from 1967-1991 the only network station in the Lima DMA was BCI’s WLIO, the NBC affiliate.¹⁰ A comparison of the share gained by a single Lima NBC station against the combined shares of Dayton’s ABC, NBC, CBS and later FOX stations for that period would undoubtedly have placed Auglaize County in the Dayton DMA. During the 13-year period the Lima DMA has been home to affiliates of the four major networks, Nielsen has assigned Auglaize County to the Lima DMA nine times, including its most recent assignment to the Lima DMA for the 2013-2014 television year.¹¹

WHIO-TV’s new reliance on Nielsen DMA assignments for years when the Lima DMA did not contain the full array of the network-affiliated stations is irrelevant, misleading, and directly conflicts with the policy underlying use of Nielsen DMA assignments as the principal

⁷ See *Market Designation Order*, ¶39.

⁸ *Market Designation Order*, ¶43 (emphasis added).

⁹ *Market Designation Order*, ¶16.

¹⁰ Petition, Exhibit R.

¹¹ Petition, Exhibits C and R; Opposition, Exhibit I.

measure for establishing television broadcast markets.¹² The Bureau should reject the argument.

Out-of-Market Restrictions on Retransmission Consent.

The Petition articulated only one reason why WHIO-TV needs must carry rights in the Auglaize and Allen County Cable Communities, claiming, with no factual support, that “cable operators nationwide have become less and less willing to continue providing ‘out-of-market’ carriage to broadcasters.”¹³ Now, in its Reply, WHIO-TV raises the entirely new and equally unsupported argument that it needs a market modification because “network affiliation agreements may prohibit an affiliate from granting retransmission outside the station’s market.”¹⁴

Nowhere in the Reply does WHIO-TV state that its network affiliation with CBS actually prohibits the station from granting retransmission consent outside its DMA. WHIO-TV knows the content of its own network affiliation agreement and can state precisely its impact in this case. That WHIO-TV does not do so speaks volumes. Further, in BCI’s experience, network affiliation agreements that prohibit out-of-market carriage many times also contain a carve-out for stations that are on the Commission’s significantly viewed list, as WHIO-TV is in both Auglaize County and Allen County.¹⁵ Even if there were a prohibition in WHIO-TV’s network affiliation agreement against granting out-of-market retransmission consent, the station can seek waiver from the network. In fact, Commission policy encourages such requests.¹⁶ Finally, to the

¹² See 1993 *Must Carry Rules Order*, ¶39 (“local” assignments must continually take into account market changes).

¹³ Petition at 8. WHIO-TV did not claim that it was unable to secure continued carriage for this reason.

¹⁴ Reply at 9 (emphasis added).

¹⁵ Petition at 28, 35; Federal Communications Commission, *Significantly Viewed TV Stations*, <http://transition.fcc.gov/mb/significantviewedstations081913.pdf>.

¹⁶ *Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004, Reciprocal Bargaining Obligation*, MB Docket No. 05-89, Report and Order, 20 FCC Rcd 10339 ¶35 (2005) (“*SHVERA Order*”). The Commission declined to find that retransmission consent restrictions in network affiliate agreements constitute *per se* violations of a broadcaster’s good faith negotiation obligation, but stated that affiliates should seek waivers from the network so that an out-of-market cable system can carry the signal. *Id.* at ¶¶34-35. The *SHVERA Order* states: “We believe that it is incumbent on broadcasters subject to such contractual limitations that have been engaged by an out-of-market MVPD to negotiate retransmission consent of its signal to at least

extent that WHIO-TV is concerned that in the future CBS would seek to impose an out-of-market retransmission consent prohibition in its network affiliation agreement, it can return to the Commission and file a market modification request based on actual conditions threatening its continued carriage in affected communities should that come to pass.

Diversity of Voices.

In its Reply, WHIO-TV advanced for the first time the novel argument that it should be deemed a local station with must carry rights in Allen County to preserve the diversity of media voices in that market.¹⁷ WHIO-TV fails to cite any precedent for the claim that “diversity of media voices in the market” is a proper consideration for the Commission in market modification proceedings, and BCI is unaware of any such precedent. Even if the claim were relevant, the Lima market contains an array of diverse media voices in addition to the BCI Lima Stations.

There is a wide diversity of television voices in the market as demonstrated by WHIO-TV’s own evidence. In addition to multicasting WLIO’s local news programming, the BCI NBC, CBS and ABC stations each carry their network’s national news programming.¹⁸ Additional national voice diversity is provided by the myriad of cable news stations carried on the Time Warner Cable’s Allen County systems including C-Span, CNN, MSNBC and Fox News Channel.¹⁹

On a local level, in addition to the extensive coverage provided by the BCI Lima

inquire with its network whether the network would waive the limitation with regard to the MVPD in question. We believe that in many situations retransmission of the Broadcaster’s signal by a distant MVPD would be deemed advantageous to the network as well as the Broadcaster and MVPD. In such situations, we believe that a network that has otherwise restricted a Broadcaster’s redistribution rights might be amenable to a limited waiver of the restriction.” *Id.* at ¶35. Furthermore, even if WHIO-TV’s network affiliation agreement contain a provision prohibiting the station from granting retransmission consent out-of-market, it is likely to pertain to the “market” (that is, the DMA) as defined by Nielsen rather than the station’s market as modified by the Commission.

¹⁷ Reply at 13-14.

¹⁸ See <http://www.hometownstations.com/link/457412/your-hometown-lima-stations-programming-schedule>. (verified on Sept. 30, 2013).

¹⁹ See Petition, Exhibit Q.

Stations, the local Lima independent station, WTLW-TV, covers matters of local interest as does the PBS station from Bowling Green, Ohio, which has been traditionally carried.²⁰ Further, the Time Warner Cable system in Allen County has historically carried, and still carries, WBNS Columbus-CBS and WTVG Toledo-ABC, both of which provide local news.²¹

There is also a diversity of media voices from other media outlets. Local coverage is provided by other broadcasters, newspapers, radio and websites. Lima has a daily newspaper, the Lima News, which publishes comprehensive local news both through its printed paper and on its website.²² Lima and Allen County are also covered in the Business Journal of West Central Ohio, which also appears in print and on-line.²³ In addition, there are many radio stations available in Allen County,²⁴ including WIMA which designates itself as “Lima’s News/Talk Radio” and includes several sister stations in Lima.²⁵ The majority of the radio stations likewise include write-ups of their news stories on their websites.²⁶

Thus, even if a “diversity of media voices” were a proper consideration in a market modification proceeding, there is no dearth of media voices in Allen County. Granting WHIO-TV’s request to be deemed “local” in Allen County is simply not required to preserve a diversity of media voices in that market.

²⁰ See <http://wtlw.com/about/>; <http://wbgu.org/index.php>. BCI notes that in 2002, WTLW-TV was granted a modification of the Lima DMA to include all of the cable communities located within the counties of Auglaize, Hardin, Mercer, Putnam and Van Wert, Ohio. *American Christian Television Services, Inc., For Modification of the Lima, Ohio DMA*, CSR-5733-A, Memorandum Opinion and Order, 17 FCC Rcd 528 ¶12 (2002) (“all of the communities are geographically closer to Lima, Ohio than to the cores of their respective markets and there appears to be a close nexus between Lima and the areas in which the communities are located.”).

²¹ See <http://www.10tv.com/>; <http://www.13abc.com/>.

²² See <http://www.limaohio.com/>.

²³ <http://www.businessjrnl.com/>.

²⁴ See <http://www.radio-locator.com/cgi-bin/locate?select=city&city=Lima&state=OH>.

²⁵ <http://www.1150wima.com/main.html>.

²⁶ See, e.g., <http://www.1150wima.com/main.html>; <http://www.t102.com/main.html>; <http://www.peakofohio.com/>; <http://www.wgte.org/wgte/listen/>.

CONCLUSION

For the foregoing reasons and the reasons stated in its Opposition, BCI respectfully submits that the Commission should reject consideration of WHIO-TV's new arguments and should reject its Petition.

The undersigned verifies that to the best of his or her knowledge, information and belief formed after reasonable inquiry, this Surreply is well grounded in fact, warranted by existing law, and not interposed for any improper purpose.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Alma Hoxha, paralegal with Cinnamon Mueller, hereby certify that a true and correct copy of the foregoing SURREPLY was delivered by me to the United States Postal Office on September 30, 2013 to be delivered to the person listed below via first-class, postage prepaid mail:

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