

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:)	
)	
Armstrong Utilities, Inc.)	Docket No. 13-245
)	File No. CSR-8838-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

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November 12, 2013

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OPPOSITION TO
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Western Pacific Broadcast, LLC (“Western Pacific”), pursuant to Rule 76.7, hereby respectfully opposes the petition for special relief (the “Petition”) filed by Armstrong Utilities, Inc. (“Armstrong”) for modification of the television market of WACP (“WACP”) to exclude certain named communities located with Chester County, 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, a new station which has been on the air just 15 months, would be denied cable carriage in a large part of a county located within WACP’s noise-limited contour. The Petition would place WACP, *a station which was purchased at FCC auction* and which is new and must struggle to survive against 15 other

¹ The communities are Oxford, PA (CUID No. PA1995), East Nottingham Twp, PA (CUID No. PA1994), Elk Twp, PA (CUID No. PA3098), Highland Twp, PA (CUID No. PA 3096), Londonderry Twp, PA (CUID No. PA3095), Lower Oxford, PA (CUID No. PA2695), Upper Oxford, PA (CUID No. PA3099), West Fallowfield, PA (CUID No. PA3097) and West Nottingham Twp, PA (CUID No. 2705).

entrenched commercial television stations, at a competitive disadvantage. The Petition is against both established precedent and the public interest and should be denied promptly.

The Petition should be decided based upon the Bureau's precedent for determining whether to delete communities from a "new" station's DMA. That precedent gives greatest weight to the location of the WACP noise-limited contour, and less weight to other market-defining factors. That contour encompasses all of the communities which Armstrong would have the Bureau exclude from WACP's market (all are within Chester County). Undeterred, Armstrong has attempted to redefine that contour to pull it in to a radius that would exclude those communities. To do this, Armstrong relies upon a faulty engineering analysis that should be rejected. Indeed, even that hypothetical contour does little to help Armstrong's case, as 7 of the 9 disputed communities lie wholly or partially within that fanciful contour.

Besides the coverage of the communities by WACP's contour, there are other factors that support denying the Petition.

First, WACP is carried in every other cable community in Chester County, and is carried by overbuilders in 4 of the 9 disputed Armstrong communities.

Second, Armstrong has defaulted in observing the absolute requirement that it depict on a map the location of these communities relative to the WACP contour, requiring that the Bureau not delete any of these communities from WACP's market.

II. The Petition 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 15 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 factors normally weighed in the Bureau's market modification analysis 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 petitions, a station on the air less than 3 years is considered a new station.² WACP, being just 15 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."³

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).⁴

² *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).

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

⁴ *Id.* at 3 n.29; *see, also, DeSoto Broadcasting*, 78 RR2d 44, 47-48 (1995).

As shown on the contour maps submitted as Exhibit A, all of the Armstrong communities are within the WACP noise-limited contour, whether that contour is predicted with the normal method or by the Longeley-Rice method.⁵ In a recent case in which the market of WACP was subject to modification, the Bureau based its conclusion on which communities to leave in the market on the location of the WACP noise-limited contour. *Complaint for Carriage by Western Pacific Broadcast LLC v. Service Electric Cable Television, Inc. and Service Electric Cablevision, Inc.*, Docket No. 13-68, DA 13-1618, at ¶33 (rel. July 23, 2013). Accordingly, there is no basis for excluding any of Armstrong’s communities from WACP’s market.

(b) Armstrong’s Attempt to Compress WACP’s Noise-limited Contour Is Based Upon a Faulty Analysis, But Still Results In a Contour that Actually Hurts Its Case, as the Majority of the Disputed Armstrong Communities Remain Wholly or Partially Within Even That Hypothetical Contour

Armstrong’s Petition contains an engineering report in which its consulting engineers attempt to substitute an antenna pattern for the true WACP transmission antenna pattern. Using this pattern, Armstrong plots a WACP noise-limited contour that is contracted from the true contour by 7 kilometers in the direction of Armstrong’s communities.⁶ As explained by Lohnes & Culver in Exhibit A, the petition relies upon an azimuth pattern for the WACP antenna that does not exhibit the same pattern characteristics as the transmitting antenna employed by WACP.⁷ Accordingly, Armstrong’s efforts to redraw the WACP noise-limited contour must be rejected.

Rule 76.59(b)(2) required Armstrong’s Petition to include “Grade B contour maps delineating the station’s technical service area and showing the location of the cable system

⁵ Exhibit A is the Technical Exhibit of Lohnes & Culver. The contour maps appear as Figures 6 and 7 of this exhibit.

⁶ Petition, at Exhibit 4.

⁷ Exhibit A, page 2.

headends *and communities in relation to the service area...*”, while Rule 76.59(c) underscores the importance of this showing by saying that “Petitions for Special Relief to modify television markets that do not include such evidence shall be dismissed without prejudice”⁸ Nowhere in Armstrong’s voluminous filing is there a depiction of where the WACP noise-limited contour falls relative to the contested cable communities.

And we believe we know why Armstrong has omitted this required map: if Armstrong submitted the map delineating the communities relative to its concocted noise-limited contour, it would show that 7 of the 9 disputed community units are wholly or partially within even the inaccurate WACP noise-limited contour Armstrong would have the Bureau accept as the correct contour. Attached to Lohnes & Culver’s report (Exhibit A) are maps showing the coverage of the communities based upon both the actual predicted contour and Armstrong’s fabricated predicted contour.⁹

(c) *Armstrong Communities May Not Be Deleted From WACP’s Market Because WACP Is Carried by Competing Cable Systems as Well as Adjacent Cable Systems*

“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.¹⁰ Clearly, this factor gives weight to any showing that an overbuilder carries the station “within such community.” In addition, “same area” portion of this factor indicates that adjacent community carriage is a significant indicator of a station’s market:

⁸ 47 C.F.R. § 76.59(b)(2) and (c) (emphasis added).

⁹ Exhibit A, Figures 6 and 7.

¹⁰ *George S. Flinn, Jr. v. Comcast Cable Communications, LLC*, DA 12-1265, at 3 ¶4 (rel. Aug. 3, 2012)(emphasis added).

“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).

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 carriage.¹¹ Still, the fact of such carriage does support WACP’s case. Even though WACP is a “newer” station, the Bureau has stated that it will give some weight to a showing the historical carriage of the station.¹² WACP is being carried throughout the single county in dispute by other cable systems, including cable systems that overbuilt and compete with Armstrong within several of the disputed communities.

1. WACP Is Carried Throughout Chester County by the Other Cable Operators Serving This County

There are a 73 cable communities in Chester County, PA, consisting of one city, 15 boroughs and 57 townships.¹³ Armstrong is a cable operator in just 9 of those communities.¹⁴ The remaining communities not served by Armstrong are served by either Comcast of Pennsylvania LLC or Verizon Pennsylvania LLC.¹⁵ WACP is carried by either Comcast, Verizon Fios or Comcast and Verizon Fios in all of those community units.¹⁶

¹¹ *Avenue Cable TV Service, Inc., supra*, at ¶19.

¹² *George S. Flinn, Jr., at* ¶10.

¹³

<http://www.dot.state.pa.us/Internet/Bureaus/pdPlanRes.nsf/infoBPRTownshipandBoroughMaps?OpenForm&AutoFramed#Chester%20County>.

¹⁴ Those are the communities for which Armstrong requests a market modification.

¹⁵ This is confirmed by the Bureau’s list of cable community units.

¹⁶ Exhibit C.

**2. WACP Is Carried in 3 of the 9 Armstrong
Communities by Verizon Who Has Overbuilt
Armstrong in Those Communities**

It is also relevant to deciding a station's local market under the historical carriage criterion to consider if competing cable systems carry the station in those communities the cable operator seeks to exclude from the station's market.¹⁷ 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*."¹⁸ Verizon of Pennsylvania competes with Armstrong in 3 of the 9 Armstrong's communities that Armstrong wants to delete from WACP's market,¹⁹ and Comcast competes with Armstrong in 1 of those 9 communities.²⁰

Western Pacific believes that weight should be given to the competing carriage of WACP in almost these Armstrong communities. This is a local *competitive* presence that is somewhat rare in market modification cases. This is not just an instance of the station being carried in an adjacent community (although it is carried in all adjacent Chester County communities, as shown above), this is the case of the station being available on one strand of cable mounted on the same pole or the same or adjacent conduit as the cable system plant of the operator that refuses to carry the signal. Given this carriage by a competitor, there is even a stronger basis for retaining these Armstrong communities within WACP's market.

¹⁷ 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).

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

¹⁹ Those communities are Highland (CUID No. PA3938), Londonderry (CUID No. 3799) and Upper Oxford (CUID No. PA3943).

²⁰ That community is Upper Oxford (CUID No. 2930).

Moreover, WACP is carried to subscribers at all points in Chester County, including the Armstrong communities, by DirecTV and DISH Network.²¹

In short, WACP is widely available in those cable communities. Faced with this information that supports the existence of viewership in the disputed communities, Armstrong instead argues that viewers in the area do not know of WACP because a single local county newspaper taken by less than 11% of the County households does not list WACP in its truncated listing of channels,²² as if the cable and DTH subscribers in Chester County relied upon this incomplete list in a printed, local newspaper for channel listings rather than the “at-your-finger-tips” and searchable electronic channel guides provided by all cable and DTH providers. Petition, at 13. Indeed, if Armstrong had looked at a newspaper with significant circulation in the county, the Philadelphia Inquirer, it would see that WACP is listed by it.

(d) Evidence of Programming Is Not Relevant to the Analysis of the Local Market of a New Station

The Petition argues that WACP provides no programming relevant to its cable communities. Petition, at 10. 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

²¹ Exhibit D.

²² Apparently, this local newspaper, the Daily Local News, only publishes its list of TV channels in its print addition, as we could not find a list of TV channels in its online edition. The circulation, paid and unpaid, of this newspaper is just 23,000 (county and out of county delivery); <http://abcas3.auditedmedia.com/ecirc/newstitlesearchus.asp>; in a county with over 194,000 housing units. <http://quickfacts.census.gov/qfd/states/42/42029.html>.

at issue. In this case, because other stations serve the communities in question, this enhancement factor does not appear applicable.²³

III. Armstrong's Efforts to Defeat Carriage on the Basis of Signal Quality Are Not Grounded in Sound Engineering and Cannot Defeat WACP's Carriage Rights

The Petition argues that the quality of the WACP signal at the Armstrong Oxford headend supports the exclusion of Armstrong's communities from WACP's market. Petition, at 4-5. To support that argument, the Petition includes Armstrong's supplemental opposition to WACP's petition for an order of carriage, Docket No. 12-364, CSR-8752-M, which Armstrong has opposed based solely upon alleged signal viewability issues. For the Bureau's convenience and because the signal quality issue is raised once again in this proceeding (with a majority of the pages of the Petition devoted to this issue), WACP will use this pleading to reply to Armstrong's oppositions to the carriage demands in Docket No. 12-364.

To understand the signal quality issue, it is important to understand the sequence of events, which Armstrong's supplemental opposition (Exhibit 3 to Petition) presents in a confusing fashion. These facts are undisputed. WACP made a carriage demand by letter dated September 14, 2012 (attached as Exhibit 4 to Exhibit 3 of the Petition). On October 2 and 3, 2012, Armstrong allegedly measured the strength of the WACP signal through a SA QCA broadband low-VHF receiver antenna mounted at 90' AGL on the headend tower. The results of these tests claimed by Armstrong were signal strengths varying within a narrow range of -61.75 dBm (barely missing the -61 dBm "good quality signal" strength threshold) to -64.41 dBm (signal test attached as Exhibit 6 to Exhibit 3 of the Petition). Based upon those tests, Armstrong declined the carriage demand by letter dated November 19, 2012 (attached as Exhibit 7 to Exhibit 3 of the Petition, and transmitting the results of the October 2 and 3, 2012 signal

²³ *KTNC Licensee*, supra, at 16276-77 ¶12 (footnotes omitted); *Act III Broadcasting of Nashville, Inc.*, 74 RR2d 761, 764 ¶14 (1993).

measurements). On December 6, 2012, WACP filed its request for an order to compel carriage, Docket No. 12-364, CSR-8752-M. On January 4, 2013, Armstrong filed its opposition in which it argued that the WACP signal did not achieve the “good quality signal” threshold of -61 dBm based upon the aforementioned October 2 and 3, 2012 signal measurements. Twenty-seven days later, on January 31, 2013, Armstrong had its consultants, Meintel, Sgrignoli & Wallace, conduct additional measurements. The existence of these measurements was not revealed to WACP until July. To this time, Armstrong had not raised any issue with the viewability of the WACP picture or with packet losses, only with the received signal strength.

On April 17, 2013, WACP’s consulting engineer, Todd Loney, conducted joint measurements with Mr. Hassler of Armstrong. Prior to performing these measurements, changes were made to the 90’ receive antenna used in the October 2 and 3, 2012 measurements to increase the strength of the WACP signal it could receive. Those changes were the addition of a Sitco preamplifier and a MFC digital bandpass filter, provided at WACP’s expense.²⁴ After that modification, the strength of the signal was measured and the quality of the signal was viewed. The signal strength exceeded the -61 dBm “good quality signal” threshold and a picture of acceptable quality was seen.²⁵ In fact, the signal strength was measured as -43 dBm,²⁶ which exceeds the “good quality signal” threshold by 18 dBm.

After the April 17 joint measurements, Armstrong’s engineer decided to conduct a further test of the WACP signal received at the Oxford headend. *Significantly, WACP was not invited to attend this test and did not attend this test.* This test, conducted roughly two weeks after the

²⁴ Exhibit E, page 2; Technical Statement of Todd Loney, Exhibit B, page 1.

²⁵ Exhibit E, page 2; Technical Statement of Todd Loney, Exhibit B, page 5.

²⁶ Technical Statement of Todd Loney, Exhibit B, page 5.

April 17 joint measurements, is the basis for Armstrong's argument that the received WACP signal quality is below a level of viewability.

What followed was Armstrong's supplemental opposition, filing in Docket No. 12-364 on June 28, 2013 (attached as Exhibit 3 to the Petition). In this supplemental opposition, Armstrong abandons the "good quality signal" argument and instead argues that the TV picture is below the visual level of quality Armstrong can accept, based upon the unwitnessed tests and packet loss analysis conducted after the April 17, 2013 joint tests. During the time of these unwitnessed picture viewing and packet loss tests, WACP discovered problems with its exciters and related electronics at the WACP transmitter and replaced the exciters and the related electronics, resulting in a much improved S/N. Although Armstrong has been informed of this equipment repair and WACP has asked to conduct further tests, no further joint test of the reception has been permitted by Armstrong and Armstrong has not submitted any new signal strength measurements.²⁷

Exhibit 4 of the Petition contains a report *nominally* dated August 28, 2013 by Meintel, Sgrignoli & Wallace ("MSW") on the WACP signal and its noise-limited contour. While Mr. Hassler had abandoned the signal strength argument in the June 28, 2013 supplemental opposition, it arises once more in this August 28, 2013 report. Unless one were to read the report carefully, one might think that the signal strength measurements described in the MSW report were conducted *after* April 17, 2013 when joint tests were conducted with the WACP-supplied Sitco preamplifier and a MFC digital bandpass filter on the 90' headend antenna. In fact, buried in the MSW report is that these signal strength measurements were conducted on *January 31*,

²⁷ Exhibit E, pages 1-3.

2013,²⁸ before the installation of the Sitco preamplifier and a MFC digital bandpass filter on the 90' headend antenna, before the April 17, 2013 joint tests, and before WACP installed the new exciters.

Thus, there is no present claim or any tests showing that the signal strength of WACP is now or has been since the installation of the preamp and filter below the -61 dBm good quality signal threshold. The statements in MSW's August 28, 2013 report as to measured signal strength on January 31, 2013, which is the only measurements it reports, are completely irrelevant, should not have been presented to the Bureau in the Petition as though they were relevant and should be disregarded.

That a good quality and viewable picture can be received at the headend is confirmed by the April 17, 2013 joint measurements.

According to Armstrong's engineer, his unilateral viewing of WACP's picture after the April 17, 2013 joint measurements revealed line distortion, picture freezing and tiling. Notably, WACP's engineer witnessed none of those distortions during the April 17 Joint Measurements.²⁹ And, importantly, WACP has not been supplied with any of the information on the television receiver or the converter used to generate the picture that was witnessed by Armstrong's engineer. Without this information, the picture distortion claims cannot be evaluated. Moreover, since these measurements and observations were taken, WACP upgraded its exciters and related equipment to resolve some instability issues, with the result that the S/N ratio has been vastly improved by better than 9 dB.³⁰ Thus, past claims of packet losses and picture distortion are moot.

²⁸ Petition, at Exhibit 4, page 6.

²⁹ Exhibit E, page 2.

³⁰ Exhibit B, pages 5-6.

In summation, what we know is that a good quality picture of at least -61 dBm is received with the addition of a Sitco preamplifier and a MFC digital bandpass filter. The claims of a distorted picture are not probative for three reasons. First, the tests at which the distortion was supposedly viewed were not witnessed by WACP's engineer. Second, WACP lacks information on the receiver and associated equipment necessary to evaluate the tests. Third, the S/N of the WACP signal has been markedly improved. And, fourth, even if the distortion is real, WACP retains the right to take measures at WACP's expense to deliver a viewable signal to Armstrong as WACP asked, in its must carry request, for this right.³¹

That right to use alternative means, of necessity, requires the cable operator's cooperation. Other than the meeting between the parties' engineers for the April 17 joint measurements, Armstrong has refused to make its engineer available to WACP. Counsel for Armstrong has erected a wall to those communications necessary to jointly develop and test an engineering solution. First, counsel for Armstrong insisted that all contact between the engineers be in writing and that there be no oral contact, which makes any progress in a give-and-take process of developing an engineering solution all but impossible.³² And, second, Armstrong's engineer cut off all contact a few months ago.³³ During this time, WACP has attempted to schedule further tests that would demonstrate the improved S/N resulting from the replacement of WACP's exciters and related transmitter equipment, but Armstrong has been resistant. Attached as Exhibit E are several emails between Armstrong and WACP demonstrating a pattern of noncooperation by Armstrong.

³¹ Letter to Dave Wittmann from M. Scott Johnson, dated June 6, 2012. FCC Rule 76.55(c)(3)(attached as Exhibit 3 of Exhibit 3 of the Petition).

³² Email from Ed Hassler of Armstrong to Todd Loney dated Jan. 11, 2013, attached as page 18 of Exhibit E.

³³ Email from Ed Hassler of Armstrong to Todd Loney dated Sep. 27, 2013, attached as page 1 of Exhibit E.

Finally, if there is any level of unacceptable picture distortion, Armstrong says it results from a land mobile station operating near to the Oxford headend on 72.06MHz. It is worth noting that operations of land mobile stations on that frequency and others within the 72 MHz band are on a condition of noninterference to TV channel 4 reception.³⁴ Accordingly, there is every reason to believe that the parties will be able to resolve the source of the signal quality problem.

IV. Conclusion

WHEREFORE, the foregoing premises considered, Western Pacific Broadcast, LLC hereby respectfully requests that the Bureau dismiss or deny the Petition. Armstrong Utilities, Inc. should be ordered to carry WACP within all of its Chester County communities are ordered to cooperate with WACP's efforts to develop and implement a means of receiving the WACP signal at the cable headend.

Respectfully submitted,

WESTERN PACIFIC BROADCAST LLC

By: _____


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Exhibit List

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- C..... Comcast and Verizon Fios Channel Lineups showing WACP carriage

³⁴ Exhibit A, page 4.

D..... DIRECTV and DISH Network Channel Lineups showing WACP carriage
E..... Emails exchanged between WACP and Armstrong

CERTIFICATE OF SERVICE

I, Michelle Brown Johnson, hereby certify that on this 12th day of November, 2013, I caused a copy of the foregoing "Opposition to Petition for Special Relief" 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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