

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

In the Matter of)
)
Petition for Modification of Dayton, OH) CSR-8824-A
Designated Market Area With Regard to) Docket No. 13-201
Television Station WHIO-TV, Dayton, OH)
)
)

MEMORANDUM OPINION AND ORDER

Adopted: November 25, 2013

Released: November 25, 2013

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Cox Media Group ("CMG"), licensee of the CBS-affiliated station WHIO-TV ("WHIO") of Dayton, Ohio, and located in the Dayton designated market area ("DMA") filed the above-captioned petition for special relief seeking to include 42 Indiana and Ohio communities in its market for purposes of the mandatory signal carriage provisions of the Communications Act.1 Indiana Broadcasting, LLC ("IB"), licensee of CBS-affiliate WISH-TV, Indianapolis, Indiana and MyNetworkTV-affiliate WNDY-TV, Marion, Indiana, filed an opposition to the petition with respect to the 10 Indiana communities,2 and Block Communications, Inc. ("BCI") licensee of ABC/CBS-affiliate WOHL-CD, Lima, Ohio, filed an opposition to the petition with respect to 32 Ohio communities.3 WHIO filed a reply to both oppositions.4 For the reasons stated below, we grant in part and deny in part the petition for special relief.

II. BACKGROUND

2. Pursuant to Section 614 of the Communications Act of 1934, as amended (the "Act"), and implementing rules adopted by the Commission, commercial television broadcast stations, such as WHIO, are entitled to assert mandatory carriage rights on cable systems located within their market.5 A

1 Petition for Special Relief of Miami Valley Broad. Corp., filed Aug. 12, 2013, at 1 ("Petition").

2 Opposition of Indiana Broadcasting to Petition for Special Relief, filed Sept. 3, 2013, at 1 n.1 ("IB Opposition").

3 Opposition of Block Communications to Petition for Special Relief, filed Sept. 3, 2013, at 1 ("BCI Opposition").

4 Reply to Oppositions to Petitions for Special Relief, filed Sept. 18, 2013 ("Reply"). BCI filed a Motion for Leave to File Surreply on Sept. 30, 2013 to respond to WHIO's Reply to which WHIO filed a Response on October 28, 2013. However, because we have not relied upon any of the arguments or facts contested by the parties in these pleadings, we find no extraordinary circumstances to warrant their addition to this proceeding. See 47 C.F.R. § 76.7(d).

5 See Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues, MM Docket No. 92-259, Report and Order, 8 FCC Rcd 2965, 2975-77 ¶¶ 41-46 (1993) ("Must Carry Order"). The Commission has subsequently extended mandatory carriage rights to digital television stations

station's market for this purpose is its "designated market area," or DMA, as defined by the Nielsen Company.⁶ The term DMA is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Pursuant to the Commission's must carry rules, cable operators have the burden of showing that a commercial station located in the same DMA is not entitled to carriage.⁷ A cable operator can show that a station's signal, which would otherwise be entitled to carriage, does not provide a good quality signal to a cable system's principal headend or is too distant from that headend.⁸ Should a station fail to provide the requisite over-the-air signal quality to a cable system's principal headend, it still may obtain carriage rights because under the Commission's rules a station may provide a cable operator with specialized equipment, at the station's expense, which will improve the station's signal to an acceptable quality at a cable system's principal headend.⁹ Particularly important for this case however are the must carry notification procedures and the requirement that a must carry complaint must be filed within 60 days of a cable operator's denial of a carriage demand.¹⁰

3. With respect to market modification petitions, under the Act, the Commission may consider requests to modify market areas. Section 614(h)(1)(C) provides that the Commission may:

with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's market to better effectuate the purposes of this section.¹¹

In considering such requests, the 1992 Cable Act provides that:

the Commission shall afford particular attention to the value of localism by taking into account such factors as -

- (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
- (II) whether the television station provides coverage or other local service to such community;
- (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community;

under Section 614(a) of the Act and has amended its rules accordingly. *See Carriage of Digital Television Broadcast Signals First Report and Order*, 16 FCC Rcd 2598, 2606 ¶¶ 15-16, 2610 ¶ 28 (2001) ("DTV Must Carry Order"); *see also* 47 C.F.R. § 76.64(f)(4).

⁶ Section 614(h)(1)(C) of the Communications Act, as amended by the Telecommunications Act of 1996, provides that a station's market shall be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns. *See* 47 U.S.C. § 534(h)(1)(C). Section 76.55(e)(2) of the Commission's rules specifies that a commercial broadcast television station's market is its Designated Market Area as determined by The Nielsen Company. 47 C.F.R. § 76.55(e)(2).

⁷ *See Must Carry Order*, 8 FCC Rcd at 2990 ¶ 102.

⁸ 47 C.F.R. § 76.55(c)(3).

⁹ *Must Carry Order*, 8 FCC Rcd at 2991 ¶ 104.

¹⁰ *See* 47 C.F.R. § 76.61(a)(5).

¹¹ 47 U.S.C. § 534(h)(1)(C).

(IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.¹²

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.¹³ In the *Modification Final Report and Order*, the Commission, in an effort to promote administrative efficiency, adopted a standardized evidence approach for modifications that requires the following evidence be submitted:

- (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) Grade B contour maps¹⁴ delineating the station's technical service area¹⁵ and showing the location of the cable system headends and communities in relation to the service areas.
- (3) Available data on shopping and labor patterns in the local market.
- (4) Television station programming information derived from station logs or the local edition of the television guide.
- (5) Cable system channel line-up cards or other exhibits establishing historic carriage, such as television guide listings.

¹² *Id.*

¹³ *Must Carry Order*, 8 FCC Rcd 2965, 2977 n.139.

¹⁴ Service area maps using Longley-Rice (version 1.2.2) propagation curves may also be included to support a technical service exhibit. The Longley-Rice model provides a more accurate representation of a station's technical coverage area because it takes into account such factors as mountains and valleys that are not specifically reflected in a traditional Grade B contour analysis. In situations involving mountainous terrain or other unusual geographic features, Longley-Rice propagation studies can aid in determining whether or not a television station actually provides local service to a community under factor two of the market modification test.

¹⁵ While the Grade B contour defined an analog television station's service area, *see* 47 C.F.R. § 73.683(a), with the completion of the full power digital television transition on June 12, 2009, there are no longer any full power analog stations. Instead, as set forth in Section 73.622(e), a station's DTV service area is defined as the area within its noise-limited contour where its signal strength is predicted to exceed the noise-limited service level – which for VHF stations is 28 dBu. *See* 47 C.F.R. § 73.622(e). Accordingly, the Commission has treated a digital station's noise limited service contour as the functional equivalent of an analog station's Grade B contour. *See Report To Congress: The Satellite Home Viewer Extension and Reauthorization Act of 2004; Study of Digital Television Field Strength Standards and Testing Procedures*, 20 FCC Rcd 19504, 19507 ¶ 3, 19554 ¶ 111 (2005); *Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004, Implementation of Section 340 of the Communications Act*, Report and Order, 20 FCC Rcd 17278, 17292 ¶ 31 (2005). *See also Lenfest Broadcasting, LLC*, 19 FCC Rcd 8970, 8974 ¶ 7 n.27 (2004) (“For digital stations operating on channels 14-69 [UHF stations], for market modification purposes the 41 dBu DTV service area contour is the digital equivalent of an analog station's Grade B contour.”).

(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.¹⁶

5. Petitions for special relief to modify television markets that do not include the above evidence shall be dismissed without prejudice and may be re-filed at a later date with the appropriate filing fee. The *Modification Final Report and Order* provides that parties may continue to submit whatever additional evidence they deem appropriate and relevant.

6. In the *Carriage of Digital Television Broadcast Signals First Report and Order* (“*DTV Must Carry Report and Order*”), the Commission concluded that under Section 614(a) of the Act, digital-only television stations had mandatory carriage rights, and amended its rules to reflect this.¹⁷ The Commission also clarified its framework for analyzing market modifications for digital television stations.¹⁸ It found that the statutory factors in Section 614(h), the current process for requesting market modifications, and the evidence needed to support such petitions, would be applicable to digital television modification petitions.¹⁹ While the Commission presumed the market of a station’s digital signal would be coterminous with that station’s market area for its prior analog signal, it recognized that the technical coverage area of a digital television signal may not exactly replicate the technical coverage area of its former analog television signal.²⁰ Therefore, in deciding DTV market modifications, the Commission would take changes in signal strength and technical coverage into consideration, on a case-by-case basis.

III. DISCUSSION

7. The issue before us is whether to grant WHIO’s request to include the subject communities as part of its television market for mandatory carriage purposes. WHIO, which is licensed to Dayton, Ohio, is an affiliate of CBS and serves the Dayton, Ohio DMA. The Wayne County communities requested for inclusion are located in Indiana and are part of the Indianapolis, Indiana DMA.²¹ The Allen County communities²² requested for inclusion are located in Ohio and are part of the Lima, Ohio DMA, and while the Auglaize²³ County communities were assigned to the Dayton DMA in 2012-2013, WHIO asserts

¹⁶ 47 C.F. R. § 76.59(b).

¹⁷ See 16 FCC Rcd 2598, 2606 ¶ 15, 2610 ¶ 28 (2001); 47 C.F.R. §76.64(f)(4).

¹⁸ See 16 FCC Rcd at 2635-36 ¶¶ 84-85. The Commission affirmed that for digital signal carriage issues, it would continue to rely on the Nielsen Company’s market designations, publications, and assignments it used for analog signal carriage issues. See *id.* at 2636 ¶ 85.

¹⁹ See *DTV Must Carry Report and Order*, 16 FCC Rcd at 2636 ¶ 85.

²⁰ See *id.* In adopting technical rules for the digital transmission of broadcast signals, the Commission attempted to ensure that a station’s digital over-the-air coverage area would replicate as closely as possible its former analog coverage area. See *id.* at 2636 ¶ 85 n.254, citing *Sixth DTV Report and Order*, 12 FCC Rcd 14588, 14605 ¶ 29 (1997).

²¹ The Wayne County communities subject to the petition are Cambridge City, Centerville, Dublin, East Germantown, Fountain City, Hagerstown, Milton, Mount Auburn, Richmond, and Spring Grove.

²² The Allen County communities subject to the petition are American Township, Auglaize Township, Bath Township, Fort Shawnee, Harrod, Lima, Shawnee Township, Spencer Township, and Spencerville.

Nielsen has indicated they will be part of the Lima DMA next year as well.²⁴ We will first examine the Wayne County Communities and then examine the Auglaize and Allen County communities.

A. Wayne County Communities

8. The first statutory factor we consider in determining whether to grant a market modification petition 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.”²⁵ WHIO states that Wayne County communities have historically carried WHIO and other Dayton television stations. WHIO provides evidence that four Dayton stations—including WHIO—currently carried in Wayne County have been carried there since at least 2003.²⁶ In fact, WHIO states it has been carried in many of the communities since commencement of cable services in those communities.²⁷

9. In its opposition, IB argues on behalf of its Indiana stations that WHIO’s historical carriage was merely due to a previous assignment of Wayne County to the Dayton DMA for “a few scattered years.”²⁸ IB argues that now Nielsen has correctly assigned Wayne County to its home-state Indianapolis DMA, the FCC should not “second-guess” Nielsen’s determination.²⁹ It argues Nielsen’s placement of Wayne County in the Indianapolis DMA demonstrates that Nielsen understands the reality that the Wayne County communities are within the influence of the greater Indianapolis metropolitan area.³⁰

10. In reply, WHIO argues that a political boundary such as a state border does not necessarily serve to isolate Wayne County from WHIO.³¹ Furthermore, with respect to shopping and labor patterns,³² WHIO provides two examples of businesses located in Wayne County that use WHIO to reach their customers as evidence of a close economic relationship between WHIO and Wayne County.³³

11. The second statutory factor is “whether the television station provides coverage or other local service to such community.”³⁴ WHIO provides Longley-Rice contour maps that demonstrate WHIO is capable of providing over-the-air service to all of Wayne County.³⁵ WHIO also provides exhibits showing that Dayton is geographically closer to many of the Wayne County communities than

²³ The Auglaize County communities subject to the petition are Buckland, Clay Township, Cridersville, Duchouquet Township, German Township, Goshen Township, Jackson Township, Logan Township, Minster, Moulton Township, New Bremen, New Knoxville, Noble Township, Pusheta Township, St. Johns, St. Mary’s, St. Mary’s Township, Uniopolis, Union Township, Wapakoneta, Washington Township, Waynesfield, and Wayne Township.

²⁴ Petition at 20.

²⁵ 47 U.S.C. § 534(h)(1)(C).

²⁶ Petition at 10-11, Exhibit G.

²⁷ *Id.* at 11. Specifically, it has been carried in the Centerville and Richmond communities since 1972, Spring Grove since 1977, and the rest of the communities since at least 1992. *Id.* at 10-11, Exhibit G.

²⁸ IB Opposition at 3.

²⁹ *Id.*

³⁰ *Id.* at 6-7.

³¹ Reply at 2-3.

³² See 47 C.F.R. § 76.59(b).

³³ Petition at 19-20.

³⁴ 47 U.S.C. § 534(h)(1)(C).

³⁵ Petition at Exhibit B.

Indianapolis.³⁶ Finally, WHIO also attaches a list of newscasts over a two-year period that contains all of the news segments, as well as public affairs and political programming, high school sports score reports, and weather alerts concerning Wayne County communities.³⁷

12. IB argues that the geographic proximity of Dayton to Wayne County is not probative,³⁸ particularly given that despite this proximity, and despite the fact that Richmond, Wayne County's main employment center, abuts Ohio, and an interstate highway (I-70) connects the two regions, there is no significant commuting between Dayton and Indiana.³⁹ Furthermore, IB argues the Office of Management and Budget's assignment of the Richmond community to a combined statistical area distinct from the Dayton statistical area, demonstrates there is no social or economic interaction between Dayton and the Wayne County communities.⁴⁰

13. IB also argues that the WHIO's programming coverage of Wayne County communities is mostly limited to one community, with no coverage whatsoever for six of the ten communities, an inadequate amount for including the communities in WHIO's television market.⁴¹ The vast majority of the segments concern Richmond or Wayne County in general,⁴² IB argues, and although WHIO claims 67 news segments for all ten communities over a period of twenty-four months, that is only the equivalent of a single story per quarter per community and the station should not be permitted to extrapolate coverage in one community to all other communities in the county.⁴³

14. In reply, WHIO provides further evidence of its commitment to provide Wayne County programming. It states it employs a reporter assigned to cover Wayne County, partners with a Wayne County radio station that provides additional stories relevant to the Wayne County communities, and maintains a Wayne County weather camera.⁴⁴ Finally, WHIO appears to argue that any disproportionality in coverage may be explained by the fact that Wayne County is rural with mostly small communities, and hence most stories of interest arise in the largest or most popular areas, such as Richmond. However, WHIO notes that residents of the smaller communities in Wayne County are impacted by county-wide issues such as education and public safety, which is why such material should be considered relevant.⁴⁵

³⁶ See *id.* at Exhibit E. WHIO asserts the Wayne County communities are an average of 44.5 miles from its transmitter, with distances ranging from 37 to 54 miles. See *id.* at 12, Exhibit E. We note, however, that WHIO's own exhibit shows that two of the communities—Mount Auburn and Dublin—are actually closer to Indianapolis than to Dayton. Another community—Cambridge City—is listed as being equidistant from both cities at a distance of 52 miles. See *id.* at Exhibit E.

³⁷ See *id.* at Exhibits I, J.

³⁸ IB Opposition at 7.

³⁹ *Id.* at 5. IB states only approximately 1.81% of Wayne County Indiana residents commute to the state of Ohio and approximately 1.94% of Wayne County's workers commute from anywhere in Ohio. See *id.* at nn.7-8 (citing <http://edcwc.com/site-selection/data/workforce>).

⁴⁰ *Id.* at 5-7.

⁴¹ *Id.* at 3-4

⁴² *Id.* at 3-4 (stating that in a two-year period, WHIO aired four short news segments related to Centerville, one each related to Hagerstown and Cambridge City and 33 mostly-crime stories related to Richmond, but none to Spring Grove, Mount Ashburn, Dublin, Fountain City, Milton and East Germantown); see also Petition at Exhibit I.

⁴³ IB Opposition at 4.

⁴⁴ Reply at 5-6.

⁴⁵ *Id.* at 6; see Petition at 14.

15. The third statutory factor 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.”⁴⁶ Neither WHIO’s petition and reply nor IB’s opposition addresses this statutory factor for the Wayne County communities, but it is generally held not to weigh against a television station that is seeking to add communities to its market.

16. The fourth statutory factor concerns “evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.”⁴⁷ WHIO argues that its programming receives significant ratings in the Wayne County communities, and it provides Nielsen survey reports indicating its ratings over a time period in 2012 and another time period in 2011.⁴⁸ WHIO states that these ratings numbers show at least a moderate viewership, which is sufficient for market modification purposes.⁴⁹ A review by the Commission of Nielsen’s 2013 data shows that WHIO has a share of 6 and a total average cume of 39 in Wayne County during the Sunday-Saturday, 7 a.m.-1 a.m. time period.⁵⁰

17. In light of the record, we will grant WHIO’s petition with regard to the Wayne County communities. We do not agree with IB’s argument that we should rely completely on Nielsen’s DMA assignment for market modification purposes. To the contrary, the purpose of market modification is to determine a station’s market based on an analysis of certain statutory and other factors, a process distinct from that which Nielsen performs to determine its DMA assignments.⁵¹ WHIO has a history of carriage in Wayne County. All of the Wayne County communities are predicted to receive Grade B coverage under Longley-Rice analysis and all of them fall inside WHIO’s Grade B contour line. Most of the communities are located closer to Dayton than Indianapolis. We agree with IB that most of the WHIO programming concerning Wayne County presented for our review is concentrated on the community of Richmond with very little coverage of the other communities, if any. Nevertheless, we accept WHIO’s explanation that Richmond, as the largest community in Wayne County, naturally receives a disproportionate amount coverage and has events of significance to the smaller nearby communities. The third factor is not applicable to the instant analysis. Finally, WHIO garners a strong total share/cume viewership value. Accordingly, by virtue of its historical carriage, its signal coverage of the Wayne County communities, and its viewership values, the Wayne County communities will be included in WHIO’s market.⁵²

⁴⁶ See 47 U.S.C. § 534(h)(1)(C).

⁴⁷ See *id.*

⁴⁸ See Petition at 17-19, Exhibit K.

⁴⁹ *Id.* at 17.

⁵⁰ 2013 County Coverage Summary for Wayne County, IN, the Nielsen Company.

⁵¹ See 47 U.S.C. § 534(h)(1)(C).

⁵² IB has not argued that the addition of WHIO to Wayne County would displace the carriage of its in-market CBS affiliate WISH, nor have we been provided with data to determine which affiliate is closer to the relevant cable system headend so as to potentially displace the other. See 47 C.F.R. § 76.56(b)(5) (“A cable operator is not required . . . to carry the signals of more than one local commercial television station affiliated with a particular broadcast network, as defined in § 76.55(f). However, if a cable operator declines to carry duplicating signals, such cable operator shall carry the station whose community of license reference point, as defined in § 76.53, is closest to the principal headend of the cable system.”). Accordingly, this did not factor into our consideration of this case.

B. Auglaize and Allen County Communities

18. In the Auglaize and Allen County communities, WHIO argues it meets the first statutory factor because of its long history of carriage. WHIO states that it has been carried in Cridersville, Minster, New Bremen, and Wapakoneta since 1972; New Knoxville, St. John's, Uniopolis, and Waynesfield since 1992; Duchoquet Township and Moulton Township since 2003; and, Clay, German, and Pusheta Townships since 2009.⁵³ Although WHIO indicates it is currently being carried in Noble, Washington, Logan, St. Mary's, Jackson, Wayne, Goshen and Union Townships, as well as Buckland,⁵⁴ it concedes it could not ascertain when service was extended to these remaining communities, and it does not assert WHIO has an extensive history of carriage in these areas.⁵⁵

19. In Allen County, WHIO indicates that it has been carried in Fort Shawnee and Lima since 1972; American Township, Bath, and Shawnee Township since 1979; Spencer Township and Spencerville since 1982; and, Harrod and Auglaize Township since 1987.⁵⁶ In its opposition, BCI concedes that WHIO has provided evidence of historic carriage by cable systems in the Auglaize and Allen Counties, but replies that BCI stations have also been historically carried by cable systems in these communities.⁵⁷

20. Regarding the second statutory factor, WHIO provides contour maps demonstrating its coverage over the air to the Auglaize and Allen Counties.⁵⁸ WHIO argues that it is within close geographic proximity to Auglaize and Allen Counties.⁵⁹ WHIO states it is located on average 56.6 miles from all Auglaize County communities, with the closest – Minster and Jackson Township at 46 miles and Cridersville, the furthest at 64 miles. WHIO is also on average 68.4 miles from all Allen County communities, including 71 miles from the furthest - American and Bath Townships - and 66 miles from the closest, Fort Shawnee.⁶⁰ WHIO argues that labor data also support the conclusion that more Auglaize County residents commute to the Dayton DMA to work than to Lima DMA counties and that more than three times as many commuters come to Auglaize to work from Dayton DMA counties than from the Lima DMA.⁶¹ Finally, WHIO provides exhibits listing its programming with news segments devoted to

⁵³ Petition at 22.

⁵⁴ *Id.* at Exhibit M.

⁵⁵ *Id.* at 22 n.68.

⁵⁶ *Id.* at 31-32.

⁵⁷ BCI Opposition at 10 n.35, Exhibit I (showing that while WOHL has been carried since at least 2009, its CBS predecessor, WLMO, was carried since 2006). BCI argues prior precedent that historical carriage alone is of marginal assistance where a system has historically carried signals from both television markets at issue. *Id.* (citing *Group W Television, Inc.*, 10 FCC Rcd 2737, 2741 ¶21 (CSB 1995)).

⁵⁸ Petition at 23, 32, Exhibit B. WHIO's 41 dBU noise-limited service contour, the functional equivalent of an analog Grade B contour, covers almost all of the Auglaize county communities with only Cridersville, Logan and Wayne Townships falling on the contour line itself. *See id.* at Exhibit B-A, Predicted 41 dBU Contour. In Allen County, WHIO concedes all of the communities fall outside its 41 dBU service contour. *See id.* at 32. However, the Longley-Rice predicted coverage map WHIO supplies shows it covers all of Auglaize and almost all of Allen County with the exception of partial/spotty coverage of American and Bath Townships. *See id.* at Exhibit B-2A.

⁵⁹ *See id.* at 23, 32.

⁶⁰ *Id.* at 23, 32, Exhibit A.

⁶¹ *Id.* at 24 n.74 (3916 Auglaize residents work in the Lima DMA and 4849 work in the Dayton DMA. 1448 Lima DMA residents work in Auglaize versus 4513 residing in Dayton DMA and working in Auglaize.) (citing U.S. Census Bureau, County-to-County Workflow Files, Ohio, Residence County, available at

the Auglaize and Allen County communities.⁶² WHIO points out that in 1980, it organized its Northern Bureau, dedicating a portion of its newsgathering staff and facilities to covering news in the northern portion of the station's market, including Auglaize County.⁶³ WHIO states it aired 65 news segments concerning Auglaize County over a two-year period as well as approximately 210 weather advisories since September 2010.⁶⁴ In addition, WHIO also provides coverage of weather, high school sports, and other local interest stories to these communities.⁶⁵ With respect to Allen County communities, WHIO states it has aired 22 news segments over a two-year period, though it does not describe its weather coverage of Allen communities.⁶⁶ However, WHIO also asserts it provides additional coverage of public affairs, high school sports, and agricultural reports concerning Allen County.⁶⁷

21. BCI has filed an opposition, arguing that its stations serving the Lima DMA provide better over-the-air coverage to the counties than WHIO.⁶⁸ Moreover, BCI stations are much closer in proximity to both counties' communities than WHIO.⁶⁹ And, BCI asserts it provides far more local programming to the two counties than WHIO provides, airing over 10,000 news, weather and sports related segments regarding Allen and Auglaize in the same time period – 175 stories per week concerning Allen County communities and 20 such segments per week for Auglaize County.⁷⁰ BCI argues that WLIO's staff of three meteorologists prioritizes weather warnings for Allen and Auglaize County, providing both live weather coverage and pre-storm warnings.⁷¹ Finally, BCI argues WHIO's high school football reporting largely concentrates on schools in the current Dayton DMA and does not provide the same local coverage as BCI's Lima stations' football and sports coverage shows.⁷²

22. BCI argues that its stations provide substantially more local programming and better service than WHIO.⁷³ As the Commission has said in the past, we believe Congress intended for this third statutory criterion to enhance a station's market modification claim where it could be shown that other stations did not serve the communities at issue.⁷⁴ Because other stations do serve the communities, this

<http://www.census.gov/population/metro/files/commuting/Table1.xlsx> &
<http://www.census.gov/population/metro/files/commuting/Table2.xlsx>).

⁶² *See id.* at 25, 33-34, Exhibits N, S.

⁶³ *Id.* at 21.

⁶⁴ *Id.* at 25-26, Exhibit N. Our review of these reports show that the vast majority of WHIO News segments are directed at St. Mary's/St. Mary's Township, Wapakoneta, New Bremen, Minster and Waynesfield.

⁶⁵ *Id.* at 25-27, Exhibit O.

⁶⁶ *Id.* at 33-34, Exhibit S.

⁶⁷ *Id.*

⁶⁸ BCI Opposition at 11. BCI's stations share news, with NBC affiliate WLIO distributing its news to its three sister stations, including to WOHL (CBS) such that the morning, early and late evening news programs are simulcasts. *See id.* at 3 & n.6. Although the ABC and CBS affiliates do not make their own news, the revenue they generate fuels the combined news program. *See id.*

⁶⁹ *Id.* at 13.

⁷⁰ *Id.* at 17-18 (noting that according to its own numbers, WHIO provides less than a story a year to Auglaize County, and only 22 stories to Allen over two years)

⁷¹ *Id.* at 19.

⁷² *Id.* at 20.

⁷³ *See supra* notes 68–72.

⁷⁴ *WTNH Broadcasting, Inc.*, 22 FCC Rcd 19761, 19768 ¶13 (2007).

factor neither weighs against nor in favor of WHIO's modification request.

23. Regarding the fourth statutory factor, WHIO argues it achieves significant ratings in the Auglaize and Allen County communities. It attaches exhibits to demonstrate that WHIO was the highest rated television station in Auglaize County in every single daypart during 2012.⁷⁵ In Allen County, WHIO argues that its ratings demonstrate that viewers in the communities are part of WHIO's market.⁷⁶ WHIO notes that such ratings exceed ratings showings that past Commission rulings have required for satisfying the fourth statutory criteria.⁷⁷ BCI retorts that good ratings do not necessarily equate to a mistake by Nielsen in determining the appropriate DMA for a community or that the requested areas are part of WHIO's market, and Nielsen moved Auglaize County to the Lima DMA as a result of its 2013-2014 DMA Review.⁷⁸ WHIO also emphasizes that Auglaize and Allen County are part of WHIO's economic market because WHIO has a strong relationship with advertisers in both counties.⁷⁹

24. Outside of the statutory factors, BCI raises several other points against granting WHIO's petition. First, BCI questions WHIO's need for must carry status in Auglaize and Allen Counties in light of its strong ratings performance and the unlikelihood of its being dropped from coverage.⁸⁰ BCI notes that the likely continued voluntary carriage of WHIO in both Auglaize and Allen cable systems distinguishes WHIO's case from those in the past where the Commission granted market modification to ensure a station's continued carriage.⁸¹ Conversely, BCI asserts that it would be harmed by the grant of WHIO's petition because it would grant the station must carry rights to 70 percent of the population of the Lima DMA.⁸² Because BCI's CBS affiliate is a low power station carried on a sub-channel and holding no mandatory carriage rights, its ability to be carried would be severely weakened.⁸³ BCI also argues that such a market modification would thus benefit an out-of-market station at the expense of the in-market station, disrupting the economic expectations underlying network affiliation agreement that WOHL-CD2 would be the locally carried CBS affiliate.⁸⁴

⁷⁵ Petition at Exhibit P. A review by the Commission of Nielsen's 2013 data shows that WHIO has a share of 9 and a total average cume of 62 during the Sunday-Saturday, 7 a.m.-1 a.m. time period in Auglaize County. The only station with a greater share was the Lima-based station WLIO, which garnered a share of 11 and a similar total average cume of 62. In contrast, EOHL (the Nielsen designation for the in-market CBS affiliate WOHL-CD2) obtained only a share of 1 and an average cume of 11.

⁷⁶ *Id.* at 29.

⁷⁷ *Id.* at 36. A review by the Commission of Nielsen's 2013 data shows that WHIO has a share of 4 and a total average cume of 30 during the Sunday-Saturday, 7 a.m.-1 a.m. time period in Allen County. This is below the 21 share and 77 total average cume of the Lima-based WLIO, and the share of 6 and a total average cume of 47 of ELIO (the Fox subchannel of WLIO). The ratings are comparable to the in-market CBS affiliate EOHL which garnered a rating of 3 share and a total average cume of 29, whereas the primary channel, WOHL, has a share of 3 and average cume of 34.

⁷⁸ BCI Opposition at 22-23.

⁷⁹ Petition at 29-30, 36-37 (stating that Auglaize and Allen County companies use WHIO to regionally advertise, - a sign that these counties are part of its economic market.).

⁸⁰ *Id.* at 5-6.

⁸¹ *Id.* at 5 n.20.

⁸² *Id.* at 6.

⁸³ *Id.*

⁸⁴ *Id.* at 24-26; see also *Broad Street Television, L.P.*, 10 FCC Rcd 5576, 5578 ¶ 12 (1995); *Guy Gannett Communications, Inc.*, 13 FCC Rcd 23470, 23478 ¶ 21 (1998), *aff'd*, 15 FCC Rcd 10762 (2000); *Pacific & Southern*

25. WHIO responds that it has no intention of intruding into BCI's market in Auglaize or Allen County, or expanding into areas where it is not already available, but it wants to maintain the status quo with respect to its continued carriage in the communities in question.⁸⁵ WHIO points out that the cable systems in both counties already carry both WHIO and BCI's CBS affiliate, WOHL-CD2, even though the systems are not required to carry the latter due to its status as a low power station,⁸⁶ and it asserts that there is no reason a cable system cannot carry both WHIO and BCI stations' signals, including their HD signals.⁸⁷

26. We agree with BCI that its stations serve the Auglaize and Allen County communities with more programming than WHIO. However, the only CBS affiliate in the Lima market, WOHL-CD2, is broadcast on the secondary channel of a low power station and therefore holds no carriage rights unless it is the designated primary stream.⁸⁸ Furthermore, low power stations' carriage rights are limited and may be subordinated to those of a full power station licensed to the same community.⁸⁹ Here, WOHL-CD2's entire news content is provided by its sister station – full-power station, WLIO licensed to the same community and county.⁹⁰ Therefore, while we would typically resist adding an out-of-market affiliate to in-market affiliate's market, so as to not unduly upset the concept of affiliation, this rationale has less applicability here.

27. We find that WHIO meets the statutory market modification factors with respect to the Auglaize County communities. All of the Auglaize County communities are predicted to receive Grade B coverage under Longley-Rice analysis and all but three of the communities fall inside WHIO's Grade B contour line with those three located on the contour line. WHIO is also located an average of 56.6 miles from all Auglaize County communities and has provided 65 news segments concerning Auglaize County over a two-year period as well as weather, high school sports, and other local interest coverage. WHIO also garners a substantial total share/cume viewership value of 9/62 in Auglaize County. Given the station's history of carriage, its provision of local programming, and the meaningful viewership shares

Co., Inc., 14 FCC Rcd 4558, 4565 ¶ 25 (1999); *Harron Communications Corp.*, 14 FCC Rcd 4547, 4556 ¶ 26 (1999) (the "*Portland Cases*").

⁸⁵ Reply at 10.

⁸⁶ *Id.* at 11-12.

⁸⁷ *Id.* at 9. WHIO cites the lack of any opposition by cable systems to the petition as evidence of this assertion. *Id.*

⁸⁸ A digital broadcaster dividing its signal into several multicast streams may designate only one of its programming streams as its "primary video" stream entitled to mandatory carriage. *See Carriage of Digital Broadcast Signals, Amendment to Part 76 of the Commission's Rules*, CS Docket No. 98-120, First Report and Order and Further Notice of Proposed Rule Rulemaking, FCC 01-22, 16 FCC Rcd 2598, 2622 ¶ 57 (2001) ("*First Report and Order*") ("[W]e conclude that "primary video" means a single programming stream and other program-related content ... [I]f a digital broadcaster elects to divide its digital spectrum into several separate, independent and unrelated programming streams, only one of these streams is considered primary and entitled to mandatory carriage. The broadcaster must elect which programming stream is its primary video, and the cable operator is required to provide mandatory carriage to only such designated stream."). The Commission subsequently affirmed this conclusion on reconsideration. *Carriage of Digital Broadcast Signals, Amendment to Part 76 of the Commission's Rules*, CS Docket No. 98-120, Second Report and Order and First Order on Reconsideration, 20 FCC Rcd 4516, 4532 ¶ 33 & 4537 ¶ 44 (2005) ("*Second Report and Order*").

⁸⁹ *See* 47 U.S.C. 534(h)(2) (providing that a low power station's qualification for carriage hinges on the absence of any full power station serving the community), *see also Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, MM Docket No. 92-259, Report and Order, 8 FCC Rcd 2965, 2981 ¶ 62 (1993).

⁹⁰ A low power station cannot qualify for carriage if a full power station is licensed to the same county and if local news and informational needs are being met by that full power station. *See* 47 C.F.R. § 76.55(d)(2) & (6).

garnered by WHIO in these communities, we will grant the addition of the Auglaize County communities to WHIO's television market for mandatory carriage purposes.

28. We decline to add WHIO to the Allen County communities. None of the Allen County communities are located within WHIO's Grade B contour line although Longley-Rice indicates it covers almost all of Allen County with the margin of its signal, with the exception of partial/spotty coverage of American and Bath Townships. Although WHIO has provided 22 news segments concerning Allen County over a two-year period and has a total share/cume of 4/30, we note that Allen County contains the core or hub of the Lima DMA. In granting the Commission authority to modify market areas to better effectuate the purpose of Section 614, Congress manifested no intent for us to alter the basic structure of designated market areas.⁹¹ We believe that based upon the record in this proceeding, the goal of protecting the integrity of a market is best served by denying WHIO must-carry status for those communities located in Allen County.⁹²

IV. ORDERING CLAUSES

29. Accordingly, **IT IS ORDERED**, pursuant to Section 614(h) of the Communications Act of 1934, as amended, 47 U.S.C. § 534, and Section 76.59 of the Commission's rules, 47 C.F.R. § 76.59, that the captioned petition for special relief (CSR-8824-A), filed by Miami Valley Broadcasting Corp., **IS GRANTED IN PART** with respect to the Wayne County and Auglaize County communities specified and **IS DENIED** with respect to the Allen County communities requested.

30. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broecker
Senior Deputy Chief, Policy Division
Media Bureau

⁹¹ See *Agape Church, Inc.*, 14 FCC Rcd 2309, 2318 ¶30 (1999); see also *Free State Communications, LLC*, 24 FCC Rcd 7339, 7349-50 ¶24 (2009).

⁹² See *id.*