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December 23, 2013

Via Federal Express

Tracking No. 797496420068

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
9300 E. Hampton Dr.
Capitol Heights, MD 20743

**Re: Block Communications, Inc.; Application for Review
CSR-8824-A, Docket No. 13-201**

Dear Ms. Dortch:

On behalf of Block Communications, Inc. ("BCI"), under 47 C.F.R. §1.115, we enclose an original and four copies of BCI's Application for Review of the Media Bureau's November 25, 2013 Memorandum Opinion and Order in the above-referenced docket. We have filed this Application for Review electronically in MB Docket 13-201.

We also enclose an additional copy of the filing and kindly ask that you date-stamp and return it in the enclosed postage-paid envelope.

Please contact us with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'Alma Hoxha', written in a cursive style.

Alma Hoxha
Paralegal

Enclosures

**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)	

APPLICATION FOR REVIEW

BLOCK COMMUNICATIONS, INC.
LIMA COMMUNICATIONS
CORPORATION AND WEST
CENTRAL OHIO BROADCASTING
CORPORATION

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December 23, 2013

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I. SUMMARY

This case illustrates how an incorrect and mechanistic application of the statutory market modification factors without due regard for evidence submitted in opposition, case precedent and established Commission policy can lead to a decision to modify a market that will completely undermine rather than preserve localism. This is the antithesis of what Congress intended when it directed the Commission “to afford particular attention to the value of localism” when ruling on a request to modify a local television market. Unless reversed, the Media Bureau’s Order (“WHIO Order”) will alter the basic structure of designated market areas (“DMAs”), undermine the integrity of the tiny Lima, OH DMA, and severely undermine the economic expectations under the affiliation agreement between Block Broadcasting, Inc. (“BCI”) and the CBS network, thus undermining its ability to continue to serve the cable communities.

The WHIO Order will allow Dayton-based WHIO to assert must carry rights in 23 Auglaize County communities, and as a practical matter, displace BCI’s in-market Lima CBS station in core communities of the Lima DMA. The Bureau reached this erroneous result by a flawed reading of the evidentiary record and by failing to follow applicable precedent and established Commission policy on the three statutory factors at issue. The Bureau’s Order undermines both the statutory market modification scheme and BCI’s ability to continue to provide superior local broadcast service in Auglaize County. Unless reversed, the decision will produce a result inconsistent with the purpose of the must carry rules and undermine, rather than further, localism. The result is contrary to the public interest, case precedent and established Commission policy and should not be left to stand. The Bureau’s WHIO Order

does not pass muster under the statute, case precedent and established Commission policy:

- The Bureau's failure to give due weight to the BCI Lima Stations' historical carriage led it to erroneously find that WHIO had carried its burden of proof on the first statutory factor in contravention of case precedent.
- The Bureau's failure to consider BCI's stronger evidence of superior signal coverage, proximity and local service led to its erroneous factual findings on the second statutory factor. This error was compounded by the Bureau's failure to follow established precedent by (i) giving little weight to WHIO's Grade B signal coverage where the BCI Lima Stations cover the communities with a Grade A signal; (ii) not properly weighing BCI's evidence of closer proximity to the communities and modifying WHIO's market to include core communities of the Lima DMA despite this evidence; (iii) failing to apply BCI's extensive local service evidence to the correct statutory factor; and (iv) according too much weight to the out-of-market station's local programming where BCI's in-market station provides more local programming, as the Bureau itself found.
- The Bureau's finding that WHIO satisfied the fourth statutory factor of viewing patterns erroneously disregarded BCI's own evidence of substantial ratings share contrary to established Commission policy that reliance on Nielsen DMA assignments constitutes the best method of ensuring stations deemed to be "local" have access to the consumers in their natural economic market.
- The Bureau's failure to protect the economic expectations underlying BCI's affiliation with CBS on the basis that BCI's Lima CBS affiliate is transmitted as a low-power multicast signal not only exceeds its delegated authority but directly conflicts with the statute, case precedent and established Commission policy mandating denial of market modification petitions where the grant would undermine the underlying economic expectations of the in-market stations' network affiliation agreement without regard to whether the station is full-power or low-power.

The Order creates a dangerous precedent to the extent it can be interpreted as creating a new evidentiary standard in market modification cases that evidence presented in opposition with respect to local service cannot be considered as to the second statutory factor – thus creating, in essence, a non-rebuttable presumption that a Petitioner has met the local service criteria by the presentation of any evidence. Properly applied, the evidence presented by BCI overwhelmingly supported findings that WHIO had failed to carry

its burden of proof on statutory factors one, two and four. Even assuming the Bureau correctly found factor four – ratings – in WHIO’s favor (which BCI disputes), the request to add the Auglaize County communities should have been denied. Ratings alone cannot and should not support modification of WHIO’s market, consistent with established Commission policy. This is particularly true when the Auglaize County communities form the core or hub of the Lima DMA and grant of the Petition will seriously undermine the economic expectations underlying BCI’s affiliation agreement with CBS.

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

In the Matter of)	
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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)	

APPLICATION FOR REVIEW

Block Communications, Inc. (“BCI”), Lima Communications Corporation and West Central Ohio Broadcasting Corporation (collectively, “BCI Lima Stations”), by their attorneys and pursuant to Section 1.115 of the rules of the Federal Communications Commission (“FCC”), 47 C.F.R. § 1.115, hereby submits this Application for Review of the Media Bureau’s Memorandum Opinion and Order in the above-captioned matter (the “WHIO Order” or “Order”).¹ In the WHIO Order, the Bureau granted in part and denied in part the market modification Petition filed by Cox Media Group, licensee of CBS-affiliated station WHIO-TV (“WHIO”) of Dayton, Ohio, regarding cable communities in Ohio and Indiana.² BCI opposed the Petition as to communities in two Ohio counties.³ The Bureau correctly

¹ *Petition for Modification of Dayton, OH Designated Market Area With Regard to Television Station WHIO-TV, Dayton, OH, CSR-8824-A, Docket No. 13-201, Memorandum Opinion and Order, DA 13-2250 (MB rel. Nov. 25, 2013) (“WHIO Order”).*

² *Cox Media Group, Miami Valley Broadcasting Corporation, Miami Valley Broadcasting Corporation, Modification of the Television Market for WHIO-TV, Dayton, Ohio, MB Docket No. 13-201, Petition for Special Relief (filed July 26, 2013) (“Petition”).*

³ *Block Communications, Inc., Lima Communications Corporation and West Central Ohio Broadcasting Corporation, Miami Valley Broadcasting Corporation, 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) (“BCI Opposition”). WHIO replied to BCI’s Opposition, and BCI filed a Surreply, to which WHIO also replied. The Bureau stated that it*

denied the request to extend WHIO must carry rights in the nine Allen County communities that form part of the core of the Lima, OH designated market area (“DMA”), while erroneously granting WHIO must carry rights in 23 Auglaize County communities.⁴

The Bureau’s modification of WHIO’s market as to Auglaize County was based on the near complete disregard of evidence submitted by BCI illustrating why such a modification was unwarranted, erroneous factual findings by the Bureau, and failure to follow case precedent and established Commission policy concerning market modifications. Simply put, the Petition failed to demonstrate satisfaction of the statutory factors or any other market modification criteria sufficient to warrant assignment of these communities to WHIO’s local market, and should have been dismissed. The Bureau’s flawed reading of the record and failure to follow applicable precedent undermines both the statutory market modification scheme and the ability of BCI to continue to provide superior local broadcast service in Auglaize County. A fair and correct reading of the record and precedent demonstrates that WHIO failed to carry its burden of proof, and also failed to demonstrate that the Auglaize County communities form part of its natural economic market. The Bureau’s incorrect mechanistic application of the statutory factors directly conflicts with Congress’ direction to the Commission that in considering requests to modify a station’s must carry market it “afford particular attention to the value of localism.”⁵ Unless reversed, the decision would produce a result inconsistent with the purpose of the must carry rules to ensure that

did not rely “upon any of the arguments or facts contested by the parties in these pleadings” and so these arguments are not addressed in the instant application. See WHIO Order, ¶ 1 n.4.

⁴ The WHIO Order also granted the Petition as to a third county, Wayne County, Indiana, served by Indiana Broadcasting, LLC.

⁵ 47 U.S.C. § 543(h)(1)(c)(ii).

television stations are carried in the areas which they serve and which form their economic market, and undermine, rather than further, localism.⁶

The Commission should reverse the WHIO Order with respect to Auglaize County. Specifically, the Commission should reverse the WHIO Order because the Bureau: (i) erroneously found that WHIO satisfied the first statutory factor without giving due weight to BCI Lima Stations' historical carriage, in contravention of case precedent; (ii) erroneously found that WHIO satisfied the second statutory factor by completely failing to consider BCI's stronger evidence concerning signal coverage, proximity and other local service, in contravention of case precedent and established Commission policy; (iii) erred by finding that WHIO satisfied the fourth statutory factor where BCI garnered significant viewership in contravention of established Commission policy; and (iv) erred by failing to protect the economic expectations underlying BCI's affiliation with CBS contrary to case precedent.

II. QUESTIONS PRESENTED

1. Whether the Bureau erroneously found that WHIO satisfied the first statutory factor where the BCI stations have also been historically carried, contrary to case precedent.
2. Whether the Bureau erroneously found that WHIO satisfied the second statutory factor by failing to consider BCI's stronger evidence concerning signal coverage, proximity and other local service and erroneously granted WHIO must carry status in communities forming the core of another DMA, contrary to case precedent.
3. Whether the Bureau erred by finding that WHIO satisfied the fourth statutory factor where BCI also garnered significant viewership, contrary to established Commission policy.
4. Whether the Bureau erred by failing to protect the economic expectations underlying BCI's affiliation with CBS, contrary to case precedent and established Commission policy.

⁶ See House Committee on Energy and Commerce, Cable Television Consumer Protection and Competition Act of 1992, H.R. Rep. No. 102-628, 102 Cong., 2d Sess. 97 (1992).

III. STANDARD OF REVIEW

In considering Applications for Review, the Commission considers whether the action taken pursuant to delegated authority: (i) is in conflict with statute, regulation, case precedent, or established Commission policy; (ii) involves a question of law or policy that has not previously been resolved by the Commission; (iii) involves the application of a precedent or policy that should be overturned or revised; (iv) is based on an erroneous finding as to an important or material question of fact, or (v) is marked by prejudicial procedural error.⁷ When reviewing Bureau action, the Commission seeks to ensure that any action taken pursuant to delegated authority does not violate the prohibition of arbitrary and capricious agency action contained in the Administrative Procedure Act.⁸ This requirement means, among other things, that an agency must consider relevant data and articulate an explanation establishing a "rational connection between the facts found and the choice made."⁹ The Media Bureau had the opportunity to pass on all questions of fact and law described in this Application.¹⁰

IV. BACKGROUND

WHIO, operating in the Dayton, OH DMA, sought through the market modification Petition to add communities to its broadcast market, including those in Allen and Auglaize County that have been assigned to the Lima, OH DMA. At the time of the filing of the

⁷ 47 C.F.R. § 76.115(b)(2)(i)-(v).

⁸ 5 U.S.C. § 706(2)(A).

⁹ See *The Boeing Company; Celsat America, Inc.; Constellation Communications Holdings, Inc.; Globalstar, L.P.; ICO Services Limited; Iridium LLC; Mobile Communications Holdings, Inc.; TMI Communications and Company, Limited Partnership*, Memorandum Opinion and Order, 18 FCC Rcd 1405, ¶ 8 (reviewing bureau action to "ensure that the Orders for which [review is sought] examine the relevant data and articulate a satisfactory explanation for their actions, including a 'rational connection between the facts found and the choice made.'") (2003), *citing and quoting* Motor Vehicle Mfrs Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

¹⁰ See 47 C.F.R. § 1.115(c).

Petition, the Dayton DMA was ranked #63 while the Lima DMA was ranked #199 out of 210.¹¹ BCI, operating broadcast stations in the Lima DMA, opposed the modification. The Bureau appropriately denied WHIO's modification with respect to the Allen County communities, but erroneously granted it with respect to the Auglaize County communities.

Block Communications Inc.

BCI is the ultimate parent company of the two licensed broadcast stations, WLIO and WOHL-CD, which are operated under the leadership of the Lima Communications Corporation in the Lima DMA. BCI has served the Allen County and Auglaize County communities for over 40 years through its ownership of WLIO, the Lima NBC affiliate. In February 2009, BCI purchased low-power FOX, ABC and CBS network affiliates, WOHL-CD (FOX); WLQP-LP (ABC); and WLMO-LP (CBS).¹² BCI delivers local news and programming of local interest to Lima area residents by simulcasting its morning, early and late evening local news programming developed by the NBC station on its ABC and CBS stations. The BCI Lima Stations are co-branded and known as "Your Hometown Lima Stations" and provide strong signal coverage throughout the Auglaize County Communities at issue.¹³ The four stations function as an economic unit, providing unified financial and other support for local community groups and activities and drawing local advertisers largely as a group rather than on a station-by-station basis. They are generally, although not

¹¹ The most recent rankings put Lima at #187 and Dayton at #64. See <http://www.nielsen.com/content/dam/corporate/us/en/docs/solutions/measurement/television/2013-2014-DMA-Ranks.pdf> (last viewed Dec. 23, 2013).

¹² The four BCI stations are carried 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). WLIO is a commercial full-power station. WOHL-CD is a commercial low-power Class A station. Operating broadcast stations in a market as small as Lima presents significant challenges but BCI has shown its commitment to localism by continual investment in its broadcast operations in the Lima DMA and surrounding region.

¹³ See BCI Opposition, Exhibit B (BCI Lima Station Coverage Maps).

uniformly, carried as a group in the majority of the Auglaize and Allen Cable Communities WHIO sought to include in its Dayton market.¹⁴ The investment in and coordinated efforts of the BCI Lima Stations have strengthened the stations and increased their ratings in their local market.

WHIO Petition and BCI Opposition

WHIO's Petition challenged Nielsen's assignment of Auglaize and Allen Counties to the Lima DMA for the 2014 television year. Lima is the county seat of Allen County and has always been assigned to the Lima DMA. Auglaize County has been assigned to the Lima DMA seven times since 1999, most recently for 2009-2010, and Nielsen included it in the Lima DMA again for the 2013-2014 television year.¹⁵ WHIO alleged that its request satisfied three of the four statutory market modification factors (history of cable carriage, signal coverage or other local service, and viewing pattern of significant ratings) for nine cable communities in Allen County and 23 cable communities in Auglaize County. WHIO further claimed that its ties to local advertisers demonstrated that the cable communities in the two counties are part of the station's economic market, despite the fact that the communities lie from 49 to 71 miles from the claimed communities.¹⁶ Other than evincing frustration with Nielsen's DMA assignment, the Petition offered little concrete indication why Dayton-based WHIO needs must carry status in the two counties to ensure continued cable carriage. The Petition reasoned, without providing adequate support, that WHIO needed modification of its

¹⁴ See *Id.*, Exhibit C (Cable Systems Carrying BCI Lima Stations in Auglaize and Allen Counties).

¹⁵ *Id.* at 4; Exhibits E-F.

¹⁶ See *Id.* at 13 (showing WHIO's transmitter site to be between 49-64 miles from the Auglaize County communities and between 67-71 miles from the Allen County communities).

market to “maintain the status quo with respect to its continued carriage in the communities in question.”¹⁷

The Petition caused grave concern for BCI because the resulting market modification could injure the economic viability of its hometown Lima stations and threaten their strong commitment to localism by reassigning the bulk of the Allen and Auglaize County cable communities to Dayton-based WHIO. In its Opposition, BCI demonstrated that WHIO had failed to carry its burden of proof with respect to the communities in each county on all three of the claimed statutory factors:

1. Historical carriage showed that the BCI Lima Stations are local to the communities;
2. The BCI Lima Stations provide superior signal coverage and other local service. The Stations: (a) provide superior over-the-air coverage; (b) are geographically closer; and (c) provide far more extensive other local service; and
3. Viewership share analysis supports rather than contradicts Nielsen’s assignment of Auglaize County to the Lima DMA.

BCI also showed that the communities form the natural market of the BCI Lima Stations, including the BCI Lima in-market CBS affiliate, and demonstrated how consideration of the additional factor of economic market nexus compelled denial rather than grant of the Petition given the BCI Lima stations far more extensive ties to local advertisers and community organizations.¹⁸ Finally, BCI demonstrated that the Petition should be denied because the market modification would frustrate the economic expectations underlying the network affiliation agreement of the BCI Lima CBS station.¹⁹

¹⁷ WHIO Order, ¶ 25. At no time did WHIO allege that it would elect must carry rather than retransmission consent in the next election, nor did it allege that its network affiliation agreement with CBS prohibited its grant of retransmission consent out-of-market.

¹⁸ BCI Opposition at 14-24.

¹⁹ BCI Opposition at 24-27.

V. ARGUMENT

The Bureau's partial grant of the Petition with respect to Auglaize County relied on its findings concerning WHIO's "history of carriage, its provision of local programming, and the meaningful viewership shares garnered by WHIO in [the Auglaize County] communities."²⁰ Contrary to precedent, the Bureau's Order misconstrues the evidentiary showings on important or material questions of fact on each statutory factor, fails to correctly apply case precedents as to two of the three statutory factors and fails to follow established Commission policy on the third. The Order also erroneously fails to protect the economic expectation underlying BCI's network affiliation agreement with CBS. On review, the Commission should reverse the Bureau Order granting modification of WHIO's local television market to include the Auglaize County communities on the grounds that:

- WHIO failed to carry its burden of proof that modification of its market is warranted under statutory factors one, two and four;
- WHIO failed to otherwise demonstrate that Auglaize County is part of WHIO's natural economic market; and
- Grant of the Petition would frustrate the economic expectations underlying the BCI Lima CBS Station's network affiliation agreement.

As described below, the Bureau's action results in undeniable harm to the integrity of the Lima DMA and BCI's ability to serve the Auglaize County communities, dealing a severe blow to the value of localism in these markets. Properly viewed, the record evidence conclusively demonstrates that WHIO failed to carry its burden for grant of the requested market modification, and, for this reason, the Petition as to the Auglaize County communities should have been denied.

²⁰ WHIO Order, ¶ 12.

A. The Bureau erroneously found that WHIO satisfied the first statutory factor without appropriately considering BCI's historical carriage in Auglaize County contrary to case precedent.

The Order contained no explanation regarding the factual basis for finding the first statutory factor of historical carriage in WHIO's favor. Indeed, the Bureau acknowledged that WHIO did not even allege an extensive history of carriage in nine of the communities: Noble, Washington, Logan, St. Mary's, Jackson, Wayne, Goshen, Union Township, and Buckland.²¹ Nevertheless, the Bureau concluded that WHIO satisfied this factor.

Such a result is clearly erroneous. First, WHIO, not BCI, bears the burden of proof on each statutory element. In its Opposition, BCI submitted un-rebutted evidence that the BCI Lima Stations have been historically carried by cable systems in the Auglaize County communities.²² In light of BCI's showing of its extensive historical carriage, the Bureau should have accorded little weight to WHIO's evidence regarding historical carriage.

Second, the Bureau's conclusion that WHIO carried its burden on the first statutory factor is contrary to case precedent. Where cable systems have historically carried signals from both television markets at issue, precedent dictates that this factor is "of marginal assistance in resolving the issue of whether the [cable] communities should be moved into [the broadcaster's] market."²³ On review, the Commission should find that WHIO failed to carry its burden as to the first statutory factor for these reasons.

²¹ WHIO Order, ¶¶ 18, 27.

²² BCI Opposition at 10, Exhibit I.

²³ *Group W Television, Inc. San Francisco, California for Modification of the San Francisco, California ADI, etc.*, Memorandum Opinion and Order, 10 FCC Rcd 2737, ¶ 21 (CSB, 1995) ("Group W Television").

B. The Bureau erred by finding that WHIO had satisfied the second statutory factor by failing to consider BCI's stronger evidence on each element and by failing to follow case precedents and established Commission policy.

WHIO alleged it met the second statutory factor based on three elements: over-the-air coverage, proximity to the communities and local service. In its Opposition, BCI presented probative and un rebutted evidence regarding each element:

- The BCI Lima Stations, including the low-power CBS affiliate, cover the Auglaize County communities with a Grade A signal contour.
- The BCI Lima Stations are much closer to the communities than WHIO and WHIO's evidence of a natural television market supported a finding that the Auglaize County communities, like the Allen County communities, form the core communities of the Lima DMA.
- The BCI Lima Stations provide comprehensive local service to the Auglaize County communities consisting of not only its extensive local news programming but also local sports and targeted local weather coverage as well as involvement with local special events and institutions.²⁴

The Bureau made several general factual findings applicable to both the Allen and Auglaize County communities and correctly found that the BCI Lima Stations "serve the Auglaize and Allen County communities with more programming than WHIO."²⁵ However, the Bureau inexplicably failed to apply this material finding to the second statutory factor and consequently did not accord the proper weight to BCI's evidence of superior signal coverage and closer proximity to the Auglaize County communities in contravention of case precedent. As demonstrated below, these cumulative errors as to several material facts led the Bureau to erroneously conclude that WHIO had satisfied the second statutory factor as to the Auglaize County communities.

²⁴ BCI Opposition at 11-22.

²⁵ WHIO Order, ¶ 26.

1. The Bureau erred by giving no weight to BCI's evidence of superior signal coverage under applicable case precedent.

The Bureau credited WHIO's evidence that all of the Auglaize County communities are predicted to receive Grade B coverage under Longley-Rice analysis, with three communities located on WHIO's Grade B contour line, while giving neither consideration nor weight to BCI's evidence showing stronger Grade A signal coverage of these communities.²⁶ As with historical carriage, the Commission places little weight on Grade B coverage where the in-market station places an "even higher signal" over the communities at issue.²⁷ Under applicable precedent, WHIO's evidence of signal strength should have been dismissed with regard to the second factor when properly considering BCI's evidence.

2. The Bureau erred by giving no weight to BCI's evidence of closer proximity to the Auglaize County communities contrary to applicable case precedent.

The Bureau credited WHIO's evidence that it is located an average of 56.6 miles from all Auglaize County communities while giving no weight to BCI's evidence showing that each Auglaize County community is closer to the BCI stations than to WHIO, with the *furthest* community only 28 miles away from the BCI transmitters.²⁸ The Bureau has previously emphasized that a broadcaster's geographic proximity to a DMA weighs in its favor.²⁹ The Bureau erred by failing to discount WHIO's proximity when the record showed BCI to be significantly closer to each of the communities.

²⁶ See WHIO Order, ¶ 20 & n.58; BCI Opposition at 11, Exhibit B.

²⁷ Group W Television, ¶ 22.

²⁸ WHIO Order, ¶ 27; BCI Opposition at 13

²⁹ See, e.g., *Dominion Broadcasting, Inc.; Petition For Modification of the DMA Market of Television Broadcast Station WLMB(TV), Toledo, Ohio*, Memorandum Opinion and Order, 18 FCC Rcd 2882, ¶ 10 (2003) (a Toledo, OH broadcaster's request to modify its market to include communities in Michigan is bolstered because "all of the Cable Communities requested for inclusion are located on the south western edge of the Detroit market closest to the Toledo, Ohio DMA"); *Great Trails Broadcasting Corp. Hagerstown, Maryland For*

3. The Bureau erred by modifying WHIO's market to include core communities of the Lima DMA that are in Auglaize County contrary to applicable precedent and established Commission policy.

The Bureau also erred with respect to the element of proximity by failing to apply applicable precedent and follow established Commission policy against adding a core or hub community of one DMA to a distant station's local market. As part of its showing that it warrants must carry status in the Auglaize County communities because of "close proximity," WHIO introduced labor flow and commuting pattern data claiming to show the communities to be part of the Dayton DMA.³⁰ In response, BCI provided extensive and un rebutted data and analysis to the contrary, demonstrating that both counties form the core or hub of the Lima DMA.³¹

Modification of Station WHAG-TV's ADI, Memorandum Opinion and Order, 10 FCC Rcd 8629, ¶ 22 (1995) (a Hagerstown, MD broadcaster's request to modify its market to include communities in Washington, D.C. is bolstered because its "city of license, is geographically closer to most of the communities in question than is Washington, D.C.").

³⁰ Petition at 24, n.74.

³¹ BCI Opposition at 10-22; Exhibits A, ¶ 11, B, E, K-O. BCI's evidence shows that Lima Stations cover the communities with a Grade A signal and are significantly closer to the communities with transmitters between 7-28 miles from the Auglaize County communities and 1-12 miles from the Allen County communities. It also shows that WHIO's labor flow data justify rather than detract from Nielsen's decision to treat Auglaize County as part of the Lima DMA and that the Office of Management and Budget ("OMB") has assigned Auglaize County to the west central Ohio Lima-Van Wert-Celina, OH Combined Statistical Area ("CSA"), along with Allen County. OMB Bulletin No. 13-01, Revised Delineations of Metropolitan Statistical Areas, Micropolitan Statistical Areas, and Combined Statistical Areas, and Guidance on Uses of the Delineations of These Areas, Feb. 28, 2013, at 38, 93, 104. These CSAs, according to OMB "can be characterized as representing larger regions that reflect broader social and economic interactions, such as wholesaling, commodity distribution, and weekend recreational activities, and are likely to be of considerable interest to regional authorities and the private sector." *Id.* at 2. In addition, BCI's evidence showed that advertising patterns bolster this evidence showing Lima to be the regional hub for the Auglaize County communities. BCI presented evidence showing that the more proximate BCI Lima Stations during the same period had 117 advertising accounts from Auglaize County, far more than the *three* Auglaize County advertisers cited by WHIO in its Petition.

The Commission has repeatedly declined to modify a station's market to include the core community of another market.³² The Bureau correctly followed the case law and Commission policy in rejecting WHIO's request to add the Allen County communities to its television market on this basis, but erred by inexplicably failing to apply this same analysis to the Auglaize County communities. With respect to the Allen County communities, the Bureau found that in granting the Commission the authority to modify markets to better effectuate the purpose of Section 614, "Congress manifested no intent for [the Commission] to alter the basic structure of designated market areas."³³ Because they formed part of the core of the Lima DMA, the Bureau held that the goal of protecting the integrity of the market would best be served by denying WHIO must-carry status in the Allen County communities.³⁴

BCI presented extensive un-rebutted evidence demonstrating that the Auglaize County communities, just like the Allen County communities, are core communities of the Lima DMA. Based on controlling precedents, the Bureau should have denied WHIO's request for must-carry status in these cable communities for the same reason it denied the Petition with respect to the Allen County communities.

³² *Agape Church, Inc.; For Modification of Station KVTJ (TV)'s ADI*, Memorandum Opinion and Order, 14 FCC Rcd 2309, ¶ 30 (CSB, 1999); *Free State Communications, LLC; For Modification of the Topeka, Kansas DMA*, CSR-8121-A, Memorandum Opinion and Order, 24 FCC Rcd 7339, ¶ 24 (MB, 2009) ("Free State"); *CHANNEL 33, INC. Miami, Florida For Modification of Station WBFS-TV's ADI*, CSR-3884-A, Memorandum Opinion and Order, 11 FCC Rcd 3579, ¶ 17 (CSB, 1996) ("Channel 33").

³³ WHIO Order, ¶ 28.

³⁴ *Id.*

4. The Bureau erroneously failed to apply BCI’s extensive evidence that it provides more and better local programming and other local service to the Auglaize County communities to the correct statutory factor.

The Petition presented evidence of signal coverage and local programming with regard to the second statutory factor, and BCI introduced its evidence of extensive local programming and other community involvement solely in response to WHIO’s claim that it satisfied the local service element of the second statutory factor – “coverage or other local service to such community.” The Bureau credited WHIO for providing some local news and other coverage in Auglaize County in support of its conclusion that the broadcaster met the second statutory factor. The Bureau, however, ignored BCI’s extensive evidence that its stations provide substantially greater local coverage in Auglaize County when analyzing the second statutory factor by wrongly claiming that such evidence should apply to the third statutory criterion. As the Bureau accurately observed, this factor – whether any other television station that is eligible to be carried 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 or other events of interest to the community – only “enhances a station’s market modification claim where it could be shown that other stations did not serve the communities at issue.”³⁵

When discussing the evidence generally, the Bureau properly credited BCI’s evidence by finding that the BCI Lima Stations “serve the Auglaize ... communities with more programming than WHIO,” but inexplicably failed to apply that critical and material

³⁵ WHIO Order, ¶ 22. The Bureau concluded that the third factor neither ways against nor in favor of WHIO’s modification request. *Id.* BCI agrees with this conclusion. As discussed below, neither party advanced any arguments concerning the third statutory factor.

finding to *any* statutory factor – but most importantly, to the second factor.³⁶ The Bureau did, however, prejudicially consider evidence provided by WHIO in determining that WHIO had met the second statutory factor when noting “WHIO has provided 65 news segments concerning the county *over a two-year* period as well as weather, high school sports, and other local interest coverage,” while ignoring BCI’s evidence on this same point.³⁷ BCI’s evidence demonstrated that it provides dramatically more local coverage than WHIO with, for example, over 20 segments *per week* concerning Auglaize County communities. Only by disregarding BCI’s evidentiary showing could the Bureau plausibly find that WHIO had carried its burden as to the local service component of the second statutory factor.

a. The Bureau’s refusal to consider evidence of BCI’s local service constitutes an erroneous finding as to an important or material question of fact.

Congress identified evidence of “other local service” as part of the *second* statutory factor to be evaluated by the Commission in ruling on a request for market modification.³⁸ The Bureau erred by failing to recognize that BCI’s local service evidence was *not* being presented as to the third statutory criteria but rather the second statutory criteria and failing to recognize that neither party argued the third criterion, and that all parties conceded that the third factor was not applicable. BCI specifically stated in its Opposition:

The Petition does not directly allege that WHIO-TV satisfies the third statutory factor concerning whether other television stations also provide local service to the cable communities at issue; rather for each county it simply mentions the factor as part of its case under the second statutory factor concerning whether it provides “other local service” to the communities. WHIO-TV’s claims with respect to the local service provided by the BCI Lima Stations will be addressed in that context. WHIO-TV would not be entitled to rely on satisfaction of the third statutory factor in any event, as the Commission treats this

³⁶ WHIO Order, ¶ 26.

³⁷ See WHIO Order, ¶ 26; BCI Opposition at 17-20.

³⁸ 47 U.S.C. § 534(h)(1)(C)(ii).

solely as an enhancement factor in cases in which there is no in-market affiliate providing service.³⁹

Thus, as explicitly noted by BCI, neither party was contending that the third criterion was applicable and evidence presented by both parties regarding local service was being presented for purposes of the local service component of the second statutory factor.

It is unclear from the Order whether the Bureau, in its haste to act on the Petition (i) missed footnote 34 of the Opposition which noted that the local service arguments were directed to the second statutory factor and therefore misinterpreted it as applying to the third factor, or (ii) recognized that it was directed at the second statutory factor but determined that such evidence *could not* be presented to counter the Petitioner's evidence on the second statutory factor and could only be presented in rebuttal as to evidence on the third statutory factor.

If the explanation is the latter, the Bureau acted in excess of its delegated authority by creating, in effect, a new non-rebuttable presumption as to the localism factor of the second statutory factor by disallowing any contrary showing in opposition. Such a result would be contrary to established precedent and to Congress's stated objective that the Commission "afford particular attention to the value of localism."⁴⁰ The Commission should reverse the Bureau's erroneous determination concerning local service and make clear that such evidence can be presented in rebuttal to a Petitioner's claim under the second

³⁹ BCI Opposition at 9-10, n.34 (emphasis added).

⁴⁰ See, e.g., *Greater Worcester Cablevision, Inc., et al. For Modification of WNDS' ADI Market for Must Carry Purposes; CTV of Derry, Inc., Licensee of Television Station WNDS, Derry, New Hampshire; For Carriage on Greater Worcester Cablevision, Inc., et al.*, Memorandum Opinion and Order, 10 FCC Rcd 12569, ¶¶ 11, 14 (CSB, 1995) (denying modification where request "would run counter to the goals of Congress as it would deny [the in-market broadcaster] access" to its local market and, according to the broadcaster, lack any offsetting benefit to the "value of localism") ("WNDS Order"); 47 U.S.C. § 534(h)(1)(C)(ii).

statutory factor. Once it has done so, it will become abundantly clear that WHIO has failed to carry its burden of proof on this element of the second statutory factor.

If the Bureau simply misread BCI's Opposition and the evidence, then the decision granting the Petition is clearly based on an erroneous finding as to an important or material question of fact because the Bureau failed to properly apply BCI's evidence concerning local service to the second statutory factor. This mistake led the Bureau to ignore and fail to properly value the service and programming already being provided by BCI. The Order relies on the news and sports coverage provided by WHIO in granting the Petition for the Auglaize Communities, demonstrating the materiality of these facts.⁴¹ The mistake also led the Bureau to ignore the fact that potential loss of carriage of BCI's CBS affiliate in Auglaize County will directly affect its ability to continue to provide such service.⁴²

Regardless of whether the Bureau acted out of oversight or intention, because it incorrectly attributed BCI's evidence of local service as to the Auglaize County communities to the wrong statutory factor, the Bureau failed to accord the evidence its appropriate weight against WHIO's lesser showing of local programming under the second statutory factor, where it would properly have tipped the factor in BCI's favor.

b. Under applicable precedent, little weight should have been given to the out-of-market station's local programming where the in-market station provides more local programming.

The Bureau also erred by failing to apply case precedent concerning the second statutory factor that give claims of local programming by the out-of-market affiliate "less weight when viewed in relation to that provided" in terms of "frequency and subject matter" by an in-market station, such as the BCI Lima Stations, including its CBS affiliate, WOHL-

⁴¹ WHIO Order, ¶ 27.

⁴² See, e.g., WNDS Order, ¶¶ 11, 14.

CD2. In similar cases where the in-market and out-of-market station each provided evidence of “local service” the (Bureau or Commission) correctly weighed the showing as per the second statutory factor rather than totally ignoring the non-petitioning party’s evidence.⁴³

C. The Bureau erred by finding that WHIO satisfied the fourth statutory factor where BCI also garnered significant viewership by finding that WHIO carried its burden of proof on ratings contrary to established Commission policy.

The Bureau credited WHIO’s evidence of significant ratings in the Auglaize County communities, finding that WHIO had garnered “meaningful viewership shares” there,⁴⁴ without adequately weighing BCI’s viewership evidence, leading to its erroneous conclusion on factor four. In its Opposition, BCI showed that Nielsen’s decision to assign Auglaize County to the Lima DMA for the 2013-2014 television year was not an aberration, but was based on the fact that the Lima DMA achieved “a larger share of viewing than the current DMA region and that the share difference is determined to be statistically significant, i.e., the difference is not simply due to sampling variation.”⁴⁵ During the 13 year period that the Lima DMA has been home to affiliates of the four major networks, Nielsen has assigned Auglaize County to the Lima DMA eight times, including its most recent assignment to the Lima DMA for the current period.⁴⁶ Nielsen assigns counties to television markets based on the market

⁴³ See, e.g., *Tennessee Broadcasting Partners; For Modification of the Television Market for WBBJ-TV/DT, Jackson, Tennessee*, 23 FCC Rcd 3928, ¶¶ 22, 34 (2008) (noting that “a station’s broadcast of local programming, which has a distinct nexus to the communities, is also evidence of local service” and comparing the level of local coverage between in-market and out-of-market broadcasters); *Channel 33*, ¶¶ 9, 15 (comparing out-of-market broadcaster’s local programming to in-market local programming in context of second statutory factor).

⁴⁴ WHIO Order, ¶¶ 27, 23.

⁴⁵ BCI Opposition at 23; Exhibit F.

⁴⁶ *Id.*, Exhibit E.

whose stations receive the largest share of viewing in the county.⁴⁷ This is the primary evidence of which station should be considered “local” to the communities in a particular county, and the Bureau erred by essentially disregarding this evidence when evaluating WHIO’s request for market modification. BCI’s evidence undeniably demonstrates the Nielsen’s assignment of Auglaize County to the Lima DMA was accurate and should be left undisturbed.

The Bureau failed to follow established Commission policy concerning market assignments by changing Nielsen’s assignment of Auglaize County to the Lima DMA in light of BCI’s own evidence of substantial ratings share in the Auglaize County communities and by failing to afford the credit the Commission traditionally gives to Nielsen choices for DMA assignments. 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.⁴⁸ The Commission again acknowledged that television markets might change when adopting the use of Nielsen DMA assignments, noting that “we 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

⁴⁷ *Definition of Markets for Purposes of the Cable Television Mandatory Television Broadcast Signal Carriage Rules Implementation of Section 301(d) of the Telecommunications Act of 1996 Market Determinations*, 11 FCC Rcd 6201, ¶ 16 (1996) (“Market Designation Order”).

⁴⁸ *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*, Report and Order, 8 FCC Rcd 2965, ¶ 39 (1993).

policy.”⁴⁹ 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.”⁵⁰ When the evidence is properly considered in accordance with Commission policy, it becomes evident that WHIO failed to carry its burden on viewership shares in Auglaize County.

Even assuming *arguendo* that WHIO had carried its burden on this sole statutory factor, the Petition should have been denied as to the Auglaize County communities. Counsel is unaware of any markets that have been modified upon satisfaction of only the ratings factor. The injustice of such a ruling becomes even more evident in view of the significant harm to both localism and the economic expectations underlying the BCI Lima CBS station’s affiliation agreement.

D. The Bureau erred by failing to protect the economic expectations underlying BCI’s affiliation with CBS contrary to case precedent and established commission policy.

Prior to this Order, market modification petitions have been consistently denied where granting the petition would undermine the economic expectations underlying the in-market station’s network affiliation agreement.⁵¹ For efficiency reasons, BCI delivers the

⁴⁹ See Market Designation Order, ¶ 39.

⁵⁰ *Id.*, ¶ 43 (emphasis added).

⁵¹ See *Guy Gannett Communications, Inc.; For Modification of the Portland-Poland Spring, Maine ADI Market*, Memorandum Opinion and Order, 13 FCC Rcd 23470, ¶¶ 22, 25 (CSB, 1998) (declining to modify market where grant would jeopardize an in-market CBS affiliate’s carriage), *affirmed on recon.*, 15 FCC Rcd 10762, ¶ 13 (CSB, 2000) (“In any instance where a network affiliate attempts to encroach into another market the potential effect can be severe and must be taken into account”); *Broad Street Television, L.P. Davenport, Iowa For Modification of Station KWQC-TV’s ADI*, Memorandum Opinion and Order, 10 FCC Rcd 5576 (1995) (declining to modify market when doing so would jeopardize carriage of the in-market affiliate); *Harron Communications Corp.; For Modification of the Portland-Poland Spring, Maine ADI Market*, Memorandum Opinion and Order, 14 FCC Rcd 4547, ¶ 28

signal of its CBS-affiliated station WOHL-CD2 as a low-power multicast signal. While the Bureau recognized that it “would typically resist adding an out-of-market affiliate to [an] in-market affiliate’s market, so as to not upset the concept of affiliation” it refused to do so here, ruling for the first time that it will not protect an affiliate’s economic expectations simply because the in-market affiliate’s signal is delivered by a low-power station.⁵²

The Bureau’s failure to protect the economic expectations underlying BCI’s CBS affiliation agreement with respect to the Auglaize County communities directly conflicts with the statute, case precedent and established Commission policy. The Bureau’s decision to distinguish, for the first time, between low-power and full-power stations when applying the well-established Commission policy of protecting a station’s economic expectations of its network affiliation is inconsistent with the basis for the protection and a violation of the Bureau’s delegated authority.

The Bureau erred by denying protection, without any precedential support and in stark contrast to the treatment it has afforded full-power stations, to a low-power station’s economic expectation stemming from its network affiliation agreement. Previous orders draw no such distinction between low-power and full-power stations and there is no rational basis for the Bureau to draw one in this case. The fact that the network signal is being provided on a low-power station does not mean that the in-market station has *no* economic expectation deserving of protection underlying its network affiliation agreement.

(1999) (declining to modify market given in-market affiliate’s viewership in the cable communities to avoid interference with “present affiliate relationship”); Free State, ¶ 25 (declining to modify market “because addition of the requested communities would violate the economic marketplace expectations underlying the affiliation concept”).

⁵² WHIO Order, ¶ 26.

BCI bargained for and pays consideration for the right to be the CBS affiliate in the Lima DMA and to receive the economic benefits of that affiliation, including the right to sell local advertising time on the CBS programming. The economic expectation was that no other CBS station would have must carry-rights within the Lima DMA and the Bureau's decision to permit WHIO – an out-of-market CBS affiliate – to have these rights in the Lima DMA undoubtedly upsets this expectation.

The Bureau placed great weight on the fact that the BCI CBS affiliate is broadcast on the secondary channel of a low-power station and therefore holds no mandatory carriage rights unless it were designated as a primary stream. This analysis completely mischaracterizes the economic expectations of the in-market station. BCI acknowledged in its Opposition that, as a Class A station, the BCI Lima CBS affiliate cannot exercise must carry rights.⁵³ However, BCI presented unrebutted evidence that its economic expectation was that as the in-market CBS affiliate, it would be in a position to negotiate carriage on seemingly equal terms with out-of-market stations because no other CBS affiliate could demand must carry within the Lima DMA; the station would therefore be in the same position to compete for carriage as any other CBS affiliate. BCI presented unrebutted evidence that grant of must carry rights would give WHIO the opportunity to gain by regulatory fiat what properly should be awarded based on the competitive market place – guaranteed carriage of its signal in the Auglaize and Allen Cable Communities. BCI explained that Time Warner Cable, like many other cable operators, offers only one HD channel per network affiliation on a system. By granting the Petition, the Bureau has now ensured that WHIO can elect must carry and require Time Warner Cable and other cable operators to carry the WHIO-TV CBS feed, including the HD feed. The likely result will be

⁵³ BCI Opposition at 25-26.

that systems such as Wapakoneta – the county seat and largest of the Auglaize County communities – would drop the in-market BCI Lima CBS station HD signal, and possibly the BCI Lima CBS station altogether.⁵⁴ The channel line-up evidence in the record confirms that none of the cable systems carry multiple HD channels of the same broadcast network.⁵⁵

The Bureau also erroneously suggested that no harm would befall BCI or local viewers because “WOHL-CD2’s entire news content is provided by its sister station – full power station, WLIO, licensed to the same community and county.”⁵⁶ The Bureau implied that adding an out-of-market CBS affiliate to the in-market BCI CBS affiliate’s market would somehow be less harmful because the news programming provided by WLIO will remain available to viewers. Such a finding is both incorrect and irrelevant to an evaluation of harm to the economic expectations of the in-market affiliate of granting must carry rights to an out-of-market station. WLIO’s news content is supported by all of the BCI Lima Stations, including revenues from WOHL-CD2 and economic injury to one of the stations would impact WLIO’s ability to continue to provide high quality local service. Indeed, the Bureau acknowledged BCI’s evidence that the ABC and CBS stations financially contribute to supporting WLIO’s local news, but then failed to consider and apply this fact in its analysis.⁵⁷ The sharing of news programming and the accompanying sharing of costs associated with producing such programming between multiple stations enables small market broadcasters to further localism and produce the kind of programming supported by Commission

⁵⁴ BCI Opposition at 26.

⁵⁵ *Id.* at 26, *citing* Petition, Exhibits L & Q.

⁵⁶ WHIO Order, ¶ 26.

⁵⁷ *See Id.*, ¶¶ 21 n.68, 26.

policies.⁵⁸ The Commission should not discourage such practices by disadvantaging broadcasters, particularly small market broadcasters, who use them.

BCI should be commended rather than punished for using advanced digital multicast technology to efficiently provide Lima with a local CBS station licensed to the community. The decision by the Bureau to draw, for the first time, an exception to the well-established economic expectation principle and to ignore that expectation if the affiliate's signal is delivered by a low power station is ill-advised and severely weakens the incentive to invest in smaller TV-markets, such as the tiny, rural Lima DMA. The Commission should ensure that the Bureau's decision does not chill future investment in smaller broadcast markets.

VI. CONCLUSION

The Order creates a dangerous precedent to the extent it can be interpreted as creating a new evidentiary standard in market modification cases that evidence presented in opposition with respect to local service cannot be considered as to the second statutory factor – thus creating in essence a non-rebuttable presumption that a Petitioner has met the local service criteria by the presentation of any evidence. Properly applied, the evidence presented by BCI overwhelmingly supported findings that WHIO had failed to carry its burden of proof on statutory factors one, two and four. Even assuming the Bureau correctly found factor four – ratings – in WHIO's favor, the request to add the Auglaize County communities should have been denied. Ratings alone cannot and should not support modification of WHIO's market, consistent with established Commission policy. This is particularly true when the communities at issue are properly considered core communities of

⁵⁸ The Bureau also noted the greater coverage of local Auglaize news by the BCI Lima stations. *Id.*, ¶ 26.

the Lima DMA and grant of the Petition will seriously undermine the economic expectations underlying BCI's affiliation agreement with CBS.

Respectfully submitted,

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December 23, 2013

CERTIFICATE OF SERVICE

I, Alma Hoxha, hereby certify that on this 23rd day of December, 2013, a true and correct copy of the foregoing Application for Review was served, via first-class mail (except as otherwise indicated), upon the following:

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Alma Hoxha

Exhibit 1

WHIO-TV, Media Bureau's Memorandum Opinion and Order

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.*