No. 09-____

IN THE

Supreme Court of the United States

CABLEVISION SYSTEMS CORPORATION,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 614 of the Communications Act, 47 U.S.C. § 534, compels cable systems to carry the programming of broadcast television stations — even if doing so is contrary to their editorial judgment and displaces programming that their customers prefer. This Court nonetheless upheld that statute (often called the "must carry" statute) against a facial First Amendment challenge in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*"), and *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*"). The Court held that, for purposes of a facial challenge, the statute was sufficiently tailored to the congressional objective of ensuring the continued availability of over-the-air broadcast signals for viewing by households not subscribing to cable. That conclusion crucially relied on several important findings about the industry, including that cable operators possessed market power. The questions presented in this case are:

1. Whether the imposition of must-carry obligations is consistent with the Constitution now that the facts undergirding the *Turner* decisions have evaporated with the emergence of vibrant competition and other dramatic market and technological changes.

2. Whether a cable operator may constitutionally be compelled to carry the programming of a broadcast station when, in addition to the industry changes noted above, the station lacks an over-the-air audience in the area in which the station is seeking carriage, the broadcast station's traditional over-the-air market is well outside of that area, the sta-

tion does not need cable carriage to remain viable, the cable operator has declined carriage for legitimate editorial reasons, the cable operator is subject to unusually robust competition, and the carriage mandate is based in part on the content of the station's programming.

3. Whether the order of the Federal Communications Commission in this case can be sustained where it ruled (without meaningful explanation) that compelled carriage is consistent with the statutory requirement that carriage be ordered only where it "better effectuate[s] the [statute's] purposes" and promotes "the value of localism." 47 U.S.C. § 534(h)(1)(C).

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

In the court of appeals, Cablevision Systems Corporation was the only petitioner. The respondents were the Federal Communications Commission and the United States of America. WRNN License Co., LLC, was an intervenor in support of respondents. The National Association of Broadcasters was an *amicus curiae* in support of respondents.

Cablevision Systems Corporation is a publicly traded company. It has no parent corporation. T. Rowe Price Group, Inc., owns 10% or more of Cablevision Systems Corporation's Class A common stock.

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INTRODUCTION

Enacted in 1992, the "must carry" statute, 47 U.S.C. § 534, requires operators of cable television systems to carry and transmit the programming of local television broadcast stations. The statute requires them to do so even when such carriage overrides cable operators' editorial judgment and displaces programming their customers prefer. This Court nonetheless upheld the must-carry statute against a facial First Amendment attack (albeit by the slimmest of margins) in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*"), and *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*").

Since then, however, the factual underpinnings of those decisions have evaporated. Most importantly, the monopolistic nature of the cable industry that was key to this Court's *Turner* decisions has been replaced by vibrant competition. In *Turner I*, the Court ruled that "[t]he must-carry provisions . . . are justified by . . . the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television." *Turner I*, 512 U.S. at 661. But, as the D.C. Circuit recently determined, cable operators today "no longer have the bottleneck power over programming that concerned the Congress in 1992." *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009).

Despite that change and a host of other important market and technological developments that gut *Turner*'s rationale, the FCC (with the Second Circuit's approval) not only enforced the must-carry statute here, but expanded its application to a new context that cannot be reconciled with *Turner*'s ana-

lysis. In particular, the FCC forced Cablevision to carry the signal of WRNN, a distant home-shopping station with no over-the-air viewership, on its Long Island cable systems. The FCC did so despite Cablevision's determination, in the exercise of its editorial discretion, that the programming of WRNN was not of interest to Cablevision's audience and that carrying the station would require Cablevision to displace programming that Cablevision's customers prefer over WRNN's programming.

Neither the must-carry statute nor its application to these circumstances can be sustained. "[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing . . . that those facts have ceased to exist." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938); *see also Cutter v. Wilkinson*, 544 U.S. 709, 726 (2005) (decision of this Court upholding a statute against a facial challenge does not constitute precedent barring later "as-applied challenges"). The factual foundations for the governmental override of editorial judgment contemplated by the must-carry regime have disappeared. And those foundations never could have supported the application here in any event.

The time has therefore come for this Court to revisit this area to determine whether the must-carry regime continues to be consistent with the Constitution. The continuing validity of that intrusion on constitutionally protected interests and the permissibility of expanding its application to new contexts present precisely the kind of important constitutional issues that should constitute the core of this Court's docket. For these and additional reasons stated below, review should be granted.

OPINION AND ORDERS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 570 F.3d 83. The FCC's order (Pet. App. 47a-68a) is reported at 22 FCC Rcd 21054. The order of the FCC's Media Bureau (Pet. App. 27a-46a) is reported at 21 FCC Rcd 5952.

JURISDICTION

The court of appeals entered its judgment on June 22, 2009. Pet. App. 1a. The court of appeals denied a petition for rehearing and rehearing en banc on October 29, 2009. Pet. App. 70a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." The Fifth Amendment to the United States Constitution provides in relevant part: "[N]or shall private property be taken for public use, without just compensation." Portions of relevant provisions of the Communications Act of 1934, 47 U.S.C. §§ 534, 535, are reprinted at Pet. App. 72a-96a.

STATEMENT

I. Statutory and Regulatory Background.

A. The Must-Carry Statute.

Enacted in 1992, the must-carry statute, 47 U.S.C. § 534, requires cable systems to retransmit the signals of all "local" commercial television broadcast stations. *Id.* § 534(a), (h)(1)(A); *see also*

47 U.S.C. § 535(a), (l) (creating an analogous carriage regime with respect to noncommercial educational stations). It requires a cable operator to do so even when, in its editorial discretion, it would choose not to carry the station, and even when carrying the broadcast station means that the cable operator must drop or reposition a non-broadcast service that it believes is of more interest to its subscribers.

Congress enacted the must-carry statute out of concern that cable posed a threat to broadcast television, and thus to the availability of video signals for households that do not subscribe to cable. "A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming," Congress declared. Cable Television Consumer Protection and Competition Act of 1992 ("*1992 Cable Act*"), Pub. L. No. 102-385, 106 Stat. 1460, § 2(a)(10). In "the absence of a requirement that [cable] systems carry local broadcast signals," it concluded, the "economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized." *Id.* § 2(a)(16).

Congress's concern rested on an intricate chain of reasoning. Congress believed that cable operators had an economic incentive to exclude broadcast stations from their channel line-up, lest they compete for local advertising. *See id.* § 2(a)(15). Ordinarily, competitive forces should prevent cable operators from acting on that incentive: a cable operator that drops a local television station with popular programming would lose customers to other providers. But Congress concluded that cable operators generally faced no multichannel competition and were

therefore free to act on the incentive without having to fear losing subscribers. *See id.* § 2(a)(2). Congress further determined that television viewers generally stop watching off-air television after subscribing to cable. *See id.* § 2(a)(17). Dropped stations, Congress believed, would therefore lose part of their audience, possibly bankrupting them. *See id.* § 2(a)(16). The end result, Congress feared, would be that consumers unable to afford cable would be left with fewer over-the-air stations to watch. *See id.* § 2(a)(12).

To address this concern, Congress enacted a statute to entitle stations to guaranteed cable carriage in their entire "market." 47 U.S.C. § 534(a), (h)(1)(A). Under FCC rules implementing that statute, markets comprise metropolitan areas and their surroundings. *See* Pet. App. 3a. For example, the New York City market at issue in this case stretches from the Catskills to near Atlantic City, and from the Poconos to Montauk. *See id.*

Local broadcast stations are entitled not merely to carriage in the entire geographic market, but to carriage on their over-the-air channel and on the cable system's service tier that reaches each of the system's subscribers. *See* 47 U.S.C. § 534(b)(6)-(7). Thus, broadcasters are automatically entitled to carriage on the most desirable part of the cable channel line-up — the part on which programmers prefer to be carried.[1]

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[1] *See Cable Horizontal and Vertical Ownership Limits*, Fourth Report & Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 2134, ¶ 58 (2008), *vacated on other grounds*, *Comcast Corp. v. FCC*, 579 F.3d 1 (D.C. Cir. 2009).

B. The *Turner* Challenge.

In the immediate wake of the statute's enactment, cable operators and programmers brought a facial First Amendment challenge. The district court, however, granted summary judgment against them: it held that the must-carry statute did not trigger strict scrutiny, and that the statute could survive intermediate scrutiny. *See Turner Broad. Sys., Inc. v. FCC*, 819 F. Supp. 32 (D.D.C. 1993) (three-judge court).[2]

On review, a five-Justice majority of this Court agreed that Congress's rationale did not trigger strict scrutiny. According to the majority opinion, the must-carry statute "impose[d] burdens and confer[red] benefits without reference to the content of speech." *Turner I*, 512 U.S. at 643. "Congress' overriding objective in enacting must-carry," the Court stated, was not to favor programming of a particular subject matter, viewpoint, or format, but rather to preserve access to free television programming for the 40 percent of Americans without cable." *Id.* at 646.

In rejecting calls for strict scrutiny, the Court deemed it crucial that, at that point in time, cable operators lacked competition from other providers of

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[2] The *Turner* plaintiffs brought their facial challenge in a three-judge district court pursuant to a provision making that forum available in a "civil action challenging the constitutionality of [the must-carry statute]." 47 U.S.C. § 555(c)(1). By contrast, Cablevision has invoked the Constitution as a defense in an FCC enforcement proceeding and has appealed pursuant to the Hobbs Act, which provides the exclusive mechanism for obtaining review of an FCC order. *See A-R Cable Servs. — Me., Inc. v. FCC*, Civ. No. 95-134, 1995 WL 283861, at *5 (D. Me. May 10, 1995).

multichannel video service. For example, the Court held that cable operators could not benefit from the principle that laws singling out particular speakers trigger strict scrutiny. According to the Court, must carry was "justified by . . . the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television." *Id.* at 661. Similarly, the Court held that, although laws compelling speech typically receive strict scrutiny, that principle did not trigger strict scrutiny of the must-carry statute. That was so, the Court stated, because "the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home." *Id.* at 656.

The Court did, however, subject the must-carry statute to intermediate scrutiny. *See id.* at 662. Thus, the Court held, must carry's defenders were required to show that the statute "furthers an important or substantial governmental interest," and that must carry's burden on speech is "no greater than is essential to the furtherance of that interest." *Id.* (internal quotation marks omitted).

Applying that standard, the Court held that it was not enough for must carry's defenders to show that must carry promotes abstract goals, such as "the widespread dissemination of information from a multiplicity of sources." *Id.* Rather, the Court required a concrete showing that "recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.* at 664. That meant that must carry's defenders had to prove that, without must carry, "significant numbers of broadcast stations

will be refused carriage on cable systems," and "broadcast stations denied carriage will either deteriorate to a substantial degree or fail altogether." *Id.* at 666. Finding that the record evidence did not support such a finding, the five-Justice majority held that the district court had erred by entering summary judgment. *See id.* at 668.

Four Justices (Justice O'Connor, joined by Justices Scalia, Thomas, and Ginsburg) dissented. They would have invalidated the statute outright. In her dissenting opinion (joined by the three other dissenters), Justice O'Connor stated that must carry's preferential treatment of broadcasters was content-based: it reflected a strict-scrutiny-triggering preference for the kind of speech engaged in by broadcast stations over that engaged in by non-broadcast video services. *See id.* at 675-82. Moreover, the dissenting Justices concluded, must carry was so overbroad that it would fail even intermediate scrutiny: it required carriage even in the many instances in which a carriage refusal was not "motivated by anticompetitive impulses" and would not "lead to the broadcaster going out of business." *Id.* at 682. Justice Ginsburg likewise filed a dissenting opinion stating that must carry triggered strict scrutiny and could not survive intermediate scrutiny. *See id.* at 685-86.

Following a remand in which the record was amplified, the Court again reviewed the statute. This time, it upheld the statute by a 5-4 vote, with no opinion garnering the full approval of a majority of Justices. A four-Justice plurality concluded that the record now supported the conclusions that "cable operators had considerable and growing market power," *Turner II*, 520 U.S. at 197; that they had an

incentive to use that power to favor cable-programming services that they owned or on which they could sell advertising, *id.* at 198, 200; and that stations denied carriage would "deteriorate to a substantial degree or fail altogether," *id.* at 208 (internal quotation marks omitted).

In a separate concurrence that supplied the fifth vote, Justice Breyer similarly concluded that the evidence showed that "a cable system . . . at present (*perhaps less in the future*) typically faces little competition, [and] that it therefore constitutes a kind of bottleneck that controls the range of viewer choice." *Id.* at 227-28 (emphasis added). Justice Breyer concluded that, "without the statute, cable systems would likely carry significantly fewer over-the-air stations, that station revenues would therefore decline, and that the quality of over-the-air programming on such stations would almost inevitably suffer." *Id.* at 228 (citations omitted).

Again, four Justices dissented. Justice O'Connor, in a dissenting opinion joined by Justices Scalia, Thomas, and Ginsburg, explained that the remand record showed that only marginal stations were at risk. *See id.* at 233. Arguments that these stations' programming content deserved protection, the dissenters explained, fortified the conclusion that the must-carry scheme was content-based. *See id.* at 233-35. In addition, Justice O'Connor urged, the majority's intermediate-scrutiny analysis reached the wrong result. *See id.* at 235-57.

II. Proceedings in This Case.

A. The FCC's Decisions.

WRNN is a television station licensed to King-

ston, New York, which lies at the very northern tip of the giant New York City television market. WRNN broadcasts mostly home-shopping programming. *See* Pet. App. 17a.[3] Traditionally, WRNN's broadcast signal reached only Kingston and its surroundings. After must carry's enactment, WRNN nonetheless sought carriage far beyond that area. As part of that effort, WRNN sought cable carriage on Cablevision's systems on Long Island — even though television viewers could not receive WRNN's over-the-air signal there, and even though cable systems had never carried it there.

Exercising its editorial discretion, Cablevision determined that carrying WRNN — a station that is licensed to a community as much as 195 miles away from the systems on which the station demanded carriage, *see* Pet. App. 66a n.11, and that broadcasts mostly home-shopping programming — would not improve the mix of speech on its cable systems serving Long Island. In the wake of must carry's enactment, therefore, Cablevision asked the FCC to "remove" Long Island from WRNN's market, invoking a provision empowering the FCC to "exclude communities from" a station's market "to better effectuate the purposes of" the must-carry statute. 47 U.S.C. § 534(h)(1)(C)(i).

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[3] The must-carry statute instructed the FCC to consider whether must-carry rights should be accorded to home-shopping stations — indeed, it instructed the FCC to consider whether home-shopping stations should be allowed to hold broadcast licenses in the first place. *See* 47 U.S.C. § 534(g). The FCC answered both questions in the affirmative. *See Implementation of Section 4(g) of the Cable Television Consumer Prot. and Competition Act of 1992: Home Shopping Station Issues*, Report and Order, 8 FCC Rcd 5321, ¶¶ 22-23, 39 (1993).

Relying in part on WRNN's inability to cast an over-the-air signal over Long Island, the FCC granted Cablevision's request. *See Petition of Cablevision Sys. Corp.*, Memorandum Opinion and Order, 11 FCC Rcd 6453 (CSB 1996), *aff'd*, *Market Modifications and the New York Area of Dominant Influence*, Memorandum Opinion and Order, 12 FCC Rcd 12262 (1997), *aff'd*, *WLNY-TV, Inc. v. FCC*, 163 F.3d 137 (2d Cir. 1998).

In an apparent attempt to gain must-carry rights after all, however, a few years later WRNN moved its antenna some 50 miles to the south, extending the reach of its over-the-air signal. *See* Pet. App. 9a, 38a ¶ 11. It also added a small amount of programming that it said was of interest to Long Islanders. *See id.* at 38a ¶ 11; *see also id.* at 41a-43a ¶ 14. It then returned to the FCC, asking the agency to reconsider its prior order.

The FCC granted the request, returning Long Island to WRNN's market. In support of this conclusion, the FCC's Media Bureau relied heavily on a single fact: that WRNN now cast a signal over Long Island. *See id.* at 43a-44a ¶ 16. On review, however, the full FCC added reliance on an additional fact: that "WRNN submitted a substantial record that details programming that focuses on Long Island," which, according to the FCC, "serve[d] to add more support to" WRNN's case. *Id.* at 52a ¶ 4.

Although the full Commission at least acknowledged Cablevision's constitutional arguments (the Bureau had not), it rejected them summarily. For example, the Commission stated briefly its belief that carriage of WRNN would "help to ensure that the . . . station . . . remains a viable option for view-

ers who rely on free, over-the-air television service in Nassau and Suffolk counties." *Id.* at 55a. The Commission did not point to specific facts supporting its conclusion despite its burden of proving facts that would sustain its order against Cablevision's constitutional challenge.

Two of the FCC's five members dissented. The dissenters expressed concern that, instead of helping localism, compelling Cablevision to carry WRNN would hurt it. Cable carriage of WRNN on Long Island, they explained, would give WRNN an incentive to serve Long Island instead of Kingston, its community of license. As the dissenters put it: "There is a point at which the concept of a 'local market' reaches the breaking point and expanding it further will actually damage the localism interests we are trying to serve. For the sake of the people of Kingston, we hope we have not reached that point here." *Id.* 68a. Unwilling to accept that risk, the dissenters would have denied WRNN's market-modification request.

B. The Decision of the Court of Appeals.

Cablevision filed a petition for review of the FCC's order in the United States Court of Appeals for the Second Circuit, invoking 28 U.S.C. § 2341, *et seq.* The court of appeals denied the petition for review. *See* Pet. App. 1a-26a.

The panel rejected Cablevision's contention that the FCC's reliance on WRNN's Long Island-targeted content triggered strict First Amendment scrutiny. *See id.* at 21a-23a. The court cited three reasons: (1) there was no proof "that the restoration of the Long Island communities to WRNN's market . . . was based on some illicit content-based motive";

(2) "WRNN's local programming was an inconsequential factor in the FCC's ultimate decision"; and (3) under the must-carry statute, WRNN had been presumptively entitled to carriage on Long Island. *Id.* at 23a. The FCC "considered the amount of local programming provided by WRNN," the court stated, "only . . . in assessing the continued need to restrict a presumptive market defined solely by geography." *Id*.

The court then held that the FCC's order could withstand intermediate scrutiny. *See id.* at 23a-24a. The court of appeals stated that the FCC's order "advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further these interests." *Id.* at 23a (internal quotation marks omitted). The court of appeals added that "[t]he burden imposed by the order — the loss of control over one channel — is no greater than necessary to further the government's interest in preserving a single broadcast channel it found serves the local community." *Id.* at 23a-24a.

The court of appeals also rejected Cablevision's arguments under the Takings Clause of the Fifth Amendment. As noted above, the must-carry statute requires cable operators to carry local stations on a tier that reaches all subscribers. That means that cable companies may not carry local stations on channels that reach, for example, only a subset of digital subscribers. Cablevision therefore argued that compelled carriage of WRNN involves the appropriation of the electronic equivalent of a beachfront lot: a 6 MHz channel on the most widely distributed cable tier. And, Cablevision argued that there is no reason to treat valuable electronic prop-

erty differently than any other form of property. But the court of appeals disagreed, seeing no *per se* taking. *See id.* 24a-26a.

Finally, the court of appeals rejected Cablevision's argument that the FCC had misinterpreted the must-carry statute and failed to justify its decision under it. Under the must-carry statute, the FCC may modify a station's market only if doing so "better effectuate[s] the purposes of" the must-carry statute and promotes "the value of localism." 47 U.S.C. § 534(h)(1)(C). Cablevision argued that the FCC had failed to explain how compelling its Long Island systems to carry WRNN was consistent with either the value of localism (when carriage outside WRNN's traditional service area would only undermine the station's incentive to serve its community of license) or the statutory purpose (when Congress's intent had been to protect broadcast stations from unfair treatment in their traditional markets — not to expand their geographic reach). But the court of appeals ruled that the FCC had permissibly found that WRNN could serve both Kingston and Long Island, and that the must-carry statute was not offended by carriage outside a station's traditional service area. *See* Pet. App. 17a-19a.

Cablevision asked the court of appeals to stay its mandate pending the filing and disposition of a petition for a writ of certiorari, thereby extending a stay pending appeal that the court of appeals had granted earlier. Cablevision showed that compelled carriage of WRNN on the most widely distributed tier would mean dropping or moving C-SPAN (a popular government-affairs service) in some systems and Syfy (a popular entertainment service) in others. Apparently concluding that there was a rea-

sonable probability that this Court would grant Cablevision's petition, the court of appeals granted the motion. *Id.* at 69a; *see id.* at 26a; *see also Conkright v. Frommert*, 129 S. Ct. 1861, 1861-62 (2009) (Ginsburg, J., in chambers) (stay of mandate appropriate only where there is "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari") (internal quotation marks omitted).

REASONS FOR GRANTING THE PETITION

"At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner I*, 512 U.S. at 641. This Court's decisions in *Turner* nonetheless sanctioned a significant medium-specific deviation from that principle. Relying (among other things) on cable companies' putative position as monopolists, the Court upheld a statute that compelled those companies to carry programming they did not want to carry (thereby displacing programming they do want to carry). Since *Turner*, however, the cable industry has experienced transformative market and technological changes, including the emergence of vibrant competition. Cable companies simply no longer have the "bottleneck" control that was critical to this Court's rationale in *Turner*. In the wake of these changes, compelled carriage pursuant to the must-carry statute is no longer compatible with the Constitution. Moreover, compelled carriage of WRNN by Cablevision's Long Island systems cannot be justified under *Turner*'s rationale quite apart from these changes. And such carriage violates not only the Constitution but also the must-carry statute itself. For all these reasons, and because of the

fundamental nature of the First Amendment freedoms at stake, this Court should grant the petition.

I. THIS COURT SHOULD DECIDE WHETHER THE CONSTITUTION PERMITS MUST-CARRY OBLIGATIONS TO BE IMPOSED UNDER CURRENT CONDITIONS.

This case offers the Court an opportunity to decide whether must-carry obligations may still be imposed consistent with the Constitution despite sweeping industry changes since the 1990s. That issue has broad significance for virtually every cable system and broadcast station in the country — and, thus, for each of the Nation's more than 100 million television households. The question has a deep impact on perhaps the most fundamental of constitutional rights, the right to speak, as well as the equally fundamental right not to speak. And it profoundly affects the rights of viewers and listeners to receive their programming of choice. This case also crisply and squarely presents the question in the preferred context of an "as applied" challenge.[4]

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[4] *See*, *e.g.*, *Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184, 1191 (2008) ("Facial challenges are disfavored . . . ."); *Sabri v. United States*, 541 U.S. 600, 608-09 (2004) ("[F]acial challenges are best when infrequent. Although passing on the validity of a law wholesale may be efficient in the abstract, any gain is often offset by losing the lessons taught by the particular, to which common law method normally looks.") (citations omitted). At the same time, the as-applied nature of Cablevision's challenge would not prevent the Court from addressing the constitutionality of the must-carry statute as applied even to cable operators other than Cablevision. *See*, *e.g.*, *Citizens United v. FEC*, No. 08-205, slip op. at 12-20 (U.S. Jan. 21, 2010).

A. *Turner*'s Factual Underpinnings Have Evaporated.

As explained above, this Court in *Turner* rejected a facial First Amendment challenge to must carry by the narrowest of margins. In a pair of 5-4 decisions, the Court held that must-carry did not trigger strict scrutiny and could survive intermediate scrutiny. It so held on the basis of a specific and narrow rationale: (1) that cable operators had an incentive not to carry broadcasters; (2) that cable operators faced no competition and were therefore free to act on the incentive; (3) that stations not carried would lose audience and go dark; and (4) that noncable households would therefore be left with fewer over-the-air viewing options. The Court recognized that it was the Government's burden to prove that the rationale was factually supported.[5] And the Court ultimately (albeit narrowly) held that the Government had carried its burden of proof to sustain the statute against a facial challenge. *See Turner II*, 520 U.S. at 196-224.

In the years since the must-carry statute's 1992 enactment, however, the facts on the ground have changed beyond recognition. Under current circumstances, the FCC can no longer make the required showing — which explains why the FCC did not even attempt to make such a showing in this case.

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[5] *See Turner I*, 512 U.S. at 664 ("When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.") (internal quotation marks and citations omitted).

In particular, the FCC can no longer show that cable operators possess bottleneck power: Cablevision demonstrated before the FCC that cable operators now face vibrant competition. *See* C.A. App. 325.[6]

As the D.C. Circuit recently noted, "satellite television companies, which were bit players in the early '90s, now serve one-third of all subscribers." *Comcast Corp. v. FCC*, 579 F.3d 1, 3 (D.C. Cir. 2009); *see also* Pet. App. 39a. In light of the new industry paradigm, the D.C. Circuit (while addressing another set of cable regulations) determined that "[c]able operators . . . no longer have the bottleneck power over programming that concerned the Congress in 1992." *Comcast*, 579 F.3d at 8. The D.C. Circuit concluded that, "[c]onsidering the marketplace as it is today and the many significant changes that have occurred since 1992, the FCC has not identified a sufficient basis for imposing upon cable operators the 'special obligations,' *Turner I*, 512 U.S. at 641, represented by the [rules at issue there]." *Comcast*, 579 F.3d at 8.

Those statements stand in sharp contrast to this Court's statement in *Turner I* that "[t]he must-carry provisions . . . are justified by . . . the bottleneck monopoly power exercised by cable operators . . . ." 512 U.S. at 661. Similarly, they stand in sharp contrast to Justice Breyer's fifth-vote-supplying concurrence, which found dispositive that "a cable system . . . at present (*perhaps less in the future*) typically faces little competition, [and] that it therefore constitutes a kind of bottleneck." *Turner II*, 520 U.S. at 227-28 (emphasis added).

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[6] "C.A. App. ___" citations are to the court of appeals appendix.

The future of which Justice Breyer spoke then is now here. Today, cable systems face extensive competition and no longer constitute any kind of bottleneck. Accordingly, *Turner*'s rationale can no longer justify an intrusion on constitutional rights, under intermediate scrutiny or any other standard. Because no alternate rationale has ever been suggested, must carry cannot be sustained.[7]

In addition to the advent of competition, three other important industry changes have fatally undermined *Turner*'s rationale. *First*, *Turner* rested on the predicate that, once consumers subscribe to cable, they lose access to over-the-air signals because, at the time, available "A/B switches" used for toggling between cable and antenna inputs did not work well. *See Turner I*, 512 U.S. at 633; *Turner II*, 520 U.S. at 219-21. By contrast, today's A/B switches are "built into television receivers and can be easily controlled from a TV remote control device." *Carriage of the Transmissions of Digital Television Broad. Stations*, Notice of Proposed Rulemaking, 13 FCC Rcd 15092, ¶ 16 (1998) (footnote omitted). Because viewers today can easily access over-the-air programming even though they subscribe to cable, the FCC cannot establish that broadcast stations need to be carried on cable to reach cable subscribers.

Second, the percentage of Americans who rely on

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[7] *See* R. Matthew Warner, *Reassessing* Turner *and Litigating the Must-Carry Law Beyond a Facial Challenge*, 60 Fed. Comm. L.J. 359, 378 (2008) ("For those communities in which cable operators experience healthy competition, must-carry rules would not achieve Congress's objectives and, thus, as applied in those particular areas, the must-carry law should be considered unconstitutional.").

over-the-air television has plummeted. *Turner* held that compelled cable carriage was needed "to preserve access to free television programming for the 40 percent of Americans without cable." *Turner I*, 512 U.S. at 646. But, by the time WRNN filed its petition, the subset of U.S. households relying on over-the-air television had plummeted to 14 percent. *See* C.A. App. 329. Since then, the number has dwindled even further: the June 2009 transition to digital broadcasting caused large numbers of Americans to give up on over-the-air reception.[8] As the number of Americans relying on over-the-air television has decreased, so too has the weight of the governmental interest in preserving the viewing options of those Americans at the expense of free speech.

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[8] *See* Nielsen Wire, *The Switch from Analog to Digital TV* (Nov. 2, 2009), *available at* http://blog.nielsen.com/nielsenwire/media_entertainment/the-switch-from-analog-to-digital-tv/ (in the wake of the transition, about a quarter of previously "broadcast only" homes signed up for cable or DBS). Indeed, the over-the-air audience is now so small that some have argued that the FCC should terminate over-the-air broadcasting and recapture its valuable spectrum. *See* John Eggerton, *Broadcasters Defend Spectrum From Reclamation Proposals*, Multichannel News (Oct. 26, 2009), *available at* http://www.multichannel.com/article/366507-Broad casters _Defend_Spectrum_From_Reclamation_Proposals.php?rssid=20076&q=broadcast+television+FCC; *see also* Stuart Minor Benjamin, *Roasting the Pig To Burn Down the House: A Modest Proposal*, 7 J. on Telecomms. & High Tech. L. 95, 98 (2009) ("Simply stated, the costs of subsidizing cable or satellite service for the 14% of households that do not subscribe to cable or satellite but want television service would be a small fraction of the value of broadcast frequencies, as reflected in the value of those frequencies at auction once they could be used for any service.").

Finally, cable operators in the 1990s offered only one or two tiers of so-called "analog" service. But cable operators today provide additional "digital" tiers. Because the analog tiers were filled up long ago, new non-broadcast services are nowadays added to the digital tiers, which have fewer subscribers. *See Cable Horizontal and Vertical Ownership Limits*, Fourth Report & Order, 23 FCC Rcd 2134, ¶ 58 (2008), *vacated on other grounds*, *Comcast Corp. v. FCC*, 579 F.3d 1 (D.C. Cir. 2009). Yet, under the must-carry statute, broadcast stations like WRNN can commandeer a channel on the most widely distributed — and thus most desirable — tier. *See* 47 U.S.C. § 534(b)(7). Thus, in today's video marketplace, the must-carry statute goes well beyond placing broadcast stations on equal footing with non-broadcast services — it grants broadcast stations special privileges.

Indeed, WRNN's business model seems to be built on that fact. In the absence of must carry, the home-shopping station might still be able to secure substantial cable carriage in the New York City market, but it would likely be carried on a digital channel higher on the cable dial and on a less penetrated tier. By claiming must-carry rights, WRNN can occupy a favored spot on the dial alongside the most widely watched cable services. *See* 47 U.S.C. § 534(b)(6)-(7). The Constitution simply cannot justify that result. Must carry was enacted and upheld on the theory that it would protect access to over-the-air broadcast signals — not that it would give broadcasters preferential treatment so that they can capture channel surfers and earn rich home-shopping profits.

B. Whether Imposition of Must-Carry Obligations Remains Consistent with the Constitution Should Be Decided Now.

"Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment." *Turner I*, 512 U.S. at 636. And "[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Id.* at 641. To this principle, the *Turner* holdings recognized a broad and unusual exception — one that compels unwanted speech in a large and important sector of the communications media.

But that exception was never cast in stone — it was predicated on the special market circumstances that existed at the time. As this Court noted just last week, media-specific First Amendment rules "might soon prove to be irrelevant or outdated by technologies that are in rapid flux." *Citizens United v. FEC*, No. 08-205, slip op. at 9 (U.S. Jan. 21, 2010) (citing *Turner I*, 512 U.S. at 639). That is precisely what happened here: the circumstances underpinning *Turner*'s rationale have now ceased to exist. Thus, the time has come for the restraint on speech to be removed as well.

Despite the transforming market and technological changes that have occurred since the 1990s, and despite the D.C. Circuit's *Comcast* decision, the court of appeals in this case held that this Court's *Turner* decisions required it to affirm the FCC's carriage order. *See* Pet. App. 19a-24a. But *Turner* rejected a *facial* attack on the statute. *See Turner I*,

512 U.S. at 671 (Stevens, J., concurring in part and concurring in the judgment). A precedent upholding a statute against a *facial* attack never bars an as-applied challenge, particularly when facts essential to that precedent's holding have changed. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) ("[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing . . . that those facts have ceased to exist."); *Cutter v. Wilkinson*, 544 U.S. 709, 725 (2005) (decision of this Court upholding a statute against a facial challenge does not constitute precedent barring later "as-applied challenges").

The court of appeals' reluctance, however, is not surprising. Both the FCC and WRNN argued before the court of appeals that any other conclusion would in effect overrule *Turner*, and that only this Court has authority to do so.[9] Because other courts of appeals will likely display similar reluctance, a conflict of authority is unlikely to develop.

Granting review in this case has an additional advantage: it will allow the Court to decide whether must carry is consistent not only with the First Amendment, but also with the Takings Clause of the Fifth Amendment. The must-carry statute does not merely appropriate cable operators' valuable

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[9] *See* FCC C.A. Br. 46 ("Much as Cablevision would like to wish the *Turner* decisions away, . . . this Court has no power to overrule or depart from controlling Supreme Court precedent."); WRNN C.A. Br. 55 ("the *Long Island Order* is within the heartland of *Turner*, and this Court is not at liberty to depart from binding Supreme Court precedent unless and until the Court reinterprets that precedent") (internal quotation marks and brackets omitted).

channels;[10] it appropriates channels on the most widely distributed cable tier — the electronic equivalent of a beach-front lot. There is no reason to treat valuable electronic property differently than any other property.[11] Yet this Court has to date not had an opportunity to address whether the full and complete appropriation of the basic property unit in cable television, the individual television channel, effects a *per se* taking: the issue was not presented to this Court in *Turner*. By contrast, Cablevision has carefully preserved the issue throughout the instant litigation. *See* Pet. App. 24a-26a, 55a-58a ¶¶ 8-9. Thus, the Court can address the issue here. For this reason, too, review should be granted.

II. THIS COURT SHOULD DECIDE WHETHER, CONSISTENT WITH THE CONSTITUTION, CABLEVISION'S LONG ISLAND CABLE SYSTEMS MAY BE COMPELLED TO CARRY WRNN.

The Court should also decide whether Cablevision's Long Island systems can be compelled to carry WRNN. Even apart from the industry-wide changes

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[10] The statute itself recognizes that cable channels constitute valuable property. *See* 47 U.S.C. § 532 (providing that a non-broadcast service that a cable system does not wish to carry voluntarily may still secure access to a cable channel if it pays for the privilege).

[11] *See Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1058 (8th Cir. 1978) ("a requirement that facilities be . . . dedicated without compensation . . . would be a deprivation forbidden by the Fifth Amendment"), *aff'd*, 440 U.S. 689 (1979); *Turner Broad. Sys., Inc. v. FCC*, 819 F. Supp. 32, 67 n.10 (D.D.C. 1993) (Williams, J., dissenting) ("The creation of an entitlement in some parties to use the facilities of another, *gratis*, would seem on its face to implicate *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) . . . .").

described above, *Turner*'s rationale cannot justify compelled carriage of WRNN here. Indeed, because of the decision below, First Amendment values have suffered across the board. Cablevision is not merely being forced to carry programming against its judgment. It must replace valuable cable programming (including the public-affairs programming provided by C-SPAN) with home-shopping programming that consumers desire to watch to a much lesser extent. This issue, moreover, helps place all facts of the case before the Court, providing concrete factual context, illustrating the breadth of must carry's application, and avoiding possible questions about the scope of the other questions presented.

A. Compelled Carriage of WRNN Here Cannot Be Predicated on *Turner*'s Rationale.

In addition to changes in the industry generally, there are five reasons why *Turner*'s rationale cannot be invoked to require Cablevision's Long Island systems to carry WRNN.

First, *Turner* rests fundamentally on the notion that must carry is necessary to safeguard the viewing choices of over-the-air viewers; absent carriage on cable, *Turner* suggested, over-the-air stations serving non-cable subscribers might have insufficient viewers to survive. But WRNN itself has trumpeted that it has *no* over-the-air audience: in asking the FCC for permission to make technical changes to its over-the-air signal, WRNN has stated that "the impact on the public will be imperceptible since, according to Nielsen Media Research, there [is] no reportable over-the-air viewing for the station . . . ." *WRNN-TV Assocs.*, 19 FCC Rcd 12343, 12344 (MB 2004); *see also* Pet. App. 45a ¶ 18 (noting

WRNN's "lack of audience share"). There is no important governmental interest in saving a broadcast signal for an over-the-air audience that does not exist. *See Turner II*, 520 U.S. at 233, 244 (O'Connor, J., dissenting).

Second, and relatedly, *Turner* rested on the notion that broadcasters should be *restored* to the audience that they would have had in a world without cable.[12] *Turner* did not rest on the notion that broadcasters should be made *better off* than they would have been without cable.[13] Here, Cablevision does not provide service to WRNN's traditional broadcast market in upstate New York; it thus does not compete for viewers. Consequently, compelled

[12] *See Turner I*, 512 U.S. at 659 ("Congress granted must-carry privileges to broadcast stations on the belief that the broadcast television industry is in economic peril due to the physical characteristics of cable transmission and the economic incentives facing the cable industry."); *id.* at 663 ("protecting noncable households from loss of regular television broadcasting service due to competition from cable systems is an important federal interest") (internal quotation marks omitted); *Turner II*, 520 U.S. at 193 ("In short, Congress enacted must-carry to preserve the existing structure of the Nation's broadcast television medium while permitting the concomitant expansion and development of cable television.") (internal quotation marks omitted); *Turner II*, 520 U.S. at 226 (Breyer, J., concurring) (describing the rationale as being "to prevent . . . a *decline* . . . of programming choice for an ever-shrinking noncable subscribing segment of the public") (emphasis added).

[13] *See Turner II*, 520 U.S. at 222 ("[A] system of subsidies would serve a very different purpose than must-carry. Must-carry is intended not to guarantee the financial health of all broadcasters, but to ensure a base number of broadcasters survive to provide service to noncable households."); *id.* at 246 (O'Connor, J., dissenting) ("the must-carry provisions have never been justified as a means of *enhancing* broadcast television") (emphasis in original).

carriage here would not give Long Island viewers access to a broadcast station on which they have traditionally relied, or give WRNN access to viewers its traditional over-the-air signals were capable of reaching. It would instead extend WRNN's reach by giving cable subscribers access to an unknown home-shopping station that merely seeks the promise of must-carry riches.

Third, *Turner*'s rationale cannot justify compelled carriage where, as here, there is no evidence that the station seeking carriage will decline absent carriage. *Turner* proposed that "broadcast stations denied carriage will either deteriorate to a substantial degree or fail altogether." *Turner I*, 512 U.S. at 666 (plurality); *see id.* at 667; *Turner II*, 520 U.S. at 195, 208. The record here shows that WRNN (a station whose low-cost home-shopping programming is already carried to millions of cable homes) has been on the air for more than a quarter of a century, *see* Pet. App. 34a, and has prospered without carriage on Long Island — so much so that it was able to fund expensive changes to its transmitter without any guarantee of a must-carry pay-off. To defend must carry against a *facial* challenge, it may have been enough for the FCC to show that, without must carry, hardship would befall *some* stations. *But see Turner I*, 512 U.S. at 682 (O'Connor, J., dissenting). In the face of an as-applied challenge, however, there must be a showing that hardship will befall the particular station at issue.

Fourth, *Turner*'s rationale does not apply where, as here, there is no evidence that the cable operator has declined to carry a station with a view to stifling competition. *Turner* posited that must carry was needed to protect stations from cable operators who

might refuse to carry them for an anticompetitive reason, namely to protect themselves from competition for local advertising. There is no record evidence that Cablevision acted on any such motive here. To the contrary, Cablevision declined to carry the home-shopping station because few subscribers are interested in watching it. To defend must carry against a *facial* challenge, it may have been enough for the FCC to show that anticompetitive motives drove *some* carriage decisions. *But see Turner I*, 512 U.S. at 682 (O'Connor, J., dissenting). In the face of an as-applied challenge, however, the Government must prove that anticompetitive motives drove the specific carriage judgment that the Government seeks to override.

Finally, *Turner*'s rationale simply ceases to function where a cable operator is subject to competition. *See supra*, pp. 17-19. *Turner*'s fundamental premise — the reason it found must carry necessary — was that cable operators had market power that enabled them to drop popular broadcast stations without having to fear losing subscribers. But that reasoning no longer holds: all cable systems in the United States are now subject to competition from two satellite operators that have garnered about one third of all subscribers. *See supra*, p.18. Cablevision's systems on Long Island are subject to particularly vibrant competition: as the order under review itself observes, Cablevision's Long Island systems *also* face robust competition from Verizon's fiber-optic cable television service. *See* Pet. App. 52a ¶ 4 n.15.

Under these circumstances, compelling Cablevision's Long Island systems to carry WRNN cannot be justified on the basis of *Turner*. Even apart from the impossibility of reconciling this application of

must carry with *Turner* itself, *see* Sup. Ct. R. 10(c), this application of must carry proves precisely why this Court's immediate intervention is necessary. Must carry is no longer being used merely as a shield to prevent potentially anticompetitive decisions from shutting out over-the-air stations that might fail as a result. It has now become a sword that stations with no over-the-air viewership can invoke to override legitimate editorial choices and expand their geographic scope at the expense of valuable educational programming that viewers prefer to watch. This is something the First Amendment cannot tolerate.

B. The FCC Order Under Review Should Be Subject to Strict Scrutiny.

In *Turner*, this Court recognized that must-carry orders can avoid strict scrutiny only if they "confer must-carry rights on . . . broadcasters . . . irrespective of the content of their programming." *Turner I*, 512 U.S. at 647. This case squarely implicates an aspect of the must-carry statute that is directly contrary to that admonition.

The must-carry statute's market-modification provision states that, in evaluating market-modification requests, the FCC should "afford particular attention to the value of localism" — *i.e.*, to whether a station provides "news coverage of issues of concern to [a] community or provides carriage or coverage of sporting and other events of interest to the community." 47 U.S.C. § 534(h)(1)(C)(ii). In *Turner I*, this Court recognized that this provision "appears to single out . . . broadcasters for special benefits on the basis of content." 512 U.S. at 644 n.6. The Court, however, had no occasion to rule on

the issue on a facial challenge. *See id.*

In this case, by contrast, the FCC expressly relied on this aspect of the statute and cited the content of WRNN's programming as a factor militating in favor of compelled carriage. *See* Pet. App. 51a-52a ¶ 4.[14] Yet the court of appeals held that such consideration of content did not trigger strict scrutiny. *See* Pet. App. 22a-23a. Each of the three reasons listed by the court of appeals is insupportable.

First, the court of appeals erred in suggesting that consideration of content triggers strict scrutiny only when there is an "illicit content-based motive." Pet. App. 23a. This Court has consistently held that "illicit legislative intent is not the *sine qua non* of a violation of the First Amendment." *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983); *see also Turner II*, 520 U.S. at 257 (O'Connor, J., dissenting) ("Whether a provision is viewpoint neutral is irrelevant to the question whether it is also *content* neutral."). Thus, the Second Circuit's contrary ruling flies in the face of this Court's unambiguous precedent.

Second, the court of appeals erroneously suggested that strict scrutiny is not triggered if considerations of content are given only "inconsequential" weight. Pet. App. 23a. The court of appeals cited no authority for that proposition, and this Court has re-

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[14] That was hardly unusual – the FCC does so routinely. *See*, *e.g.*, *Tennessee Broad. Partners*, Memorandum Opinion and Order, 23 FCC Rcd 3928, ¶¶ 61-75 (2008); *Harron Cablevision of Mass. d/b/a Harron Commc'ns Corp.*, Memorandum Opinion and Order, 18 FCC Rcd 16856, ¶ 4 (2003); *Mid-State Television, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 5525, ¶ 15 (2001).

jected the use of *de minimis* exceptions in the First Amendment area. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 567 (2001) ("There is no *de minimis* exception for a speech restriction that lacks sufficient tailoring or justification."); *see also Turner I*, 512 U.S. at 679 (O'Connor, J., dissenting) ("[W]e have never held that the presence of a permissible justification lessens the impropriety of relying in part on an impermissible justification. In fact, we have often struck down statutes as being impermissibly content based even though their primary purpose was indubitably content neutral."); *id.* at 686 (Ginsburg, J., dissenting) ("an intertwined or even discrete content-neutral justification does not render speculative, or reduce to harmless surplus, Congress' evident plan to advance local programming").

Finally, the Second Circuit erred in suggesting that the FCC may consider content in returning WRNN to its statutory "presumptive" market — apparently on the theory that Congress fixed the default market without regard to content. Pet. App. 22a. It may be that, if the FCC had not limited WRNN's market previously, the FCC would not have had an opportunity to restore WRNN to the statutory default and to rely on WRNN's content in the process. But the FCC did limit WRNN's market, it did restore that market, and, in doing so, it did rely on content. If, in restoring WRNN's default market, the FCC had relied on WRNN's political viewpoint, its order undoubtedly would have been impermissibly content-based. It is hard to see how this is any different: "[r]egulation of the subject matter of messages, though not as obnoxious as viewpoint-based regulation, is also an objectionable form of content-based regulation." *Hill v. Colorado*,

530 U.S. 703, 723 (2000).

In sum, this Court in *Turner* left open whether strict scrutiny is triggered by the market-modification provision's instruction that the FCC consider a station's programming content. That issue is important. And although *Turner* had no occasion to rule on the issue, the Court strongly suggested that the answer is "yes." The court of appeals nonetheless resolved the issue the other way. None of its three purported distinctions is compatible with this Court's precedent. Review of this aspect of the court of appeals' decision is therefore appropriate as well.

III. THIS COURT SHOULD DECIDE WHETHER COMPELLED CARRIAGE OF WRNN IS CONSISTENT WITH THE MUST-CARRY STATUTE.

The Court should also decide whether compelled carriage in this case is consistent with the must-carry statute. The issue is not merely important. It also is closely related to the fundamental constitutional dispute at the core of this case and places before the Court that dispute's full context.

As noted above, the order under review altered WRNN's must-carry market pursuant to 47 U.S.C. § 534(h)(1)(C). That provision states that the FCC may modify stations' markets "to better effectuate the purposes of this section." *Id.* § 534(h)(1)(C)(i). It further states that the FCC must "afford particular attention to the value of localism." *Id.* § 534(h)(1)(C)(ii).

Compelled carriage of WRNN by Cablevision's systems on Long Island will do nothing to further

the value of localism. Localism calls for the needs of Long Islanders to be served by Long Island stations — not by stations from upstate New York.[15] Conversely, localism is not furthered by giving a Kingston station an incentive to neglect its Kingston audience and to cater to a seemingly more appealing audience on Long Island.[16]

More generally, the purpose of the must-carry statute was to restore broadcasters to the audience that they would have had in a world without cable — not to make broadcasters better off than they would have been without cable. *See supra*, p.26. Thus, requiring carriage of WRNN many of miles away from its traditional over-the-air service area

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[15] *See*, *e.g.*, *Broadcast Localism*, Report on Broadcast Localism and Notice of Proposed Rulemaking, 23 FCC Rcd 1324, ¶ 5 (2008) ("the Commission has long recognized that every community of appreciable size has a presumptive need for its own transmission service") (internal quotation marks omitted).

[16] *See* Pet. App. 68a (Joint Statement of Commissioners Copps and Adelstein, dissenting) ("There is a point at which the concept of a 'local market' reaches the breaking point and expanding it further will actually damage the localism interests we are trying to serve."). Indeed, the FCC previously recognized precisely that in defending against WRNN's attack on the agency's prior market-modification order. *See* Brief of Respondents-Appellees at 29-30, *WLNY-TV, Inc. v. FCC*, No. 97-4243 (2d Cir. Jan. 22, 1998) ("[I]f a station licensed to upstate New York were carried on cable systems serving . . . more densely populated Nassau County, it would have an incentive to provide programming targeted at the more profitable Long Island communities at the expense of the community the station has been licensed to serve. That would defeat the very localism that must carry is intended to promote as well as the congressional policy that television stations be licensed to various communities throughout the country and not just in the most populous areas.").

does not "better effectuate the purposes of" the must-carry statute.

Despite these serious statutory concerns, the FCC held that Cablevision must carry WRNN. It did so without even addressing whether compelled carriage "better effectuate[s] the purposes of this section" and promotes "the value of localism." The FCC thereby violated both the must-carry statute, 47 U.S.C. § 534(h)(1)(C), and the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 27, 2010

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
August Term 2007
(Argued: April 7, 2008 Decided: June 22, 2009)
Docket No. 07-5553-ag

CABLEVISION SYSTEMS CORPORATION,
Petitioner,

— v. —

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA,
Respondents,

WRNN LICENSE COMPANY, LLC,
Intervenor Respondents,

B e f o r e: WALKER, CABRANES, and RAGGI, *Circuit Judges*.

Petition for review of an order of the Federal Communications Commission directing petitioner Cablevision to carry the signal of television station WRNN pursuant to 47 U.S.C. § 534 (a)-(b) & (h)(1)(c). Cablevision argues that the Commission's decision contravenes the text and purpose of the statute, and that the statute, as applied, violated Cablevision's First and Fifth Amendment rights.

PETITION DENIED.

HENK BRANDS (Allan J. Arffa and J. Adam Skaggs, on the brief), Paul, Weiss, Rifkind, Wharton & Garrison LLP, Washington, D.C., and Howard J.

Symons and Tara M. Corvo (on the brief), Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., Washington, D.C., for Petitioner.

JACOB M. LEWIS (Matthew B. Berry, Joseph R. Palmore, and Nicholas A. Degani, Federal Communications Commission, and Thomas O. Barnett, John J. O'Connell, Jr., Catherine G. O'Sullivan, and Robert J. Wiggers, U.S. Department of Justice, on the brief), Federal Communications Commission, Washington, D.C., for Respondent.

ANDREW G. MCBRIDE (Todd M. Stansbury and William S. Consovoy, on the brief), Wiley Rein LLP, Washington, D.C., for Intervenor.

Jane E. Mago, Marsha J. MacBride, and Erin L. Dozier (on the brief), National Association of Broadcasters, Washington, D.C., for Amicus Curiae National Association of Broadcasters.

John M. Walker, Jr., *Circuit Judge*:

The must-carry provisions of the Cable Television Consumer Protection and Competition Act ("1992 Cable Act" or "Cable Act") require cable operators to transmit, over their cable systems, the signals of certain broadcast stations operating in the same market. The statute also gives the Federal Communications Commission ("FCC" or "the Commission") authority to modify a given broadcast station's market, thus potentially changing the universe of cable operators required to carry that station. In this case, Cablevision, a cable systems operator, petitions for review of the FCC's decision to include certain Long Island communities in the market of WRNN, a station broadcasting from upstate New York, and the resulting order directing

Cablevision to carry WRNN on its Long Island cable systems. Because we find no constitutional or legal error in the FCC's decision, we DENY the petition.

BACKGROUND

I. The 1992 Cable Act and Its Must-Carry Provisions

The must-carry provisions of the 1992 Cable Act require "cable operators," such as Cablevision, to carry the signals of a number of "local commercial television stations." 47 U.S.C. § 534(a). The statute caps the number of such stations that a cable operator must carry at "up to one-third of the aggregate number of usable activated channels" on that operator's system. *Id.* § 534(b)(1)(B). For our purposes, a "local commercial television station" is a broadcast station (*i.e.*, a station that transmits its signal over the airwaves) that, "with respect to a particular cable system, is within the same television market as the cable system." *Id.* § 534(h)(1)(A).

A broadcast 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." *Id.* § 534(h)(1)(C)(i). Currently, the Commission relies on the commercial publications of Nielsen Media Research that divide the nation into a series of coterminous geographic "Designated Market Areas" ("DMAs") based on viewership patterns. 47 C.F.R. § 76.55(e)(2). For example, the New York City DMA contains not only the five boroughs of the city, but also neighboring areas of Long Island, Connecticut, New Jersey, and upstate New York, as well as limited areas of Pennsylvania, be-

cause people in those areas, in the aggregate, watch the same television channels.

The upshot of the must-carry provisions is that, in general, each cable operator is required to carry the signal of every broadcast station in its DMA, until it has dedicated "one-third of the aggregate number of usable activated channels" on its system to such channels. 47 U.S.C. § 534(b)(1)(B); *see also id.* § 534(a)-(b), (h)(1)(C). Both Cablevision and WRNN are located within the New York City DMA, and Cablevision currently has fewer than one-third of its channels dedicated to must-carry stations.

The only relevant exception to this must-carry rule occurs under the statute's market modification provision. Pursuant to this provision, the FCC may, on written request, add certain communities to, or exclude certain communities from, a given broadcast station's market "to better effectuate the purposes" of the statute. § 534(h)(1)(C)(i). If a given community is excluded from a station's market, cable operators in that community are no longer required to carry that station. If a given community is added, cable operators in that community must commence carriage of that station's signal unless they already devote one-third of their channels to local broadcast stations. *See id.*

In considering market modification requests, the statute instructs the FCC to

> 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 com-

> munity; [the "historical carriage factor"]
>
> (II) whether the television station provides coverage or other local service to such community; [the "local service factor"]
>
> (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; [the "other stations factor"] and
>
> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community [the "viewing patterns factor"].

47 U.S.C. § 534(h)(1)(C)(ii)(I)-(IV). The FCC's interpretation and application of this provision lies at the heart of this dispute.

II. The *Turner* Litigation

Shortly after the passage of the 1992 Cable Act, several cable operators mounted a First Amendment challenge to the legislation by claiming that the statute, on its face, impermissibly burdened the rights both of cable programmers, who produce television shows exclusively for cable distribution (*e.g.*, HBO, TNT), and of cable operators, who actually transmit the programming to consumers via coaxial cable (*e.g.*, Cablevision). In *Turner Broadcasting System, Inc. v. FCC* ("*Turner I*"), 512 U.S. 622 (1994), the Supreme Court held that the statute's requirements were content neutral, and therefore subject to intermediate scrutiny. The Court's major-

ity opinion announced that, at least in the abstract, the statute served three "important," interrelated interests articulated by Congress in the statute's findings: "(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming." *Id.* at 662. The majority, however, concluded that "deficienc[ies]" in the record prevented it from determining whether the statute was sufficiently tailored to further those interests without substantially burdening protected speech and remanded for further proceedings. *Id.* at 667-68.

Significantly, the majority noted that the district court had not addressed whether the language of the market modification provision, with its references to "the value of localism" and to stations "provid[ing] news coverage of issues of concern to such community," altered the content-neutrality of the statute. *Id.* at 643 n.6 (quoting 47 U.S.C. § 534(h)(1)(C)(ii)). The Court did not address this point. *Id.* In a dissent joined by three other justices, Justice O'Connor, relying in part on the language of the market modification provision, wrote that the must-carry regulation was content-based, and thus subject to strict scrutiny, such that it could only be justified by a compelling governmental interest and would have to be narrowly tailored to achieve its intended purpose. *Id.* at 680.

In 1997, with a more fully developed record before it, the Supreme Court held that "the must-carry provisions further important governmental interests" and that the provisions did not violate the

First Amendment because they did "not burden substantially more speech than necessary to further those interests." *Turner Broad. Sys., Inc. v. FCC* ("*Turner II*"), 520 U.S. 180, 185 (1997). None of the opinions in *Turner II* specifically mentioned or cited the market modification provision.

III. Market Modification Decisions in the New York City DMA

In 1996, Cablevision petitioned the FCC to exclude a number of communities from the markets of several local broadcast stations, including WRNN, a station licensed in Kingston, New York that transmitted its signal from Overlook Mountain in Woodstock, New York. The FCC's Cable Services Bureau (the "Bureau") granted Cablevision's request in part and denied it in part, excluding communities in Long Island's Nassau and Suffolk counties from WRNN's market, but declining to exclude communities elsewhere, such as New York's Westchester County and Connecticut's Fairfield County. *Cablevision Sys. Corp.* ("*1996 CSB Order*"), 11 F.C.C.R. 6453 (1996). In making both decisions, the Bureau noted that, in the New York DMA, reliance on the four enumerated factors alone would not allow it to "take into account the particular difficulties faced by these stations in light of the purposes of the carriage rule." *Id.* at 6475 ¶ 50. Accordingly, the Bureau also considered the station's "Grade B contour," *i.e.*, the area within which viewers can receive its broadcast signal over the air, and the "geography and terrain" separating the target communities from the broadcasting station. *Id.* at 6480-81 ¶ 67. In 1997, the FCC affirmed the Bureau's decision, noting that

> Grade B contour coverage, in the absence of other determinative market facts (i.e. where the four statutory factors by themselves define the market, where there is no clear proof that the contour fails to reflect actual coverage, or where there is a terrain obstacle such as a mountain range or a significant body of water) is an efficient tool to adjust market boundaries because it is a sound indicator of the economic reach of a particular television station's signal.

Market Modifications and the New York Area of Dominant Influence ("*1997 FCC Order*"),[1] 12 F.C.C.R. 12262, 12271 ¶ 17 (1997) (footnote omitted).

When WRNN and several other stations petitioned for review, this court endorsed the agency's reliance on Grade B contour in particular and factors not enumerated in the statute in general. We approved of the view that "the four factors [enumerated in the statute] are not exclusive," and we held that "[t]he FCC and the Cable Services Bureau, experts in the area of regulation of the television industry, carefully and properly analyzed the particular facts of the various petitions under the four factors listed in the statute and under non-statutory factors." *WLNY-TV, Inc. v. FCC*, 163 F.3d 137, 141-42 (2d Cir. 1998).

IV. The Current Proceedings

Subsequent to the outcome of the 1996-98 proceedings, WRNN moved its transmitter to Beacon

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[1] "Area of dominant influence" ("ADI") is the pre-2001 equivalent of the term "Designated Market Area" ("DMA").

Mountain, New York, some 50 miles closer to Manhattan, and commenced digital-only broadcast operations. In 2005, it petitioned the FCC to add back some of the communities in the New York City DMA in its market so that Time Warner Cable, which served the relevant communities, would have to carry WRNN on its system. Relying primarily on Grade B contour and local programming, the FCC's Media Bureau (the successor to the Cable Services Bureau) granted WRNN's request. *WRNN License Co.*, 20 F.C.C.R. 7904, 7911 ¶¶ 15, 16 (2005). Time Warner Cable did not appeal the decision to the full Commission.

In 2006, relevant to the present review, WRNN petitioned for re-inclusion of several communities, this time served by Cablevision, in Long Island's Nassau and Suffolk Counties. The Bureau denied the request as to a number of the Suffolk County communities based on WRNN's failure to comply with "standardized evidentiary requirements." *WRNN License Co.* ("*2006 Bureau Order*"), 21 F.C.C.R. 5952, 5956 ¶ 9 (2006). WRNN does not seek review of the Bureau's decision as to these communities. As to the remaining Nassau and Suffolk communities, which we will refer to as the "Long Island communities," the Bureau noted that the enumerated market modification factors did not offer strong support for WRNN's position. The parties vigorously disputed the amount of Long Island-specific programming WRNN offered, and the Bureau ultimately concluded that the local service factor weighed against carriage. As to the historical carriage factor, the Bureau found it insignificant that both cable systems in neighboring communities and digital broadcast satellite operators in the Long

Island communities carried WRNN. It also accorded little weight to the fact that Verizon was scheduled to begin carrying WRNN on its FiOS system, which delivers television programming to subscribers over fiber optic phone lines, thus competing directly with cable television service. Nonetheless, the Bureau granted WRNN's request to include the remaining Long Island communities, noting that Commission precedent "instructs us to give little weight to the level of viewership [that] station[s] like WRNN achieve" and to treat Grade B contour as a "very relevant factor" when "the other [enumerated] factors would not add significantly to the analysis of a station's market." *Id.* at 5957 ¶ 10. In the Bureau's view, Grade B contour weighed decisively in WRNN's favor.

On appeal, the FCC affirmed the Bureau's order. *WRNN License Co.* ("*2007 FCC Order*"), 22 F.C.C.R. 21054 (2007). It disagreed with the Bureau's analysis of the local service and historical carriage factors, finding that those factors lent additional support to the Bureau's decision to include the Long Island communities in WRNN's market. *Id.* at 21056 ¶ 4 & n. 15. The FCC also rejected Cablevision's claims that the Bureau's application of the market modification provision violated the First Amendment and the takings clause of the Fifth Amendment. *Id.* at 21057-59 ¶¶ 7-10. Cablevision filed a timely petition for review in this court.

DISCUSSION

In general, we will overturn an agency decision "only if it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 89

(2d Cir. 2000) (quoting 5 U.S.C. § 706(2)(A)). "An agency's factual findings must be supported by substantial evidence," which means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (internal quotation marks omitted). We review an agency's disposition of constitutional issues *de novo*. *See Rural Tel. Coal. v. FCC*, 838 F.2d 1307, 1313 (D.C. Cir. 1988).

In its petition for review, Cablevision argues that the FCC's order improperly analyzed the statutory factors, that its decision contravened the "purpose" of the must-carry statute, and that requiring Cablevision to carry WRNN violates the First and Fifth Amendments. We address each of these arguments in turn.

I. The FCC's Analysis of the Section 534(h)(1)(C) Factors

A. The Local Service Factor

Cablevision claims that the FCC failed to adequately explain its finding that WRNN provided significant programming targeted to the Long Island communities. By insisting, however, that "at a minimum, the FCC was required to explain" why Cablevision's arguments and evidence to the contrary were "unpersuasive," Cablevision Br. at 35, Cablevision overstates an agency's duty to account for its actions.

An administrative agency has a duty to explain its ultimate action. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action."). However, it need not explain each and

every step leading to this decision; it is enough "if the agency's path may reasonably be discerned." *Id.* (internal quotation marks omitted). Here, the reason for the FCC's decision to affirm the Media Bureau's order is perfectly clear: it agreed with the reasoning of the Bureau in most respects and disagreed in certain others, but only in ways that strengthened the validity of the Bureau's decision. In such circumstances, we will not require the FCC to sift through each piece of evidence offered by a party and explain why it is more or less compelling than the counter-evidence put forth by an opponent.

The fact that we review agency fact-finding for "substantial evidence" supports our conclusion that the FCC's explanation was adequate. To determine whether substantial evidence supports a finding, we need ask only whether "a reasonable mind might accept [it] as adequate" support. *Cellular Phone Taskforce*, 205 F.3d at 89 (internal quotation marks omitted). Here, the agency found WRNN's evidence that it had significant Long Island-targeted programming to be more persuasive than Cablevision's evidence to the contrary. We need not know the agency's precise rationale in order to conclude that it was reasonable for the agency to so find. While such an explanation might have aided our reasonableness inquiry, it is not indispensable.

Both sides offered evidence regarding WRNN's programming content. According to Cablevision, its evidence showed that WRNN broadcast less than an hour of programming covering "Long Island issues" in a "representative week." Cablevision Br. at 33. WRNN pointed to evidence that it had aired over 4000 Long Island-related items between June and

November 2005. It would be reasonable for the agency to resolve this conflicting evidence in favor of WRNN and to conclude (as it obviously did) that Cablevision failed to include some programming that should properly be considered as local to Long Island, or that its sample week was not actually representative. Thus, substantial evidence supports the FCC's finding on this factor.

We note that the Bureau, on its initial consideration of this petition, made a contrary finding as to this factor. This fact, however, does not alter our assessment of the FCC's ultimate determination. "An agency conclusion may be supported by substantial evidence even though a plausible alternative interpretation of the evidence would support a contrary view." *Robinson v. Nat'l Transp. Safety Bd.*, 28 F.3d 210, 215 (D.C. Cir. 1994) (internal quotation marks omitted). On questions of fact, our task on review is not to "displace [the agency's final] choice between two fairly conflicting views." *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

B. The Historical Carriage Factor

After the Bureau issued its 2006 Order, but before the FCC affirmed it, Verizon began carrying WRNN on its FiOS system to areas of Nassau and Suffolk Counties. *2007 FCC Order*, 22 F.C.C.R. at 21056 ¶ 4 & n.15. The FCC concluded that this "overlapping carriage provides support for WRNN-DT with respect to the historic carriage factor." *Id.* at ¶ 4 n.15. In a single paragraph in its brief, Cablevision argues that this analysis is "contrary to clear statutory language" because "[c]arriage initiated in the past few months does not constitute *historical* carriage." Cablevision Br. at 36-37.

Cablevision, however, fails to supply a contrary, "correct" definition of "historically carried," and does not discuss whether we should defer to the Bureau's interpretation of the term, in accordance with *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), as we did with the must-carry statute generally in *WLNY-TV, Inc. v. FCC*, 163 F.3d at 142. Even if Cablevision could demonstrate error in the sense that the Verizon carriage was not "historical," they have failed to show why such error would warrant vacatur given that (1) Cablevision does not contest the propriety of considering Verizon's carriage as an unenumerated, non-statutory factor, and (2) the Bureau decided to order carriage despite its belief that WRNN had not been "historically carried" in the relevant communities. Accordingly, we decline to vacate the FCC's order based on this asserted error in the FCC's analysis of the historical carriage factor.

C. Grade B Contour

In its *1997 FCC Order* involving Cablevision and WRNN, the Commission stated that "Grade B contour coverage, in the absence of other determinative market facts (i.e.[,] . . . a terrain obstacle such as a mountain range or a significant body of water), is an efficient tool to adjust market boundaries." *1997 FCC Order*, 12 F.C.C.R. at 12271 ¶ 17. Cablevision contends that the Hudson River, the Long Island Sound, and the "skyline of New York City" constitute such terrain obstacles, and it was therefore inconsistent with the *1997 FCC Order* for the FCC and the Bureau to weigh Grade B contour in WRNN's favor here. Cablevision Br. at 38. The *1997 FCC Order* itself forcefully rejects this reason-

ing, because it explicitly *endorses* the use of Grade B contour as proof of market *in the New York City DMA*-the same context in which Cablevision now contends that relying on Grade B contour is inappropriate. Because the *1997 FCC Order* establishes, rather than refutes, the relevance of Grade B contour in market modifications within the New York City DMA, the FCC's decision here is consistent with its precedent.

D. The Other Stations and Viewing Patterns Factors

Cablevision also alleges error in the FCC's treatment of the two remaining statutory factors. In the instant order, the FCC stated that Congress did not intend "the 'coverage by other qualified stations' factor to bar a request for extending a station's market when other stations could be shown to serve the communities at issue." *2007 FCC Order*, 22 F.C.C.R. at 21055-56 ¶ 4.

In essence, then, the FCC decided to give the factor significant weight when a lack of coverage by other stations favored including a community in a station's market, but to discount its importance when the existence of coverage arguably cut against inclusion. Cablevision argues that this decision "is directly contrary to . . . the statutory text." Cablevision Br. at 40. This argument is unavailing. The text of the statute directs the agency to consider a number of factors, and it is clear from the opinion that both the FCC and the Bureau did consider this factor. Upon doing so, the FCC saw no reason to depart from its normal policy, which is to discount the "other stations' coverage" factor when it tends to cut against inclusion. Unsurprisingly, Cablevision

cites no decision of this court vacating a decision because we disagree with an agency's weighing of a statutory factor. The law is to the contrary. In interpreting another provision of the 1992 Cable Act that directs the FCC to undertake a factoral analysis, the D.C. Circuit concluded that giving little or no weight to a statutory factor, as long as the factor is expressly considered, does not violate the statute:

> [T]he statute by its terms merely requires the Commission to consider the . . . factors . . . . That means only that it must reach an express and considered conclusion about the bearing of a factor, but is not required to give any specific weight to it. Therefore, when the Commission, after expressly considering the potential role of the . . . factor, ultimately concluded that it should not be given any weight, it did not violate the statute.

Time Warner Entm't Co. v. FCC, 56 F.3d 151, 175 (D.C. Cir. 1995) (internal quotation marks and citations omitted). This sound reasoning is equally applicable here.

Cablevision also argues that the FCC improperly weighed the evidence with respect to the viewership patterns factor. This argument fails for the same reasons.

II. The FCC's Consideration of the Purposes of the Must-Carry Statute

The market modification provision of the must-carry statute provides that the FCC may add or remove communities from a local broadcast station's market "to better effectuate the purposes of this section." 47 U.S.C. § 534(h)(1)(C)(i). Cablevision argues that the FCC's inclusion of the Long Island

communities in WRNN's market contravened the purposes of must-carry in two ways. First, expanding WRNN's market in fact frustrates the goal of "localism" by necessarily decreasing programming relevant to the community WRNN has traditionally served (the Kingston community). And second, rewarding WRNN's actions with broader must-carry rights encourages gamesmanship which frustrates the purpose of must-carry, which is to preserve, but not expand, a broadcast station's market. We reject the first argument because it incorrectly presumes that WRNN cannot increase Long Island-targeted programming without decreasing Kingston-targeted programming. We reject the second because it rests on a conception of the statute's purpose that is overly narrow, unsupported by precedent, and contrary to the language of the statute.

According to Cablevision, the FCC's decision defeats the purposes of the must-carry statute because "[a]ny targeting of other spokes [i.e., communities that are remote from 'a DMA's metropolitan center'] necessarily comes at the expense of the station's community of license." Cablevision Br. at 43. This argument rests on the false premise that WRNN's programming consists entirely of either Kingston-specific programming or Long Island-specific programming. As Cablevision reminds us elsewhere, however, a great deal of WRNN's content is "home-shopping" programming that targets neither Kingston nor Long Island specifically. *See* Cablevision Br. at 33 (claiming that 78% of WRNN programming in a representative week "consisted of home shopping and infomercials"). It is entirely possible, and Cablevision does not suggest otherwise, that WRNN could increase its Long Island-targeted pro-

gramming by decreasing its home-shopping programming, leaving its Kingston-targeted programming unaffected. And to the extent that a Kingston viewer might prefer certain home-shopping programming to programming concerning Long Island, we do not see how frustrating *that* preference undermines localism.

Essentially, Cablevision's claim is that, as a matter of law, a cable company in a community that is outside a "DMA's metropolitan center," such as Long Island, should not be required to carry a station based in a different community that is also remote from the center, such as Kingston: in Cablevision's parlance, a "spoke" cable company should not be required to carry a station based in a different spoke. Congress, however, did not share that view, and, as the FCC points out, the default rule is that WRNN must be carried by cable operators throughout the New York City DMA. *See* 47 U.S.C. § 534(a)-(b), (h)(1)(C).

Cablevision also contends that the FCC's decision rewards "gamesmanship" because WRNN moved its transmitter and changed its programming simply to obtain must-carry privileges in other communities. Cablevision Br. at 46. In other words, they suggest that the FCC cannot award WRNN a regulatory benefit if WRNN has changed its conduct in an attempt to receive that benefit. This rule, applied universally, would run counter to a central premise of the regulatory scheme that a regulated entity will change its conduct in socially desirable ways to achieve a regulatory benefit. Accordingly, we reject it.

Cablevision also argues that any decision that increases a station's market is contrary to the purpose of the statute, because the purpose is "to return broadcasters to their 'natural market,'" Cablevision Br. at 47; thus, any FCC action which augments a broadcaster's market contravenes this purpose. The purpose of the statute, however, is not to "preserve" a group of broadcast stations, or a particular conception of a station's market, but, *inter alia*, to "preserv[e] the benefits of free, over-the-air television," and "promot[e] the widespread dissemination of information from a multiplicity of sources." *Turner I*, 512 U.S. at 662. We do not think that these purposes are served only by granting broadcasters the minimum must-carry coverage necessary for survival; or that these purposes are frustrated by actions which result in a station's greater prosperity. Accordingly, we conclude that the FCC did not violate the statutory admonition that market modifications should be made "to better effectuate the purposes of this section." 47 U.S.C. § 534(h)(1)(C)(i). The remainder of Cablevision's arguments on this point fail to persuade us otherwise.

III. Cablevision's First Amendment Challenge

Cablevision argues that "compelled carriage of WRNN on Long Island violates the First Amendment on an as-applied basis." Cablevision Br. at 51. We think that the *Turner* cases do not foreclose the possibility of a successful as-applied First Amendment challenge to the 1992 Cable Act's market modification provisions. In this case, however, Cablevision has failed to demonstrate that the FCC applied the market modification provision unconstitutionally.

As a threshold matter, a party alleging violation of its First Amendment rights must show that the challenged government action actually regulates protected speech. Thus, in *Turner I*, the Court found it necessary to establish, as an "initial premise," that "[c]able programmers and cable operators engage in and transmit speech," and that "the must-carry rules," in general, "regulate cable speech." 512 U.S. at 636. Similarly, Cablevision here must articulate *how* the FCC's order "interferes with [its] speech rights." *Time Warner Entm't Co.*, 240 F.3d at 1129.

This threshold requirement serves two interrelated functions. Identifying the "burden" imposed by government action enables a court to undertake heightened scrutiny analysis: without understanding how a regulation burdens speech, a court cannot decide whether that burden is "no greater than is essential" to further the goals of the regulation in question. *See United States v. O'Brien*, 391 U.S. 367, 377 (1968). And the failure to identify the burden has an even more fundamental consequence: without a plausible allegation that the offensive conduct interferes with First Amendment rights or, put differently, that the interaction between government and citizen "bring[s] into play the First Amendment," *id.* at 376, a reviewing court has neither a reason nor the ability to subject the conduct of the governmental actor to heightened scrutiny.

The *Turner I* and *Turner II* Courts considered the First Amendment implications of the "must-carry provisions" taken as a whole, as distinguished from the market modification provisions at issue here,

and found that they posed two potential burdens on speech rights:

> First, the [must-carry] provisions restrain cable operators' editorial discretion in creating programming packages by reducing the number of cable channels over which they exercise unfettered control. Second, the rules render it more difficult for cable programmers to compete for carriage on the limited channels remaining.

Turner II, 520 U.S. at 214 (citation, alterations, and internal quotation marks omitted); *accord Turner I*, 512 U.S. at 637.

Cablevision raises a similar, but not identical, First Amendment challenge to that raised in *Turner I* and *Turner II*. Cablevision presents an as-applied First Amendment challenge to the FCC's order modifying the market of WRNN, pursuant to the provision of the must-carry statute on market determinations, 47 U.S.C. § 534(h)(1)(C)(ii). The challenged order threatens the First Amendment interest of Cablevision in a similar manner to that described in *Turner I* and *Turner II*. The order reduces the number of channels over which Cablevision exercises editorial control by forcing it to carry WRNN, *see Turner II*, 520 U.S. at 213, and it also makes it more difficult for the cable programming arm of Cablevision to compete for carriage on the remaining channels, *id.*

In order to apply the appropriate level of scrutiny, we must first determine whether the order is content based or content neutral. *Turner I*, 512 U.S. at 642. In *Turner I*, the Court concluded that the burdens imposed on cable operators as well as the benefits conferred on broadcast channels were con-

tent neutral. *See id.* at 643-44 ("Although the provisions interfere with cable operators' editorial discretion by compelling them to offer carriage to a certain minimum number of broadcast stations, the extent of the interference does not depend upon the content of the cable operators' programming. The rules impose obligations upon all operators, save those with fewer than 300 subscribers, regardless of the programs or stations they now offer or have offered in the past."); *id.* at 645 (noting that the selection of broadcast channels that must be carried on the cable systems was "also unrelated to content").

The *Turner I* Court explicitly rejected the argument that "the must-carry regulations are content based because Congress' purpose in enacting them was to promote speech of a favored content." *Id.* at 646. Indeed, as the Court noted, when a cable system is required to "make room for a broadcast station, nothing would stop a cable operator from displacing a cable station that provides all local- or education-oriented programming with a broadcaster that provides very little." *Id.* at 648. However, separate from the must-carry provisions' general requirements, the *Turner I* Court expressly declined to decide whether a market modification order motivated by a concern for localism would be content based or content neutral. *See id.* at 644 n.6. The Court suggested that such an order might confer "special benefits on the basis of content." *Id.*

However, we think the order before us now is content neutral. WRNN's presumptive DMA would have included Nassau and Suffolk counties. It was Cablevision that first invoked the market modification provision to exclude these counties from

WRNN's market. It succeeded based on the FCC's concern, in part, that WRNN lacked a Grade B contour reaching Long Island. When WRNN, after expanding its Grade B contour, returned to the FCC seeking restoration of its presumptive DMA, Cablevision argued that the station had failed to demonstrate that the various factors outlined in the market modification provision, including the local programming factor, weighed in WRNN's favor. The Bureau and the FCC reached different conclusions on this factor, yet both agreed that the totality of circumstances no longer justified excluding Long Island communities from WRNN's presumptive DMA. The FCC considered the amount of local programming provided by WRNN only in this context, *i.e.*, in assessing the continued need to restrict a presumptive market defined solely by geography. Moreover, WRNN's local programming was an inconsequential factor in the FCC's ultimate decision. Additionally, Cablevision has not alleged, much less proven, that the restoration of the Long Island communities to WRNN's market under these circumstances was based on some illicit content-based motive. *See id.* at 652. We conclude, therefore, that the order is content neutral and deserving of intermediate scrutiny.

We have no trouble in concluding that the order "advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further these interests." *Turner II*, 520 U.S. at 189 (citing *O'Brien*, 391 U.S. at 377). The burden imposed by the order — the loss of control over one channel — is no greater than necessary to further the government's interest in preserving a single

broadcast channel it found serves the local community.

In sum, we conclude that the application of the market modification provision in this case does not violate the First Amendment. While we cannot rule out the possibility that the FCC's order might interfere with speech rights in other ways, Cablevision has presented neither factual support nor even a theory of any such additional infringement.

IV. Cablevision's Fifth Amendment Challenge

Finally, Cablevision asserts that by ordering it to carry WRNN, the FCC effected a *per se* taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). The *sine qua non* of the takings analysis in *Loretto*, however, is "permanent *physical* occupation." *Id.* (emphasis added). This *per se* takings rule is "very narrow," *id.* at 441, and its touchstone is "required acquiescence" to the occupation of the property by an uninvited stranger or an "interloper with a government license." *FCC v. Fla. Power Corp.*, 480 U.S. 245, 252-53 (1987); *see also Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 374 (2d Cir. 2006) ("Physical takings (or physical invasion or appropriation cases) occur when the government physically takes possession of an interest in property for some public purpose."). Our own test for whether a regulation constitutes a permanent physical occupation, set forth in *Southview Associates, Ltd. v. Bongartz*, 980 F.2d 84 (2d Cir. 1992), looks to (1) the permanency of the invasion, and (2) whether the invasion is an "absolute, exclusive physical occupation." *Id.* at 94-95. In turn, we must examine the nature of the interference with "the bundle of rights that constitute ownership," *id.* at

95, such as the right to possess and exclude, the right to control the use of the property, and the right to sell the property.

The initial determination — whether the invasion is physical — is primarily factual. *Cf. John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1357 (Fed. Cir. 2006) ("[T]he determination of whether government occupancy is 'permanent' is highly fact-specific."). The fact finder must determine, in the first instance, whether any physical assets are involved. *See, e.g.*, *Qwest Corp. v. United States*, 48 Fed. Cl. 672, 689 (2001) ("In determining whether plaintiff's property has been subject to a physical taking, our initial inquiry must focus on the nature of the property at issue. What are the physical assets involved?"). The FCC found that the transmission of WRNN over the Cablevision system did not require installation of any equipment at Cablevision's facilities. "Rather, a programming stream is transmitted in bits of data over cable bandwidth through electrons or photons at the speed of light." *2007 FCC Order*, 22 F.C.C.R. at 21058 ¶ 8. It further found that Cablevision "retains complete control over its property." *Id.* We see no reason to disturb these findings or the conclusion that the transmission of WRNN's signal does not involve a physical occupation of Cablevision's equipment or property. And Cablevision effectively conceded that this physicality is absent here when it argued in its reply brief that "[t]he result [under *Loretto*] should be no different when the occupation is not of a *physical* pipeline but of an electronic one." Cablevision Reply Br. at 25.

The amorphous nature of the alleged "taking" suggests that the takings claim here fits more comfortably within the Supreme Court's "regulatory taking" analytical framework. *See Penn Cent. Trans. Co. v. City of New York*, 438 U.S. 104 (1978). In order to establish a regulatory taking, Cablevision was required to show that the regulation had an economic impact that interfered with "distinct investment-backed expectations." *Id.* at 124. Cablevision has presented no such evidence despite its "heavy burden" on this issue, *Tobe*, 464 F.3d at 375, and any regulatory taking theory must therefore fail.

CONCLUSION

Because we find no abuse of discretion or constitutional violation in the FCC's decision to include the relevant Long Island communities in WRNN's market for must-carry purposes, we DENY the petition for review. In accordance with our order of March 14, 2008, the stay of the FCC order pending judicial review is vacated, and the applicable deadline for Cablevision's compliance is one week from the issuance of the mandate in this case.

APPENDIX B

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

In the Matter of

WRNN License Company, LLC

Petition for Modification of Television Market of
Television Station WRNN-DT, Kingston, New York

CSR 6956-A

MEMORANDUM OPINION AND ORDER

Adopted: May 23, 2006
Released: May 25, 2006

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. WRNN License Company, LLC ("WRNN"), licensee of television station WRNN-DT, Kingston, New York ("WRNN-DT" or the "Station"), filed the above captioned petition for special relief, seeking to modify the Station's market to include all cable communities located in Nassau and Suffolk Counties that are served by Cablevision Systems Corporation's ("Cablevision") cable systems in which the Station is not carried (the "Communities"). Cablevision filed an opposition to the petition and WRNN filed a reply. Cablevision filed a surreply, and WRNN filed a response. For the reasons stated below, we grant the petition in part and deny the petition in part.

II. BACKGROUND

2. Pursuant to Section 614 of the Communications Act and implementing rules adopted by the Commission in *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues ("Must Carry Order")*,[1] commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its designated market area ("DMA"), as defined by Nielsen Media Research.[2] A DMA is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Each county in the United States is assigned to a market based on the home-market stations that receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing

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[1] 8 FCC Rcd 2965, 2976-2977 (1993).

[2] Section 614(h)(1)(C) of the Communications Act, as amended, 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) of the Commission's rules requires that a commercial broadcast television station's market be defined by Nielsen Media Research's DMAs. 47 C.F.R. § 76.55(e); *Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules,* 14 FCC Rcd 8366 (1999)(*"Modification Final Report and Order"*).

are included.[3]

3. Under the Act, however, the Commission is also directed to consider changes in 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 television market to better effectuate the purposes of this section.[4]

4. 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, has 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

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[3] For a more complete description of how counties are allocated, *see* Nielsen Media Research's *Nielsen Station Index: Methodology Techniques and Data Interpretation.*

[4] 47 U.S.C. § 534(h)(1)(C).

> or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and non-cable households within the areas served by the cable system or systems in such community.[5]

5. The legislative history of the provision states that:

> where the presumption in favor of [DMA] carriage would result in cable subscribers losing access to local stations because they are outside the [DMA] in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the area in which they serve and which form their economic market.
>
> * * * *
>
> [This subsection] establishes certain criteria that the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[6]

6. In the *Modification Final Report and Order*, the Commission, in an effort to promote administrative efficiency, adopted a standardized evidence ap-

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[5] *Must Carry Order,* 8 FCC Rcd at 2976 (1993).

[6] H.R. Rep. 102-628, 102d Cong., 2d Sess 97 (1992).

proach for modification petitions 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 maps delineating the station's technical service area and showing the location of the cable system headends and communities in relation to the service areas.

Note: Service area maps using Longley-Rice (version 1.2.2) propagation curves may also be included to support a technical service exhibit.[7]

(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 guides.

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[7] 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 geographical 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.

(5) Cable system channel line-up cards or other exhibits establishing historic carriage, such as television guide listings.

(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., 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.[8]

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 *Market Modification Final Report and Order* provides that parties may continue to submit whatever additional evidence they deem appropriate and relevant.[9]

7. In *Carriage of Digital Television Broadcast Signals*, the Commission concluded that under Section 614(a) of the Act, a digital-only television station has mandatory carriage rights, and amended the rules accordingly.[10] The Commission has estab-

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[8] 47 C.F.R. § 76.59(b).

[9] *Market Modification Final Report and Order*, 14 FCC Rcd at 8389.

[10] *See Carriage of Digital Television Broadcast Signals*, 16 FCC Rcd 2598, 2606 (2001)(*"DTV Must Carry Report and Order"*); 47 C.F.R. § 76.64(f)(4). The Commission concluded that for purposes of supporting the conversion to digital signals and facilitating the return of the analog spectrum, a television station may demand that one of its high definition digital

lished a framework for analyzing market modifications for digital television stations.[11] The Commission stated that Nielsen's market designations, publications, and assignments for the analog television market should continue to be binding on broadcast stations transitioning to digital television broadcasting. The presumption is that the market of the station's digital signal is coterminous with the station's market area for its analog signal during the transition period.[12] The Commission also found that the statutory factors in Section 614(h), the current process for requesting market modifications, and the evidence needed to support such petitions, will be applicable to digital television modification petitions during the transition period when television stations broadcast both an analog signal and a digital signal.[13] The Commission recognized that the technical coverage area of a digital television signal may not exactly replicate the technical coverage area of the analog television signal. Therefore, in deciding DTV market modification cases, the Commission

("HDTV") or standard definition digital ("SDTV") television signals be carried on the cable system for delivery to subscribers in either a digital or an analog format. *DTV Must Carry Report and Order*, 16 FCC Rcd at 2630.

[11] *See DTV Must Carry Report and Order*, 16 FCC Rcd at 2635-36.

[12] We note that in adopting technical rules for the digital transmission of broadcast signals, the Commission attempted to insure that a station's digital over-the-air coverage area would replicate as closely as possible its current over-the-air analog coverage area. *See Sixth DTV Report and Order*, 12 FCC Rcd 14588, 14605 (1997).

[13] *See DTV Must Carry Report and Order*, 16 FCC Rcd at 2636.

stated that it would take into consideration changes in signal strength and technical coverage because of new digital television channel assignments and power limits. It concluded that all other matters concerning the modification process for digital television signals will be decided on a case-by-case basis.[14]

8. In 1985, WRNN inaugurated service on analog Channel 62 from a transmitter located on Overlook Mountain in Woodstock, New York and the station's main studios in Kingston, New York. In 1996, by a Cable Services Bureau Order, the Communities at issue in this Petition were deleted from WRNN's analog television market for purposes of must carry.[15] On review of the Bureau Order, the Commission concluded that WRNN failed to satisfy any statutory criteria applicable to market modification proceedings.[16] The Commission found that WRNN had no history of cable carriage on Cablevision's systems serving the Communities, that WRNN did not provide local service to the Communities, and that WRNN did not place either a Grade A or Grade B contour over the Communities.[17] In addition, the Commission concluded that WRNN is geographi-

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[14] *Id.*

[15] *See Petition of Cablevision Systems Corporation for Modification of the ADI of Television Broadcast Stations WTBY, WRNN, WMBC-TV, and WHAI-TV*, 11 FCC Rcd 6453 (1996) (*WRNN Modification Decision*), aff'd *WLNY-TV, Inc. v. FCC*, 163 F.3d 137 (2d Cir. 1998) ("*WLNY-TV, Inc.*").

[16] *Market Modifications and the N.Y. Area of Dominant Influence*, 12 FCC Rcd 12262 (1997) ("*NY ADI Order*").

[17] *Id.* at 12266-67; *see WRNN Modification Decision*, 11 FCC Rcd at 6480-6481.

cally distant from the Communities with Woodstock, New York, where the station's transmitter site was located, an average of 104.75 miles away.[18] The *NY ADI Order* also found that several television stations licensed to New York City and adjacent communities had a closer economic nexus, cast a City Grade signal over the Communities, and provided more focused local programming than WRNN.[19] The Commission also determined that WRNN had no audience in the counties in which the cable systems were located.[20]

9. Cablevision serves the communities at issue with essentially three large cable systems serving Nassau County; Suffolk County; and Shelter Island, Riverhead, and East Hampton (the "Shelter Island System") which are also located in Suffolk County, New York. We will first address WRNN's market modification request relating to the communities served by Cablevision's Suffolk, County; and Shelter Island cable systems. As noted earlier, in the *Modification Final Report and Order*, the Commission adopted standardized evidentiary requirements covering DMA modification petitions. WRNN's petition fails to include information required by the *Modification Final Report and Order* with respect to the communities served by Cablevision's Suffolk County and Shelter Island cable systems, and accordingly

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[18] *NY ADI Order,* 12 FCC Rcd at 12266-67*; see WRNN Modification Decision* 11 FCC Rcd at 6480.

[19] *NY ADI Order,* 12 FCC Rcd at 12266-67*; see WRNN Modification Decision* 11 FCC Rcd at 6480.

[20] *NY ADI Order,* 12 FCC Rcd at 12266-67*; see WRNN Modification Decision* 11 FCC Rcd at 6480.

WRNN's petition with regard to these systems will be dismissed. In this instance, we note that WRNN's petition fails to include information regarding the first and second evidentiary provisions of the *Modification Final Report Order*. These provisions require petitioners, such as WRNN, to include maps illustrating the relevant community locations. While WRNN provided a map showing WRNN-DT's predicted 41 dBu signal contour, it did not provide a map clearly illustrating the relevant cable communities and their distances from the WRNN transmitter site.[21] While 41 dBu coverage in the Nassau County Communities is apparent, we cannot make a reasoned analysis with respect to the isolated communities served by Cablevision in Suffolk County including Cablevision's Shelter Island system without a map indicating coverage in each specific Community.[22] Consequently, we will dismiss WRNN's petition with regard to the communities served from Cablevision's Suffolk County; and Shelter Island cable systems. In doing so, we also note that it is evident that WRNN is geographically distant from the Communities in Suffolk County, and that the Station is separated from those Suffolk County Communities by the significant barriers that the Long Island Sound and New York City present.[23] In addition, we note that WRNN's signal levels covering these isolated communities appear to be

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[21] 47 C.F.R. §76.59(b).

[22] *See* WRNN Petition at Exhibit 2.

[23] Indeed, the driving distance between Islip, New York, one of the closest Suffolk County Communities and Kingston, New York, WRNN-DT's community of license, is over 143 miles. Cablevision Opposition at Exhibit 3.

weaker, as well as, more dispersed over this area of Long Island.

10. As noted above, and contrary to the situation regarding the communities served by Cablevision's systems located in Suffolk County, it is apparent that WRNN's 41dBu signal covers all of Nassau County. Consequently the information relating to maps and other geographic information becomes less important in our analysis of WRNN's petition as it relates to the Nassau Communities. Therefore, we will address the arguments raised by the parties with respect to the communities served by Cablevision's Nassau County cable system. However, before we address the specific arguments raised by the parties, we note that the Commission in the *NY ADI Order* addressed a very similar factual pattern to that presented by WRNN's Petition.[24] There, the Commission recognized that stations, like WRNN, that offer specialty programming generally have low viewership levels, and for that reason the Commission instructs us to give little weight to the level of viewership station's like WRNN achieve.[25] Also the Commission's decision in the *NY ADI Order* recognized that in instances where the other three factors would not add significantly to the analysis of a station's market, Grade B coverage becomes a very relevant factor in determining whether to modify a particular station's market.[26] In this instance, were we to apply the other three statutory factors without considering WRRN's signal coverage, WRNN would

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[24] *NY ADI Order*, 12 FCC Rcd at 12271.

[25] *Id.*

[26] *Id.*

have little if any carriage rights anywhere within its New York Market. Consequently, we will address WRNN's petition with the Commission's guidance in mind.

11. WRNN asserts that since the *WRNN Modification Order*, it has modified its operations and program services and currently provides a unique local service to the Communities located in Nassau County from its digital-only television facilities.[27] WRNN argues that it is geographically proximate to the Nassau Communities because its new digital transmitter site is located on Beacon Mountain, New York, which is significantly closer to the Nassau Communities that its old analog antenna site[28] WRNN emphasizes that the change in circumstances that led the Commission to modify WRNN-DT's market to include cable systems in New York City, also warrant the addition of the Nassau Communities to WRNN-DT's market.[29] Cablevision responds that the Nassau Communities are significantly distant from WRNN-DT's transmitter,[30] and that WRNN-DT's signal is weak in the Communities.[31] Further, Cablevision argues and that the

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[27] WRNN Petition at 10-11.

[28] *Id*. at 12-13, Exhibit 7, citing *Busse Broadcasting Corp.*, 11 FCC Rcd 6408, 6416, 6422-25 (1996), *Jasas Corp*., 14 FCC Rcd 6968, 6972 (1999).

[29] *Id.* at 4-5, citing *WRNN License Company, LLC, Petition for Modification of the Television Market of WRNN-DT, Kingston, New York*, 20 FCC Rcd 7904 (MB 2005) ("*WRNN NYC Modification Decision*").

[30] Cablevision Opposition at 11-23.

[31] *Id.* at 23-24.

changes in circumstances that the Commission found relevant in the *WRNN NYC Modification Decision* are not relevant to the Communities, especially given the geographic barriers that separate the Communities from WRNN-DT's community of license and the dearth of WRNN-DT programming that is relevant to residents of the Nassau Communities.[32] WRNN's market modification arguments and Cablevision's responsive arguments are set forth in detail below.

Historic Carriage. WRNN-DT is a single channel digital-only television station operating on DTV Channel 48.[33] WRNN asserts that cable systems in areas adjacent to the Communities have historically carried the Station.[34] Additionally, WRNN states that digital broadcast satellite (DBS) operators DirecTV and EchoStar make the station available to a significant number of residents in the Nassau Communities via local-into-local service,[35] and that Verizon plans to carry the Station on its competitive systems in the Nassau Communities.[36] Cablevision counters that neither WRNN-DT nor WTBY, another Kingston-area broadcast station, has history of carriage on cable systems in the Nassau Communities. Cablevision argues that only one of the 78 Communities abuts a community where WRNN-DT (or its analog predecessor) has historically been carried, and that all of the Communities are in a differ-

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[32] *Id.* at 50-52.

[33] WRNN Petition at 1.

[34] *Id.* at 8-9.

[35] *Id.*

[36] WRNN Response at 2.

ent county than the adjacent communities.[37] Further, Cablevision asserts that DBS operators are statutorily required to carry all broadcast stations in a DMA if the DBS operator carries any broadcast station in that DMA and the markets may not be modified.[38] Therefore, DBS carriage is not reliable evidence of historic carriage.[39]

12. We find that WRNN-DT (and its analog predecessor) has not been historically carried on the cable systems that serve the Nassau Communities. The Commission has, however, held that carriage on systems that serve "communities adjacent to and near the Communities at issue is indicative of interest in the programming of" the station,[40] and WRNN presents evidence of carriage on cable systems that are adjacent or sufficiently near to those Communities that reside in Nassau County.[41]

13. **Local Service.** WRNN asserts that it essentially provides a 48 dBu City grade signal to all of Nassau County Communities.[42] It states that the current coverage of the Nassau County Communities is the result of facilities modifications that WRNN has undertaken pursuant to Commission

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[37] Cablevision Opposition at 10.

[38] Cablevision Surreply at 9, citing 47 C.F.R. § 76.66(b).

[39] Cablevision Surreply at 9.

[40] *Petition of Paxson Communications Corporation for Modification of Television Market of Station WPXD(TV). Ann Arbor, Michigan*, 13 FCC Rcd 17869, 17874 (1998).

[41] *See* WRNN Petition at 8-9, Exhibit 5.

[42] *Id*. at 10-11.

approval.[43] According to WRNN, the Nassau Communities are geographically proximate to WRNN-DT, and that the Communities are even closer to WRNN-DT's main studio in Manhattan.[44] WRNN argues that the distances between the Nassau Communities and the Station are well within the range that the Commission has approved for adding communities to a station's must carry market, or in refusing to delete communities from a station's market.[45] Cablevision notes that the Nassau Communities and the Station are separated by the Long Island Sound, and asserts that the driving distance from the closest Community to WRNN-DT's community of license is 111 miles.[46]

14. Each party has filed extensive engineering reports that support their respective coverage claims.[47] On balance, we conclude that WRNN's report demonstrating that it provides a 41 dBu signal, the functional equivalent of a Grade B signal contour, over all of Nassau County to be accurate and consistent with good engineering practices.[48] As the Commission has previously held, Grade B coverage "is an efficient tool to adjust market boundaries because it is a sound indicator of the economic reach of

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[43] *Id.*

[44] *Id*. at 12-14.

[45] *Id.* at 13.

[46] Cablevision Opposition at Exhibit 3.

[47] *See id.* at Exhibit 6; WRNN Reply at Exhibits A, B and C; Cablevision Surreply at 3-7; WRNN Response at 4-5.

[48] *Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 16 FCC Rcd 5945, 5957 (2001).

a particular television station's signal."[49] With regard to programming, WRNN asserts that it airs more than fourteen hours per week of daily, regularly scheduled, local news and public affairs programming of specific relevance to the Communities, including "RNN Metro" and "Richard French Live."[51] WRNN points out that "Richard French Live" covers national and global issues as well, but in a manner that is of particular interest to the Communities.[52] In addition, WRNN asserts that the Station provides a wide range of other news and information programming targeted to the Communities, including "News on the Hour" in which Station reporters provide local weather, news, financial reports and traffic reports covering the Communities,[53] averaging over 650 Long Island specific reports every month.[54] WRNN also states that it provides entertainment calendar updates listing ongoing and one-time events throughout the New York City area and in the Communities,[55] and that it originates and airs numerous sporting events and sports scores of high schools and colleges located throughout the Communities.[56] WRNN offers letters from several local political leaders in support of carriage of WRNN-DT on cable systems in the

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[49] *NY ADI Order*, 12 FCC Rcd at 12271.

[51] WRNN Petition at 15-23.

[52] *Id.* at 20.

[53] *Id.* at 25-26, Exhibits 18-20.

[54] WRNN Reply at 13.

[55] WRNN Petition at 27-28.

[56] *Id.* at 26-27.

Communities, asserting that WRNN-DT serves the local needs of the Communities.[57]

15. Cablevision counters that WRNN-DT does not air fourteen hours of local news and public affairs programming that is specifically relevant to the Communities.[58] According to Cablevision, less than one hour of WRNN-DT's weekly programming is dedicated to covering Long Island issues.[59] Cablevision also argues that many of WRNN-DT's Long Island specific reports are short in duration (often part of a headline scroll), and that most news stories that WRNN-DT airs are national, regional and global in scope.[60]

16. We disagree with WRNN's assertion that WRNN-DT airs fourteen hours of programming that is of specific relevance to the Communities every week. The programming analysis that WRNN submitted does not indicate that much of WRNN-DT's programming concerning Long Island focuses on those Communities in Nassau County.[61] Further, WRNN-DT's situation is consistent with the "hub and spoke" model described by the Second Circuit in *WLNY-TV, Inc*,[63] in which the outlying "spoke"

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[57] *See id.* at Exhibits 9-17.

[58] Cablevision Opposition at 33.

[59] *Id*. at 34-35.

[60] *Id.* at 10-11.

[61] *See* WRNN Petition at Exhibit 4.

[63] *See WLNY-TV, Inc.*, 163 F.3d at 144. Indeed, *WLNY-TV, Inc.* dealt with this same issue before WRNN-DT upgraded its system, upholding the Commission's decision to remove Long Island communities from WRNN's market.

communities in Nassau County and New York's Hudson Valley are connected by the "hub" of New York City. The "spoke" market programming generally is not of interest to other "spoke" communities. The record in this proceeding is not impressive relative to WRNN's programming targeted to the Nassau Communities. Nevertheless, the record does indicate that WRNN airs at least some programming aimed at the Nassau Communities. More impressive, however, is the evidence that WRNN-DT places a Grade B signal contour over all of Nassau County. Indeed, WRNN-DT places a City Grade signal contour over a substantial portion of Nassau County.[64] Based on the Commission's guidance in the *NY ADI Order*,[65] we find that, in this instance, the local coverage and service factor weighs in favor of modifying of WRNN-DT's market with respect to Cablevision's Communities within Nassau County.

17. **Coverage by Other Qualified Stations**. We believe that Congress did not intend this factor to bar a request, but rather intended to enhance a station's claim where it could be shown that other stations do not serve the communities at issue.[66] As we stated in the *WRNN Modification Decision*, however, the Communities have, "an abundance of far

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[64] A 48 dBu signal contour is the functional equivalent of a City Grade signal contour. *See Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 16 FCC Rcd 5945, 5957 (2001).

[65] *See supra* nn. 24-26 and accompanying text (discussing the *NY ADI Order*).

[66] *See*, *e.g.*, *WRNN NYC Modification Decision*, 20 FCC Rcd at 7911, *Lenfest Broadcasting, LLC*, 19 FCC Rcd 8970, 8980 (2004).

closer New York City and Long Island stations programming to the cable communities."[67] Therefore, we assign no weight to this factor.

18. **Viewership Patterns**. WRNN submits evidence that WRNN-DT's cume rating in the Communities is a 5.9, argues that "[l]ast year, Long Island residents placed hundreds of [home shopping] orders with WRNN," and offers that since the beginning of 2004, WRNN has received 1,800 phone calls from the Communities.[68] We do not believe that Long Island viewership patterns of WRNN-DT meet our "moderate level of viewership" threshold.[69] We note, however, that in cases of stations with home shopping formats, which are specialty stations, we do not weigh heavily a lack of audience share.[70] Therefore, while WRNN-DT may have limited audience appeal, this factor is not outcome determinative on its own.

19. **Conclusion.** In view of the foregoing, we find that grant of WRNN's petition with respect to those communities served by Cablevision's Nassau County cable system is in the public interest.[71]

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[67] *WRNN Modification Decision*, 11 FCC Rcd at 6481.

[68] WRNN Petition at 29-31.

[69] In *KSBW License, Inc.*, the station at issue had a 22 cume, more than three times WRNN-DT's reported cume. *KSBW License, Inc.*, 11 FCC Rcd 2368, 2371 (1996).

[70] *Avenue Cable Service, Inc*. 11 FCC Rcd 4803, 4812 (1996).

[71] WRNN's petition is granted with respect to all of the communities served by Cablevision's system with the identifier PSID 003146. *See* WRNN Petition at Exhibit 1 (List of Communities). We note that ten of the Communities served by

III. ORDERING CLAUSES

20. Accordingly, **IT IS ORDERED**, pursuant to Section 614(h) of the Communications Act of 1934, as amended,[72] and Section 76.59 of the Commission's rules[73] that the captioned petition for special relief (CSR-6956-A), filed by WRNN License Company, LLC **IS GRANTED IN PART** and **IS DENIED IN PART** to the extent indicated herein.

21. These actions are taken pursuant to authority delegated by Section 0.283 of the Commission's rules.[74]

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Deputy Chief, Policy Division, Media Bureau

PSID 003146 reside in Suffolk County. We include these communities in the modification of WRNN-DT's market because they are an integrated part of Cablevision's Nassau County system, and are in close proximity to Cablevision's Nassau County cable system.

[72] 47 U.S.C. § 534(h).

[73] 47 C.F.R. § 76.59.

[74] 47 C.F.R. § 0.283.

APPENDIX C

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

In the Matter of

Petition of WRNN License Company, LLC

For Modification of Television Market For Television Station WRNN-DT, Kingston, New York

Application for Review

CSR-6956-A

WRNN License Company, LLC

v.

Cablevision Systems Corporation

Request for Mandatory Carriage of Television Station WRNN-DT, Kingston, New York

CSR-7053-M

MEMORANDUM OPINION AND ORDER

Adopted: August 24, 2007
Released: November 29, 2007

By the Commission: Commissioners Copps and Adelstein dissenting and issuing a joint statement.

I. INTRODUCTION

1. Cablevision Systems Corporation ("Cablevision") has filed an application for review, pursuant to Section 1.115 of the Commission's rules (the

"Rules"),[1] of the Memorandum Opinion and Order in *WRNN License Company, LLC*.[2] In that Order, the Media Bureau (the "Bureau"), pursuant to Section 614(h)(1)(C) of the Communications Act of 1934, as amended (the "Act"),[3] granted in part the petition of WRNN License Company, LLC ("WRNN") for modification of television station WRNN-DT's market to include cable communities located in Nassau and Suffolk Counties, New York (the "Communities"). WRNN filed an opposition to Cablevision's application, and Cablevision filed a reply to the opposition. Based on our review of the record in this proceeding, we deny Cablevision's application for review.

2. WRNN also filed a must-carry complaint against Cablevision for carriage of WRNN-DT on cable systems serving the Communities. Cablevision filed an opposition to which WRNN replied. WRNN also made a supplemental filing to which Cablevision replied. In light of the similar facts, parties, and issues presented in these proceedings,

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[1] 47 C.F.R. § 1.115.

[2] *WRNN License Company, LLC Petition for Modification of Television Market of Television Station WRNN-DT, Kingston, New York*, Memorandum Opinion and Order, 21 FCC Rcd 5952 (MB 2006) ("*WRNN-DT Modification Order*").

[3] 47 U.S.C. § 534(h)(1)(C). Section 76.55(e) of the Rules requires that a commercial broadcast television station's market be defined by Nielsen Media Research's Designated Market Areas, or "DMAs". *See Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, Order on Reconsideration and Second Report and Order, 14 FCC Rcd 8366 (1999); 47 C.F.R. § 76.55(e).

we consolidate them for purposes of this action.[4] Based on our review of the record in these proceeding, we order Cablevision to commence carriage of WRNN-DT within 60 days from the date on which WRNN provides the necessary specialized equipment to receive a good quality signal at Cablevision's principal headend.[5]

II. DISCUSSION

3. In the *WRNN-DT Modification Order*, the Bureau applied the four factors set forth in Section 614(h)(1)(C)[6] and concluded that all of the communi-

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[4] *See MCI Telecommunications Corp. v. Pac. Northwest Bell Tel. Co*., Memorandum Opinion and Order, 5 FCC Rcd 216, 218 n.25 (1990) ("Due to the similarity of the issues and arguments raised by the parties, the complaints have been consolidated for disposition"); *Aerco Broadcasting Corporation And R y F Broadcasting Inc. v. DIRECTV, Inc., DIRECTV Latin America, LLC, And Echostar Satellite, LLC*, Memorandum Opinion and Order, 21 FCC Rcd 5853 (MB 2006).

[5] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965, 2991 (1993) ("*Must Carry Order*"); *Maranatha Broadcasting Company, Inc., Licensee of WFMZ-TV, Allentown, Pennsylvania v. Harron Communications Corp.*, Memorandum Opinion and Order, 11 FCC Rcd 10409, 10414 (CSB 1996).

[6] The four statutory factors are: "(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

ties in Nassau County and certain communities in Suffolk County should be considered part of WRNN-DT's local market.[7] Cablevision's application seeks review of the *WRNN-DT Modification Order* on the grounds that the Order is based on erroneous findings as to material questions of fact, does not consider Cablevision's constitutional arguments, and conflicts with the Act and Commission precedent.[8] Cablevision contends that the Bureau erred in its application of each statutory factor, and gave overwhelming weight to WRNN-DT's signal coverage.[9] WRNN opposed the application, arguing that the Bureau applied the four statutory factors properly and followed applicable Commission precedent.

4. Section 614(h)(1)(C) of the Act requires the Commission to include or exclude particular communities from a television station's market to ensure that a television station is carried in the areas it serves and in its economic market.[10] We have re-

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other events of interest to the community; and (IV) evidence of viewing patterns in cable and non-cable households within the areas served by the cable system or systems in such community." 47 U.S.C. § 534(h)(1)(C)(ii).

[7] *WRNN-DT Modification Order*, 21 FCC Rcd at 5957-5961. The Bureau declined WRNN-DT's request to modify its market to include 24 separate cable communities in Suffolk County. *See id*. at 5961 n.71.

[8] *See* Application for Review at 1-2.

[9] *Id.*

[10] *See* H.R. REP. NO. 102-628, at 97 (1992); *Review of the Commission's Regulations Governing Television Broadcasting*, Report and Order, 14 FCC Rcd 12903, 12926 (MMB 1999) ("DMAs are a better measure of actual television viewing patterns, and thus serve as a good measure of the economic mar-

viewed the record in this proceeding, which need not be restated in detail, and we find that the Bureau correctly modified WRNN-DT's market. As the Commission has stated on numerous occasions, we do not believe that Congress intended the "coverage by other qualified stations" factor to bar a request for extending a station's market when other stations could be shown to serve the communities at issue. Rather, we continue to believe this criterion was intended to enhance a station's claim where it could be shown that other stations do not serve the communities at issue.[11] We also agree with the Bureau's conclusion that in the case of specialty stations, the viewership factor should not be afforded significant weight.[12] We note, however, that the Bureau erred in its analysis of WRNN-DT's programming by finding that WRNN's record evidence did not support a finding of significant programming

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ketplace in which broadcasters, program suppliers and advertisers buy and sell their services and products"); *see also Petition of Frederick Cablevision, Inc. and C/R TV Cable, Inc.*, Memorandum Opinion and Order, 20 FCC Rcd 753, 754 (MB 2005).

[11] *WRNN-DT Modification Order*, 21 FCC Rcd at 5960, citing *WRNN License Company, LLC, Petition for Modification of the Television Market of WRNN-DT, Kingston, New York*, Memorandum Opinion and Order, 20 FCC Rcd 7904, 7911 (MB 2005). *See also Lenfest Broadcasting, LLC*, Memorandum Opinion and Order, 19 FCC Rcd 8970, 8980 (MB 2004), *Great Trails Broadcasting Corp.*, Memorandum Opinion and Order, 10 FCC Rcd 8629, 8633-34 (CSB 1995), *Paxson San Jose License, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 17520, 17526 (CSB 1997).

[12] *WRNN-DT Modification Order*, 21 FCC Rcd at 5960 (citing *Avenue Cable Service, Inc.*, 11 FCC Rcd 4803, 4812 (1996)).

targeted to communities in Long Island.[13] WRNN submitted a substantial record that details programming that focuses on Long Island, particularly communities in Nassau County and communities in Suffolk County that border Nassau County.[14] Correction of this error, however, serves to add more support to the conclusions underlying the Bureau's decision to modify WRNN-DT's market. Additionally, the justification for modifying WRNN-DT's market has strengthened since the *WRNN-DT Modification Order*, as WRNN-DT is now carried on competitive cable systems in Nassau and Suffolk Counties.[15]

5. Cablevision asserts that the Bureau's decision to modify WRNN-DT's market to include certain cable communities in Suffolk County conflicts with the statute and with Commission precedent. While the Bureau should have clarified that its analysis of the statutory factors applied equally to the Suffolk County communities served by Cablevision's Woodbury and Islip systems, we believe that carriage in those Suffolk County communities is in accordance with the Act and Commission precedent. The record demonstrates that WRNN-DT's signal strength in

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[13] *See WRNN-DT Modification Order*, 21 FCC Rcd at 5959-5960.

[14] *See* WRNN Petition at Exhibit 4.

[15] *See* Opposition to Application for Review at 7, 15. Verizon carries WRNN-DT on its systems in Massapequa Park, Oyster Bay and Hempstead, New York. *Id*. at 7. This overlapping carriage provides support for WRNN-DT with respect to the historic carriage factor. *See* 47 U.S.C. § 534(h)(1)(C)(ii)(I).

those specific communities,[16] the local programming that WRNN-DT directs toward those specific communities,[17] and WRNN-DT's carriage on overlapping and adjacent systems in those specific communities[18] all support modification of WRNN-DT's local market to include those specific communities. We also note that those specific communities are served by the same physical system that serves cable communities in Nassau County. As a result, grant of WRNN's petition with respect to those ten communities served by Cablevision's Woodbury and Islip systems was proper.[19] Therefore, we find no conflict between the *WRNN-DT Modification Order* and the Act or Commission precedent.

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[16] *See* WRNN Petition at Exhibit 2

[17] *See id.* at Exhibit 4.

[18] *See* WRNN Reply to Opposition at 6, Opposition to Application for Review at 7, 15.

[19] Cablevision and WRNN agree that the Act and Commission precedent dictate that requests to modify a station's market shall be reviewed on a community-by-community basis. *See* Application for Review at 24 (citing 47 U.S.C. § 534(h)(1)(C)(i)); Opposition to Application for Review at 16, (citing *Young Broadcasting of Lansing, Inc.*; *Petition for Modification of the Television Market of Television Station WLNS-TV, Lansing, Michigan*, Memorandum Opinion and Order, 18 FCC Rcd 24889, 24891 (MB 2003) (citing *Must Carry Order*, 8 FCC Rcd at 2977, n.139)). Based on our review of the record and the factors listed in Section 614(h)(1)(c) of the Act, the ten communities in Suffolk County are distinguishable from the other cable communities in Suffolk County (*e.g.*, WRNN-DT provided record evidence of significant programming targeted to those communities and those communities fall within WRNN-DT's coverage contour).

6. Cablevision argues that the *WRNN-DT Modification Order* results in unconstitutional infringement of Cablevision's free speech rights under the First Amendment of the Constitution, as well as an unconstitutional taking of Cablevision's property under the Fifth Amendment of the Constitution.[20] While Cablevision argues that the Commission "has previously recognized that it has discretion to decide constitutional claims,"[21] we note at the outset that the United States Supreme Court has upheld the constitutionality of Section 614 of the Act.[22]

7. Turning to the specifics of Cablevision's contentions, we first address Cablevision's argument that mandatory carriage of WRNN-DT constitutes an as-applied First Amendment violation. To the contrary, we find that Supreme Court precedent supports carriage of WRNN-DT's signal. In the context here — concerning a challenge to a content-neutral regulation — the intermediate scrutiny standard applies.[23] Under that framework, the Supreme Court has sustained Section 614 of the Act's mandatory carriage requirements against facial challenge, finding that the obligations further three

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[20] Application for Review at 16-22.

[21] *Id.* at 22 (citing *WXTV License Partnership, G.P. Petition for Special Relief Concerning Carriage of Television Station WXTV, Paterson, New Jersey on Channel 41 on Certain Cablevision Cable Systems in the New York Television Market,* Order on Reconsideration, 15 FCC Rcd 3308, 3317-3319 (2000)).

[22] *Turner Broadcasting System v. FCC*, 520 U.S. 180 (1997) ("*Turner II*").

[23] U.S. CONST. amend. I; *Turner Broadcasting System v. FCC*, 512 U.S. 623, 661-662 (1994) ("*Turner I*") (citing *United States v. O'Brien*, 391 U.S. 367, 376-377 (1968)).

important governmental interests unrelated to the suppression of free expression and that the statutorily imposed burden is no greater than necessary to further those interests.[24] Even assuming a party may mount an as-applied First Amendment challenge to the carriage of an individual station in the face of this Supreme Court precedent, we find, applying that precedent to the facts at issue in this case, that Cablevision's carriage of WRNN-DT furthers at least two of the three interests identified by the Court. In particular, we find that carriage will help to ensure that the digital-only station (1) remains a viable option for viewers who rely on free, over-the-air television service in Nassau and Suffolk counties, and (2) continues to number among the multiplicity of information sources available to viewers in those counties. Moreover, compelled carriage of WRNN-DT does not burden substantially more speech than necessary because the obligation is no more extensive than is necessary to further the government interests identified above and is not more extensive than that occasioned by Cablevision's carriage of any other television broadcast station pursuant to section 614.[25]

8. Second, we do not find that Cablevision has demonstrated that mandatory carriage of WRNN-DT would constitute a Fifth Amendment taking un-

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[24] *Turner I*, 512 U.S. at 647, 655; *Turner II*, 520 U.S. at 209, 224 (1997) (finding that requirements serve to preserve the benefits of free, over-the-air broadcast television; promote widespread dissemination of information from a multiplicity of sources; and promote fair competition in the market for television programming).

[25] *Turner II*, 520 U.S. at 215-216.

der either the "*per se*" or "regulatory" takings analyses.[26] To qualify as a *per se* taking, the challenged government action must authorize a permanent physical occupation of property or result in the loss of all economically viable use of property.[27] *Per se* takings are defined without regard to the public interest they may serve,[28] the size of the occupation,[29] or the economic impact on the property owner.[30] Contrary to Cablevision's argument, we do not believe that a *per se* takings analysis applies here. The Supreme Court has advised that a *per se* taking is "relatively rare and easily identified,"[31] and this is

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[26] The "takings" clause of the Fifth Amendment provides that no private property: "shall . . . be taken for public use, without just compensation." U.S. CONST. amend. V. For discussion of the two current strains of takings analyses, "*per se*" or "regulatory," *see generally Yee v. City of Escondido*, 503 U.S. 519, 522-23 (1992)("*Yee*").

[27] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) ("*Loretto*"); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014-1019 (1992) ("*Lucas*").

[28] *Loretto*, *supra* n. 27, 458 U.S. at 426 ("We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve").

[29] *Id*. at 436-37 ("[C]onstitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied.").

[30] *Id*. at 434 ("[O]ur cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.").

[31] *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324 (2002) ("*Tahoe-Sierra Pres. Council, Inc.*").

neither. Mandatory carriage regulation effectuates no permanent physical occupation of a cable operator's property, such as installation of the physical equipment at issue in *Loretto v. Teleprompter Manhattan CATV Corp.*[32] Rather, a programming stream is transmitted in bits of data over cable bandwidth through electrons or photons at the speed of light while the cable operator retains complete control over its physical property (*e.g.*, headend equipment). Moreover, because carriage of a single station represents only a small fraction of available bandwidth, Cablevision has not shown a loss of all economically viable use of its property.[33] Courts have rejected application of permanent physical occupation to the technological realm,[34] and we believe these decisions to be consistent with the Supreme Court's admonition that a permanent physical occupation of property is easily identifiable and "presents relatively few problems of proof."[35]

9. As for its alternative takings claim, Cablevision presents virtually no substantive argument that requiring carriage of WRNN-DT would constitute a regulatory taking. A regulatory taking analysis is conducted under the multi-factor inquiry set forth in *Penn Central Transportation Co. v. City*

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[32] *Loretto*, *supra* n. 27.

[33] *Cf. Lucas*, *supra* n. 27, 505 U.S. at 1014-1019; *Tahoe-Sierra Pres. Council, Inc*, *supra* n. 31, 535 U.S. at 330-331 (2002).

[34] *See*, *e.g.*, *Qwest Corp. v. United States*, 48 Fed. Cl. 672, 693-94 (2001).

[35] *Loretto*, *supra* n. 27, 458 U.S. at 437; *see also Tahoe-Sierra Pres. Council, Inc.*, *supra* n. 31, 535 U.S. at 324.

of New York:[36] (1) the character of the governmental action; (2) its economic impact; and (3) its interference with reasonable investment-backed expectations.[37] Cablevision, however, addresses none of these factors. Furthermore, in employing this test, we find no evidence in the record that requiring carriage of WRNN-DT will have a significant economic impact on Cablevision or will interfere with the company's reasonable, investment-backed expectations. Indeed, based upon the statutory cap for commercial stations and the numerical limit for non-commercial stations, cable operators should reasonably expect to devote up to one-third of their capacity to carriage of local broadcast stations.[38] Finally, we believe the governmental action at issue to be a modest attempt to "adjust the benefits and burdens of economic life to promote the common good," in what traditionally has been and remains a regulated industry.[39] Therefore, we reject Cablevision's constitutional arguments, and for the above reasons deny Cablevision's petition.

10. Based on the foregoing, Cablevision is required to carry WRNN-DT in the Communities.[40] Consistent with our rules, WRNN-DT provided Ca-

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[36] *Penn Central Transportation Co. v. City of New York* 438 U.S. 104, 124 (1978) ("*Penn Cent. Transp. Co.*").

[37] *See FCC v. Florida Power Co.,*, 480 U.S. 245, 252 (1982) (citing *Penn Cent. Transp. Co.,* 438 U.S. at 124). *See also Yee*, *supra* n. 26, 503 U.S. at 523; *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980).

[38] *See* 47 U.S.C. §§ 534(b) and 535(b).

[39] *Penn Cent. Transp. Co.*, *supra* n. 36, 438 U.S. at 124.

[40] *See* 47 C.F.R. § 76.56(b).

blevision notice that it wished to exercise its carriage rights.[41] Cablevision's main argument against carriage — the pending application for review of the *WRNN-DT Modification Order*[42] — is now moot. Furthermore, WRNN has sufficiently addressed Cablevision's other concerns by promising to pay any costs associated with downconverting its signal from digital to analog for carriage on the basic analog tier,[43] and by promising to provide the necessary specialized equipment to receive a good quality signal at Cablevision's principal headend.[44] Therefore, we order Cablevision to carry WRNN-DT on cable systems serving Nassau County, including the system that serves the ten communities in Suffolk County, 60 days from the date on which WRNN provides the equipment necessary to receive a good quality signal at Cablevision's principal headend.

III. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED**, pursuant to Sections 1, 4(i), 5(c), 405, and 614(h)(1)(C) of the Communications Act of 1934, as amended,[45] and

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[41] Must-Carry Complaint at Exhibits B & C. Regardless of Cablevision's argument that WRNN's right to mandatory carriage did not vest until September 14, 2006, it is now clear that Cablevision should carry WRNN-DT on its systems pursuant to the *WRNN-DT Modification Order*, this Order, and our rules. *See* 47 C.F.R. §§ 76.55, 76.61.

[42] *See* Opposition to Must-Cary Complaint at 5-7.

[43] *See* Reply to Opposition to Must-Carry Complaint at 7-8.

[44] *Id*. at 8-9.

[45] 47 U.S.C. §§ 151, 154(i), 155(c), 405, 534(h)(1)(C).

Section 1.115 of the Commission's Rules,[46] that the captioned application for review **IS DENIED**.

12. **IT IS FURTHER ORDERED** that the Petition for Stay of the above-captioned proceeding filed by Cablevision Systems Corporation on June 26, 2006, **IS DISMISSED** as moot.

13. **IT IS FURTHER ORDERED**, that the must carry complaint filed by WRNN License Company, LLC on September 14, 2006, (CSR-7053-M) **IS GRANTED** pursuant to Section 614(d)(3) of the Communications Act of 1934, as amended.[47] Cablevision Systems Corporation **IS ORDERED** to commence carriage of WRNN-DT on its cable systems serving Nassau County, including the system that serves certain communities in Suffolk County (PSID 003146), sixty (60) days from the date on which WRNN License Company, LLC provides the necessary specialized equipment to receive a good quality signal at Cablevision's principal headend.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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[46] 47 C.F.R. § 1.115.

[47] 47 U.S.C. § 534(d)(3).

JOINT STATEMENT OF COMMISSIONER MICHAEL J. COPPS AND COMMISSIONER JONATHAN S. ADELSTEIN DISSENTING

In the Matter of Petition of WRNN License Company, LLC, for Modification of Television Market for WRNN-DT, Kingston, New York

Localism is our lodestar in cable market modification cases. Section 614(h)(1)C) of the Act requires the Commission to "afford particular attention to the value of localism" by taking into account factors such as: (1) historical carriage; (2) local service; (3) coverage by other local stations; and (4) local viewing patterns. In case its intent was not clear, the legislative history stressed that the Commission should act on market modification cases "consistent with Congress' objective to ensure that television stations be carried in the area in which they serve and which form their economic market."[1] This reference to a station's economic market is no accident. The must-carry statute is premised on the idea that cable carriage is necessary to ensure that over-the-air broadcasters are able to maintain their local advertising base and survive in a world in which so many consumers get their television over cable. Thus, while the factors we use to assess market modification cases are flexible, our objective is not.

Historical Carriage. The plain language of the statute asks whether the station historically has been carried on systems "within" the communities in question, ***not*** whether it has been carried on sys-

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[1] H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

tems "adjacent to and near" the communities. The Media Bureau's finding that WRNN historically has not been carried on systems within the communities at issue should have ended the inquiry.[2] For similar reasons, we reject the majority's view that Verizon's apparent initiation of carriage in certain communities sometime during the past fifteen months strengthens the case for "historical carriage." The majority reads the word "historically" out of the statute.

Having said that, we do not believe that historical carriage is necessarily the only key factor in the analysis. In particular, we recognize that "some stations have not had an opportunity to build a record of historical carriage for specific reasons that do not necessarily reflect a judgment as to the geography of the market involved" and that if the historic carriage factor were controlling it would "prevent weaker stations, that cable systems had previously declined to carry, from ever obtaining carriage rights."[3] But while we readily agree that the his-

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[2] *See* Bureau Order at ¶12. The one Bureau decision cited for the proposition that carriage on systems "adjacent to and near" the communities at issue could be relevant simply found that adjacent or nearby carriage is "indicative of interest in the programming" of the station — *i.e.,* indicates that the station may provide "local service" under factor two — ***not*** that nearby carriage resolves the factual issue of whether the station historically has been carried within the community itself. *See Petition of Paxson Communications for Modification of WPXD(TV),* 13 FCC Rcd 17869, 17874 (Cable Serv. Bur. 1998).

[3] *See In Re Petition of Cablevision Systems Corp.*, 11 FCC Rcd 6453, 6473 (Cable Serv. Bur. 1996).

torical carriage factor should not be controlling, we cannot agree that it does not mean what it says.

Local Service. This factor is typically given the most attention in market modification cases, and rightfully so — if our objective is to promote localism, the nature and extent of local service are critical. Unfortunately, this factor is also the most difficult to define, usually involving a number of considerations including signal strength, geographic proximity, natural or man-made barriers, and local programming.

In WRNN's favor is the Bureau's finding that the station puts a Grade B-equivalent signal over Nassau County.[4] This is an important finding because, as the Bureau noted, the Commission found in the *NY ADI* case that Grade B coverage "is an efficient tool to adjust market boundaries because it is a sound indicator of the economic reach of a particular station's signal."[5] But the Bureau, and now the majority, fails to cite the immediately preceding language: that Grade B coverage is a sound indicator of a station's economic reach "in the absence of other determinative market facts" such as "where there is a terrain obstacle such as a mountain range or a significant body of water."[6]

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[4] Also in WRNN's favor, as noted above, is the fact that its signal is being carried by cable systems in adjacent and nearby — and apparently in the case of Verizon, overlapping — cable communities.

[5] *See* Bureau Order at ¶ 14, citing *NY ADI Order*, 12 FCC Rcd 12262, 12271 (1997).

[6] *See NY ADI Order*, 12 FCC Rcd at 12271.

This omission is all the more puzzling because the *NY ADI* case involved the question of whether WRNN and other New York market broadcast stations were entitled to carriage on Cablevision and other cable systems in the New York metropolitan area. In that decision, the Commission noted "the importance of geographic features such as expansive waterways like the Hudson River and the Long Island Sound and the interposition of Manhattan in the epicenter of the market with its extremely congested infrastructure, that act to remove communities from one another."[7] Accordingly, the Commission divided the New York market into four "subzones" as part of its market modification analyses: (1) Northern and Central New Jersey; (2) New York City; (3) Long Island; and (4) Upstate New York/Fairfield County, CT.[8]

On appeal, the Second Circuit Court of Appeals affirmed the Commission's findings:

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[7] *See id.* at 12268. Indeed, in the underlying Order addressing another station, the Commission stated: "We also note that while WHAI-TV provides Grade B service to some of the Long Island communities named in the petition, the intervention of Long Island Sound between these communities and the Bridgeport sites of the station appears to be a logical boundary to its market area and validates the absence of audience and historic carriage as appropriate market defining evidence." *See In Re Cablevision,* 11 FCC Rcd at 6453, 6478 (1996).

[8] *See NY ADI Order,* 12 FCC Rcd at 12268. The underlying Bureau Order found that WRNN was separated "by geography and terrain" from the Long Island cable systems on which it was seeking access. *See* 11 FCC Rcd at 6480.

> With respect to its geographic make-up, not only does the New York ADI [now DMA] span four states, but the counties within this area are not contained in one contiguous land mass. Rather, they are separated by several bodies of water, including the Hudson River and Long Island Sound. New York City acts as a natural boundary because its complicated and congested traffic patterns make it difficult for residents at one end of the ADI to access communities at the other end. The ADI therefore has an obvious tendency to break itself up into smaller divisions reflecting localized regions. New York City serves as the "hub," with its stations' programming and advertising being of widespread interest across the ADI. Outlying communities are the "spokes," with their stations generally showing programming and advertising of interest only to viewers in relatively close proximity to that community.[9]

Those market realities have not changed since 1998. All that has changed is that WRNN now operates from a transmitter site well south of its old transmitter site (hence the improved signal strength over Long Island) and moved its main studio from Kingston, its community of license, to New York City.[10] But that does not transform WRNN from a Kingston "spoke" station into a New York City "hub"

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[9] *See WLNY-TV, WRNN-TV, et al. v. FCC*, 163 F.3d 137, 144 (2d Cir. 1998).

[10] This case is a good example of how the Commission's relaxation of its main studio rules have gone too far. A Kingston resident who wanted to visit WRNN's main studio would have to travel over 100 miles. *See* Cablevision Opposition to WRNN Petition at 21.

station. WRNN is licensed to serve the residents of Kingston, not New York City or the New York region. The question from a localism perspective is whether the cable communities are in the same "local market" as the station's community of license. A station's Grade B contour is often a good proxy for that determination. Here, given the unique geography of the New York market and the distances involved,[11] we believe it is not.

Regarding the issue of whether WRNN provides local programming of particular relevance to Long Island viewers, the record contains voluminous and conflicting evidence. For instance, WRNN argues that it carries fourteen hours of programming per week of specific interest to the Long Island cable communities; Cablevision argues that it actually carries less than an hour. The Bureau, after reviewing all of the evidence, rejected WRNN's arguments, finding that the record "does not indicate that much of WRNN-DT's programming concerning Long Island focuses on those communities in Nassau County."[12] The Bureau went on to find that this case is consistent with the Second Circuit's holding in *WLNY* that the outlying "spoke" communities in Nassau County and the Hudson Valley are connected by the "hub" of New York City, and that that

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[11] Driving distances between Kingston and the Cable Communities range from 111 miles to 195 miles and average 151 miles. Straight-line distances — ignoring the Long Island Sound — range from nearly 79 miles to over 119 miles and average nearly 94 miles. *See* Cablevision Opposition to WRNN Petition at 12-13.

[12] *See* Bureau Order at ¶16.

"spoke" market programming is generally not of interest to other "spoke" communities.[13]

The majority, however, finds that the Bureau "erred in its analysis" by finding that the record did not support a finding of significant programming to the Long Island communities. As proof, the majority simply cites to an exhibit filed by WRNN without any explanation how the Bureau "erred" or any attempt to address the contradictory evidence. We would have affirmed the Bureau on this point.

Overall, this factor is a close call. In the end, we believe that the unique characteristics of the New York market coupled with the Bureau's finding regarding the lack of locally-focused programming outweigh the Grade B presumption of local service.

Coverage by Other Qualified Stations. We agree that the presence of other local stations should not keep an otherwise qualified local station from extending its market. But we do not see a statutory basis for a finding that this factor can ***only*** be relevant to enhance a station's claim — *i.e.*, where it can be shown that other stations do not serve the communities at issue. The Commission has held that it could also be relevant where a station clearly does not provide local programming and other nearby stations do.[14] In any event, this is not such a case and we assign little weight to this factor.

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[13] *Id.*

[14] *See NY ADI Order*, 12 FCC Rcd at 12266-67; *In Re Cablevision*, 11 FCC Rcd at 6475, citing *Petition of Time Warner Cable*, 10 FCC Rcd 8625 (1995).

Viewership. Like the majority, we recognize that many stations seeking market modifications — especially new stations or those with specialized formats — will not have significant levels of viewership in the communities at issue. Although there may be cases where viewership is relevant, we generally believe it will not be outcome determinative. Here, we agree that while WRNN's viewership levels are low, that factor should not be afforded significant weight.[15]

In sum, we find that none of the statutory factors supports the addition of the Long Island communities to WRNN's local market. There is a point at which the concept of a "local market" reaches the breaking point and expanding it further will actually damage the localism interests we are trying to serve. For the sake of the people of Kingston, we hope we have not reached that point here.

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[15] *See* Bureau Order at ¶18.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

* * *

Docket Number(s): 07-5553-ag

* * *

CABLEVISION SYSTEMS CORP., Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, et al., Respondents.

* * *

[UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED DEC 09, 2009
Catherine O'Hagan Wolfe, Clerk]

ORDER

Before: John M. Walker, Jr., José A. Cabranes, Reena Raggi, *Circuit Judges*.

IT IS HEREBY ORDERED that the motion by Petitioner Cablevision Systems Corp. to stay the mandate pending the filing and disposition of a petition for writ of *certiorari* is GRANTED.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

by

/s/
Joy Fallek, Administrative Attorney

Dec. 09, 2009

Date

APPENDIX E

[UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED OCT 29, 2009
Catherine O'Hagan Wolfe, Clerk]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 29th day of October, two thousand nine.

07-5553-ag

CABLEVISION SYSTEMS CORPORATION,
Petitioner,

— v. —

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA,
Respondents,

WRNN LICENSE COMPANY, LLC,
Intervenor.

Petitioner Cablevision Systems Corporation having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members

of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By:

/s/
Frank Perez, Deputy Clerk

APPENDIX F

UNITED STATES CODE (2006)

TITLE 47

TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS

* * *

§ 534. Carriage of local commercial television signals

(a) Carriage obligations

Each cable operator shall carry, on the cable system of that operator, the signals of local commercial television stations and qualified low power stations as provided by this section. Carriage of additional broadcast television signals on such system shall be at the discretion of such operator, subject to section 325(b) of this title.

(b) Signals required

(1) In general

(A) A cable operator of a cable system with 12 or fewer usable activated channels shall carry the signals of at least three local commercial television stations, except that if such a system has 300 or fewer subscribers, it shall not be subject to any requirements under this section so long as such system does not delete from carriage by that system any signal of a broadcast television station.

(B) A cable operator of a cable system with more than 12 usable activated channels shall carry the signals of local commercial television

stations, up to one-third of the aggregate number of usable activated channels of such system.

(2) Selection of signals

Whenever the number of local commercial television stations exceeds the maximum number of signals a cable system is required to carry under paragraph (1), the cable operator shall have discretion in selecting which such stations shall be carried on its cable system, except that —

(A) under no circumstances shall a cable operator carry a qualified low power station in lieu of a local commercial television station; and

(B) if the cable operator elects to carry an affiliate of a broadcast network (as such term is defined by the Commission by regulation), such cable operator shall carry the affiliate of such broadcast network whose city of license reference point, as defined in section 76.53 of title 47, Code of Federal Regulations (in effect on January 1, 1991), or any successor regulation thereto, is closest to the principal headend of the cable system.

(3) Content to be carried

(A) A cable operator shall carry in its entirety, on the cable system of that operator, the primary video, accompanying audio, and line 21 closed caption transmission of each of the local commercial television stations carried on the cable system and, to the extent technically feasible, program-related material carried in the vertical blanking interval or on subcarriers. Retransmission of other material in the vertical blanking in-

ternal or other nonprogram-related material (including teletext and other subscription and advertiser-supported information services) shall be at the discretion of the cable operator. Where appropriate and feasible, operators may delete signal enhancements, such as ghost-canceling, from the broadcast signal and employ such enhancements at the system headend or headends.

(B) The cable operator shall carry the entirety of the program schedule of any television station carried on the cable system unless carriage of specific programming is prohibited, and other programming authorized to be substituted, under section 76.67 or subpart F of part 76 of title 47, Code of Federal Regulations (as in effect on January 1, 1991), or any successor regulations thereto.

(4) Signal quality

(A) **N**ondegradation; technical specifications

The signals of local commercial television stations that a cable operator carries shall be carried without material degradation. The Commission shall adopt carriage standards to ensure that, to the extent technically feasible, the quality of signal processing and carriage provided by a cable system for the carriage of local commercial television stations will be no less than that provided by the system for carriage of any other type of signal.

(B) Advanced television

At such time as the Commission prescribes modifications of the standards for television broadcast signals, the Commission shall initiate a

proceeding to establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of such broadcast signals of local commercial television stations which have been changed to conform with such modified standards.

(5) Duplication not required

Notwithstanding paragraph (1), a cable operator shall not be required to carry the signal of any local commercial television station that substantially duplicates the signal of another local commercial television station which is carried on its cable system, or to carry the signals of more than one local commercial television station affiliated with a particular broadcast network (as such term is defined by regulation). If a cable operator elects to carry on its cable system a signal which substantially duplicates the signal of another local commercial television station carried on the cable system, or to carry on its system the signals of more than one local commercial television station affiliated with a particular broadcast network, all such signals shall be counted toward the number of signals the operator is required to carry under paragraph (1).

(6) Channel positioning

Each signal carried in fulfillment of the carriage obligations of a cable operator under this section shall be carried on the cable system channel number on which the local commercial television station is broadcast over the air, or on the channel on which it was carried on July 19, 1985, or on the channel on which it was carried on January 1, 1992, at the election of the station, or on such other channel number as is mutually agreed upon by the station and the

cable operator. Any dispute regarding the positioning of a local commercial television station shall be resolved by the Commission.

(7) Signal availability

Signals carried in fulfillment of the requirements of this section shall be provided to every subscriber of a cable system. Such signals shall be viewable via cable on all television receivers of a subscriber which are connected to a cable system by a cable operator or for which a cable operator provides a connection. If a cable operator authorizes subscribers to install additional receiver connections, but does not provide the subscriber with such connections, or with the equipment and materials for such connections, the operator shall notify such subscribers of all broadcast stations carried on the cable system which cannot be viewed via cable without a converter box and shall offer to sell or lease such a converter box to such subscribers at rates in accordance with section 543(b)(3) of this title.

(8) Identification of signals carried

A cable operator shall identify, upon request by any person, the signals carried on its system in fulfillment of the requirements of this section.

(9) Notification

A cable operator shall provide written notice to a local commercial television station at least 30 days prior to either deleting from carriage or repositioning that station. No deletion or repositioning of a local commercial television station shall occur during a period in which major television ratings services measure the size of audiences of local television stations. The notification provisions of this

paragraph shall not be used to undermine or evade the channel positioning or carriage requirements imposed upon cable operators under this section.

(10) Compensation for carriage

A cable operator shall not accept or request monetary payment or other valuable consideration in exchange either for carriage of local commercial television stations in fulfillment of the requirements of this section or for the channel positioning rights provided to such stations under this section, except that—

(A) any such station may be required to bear the costs associated with delivering a good quality signal or a baseband video signal to the principal headend of the cable system;

(B) a cable operator may accept payments from stations which would be considered distant signals under section 111 of title 17 as indemnification for any increased copyright liability resulting from carriage of such signal; and

(C) a cable operator may continue to accept monetary payment or other valuable consideration in exchange for carriage or channel positioning of the signal of any local commercial television station carried in fulfillment of the requirements of this section, through, but not beyond, the date of expiration of an agreement thereon between a cable operator and a local commercial television station entered into prior to June 26, 1990.

(c) Low power station carriage obligation

(1) Requirement

If there are not sufficient signals of full power local commercial television stations to fill the channels set aside under subsection (b) of this section—

(A) a cable operator of a cable system with a capacity of 35 or fewer usable activated channels shall be required to carry one qualified low power station; and

(B) a cable operator of a cable system with a capacity of more than 35 usable activated channels shall be required to carry two qualified low power stations.

(2) Use of public, educational, or government channels

A cable operator required to carry more than one signal of a qualified low power station under this subsection may do so, subject to approval by the franchising authority pursuant to section 531 of this title, by placing such additional station on public, educational, or governmental channels not in use for their designated purposes.

(d) Remedies

(1) Complaints by broadcast stations

Whenever a local commercial television station believes that a cable operator has failed to meet its obligations under this section, such station shall notify the operator, in writing, of the alleged failure and identify its reasons for believing that the cable operator is obligated to carry the signal of such station or has otherwise failed to comply with the channel positioning or repositioning or other requirements of this section.

The cable operator shall, within 30 days of such written notification, respond in writing to such notification and either commence to carry the signal of such station in accordance with the terms requested or state its reasons for believing that it is not obligated to carry such signal or is in compliance with the channel positioning and repositioning and other requirements of this section. A local commercial television station that is denied carriage or channel positioning or repositioning in accordance with this section by a cable operator may obtain review of such denial by filing a complaint with the Commission. Such complaint shall allege the manner in which such cable operator has failed to meet its obligations and the basis for such allegations.

(2) Opportunity to respond

The Commission shall afford such cable operator an opportunity to present data and arguments to establish that there has been no failure to meet its obligations under this section.

(3) Remedial actions, dismissal

Within 120 days after the date a complaint is filed, the Commission shall determine whether the cable operator has met its obligations under this section. If the Commission determines that the cable operator has failed to meet such obligations, the Commission shall order the cable operator to reposition the complaining station or, in the case of an obligation to carry a station, to commence carriage of the station and to continue such carriage for at least 12 months. If the Commission determines that the cable operator

has fully met the requirements of this section, it shall dismiss the complaint.

(e) Input selector switch rules abolished

No cable operator shall be required—

(1) to provide or make available any input selector switch as defined in section 76.5(mm) of title 47, Code of Federal Regulations, or any comparable device; or

(2) to provide information to subscribers about input selector switches or comparable devices.

(f) Regulations by Commission

Within 180 days after October 5, 1992, the Commission shall, following a rulemaking proceeding, issue regulations implementing the requirements imposed by this section. Such implementing regulations shall include necessary revisions to update section 76.51 of title 47 of the Code of Federal Regulations.

(g) Sales presentations and program length commercials

(1) Carriage pending proceeding

Pending the outcome of the proceeding under paragraph (2), nothing in this chapter shall require a cable operator to carry on any tier, or prohibit a cable operator from carrying on any tier, the signal of any commercial television station or video programming service that is predominantly utilized for the transmission of sales presentations or program length commercials.

(2) Proceeding concerning certain stations

Within 270 days after October 5, 1992, the Commission, notwithstanding prior proceedings to determine whether broadcast television stations that are predominantly utilized for the transmission of sales presentations or program length commercials are serving the public interest, convenience, and necessity, shall complete a proceeding in accordance with this paragraph to determine whether broadcast television stations that are predominantly utilized for the transmission of sales presentations or program length commercials are serving the public interest, convenience, and necessity. In conducting such proceeding, the Commission shall provide appropriate notice and opportunity for public comment. The Commission shall consider the viewing of such stations, the level of competing demands for the spectrum allocated to such stations, and the role of such stations in providing competition to nonbroadcast services offering similar programming. In the event that the Commission concludes that one or more of such stations are serving the public interest, convenience, and necessity, the Commission shall qualify such stations as local commercial television stations for purposes of subsection (a) of this section. In the event that the Commission concludes that one or more of such stations are not serving the public interest, convenience, and necessity, the Commission shall allow the licensees of such stations a reasonable period within which to provide different programming, and shall not deny such stations a renewal expectancy solely because their programming consisted predominantly of

sales presentations or program length commercials.

(h) Definitions

(1) Local commercial television station

(A) In general

For purposes of this section, the term "local commercial television station" means any full power television broadcast station, other than a qualified noncommercial educational television station within the meaning of section 535(*l*)(1) of this title, licensed and operating on a channel regularly assigned to its community by the Commission that, with respect to a particular cable system, is within the same television market as the cable system.

(B) Exclusions

The term "local commercial television station" shall not include—

(i) low power television stations, television translator stations, and passive repeaters which operate pursuant to part 74 of title 47, Code of Federal Regulations, or any successor regulations thereto;

(ii) a television broadcast station that would be considered a distant signal under section 111 of title 17, if such station does not agree to indemnify the cable operator for any increased copyright liability resulting from carriage on the cable system; or

(iii) a television broadcast station that does not deliver to the principal headend of a cable

system either a signal level of -45dBm for UHF signals or -49dBm for VHF signals at the input terminals of the signal processing equipment, if such station does not agree to be responsible for the costs of delivering to the cable system a signal of good quality or a baseband video signal.

(C) Market determinations

(i) For purposes of this section, a broadcasting 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, except that, following a written request, 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 television market to better effectuate the purposes of this section. In considering such requests, the Commission may determine that particular communities are part of more than one television market.

(ii) In considering requests filed pursuant to clause (i), 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; and

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

(iii) A cable operator shall not delete from carriage the signal of a commercial television station during the pendency of any proceeding pursuant to this subparagraph.

(iv) Within 120 days after the date on which a request is filed under this subparagraph (or 120 days after February 8, 1996, if later), the Commission shall grant or deny the request.

(2) Qualified low power station

The term "qualified low power station" means any television broadcast station conforming to the rules established for Low Power Television Stations contained in part 74 of title 47, Code of Federal Regulations, only if—

(A) such station broadcasts for at least the minimum number of hours of operation required by the Commission for television broadcast sta-

tions under part 73 of title 47, Code of Federal Regulations;

(B) such station meets all obligations and requirements applicable to television broadcast stations under part 73 of title 47, Code of Federal Regulations, with respect to the broadcast of nonentertainment programming; programming and rates involving political candidates, election issues, controversial issues of public importance, editorials, and personal attacks; programming for children; and equal employment opportunity; and the Commission determines that the provision of such programming by such station would address local news and informational needs which are not being adequately served by full power television broadcast stations because of the geographic distance of such full power stations from the low power station's community of license;

(C) such station complies with interference regulations consistent with its secondary status pursuant to part 74 of title 47, Code of Federal Regulations;

(D) such station is located no more than 35 miles from the cable system's headend, and delivers to the principal headend of the cable system an over-the-air signal of good quality, as determined by the Commission;

(E) the community of license of such station and the franchise area of the cable system are both located outside of the largest 160 Metropolitan Statistical Areas, ranked by population, as determined by the Office of Management and Budget on June 30, 1990, and the population of

such community of license on such date did not exceed 35,000; and

(F) there is no full power television broadcast station licensed to any community within the county or other political subdivision (of a State) served by the cable system. Nothing in this paragraph shall be construed to change the secondary status of any low power station as provided in part 74 of title 47, Code of Federal Regulations, as in effect on October 5, 1992.

§ 535. Carriage of noncommercial educational television

(a) Carriage obligations

In addition to the carriage requirements set forth in section 534 of this title, each cable operator of a cable system shall carry the signals of qualified noncommercial educational television stations in accordance with the provisions of this section.

(b) Requirements to carry qualified stations

(1) General requirement to carry each qualified station

Subject to paragraphs (2) and (3) and subsection (e) of this section, each cable operator shall carry, on the cable system of that cable operator, any qualified local noncommercial educational television station requesting carriage.

(2) Systems with 12 or fewer channels

(A) Notwithstanding paragraph (1), a cable operator of a cable system with 12 or fewer usable activated channels shall be required to carry the signal of one qualified local noncommercial educational television station; except that a cable operator of such a system shall comply with subsection (c) of this section and may, in its discretion, carry the signals of other qualified noncommercial educational television stations.

(B) In the case of a cable system described in subparagraph (A) which operates beyond the presence of any qualified local noncommercial educational television station—

(i) the cable operator shall import and carry on that system the signal of one qualified noncommercial educational television station;

(ii) the selection for carriage of such a signal shall be at the election of the cable operator; and

(iii) in order to satisfy the requirements for carriage specified in this subsection, the cable operator of the system shall not be required to remove any other programming service actually provided to subscribers on March 29, 1990; except that such cable operator shall use the first channel available to satisfy the requirements of this subparagraph.

(3) Systems with 13 to 36 channels

(A) Subject to subsection (c) of this section, a cable operator of a cable system with 13 to 36 usable activated channels—

(i) shall carry the signal of at least one qualified local noncommercial educational television station but shall not be required to carry the signals of more than three such stations, and

(ii) may, in its discretion, carry additional such stations.

(B) In the case of a cable system described in this paragraph which operates beyond the presence of any qualified local noncommercial educational television station, the cable operator shall import and carry on that system the signal

of at least one qualified noncommercial educational television station to comply with subparagraph (A)(i).

(C) The cable operator of a cable system described in this paragraph which carries the signal of a qualified local noncommercial educational station affiliated with a State public television network shall not be required to carry the signal of any additional qualified local noncommercial educational television stations affiliated with the same network if the programming of such additional stations is substantially duplicated by the programming of the qualified local noncommercial educational television station receiving carriage.

(D) A cable operator of a system described in this paragraph which increases the usable activated channel capacity of the system to more than 36 channels on or after March 29, 1990, shall, in accordance with the other provisions of this section, carry the signal of each qualified local noncommercial educational television station requesting carriage, subject to subsection (e) of this section.

(c) Continued carriage of existing stations

Notwithstanding any other provision of this section, all cable operators shall continue to provide carriage to all qualified local noncommercial educational television stations whose signals were carried on their systems as of March 29, 1990. The requirements of this subsection may be waived with respect to a particular cable operator and a particular such station, upon the written consent of the cable operator and the station.

(d) Placement of additional signals

A cable operator required to add the signals of qualified local noncommercial educational television stations to a cable system under this section may do so, subject to approval by the franchising authority pursuant to section 531 of this title, by placing such additional stations on public, educational, or governmental channels not in use for their designated purposes.

(e) Systems with more than 36 channels

A cable operator of a cable system with a capacity of more than 36 usable activated channels which is required to carry the signals of three qualified local noncommercial educational television stations shall not be required to carry the signals of additional such stations the programming of which substantially duplicates the programming broadcast by another qualified local noncommercial educational television station requesting carriage. Substantial duplication shall be defined by the Commission in a manner that promotes access to distinctive noncommercial educational television services.

(f) Waiver of nonduplication rights

A qualified local noncommercial educational television station whose signal is carried by a cable operator shall not assert any network nonduplication rights it may have pursuant to section 76.92 of title 47, Code of Federal Regulations, to require the deletion of programs aired on other qualified local noncommercial educational television stations whose signals are carried by that cable operator.

(g) Conditions of carriage

(1) Content to be carried

A cable operator shall retransmit in its entirety the primary video, accompanying audio, and line 21 closed caption transmission of each qualified local noncommercial educational television station whose signal is carried on the cable system, and, to the extent technically feasible, program-related material carried in the vertical blanking interval, or on subcarriers, that may be necessary for receipt of programming by handicapped persons or for educational or language purposes. Retransmission of other material in the vertical blanking interval or on subcarriers shall be within the discretion of the cable operator.

(2) Bandwidth and technical quality

A cable operator shall provide each qualified local noncommercial educational television station whose signal is carried in accordance with this section with bandwidth and technical capacity equivalent to that provided to commercial television broadcast stations carried on the cable system and shall carry the signal of each qualified local noncommercial educational television station without material degradation.

(3) Changes in carriage

The signal of a qualified local noncommercial educational television station shall not be repositioned by a cable operator unless the cable operator, at least 30 days in advance of such repositioning, has provided written notice to the station and all subscribers of the cable system. For purposes of this paragraph, repositioning in-

cludes (A) assignment of a qualified local noncommercial educational television station to a cable system channel number different from the cable system channel number to which the station was assigned as of March 29, 1990, and (B) deletion of the station from the cable system. The notification provisions of this paragraph shall not be used to undermine or evade the channel positioning or carriage requirements imposed upon cable operators under this section.

(4) Good quality signal required

Notwithstanding the other provisions of this section, a cable operator shall not be required to carry the signal of any qualified local noncommercial educational television station which does not deliver to the cable system's principal headend a signal of good quality or a baseband video signal, as may be defined by the Commission.

(5) Channel positioning

Each signal carried in fulfillment of the carriage obligations of a cable operator under this section shall be carried on the cable system channel number on which the qualified local noncommercial educational television station is broadcast over the air, or on the channel on which it was carried on July 19, 1985, at the election of the station, or on such other channel number as is mutually agreed upon by the station and the cable operator. Any dispute regarding the positioning of a qualified local noncommercial educational television station shall be resolved by the Commission.

(h) Availability of signals

Signals carried in fulfillment of the carriage obligations of a cable operator under this section shall be available to every subscriber as part of the cable system's lowest priced service tier that includes the retransmission of local commercial television broadcast signals.

(i) Payment for carriage prohibited

(1) In general

A cable operator shall not accept monetary payment or other valuable consideration in exchange for carriage of the signal of any qualified local noncommercial educational television station carried in fulfillment of the requirements of this section, except that such a station may be required to bear the cost associated with delivering a good quality signal or a baseband video signal to the principal headend of the cable system.

(2) Distant signal exception

Notwithstanding the provisions of this section, a cable operator shall not be required to add the signal of a qualified local noncommercial educational television station not already carried under the provision of subsection (c) of this section, where such signal would be considered a distant signal for copyright purposes unless such station indemnifies the cable operator for any increased copyright costs resulting from carriage of such signal.

(j) Remedies

(1) Complaint

Whenever a qualified local noncommercial educational television station believes that a cable operator of a cable system has failed to comply with the signal carriage requirements of this section, the station may file a complaint with the Commission. Such complaint shall allege the manner in which such cable operator has failed to comply with such requirements and state the basis for such allegations.

(2) Opportunity to respond

The Commission shall afford such cable operator an opportunity to present data, views, and arguments to establish that the cable operator has complied with the signal carriage requirements of this section.

(3) Remedial actions; dismissal

Within 120 days after the date a complaint is filed under this subsection, the Commission shall determine whether the cable operator has complied with the requirements of this section. If the Commission determines that the cable operator has failed to comply with such requirements, the Commission shall state with particularity the basis for such findings and order the cable operator to take such remedial action as is necessary to meet such requirements. If the Commission determines that the cable operator has fully complied with such requirements, the Commission shall dismiss the complaint.

(k) Identification of signals

A cable operator shall identify, upon request by any person, those signals carried in fulfillment of the requirements of this section.

(*l*) Definitions

For purposes of this section—

(1) Qualified noncommercial educational television station

The term "qualified noncommercial educational television station" means any television broadcast station which—

(A)(i) under the rules and regulations of the Commission in effect on March 29, 1990, is licensed by the Commission as a noncommercial educational television broadcast station and which is owned and operated by a public agency, nonprofit foundation, corporation, or association; and

(ii) has as its licensee an entity which is eligible to receive a community service grant, or any successor grant thereto, from the Corporation for Public Broadcasting, or any successor organization thereto, on the basis of the formula set forth in section 396(k)(6)(B) of this title; or

(B) is owned and operated by a municipality and transmits predominantly noncommercial programs for educational purposes.

Such term includes (I) the translator of any noncommercial educational television station with five watts or higher power serving the franchise

area, (II) a full-service station or translator if such station or translator is licensed to a channel reserved for noncommercial educational use pursuant to section 73.606 of title 47, Code of Federal Regulations, or any successor regulations thereto, and (III) such stations and translators operating on channels not so reserved as the Commission determines are qualified as noncommercial educational stations.

(2) Qualified local noncommercial educational television station

The term "qualified local noncommercial educational television station" means a qualified noncommercial educational television station—

(A) which is licensed to a principal community whose reference point, as defined in section 76.53 of title 47, Code of Federal Regulations (as in effect on March 29, 1990), or any successor regulations thereto, is within 50 miles of the principal headend of the cable system; or

(B) whose Grade B service contour, as defined in section 73.683(a) of such title (as in effect on March 29, 1990), or any successor regulations thereto, encompasses the principal headend of the cable system.