

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-1288

MICHAEL KARR D/B/A WVUX-LD,

PETITIONERS,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties.

The petitioner is Michael Karr doing business as WVUX-LD. The respondents are the Federal Communications Commission and the United States of America. There are no intervenors or amici.

2. Ruling under Review.

In the Matter of Michael Karr d/b/a WVUX-LD v. DIRECTV, LLC and DISH Network LLC, Memorandum Opinion and Order, 35 FCC Rcd 6859 (2020) (RA 33).¹

3. Related Cases.

The order on review has not previously been before this Court. Counsel is not aware of any related cases that are pending before this Court or any other court.

¹ Cited items in the record are set forth in the respondents' appendix ("RA") to this brief.

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GLOSSARY

Act or Communications Act	Communications Act of 1934, as amended, 47 U.S.C. §§ 151, <i>et seq.</i>
<i>Bureau Order</i>	<i>In the Matter of Michael Karr d/b/a WVUX-LD v. DIRECTV, LLC and DISH Network L.L.C.</i> , Memorandum Opinion and Order, 34 FCC Rcd 9562 (2019) (RA 14)
<i>Order on Review</i>	<i>In the Matter of Michael Karr d/b/a WVUX-LD v. DIRECTV, LLC and DISH Network LLC</i> , Memorandum Opinion and Order, 35 FCC Rcd 6859 (2020) (RA 33)
Section 338	47 U.S.C. § 338
<i>Section 338 Implementation Order</i>	<i>In the Matter of: Implementation of the Satellite Home Viewer Improvement Act of 1999</i> , Notice of Proposed Rulemaking, 15 FCC Rcd 12147 (2000)
Section 614	47 U.S.C. § 534

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BRIEF FOR RESPONDENTS

INTRODUCTION

A satellite carrier provides “local-into-local” service when it retransmits a television broadcast station’s signal back into that station’s local market for reception by the satellite carrier’s subscribers. Section 338 of the Communications Act, 47 U.S.C. § 338, mandates that if a satellite carrier provides local-into-local service with respect to one television broadcast station, then it “shall carry upon request the signals of all television broadcast stations located within that local market, subject to section 325(b).” 47 U.S.C. § 338(a)(1). Section 338 provides, however, that “[n]o low power television

station . . . shall be entitled to insist on carriage under this section,” *id.*

§ 338(a)(3), and section 325(b) further provides that the term “television broadcast station’ . . . does not include a low-power or translator television station.” 47 U.S.C. § 325(b)(7).

Petitioner Michael Karr operates WVUX-LD, a low power television station in Fairmont, West Virginia. Karr filed a Petition for Declaratory Ruling and Demand for Carriage with the Federal Communications Commission against DIRECTV, LLC, and DISH Network L.L.C., two satellite carriers providing local-into-local service in WVUX-LD’s market that refused WVUX-LD’s demand for carriage. The Commission denied Karr’s petition and demand on the grounds that section 338 of the Act grants mandatory carriage rights to “television broadcast stations,” 47 U.S.C. § 338(a)(1), and section 325(b) provides that such stations do not include “low power . . . television stations,” 47 U.S.C. § 325(b)(7). *See In the Matter of Michael Karr d/b/a WVUX-LD v. DIRECTV, LLC and DISH Network LLC*, 35 FCC Rcd 6859, 6861 ¶7 (2020) (“*Order on Review*”) (RA 33, 34).

Karr, proceeding pro se, contends in this Court that review is warranted because, in the *Order on Review*, “the FCC misinterpret[ed] 47 USC §338, rendering it unconstitutional.” Petitioner’s Brief (“Pet. Br.”) at 1. But as we

show, the Commission's interpretation is compelled by the statutory text and the statute is constitutional. The petition for review should be denied.

JURISDICTION

The *Order on Review* was adopted on June 20, 2020 and released on June 22, 2020. On July 29, 2020, WVUX-LD filed a petition for review, within the 60 days provided by 28 U.S.C. § 2344. This Court has jurisdiction under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

QUESTIONS PRESENTED

1. Did the Commission reasonably determine that WVUX-LD was not entitled to mandatory satellite carriage because it is a low power television station?
2. Does that interpretation unconstitutionally discriminate against qualified low power television stations that are entitled to carriage on cable television systems?

STATUTES AND REGULATIONS

47 U.S.C. § 338 provides, in pertinent part:

(a) Carriage obligations.

- (1) In general. Each satellite carrier providing, . . . secondary transmissions to subscribers located within the local market of a television broadcast station of a primary transmission made by that station shall carry upon request the signals of all television broadcast stations located within that local market, subject to section 325(b) of this title.

(3) Low power station carriage optional. No low power television station . . . shall be entitled to insist on carriage under this section, regardless of whether the satellite carrier provides secondary transmissions of the primary transmissions of other stations in the same local market

47 U.S.C. § 325(b) provides, in pertinent part:

(7) For purposes of this subsection, the term—

(B) “television broadcast station” means an over-the-air commercial or noncommercial television broadcast station licensed by the Commission under subpart E of part 73 of title 47, Code of Federal Regulations, except that such term does not include a low-power or translator television station.

Other relevant statutory provisions and regulations are set forth in the statutory appendix to this brief.

COUNTERSTATEMENT

I. STATUTORY AND REGULATORY BACKGROUND

Section 122 of the Copyright Act grants a statutory copyright license to satellite carriers for the retransmission of television broadcast signals to subscribers in the television station’s local market and eliminates the need for satellite carriers to obtain retransmission rights for each program carried by a television station. 17 U.S.C. § 122(a)(1). In return, section 338 of the Communications Act requires satellite carriers who rely on the statutory license to “carry upon request the signals of all television broadcast stations” in a local market if they choose to transmit to their subscribers in that market

the signals of at least one such station in the market. *See* 47 U.S.C. § 338(a)(1).¹

Section 338 thus “gives satellite carriers a choice”: If they “provide their subscribers with the signals of local television stations through reliance on the statutory copyright license, they will have the obligation to carry all of the television signals in that particular market that request carriage.” *In the Matter of: Implementation of the Satellite Home Viewer Improvement Act of 1999*, Notice of Proposed Rulemaking, 15 FCC Rcd 12147, 12152 ¶10 (2000) (“*Section 338 Implementation Order*”).

The carriage obligations set forth in section 338 apply only to a “television broadcast station” as defined “in section 325(b)(7)” of the Communications Act. 47 U.S.C. § 338(a)(1) (carriage obligations are “subject to section 325(b)”). *See id.* § 338(k)(10) (“The term ‘television broadcast station’ has the meaning given such term in section 325(b)(7)”). Section 325(b), in turn, defines a “television broadcast station” as “an over-the-air

¹ With respect to satellite carriage, a television station’s local market is the designated market area in which that station is located. *See* 47 C.F.R. § 76.66(e). A designated market area is a geographic market designation that is delineated based on viewing patterns; on a yearly basis, the Nielsen Company assigns each county in the United States (except for certain counties in Alaska) to a designated market area based on the county’s viewing patterns. *See In the Matter of Monongalia County, West Virginia and Preston County, West Virginia*, 33 FCC Rcd 1168, 1169 ¶3 & n.8 (MB 2018).

commercial or noncommercial television station licensed by the Commission under subpart E of part 73 of title 47, Code of Federal Regulations, except that such term does not include a low-power or translator television station.” 47 U.S.C. § 325(b)(7).² Section 338(a)(3) reaffirms that “[n]o low power television station . . . shall be entitled to insist on carriage under this section,” 47 U.S.C. § 338(a)(3). *See Section 338 Implementation Order*, 15 FCC Rcd at 12154 ¶12 (“unlike cable operators, satellite carriers have no obligation to carry low power television stations in any instance”).

In contrast to section 338, section 614 of the Communications Act requires a cable operator (not a satellite carrier) to “carry, on the cable system of that operator, the signals of local commercial television stations and qualified low power stations.” 47 U.S.C. § 534(a). A low power television station is qualified for mandatory cable carriage, if, among other requirements, it “is located no more than 35 miles from the cable system’s headend [a facility uniquely used in cable operations to receive, process, and distribute video programming],” 47 U.S.C. § 534(h)(2)(D), and “there is no

² *See also* 47 C.F.R. § 76.66(a)(4) (“A television broadcast station is an over-the-air commercial or noncommercial television broadcast station licensed by the Commission under subpart E of part 73 of title 47, Code of Federal Regulations, except that such term does not include a low-power or translator television station.”).

full power television broadcast station licensed to any community within the county or other political subdivision . . . served by the cable system,” *id.* (F).

II. THE PROCEEDING BELOW

WVUX-LD is a low power television station located in Fairmont, West Virginia, a community in the Clarksburg-Weston designated market area. On September 7, 2018, Michael Karr, owner and operator of WVUX-LD, filed a Petition for Declaratory Ruling and Demand for Coverage (“Demand”) with the Commission, complaining that DIRECTV and DISH had wrongfully refused the station’s request for carriage on their satellite systems on the grounds that they are not required to carry the signals of low power television stations. Demand at 1-2 (RA 3-4).

Karr argued that WVUX-LD was entitled to carriage because it is a “qualified low power television’ station as defined in 47 USC §534(h)(2),” and therefore falls outside the definition of “low power television station” in Section 338(k)(5) of the Act. Demand at 4 (RA 6). *See* 47 U.S.C.

§ 338(k)(5).³ Karr accordingly sought a declaratory ruling “to clarify whether

³ Section 338(k)(5) defines “low power television station” to mean “a low power television station as defined under 74.701(f)” of the Commission’s rules, “as in effect on June 1, 2004,” and “includes a low power television station that has been accorded primary status as a Class A television licensee under [47 C.F.R.] section 73.6001(a).” 47 U.S.C. § 338(k)(5). Karr contended that WVUX-LD was neither. Demand at 4 (RA 6).

qualified [low power television stations] are entitled to insist on mandatory carriage by satellite providers,” Demand at 7 (RA 9), and requested that the Commission “order DIRECTV and DISH Network to carry [his] qualified [low power television station].” *Id.* at 8 (RA 10).

On October 24, 2019, the Commission’s Media Bureau (“Bureau”) denied the Demand. *In the Matter of Michael Karr d/b/a WVUX-LD v. DIRECTV, LLC and DISH Network L.L.C.*, 34 FCC Rcd 9562 (2019) (“*Bureau Order*”) (RA 14).

The Bureau explained that “WVUX-LD’s status as [a low power television] station is fatal to its request for satellite mandatory carriage . . . because a [low power television] station is not entitled to mandatory carriage on satellite carriers under the Act.” *Id.* ¶6 (RA 16). And it concluded that “WVUX-LD’s emphasis on being a qualified [low power television station] is meaningless because Congress has explicitly excluded [low power television] stations from a satellite carrier’s mandatory carriage obligation.” *Ibid.* (RA 16).

Turning to WVUX-LD’s petition for declaratory ruling, the Bureau ruled that because the “text of the Act, the Commission’s rules implementing that text and Commission precedent all conclusively indicate that [low power television] stations have absolutely no carriage rights on satellite providers,

even if they meet the cable definition of a ‘qualified’ [low power television] station,” it had no power to “grant a declaratory ruling that directly conflicts with the unambiguous state of the law.” *Id.* ¶7 (RA 17).

III. THE ORDER ON REVIEW

Karr applied to the Commission to review the *Bureau Order*.⁴ On June 22, 2020, the Commission upheld the Bureau and denied review, concluding that Karr had failed “to show any error in the Bureau’s analysis of the statute, Commission rules, relevant precedent, or policy.” *Order on Review* ¶6 (RA 34).

The Commission reaffirmed that the definition of a “television broadcast station” entitled to satellite carriage under section 338 “does not include a low-power . . . television station.” *Id.* ¶7 (RA 35) (quoting 47 U.S.C. § 325(b)(7)). The Commission also rejected Karr’s argument that “low power stations” that are “qualified” within the meaning of section 614(h)(2) of the Act, 47 U.S.C. § 534(h)(2), and entitled to carriage by cable operators under Section 614(a) of the Act, 47 U.S.C. § 534(a), do not fall within the statutory exclusion from satellite carriage obligations applicable to

⁴ Application for Review of Memorandum Opinion and Order Denying Petition for Declaratory Ruling and Demand for Coverage (“Application for Review”) (RA 18).

“low power television stations.” *Order on Review* ¶9 (citing 47 U.S.C. § 338(a)(3) and Application for Review at 6-7) (RA 36).

As the Commission explained, the definition of low power television station applicable to section 338(a)(3)’s exclusion includes a “qualified low power station.” *Order on Review* ¶9 (RA 36). *See* 47 U.S.C. § 534(h)(2) (a “qualified” low power station is one that, among other things, “conform[s] to the rules established for Low Power Television Stations contained in [47 C.F.R.] Part 74.”). “In any event,” the Commission concluded, “whether or not WVUX-LD falls within the specific exclusion from satellite must carry rights in section 338(a)(3), it is not entitled to mandatory carriage rights under section 338(a)(1), because . . . it is not a ‘television broadcast station’ as defined by the Act.” *Order on Review* ¶10 (RA 37).

In sum, the Commission found “no basis” in the Application for Review “to modify the Bureau’s Order” and so concluded that Karr had “failed to demonstrate that the Bureau erred.” *Id.* ¶12 (RA 37). The Commission accordingly denied the application for review. *Id.* ¶13 (RA 37).

SUMMARY OF ARGUMENT

Section 338 of the Communications Act governs the circumstances under which satellite carriers are obligated to carry television stations on their systems. Specifically, section 338(a)(1) requires satellite carriers to carry, on

request, the signals of “television broadcast stations” in television markets where the satellite carrier provides local-into-local service. 47 U.S.C. § 338(a)(1). A low power television station is not a “television broadcast station” within the meaning of section 338(a)(1). 47 U.S.C. §§ 325(b)(7), 338(a)(1), and 333(k)(10). Such stations are also expressly excluded from section 338(a)(1)’s mandatory carriage rights by section 338(a)(3) (“[n]o low power television station . . . shall be entitled to insist on carriage under this section”).

Based on the unambiguous meaning of section 338, the Commission upheld the Bureau’s denial of low power television station WVUX-LD’s demand for satellite carriage and refusal to grant a declaratory ruling that, as a qualified low power television station with respect to cable carriage, WVUX-LD is entitled to insist on satellite carriage.

STANDARD OF REVIEW

This is a case of statutory construction where “Congress has directly spoken to the precise question at issue.” *Chevron, USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

ARGUMENT

I. THE COMMISSION’S INTERPRETATION GIVES EFFECT TO THE UNAMBIGUOUSLY EXPRESSED INTENT OF CONGRESS THAT LOW POWER TELEVISION STATIONS LIKE WVUX-LD ARE NOT ENTITLED TO MANDATORY CARRIAGE ON SATELLITE SYSTEMS.

In the *Order on Review*, the Commission upheld “the Bureau’s determination that WVUX-LD’s status as [a low power television] station is fatal to its request for satellite mandatory carriage under the terms of the statute.” *Id.* ¶7 (internal quotation marks omitted) (RA 35). As the Commission explained, “section 338 limits mandatory carriage on a satellite system to a television broadcast station” as defined “in section 325(b)(7)” of the Act, and WVUX-LD is not such a station. *Ibid.* (internal quotation marks omitted) (RA 34-35).

Section 325(b)(7) defines a “television broadcast station” as “an over-the-air commercial or noncommercial television broadcast station licensed by the Commission under subpart E of part 73 of title 47, Code of Federal Regulations, except that such term does not include a low-power or translator television station.” 47 U.S.C. § 325(b)(7). Low power television stations are not licensed under part 73 of the Commission’s rules and are expressly excepted by this statutory definition. Low power television stations are licensed under part 74 of the Commission’s rules—specifically, under

“Subpart G—Low Power TV, TV Translator, and TV Booster Stations,” 47 C.F.R. §§ 74.701 *et seq.* See *Order on Review* ¶9 (RA 36).

Karr does not dispute that WVUX-LD is a low power station that is licensed under part 74 of the Commission’s rules, nor does he argue that it is a “television broadcast station” licensed under part 73 of the Commission’s rules. See Pet. Br. at 5 (WVUX-LD “conforms to the rules established for [low power television stations] in part 47 CFR §74”). Because WVUX-LD is not a television broadcast station, it is not entitled to satellite carriage by the plain terms of section 338(a)(1).

Karr nonetheless argues that WVUX-LD is entitled to carriage by satellite carriers because it is a “qualified low power station” within the meaning of section 614(h)(2) of the Act, 47 U.S.C. § 534(h)(2), and therefore entitled to carriage by cable operators under the cable carriage obligations of section 614(a) of the Act, 47 U.S.C. § 534(a). But satellite carriers are not cable operators, *compare* 47 U.S.C. § 338(k)(7); 17 U.S.C. § 119(d) (“satellite carrier”) *with id.* § 522(5) (“cable operator”). Moreover, the carriage obligations of satellite carriers under section 338 are not governed by the carriage obligations of cable operators under section 614. And although WVUX-LD is “a ‘qualified low power’ station as defined in 47 USC §534(h)(2),” Pet. Br. at 5, there is no such definition for the purposes of

satellite carriage. *Order on Review* ¶10 (RA 37) (a “qualified” low power television station “exists solely in the . . . cable context”).

In short, the fact that WVUX-LD qualifies for carriage by its local cable operator as a qualified low power television station has nothing to do with whether it qualifies for carriage by a satellite carrier. Only a “television broadcast station” qualifies for satellite carriage under section 338(a)(1), and a low power television station like WVUX-LD does not fall within section 325(b)’s definition of such a station. It is therefore not entitled to satellite carriage.

Karr argues that WVUX-LD does not fall within Section 338(a)(3)’s express exclusion of low power television stations from the mandatory carriage obligation of satellite carriers. Pet. Br. at 7. *See* 47 U.S.C.

§ 338(a)(3) (“[n]o low power television station whose signals are provided under [17 U.S.C. § 119(a)(14)] shall be entitled to insist on carriage under this section”).⁵ This is because, he contends, section 338(k)(5) of the Act defines such a station to mean a low power television station “as defined under [47 C.F.R. §] 74.701(f) . . . as in effect on June 1, 2004,” and “includes a low power television station that has been accorded primary status as a

⁵ 17 U.S.C. § 119(a)(14) was later repealed, but no conforming amendment to Section 338(a)(3) was enacted. *See Order on Review* n.25 (RA 36).

Class A television licensee under [47 C.F.R. §] 73.6001(a),” 47 U.S.C.

§ 338(k)(5), and WVUX-LD is neither. Pet. Br. at 7.

The Commission correctly disagreed. *See Order on Review* ¶9 (RA 36). As it explained, the “definition of ‘low power television station’ as used in section 338(a)(3) . . . extends to WVUX-LD because a ‘qualified low power station,’ established under section 614(h)(2) of the Act, by definition ‘conform[s] to the rules established for Low Power Television Stations contained in part 74 of title 47, Code of Federal Regulations.’” *Id.* ¶9 (quoting section 614(h)(2), 47 U.S.C. § 534(h)(2)) (RA 36).

In any event, “[w]hether or not WVUX-LD falls within the specific exclusion from satellite must carry rights in section 338(a)(3), it is not entitled to mandatory carriage rights under section 338(a)(1) because . . . it is not a ‘television broadcast station’ as defined by the Act.” *Id.* ¶10 (RA 37).

Finally, Karr relies on a single statement in a footnote in a 2016 Government Accountability Office report to Congress as “persuasive authority” that satellite carriers nonetheless are obligated to carry low power television stations. Pet Br. at 8.⁶ But, as the Commission rightly concluded,

⁶ Citing to U.S. Government Accountability Office, *Telecommunications: Information on Low Power Television, FCC’s Spectrum Incentive Auction, and Unlicensed Spectrum Use*, Report GAO-17-135 (published Dec. 5, 2016) (“GAO report”).

the “inaccurate statement in the GAO report” cannot override the clear intent of Congress that “no low power television stations are entitled to insist on carriage by satellite carriers.” *Order on Review* n.21 (RA 35).

II. THE COMMISSION’S INTERPRETATION OF SECTION 338 DOES NOT RENDER IT UNCONSTITUTIONAL.

Karr argues that the “FCC’s construction” of section 338 “run[s] afoul of the equal protection provisions of the United States Constitution” because “[t]he FCC has construed the statute such that Congress is deemed to have arbitrarily discriminated between functionally equivalent facilities”— “cable providers, who are required to carry qualified low power stations, and satellite providers,” who are not. Pet. Br. at 8, 9. Karr therefore contends that the FCC should have adopted an alternative construction under the doctrine of constitutional avoidance. Pet. Br. at 8 (citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). But here, as we have explained, the plain language of the governing statutes excludes WVUX-LD from satellite carriage obligations. And the doctrine of constitutional avoidance does not permit an agency to rewrite statutes in the guise of interpreting them. *See, e.g., Commodities Futures Trading Comm’n v. Schor*, 478 U.S. 833, 841 (1986); *In re Espy*, 80 F.3d 501, 505 (D.C. Cir. 1996).

In any event, section 338 is constitutional. It is well settled that “[i]n areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” *FCC v. Beach Commc’ns, Inc.* 508 U.S. 307, 313 (1993). Under such “rational basis review,” a statutory classification “comes . . . bearing a strong presumption of validity, . . . and those attacking the rationality of the legislative classification have the burden ‘to negative every conceivable basis which might support it.’” *Id.* at 314 (citing *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

Karr contends that the differential treatment here burdens First Amendment rights and is therefore subject to “strict scrutiny.” Pet. Br. at 10. But he does not allege that the complained-of difference between cable and satellite carriage obligations is motivated by an attempt to disfavor the speech of one or the other type of provider, and strict scrutiny is not triggered by speaker distinctions that are justified by “some special characteristic” differentiating them. *See, e.g., Turner Broad. Sys. v. FCC*, 512 U.S. 622, 660-61 (1994) (citation omitted). Moreover, WVUX-LD’s own speech rights are nowhere implicated, since its ability to broadcast is unaffected and it has no

inherent right to have its signals carried by a satellite carrier. And to the extent Karr seeks to represent the interests of “West Virginian viewers” in WVUX-LD’s local market, Pet. Br. at 10, he has not shown standing to do so.

Here, as the Commission recognized, “Congress decided to treat satellite carriers differently than cable operators” insofar as their mandatory carriage obligations are concerned, “based on the technical differences between the two systems.” *Order on Review* ¶8 (RA 36). For one thing, “satellite carriers provide a national service and need not have a franchise from local or state authorities to serve subscribers”; “[c]able operators, on the other hand, serve local franchise areas under franchise agreements with either local, county or state authorities.” *Section 338 Implementation Order*, 15 FCC Rcd at 12150-51 ¶7. Congress may well have thought it reasonable to require cable companies, under their local franchises, to carry qualified low power stations, since such stations qualify only if, among other things, they provide programming “address[ing] local news and informational needs which are not being adequately served by full power television broadcast stations.” 47 U.S.C. § 534(h)(2)(B). By contrast, the basis for the carriage obligation of satellite carriers reasonably takes account of the fact that they provide programming on a nationwide basis, and their obligation to carry local stations is a consequence of their voluntary choice to provide local

programming. Satellite carriers, unlike cable operators, also can encounter technical obstacles to providing signals to a particular community. *See* 47 U.S.C. § 338(1)(3)(A) (refusing to impose “additional carriage obligations for a satellite carrier” if carriage “is not technically and economically feasible” using “its satellites in operation at the time”). In sum, for purposes of the equal protection clause, cable operators and satellite carriers are not “similarly situated” with respect to mandatory carriage of local television programming, *see* Pet. Br. at 8, and Congress could reasonably have decided against imposing identical obligations on them.

Karr also complains that the Commission’s statutory construction limits the “local options for public viewers who subscribe to [a] satellite provider.” Pet. Br. at 12. But nothing forbids a satellite carrier from choosing to carry a low power television station; it is just not obligated to do so by the Communications Act. Indeed, as Karr acknowledges, DIRECTV and DISH have chosen to voluntarily carry in West Virginia “low power television stations WOVA and WIYE.” *See id.* at 11. Such carriage, however, has no bearing on Karr’s claim that WVUX-LD has the right to require DIRECTV and DISH to carry it. And, as the Commission concluded, Karr’s “policy arguments cannot overcome the statutory requirements of section 338 and our implementing rules.” *Order on Review* n.34 (RA 37).

CONCLUSION

For the reasons above, the petition for review should be denied.

Respectfully submitted,

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September 17, 2021

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I, Pamela L. Smith, hereby certify that on September 17, 2021, I filed the foregoing Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the electronic CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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STATUTORY APPENDIX

Communications Act Provisions:

47 U.S.C. § 325(b)(7)

47 U.S.C. § 338(a)(1), (a)(3), (k)(5), (k)(10) and (l)(3)(A)

FCC Rules:

47 C.F.R. § 76.66(a)(4)

47 C.F.R. § 74.701(f)

47 U.S.C.

§ 325. False, fraudulent, or unauthorized transmissions

(b) Consent to retransmission of broadcasting station signals

(7) For purposes of this subsection, the term—

(B) “television broadcast station” means an over-the-air commercial or noncommercial television broadcast station licensed by the Commission under subpart E of part 73 of title 47, Code of Federal Regulations, except that such term does not include a low-power or translator television station.

§ 338. Carriage of local television signals by satellite carriers

(a) Carriage obligations

(1) In general

Each satellite carrier providing, under section 122 of Title 17, secondary transmissions to subscribers located within the local market of a television broadcast station of a primary transmission made by that station shall carry upon request the signals of all television broadcast stations located within that local market, subject to section 325(b) of this title.

(3) Low power station carriage optional

No low power television station whose signals are provided under section 119(a)(14) of Title 17 shall be entitled to insist on carriage under this section, regardless of whether the satellite carrier provides secondary transmissions of the primary transmissions of other stations in the same local market pursuant to section 122 of such title nor shall any such carriage be considered in connection with the requirements of subsection (c) of this section.

(k) Definitions

As used in this section:

(5) Low power television station

The term “low power television station” means a low power television station as defined under section 74.701(f) of title 47, Code of Federal Regulations, as in effect on June 1, 2004. For purposes of this paragraph, the term “low power television station” includes a low power television station that has been accorded primary status as a Class A television licensee under section 73.6001(a) of title 47, Code of Federal Regulations.

(10) Television broadcast station

The term “television broadcast station” has the meaning given such term in section 325(b)(7) of this title.

(I) Market determinations**(3) Carriage of signals****(A) Carriage obligation**

A market determination under this subsection shall not create additional carriage obligations for a satellite carrier if it is not technically and economically feasible for such carrier to accomplish such carriage by means of its satellites in operation at the time of the determination.

47 C.F.R.**§ 76.66 Satellite broadcast signal carriage.****(a) Definitions—**

(4) Television broadcast station. A television broadcast station is an over-the-air commercial or noncommercial television broadcast station licensed by the Commission under subpart E of part 73 of title 47, Code of Federal Regulations, except that such term does not include a low-power or translator television station.

§ 74.701 Definitions.

(f) Low power TV station. A station authorized under the provisions of this subpart that may retransmit the programs and signals of a TV broadcast station and that may originate programming in any amount greater than 30 seconds per hour and/or operates a subscription service. (See § 73.641 of Part 73 of this chapter.)