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

In the Matter of	)	
	)	
Petition of WRNN License Company, LLC	)	CSR-6956-A
	)	
For Modification of Television Market For WRNN-DT, Kingston, New York	)	
	)	
Application for Review	)	
	)	
WRNN License Company, LLC	)	CSR-7053-M
	)	
v.	)	
	)	
Cablevision Systems Corporation	)	
	)	
Request for Mandatory Carriage of Television Station WRNN-DT, Kingston, New York	)	

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 Rrules (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.

[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).

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, 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 communities 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 reviewed 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

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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 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 marketplace 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).

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 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 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

[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)).

[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).

[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.

Islip systems was proper.[19] Therefore, we find no conflict between the *WRNN-DT Modification Order* and the Act or Commission precedent.

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 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]

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[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).

[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)).

[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.

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

[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."*).

[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.

[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).

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 Cablevision 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 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.

[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).

[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).

[46] 47 C.F.R. § 1.115.

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

[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 systems "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 historical 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

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

[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).

[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.

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]

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 "sub-zones" 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:

> 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" 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

[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.

[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.

[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.

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 "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.

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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[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.

[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).

[15] *See* Bureau Order at ¶18.