

**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.”<sup>1</sup> 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.<sup>2</sup> 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.”<sup>3</sup> 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.<sup>4</sup> 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

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<sup>1</sup> H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

<sup>2</sup> 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).

<sup>3</sup> See *In Re Petition of Cablevision Systems Corp.*, 11 FCC Rcd 6453, 6473 (Cable Serv. Bur. 1996).

<sup>4</sup> 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.

indicator of the economic reach of a particular station's signal."<sup>5</sup> 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."<sup>6</sup>

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."<sup>7</sup> 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.<sup>8</sup>

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.<sup>9</sup>

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.<sup>10</sup> 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 market" as the station's community of license. A station's Grade B contour is often a good proxy for that

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<sup>5</sup> See Bureau Order at ¶ 14, citing *NY ADI Order*, 12 FCC Rcd 12262, 12271 (1997).

<sup>6</sup> See *NY ADI Order*, 12 FCC Rcd at 12271.

<sup>7</sup> 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).

<sup>8</sup> 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.

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

<sup>10</sup> 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.

determination. Here, given the unique geography of the New York market and the distances involved,<sup>11</sup> 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."<sup>12</sup> 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.<sup>13</sup>

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.<sup>14</sup> 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.<sup>15</sup>

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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<sup>11</sup> 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.

<sup>12</sup> See Bureau Order at ¶16.

<sup>13</sup> *Id.*

<sup>14</sup> 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).

<sup>15</sup> See Bureau Order at ¶18.