



**FLEISCHMAN  
AND  
HARDING LLP**

November 29, 2007

## **MEMORANDUM TO CLIENTS**

**Re: FCC Rejects First and Fifth Amendment Challenge to Must Carry Market Modification Decision.**

The full FCC has, for the first time, addressed in detail a cable operator's objections that a market modification expanding the area within which a broadcast station is entitled to mandatory carriage violated the First and Fifth Amendments to the United States Constitution.

The case involved a decision by the Media Bureau granting a request by a digital-only Kingston, New York television station (WRNN-DT) that its local market for must carry purposes be expanded to include several communities in Nassau and Suffolk Counties, New York. The local cable operator, Cablevision, filed an application for review of the Bureau's decision in which it argued, among other things, that mandatory carriage of WRNN-DT would constitute both an "as-applied" violation of Cablevision's free speech rights and a "taking" of Cablevision's property in violation of the Fifth Amendment.

In the past, the Commission has generally dismissed constitutional objections to must carry-related decisions with little or no discussion. However, in this instance, the Commission gave a relatively detailed explanation for its denial of Cablevision's claims.

With regard to the First Amendment claim, the Commission stated that Cablevision's carriage of WRNN-DT would further at least two of the three governmental interests identified by the Supreme Court in the Turner case (upholding the constitutionality of must carry against a facial challenge). Specifically, according to the Commission, carriage of WRNN-DT would help ensure that the digital-only station "remains a viable option for viewers who rely on free, over-the-air television service in Nassau and Suffolk Counties" and continues to "number among the multiplicity of information sources available to viewers in those counties." The Commission also found that carriage of WRNN-DT would not burden more speech than necessary to serve these interests because it is not more extensive than the burden occasioned by Cablevision's carriage of any other must-carry station.

With regard to Cablevision's Fifth Amendment argument, the Commission first found that mandatory carriage of WRNN-DT did not constitute a "*per se* taking" because it would not effectuate a "permanent physical occupation of a cable operator's property" or result in "the loss of all economically viable use of the property." In support of this conclusion, the Commission distinguished between a cable operator's "physical property (e.g., headend equipment)" and the

transmission of “bits of data over cable bandwidth through electrons or photons at the speed of light,” finding that the operator retained “complete control” over the former. Moreover, the Commission ruled that because carriage of a single station represents only a small fraction of available bandwidth, Cablevision could not show a loss of all economically viable use of its property.

The Commission also rejected Cablevision’s alternative argument that extension of mandatory carriage rights to WRNN-DT constituted a “regulatory taking” of Cablevision’s property, concluding that there was no evidence in the record that carriage of the station would have “a significant economic impact on Cablevision or will interfere with the company’s reasonable, investment-backed expectations.” Indeed, according to the FCC, the statutory cap on must carry meant that Cablevision should reasonably expect to devote up to one-third of its capacity to mandatory carriage of local broadcast signals.

Finally, the decision is notable for one additional reason. While not expressing any views on the constitutional issues, Commissioners Copps and Adelstein dissented, arguing that the Bureau’s decision was not supported by the statutory factors governing the grant of market modifications. In particular, the dissenters argued that even though WRNN-DT placed a Grade B contour over the communities being added to its local market, those communities were separated geographically from WRNN-DT by the Long Island Sound and were, in driving mileage, an average of 151 miles from the station’s community of license. In addition, the dissenters cited the Bureau’s initial finding that the station did not provide programming of interest to viewers in Nassau and Suffolk County. The dissenters expressed concern that by upholding the market modification, the majority was harming localism by giving stations an incentive to shift the focus of their programming away from smaller communities of license and towards larger, well-served population centers.

We would be pleased to respond to any questions regarding this matter.

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