

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3
4 August Term 2007

5 (Argued: April 7, 2008

Decided: June 22, 2009)

6 Docket No. 07-5553-ag

7 -----x
8 CABLEVISION SYSTEMS CORPORATION,

9
10 Petitioner,

11
12 -- v. --

13
14 FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF
15 AMERICA,

16
17 Respondents,

18
19 WRNN LICENSE COMPANY, LLC,

20
21 Intervenor.

22
23 -----x
24
25 B e f o r e : WALKER, CABRANES, and RAGGI, Circuit Judges.
26

27 Petition for review of an order of the Federal
28 Communications Commission directing petitioner Cablevision to
29 carry the signal of television station WRNN pursuant to 47 U.S.C.
30 § 534(a)-(b) & (h)(1)(C). Cablevision argues that the
31 Commission's decision contravenes the text and purpose of the
32 statute, and that the statute, as applied, violated Cablevision's
33 First and Fifth Amendment rights.

34 PETITION DENIED.

1 HENK BRANDS (Allan J. Arffa and J.
2 Adam Skaggs, on the brief), Paul,
3 Weiss, Rifkind, Wharton & Garrison
4 LLP, Washington, D.C., and Howard
5 J. Symons and Tara M. Corvo (on the
6 brief), Mintz, Levin, Cohn, Ferris,
7 Glovsky and Popeo, P.C.,
8 Washington, D.C., for Petitioner.

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

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

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

32
33 JOHN M. WALKER, JR., Circuit Judge:

34 The must-carry provisions of the Cable Television Consumer
35 Protection and Competition Act ("1992 Cable Act" or "Cable Act")
36 require cable operators to transmit, over their cable systems,
37 the signals of certain broadcast stations operating in the same
38 market. The statute also gives the Federal Communications
39 Commission ("FCC" or "the Commission") authority to modify a
40 given broadcast station's market, thus potentially changing the
41 universe of cable operators required to carry that station. In

1 this case, Cablevision, a cable systems operator, petitions for
2 review of the FCC's decision to include certain Long Island
3 communities in the market of WRNN, a station broadcasting from
4 upstate New York, and the resulting order directing Cablevision
5 to carry WRNN on its Long Island cable systems. Because we find
6 no constitutional or legal error in the FCC's decision, we DENY
7 the petition.

8 BACKGROUND

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

10 The must-carry provisions of the 1992 Cable Act require
11 "cable operators," such as Cablevision, to carry the signals of a
12 number of "local commercial television stations." 47 U.S.C. §
13 534(a). The statute caps the number of such stations that a
14 cable operator must carry at "up to one-third of the aggregate
15 number of usable activated channels" on that operator's system.
16 Id. § 534(b)(1)(B). For our purposes, a "local commercial
17 television station" is a broadcast station (i.e., a station that
18 transmits its signal over the airwaves) that, "with respect to a
19 particular cable system, is within the same television market as
20 the cable system." Id. § 534(h)(1)(A).

21 A broadcast station's market "shall be determined by the
22 Commission by regulation or order using, where available,
23 commercial publications which delineate television markets based
24 on viewing patterns." Id. § 534(h)(1)(C)(i). Currently, the

1 Commission relies on the commercial publications of Nielsen Media
2 Research that divide the nation into a series of coterminous
3 geographic "Designated Market Areas" ("DMAs") based on viewership
4 patterns. 47 C.F.R. § 76.55(e)(2). For example, the New York
5 City DMA contains not only the five boroughs of the city, but
6 also neighboring areas of Long Island, Connecticut, New Jersey,
7 and upstate New York, as well as limited areas of Pennsylvania,
8 because people in those areas, in the aggregate, watch the same
9 television channels.

10 The upshot of the must-carry provisions is that, in general,
11 each cable operator is required to carry the signal of every
12 broadcast station in its DMA, until it has dedicated "one-third
13 of the aggregate number of usable activated channels" on its
14 system to such channels. 47 U.S.C. § 534(b)(1)(B); see also id.
15 § 534(a)-(b), (h)(1)(C). Both Cablevision and WRNN are located
16 within the New York City DMA, and Cablevision currently has fewer
17 than one-third of its channels dedicated to must-carry stations.

18 The only relevant exception to this must-carry rule occurs
19 under the statute's market modification provision. Pursuant to
20 this provision, the FCC may, on written request, add certain
21 communities to, or exclude certain communities from, a given
22 broadcast station's market "to better effectuate the purposes" of
23 the statute. § 534(h)(1)(C)(i). If a given community is
24 excluded from a station's market, cable operators in that
25 community are no longer required to carry that station. If a

1 given community is added, cable operators in that community must
2 commence carriage of that station's signal unless they already
3 devote one-third of their channels to local broadcast stations.

4 See id.

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

7 afford particular attention to the value of localism by
8 taking into account such factors as--

9 (I) whether the station, or other stations located in the
10 same area, have been historically carried on the cable
11 system or systems within such community; [the "historical
12 carriage factor"]

13 (II) whether the television station provides coverage or
14 other local service to such community; [the "local service
15 factor"]

16 (III) whether any other television station that is eligible
17 to be carried by a cable system in such community in
18 fulfillment of the requirements of this section provides
19 news coverage of issues of concern to such community or
20 provides carriage or coverage of sporting and other events
21 of interest to the community; [the "other stations factor"]
22 and

23 (IV) evidence of viewing patterns in cable and noncable
24 households within the areas served by the cable system or
25 systems in such community [the "viewing patterns factor"].
26

27 47 U.S.C. § 534(h) (1) (C) (ii) (I)-(IV). The FCC's interpretation
28 and application of this provision lies at the heart of this
29 dispute.

30 **II. The Turner Litigation**

31 Shortly after the passage of the 1992 Cable Act, several
32 cable operators mounted a First Amendment challenge to the
33 legislation by claiming that the statute, on its face,
34 impermissibly burdened the rights both of cable programmers, who
35 produce television shows exclusively for cable distribution

1 (e.g., HBO, TNT), and of cable operators, who actually transmit
2 the programming to consumers via coaxial cable (e.g.,
3 Cablevision). In Turner Broadcasting System, Inc. v. FCC
4 ("Turner I"), 512 U.S. 622 (1994), the Supreme Court held that
5 the statute's requirements were content neutral, and therefore
6 subject to intermediate scrutiny. The Court's majority opinion
7 announced that, at least in the abstract, the statute served
8 three "important," interrelated interests articulated by Congress
9 in the statute's findings: "(1) preserving the benefits of free,
10 over-the-air local broadcast television, (2) promoting the
11 widespread dissemination of information from a multiplicity of
12 sources, and (3) promoting fair competition in the market for
13 television programming." Id. at 662. The majority, however,
14 concluded that "deficienc[ies]" in the record prevented it from
15 determining whether the statute was sufficiently tailored to
16 further those interests without substantially burdening protected
17 speech and remanded for further proceedings. Id. at 667-68.

18 Significantly, the majority noted that the district court
19 had not addressed whether the language of the market modification
20 provision, with its references to "the value of localism" and to
21 stations "provid[ing] news coverage of issues of concern to such
22 community," altered the content-neutrality of the statute. Id.
23 at 643 n.6 (quoting 47 U.S.C. § 534(h)(1)(C)(ii)). The Court did
24 not address this point. Id. In a dissent joined by three other
25 justices, Justice O'Connor, relying in part on the language of

1 the market modification provision, wrote that the must-carry
2 regulation was content-based, and thus subject to strict
3 scrutiny, such that it could only be justified by a compelling
4 governmental interest and would have to be narrowly tailored to
5 achieve its intended purpose. Id. at 680.

6 In 1997, with a more fully developed record before it, the
7 Supreme Court held that "the must-carry provisions further
8 important governmental interests" and that the provisions did not
9 violate the First Amendment because they did "not burden
10 substantially more speech than necessary to further those
11 interests." Turner Broad. Sys., Inc. v. FCC ("Turner II"), 520
12 U.S. 180, 185 (1997). None of the opinions in Turner II
13 specifically mentioned or cited the market modification
14 provision.

15 **III. Market Modification Decisions in the New York City DMA**

16 In 1996, Cablevision petitioned the FCC to exclude a number
17 of communities from the markets of several local broadcast
18 stations, including WRNN, a station licensed in Kingston, New
19 York that transmitted its signal from Overlook Mountain in
20 Woodstock, New York. The FCC's Cable Services Bureau (the
21 "Bureau") granted Cablevision's request in part and denied it in
22 part, excluding communities in Long Island's Nassau and Suffolk
23 counties from WRNN's market, but declining to exclude communities
24 elsewhere, such as New York's Westchester County and

1 Connecticut's Fairfield County. Cablevision Sys. Corp. ("1996
2 CSB Order"), 11 F.C.C.R. 6453 (1996). In making both decisions,
3 the Bureau noted that, in the New York DMA, reliance on the four
4 enumerated factors alone would not allow it to "take into account
5 the particular difficulties faced by these stations in light of
6 the purposes of the carriage rule." Id. at 6475 ¶ 50.

7 Accordingly, the Bureau also considered the station's "Grade B
8 contour," i.e., the area within which viewers can receive its
9 broadcast signal over the air, and the "geography and terrain"
10 separating the target communities from the broadcasting station.
11 Id. at 6480-81 ¶ 67. In 1997, the FCC affirmed the Bureau's
12 decision, noting that

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

22
23 Market Modifications and the New York Area of Dominant Influence

24 ("1997 FCC Order"),¹ 12 F.C.C.R. 12262, 12271 ¶ 17 (1997)

25 (footnote omitted).

26 When WRNN and several other stations petitioned for review,
27 this court endorsed the agency's reliance on Grade B contour in
28 particular and factors not enumerated in the statute in general.

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

1 We approved of the view that "the four factors [enumerated in the
2 statute] are not exclusive," and we held that "[t]he FCC and the
3 Cable Services Bureau, experts in the area of regulation of the
4 television industry, carefully and properly analyzed the
5 particular facts of the various petitions under the four factors
6 listed in the statute and under non-statutory factors." WLNY-TV,
7 Inc. v. FCC, 163 F.3d 137, 141-42 (2d Cir. 1998).

8 **IV. The Current Proceedings**

9 Subsequent to the outcome of the 1996-98 proceedings, WRNN
10 moved its transmitter to Beacon Mountain, New York, some 50 miles
11 closer to Manhattan, and commenced digital-only broadcast
12 operations. In 2005, it petitioned the FCC to add back some of
13 the communities in the New York City DMA in its market so that
14 Time Warner Cable, which served the relevant communities, would
15 have to carry WRNN on its system. Relying primarily on Grade B
16 contour and local programming, the FCC's Media Bureau (the
17 successor to the Cable Services Bureau) granted WRNN's request.
18 WRNN License Co., 20 F.C.C.R. 7904, 7911 ¶¶ 15, 16 (2005). Time
19 Warner Cable did not appeal the decision to the full Commission.

20 In 2006, relevant to the present review, WRNN petitioned for
21 re-inclusion of several communities, this time served by
22 Cablevision, in Long Island's Nassau and Suffolk Counties. The
23 Bureau denied the request as to a number of the Suffolk County
24 communities based on WRNN's failure to comply with "standardized
25 evidentiary requirements." WRNN License Co. ("2006 Bureau

1 Order"), 21 F.C.C.R. 5952, 5956 ¶ 9 (2006). WRNN does not seek
2 review of the Bureau's decision as to these communities. As to
3 the remaining Nassau and Suffolk communities, which we will refer
4 to as the "Long Island communities," the Bureau noted that the
5 enumerated market modification factors did not offer strong
6 support for WRNN's position. The parties vigorously disputed the
7 amount of Long Island-specific programming WRNN offered, and the
8 Bureau ultimately concluded that the local service factor weighed
9 against carriage. As to the historical carriage factor, the
10 Bureau found it insignificant that both cable systems in
11 neighboring communities and digital broadcast satellite operators
12 in the Long Island communities carried WRNN. It also accorded
13 little weight to the fact that Verizon was scheduled to begin
14 carrying WRNN on its FiOS system, which delivers television
15 programming to subscribers over fiber optic phone lines, thus
16 competing directly with cable television service. Nonetheless,
17 the Bureau granted WRNN's request to include the remaining Long
18 Island communities, noting that Commission precedent "instructs
19 us to give little weight to the level of viewership [that]
20 station[s] like WRNN achieve" and to treat Grade B contour as a
21 "very relevant factor" when "the other [enumerated] factors would
22 not add significantly to the analysis of a station's market."
23 Id. at 5957 ¶ 10. In the Bureau's view, Grade B contour weighed
24 decisively in WRNN's favor.

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

12 **DISCUSSION**

13 In general, we will overturn an agency decision "only if it
14 was 'arbitrary, capricious, an abuse of discretion, or otherwise
15 not in accordance with law.'" Cellular Phone Taskforce v. FCC,
16 205 F.3d 82, 89 (2d Cir. 2000) (quoting 5 U.S.C. § 706(2)(A)).
17 "An agency's factual findings must be supported by substantial
18 evidence," which means "such relevant evidence as a reasonable
19 mind might accept as adequate to support a conclusion." Id.
20 (internal quotation marks omitted). We review an agency's
21 disposition of constitutional issues de novo. See Rural Tel.
22 Coal. v. FCC, 838 F.2d 1307, 1313 (D.C. Cir. 1988).

23 In its petition for review, Cablevision argues that the
24 FCC's order improperly analyzed the statutory factors, that its

1 decision contravened the "purpose" of the must-carry statute, and
2 that requiring Cablevision to carry WRNN violates the First and
3 Fifth Amendments. We address each of these arguments in turn.

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

5 **A. The Local Service Factor**

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

13 An administrative agency has a duty to explain its ultimate
14 action. See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto.
15 Ins. Co., 463 U.S. 29, 43 (1983) ("[T]he agency must examine the
16 relevant data and articulate a satisfactory explanation for its
17 action."). However, it need not explain each and every step
18 leading to this decision; it is enough "if the agency's path may
19 reasonably be discerned." Id. at 43 (internal quotation marks
20 omitted). Here, the reason for the FCC's decision to affirm the
21 Media Bureau's order is perfectly clear: it agreed with the
22 reasoning of the Bureau in most respects and disagreed in certain
23 others, but only in ways that strengthened the validity of the
24 Bureau's decision. In such circumstances, we will not require

1 the FCC to sift through each piece of evidence offered by a party
2 and explain why it is more or less compelling than the counter-
3 evidence put forth by an opponent.

4 The fact that we review agency fact-finding for "substantial
5 evidence" supports our conclusion that the FCC's explanation was
6 adequate. To determine whether substantial evidence supports a
7 finding, we need ask only whether "a reasonable mind might accept
8 [it] as adequate" support. Cellular Phone Taskforce, 205 F.3d at
9 89 (internal quotation marks omitted). Here, the agency found
10 WRNN's evidence that it had significant Long Island-targeted
11 programming to be more persuasive than Cablevision's evidence to
12 the contrary. We need not know the agency's precise rationale in
13 order to conclude that it was reasonable for the agency to so
14 find. While such an explanation might have aided our
15 reasonableness inquiry, it is not indispensable.

16 Both sides offered evidence regarding WRNN's programming
17 content. According to Cablevision, its evidence showed that WRNN
18 broadcast less than an hour of programming covering "Long Island
19 issues" in a "representative week." Cablevision Br. at 33. WRNN
20 pointed to evidence that it had aired over 4000 Long Island-
21 related items between June and November 2005. It would be
22 reasonable for the agency to resolve this conflicting evidence in
23 favor of WRNN and to conclude (as it obviously did) that
24 Cablevision failed to include some programming that should

1 properly be considered as local to Long Island, or that its
2 sample week was not actually representative. Thus, substantial
3 evidence supports the FCC's finding on this factor.

4 We note that the Bureau, on its initial consideration of
5 this petition, made a contrary finding as to this factor. This
6 fact, however, does not alter our assessment of the FCC's
7 ultimate determination. "An agency conclusion may be supported
8 by substantial evidence even though a plausible alternative
9 interpretation of the evidence would support a contrary view."
10 Robinson v. Nat'l Transp. Safety Bd., 28 F.3d 210, 215 (D.C. Cir.
11 1994) (internal quotation marks omitted). On questions of fact,
12 our task on review is not to "displace [the agency's final]
13 choice between two fairly conflicting views." Universal Camera
14 Corp. v. NLRB, 340 U.S. 474, 488 (1951).

15 **B. The Historical Carriage Factor**

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

1 carriage.” Cablevision Br. at 36-37.

2 Cablevision, however, fails to supply a contrary, “correct”
3 definition of “historically carried,” and does not discuss
4 whether we should defer to the Bureau’s interpretation of the
5 term, in accordance with Chevron U.S.A., Inc. v. Natural
6 Resources Defense Council, Inc., 467 U.S. 837 (1984), as we did
7 with the must-carry statute generally in WLNY-TV, Inc. v. FCC,
8 163 F.3d at 142. Even if Cablevision could demonstrate error in
9 the sense that the Verizon carriage was not “historical,” they
10 have failed to show why such error would warrant vacatur given
11 that (1) Cablevision does not contest the propriety of
12 considering Verizon’s carriage as an unenumerated, non-statutory
13 factor, and (2) the Bureau decided to order carriage despite its
14 belief that WRNN had not been “historically carried” in the
15 relevant communities. Accordingly, we decline to vacate the
16 FCC’s order based on this asserted error in the FCC’s analysis of
17 the historical carriage factor.

18 **C. Grade B Contour**

19 In its 1997 FCC Order involving Cablevision and WRNN, the
20 Commission stated that “Grade B contour coverage, in the absence
21 of other determinative market facts (i.e., [] . . . a terrain
22 obstacle such as a mountain range or a significant body of
23 water), is an efficient tool to adjust market boundaries.” 1997
24 FCC Order, 12 F.C.C.R. at 12271 ¶ 17. Cablevision contends that

1 the Hudson River, the Long Island Sound, and the "skyline of New
2 York City" constitute such terrain obstacles, and it was
3 therefore inconsistent with the 1997 FCC Order for the FCC and
4 the Bureau to weigh Grade B contour in WRNN's favor here.
5 Cablevision Br. at 38. The 1997 FCC Order itself forcefully
6 rejects this reasoning, because it explicitly endorses the use of
7 Grade B contour as proof of market in the New York City DMA—the
8 same context in which Cablevision now contends that relying on
9 Grade B contour is inappropriate. Because the 1997 FCC Order
10 establishes, rather than refutes, the relevance of Grade B
11 contour in market modifications within the New York City DMA, the
12 FCC's decision here is consistent with its precedent.

13 **D. The Other Stations and Viewing Patterns Factors**

14 Cablevision also alleges error in the FCC's treatment of the
15 two remaining statutory factors. In the instant order, the FCC
16 stated that Congress did not intend "the 'coverage by other
17 qualified stations' factor to bar a request for extending a
18 station's market when other stations could be shown to serve the
19 communities at issue." 2007 FCC Order, 22 F.C.C.R. at 21055-56 ¶
20 4.

21 In essence, then, the FCC decided to give the factor
22 significant weight when a lack of coverage by other stations
23 favored including a community in a station's market, but to
24 discount its importance when the existence of coverage arguably

1 cut against inclusion. Cablevision argues that this decision "is
2 directly contrary to . . . the statutory text." Cablevision Br.
3 at 40. This argument is unavailing. The text of the statute
4 directs the agency to consider a number of factors, and it is
5 clear from the opinion that both the FCC and the Bureau did
6 consider this factor. Upon doing so, the FCC saw no reason to
7 depart from its normal policy, which is to discount the "other
8 stations' coverage" factor when it tends to cut against
9 inclusion. Unsurprisingly, Cablevision cites no decision of this
10 court vacating a decision because we disagree with an agency's
11 weighing of a statutory factor. The law is to the contrary. In
12 interpreting another provision of the 1992 Cable Act that directs
13 the FCC to undertake a factoral analysis, the D.C. Circuit
14 concluded that giving little or no weight to a statutory factor,
15 as long as the factor is expressly considered, does not violate
16 the statute:

17 [T]he statute by its terms merely requires the Commission to
18 consider the . . . factors That means only that it
19 must reach an express and considered conclusion about the
20 bearing of a factor, but is not required to give any
21 specific weight to it. Therefore, when the Commission,
22 after expressly considering the potential role of the . . .
23 factor, ultimately concluded that it should not be given any
24 weight, it did not violate the statute.
25

26 Time Warner Entm't Co. v. FCC, 56 F.3d 151, 175 (D.C. Cir. 1995)

27 (internal quotation marks and citations omitted). This sound
28 reasoning is equally applicable here.

29 Cablevision also argues that the FCC improperly weighed the

1 evidence with respect to the viewership patterns factor. This
2 argument fails for the same reasons.

3 **II. The FCC's Consideration of the Purposes of the Must-Carry** 4 **Statute**

5 The market modification provision of the must-carry statute
6 provides that the FCC may add or remove communities from a local
7 broadcast station's market "to better effectuate the purposes of
8 this section." 47 U.S.C. § 534(h)(1)(C)(i). Cablevision argues
9 that the FCC's inclusion of the Long Island communities in WRNN's
10 market contravened the purposes of must-carry in two ways.
11 First, expanding WRNN's market in fact frustrates the goal of
12 "localism" by necessarily decreasing programming relevant to the
13 community WRNN has traditionally served (the Kingston community).
14 And second, rewarding WRNN's actions with broader must-carry
15 rights encourages gamesmanship which frustrates the purpose of
16 must-carry, which is to preserve, but not expand, a broadcast
17 station's market. We reject the first argument because it
18 incorrectly presumes that WRNN cannot increase Long Island-
19 targeted programming without decreasing Kingston-targeted
20 programming. We reject the second because it rests on a
21 conception of the statute's purpose that is overly narrow,
22 unsupported by precedent, and contrary to the language of the
23 statute.

1 According to Cablevision, the FCC's decision defeats the
2 purposes of the must-carry statute because "[a]ny targeting of
3 other spokes [i.e., communities that are remote from 'a DMA's
4 metropolitan center'] necessarily comes at the expense of the
5 station's community of license." Cablevision Br. at 43. This
6 argument rests on the false premise that WRNN's programming
7 consists entirely of either Kingston-specific programming or Long
8 Island-specific programming. As Cablevision reminds us
9 elsewhere, however, a great deal of WRNN's content is "home-
10 shopping" programming that targets neither Kingston nor Long
11 Island specifically. See Cablevision Br. at 33 (claiming that
12 78% of WRNN programming in a representative week "consisted of
13 home shopping and infomercials"). It is entirely possible, and
14 Cablevision does not suggest otherwise, that WRNN could increase
15 its Long Island-targeted programming by decreasing its home-
16 shopping programming, leaving its Kingston-targeted programming
17 unaffected. And to the extent that a Kingston viewer might
18 prefer certain home-shopping programming to programming
19 concerning Long Island, we do not see how frustrating that
20 preference undermines localism.

21 Essentially, Cablevision's claim is that, as a matter of
22 law, a cable company in a community that is outside a "DMA's
23 metropolitan center," such as Long Island, should not be required

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

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

18 Cablevision also argues that any decision that increases a
19 station's market is contrary to the purpose of the statute,
20 because the purpose is "to return broadcasters to their 'natural
21 market,'" Cablevision Br. at 47; thus, any FCC action which
22 augments a broadcaster's market contravenes this purpose. The
23 purpose of the statute, however, is not to "preserve" a group of
24 broadcast stations, or a particular conception of a station's

1 market, but, inter alia, to “preserv[e] the benefits of free,
2 over-the-air television,” and “promot[e] the widespread
3 dissemination of information from a multiplicity of sources.”
4 Turner I, 512 U.S. at 662. We do not think that these purposes
5 are served only by granting broadcasters the minimum must-carry
6 coverage necessary for survival; or that these purposes are
7 frustrated by actions which result in a station’s greater
8 prosperity. Accordingly, we conclude that the FCC did not
9 violate the statutory admonition that market modifications should
10 be made “to better effectuate the purposes of this section.” 47
11 U.S.C. § 534(h) (1) (C) (i). The remainder of Cablevision’s
12 arguments on this point fail to persuade us otherwise.

13 **III. Cablevision’s First Amendment Challenge**

14 Cablevision argues that “compelled carriage of WRNN on Long
15 Island violates the First Amendment on an as-applied basis.”
16 Cablevision Br. at 51. We think that the Turner cases do not
17 foreclose the possibility of a successful as-applied First
18 Amendment challenge to the 1992 Cable Act’s market modification
19 provisions. In this case, however, Cablevision has failed to
20 demonstrate that the FCC applied the market modification
21 provision unconstitutionally.

22 As a threshold matter, a party alleging violation of its
23 First Amendment rights must show that the challenged government
24 action actually regulates protected speech. Thus, in Turner I,

1 the Court found it necessary to establish, as an "initial
2 premise," that "[c]able programmers and cable operators engage in
3 and transmit speech," and that "the must-carry rules," in
4 general, "regulate cable speech." 512 U.S. at 636. Similarly,
5 Cablevision here must articulate how the FCC's order "interferes
6 with [its] speech rights." Time Warner Entm't Co., 240 F.3d at
7 1129.

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

22 The Turner I and Turner II Courts considered the First
23 Amendment implications of the "must-carry provisions" taken as a
24 whole, as distinguished from the market modification provisions

1 at issue here, and found that they posed two potential burdens on
2 speech rights:

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

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

11 Cablevision raises a similar, but not identical, First
12 Amendment challenge to that raised in Turner I and Turner II.
13 Cablevision presents an as-applied First Amendment challenge to
14 the FCC's order modifying the market of WRNN, pursuant to the
15 provision of the must-carry statute on market determinations, 47
16 U.S.C. § 534(h)(1)(C)(ii). The challenged order threatens the
17 First Amendment interest of Cablevision in a similar manner to
18 that described in Turner I and Turner II. The order reduces the
19 number of channels over which Cablevision exercises editorial
20 control by forcing it to carry WRNN, see Turner II, 520 U.S. at
21 213, and it also makes it more difficult for the cable
22 programming arm of Cablevision to compete for carriage on the
23 remaining channels, id.

24 In order to apply the appropriate level of scrutiny, we must
25 first determine whether the order is content based or content
26 neutral. Turner I, 512 U.S. at 642. In Turner I, the Court
27 concluded that the burdens imposed on cable operators as well as

1 the benefits conferred on broadcast channels were content
2 neutral. See id. at 643-44 (“Although the provisions interfere
3 with cable operators’ editorial discretion by compelling them to
4 offer carriage to a certain minimum number of broadcast stations,
5 the extent of the interference does not depend upon the content
6 of the cable operators’ programming. The rules impose
7 obligations upon all operators, save those with fewer than 300
8 subscribers, regardless of the programs or stations they now
9 offer or have offered in the past.”); id. at 645 (noting that the
10 selection of broadcast channels that must be carried on the cable
11 systems was “also unrelated to content”).

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

1 However, we think the order before us now is content
2 neutral. WRNN's presumptive DMA would have included Nassau and
3 Suffolk counties. It was Cablevision that first invoked the
4 market modification provision to exclude these counties from
5 WRNN's market. It succeeded based on the FCC's concern, in part,
6 that WRNN lacked a Grade B contour reaching Long Island. When
7 WRNN, after expanding its Grade B contour, returned to the FCC
8 seeking restoration of its presumptive DMA, Cablevision argued
9 that the station had failed to demonstrate that the various
10 factors outlined in the market modification provision, including
11 the local programming factor, weighed in WRNN's favor. The
12 Bureau and the FCC reached different conclusions on this factor,
13 yet both agreed that the totality of circumstances no longer
14 justified excluding Long Island communities from WRNN's
15 presumptive DMA. The FCC considered the amount of local
16 programming provided by WRNN only in this context, i.e., in
17 assessing the continued need to restrict a presumptive market
18 defined solely by geography. Moreover, WRNN's local programming
19 was an inconsequential factor in the FCC's ultimate decision.
20 Additionally, Cablevision has not alleged, much less proven, that
21 the restoration of the Long Island communities to WRNN's market
22 under these circumstances was based on some illicit content-based
23 motive. See id. at 652. We conclude, therefore, that the order
24 is content neutral and deserving of intermediate scrutiny.

1 We have no trouble in concluding that the order “advances
2 important governmental interests unrelated to the suppression of
3 free speech and does not burden substantially more speech than
4 necessary to further these interests.” Turner II, 520 U.S. at
5 189 (citing O’Brien, 391 U.S. at 377). The burden imposed by the
6 order - the loss of control over one channel - is no greater than
7 necessary to further the government’s interest in preserving a
8 single broadcast channel it found serves the local community.

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

15 **IV. Cablevision’s Fifth Amendment Challenge**

16 Finally, Cablevision asserts that by ordering it to carry
17 WRNN, the FCC effected a per se taking under Loretto v.
18 Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982). The
19 sine qua non of the takings analysis in Loretto, however, is
20 “permanent physical occupation.” Id. (emphasis added). This per
21 se takings rule is “very narrow,” id. at 441, and its touchstone
22 is “required acquiescence” to the occupation of the property by
23 an uninvited stranger or an “interloper with a government
24 license.” FCC v. Fla. Power Corp., 480 U.S. 245, 252-53 (1987);

1 see also Buffalo Teachers Fed'n v. Tobe, 464 F.3d 362, 374 (2d
2 Cir. 2006) ("Physical takings (or physical invasion or
3 appropriation cases) occur when the government physically takes
4 possession of an interest in property for some public purpose.").
5 Our own test for whether a regulation constitutes a permanent
6 physical occupation, set forth in Southview Associates, Ltd. v.
7 Bongartz, 980 F.2d 85 (2d Cir. 1992), looks to (1) the permanency
8 of the invasion, and (2) whether the invasion is an "absolute,
9 exclusive physical occupation." Id. at 94-95. In turn, we must
10 examine the nature of the interference with "the bundle of rights
11 that constitute ownership," id. at 95, such as the right to
12 possess and exclude, the right to control the use of the
13 property, and the right to sell the property.

14 The initial determination - whether the invasion is physical
15 - is primarily factual. Cf. John R. Sand & Gravel Co. v. United
16 States, 457 F.3d 1345, 1357 (Fed. Cir. 2006) ("[T]he
17 determination of whether government occupancy is 'permanent' is
18 highly fact-specific."). The fact finder must determine, in the
19 first instance, whether any physical assets are involved. See,
20 e.g., Qwest Corp. v. United States, 48 Fed. Cl. 672, 689 (2001)
21 ("In determining whether plaintiff's property has been subject to
22 a physical taking, our initial inquiry must focus on the nature
23 of the property at issue. What are the physical assets
24 involved?"). The FCC found that the transmission of WRNN over

1 the Cablevision system did not require installation of any
2 equipment at Cablevision's facilities. "Rather, a programming
3 stream is transmitted in bits of data over cable bandwidth
4 through electrons or photons at the speed of light." 2007 FCC
5 Order, 22 F.C.C.R. at 21058 ¶ 8. It further found that
6 Cablevision "retains complete control over its property." Id.
7 We see no reason to disturb these findings or the conclusion that
8 the transmission of WRNN's signal does not involve a physical
9 occupation of Cablevision's equipment or property. And
10 Cablevision effectively conceded that this physicality is absent
11 here when it argued in its reply brief that "[t]he result [under
12 Loretto] should be no different when the occupation is not of a
13 physical pipeline but of an electronic one." Cablevision Reply
14 Br. at 25.

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

1 **CONCLUSION**

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