

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of

CoxCom, LLC

For Modification of the Market of  
WMDE, Dover, Delaware

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CSR - \_\_\_\_\_ - A

MB Docket No. 15 - \_\_\_\_\_

To:           The Secretary's Office  
Attention:    Chief, Media Bureau

**PETITION FOR SPECIAL RELIEF**

CoxCom, LLC

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May 20, 2015

## TABLE OF CONTENTS

	<u>PAGE</u>
SUMMARY .....	iii
BACKGROUND .....	2
DISCUSSION .....	5
I.    Neither WMDE Nor Any Other Delaware Stations Have Historically Been Carried In The Cox Communities.....	5
II.   WMDE Fails To Provide Technical Coverage Or Other Local Service To The Cox Communities. ....	8
A.    WMDE Fails To Provide Technical Service To The Cox Communities.....	8
B.    Enormous Distances Preclude Any Market Nexus Between The Station And The Cox Communities.....	13
C.    WMDE Fails To Provide Any Programming Directed Specifically To The Cox Communities. ....	14
III.  Modifying WMDE’s Must-Carry Market Will Promote Consumer Access To Virginia Broadcast Signals In The Cox Communities.....	18
IV.  Other Stations Carried By Cox Provide Abundant Coverage Of Local News, Issues Of Concern, And Sporting And Other Events Of Interest To Viewers In The Cox Communities.....	19
V.   WMDE Fails To Achieve Any Ratings In The Cox Communities. ....	20
VI.  All Available Geographic, Economic, And Political Factors Confirm That WMDE Does Not Operate In The Same Market As The Cox Communities. ....	21
CONCLUSION.....	26

## SUMMARY

The Commission should modify the market of WMDE (Channel 5, Dover, Delaware) (“WMDE” or the “Station”) by excluding the cable communities served by CoxCom, LLC (“Cox”) in Fairfax County, Virginia (the “Cox Communities”). The Cox Communities in Virginia and the Station’s city of license in Dover, Delaware are located in demonstrably distinct television markets, which are separated not only by vast distances and substantial geographic barriers, but also by significant economic and political boundaries. In short, no market nexus exists between WMDE and the Cox Communities.

All the statutory factors applicable to market modification requests confirm WMDE is not a local station in the Cox Communities. The Station has no significant historic carriage and no measurable viewership in the Cox Communities, no Multichannel Video Programming Distributors (“MVPDs”) serving Fairfax County, Virginia carry any other stations licensed to Dover or anywhere else in Delaware or nearby eastern Maryland, the Station fails to place a 28 dBμ noise-limited service contour over all but a *de minimis* portion of either the Cox Communities or the Washington, DC (Hagerstown) Designated Market Area (“DMA”), and numerous signal tests have demonstrated consistently that WMDE does not and cannot provide a broadcast signal anywhere in the Cox Communities. In contrast, the Station’s signal contour covers nearly all of the Baltimore DMA. The Station also provides no programming specifically directed to the Cox Communities, in contrast to the many truly local broadcasters and programming services Cox already carries, which offer extensive news coverage regarding issues of concern in the Cox Communities and provide carriage and coverage of sporting and other events of interest to viewers in the Cox Communities. Conferring must-carry status to a distant Delaware station such as WMDE also would disserve Fairfax County, Virginia residents by limiting Cox’s resources and flexibility to carry current and future local in-state broadcast stations.

A variety of other geographical, economic, and political factors also confirm that WMDE and the Cox cable system in Fairfax County, Virginia serve different markets. For example, the distance between Dover, Delaware and Fairfax County, Virginia is approximately 100 miles, and commuting between them is effectively non-existent. This is unsurprising because the driving time between Dover and Falls Church, Virginia (the Cox Community closest to Dover) is more than two hours, even without accounting for the traffic delays typical of the congested Washington, DC metropolitan area, which also separates Dover and the Cox Communities. In fact, Kent County, Delaware (Dover's home county) is assigned to the Philadelphia DMA, and the only reason WMDE is now assigned to the Washington, DC (Hagerstown) DMA is that The Nielsen Company ("**Nielsen**") acquiesced to the Station's request for reassignment. Despite Nielsen's dutiful reassignment of the Station, Nielsen significantly did not change the DMA assignment of Kent County, Delaware, which remains in the Philadelphia DMA and which also is separated from the Cox Communities by the intervening Baltimore DMA. Given these circumstances, the fact that nationally-recognized sources, such as the Rand McNally Guide and the U.S. Office of Management and Budget ("**OMB**"), all assign the Cox Communities and Dover, Delaware to different markets also is unsurprising. Thus, all available evidence confirms that the Cox Communities do not belong in WMDE's must-carry market.

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**PETITION FOR SPECIAL RELIEF**

CoxCom, LLC ("**Cox**"), pursuant to Section 614(h)(1)(C) of the Communications Act (the "**Act**") and Sections 76.7 and 76.59 of the Commission's rules, hereby submits this Petition for Special Relief to modify the television market of WMDE (Channel 5, Dover, Delaware) ("**WMDE**" or the "**Station**") and exclude the cable communities that Cox serves in Fairfax County, Virginia (the "**Cox Communities**").<sup>1</sup>

Although Nielsen recently assigned the Station, but not its city of license, to the Washington, DC (Hagerstown) Designated Market Area ("**DMA**") at the Station's request, the Station's city of license and the Cox Communities are located an average of 98 miles apart, which precludes any market nexus between them and which far exceeds distances the Bureau has previously found to justify market modification requests. The Cox Communities also are separated from the Station by substantial political, geographic, and economic barriers, including

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<sup>1</sup> The Cox Communities are Fairfax City, Vienna, Fairfax County, Falls Church, Herndon, and Clifton, Virginia. A list of the Cox Communities and their corresponding CUID numbers is attached as Exhibit 1. The locations and the distances between each of the Cox Communities and WMDE's city of license in Dover, Delaware, are included on the maps in the Engineering Statement attached hereto as Exhibit 2.

but not limited to the states of Virginia, Maryland, and Delaware, the congested Washington, DC metropolitan area, the Chesapeake Bay, the Potomac River, and both the Philadelphia DMA and the Baltimore DMA (where the Station's transmitter is situated). The enormous distances and natural barriers separating the Station's market from the Cox Communities, combined with a variety of political and economic factors, render the Cox Communities so far removed from the Station that the Cox Communities cannot realistically be deemed to be part of its market. The Bureau should grant the instant Petition because these factors combined with the relevant statutory factors demonstrate that WMDE operates in and serves a different local market than that of the Cox Communities.

### **BACKGROUND**

Congress enacted the cable must-carry requirements in 1992 to preserve free local television broadcasting service, including local news, public affairs offerings, and emergency broadcasts;<sup>2</sup> in other words "to ensure that television stations be carried in the areas which they serve and which form their economic market."<sup>3</sup> Congress nonetheless recognized that "a community within a station's [DMA] may be so far removed from the station that it cannot be deemed part of the station's market."<sup>4</sup> Congress therefore authorized the Commission, upon petition, to better reflect those service and market realities by excluding certain cable communities from a station's must-carry market. Section 614 of the Communications Act directs the Commission to consider certain factors in market modification requests and specifies that in doing so the Commission must "afford particular attention to the value of localism."<sup>5</sup> The

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<sup>2</sup> See S. Rep. No. 102-92, at 42 (1992) ("**Senate Report**").

<sup>3</sup> H.R. Rep. No. 102-628, at 97 (1992) ("**House Report**").

<sup>4</sup> *Id.*

<sup>5</sup> 47 U.S.C. § 534(h)(1)(C)(ii). Congress specifically directed the Commission to consider  
(continued . . .)

Commission's *Modification Final Report and Order* established standardized evidentiary requirements to implement the statutory directives in market modification matters.<sup>6</sup>

The statutory factors in this case, along with other geographic, political, and economic data, confirm that the Cox Communities should be excluded from the WMDE must-carry market. As demonstrated herein: (1) the Station has no significant historical carriage in the Cox Communities or the Washington, DC (Hagerstown) DMA,<sup>7</sup> and no Fairfax County, Virginia Multichannel Video Programming Distributors ("MVPDs") carry any other stations licensed to Dover or anywhere else in Delaware or nearby eastern Maryland; (2) WMDE fails to provide

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(. . . *continued*)  
the following factors:

- (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 or on the satellite carrier or carriers serving such community;
- (II) whether the television station provides coverage or other local service to such community;
- (III) whether modifying the market of the television station would promote consumers' access to television broadcast station signals that originate in their State of residence;
- (IV) 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
- (V) evidence of viewing patterns in households that subscribe and do not subscribe to the services offered by multichannel video programming distributors within the areas served by such multichannel video programming distributors in such community.

Congress, however, did not intend for these factors to be exclusive, and the Commission may consider other relevant factors. *See* House Report at 97; *Market Modifications and the New York Area of Dominant Influence, Memorandum Opinion and Order*, 12 FCC Rcd 12262, 12267 at para. 10 (1997) ("*New York ADI Order*"), *aff'd*, *WLNY-TV, Inc. v. FCC*, 163 F.3d 137 (2d Cir. 1998). The STELA Reauthorization Act of 2014 ("**STELAR**"), Pub. L. No. 113-200, 128 Stat. 2059 (2014), enacted December 4, 2014, added a new statutory factor, denominated as factor III above, and the Commission is now seeking comments regarding its implementation. *See* Amendment to the Commission's Rules Concerning Market Modification, *Notice of Proposed Rulemaking*, 30 FCC Rcd 3039, FCC 15-34 (rel. March 26, 2015).

<sup>6</sup> *Definition of Markets for Purposes of the Cable Television Broadcast Signal Coverage Rules*, Order on Reconsideration and Second Report and Order, 14 FCC Rcd 8366 (1999) ("*Modification Final Report and Order*"). *See* 47 C.F.R. § 76.59(b). All the evidence required under the rule, and more, is provided herein.

<sup>7</sup> Of the seven MVPDs operating in Fairfax County, Virginia, only Verizon and Comcast have very recently begun carrying WMDE. *See* Exhibit 3, Channel Line-Ups for Dish Network, DirecTV, Verizon FiOS, Comcast, RCN-Starpower, and Cox.

any signal coverage or programming tailored to the Cox Communities; (3) modifying the Station's must-carry market will promote consumer access to in-state broadcasters; (4) unlike WMDE, numerous other truly local broadcast stations that Cox already carries offer extensive news coverage regarding issues of concern in the Cox Communities and provide carriage and coverage of sporting and other events of interest to viewers in the Cox Communities; and (5) WMDE has no measurable broadcast or MVPD viewership in the Cox Communities or the Washington, DC (Hagerstown) DMA.

The Station's history also demonstrates that it has no legitimate connection to the Washington DMA. On December 18, 2009, the Media Bureau issued a *Notice of Proposed Rulemaking* to allot Channel 5 to Seaford, Delaware pursuant to Section 331(a) of the Act because Delaware did not then have a VHF commercial channel allotment.<sup>8</sup> The Bureau adopted the proposal in 2010,<sup>9</sup> and one year later, the Commission auctioned television station construction permits for Channel 5 (Seaford, Delaware, in the Salisbury DMA), as well as Channel 4 (Atlantic City, New Jersey, in the Philadelphia DMA).<sup>10</sup> Western Pacific Broadcast, LLC ("**Western Pacific**") won both construction permits.<sup>11</sup> For its Seaford, Delaware station,

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<sup>8</sup> *Seaford, Delaware*, Notice of Proposed Rulemaking, 24 FCC Rcd 14596 (Med. Bur. 2009); 47 U.S.C. § 331(a) ("It shall be the policy of the Federal Communications Commission to allocate channels for very high frequency commercial television broadcasting in a manner which ensures that not less than one such channel shall be allocated to each State, if technically feasible.").

<sup>9</sup> *See Seaford, Delaware*, Report and Order, 25 FCC Rcd 4466 (Med. Bur. 2010).

<sup>10</sup> *See Auction of VHF Commercial Television Station Construction Permits Close*, Public Notice, 26 FCC Rcd 1916 (2011); *FCC Releases Feb. 15 DTV License Auction Details*, TVTechnology, available at <http://www.tvtechnology.com/feature-box/0124/fcc-releases-feb-dtv-license-auction-details/207975>. *See also* Exhibit 16 *infra*, Washington DC (Hagerstown) DMA Map, reproduced from Warren Communications News Advanced TV Factbook Online A-601 (2013 ed.).

<sup>11</sup> *See Richland Tower-formed Company Wins New VHF TV Station Licenses for \$4 Million*, TVTechnology, available at <http://www.tvtechnology.com/feature-box/0124/richland-tower-formed--company-wins-new-vhf-tv-station-licenses-for--million/208385>; Brian Ianieri,

(continued . . .)

which was assigned the call sign WMDE, Western Pacific sought and successfully obtained the Commission's approval to move the Station's city of license from Seaford to Dover, Delaware; *i.e.* from the Salisbury DMA to the Philadelphia DMA (where Western Pacific had also acquired Channel 4).<sup>12</sup> Western Pacific then requested Nielsen to reassign WMDE to the Washington DMA, which it did.<sup>13</sup> Nielsen, however, did not reassign the Station's city of license (Dover, Delaware), which remains in the Philadelphia DMA. Western Pacific commenced broadcasting from WMDE on September 22, 2014.<sup>14</sup> As the Commission has previously stated, however, DMA reassignment made at a station's request does not create a market nexus,<sup>15</sup> and the Station's DMA-shopping activities in this case confirm the wisdom of that policy.

## DISCUSSION

### I. Neither WMDE Nor Any Other Delaware Stations Have Historically Been Carried In The Cox Communities.

The first statutory factor focuses on whether the Station or other stations located in the same area have a history of carriage on cable systems in the relevant community.<sup>16</sup> The Commission has long recognized that historical carriage patterns may be useful if they provide

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*Florida Company Buys Station to Broadcast Television in Atlantic City Area*, Press of Atlantic City, available at [http://www.pressofatlanticcity.com/business/fla-company-buys-station-to-broadcast-television-in-atlantic-city/article\\_13e42cf5-5663-5701-a9c4-e4a69b877c3e.html](http://www.pressofatlanticcity.com/business/fla-company-buys-station-to-broadcast-television-in-atlantic-city/article_13e42cf5-5663-5701-a9c4-e4a69b877c3e.html).

<sup>12</sup> *Western Pacific Broadcast, LLC, (Seaford, Delaware and Dover, Delaware)*, Report and Order, 29 FCC Rcd 4773 (Med. Bur. 2014) (realloting channel 5 from Seaford, Delaware to Dover, Delaware, and modifying the construction permit for WMDE).

<sup>13</sup> See Letter from Robert Lich (The Nielsen Company) to Matt Bray (Western Pacific Broadcast, LLC), attached hereto as Exhibit 4.

<sup>14</sup> See Program Tests Notification, WMDE(TV), Facility ID No. 189357, File No. BNPCDT-20110330AAY (filed Sept. 22, 2014).

<sup>15</sup> *TCI of Illinois, Inc.*, 12 FCC Rcd 23231, 23242, n.34 (Cab. Serv. Bur. 1997) ("It appears that this [DMA reassignment] change was made at the request of the station. This does not persuade us, however, that the station is specifically local to the cable communities at issue here."); *Charter Communications*, 12 FCC Rcd 12173, 12184, para. 27 (Cab. Serv. Bur. 1997); *New York ADI Order*, 12 FCC Rcd at 12271-72, para. 19.

<sup>16</sup> 47 U.S.C. § 534(h)(1)(C)(ii)(I).

“insight into the structure of the market involved” and help to differentiate among communities in the market.<sup>17</sup> Although WMDE is a relatively new station, which commenced broadcasting on September 22, 2014,<sup>18</sup> neither WMDE nor any other distant Delaware or eastern Maryland stations have historically been carried by MVPDs in Fairfax County, Virginia.

The Commission generally gives less weight to the historic carriage and viewing pattern factors in considering new stations, but historic carriage is “not entirely discounted for new stations, nor are such stations exempt from the market modification process.”<sup>19</sup> The Commission in such cases “typically rel[ies] more on a station’s Grade B contour to delineate its market.”<sup>20</sup> Moreover, “[l]ack of historical carriage and dearth of audience shares is of evidential significance when linked with other information regarding the market, including lack of Grade B coverage, geographic distance, and the absence of noncable audience share in relevant communities.”<sup>21</sup>

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<sup>17</sup> See, e.g., *Kansas City Cable Partners*, 10 FCC Rcd 3807, 3809 at para. 13 (Cab. Serv. Bur. 1995) (“[C]arriage patterns are useful insofar as they provide insight into structure of the market involved.”).

<sup>18</sup> See *supra* n.14.

<sup>19</sup> *Western Pacific Broadcast, LLC*, 29 FCC Rcd 1835, 1845 at para. 19 (Med. Bur. 2014).

<sup>20</sup> *Western Pacific Broadcast, LLC v. Service Electric Cable Television, Inc. and Service Electric Cablevision, Inc.*, 28 FCC Rcd 10804, 10815 (Med. Bur. 2013) (footnote omitted) (citing *Avenue Cable TV Service, Inc.*, 16 FCC Rcd 16436, 16445 at para. 22 (Med. Bur. 2001); see also *Western Pacific*, 29 FCC Rcd at 1848, para. 27; *Time Warner Entertainment Co., L.P.*, 12 FCC Rcd 22069, 22077 at paras. 23-25 (1997); *Cablevision of Monmouth, Inc.*, 11 FCC Rcd 9314, 9322 at para. 19 (Cab. Serv. Bur. 1996).

<sup>21</sup> *Western Pacific*, 28 FCC Rcd at 10815, n.94; see also *In re Cablevision*, 11 FCC Rcd 9314, 9322-23 (1996); *U.S. Cablevision Corp.*, 12 FCC Rcd 21144, 21152 (Cab. Serv. Bur. 1997) (another factor to consider could be the availability of other more local television stations in the relevant communities); *Cablevision of Monmouth, Inc.*, 11 FCC Rcd at 9322 at para. 19. In analyzing historic carriage for new stations, the Commission may also consider carriage by competing providers in the communities at issue, carriage on proximate systems, and carriage of stations from the same area. *Western Pacific*, 28 FCC Rcd at 10815, para. 24, 10819, at para. 33; see also *Frontiervision Operating Partners, L.P.*, 16 FCC Rcd 17745, 17753 at para. 18 (Cab. Serv. Bur. 2001).

In this case, WMDE’s lack of historical carriage in the Cox Communities fully supports modification of the Station’s market given the overwhelming additional evidence provided herein, which demonstrates the absence of any market nexus between the Station and the Cox Communities. That evidence includes, *e.g.*, no signal coverage, no local programming, abundant local programming provided by other broadcast stations carried in the Cox Communities, enormous distances and geographical barriers, no audience share, and no carriage by MVPDs in or around the Cox Communities of other Delaware stations. Of the seven MVPDs operating in Fairfax County, Virginia, only Verizon FiOS and Comcast have briefly carried WMDE pursuant to the must-carry mandates of the Act and Commission’s rules.<sup>22</sup> The Commission, however, has repeatedly held a brief period of carriage pursuant to must-carry does not satisfy the historic carriage factor.<sup>23</sup> No other Fairfax, Virginia-area MVPDs carry WMDE or any other stations located near WMDE, such as stations licensed to Dover or anywhere else in Delaware or nearby eastern Maryland. The near uniform absence of Dover, Delaware-area stations from MVPD channel line-ups in Virginia reflects the common-sense recognition — by operators, television viewers, and stations alike — that a station licensed to Dover, Delaware cannot realistically be part of the Fairfax, Virginia television market. As demonstrated below, all the other statutory factors also confirm this common-sense understanding.

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<sup>22</sup> Comcast began carrying WMDE only within the past several weeks.

<sup>23</sup> See *Bitmore Broadcasting, L.L.C.*, 17 FCC Rcd 7984, 7989-90 at para. 10 (Med. Bur. 2002); *Comcast Cablevision of Santa Maria, Inc.*, 13 FCC Rcd 24192, 24197, at para. 13 (Cab. Serv. Bur. 1998) (“KADY has only a brief history of carriage on Comcast’s systems, and the station has been carried under the mandates of the Act and the Commission’s mandatory carriage rules. The Commission has held that such carriage does not rise to the level of historic carriage in analyzing a cable operator’s market modification petition.”); *Dynamic Cablevision of Florida, Ltd.*, 11 FCC Rcd 9880, 9889, at para. 20 (Cab. Serv. Bur. 1996) (“With regard to historic carriage, we do not believe that the station has satisfied this prong as WEYS has had only a brief history of carriage on the systems and the operators have carried the station under mandate of the 1992 Cable Act.”).

## **II. WMDE Fails To Provide Technical Coverage Or Other Local Service To The Cox Communities.**

Under the second statutory factor,<sup>24</sup> the Commission considers both whether the station “places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage,”<sup>25</sup> and whether the station broadcasts local programming with a “distinct nexus to the cable communities.”<sup>26</sup> The Commission’s precedents demonstrate that these factors are the most important in determining the scope of a station’s market.<sup>27</sup> In this case, WMDE fails to provide either a significant service contour or a viewable signal to the Cox Communities, the Station is located approximately 100 miles from each of the Cox Communities, and it provides no local programming directed to the Cox Communities.

### **A. WMDE Fails To Provide Technical Service To The Cox Communities.**

The Commission has long recognized the importance of Grade B coverage in determining local service and adjusting market boundaries.

Grade B contour coverage, in the absence of other determinative market facts (i.e. where the four statutory factors by themselves define the market, where there is no clear proof that the contour fails to reflect actual coverage, or where there is a terrain obstacle such as a mountain range or a significant body of water), is an efficient tool to adjust market

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<sup>24</sup> 47 U.S.C. § 534(h)(1)(C)(ii)(II).

<sup>25</sup> *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965, 2977 at para. 47 (1993) (“*Must Carry Order*”).

<sup>26</sup> *Media General Cable of Fairfax County, Inc.*, 15 FCC Rcd 149, 155 at para. 17 (Cab. Serv. Bur. 2000). WMDE is an affiliate of the “Soul of the South” national network, which provides general interest programming exclusively. See <http://wmdetv.com> (last visited Apr. 17, 2015).

<sup>27</sup> See, e.g., *New York ADI Order*, 12 FCC Rcd at 12271, para. 17; *Arkansas 49, Inc.*, 18 FCC Rcd 24000, 24004 at para. 9, 24006 at para. 14 (Med. Bur. 2003); *Lenfest Broadcasting, LLC*, 19 FCC Rcd 8970, 8979 at paras. 21-23 (Med. Bur. 2004); *Charter Communications Properties LP and Falcon Telecable*, 19 FCC Rcd 8655, 8663 at para. 14 (Med. Bur. 2004); *Comcast of California/Idaho, Inc.*, 19 FCC Rcd 8642, 8650-51 at para. 14 (Med. Bur. 2004).

boundaries because it is a sound indicator of the economic reach of a particular television station's signal."<sup>28</sup>

In other words, unless other factors confirm market separations, the Commission logically views the economic market of a broadcast station to be the area in which consumers can receive the station using a home antenna.<sup>29</sup> The Commission, however, also has held that *de minimis* predicted coverage, such as the *de minimis* portion of eastern Fairfax County predicted to be covered by WMDE's 28 dB $\mu$  noise-limited contour, is insufficient to demonstrate a market nexus.<sup>30</sup>

In this case, WMDE's 28 dB $\mu$  noise-limited service contour ("NLSC") not only fails to cover all but a *de minimis* portion of either the Cox Communities or the Washington DMA, but "there is. . . [also] clear proof that the contour fails to reflect actual coverage."<sup>31</sup> As demonstrated in the attached Engineering Statement, the Station's 28 dB $\mu$  NLSC fails to reach

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<sup>28</sup> *New York ADI Order*, 12 FCC Rcd at 12271, para. 17 (footnote omitted); *Red River Broadcasting Corp.*, 12 FCC Rcd 6090, 6095 at para. 14 (Cab. Serv. Bur. 1997) ("as a general matter, Grade B coverage demonstrates service to cable communities and serves as a measure of a station's natural economic market"); *see Must Carry Order*, 8 FCC Rcd at 2977, para. 47; *Time Warner Entertainment*, 13 FCC Rcd 1727, 1733 at para. 13 (Cab. Serv. Bur. 1997) ("[L]ocal service, as measured by a station's service contours may also be a decisive factor."); Amendment of Section 76.51, *Major Television Markets (Orlando-Daytona Beach-Melbourne, and Cocoa, Florida)*, Report and Order, 102 FCC 2d 1062, 1070, para. 14 (1985) ("We believe that television stations actually do or logically can rely on the area within their Grade B contours for economic support.").

<sup>29</sup> *See, e.g.*, 47 C.F.R. § 73.686(e)(2)(iii). Since the digital transition on June 12, 2009, the Commission has accepted a digital station's noise-limited service contour ("NLSC") as the functional equivalent of an analog station's Grade B contour. As set forth in Section 73.622(e) of the Rules, a full-power station's DTV service area is defined as the area within its noise-limited contour where its signal strength is predicted to exceed the noise-limited service level. *See* 47 C.F.R. § 73.622(e); *Tennessee Broadcasting Partners*, 25 FCC Rcd 4857, 4859 at n.14 (Med. Bur. 2010).

<sup>30</sup> *See Mountain Broadcasting Corp.*, 27 FCC Rcd 2231, 2241 at para. 23 (Med. Bur. 2012); *Tennessee Broadcasting Partners*, 23 FCC Rcd 3928 at para. 74 (Med. Bur. 2008).

<sup>31</sup> *See New York ADI Order*, 12 FCC Rcd at 12271, para. 17; *see also* Exhibit 2, Chesapeake RF Consultants, LLC Engineering Statement.

four of the Cox Communities at all (Vienna, Fairfax City, Herndon, and Clifton).<sup>32</sup> It covers only 11.5% of Falls Church, only 10.9% overall of the Cox system in Fairfax County, Virginia, and only 13% of the Washington DC (Hagerstown) DMA.<sup>33</sup> In contrast, WMDE's 28 dB $\mu$  NLSC covers 87.4%, or nearly all, of the Baltimore DMA and 14.9% of the Philadelphia DMA.<sup>34</sup> Moreover, a realistic 40 dB $\mu$  service contour for the Station fails to reach either the Cox Communities or Fairfax County, Virginia.<sup>35</sup> In any event, WMDE's signal cannot actually be received by Fairfax County broadcast television viewers inside or outside the Station's NLSC even where Longley-Rice predicts 28 dB $\mu$  or greater field strength.<sup>36</sup> More than fifteen (15) signal strength tests conducted by both Cox engineers and a respected engineering firm confirmed WMDE cannot actually provide any broadcast signal to Cox's principal headend or anywhere else in the Cox Communities; this total absence of actual technical coverage, includes areas both inside and outside the Station's NLSC where Longley-Rice predicts field strength levels as strong as 38-48 dB $\mu$ .<sup>37</sup> WMDE acknowledged its inability to provide a broadcast signal to Fairfax County by offering to deliver its programming to Cox by means of WWTD-LD, a low

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<sup>32</sup> See Exhibit 2, Chesapeake RF Consultants, LLC Engineering Statement.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> See *id.*; see also Exhibit 5, Cox Signal Strength Tests, and Exhibit 6, Meintel, Sgrignoli & Wallace, LLC Signal Tests.

<sup>37</sup> Cox's signal tests confirmed that WMDE could provide no broadcast signal to Cox's principal headend even with a properly oriented receiving antenna mounted at 200 feet. See Exhibit 5, Cox Signal Strength Tests. Moreover, fifteen additional signal tests conducted by Meintel, Sgrignoli & Wallace, LLC in various locations in the Cox Communities both inside and outside the Station's NLSC demonstrated conclusively that WMDE cannot in fact provide a viewable broadcast signal anywhere in those areas. See Exhibit 6, Meintel, Sgrignoli & Wallace, LLC signal tests.

power television station (“LPTV”) unaffiliated with Western Pacific that rebroadcasts WMDE’s programming.<sup>38</sup>

The Commission has encouraged petitioners to submit maps using the Longley–Rice prediction methodology “[i]n situations involving mountainous terrain or other unusual geographical feature[s],” (a scenario noticeably absent here) and has indicated that in those circumstances it “will consider Longley-Rice propagation studies in determining whether or not a television station actually provides local service to a community under factor two of the market modification test.”<sup>39</sup> The Commission has credited Longley-Rice predictions where geographical barriers exist, such as mountains, valleys or any other unusual terrain that may block signal reception “because it takes into account such factors as mountains and valleys that are not specifically reflected in a traditional Grade B contour analysis.”<sup>40</sup> In this case, the terrain between WMDE’s facilities in eastern Maryland and the Cox Communities in Fairfax, Virginia is devoid of any such signal-blocking terrain features; in fact, the terrain is almost entirely flat.<sup>41</sup>

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<sup>38</sup> Cox’s signal tests also confirmed that low-power station WWTD-LD similarly fails to provide a good-quality signal to Cox’s principal headend. Even if WWTD-LD *arguendo* could deliver a good-quality WMDE signal to Cox’s principal headend, however, that could have no effect on the market modification analysis here because the Commission’s precedents prohibit WMDE from enlarging its technical service coverage area by including the coverage area of a related LPTV. See, e.g., *TCI of Illinois, Inc.*, 12 FCC Rcd at 23243, para. 27; *Charter Communications*, 12 FCC Rcd at 12184, n.44; *New York ADI Order*, 12 FCC Rcd at 12269-70, paras. 14-15. The Bureau reiterated this principle as recently as March 2015 in a similar proceeding where it modified the market of another Soul of the South affiliate: “[WFXU] cannot establish a local presence to satisfy the coverage prong of the market modification test by relying on the fact that WUFX-LD, a low power digital television station, receives and rebroadcasts content from WFXU.” *Comcast Cable Communications, LLC*, 30 FCC Rcd 2048 at para. 17 (Med. Bur. 2015).

<sup>39</sup> *Modification Final Report and Order*, 14 FCC Rcd at 8388, para. 50. Cox’s Longley-Rice study is included in the Technical Report attached hereto as Exhibit 2.

<sup>40</sup> *Modification Final Report and Order*, 14 FCC Rcd at 8388, para. 50.

<sup>41</sup> The vast Chesapeake Bay, the Potomac River, and the congested Washington, DC metropolitan area nevertheless are geographical barriers separating the *economic* markets of WMDE and the Cox Communities. See *WLNY-TV, Inc. v. FCC*, 163 F.3d at 144 (bodies of

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Longley-Rice predictions alone, therefore, are not *per se* determinative of the Station's technical coverage.

Moreover, even though the Longley-Rice study in this case predicts some marginal and sporadic 28 dBμ coverage in portions of the Cox Communities,<sup>42</sup> the Station's broadcast signal cannot actually be received in those areas because, as the Commission is aware, low-band VHF stations such as WMDE (Channel 5) frequently suffer from "serious reception problems."<sup>43</sup> The Commission previously has observed that "TV operations on the lower VHF channels 2-6 are subject to a number of technical penalties, including higher ambient noise levels due to leaky power lines, vehicle ignition systems, and other impulse noise sources and interference to and from FM radio service."<sup>44</sup> The Commission went as far as "assess[ing] that the low VHF channels are less suitable for DTV service because of high levels of atmospheric and man-made noise."<sup>45</sup> Given these circumstances, the actual coverage area of WMDE's Channel 5 is less than

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water such as rivers and bays separate markets, and a large city "acts as a natural boundary because its complicated and congested traffic patterns make it difficult for residents at one end of the [DMA] to access communities at the other end."); *In re Cablevision Sys. Corp.*, 11 FCC Rcd at 6478 (Long Island Sound is a logical boundary between a Connecticut broadcaster and New York cable communities). See Section VI, *infra*.

<sup>42</sup> See Exhibit 2, Chesapeake RF Consultants, LLC Engineering Statement.

<sup>43</sup> See Statement of John E. Hidle In Support of WPVI-TV Application for Construction Permit, FCC File No. BPCDT-20120604AEC (filed June 4, 2012), at 1-2 ("A very substantial body of serious reception problems suffered by digital television stations broadcasting on the VHF channels is well-documented . . . . The most serious of the documented reception problems appears to be suffered by the digital television stations that are broadcasting on any one of the low-VHF channels."). For example, WPVI-TV, a VHF station (Channel 6, Philadelphia), sought FCC approval to increase its station power to 62.9 kW because of "serious reception problems," even though the station has twice increased its power already: first from 7.56 kW to 30.2kW, and then from 30.2kW to 34.0kW. See *id.*

<sup>44</sup> *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Sixth Report and Order, 12 FCC Rcd 14588, 14627, para. 82 (1997).

<sup>45</sup> *Id.* at 14615, para. 50; see also "Reasons Channels 2 through 6 Are Not Commercially Viable for DTV," R. Evans Wetmore, P.E., Fox Technology Group, Oct. 4, 2004; "Performance Assessment of the ATSC Transmission System, Equipment and Future Directions," Advanced

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both its 28 dB $\mu$  NLSC and Longley-Rice analyses suggest, which Cox's multiple signal strength tests and Engineering Statement indisputably demonstrate.<sup>46</sup> As the attached Engineering Statement demonstrates, a 40 dB $\mu$  signal contour more accurately reflects the coverage of low VHF station WMDE and verifies that the Station provides no technical coverage to Fairfax County, Virginia.<sup>47</sup> Given the "clear proof" presented herein that WMDE's 28 dB $\mu$  contour "fails to reflect actual coverage,"<sup>48</sup> the Bureau should disregard the Station's sporadic and marginal predicted 28 dB $\mu$  coverage. WMDE's broadcast signal cannot in fact be received anywhere in the Cox Communities.

**B. Enormous Distances Preclude Any Market Nexus Between The Station And The Cox Communities.**

The fact that WMDE is unable to provide the Cox Communities with broadcast signal coverage is unsurprising given the vast distances that separate the distinct markets in which they operate and which preclude any market nexus between them.

WMDE's city of license in Dover, Delaware and the Cox Communities in Fairfax County, Virginia are separated by between 86 and 109 miles: the incorporated Cox Communities of Fairfax City, Vienna, Falls Church, Herndon, and Clifton, Virginia are 98, 95, 91, 101, and 104 miles, respectively, and average 97.8 miles, from Dover, Delaware (which is the

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Television Systems Committee (ATSC), Apr. 12, 2001 Revision 1.0 ("Field tests . . . have shown that the minimum decodable signal levels are well above those planned for . . . . For VHF channel 2, that 'field strength' is at least 40 dBu compared with the specified value of 28 dBu."); "Planning Factors for Fixed and Portable DTTV Reception," Oded Bendov, Yiyang Wu, Charles W. Rhodes, and John F.X. Browne," IEEE Transactions of Broadcasting, Vol. 50, No. 3, Sept. 2004 ("Our analysis indicates a shortfall of at least 8 dB of signal power in the UHF range and 10 dB in the low VHF range.").

<sup>46</sup> See Exhibit 6, Meintel, Sgrignoli & Wallace, LLC signal tests; see also Exhibit 2, Chesapeake RF Consultants, LLC Engineering Statement.

<sup>47</sup> See Exhibit 2, Chesapeake RF Consultants, LLC Engineering Statement.

<sup>48</sup> *New York ADI Order*, 12 FCC Rcd at 12271, para. 17.

approximate distance between New York City and Wilmington, Delaware).<sup>49</sup> These distances far exceed those found to justify previous market modification determinations.<sup>50</sup> WMDE's transmitter, located in Queen Anne County, Maryland (in the Baltimore DMA), similarly is 62 miles from Cox's Fairfax, Virginia headend. Distances of this magnitude preclude any market nexus between WMDE and the Cox Communities. For example, the driving distance between Dover, Delaware and the nearest Cox Community in Falls Church, Virginia is approximately 104 miles, which takes at least 2 hours and 11 minutes, even without accounting for the delays imposed by the famously congested traffic patterns of the intervening Washington, DC metropolitan area.<sup>51</sup>

**C. WMDE Fails To Provide Any Programming Directed Specifically To The Cox Communities.**

WMDE also fails to provide any programming directed specifically to the Cox Communities. WMDE is an affiliate of Soul of the South ("SSN"), a national network targeting an African-American audience, and the Station's program schedule apparently is common to all SSN-affiliated stations across the country.<sup>52</sup> The Bureau recently reviewed SSN's programming

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<sup>49</sup> See Exhibit 7, Distance Calculations; see also Exhibit 2, Chesapeake RF Consultants, LLC Engineering Statement.

<sup>50</sup> See, e.g., *Massillon Cable TV, Inc.*, 26 FCC Rcd 15221, 15225, para. 7 (Med. Bur. 2011) (71 to 80 miles); *Armstrong Utilities, Inc.*, 21 FCC Rcd 13475, 13479, para. 6 (Med. Bur. 2006) (51.4 miles); *Time Warner Cable*, 17 FCC Rcd 9542, 9545, para. 6 (Med. Bur. 2002) (63 miles); *Comcast Cable Communications, LLC*, 30 FCC Rcd 2048 at para. 17 (82 miles); *Greater Worcester Cablevision, Inc.*, 13 FCC Rcd 22220, 22223, para. 8 (Cab. Serv. Bur. 1998) (39 to 70 miles); *Greater Worcester Cablevision, Inc.*, 12 FCC Rcd 17347, 17355, para. 21 (Cab. Serv. Bur. 1997) (38 to 61 miles); *Time Warner Cable*, 12 FCC Rcd 23249, 23255, para. 15 (Cab. Serv. Bur. 1997) (42 to 58 miles); *Time Warner Cable*, 11 FCC Rcd 13149, 13156, para. 13 (Cab. Serv. Bur. 1996) (45 miles); and *Cablevision of Cleveland, L.P. and V Cable, Inc. d/b/a Cablevision of Ohio*, 11 FCC Rcd 18034, 18040, para. 13 (1996) (Cab. Serv. Bur. 41 miles).

<sup>51</sup> Cox obtained driving distances and estimated driving times from <http://www.maps.google.com>, which are attached hereto as Exhibit 8.

<sup>52</sup> In fact, the "Program Schedule" section of WMDE's website links directly to the program schedule page of SSN's website. See <http://wmdetv.com/>; <http://www.ssn.tv/schedule/>  
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in a market modification involving another SSN affiliate, WFXU, and concluded it “does not offer any significant local programming.”<sup>53</sup> The Bureau deleted cable communities from WFXU’s market accordingly.<sup>54</sup>

The facts here regarding local programming are all but identical to those in the recent *WFXU* case, and the result should be the same as well. Like WFXU, WMDE offers no local programming. An examination of WMDE’s / SSN’s May 2015 programming schedule demonstrates that the Station provides no programming of any kind directed specifically to the Cox Communities. Instead, the Station’s schedule includes general interest programming exclusively; *viz.*, *Great Gospel Morning* (“television magazine that combines joyous gospel music, inspiring feature stories and interviews”); *The Daily Buzz* (national syndicated morning show); *Emotional Mojo* (national syndicated motivational show); *Real Life 101* (career education show that “introduces [viewers] to real people doing real jobs”); *The Real Winning Edge* (“TV series that features three young achievers per episode who have overcome obstacles in their lives”); *Blacktree on TV* (Black entertainment news); *Soul Cinema Primetime* (Hollywood movies); *D.C. Breakdown* (political talk show) and *SSN Evening News* (national and Southern regional news).<sup>55</sup>

The Bureau has consistently and repeatedly held that general interest programming, such as the programming carried on WMDE, neither specifically targets nor serves the informational needs of local residents and therefore fails to satisfy the local programming prong of the statutory

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(last visited Apr. 20, 2015). The Station’s programming schedule also does not appear in *The Washington Post*’s local television guide.

<sup>53</sup> *Comcast Cable Communications, LLC*, 30 FCC Rcd 2048 at para. 16.

<sup>54</sup> *Id.*

<sup>55</sup> See Exhibit 9, WMDE/SSN Program Schedule, also available at <http://www.ssn.tv/schedule/> and <http://www.zap2it.com>.

market modification test.<sup>56</sup> WMDE's affiliation with a national network seeking to become the "primary source for Black American news, information, entertainment and culture"<sup>57</sup> therefore cannot demonstrate any specific market nexus to the Cox Communities in suburban Virginia. As the Commission has held repeatedly, programming tailored to specific ethnic groups, such as Hispanics or African-Americans, without more, is simply general interest programming; the Commission therefore has consistently declined to credit as local programming "minority-owned and culturally diverse" shows that failed to establish a "specific market connection" to the communities at issue.<sup>58</sup>

A closer review of WMDE's programming demonstrates that none of it is directed specifically to the Cox Communities. For example, although the titles *D.C. Breakdown* and *SSN Evening News* appear to suggest a local focus, SSN's description of the programs belies that suggestion. SSN describes *D.C. Breakdown* as a general political talk show concerning the federal government, and it broadly targets "those who want to be in the know about the policies and people who shape our government."<sup>59</sup> Topics *D.C. Breakdown* covered in the last two quarters include, e.g.: immigration, California death penalty, gun violence, Affordable Care Act,

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<sup>56</sup> See, e.g., *Frontiervision Operating Partners, L.P.*, 17 FCC Rcd 9332, 9342 at para. 24 (Med. Bur. 2002); *Adelphia Cable Partners, L.P., Adelphia Cable Partners*, 16 FCC Rcd 5328, 5337 at para. 24 (Cab. Serv. Bur. 2001); *Hispanic Broadcasters of Philadelphia, LLC v. Service Electric Cable TV, Inc.*, 19 FCC Rcd 2609, 2613 at para. 12 (Med. Bur. 2004); *Comcast of California/Idaho, Inc.*, 19 FCC Rcd at 8648, para. 11; *KTNC License, LLC*, 18 FCC Rcd 16269, 16275 at paras.10-15 (Med. Bur. 2003); *MetroCast Cablevision of New Hampshire, LLC*, 16 FCC Rcd 5244, 5251 at para. 18 (Cab. Serv. Bur. 2001); *MediaOne of Los Angeles, Inc.*, 15 FCC Rcd 19386, 19398 at para. 98 (Cab. Serv. Bur. 2000).

<sup>57</sup> See Exhibit 10, SSN WMDE Presentation and Programming Description.

<sup>58</sup> *MediaOne of Los Angeles, Inc.*, 15 FCC Rcd at 19398, para. 29; see also *Comcast Cable Communications, LLC*, 30 FCC Rcd 2048 at para. 16; *Hispanic Broadcasters of Philadelphia, LLC*, 19 FCC Rcd at 2613, para. 12; *KTNC License, LLC*, 18 FCC Rcd at 16275, para. 15 ("[O]ther than generalized statements about its Spanish-language programming, KTNC-TV has not shown that any of its programming has a local nexus to the communities."); *MetroCast Cablevision of New Hampshire, LLC*, 16 FCC Rcd at 5251, para. 19.

<sup>59</sup> See Exhibit 10, DC Breakdown Program Description.

Taliban resurgence, STEM education, and drug sentence reduction.<sup>60</sup> None of these are issues of specific interest or concern to Fairfax County, Virginia viewers.

*SSN Evening News* similarly is just another general interest program, which also is broadcast on all other SSN affiliates. *SSN Evening News* is “the network’s premier nightly evening news program which reports the national news” and features stories “which either emanate[ ] or significantly impact[ ] the Southern Region as reported by the SSTV team of multimedia journalists located throughout the South.”<sup>61</sup> The news coverage is national and regional to the South as a whole, and is not directed to the interests and needs of residents in the Cox Communities. To the extent *SSN Evening News* could even be considered “local” in this context, the Commission has held repeatedly such a *de minimis* level of local programming is insufficient to satisfy this factor or overcome the absence of technical service to the subject communities.<sup>62</sup> Moreover, as demonstrated below, and unlike WMDE’s purely general-interest programming, the other broadcast and non-broadcast programming Cox carries provide abundant news coverage of issues of concern to the Cox Communities, including coverage of sporting and other truly local events.<sup>63</sup>

In sum, WMDE’s failure to provide technical service to the Cox Communities, the enormous distances involved, and the Station’s utter lack of local programming directed specifically to the Cox Communities weigh heavily in favor of Cox’s request. WMDE simply

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<sup>60</sup> See Exhibit 11, WMDE Most Significant Issues Programs Lists, Q4 2014 & Q1 2015.

<sup>61</sup> Exhibit 10, *SSN Evening News* Program Description and Archived Videos, also available at <https://vimeo.com/channels/705215>.

<sup>62</sup> *CoxCom, Inc.*, 20 FCC Rcd 13474, 13483-84 at para. 27 (Med. Bur. 2005); *Adelphia Cable Partners*, 16 FCC Rcd at 5337-38, para. 24; *CoxCom, Inc.*, 19 FCC Rcd 4509, 4515 at para. 11, 4517, para. 16 (Med. Bur. 2004); *Altrio Communications*, 18 FCC Rcd 23832, 23839 at para. 17 (Med. Bur. 2003).

<sup>63</sup> See *infa*, Section IV.

does not provide “coverage or other local service” to the Cox Communities within the meaning of the Act or the Commission’s policies and precedents.

### **III. Modifying WMDE’s Must-Carry Market Will Promote Consumer Access To Virginia Broadcast Signals In The Cox Communities.**

The third factor, very recently added by the STELA Reauthorization Act of 2014,<sup>64</sup> addresses whether market modification would promote consumers’ access to in-state broadcast stations.<sup>65</sup> The legislative history reflects Congress’s concern that “many consumers, particularly those who reside in DMAs that cross State lines or cover vast geographic distances,” may “lack access to local television programming that is relevant to their everyday lives.”<sup>66</sup> The legislative history also confirms congressional intent for the Commission to “consider the plight of these consumers when judging the merits of a [market modification] petition . . . even if granting such modification would pose an economic challenge to various local television broadcast stations.”<sup>67</sup>

Modifying the market of Delaware’s WMDE will promote consumer access to current and future Virginia broadcasters by providing Cox additional bandwidth, and therefore more flexibility, to promote and support in-state local broadcast stations that serve Fairfax viewers.<sup>68</sup> In contrast, allowing a distant, Delaware broadcast station such as WMDE to assert must-carry

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<sup>64</sup> See STELAR, Pub. L. No. 113-200, 128 Stat. 2059.

<sup>65</sup> See 47 U.S.C. § 534(h)(1)(C)(ii)(III). As of the writing of this Petition, the Commission is seeking comments regarding the interpretation and implementation of this new statutory factor. See *Amendment to the Commission’s Rules Concerning Market Modification*, Notice of Proposed Rulemaking, 30 FCC Rcd 3039 (2015) (“*Market Modification NPRM*”).

<sup>66</sup> *Market Modification NPRM* at para. 11 (citing Senate Commerce, Science, and Transportation Committee Report accompanying S. 2799, 113th Cong., S. Rep. No. 113-322 at 11 (2014)).

<sup>67</sup> Senate Commerce, Science, and Transportation Committee Report accompanying S. 2799, 113th Cong., S. Rep. No. 113-322 at 11.

<sup>68</sup> For example, Cox carries WPXW-TV, licensed to Manassas, Virginia.

status in Virginia will disserve Fairfax County viewers by limiting Cox's resources and flexibility to support in-state broadcasters.

**IV. Other Stations Carried By Cox Provide Abundant Coverage Of Local News, Issues Of Concern, And Sporting And Other Events Of Interest To Viewers In The Cox Communities.**

The fourth statutory factor evaluates whether other broadcasters provide local programming to the relevant communities.<sup>69</sup> Inasmuch as WMDE fails to provide any local service to the Cox Communities, local coverage by other broadcasters takes on greater weight in the analysis under the Commission's well-established policies.<sup>70</sup>

In contrast to the complete absence of programming on WMDE that is directed specifically to viewers in the Cox Communities, those viewers receive abundant coverage of local interests and concerns from the numerous local broadcast stations currently carried by Cox and other Fairfax County MVPDs. Cox carries at least 6 local broadcast television stations: WMDO (UniMas), WRC (NBC), WTTG (FOX), WJLA (ABC), WUSA (CBS), and WFDC (Univision);<sup>71</sup> and each of these local broadcasters provides Fairfax County, Virginia viewers with extensive coverage of local news, sports, and public affairs programming. For example, during the week of April 3 through 9, 2015, Cox cable customers in Fairfax, Virginia had access to at least 181 hours of local news, sports, and public affairs programming provided by these local broadcasters on morning, mid-day, evening, late night, and weekend local news shows.<sup>72</sup>

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<sup>69</sup> See 47 U.S.C. § 534(h)(1)(C)(ii)(IV).

<sup>70</sup> See, e.g., *Hispanic Broadcasters*, 19 FCC Rcd at 2614, para. 14; *Marcus Cable Associates, LLC*, 14 FCC Rcd 1 (Cab. Serv. Bur. 1998); *Service Electric Cable TV, Inc.*, 12 FCC Rcd 13299, 13309 at para. 24 (Cab. Serv. Bur. 1997).

<sup>71</sup> See Cox Fairfax County, Falls Church, Fairfax, Clifton, Herndon, and Vienna Channel Guide, attached hereto as Exhibit 12.

<sup>72</sup> See Exhibit 13, sample of local broadcast news programming carried on the Cox Fairfax cable system April 3-9, 2015.

In addition, Cox carries News Channel 8, a 24-hour cable news channel provided in conjunction with WJLA that is focused particularly on local news, sports, and public affairs. The Cox Fairfax, Virginia cable system also provides plentiful local non-broadcast programming on the fifteen (15) government, educational, and public access channels it carries in the Cox Communities, including, among others, channels dedicated exclusively to the Cox Communities of Falls Church, Herndon, Vienna, Fairfax City, and Fairfax County.<sup>73</sup>

The total absence of programming on Delaware's WMDE that is directed specifically to the Cox Communities in Virginia, combined with the extensive coverage of local issues and events provided by the many local broadcasters Cox already carries, confirms that deletion of the Cox Communities from WMDE's must-carry market will implement Congress's directive for the Commission to "afford particular attention to the value of localism" in market modification cases.<sup>74</sup>

#### **V. WMDE Fails To Achieve Any Ratings In The Cox Communities.**

Under the fifth statutory factor, the Bureau considers evidence of viewing patterns within the areas served by MVPDs in the relevant communities.<sup>75</sup> Consistent with its approach to the historic carriage factor for newer stations, the Bureau relies more on the station's service contour, together with all the other statutory and additional factors, to delineate a new station's market.<sup>76</sup> Nevertheless, "the lack of historical carriage and the dearth of audience is of evidential

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<sup>73</sup> See, e.g., Cox Channel Guide, attached hereto as Exhibit 12; see also Cox Fairfax City Franchise Agreement, Section 7 (PEG channels), available at <http://www.fairfaxva.gov/government/city-clerk/franchises-licenses>; Cox Fairfax County Franchise Agreement, Section 7 (PEG channels), available at [http://www.fairfaxcounty.gov/cable/regulation/franchise/cox/franchise\\_agreement\\_cox\\_fairfax\\_cty.pdf](http://www.fairfaxcounty.gov/cable/regulation/franchise/cox/franchise_agreement_cox_fairfax_cty.pdf).

<sup>74</sup> 47 U.S.C. § 534(h)(1)(C)(ii).

<sup>75</sup> See 47 U.S.C. § 534(h)(1)(C)(ii)(V).

<sup>76</sup> *Western Pacific Broadcast, LLC*, 29 FCC Rcd at 1848, para. 27.

significance when linked with other information regarding the market, including lack of Grade B coverage, geographic distance, and the absence of noncable audience share in the relevant communities.”<sup>77</sup> In this case, Delaware’s WMDE not surprisingly fails to achieve any reportable viewing in Fairfax County, Virginia.

As demonstrated by the attached Nielsen Media ratings, WMDE had no reportable viewing for either MVPD or non-MVPD households in Fairfax County in the year 2014, or in either the November 2014 or February 2015 “sweeps.”<sup>78</sup> WMDE also is not included in the television program listings of the area’s major newspaper, *The Washington Post*.<sup>79</sup> The lack of viewership — which is unsurprising given the Station’s failure to provide any broadcast signal or any programming directed to the Cox Communities, the geographic distances separating these distinct markets, and the other factors discussed herein — is of “evidential significance” supporting deletion of the Cox Communities from WMDE’s market. Such deletion will better effectuate the values of localism underlying the Act’s mandatory carriage provisions, and would be entirely consistent with the Commission’s treatment of similar market modification requests involving stations that lack a demonstrable connection to distant cable communities.<sup>80</sup>

**VI. All Available Geographic, Economic, And Political Factors Confirm That WMDE Does Not Operate In The Same Market As The Cox Communities.**

In addition to the enumerated statutory factors, the Commission may consider additional factors such as geographic and political features in market determinations, “so long as they help ensure the continuation of the local origination of programming, *i.e.*, afford attention to the

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<sup>77</sup> *Cablevision of Monmouth, Inc.*, 11 FCC Rcd at 9322, para. 19.

<sup>78</sup> See Exhibit 14, Nielsen Ratings.

<sup>79</sup> See Exhibit 15, Washington Post television listings.

<sup>80</sup> See, e.g., *Adelphia Cablevision Associates, L.P.*, 14 FCC Rcd 7686, 7692 at para. 17 (Cab. Serv. Bur. 1999); *Cablevision of Cleveland, L.P.*, 11 FCC Rcd 18034, 18041 at para. 15 (Cab. Serv. Bur. 1996).

‘value of localism.’”<sup>81</sup> As the Commission explained in the *New York ADI Order*; even where a station places a contour over the relevant communities (a circumstance notably absent in this case), “other determinative market facts” including, for example, “a terrain obstacle such as a mountain range or a significant body of water”<sup>82</sup> may confirm the station and the communities at issue operate in separate economic markets. The Media Bureau also has frequently acknowledged that terrain features such as mountain ranges and waterways can serve to divide market areas.<sup>83</sup>

In this case, an analysis of geographical features<sup>84</sup> combined with political and marketplace realities further strengthens the conclusion to which an analysis of the statutory factors inevitably leads; namely, that the Cox Communities and WMDE belong to wholly distinct television markets.

In terms of geographic factors, not only does the expansive Washington DC (Hagerstown) DMA include four states and the District of Columbia,<sup>85</sup> but terrain features such as the Chesapeake Bay and the Potomac River also divide the DMA into smaller localized

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<sup>81</sup> *WLNY-TV, Inc. v. FCC*, 163 F.3d at 143.

<sup>82</sup> *New York ADI Order*, 12 FCC Rcd at 12271, para. 17.

<sup>83</sup> See, e.g., *CoxCom Inc. d/b/a Cox Communications Phoenix*, 20 FCC Rcd 13474, 13480-1, para. 20 (Med. Bur. 2005) (“The distance and terrain factors in this case . . . strongly indicate that the communities served by Cox are too distant to properly be part of [the station’s] television market.”); *CoxCom Inc. d/b/a Cox Communications Orange County*, 19 FCC Rcd at 4517, para. 16; *Mediacom California*, 18 FCC Rcd 14575, 14579, para. 7; 14580, para. 11 (Med. Bur. 2003); *Costa de Oro Television, Inc.*, 13 FCC Rcd 4360, 4374, para. 30 (Cab. Serv. Bur. 1998). In *Rifkin/Narragansett South Florida*, the Bureau explained that it “tak[es] into account natural phenomena such as waterways, mountains, and valleys which tend to separate communities.” *Rifkin/Narragansett South Florida, CATV Limited Partnership*, 11 FCC Rcd 21090, 21104, para. 26 (Cab. Serv. Bur. 1996), *recon. denied*, 14 FCC Rcd 13788 (1999).

<sup>84</sup> Even if a station provides technical coverage to cable communities, which WMDE does not, mitigating factors such as geographic features can nullify this attribute. See *Family Stations, Inc.*, 18 FCC Rcd 22916, 22922, para. 17 (Med. Bur. 2003).

<sup>85</sup> The DMA includes portions of Maryland, Pennsylvania, Virginia, and West Virginia. See Exhibit 16, Washington, DC (Hagerstown) DMA map. See also Exhibit 2, figure 2.

regions. Just as the Bureau and the Second Circuit Court of Appeals considered Long Island Sound and the Hudson River in New York to be an “intervention” and a “logical boundary” separating markets,<sup>86</sup> the Chesapeake Bay, which is wider than Long Island Sound at its widest point, and the Potomac River are logical and natural barriers separating the Cox Communities from WMDE. The Washington, DC metropolitan area also acts as a natural boundary because “its complicated and congested traffic patterns make it difficult for residents at one end of the DMA to access communities at the other end. The [DMA] therefore has an obvious tendency to break itself up into smaller divisions reflecting localized regions.”<sup>87</sup> These geographic barriers separating the markets “make[] it more difficult for residents in [the Cox Communities] to travel to businesses that may advertise on the Station and are located in [Dover, Delaware].”<sup>88</sup> Even ignoring the substantial delays imposed by Washington, DC’s famously congested traffic, driving time from Dover, Delaware to Falls Church, Virginia (the Cox Community closest to Dover) is more than two hours.<sup>89</sup> This deters Fairfax, Virginia area residents from traveling to Dover, Delaware for shopping, dining, movie-going, or patronizing other businesses that might advertise on a local Delaware station.

Moreover, even if the Station’s city of license in Dover, Delaware were part of the Washington DMA, which it is not, this would be the classic “hub and spoke” scenario described

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<sup>86</sup> *WLNY-TV, Inc. v. FCC*, 163 F.3d at 145.

<sup>87</sup> *Id.* at 144.

<sup>88</sup> *See, e.g., Family Stations, Inc.*, 18 FCC Rcd at 22922, para. 17 (“[T]here are major waterways that separate the Station from communities in San Francisco, Marin, San Mateo, and Sonoma Counties. This geological factor makes it more difficult for residents in those counties to travel to businesses that may advertise on the Station and are located in Stockton or nearby communities in San Joaquin County.”).

<sup>89</sup> *See* Exhibit 8, Driving Distances and Times Calculations; *see also* Exhibit 7, Distance Calculations, and Exhibit 2, Chesapeake RF Consultants, LLC Engineering Statement.

by the Second Circuit Court of Appeals.<sup>90</sup> “[Washington, DC] serves as the ‘hub,’ with its stations’ programming and advertising being of widespread interest across the [DMA]. 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>91</sup> If Dover, Delaware were part of the Washington DMA, it would be a “spoke” with regard to the District of Columbia “hub”; in any event, residents in Fairfax County, Virginia, area understandably do not look to a distant Dover, Delaware broadcaster for programming.

In terms of economic factors, U.S. Census workforce data confirms the obvious; namely, that a *de minimis* number of residents from the Cox Communities work in WMDE’s city of license, and vice versa, which further demonstrates the non-existent nexus between WMDE and the Cox Communities.<sup>92</sup> Of the 30,099 jobs reported for Dover, Delaware workers, only nine are occupied by residents of Fairfax County, Virginia.<sup>93</sup> The county-to-county analysis is equally telling, as Cox only serves portions of Fairfax County: just twenty-three of 55,580 jobs (0.04%) reported for Kent County, Delaware are occupied by Fairfax County residents. In addition, only ninety-three of 558,664 jobs (0.02%) reported for Fairfax County, Virginia are occupied by Kent County, Delaware residents. The Census data highlights the absence of any local nexus between the Cable Communities and WMDE, but the *de minimis* number of commuters from Dover, Delaware to the Cox Communities in Virginia and vice versa is unsurprising because, as

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<sup>90</sup> *WLNY-TV, Inc. v. FCC*, 163 F.3d at 144.

<sup>91</sup> *Id.*

<sup>92</sup> Cox obtained U.S. Census workforce data from <http://onthemap.ces.census.gov/>, relevant portions of which are attached as Exhibit 17.

<sup>93</sup> The Census specifically reported two from Chantilly CDP, and one each from Bailey’s Crossroads CDP, Burke CDP, Fair Oaks CDP, Franconia CDP, Idylwood CDP, McNair CDP, and West Springfield CDP. *See* Exhibit 17. The Census did not specifically report Dover workers commuting from the Cox Communities of Vienna, Fairfax City, Herndon, Falls Church, and Clifton.

previously stated, the driving distances and times between Dover and the Cox Communities are substantial.<sup>94</sup>

In addition, several nationally recognized, objective market classifications place the Cox Communities and WMDE's community of license in separate markets. Rand-McNally's Ranally Metro Area ("RMA") standard identifies "developed areas around each major city" without regard to county boundaries.<sup>95</sup> Rand-McNally places all of the Cox Communities in the Washington, DC-MD-VA RMA and places Dover in the Dover, DE RMA. Rand-McNally therefore places all of the Cox Communities in a single distinct metropolitan area separate from that of Dover, Delaware. The U.S. Office of Management and Budget's ("OMB") Metropolitan Statistical Area ("MSA") classification standard similarly confirms that the Cox Communities are not part of the Station's natural market. OMB defines an MSA as a geographic area consisting of a large population center, along with adjacent communities and areas "having strong economic and social ties" to that population center. The classification process includes an analysis of commuting trends between communities in different counties and MSAs. If a sizable number of residents commute to a given location in another MSA, the two areas are combined into a single MSA. OMB has concluded that WMDE's city of license in Dover, Delaware is in the Dover MSA, whereas the Cox Communities are all in the DC-VA-MD-WV MSA.<sup>96</sup>

All economic and political tools point to the same conclusion: WMDE's community of license and service area are part of a market wholly distinct from that of the Cox Communities.

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<sup>94</sup> See Exhibit 8.

<sup>95</sup> 2009 Rand-McNally Commercial Atlas & Marketing Guide, Vol. 2. Relevant pages from Rand-McNally Commercial Atlas & Marketing Guide are attached as Exhibit 18.

<sup>96</sup> OMB Bulletin No. 13-01, "Revised Delineations of Metropolitan Statistical Areas, Micropolitan Statistical Areas, and Combined Statistical Areas, and Guidance on Uses of the Delineations of These Areas," Feb. 28, 2013, at 30, 51, relevant pages attached hereto as Exhibit 19.

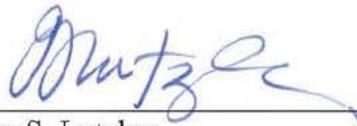
Based upon the statutory factors, as well as the objective and expert determinations of Rand-McNally, OMB, and the U.S. Census Bureau, the Media Bureau should conclude the Cox Communities are not in WMDE's market.

### CONCLUSION

The Commission's observation that "the broadcast signal carriage rules were not intended to transform an otherwise local station into a regional 'super-station' that must be automatically carried in every single community in an [DMA]"<sup>97</sup> is particularly relevant here to carriage of a distant Delaware station that would not even be assigned to the same DMA as the Cox Communities but for Nielsen's acquiescence to the Station's request. Affording must-carry status to WMDE therefore would contradict congressional intent to support the value of localism. For all of the reasons above, the Media Bureau should grant this Petition forthwith and exclude the Cox Communities from WMDE's must-carry market.

Respectfully submitted,

CoxCom, LLC



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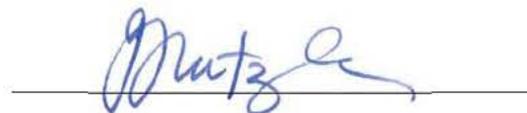
May 20, 2015

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<sup>97</sup> *Time Warner Entertainment-Advance/Newhouse Partnership*, 11 FCC Rcd 6541, 6554 at para. 25 (1996); see *MetroCast Cablevision of New Hampshire, LLC*, 16 FCC Rcd at 5251, para. 18; *Frontiervision Operating Partners, L.P.*, 17 FCC Rcd at 9340, para. 17.

**Verification**

To the best of my knowledge, information and belief formed after reasonable inquiry, this Petition for Special Relief is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and it is not interposed for any improper purpose.



Gary S. Lutzker

May 20, 2015

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of  
CoxCom, LLC

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CSR - \_\_\_\_\_ - A  
MB Docket No. 15 - \_\_\_\_\_

For Modification of the Market of  
WMDE, Dover, Delaware

To: The Secretary's Office  
Attention: Chief, Media Bureau

**DECLARATION OF KATHYRN FALK**

1. My name is Kathryn Falk, and I am Vice President, Public and Government Affairs for CoxCom, LLC.
2. I have reviewed the foregoing Petition for Special Relief (the "**P**etition") and I am familiar with the contents thereof.
3. I declare under penalty of perjury that the facts contained herein and in the foregoing Petition are true and correct to the best of my knowledge, information and belief formed after reasonable inquiry, that the Petition is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose.

By:   
Kathyrn Falk  
Vice President, Public and  
Government Affairs  
CoxCom, LLC  
3080 Centerville Road  
Herndon, VA 20171  
703-480-5248

May 14, 2015

## CERTIFICATE OF SERVICE

I, Sandra Jeter, a secretary at the law firm of BakerHostetler, LLP, certify that on this twentieth day of May 2015, I caused the foregoing Petition for Special Relief to be served by first-class mail, except where hand delivery is indicated, on the following:

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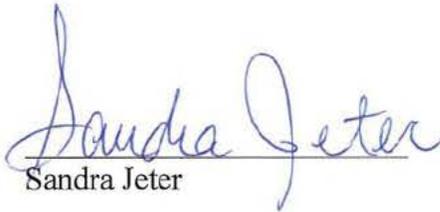
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