Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Promoting Diversification of Ownership in the Broadcasting Services	)))))	MB Docket No. 07-294

COMMENTS OF CABLEVISION SYSTEMS CORP.

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Cablevision Systems Corp. ("Cablevision") respectfully submits these comments in response to the Commission's inquiry regarding whether the Commission has the authority to require cable carriage of Class A low-power television stations.[1/]

INTRODUCTION AND SUMMARY

In the 1992 Cable Act, Congress explicitly determined that low-power television ("LPTV") stations do not have must-carry rights except in very limited circumstances in which the station meets each of six very specific requirements.[2/] The Community Broadcasters Protection Act of 1999,[3/] while granting certain LPTV stations status as Class A stations and protecting Class A LPTV stations from displacement by full-power broadcast stations,[4/] did not change the limited must-carry rights of LPTV stations (including Class A stations). Accordingly, the Commission may not do so here.

[1/] *Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Third Further Notice of Proposed Rulemaking, FCC 07-217 (rel. March 5, 2008), ¶ 99 ("*Third FNPRM*").

[2/] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 4, 106 Stat. 1460, 1471-77 (1992).

[3/] Community Broadcasters Protection Act of 1999, Pub. L. No. 106-113, 113 Stat. App. I, 1501A-594 (1999).

[4/] *See Establishment of a Class A television Service*, Report and Order, 15 FCC Rcd. 6355, ¶ 5 (2000) ("*Class A Order*").

Class A stations are low power stations. By clear direction of Congress, such stations are not authorized must-carry rights beyond those they would ordinarily have as LPTV stations. The Commission possesses no authority to act in contravention of the plain language of the statute, nor to thwart Congressional intent by granting Class A LPTV stations full-power status for must-carry purposes.

Granting must-carry rights to Class A LPTV stations would not further the Commission's stated goals. It would neither promote diversity -- especially on Cablevision's cable systems, which already provide a widely diverse programming line-up, including numerous niche services -- nor promote localism, given the broad array of local programming already available from local full-power stations, locally produced cable programming, and those Class A stations that are voluntarily carried by cable operators because they provide valuable programming of local interest.

Instead, extending mandatory carriage rights to Class A LPTV stations would work against numerous important congressional and Commission goals. Requiring cable operators to undertake major shuffling of channel line-ups shortly before the DTV transitional change-over in February 2009 would create customer confusion and undermine efforts of cable operators to assure customers that the DTV transition will not disrupt their service, and the litigation that would inevitably ensue would cause further uncertainty at a time when Cablevision and other cable operators need clarity so that they can plan for a smooth transition. Competition also would be adversely affected. Cable operators face strong and growing competition from other multichannel video programmers ("MVPDs") such as satellite providers and the telephone companies, and much of that competition now centers on provision of high definition ("HD") programming, which requires significant bandwidth to deliver to customers. Requiring cable

operators alone to carry Class A stations would require allocation of significant bandwidth for those stations, potentially at the expense of bandwidth needed for HD programming; such a rule would create an unlevel playing field and distort the competitive market. Similarly, required allocation of bandwidth to Class A stations could limit the amount of bandwidth available for provision of advanced services -- one of the Commission's priority areas and another area of fierce competition for cable operators with other providers.

Requiring cable operators to carry Class A stations would also violate the cable operators' First Amendment rights to free speech. While the courts upheld the concept of must-carry rights for full-power broadcast stations, they expressly did so in the context of a cable monopoly in provision of MVPD services -- a factual predicate that is no longer viable. In any case, Congress already has determined that must-carry rights for LPTV stations are not necessary to further the goals of the statute. In addition, any requirement that Class A stations be carried by cable operators would be a clear uncompensated governmental appropriation of the property -- channel position spectrum -- of cable operators in violation of the Fifth Amendment. The Commission should decline to extend must-carry rights to Class A LPTV stations.

I. THE COMMISSION HAS NO AUTHORITY TO GRANT CLASS A LOW POWER TELEVISION STATIONS MUST-CARRY RIGHTS

Section 614 of the Communications Act establishes cable operators' must-carry obligations and expressly limits carriage requirements to full-power broadcast stations,[5/] except for a very narrow subset of low power stations referred to as "qualified low power stations."[6/] A

[5/] A "local commercial television station" entitled to carriage rights is defined to mean a "full power television broadcast station"; the definition specifically excludes "low power television stations." 47 U.S.C. § 534(h)(1).

[6/] 47 U.S.C. § 534(a).

"qualified low-power station" is one that meets six criteria set forth in the statute.[7/]

Class A stations are low-power stations, but they are not necessarily qualified low-power stations. As such, under the plain language of the statute, the Commission may not grant them must-carry rights. As the Supreme Court has famously explained, "If the intent of Congress is clear, that is the end of the matter; for . . . the agency, must give effect to the unambiguously expressed intent of Congress."[8/] Indeed, the Commission previously has recognized that Congress "intended that Class A stations have the same limited must carry rights as LPTV stations" and did not intend to grant Class A stations must-carry rights unless they otherwise meet the definition of a "qualified low power station," explaining that "it is unlikely that Congress intended to grant Class A stations full must carry rights, equivalent to those of full-service stations, without addressing the issue directly."[9/]

Nor could the Commission circumvent this requirement by allowing Class A stations to convert to full-power status.[10/] Class A stations were created by Congress in the Community Broadcasters Protection Act of 1999 "to provide some regulatory certainty for low-power

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[7/] *See* 47 U.S.C. § 534(h)(2).

[8/] *Chevron USA, Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842-43 (1984). *See also Pub. Emp. Ret. Sys. v. Betts*, 492 U.S. 158, 171 (1989) ("[N]o deference is due to agency interpretations at odds with the plain language of the statute itself."); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978) ("There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted.").

[9/] *Establishment of a Class A Television Service*, Memorandum Opinion and Order on Reconsideration, 16 FCC Rcd. 8244, ¶ 39-42 (2001) ("*Class A Reconsideration Order*") (noting that "to be eligible for must carry, Class A stations, like other low power television stations, must comply with the Part 74 rules and the other eligibility criteria established by statute and our rules"). That Congress does not believe Class A stations can have must-carry rights under the statute without action by Congress is further clear from the fact that at times legislation has been introduced (unsuccessfully) to extend must-carry rights to Class A stations. *See, e.g.*, H.R. 1626, 108th Cong. (2003) (The "Local Voices on TV Act of 2003"). H.R. 1626 was not enacted.

[10/] *Cf. Martin Details DTV-Transition Proposals for Low-Power, Full-Power Stations*, BROADCASTING & CABLE (Feb. 8, 2008).

television service" following the digital transition.[11/] Congress sought to "buttress the commercial viability of those LPTV stations that can demonstrate that they provide valuable programming to their communities"[12/] by giving select low-power stations certain interference protection normally reserved for full power stations.[13/] Congress did not extend this benefit to all low-power stations, but only to "a small number of license holders [that] have operated their stations in a manner beneficial to the public good [by] providing broadcasting to their communities that would not otherwise be available."[14/]

Congress could have defined Class A low power television stations as full power stations, but it did not; instead designating them as a subcategory of low-power stations.[15/] As the Commission has recognized, Congress plainly intended that Class A stations continue to be low power stations.[16/] Congress deliberately chose to designate Class A stations to be low power stations and to preserve a distinction between Class A stations and full power stations. Accordingly, the Commission cannot thwart the intent of the statute by granting Class A stations full-power status.[17/]

[11/] Section-by-Section Analysis to S. 1948, the Act known as the "Intellectual Property and Communications Omnibus Reform Act of 1999," as printed in the CONGRESSIONAL RECORD of November 17, 1999 at pages S 14708 – 14726 ("Section-by-Section Analysis"), at S 14725.

[12/] *Id*.

[13/] 47 U.S.C. § 336(f).

[14/] Community Broadcasters Protection Act of 1999, Pub. L. No. 106-113, 113 Stat. App. I, 1501A-594, § 5008(b)(1) (1999).

[15/] *See, e.g.*, Section-by-Section Analysis at S 14725 (referring to the stations as "Class A LPTV stations").

[16/] *Class A Reconsideration Order* ¶ 41 (agreeing that 47 U.S.C. § 534 defines the term "local commercial television station" to "include only 'full power' stations, while Class A stations, like LPTV stations, operate at low power").

[17/] *Chevron USA*, 467 U.S. at 842-43. *See also* Sid*ney Coal Co. v. SSA*, 427 F.3d 336, 344 (2005) ("When interpreting the purpose of a provision, 'the court will not look merely to a particular clause in which general words may be used, but will take in connection with it . . . the objects and policy of the law.'") (quoting *Stafford v. Briggs*, 444 U.S. 527, 535 (1980)); *Toledo Hosp. v. Shalala*, 104 F.3d 791,

II. EXPANDING CARRIAGE OBLIGATIONS TO INCLUDE CLASS A STATIONS WOULD NOT FURTHER ANY OF THE COMMISSION'S POLICY GOALS

The ramifications on Cablevision of granting Class A stations must-carry rights would be severe. Cablevision has numerous Class A stations in its service areas. Expanding carriage rights to those stations would cause significant disruption to Cablevision's channel line-ups and frustration to Cablevision consumers, would not further the goals the Commission identifies, and would work against other important Commission policies.

The addition of even one new must-carry station to the cable system can cause significant disruption and force the displacement and rearrangement of multiple other channels on the system. The simultaneous addition of multiple new must-carry stations would require a wholesale revision of Cablevision's channel line-ups, causing multiple channel reassignments and possibly the deletion of currently carried programming services. This would substantially confuse and frustrate Cablevision's customers at virtually the same time when Cablevision is striving to reassure customers that the imminent digital transition will not cause any disruption to their cable service.

Moreover, contrary to the Commission's suggestion,[18/] there would be no corresponding benefit to Cablevision customers in return for this substantial disruption to their cable service. Granting Class A stations must-carry status would not increase diversity of programming or voices on the cable system or promote localism.

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800 (6th Cir. 1997) ("When [a] court can readily discern that an agency has strayed from the path intended by Congress, the inference of legislatively delegated authority vanishes."); *Id*. ("[I]t is difficult to imagine that, had Congress intended the result urged by the Secretary, it would have used the language that ultimately found its way into the statute."); *ACLU v. FCC*, 823 F.2d 1554, 1570 (D.C. Cir. 1987) ("This is not a situation where Congress has left gaps for the agency to fill. Rather, Congress has spoken directly and specifically by providing a definition of the exact term the Commission now seeks to redefine.") (internal citation omitted).

[18/] *Third FNPRM* ¶ 99.

Cablevision's channel line-ups are already among the most diverse available in the country. Cablevision is a leader among cable operators and other MVPDs in the offering of niche programming networks designed to satisfy and respond to very varied subscriber interests, including, for example, the offering of over 60 international networks in 11 languages. Adding low-power stations to Cablevision's channel line-ups is unlikely to improve on this programming diversity. The programming provided by many Class A stations in Cablevision's service areas is religious programming, and Cablevision already offers its subscribers a significant number of religious programmers, such as Jewish Channel, Telecare, Trinity Broadcasting Network (through WTBY), EWTN, Archdiocesan TV, EWTN Espanol, and the Word Network.

In fact, forced carriage of Class A stations would deprive Cablevision of channel capacity it could otherwise use to provide more diverse programming from a variety of sources. As it is for all providers, Cablevision's channel capacity is a valuable and limited resource, and Cablevision carefully chooses each programming service it carries to meet subscriber interest in specific programming services and to constantly create the most innovative and varied mix of programming possible in order to appeal to the greatest number of different viewers with different interests. Forcing Cablevision to devote multiple channels to similarly focused programming would limit Cablevision's ability to offer a diverse programming line-up.[19/]

In addition, the primary method currently being deployed by Cablevision for increasing channel capacity and offering more diversity on the cable systems is reducing the number of duplicative analog feeds of services it carries and redeploying such bandwidth using digital technology. Cablevision has been eliminating the duplicative analog feeds of more and more

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[19/] This problem would be compounded further if a grant of must-carry rights to Class A stations led, as it inevitably would, to a demand by additional low-power stations that the Commission allow them to convert to Class A status. Cablevision has over 30 low-power stations in its service areas.

services it carries to accomplish this goal (as a result of which, such services remain available only in digital format), and is attempting to meet competitive demands by recapturing even more analog bandwidth as time progresses. Forcing Cablevision to roll back these efforts and utilize additional analog bandwidth will significantly reduce Cablevision's ability to offer a diverse programming line-up, as well as significantly impede its competitive position.[20/]

Nor would granting Class A stations must-carry rights promote localism. While the Commission points to the fact that "all such stations are required to originate local content,"[21/] Class A stations are required to offer only three hours of local programming per week, and many do no more than that, instead focusing on other programming. Moreover, in addition to an average per system of 22 local broadcasters whose must-carry rights are premised on the provision of local programming, there are already multiple channels focused on local issues on Cablevision's systems, such as News 12, NY 1, and Cablevision-produced local programming.

To the extent a Class A station provides programming that may be of interest to Cablevision subscribers, Cablevision already voluntarily carries such stations in those station's local communities where carriage makes sense. For example, Cablevision carries WVVH, "Hamptons Television," a station that focuses on Hamptons news and events, on its systems serving the Hamptons, and carries WZBN, a station that focuses its programming on Mercer County, New Jersey, on its Hamilton system, which serves that county and surrounding areas. Granting those stations must-carry rights, however, would give them carriage rights on all cable systems throughout the New York market, the largest television market in the United States[22/] --

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20/ *See* pp. 9-10, *infra*.

21/ *Third FNPRM* ¶ 99.

22/ While Cablevision could seek to modify those stations' markets, the market modification procedure is a lengthy, burdensome and unpredictable process.

a result that would be tremendously burdensome for Cablevision and would offer no value to Cablevision subscribers, who have no interest in receiving those stations outside their relevant communities.[23/]

Moreover, not only would expanding must-carry rights to Class A stations not further the goals the Commission specifies, it would actually work against other important policies that the Commission is seeking to promote.

Granting Class A Stations Must-Carry Rights Would Decrease Competition. Allowing cable operators to create the best channel line-up possible by utilizing their business judgment to select programming that reflects and appeals to the needs and interests of their subscribers is the best driver of competition. In competitive markets, such as those in which Cablevision operates, a key competitive necessity today is the ability to offer significant numbers of HD channels. How many and which HD channels are offered has become the leading competitive differentiator among multichannel video programming distributors, and the information is widely touted in advertisements and press releases.[24/] In response to consumer interest and competitors' offerings, Cablevision has launched extensive numbers of HD channels, with six additional HD channels launched in the past year, a publicly-announced plan to launch 15 additional HD channels on August 1, 2008, and plans to launch 10 more HD channels by October 2008.

[23/] Given that Cablevision's carriage of WZBN is entirely voluntary, if additional Cablevision subscribers were interested in receiving the station, Cablevision would be making it available to them.

[24/] *See, e.g.*, Press Release, Verizon, *Verizon FiOS TV Delivers 100 High-Definition Channels to New Yorkers - on the Network Built for HD* (July 28, 2008), *at* http://newscenter.verizon.com/press-releases/verizon/2008/verizon-fios-tv-delivers-100.html; Press Release, Dish Network, *DISH Network Meets 100 HD Channel Mark Ahead of Schedule; Announces Launch of 17 More National HD Channels* (July 10, 2008), *at* http://dish.client.shareholder.com/releasedetail.cfm?ReleaseID=320956; Press Release, DirecTV, *DirecTV Remains Clear HD Leader with 130 Channels on Tap for Mid-August* (July 28, 2008), *at* http://dtv.client.shareholder.com/releasedetail.cfm?ReleaseID=324646.

If cable operators are required to dedicate capacity to yet more broadcasters that, in their business judgment, do not merit carriage in the open market, rather than having the flexibility to offer more HD programming and respond to competitors' HD offerings, they face a significant competitive disadvantage. The Commission's proposal appears to be directed only at cable operators and not their competitors.[25/] Establishing such an unlevel playing field could have an adverse effect on competition in the market, contrary to the Commission's goal of creating a competitive MVPD marketplace.[26/]

Granting Class A Stations Must-Carry Rights Would Decrease The Availability of Advanced Services. Occupying spectrum with more must-carry channels also deprives cable operators of the ability to offer more advanced and interactive services. Cablevision continuously earmarks capacity for the launch of new products and services, which are vital to its competitive position. Each time the Commission requires cable operators to give away channels to broadcasters or others, it results in less capacity being available to launch or improve other services that require dedicated bandwidth, such as the development of interactive television applications. Capacity used for must-carry stations is simply capacity that is rendered unavailable for these offerings, contrary to Congress's goals and direction.[27/]

[25/] *Third FNPRM* ¶ 99.

[26/] 47 U.S.C. § 521(6) (providing that one of the purposes of Title VI is "to promote competition in cable communications"); *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Unites and Other Real Estate Developments*, Notice of Proposed Rulemaking, 22 FCC Rcd 5935, ¶ 1 (2007) (stating that "[g]reater competition in the market for the delivery of multichannel video programming is one of the primary goals of federal communications policy"); *Implementation of Section 621(A)(1) of the Cable Communications Policy Act of 1984 as Amended*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, ¶ 1 (2007) (identifying the "interrelated federal goals" as "enhanced cable competition" and "accelerated broadband deployment").

[27/] 47 U.S.C § 157(a) ("It shall be the policy of the United States to encourage the provision of new technologies and services to the public.").

Granting Class A Stations Must-Carry Rights Would Disrupt the Digital Transition. Injecting uncertainty -- and the litigation that would result from any new must-carry obligations -- at this late stage, only a few months before the digital transition is scheduled to occur, would be extremely disruptive to cable operators' efforts to prepare for a smooth transition and educate their customers. Incorporating even one station into a line-up is disruptive; adding numerous stations would be disastrous, resulting in multiple channel moves and possibly the deletion of services, at a time when cable operators are striving to deliver the message that the digital transition will not result in the loss of any programming. The Commission should be taking every effort to keep channel line-ups as consistent as possible at this sensitive time, not considering sweeping new policies that could cause major disruption to cable service.

III. GRANTING CLASS A STATIONS MUST-CARRY RIGHTS WOULD VIOLATE THE FIRST AMENDMENT

The Supreme Court recognized in *Turner* that "there can be no disagreement" about the "initial premise" that "cable operators engage in and transmit speech, and they are entitled to the protections of the speech and press provisions of the First Amendment."[28/] The Court further concluded that "the must-carry rules regulate cable speech."[29/] As such, in order to survive First Amendment scrutiny, must-carry burdens must "serve important government interests 'in a direct and effective way,'"[30/] and must be narrowly tailored not to "burden substantially more speech than is necessary to further"[31] the government interests served by must-carry.

Must-carry was intended "to serve three interrelated interests: (1) preserving the benefits of free, over-the-air local broadcast television; (2) promoting the widespread dissemination of

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28/ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) ("*Turner I*").

29/ *Id.* at 637.

30/ *Turner II*, 520 U.S. at 213 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989)).

31 *Turner I*, 512 U.S. at 662.

information from a multiplicity of sources; and (3) promoting fair competition in the market for television programming."[32/] Additionally, in upholding must-carry, the Court found that these interests were subsumed in the "overriding congressional purpose" of "'protecting non cable households from loss of regular television broadcasting service due to competition from cable systems.'"[33/] After analyzing the market for distribution of programming at the time of the decision, the Court narrowly found that must-carry furthered these interests in a manner that would be achieved less effectively absent the statute, and its resulting burdens on speech were narrowly tailored so as not to burden substantially more speech than was necessary to further those interests.[34/] The same would not hold true today.

Since 1992, the market for distribution of programming has fundamentally changed. The Court found must-carry justified based on the facts that in 1992, 40% of the public relied solely upon over-the-air broadcasts;[35/] cable operators possessed a local monopoly over cable households;[36/] cable systems had little incentive to carry, and a significant incentive to drop, broadcast stations;[37/] denying carriage to broadcast stations would be rational because a cable company could drop a broadcast station without losing a substantial number of subscribers;[38/] and the burden of must-carry was "modest" since most cable operators had excess capacity to

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32/ *Turner II*, 520 U.S. at 189 (internal citations omitted).

33 *Turner I*, 512 U.S. at 647 (quoting *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984)). This purpose built upon the long-standing "basic tenet of national communications policy that 'the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.'" *Turner II*, 520 U.S. at 192.

34/ *Turner II*, 520 U.S. at 197-224.

35/ *Id*. at 190.

36/ *Id*. at 197.

37/ *Id*. at 201.

38/ *Id*. at 202.

dedicate to carriage of additional broadcast channels.[39/] None of those facts is true today:

- Approximately 14% of households today rely on over-the-air broadcasting, far below the 40% that did so in 1992.[40/]

- "Today, almost all consumers are able to obtain programming through over-the-air broadcast television, a cable system, and at least two DBS providers."[41/] Cablevision is additionally subject to competition from either Verizon or AT&T in the vast majority of its footprint.

- Both Congress and the FCC now recognize that carriage of local broadcast signals is essential if an MVPD is to attract and retain subscribers.[42/]

- In 2008, a cable system must allocate its scarce capacity among numerous broadcast stations, approximately 565 nationally available programming networks, more than 100 regional networks,[43/] and other, new uses for the cable plant such as satisfying consumers' ever-increasing demand for advanced services such as VoIP service, faster Internet service, and Wi-Fi service.

Because the justifications for must-carry accepted by the Supreme Court in *Turner II* no longer exist, must-carry would not survive scrutiny today.

Even if must-carry would be found constitutional today despite the significant developments in the marketplace, however, required must-carry of Class A stations cannot survive First Amendment scrutiny under *Turner*.

Carriage of Class A stations fails to advance *any* of the purposes of must-carry. It does not "preserve" or "restore" rights formally enjoyed by such stations, protect non-cable

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39/ *Id*. at 214.

40/ *See* News Release, *FCC Adopts 13th Annual Report to Congress on Video Competition and Notice of Inquiry for the 14th Annual Report*, at 3 (rel. Nov. 27, 2007).

41/ *Id*. (also noting expanded competition from telcos).

42/ *General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee for Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd. 473, ¶¶ 201-02 (2004). *See also Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, 2005 WL 2206070, ¶ 44 (Sept. 8, 2005) (noting that a "station's programming makes the MVPD's offerings more appealing to consumers").

43/ *See* News Release, *FCC Adopts 13th Annual Report to Congress on Video Competition and Notice of Inquiry for the 14th Annual Report*, at 4 (rel. Nov. 27, 2007).

households from the loss of their regularly enjoyed television broadcasting service due to competition from cable systems, nor promote fair competition in the market for television programming. Class A stations were not even created until years after the must-carry statute was enacted. They have existed -- and survived without carriage rights -- entirely in a world where cable systems possessed the same or less market power as existed in 1992. Moreover, as discussed above, Class A stations are low-power stations, and Congress determined conclusively in 1992 that mandatory carriage rights for low-power stations were not necessary to advance the goals it sought to achieve in the must-carry statute.

Under such circumstances, granting Class A stations must-carry rights would have no connection with the purpose of "preservation"[44/] that underlies the constitutional justification of must-carry and would not "ensure that broadcast television remains available as a source of video programming for those without cable."[45/] Nor, as discussed above, would carriage of Class A stations increase diversity on the cable system or promote competition in programming. Finally, given the increased competition in the market for television programming, granting Class A stations must-carry rights is not necessary to ensure fair competition in the market; in fact, as discussed above, granting such stations must-carry rights would, if anything, create an imbalance in the market and distort competition.

Therefore, this is not a situation where "the burden imposed by must-carry is congruent to the benefits it affords," as the Supreme Court found to be the case for must-carry in general in

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44/ *Turner I*, 512 U.S. at 623 and 652 ("In short, the must-carry provisions . . . are meant to protect broadcast television from what Congress determined to be unfair competition by cable systems. In enacting the provisions, Congress sought to preserve the existing structure of the Nation's broadcast television medium . . . and, in particular, to ensure that broadcast television remains available as a source of video programming for those without cable.").

45/ *Turner II*, 520 U.S. at 231.

1992.[46/] A grant of must-carry rights to Class A stations would place serious burdens on Cablevision's speech that do not directly further any of must-carry's stated purposes. Grant of such rights would therefore be an unconstitutional application of the must-carry provision of the 1992 Cable Act under the test established in *Turner I* and *Turner II*.

IV. GRANTING CLASS A STATIONS MUST-CARRY RIGHTS WOULD CONSTITUTE A TAKING IN VIOLATION OF THE FIFTH AMENDMENT

It is well understood that channel capacity is the essence of the cable operator's property. Granting Class A stations must-carry rights and so requiring Cablevision to provide them with permanent channel space would effect a *per se* regulatory and physical taking of this property in violation of the Fifth Amendment.[47/]

As noted constitutional scholar Laurence Tribe has explained:

> Must carry rules do not simply regulate the manner in which cable operators use their systems. Rather, they effectively condemn a portion of cable operators' property and *turn it over to third parties* who are entitled to exclusive use of the channels in question on a continuing basis. This system is effectively the exercise of eminent domain power over a portion of the cable system. The power to exclude others from one's property is a traditional property right.[48/]

Class A stations with carriage rights would deprive Cablevision of "economically beneficial us[e]" of its channel space, a *per se* taking.[49/] This is the case even if that taking is

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46/ *Turner II*, 520 U.S. at 215.

47/ *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419 (1982) (the government's partial taking and occupation of a rooftop to provide tenants cable access constituted a *per se* taking).

48/ Laurence H. Tribe, *Why the Commission Should Not Adopt a Broad View of the 'Primary Video' Carriage Obligation*, submitted in CS Docket No. 98-120 (July 9, 2002) at 12-13 (citing *Loretto*, 458 U.S. at 435; *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 830-32 (1987); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979)).

49/ *Lucas v. South Carolina Coast Council*, 505 U.S. 1003, 1019 (1992) (an owner that "sacrifice[s] all economically beneficial uses in the name of the common good… has suffered a taking"); *Lingle v. Chevron U.S.A. Inc*., 125 S. Ct. 2074, 2081 (2005) (whether a taking "substantially advances" the government's interest is not an appropriate inquiry for a Fifth Amendment takings claim).

49/ *Lucas*, 505 U.S. at 1019; *Nollan v. California Coastal Comm'n*, 483 U.S. 824, 834 (1987). *See also* Tribe, *supra* note 48, at 13.

"partial" or "minor."[50/] Moreover, because a finding that Class A stations have must-carry rights would open the door to other low-power stations clamoring to convert to Class A status, or be granted must-carry rights themselves, such a grant could open the door to significant additional must-carry obligations. As Professor Tribe concluded, "[g]iving broadcasters exclusive use of multiple cable channels on a continuing basis is at least as clearly a taking as is granting cable operators the more visible but far less economically viable right to attach their wires to a small corner of a building's roof or requiring local exchange carriers to permit physical co-location on their premises."[51/]

Cablevision has invested hundreds of millions of dollars in its network to provide quality cable and other advanced services to its subscribers. These investments have significantly helped Congress's and the Commission's efforts to promote broadband -- indeed, Cablevision is consistently recognized as a leader in digital subscriber penetration. Forcing Cablevision to turn over any part of that investment is a clear violation of the Takings Clause.[52/]

50/ *Penn. Central Co. v. New York City*, 438 U.S. 104, 124-25 (1978).

51/ Tribe, *supra* note 48, at 13-14 (comparing must-carry to *Loretto* and *Bell Atlantic Corp. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1996), two cases in which the court found a regulatory taking).

52/ *See* Tribe, *supra* note 48, at 15 ("The constitutional principle is the same whether the transfer is accomplished wholesale or piece by piece.").

CONCLUSION

For the reasons discussed, the Commission has no authority to and should not grant Class A low-power television stations must-carry rights.

Respectfully submitted,

/s/

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July 30, 2008

CERTIFICATE OF SERVICE

I, Ernest C. Cooper, hereby certify that on this 30th day of July 2008, the foregoing Comments of Cablevision Systems Corp., was filed electronically through the FCC's Electronic Comments Filing System (ECFS) and copies were served on the following as indicated:

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