BEFORE THE

# Federal Communications Commission

WASHINGTON, D.C. 20554

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| In re Petition of | ) | |
| | ) | |
| Mauna Kea Broadcasting Company, | ) | CSR-8658-M |
| Licensee of Television Station KLEI-DT, | ) | Docket No. 12-167 |
| Kailua-Kona, Hawaii | ) | |
| | ) | CSR-8682-M |
| v. | ) | Docket No. 12-197 |
| | ) | |
| Time Warner Entertainment Company, L.P., | ) | CSR-8686-A |
| d/b/a Oceanic Time Warner Cable, | ) | Docket No. 12-208 |
| and Hawaiian Telcom, Inc., d/b/a | ) | |
| Hawaiian Telcom Services Company, Inc. | ) | |

**To: The Secretary**
**For: Chief, Media Bureau**

## PETITION FOR RECONSIDERATION

**TIME WARNER ENTERTAINMENT COMPANY, L.P.**

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Date: November 19, 2012

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## SUMMARY

The Media Bureau erred in denying the Petition by Time Warner Cable ("TWC") requesting modification of the Designated Market Area ("DMA") of television station KLEI-TV, Kailua-Kona, Hawaii ("KLEI" or "Station") so as to remove the various unincorporated areas, incorporated municipalities and military installations (the "Communities") served by TWC's systems located in Honolulu, Kauai, Kalawao, and Maui Counties (the "Systems"). The Bureau Order is based on a faulty analysis of the statutory criteria for market modification decisions and is directly inconsistent with extensive Commission precedent. Moreover, the Bureau Order violates TWC's First Amendment rights because it relies on content-based determinations to require TWC to carry KLEI far outside its natural economic market. Accordingly, the Bureau should reverse its decision and modify KLEI's local market so as to relieve TWC from any obligation to carry KLEI in the Communities.

TWC's Petition conclusively demonstrated that KLEI: 1) has never been carried in the Communities; 2) does not provide digital equivalent Grade B contour coverage to the Communities; 3) does not provide programming with specific focus on particularized issues and events involving the Communities; 4) does not have any measurable viewership in the Communities; and 5) has no meaningful economic nexus with the Communities. Furthermore, the Petition demonstrated that the Communities are extremely well-served by numerous other broadcast stations carried on the Systems. Denial of TWC's Petition was contrary to the statute and arbitrary and capricious.

First, the Bureau Order improperly fails to give the "historical carriage" and the "viewing patterns" statutory factors any weight by misapplying well-established Commission precedent. The Bureau Order summarily brushed aside these two factors, claiming that "with new or specialty stations, failure to establish historic carriage or significant viewership is given lesser

weight," despite the fact that long standing Commission precedent demonstrates that KLEI does not qualify as either a "new" or "specialty" station.

The Bureau Order also misconstrues the "local service" statutory factor contrary to law and precedent, both in its disregard of KLEI's lack of technical coverage of the Communities, and also its analysis of KLEI's limited local programming offerings that fail to include any programming specifically targeted to the Communities. Remarkably, while the Bureau Order acknowledges that "KLEI does not appear to provide the digital equivalent of a Grade B contour coverage to the communities," a fact that is often determinative in market modification decisions, the lack of coverage was improperly given no weight at all. Furthermore, contrary to other long lines of prior precedent, the Bureau failed to follow well-established decisions that great distances (KLEI's city of license is located anywhere from 66 to 294 miles from the Communities) and geographical barriers, such as vast bodies of water, create logical limits to a station's natural market.

Also contrary to precedent, the Bureau Order gives great weight to KLEI's insignificant amount of original programming, even though it was not targeted to the Communities and/or was not carried prior to the filing of the Petition. Specifically, the Bureau Order failed to explain how any of the referenced KLEI programs specifically target any of the affected Communities. The record demonstrated that KLEI's programming lineup consists of mostly re-runs of ancient syndicated programs and infomercials, accounting for over ninety percent of its schedule. The limited amount of KLEI's local programming focused entirely on events, people and places located on the Island of Hawaii, and not in the relevant Communities, which are all on the other Hawaiian Islands. Commission practice in market modification proceedings involving, as is the case here, many communities across multiple counties, is to analyze each program (or each news story) on its own terms, assigning credit only to programming directly focusing on specific communities, but not to programming of general interest throughout the DMA. Without any discussion why that was not done here, the Bureau Order simply holds that, as an aggregate, KLEI's *de minimis* amount of allegedly "local" programming has universal appeal in all the Communities.

The Bureau Order also improperly ignored Commission precedent that recently added or promised future local programming is to be given no weight in determining whether a station provides sufficient local programming relevant to residents of the targeted communities. The record had demonstrated that it was only after the initiation of this proceeding that this programming magically appeared, as KLEI abruptly overhauled its programming lineup to shore up its arguments.

Also contrary to precedent, the Bureau Order fails to provide any substantial weight to the "other stations' local programming" factor, despite acknowledging that the factor was overwhelmingly met. Instead, the Bureau erroneously turns the factor on its head to create a new DMA wide non-discriminatory carriage principle, which essentially reads the market modification process completely out of the statute. The Bureau must reverse its action and give appropriate weight to the undeniable fact that the extensive amount of local programming tailored to the Communities that is broadcast by other stations carried by TWC in the Communities is clearly a factor weighing heavily in favor of excluding the Communities from KLEI's market.

Finally, the Bureau Order violates TWC's First Amendment rights because it relies on content-based determinations to require TWC to carry KLEI far outside its natural economic market. Here, the Bureau Order relied heavily if not exclusively on KLEI's proffer of local programming. Indeed, by ignoring prior precedent awarding credit only for programming directly focusing on the specific affected communities, the Bureau Order awarded mandatory carriage rights to KLEI far beyond its natural economic market based on an analysis of particular programs aired by KLEI.

By engaging in this content-based analysis of the subject matter of KLEI's programming, the Bureau Order is subject to strict scrutiny. The Bureau Order does not suggest any "compelling" governmental interest served by requiring carriage of KLEI far outside its natural market, or that the means selected are narrowly tailored to achieve those ends, and thus it fails under strict scrutiny.

The Bureau Order would also fail under intermediate scrutiny, particularly when viewed in light of the vast changes in circumstances since passage of the 1992 Cable Act. Thus, for example, a razor thin plurality of the Supreme Court upheld must-carry as facially constitutional as a means to prevent cable operators from using their "bottleneck" power to prevent stations from serving their natural off-the-air audience. But, as the courts have acknowledged, cable operators are no longer a bottleneck. Broadcasters have multiple options to reach their audience, including telephone company competitors, satellite providers, shared multicast streams, and multiple video outlets on the Internet. Moreover, the must-carry rationale upheld in Turner does not support a carriage duty with respect to a station that cannot even be received over-the-air. While mandatory carriage may have been supportable to prevent cable operator abuse of bottleneck power to prevent a station from reaching its natural audience, it was never intended to subsidize broadcasters through cable carriage in areas where their signal is unavailable.

Subsequent events demonstrate that preservation of every local station -- particularly those such as KLEI that are struggling even with must-carry rights in their local markets -- is no longer an important governmental interest at all, let alone an interest substantial enough to warrant intrusion on the free speech rights of cable operators. On February 22, 2012, the "Middle Class Tax Relief and Job Creation Act of 2012" ("Spectrum Act") was enacted, whereby Congress authorized the FCC to "encourage" television broadcast licensees "to relinquish voluntarily some or all" of their licensed spectrum to be auctioned for wireless uses. In so doing, Congress recognized that national priorities have shifted since 1992, and thus created incentives for marginal stations to relinquish their spectrum for a higher and better use. Indeed, this repurposing of spectrum has been characterized by the FCC as "essential to continuing U.S. leadership in technological innovation, growing our economy, and maintaining our global competitiveness." Here, forcing TWC to carry KLEI outside its natural market cannot be justified as serving an important governmental interest, and will thus fail judicial review.

In sum, TWC's Petition clearly satisfied the statutory criteria for market modification. In holding otherwise, the Bureau Order is contrary to law, is arbitrary and capricious, violates TWC's First Amendment rights, and must be reversed.

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**To: The Secretary**
**For: Chief, Media Bureau**

## PETITION FOR RECONSIDERATION

Time Warner Entertainment Company, L.P., d/b/a Oceanic Time Warner Cable ("TWC"), by its attorneys, and pursuant to Section 405 of the Communications Act[1] and Section 1.106 of the Commission's rules,[2] hereby petitions the Mass Media Bureau (the "Bureau") to reconsider its October 19, 2012 Order (DA 12-1683) (the "Bureau Order")[3] denying TWC's Petition for Special Relief[4] (the "Petition") seeking exclusion of TWC's cable television systems (the "Systems") serving unincorporated areas, incorporated municipalities and military installations located in Honolulu, Kauai, Kalawao, and Maui Counties (collectively, the "Communities") from the Designated Market Area ("DMA") of television station KLEI-TV, Kailua-Kona, Hawaii ("KLEI" or the "Station"). As demonstrated below, the Bureau Order is

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[1] 47 U.S.C. § 405.
[2] 47 C.F.R. § 1.106.
[3] Mauna Kea Broad. Co. v. Time Warner Ent'mt Co., et al., Memorandum Opinion and Order, DA 12-1683 (rel. Oct. 19, 2012) [hereinafter "Bureau Order"].
[4] Time Warner Entertainment Company, L.P., Petition for Special Relief, MB Docket 12-208 (filed July 13, 2012) [hereinafter "Petition"].

based on a faulty analysis of the statutory criteria for market modification decisions and is directly inconsistent with extensive Commission precedent. Moreover, the Bureau Order violates TWC's First Amendment rights because it relies on content-based determinations to require TWC to carry KLEI far outside its natural economic market. Accordingly, the Bureau should reverse its decision and modify KLEI's local market so as to relieve TWC from any obligation to carry KLEI in the Communities.

## I. THE BUREAU ORDER IS BASED ON A FAULTY ANALYSIS OF THE STATUTORY FACTORS, CONTRARY TO WELL-ESTABLISHED PRECEDENT

Section 614(h)(1)(C) of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")[5] directs the Commission, in evaluating requests to modify a station's local market, to consider four discreet 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;
>
> (II) whether the television station provides coverage or other service to such community;
>
> (III) 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
>
> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.[6]

Despite a clear record that KLEI meets absolutely none of these factors with regard to the Communities, the Bureau Order nonetheless rejects TWC's request to modify the Station's market. As demonstrated below, the Bureau Order's treatment of each of the four factors is contrary to law and precedent, is otherwise arbitrary and capricious, and must be reversed.

[5] 47 U.S.C. § 534(h)(1)(C).
[6] 47 U.S.C. § 534(h)(1)(C)(ii).

## A. Historical Carriage and Viewing Patterns

The Bureau Order improperly fails to give the first (historical carriage) and the fourth (viewing patterns) statutory factors any weight. In doing so, the Bureau Order misapplied well-established Commission precedent narrowly delineating when such factors may be discounted. Upon reconsideration, KLEI's failure to meet these factors should be afforded significant weight.

The first statutory market modification factor requires an assessment of the historical carriage, if any, of the station by cable systems serving the affected communities,[7] and the fourth statutory factor concerns viewing patterns in the communities in question.[8] There is no dispute that TWC and Hawaiian Telcom, the only cable operators serving any of the Communities, currently do not carry KLEI and have never done so. Similarly, KLEI is not currently carried anywhere in Hawaii (even on the Big Island) by DirecTV or DISH.[9] Moreover, the record is clear that Nielsen cable and non-cable audience data evidences no reportable viewing of the station. Indeed, the Bureau Order readily acknowledges "that KLEI has not shown a history of cable carriage in the communities and has no measurable viewing in the communities and therefore does not meet the first and fourth market modification factors."[10]

Nonetheless, the Bureau Order summarily brushed aside these two factors, claiming that "with new or specialty stations, failure to establish historic carriage or significant viewership is given lesser weight."[11] While true as far as it goes, the problem with this analysis, as clearly demonstrated by the cases cited in the Bureau Order, KLEI simply does not qualify as either a "new" or "specialty" station.[12]

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[7] 47 U.S.C. § 534(h)(1)(C)(ii)(I).
[8] 47 U.S.C. § 534(h)(1)(C)(ii)(IV).
[9] Bureau Order ¶ 15.
[10] Id.
[11] Id. ¶ 7.
[12] Significantly, three cases cited in the Bureau Order to support the treatment KLEI as a "new station," Paxson San Jose License, Inc., 12 FCC Rcd 17520 (CSB 1997); Comcast Cablevision of

Commission precedent going back to at least 1975 holds that a station must have been in operation for less than three years to be considered "new" for local market definition purposes.[13] Here, the record demonstrated that KLEI has been in operation for over twenty-eight years (since 1984), a fact that clearly should have disqualified KLEI from treatment as a "new" station.[14] Moreover, a subsequent change in ownership or format does not reset the clock, thereby qualifying the station as "new."[15] For example, the Bureau in 2011 held in Comcast Cable Communications, LLC that a station in operation for seven years would not be considered a "new" station in a market modification analysis, even though there was, as here, a subsequent change in ownership and a format change.[16] The Bureau there explained a station's "change in ownership . . . does not automatically reclassify it as a new station."[17] Thus, to the extent KLEI may have had a change in ownership and format in 2011 should have been of no consequence.

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Danbury, Inc., 18 FCC Rcd 274 (MB 2003); and CoxCom v. KPFH, 17 FCC Rcd 17192 (MB 2002); are all true "specialty station" cases, and thus not on point. Indeed, each of the stations involved in those cases were uncontested "specialty stations," fully meeting all legal standards for such status.

[13] See, e.g., George S. Flinn, Jr. v. Comcast, LLC, 27 FCC Rcd 9085, 9090 & n.32 (MB 2012) [hereinafter "Flinn, Jr."]; Cox Communications Las Vegas, Inc., 24 FCC Rcd 7846, ¶18 at n.60 (MB 2009) ("As the Bureau recently found, seven years of operation do not entitle a station to 'new station' status."); Avenue TV Cable Service, Inc., 16 FCC Rcd 16436, 16445, ¶ 22 (2001) (stating that "[s]tations normally take up to 3 years to build viewership within their licensed areas"); Cable Satellite of South Miami, Inc., 13 FCC Rcd 298, 306 (CSB 1998) ("[S]tations can take up to three years to establish their viewing patterns"); Gulf & Pacific Communications L.P., 12 FCC Rcd 21986 (1997); DeSoto Broadcasting, Inc., 10 FCC Rcd 4991 (1995); Amendment of Part 76 of the Commission's Rules and Regulations to Permit Showings that Certain Television Broadcast Stations are Significantly Viewed Based on County-Wide Surveys, Report and Order, 56 FCC 2d 265, 270 (1975) (indicating three years "afford[s] adequate time to affected stations to establish audience levels to meet the significantly viewed criteria.").

[14] See Federal Communications Commission, Consolidated Database Filing System (CDBS), KLEI-TV, Call Sign History, http://licensing.fcc.gov/prod/cdbs/pubacc/prod/sta_sear.htm (search "Previous Callsign" for "KLEI"; then follow "Click for Details" hyperlink under "KLEI-TV"; then follow "View Call Sign History" hyperlink) (last visited Nov. 12, 2012). The station was originally licensed as KSHQ, changed its call sign to KVHF in 1986 and to KLEI in 1992 before becoming KLEI-TV in 2012. Id.

[15] Bureau Order ¶ 15.

[16] Comcast Cable Communications, LLC, 26 FCC Rcd 14453, ¶ 15 (MB 2011) [hereinafter "Comcast Cable"] ("While KQSL has argued that we should overlook its failure to meet these factors because it is both a 'new' station and a 'specialty' station, we disagree. KQSL has been on-the-air for over 20 years. A change in ownership or operations, therefore, does not automatically reclassify it as a new station.")

[17] Id.

Similarly, by affording "specialty station" status to KLEI, the Bureau Order is also contrary to a long line of Commission precedent. The Commission has always limited the "specialty station" designation and its benefits to only those stations where more than one-third of the hours of an average broadcast week and more than one-third of the station's weekly prime time hours are devoted to religious or foreign-language programs.[18] Here, where such programming constitutes, at most, well under ten percent of KLEI's schedule, KLEI plainly fails to meet the criteria for favored treatment under the definition of a specialty station.

While not entirely clear, the Bureau Order also appears to rely on TWC's past carriage of KPXO, Oahu, in the Communities as an additional reason to overlook KLEI's lack of historical carriage, insinuating without elaboration that carriage of KPXO is relevant because KLEI was once a satellite of KPXO.[19] The undisputed fact remains that KLEI has never been carried in the Communities, whether during its tenure as a satellite of KPXO or under its current ownership. Indeed, the Bureau Order cites no case where carriage of a parent station has been deemed to constitute historic carriage of its satellite. Any past carriage of KPXO is a *non-sequitur* and in no manner undercuts the fact that KLEI cannot demonstrate historic carriage in any of the Communities.

Because there was no basis, either in fact or based on precedent, for treating KLEI either as a new or specialty station entitled to any exception, on reconsideration the Bureau must afford appropriate weight to the fact that KLEI fails to meet the first and fourth statutory factors.

[18] See 47 C.F.R. § 76.5(kk) (1981) (*repealed*). Although that definition has been repealed along with the other signal importation quota rules, the Commission continues to take specialty station status into account in market modification proceedings by, for example, significantly discounting the absence of historic carriage or lack of ratings data as factors to be used against a specialty station. See, e.g., KTNC Licensee, LLC, 18 FCC Rcd 16269, 16278 (MB 2003); Falcon Cable Systems Co. II, L.P., 18 FCC Rcd 23774, 23781 (MB 2003), Nationwide Communications, Inc., 10 FCC Rcd 13040, 13043 (CSB 1995); Family Stations, Inc., 18 FCC Rcd 22916, 2292 (MB 2003) ("In analyzing a specialty station's request to modify it[s] television market, historical carriage and local viewership are not as important in the analysis."). Furthermore, KLEI appears nowhere on the U.S. Copyright Office's certified list of specialty stations. See Cable Statutory License: Specialty Station List, 77 Fed. Reg. 18869 (2012).

[19] Bureau Order ¶ 8.

### B. <u>Coverage Or Local Service.</u>

The Bureau Order also misconstrues the second statutory factor (coverage or local service) contrary to law and precedent, both in its disregard of KLEI's lack of technical coverage of the Communities, and also its analysis of KLEI's limited local programming offerings that fail to include any programming specifically targeted to the Communities.

#### 1. The Bureau Order Improperly Disregards KLEI's Lack of Technical Coverage and Geographic Barriers Limiting Its Natural Market.

The first part of the second factor requires an analysis of whether the station can technically cover the subject communities with an over-the-air signal. Commission rules state that for a market modification petitioner to make a *prima facie* case on a station's technical coverage, it must submit the station's Grade B contour map.[20] A station's lack of Grade B coverage over a cable system's communities is a highly relevant (and typically fatal) factor in determining that a station does not provide technical service, and thus is not local, to those communities.[21] Here, the Bureau Order acknowledges that "KLEI does not appear to provide the digital equivalent of a Grade B contour coverage to the communities."[22] This fact was not contested in any manner by KLEI and its allies. While this should have been a strongly determinative factor in favor of redefining KLEI's market, it was improperly given no weight.

The Bureau Order also explains that the Bureau conducted its own internal review of a KLEI Longley-Rice study, and notes that a small community of 390 households on the remote eastern edge of the Island of Maui theoretically might receive KLEI over the air.[23] This

[20] 47 U.S.C. § 76.59(b)(2).
[21] <u>See, e.g.</u>, <u>Comcast Cable</u>, 26 FCC Rcd 14453, 14456-57 (MB 2011); <u>Massillon Cable TV, Inc.</u>, 26 FCC Rcd 15221, 15225 (MB 2011); <u>Time Warner NY Cable LLC</u>, 22 FCC Rcd 16026, 16030 (MB 2007); <u>Greater Worcester Cablevision, Inc.</u>, 12 FCC Rcd 17347, 17353-54, ¶¶ 16-22 (CSB 1997).
[22] <u>See</u> Petition at Exhibit D.
[23] Bureau Order ¶ 10 ("Furthermore, based on our internal analysis of KLEI's Longley Rice coverage – which TWC did not supply – KLEI does in fact reach some areas on the island of Maui in addition to Hawaii. For example, it appears to reach Hana-Maui but does not appear to be carried on the

statement incorrectly insinuates that a Longley-Rice analysis needs to be submitted in addition to the unchallenged Grade B contour map showing that KLEI cannot technically serve any of the Communities. While the rules and precedent certainly allow the introduction of a Longley-Rice analysis as a supplement to the Grade B contour, they do not require such submission. In any event, the Commission has held in many other contexts,[24] including just within the past month,[25] that the Grade B contour, and not a Longley-Rice analysis, is the proper measure to delineate a station's technical service area. Here, where the fact that KLEI cannot provide technical coverage to any of the Communities was in effect stipulated by the Station, the Bureau cannot properly place any reliance on a Longley-Rice showing.[26]

The Bureau Order also improperly ignored clear Commission precedent requiring that geographical considerations be taken into account in determining that a station's natural economic market does not encompass an entire expansive DMA. The Petition demonstrated that KLEI's city of license is located anywhere from 66 to 294 miles from the Communities. Clear precedent dictates that such distances require exclusion of communities from a station's

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TWC cable system serving Hana-Maui, even though other stations operating out of Oahu with Grade B contours that also do not reach this region appear to be carried there.").

[24] Study of Digital Television Field Strength Standards and Testing Procedures, 20 FCC Rcd 19504, 19507 (2005) ("For digital television stations, the counterpart to the Grade B signal intensity standards for analog television stations are the values set forth in Section 73.622(e) of the Commission's Rules describing the DTV noise-limited service contour.").

[25] Randall Terry for President, DA 12-1734, ¶ 8 (rel. October 31, 2012) (choosing Grade B analysis over Longley-Rice studies for delineating broadcast station's service area in the political advertising context).

[26] Notably, the Bureau should have made its Longley-Rice analysis available for review and comment by the parties before issuing its decision. *See*, *e.g.*, Solite Corp. v. EPA, 952 F.2d 473, 484 (D.C. Cir. 1991) ("Integral to the notice requirement is the agency's duty to identify and make available technical studies and data that it has employed.... An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed [decision] in time to allow for meaningful commentary.") (internal quotation marks and ellipsis omitted). TWC hereby requests the Bureau to place this analysis in the public record and provide copies to the parties in this proceeding.

market.[27] Contrary to another long line of prior precedent, the Bureau failed to follow well-established decisions that geographical barriers, such as vast bodies of water, create logical limits to a station's natural market.[28] By failing to follow this well-established precedent here, without explanation, the Bureau Order was arbitrary and capricious.[29]

Finally, the Bureau Order improperly and incorrectly applied the *spoke and hub* doctrine from the *WLNY-TV* decision. Under a proper application of that doctrine, a "spoke" station, located at the far extremities of a DMA (as is the case with KLEI), has no presumptive claim to DMA-wide carriage.[30] As the Second Circuit explained, "in dealing with exclusion requests for "'spoke' or 'rim' broadcast stations, located at the edge of a[] [DMA] . . . a strict application of the four statutory factors might indicate that widespread exclusion is in order."[31] Thus, the

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[27] See, e.g., Greater Worcester Cablevision, Inc., 12 FCC Rcd at 17350, ¶ 8 (communities between 39 and 70 miles from station's city of license); Texas Cable Partners, L.P. d/b/a Paragon Cable, Order on Reconsideration, 15 FCC Rcd 21429 (CSB 2000) (communities located 41-45 miles from station); Mid-Hudson Cablevision, Inc., 15 FCC Rcd 5011 (CSB 2000) (communities located 31 to 70 miles from station).

[28] See, e.g., Adelphia Cablevision Associates, L.P., 14 FCC Rcd 7686 (CSB 1999); Rifkin/Narragansett South Florida CATV Limited Partnership, d/b/a Gold Coast Cablevision, 11 FCC Rcd 21090, ¶ 26 (CSB 1996) [hereinafter "Gold Coast Cablevision"], recon. denied, 14 FCC Rcd 13788 (1999); Time Warner N.Y.C. Cable Group, 11 FCC Rcd 6528 (CSB 1996); Time Warner N.Y.C. Cable Group, 12 FCC Rcd 13094 (CSB 1996); recon. denied, 12 FCC 12262 (1997); Comcast of Central N.J., 13 FCC Rcd 1656, ¶ 25 (CSB 1997) ("The communities are also geographically separated from WFMZ-TV's city of license in terms of mileage by approximately 55 miles, are on the other side of the Delaware River from Allentown, and are in a different state.").

[29] Thus, for example, in Cablevision Systems Corporation, the Bureau deleted certain communities from WRNN's mandatory carriage zone, finding them separated from the station's city of license by "geography and terrain," separated by distances ranging from 83 to 130 miles, and beyond its analog Grade B contour. 11 FCC Rcd 6453, 6481 (CSB 1996) [hereinafter "Cablevision Systems"]. That decision was upheld by the full Commission, 12 FCC Rcd 12262 (1997) and the Second Circuit, WLNY-TV, Inc. v. FCC, 163 F.3d 137 (2d Cir. 1998) [hereinafter "WLNY-TV"]. Subsequently, certain of these communities were returned to WRNN's market because they fell within the station's new digital coverage contour. WRNN License Company, LLC, 21 FCC Rcd 5952 (MB 2006). Again, that decision was upheld by the full Commission, 22 FCC Rcd 21054 (2007) and the Second Circuit, Cablevision Sys. Corp. v. FCC, 570 F. 3d 83, 97 (2d Cir. 2009) [hereinafter "Cablevision"]. Significantly, however, the Bureau Order fails to cite a single case where a market modification was denied as to communities outside a station's coverage contour, separated by distances of 80 to 100 miles or more as well as by geographical barriers, and where the station had no historical carriage or measureable audience ratings. The Bureau lacks delegated authority to so thoroughly disregard established precedent here.

[30] WRNN License Co., 21 FCC Rcd. at 5960, ¶ 16 (finding station's situation "consistent with the 'hub and spoke' model . . . in which the outlying 'spoke' communities in [the New York DMA] are connected by the 'hub' of New York City" and recognizing that the "'spoke' market programming generally is not of interest to other 'spoke' communities.").

[31] WLNY-TV, 163 F.3d at 145.

Bureau applied the doctrine here exactly backwards and incorrectly, by giving state-wide carriage rights to KLEI, a station at the outer reaches of the DMA. Indeed, the Bureau Order does not cite a single case where a "spoke" station has ever been granted mandatory carriage rights far beyond its Grade B contour, and the Bureau lacks delegated authority to break such new ground here.[32]

### 2. The Bureau Order Improperly Credits Programming That Was Not Targeted To The Communities And Was Not Carried Prior To The Filing of the Petition.

The second statutory factor, "coverage or other service," on its face is capable of content-neutral construction through consideration of such matters as signal coverage or geography. Nevertheless, previous Commission decisions typically employ a two-pronged analysis that also considers whether the station airs programs that specifically focus on the communities at issue. As explained in Part II.A., *infra*, by construing the statute to allow consideration of the content of individual programs broadcast by KLEI, the Bureau Order faces strict scrutiny under the First Amendment. But even assuming (incorrectly) that consideration of the station's content is constitutionally permissible under the second statutory factor, the analysis in the Bureau Order is flatly inconsistent with prior precedent.

Most notably, the Bureau Order failed to explain how any of the referenced KLEI programs specifically target any of the affected Communities. TWC's Petition demonstrated that KLEI's programming lineup consists of mostly re-runs of ancient syndicated programs and infomercials, accounting for over ninety percent of its programming.[33] TWC also demonstrated that the limited amount of local programming cited by the station focused entirely on events,

[32] For the record, TWC does not concede that "hub" stations automatically "merit carriage throughout the market." Time Warner Entertainment – Advance/Newhouse Partnership, 22 FCC Rcd. 13642, 13645-46 (MB 2007). Indeed, Section 614(h)(1)(C) requires that the statutory market modification factors be applied on a case-by-case basis to the facts of each particular station, whether "hub" or "spoke."

[33] Petition at 19, Exhibit G.

people and places located on the Island of Hawaii, and not in the relevant Communities, which are all on the other Hawaiian Islands.

Commission practice in market modification proceedings involving, as is the case here, many communities across multiple counties, is to analyze each program (or each news story) on its own terms, assigning each in terms of its appeal to specific communities being addressed (at least on a county-by-county basis) and to only award credit for programming directly focusing on specific communities. For example, in Mountain Broadcasting Corp.[34] and Tennessee Broadcasting Partners,[35] both cases involving, as here, communities spread over multiple counties, the Bureau conducted a county-by-county analysis of the station's local programming and news coverage, assigning individual programs or segments to particular geographic areas to demonstrate whether the station truly produces programing specifically targeted to residents in those areas, but without crediting programming of general interest to all affected communities.[36] Here, without conducting the requisite community-specific analysis, the Bureau Order simply holds that, as an aggregate, KLEI's *de minimis* amount of allegedly "local" programming has universal appeal in all the Communities. For this reason, the Bureau Order's analysis of KLEI's programming is not merely deficient, it is arbitrary and capricious, and must be reversed.

In addition, the Bureau Order improperly ignored Commission precedent that recently added or promised future local programming is to be given no weight in determining whether a

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[34] See, e.g., Mountain Broadcasting Corp., 27 FCC Rcd 2231, ¶ 21 (MB 2012) ("[The station] aired the following numbers of stories (given as numbers of stories between January and July 2011/and then counted for the full year 2011) toward the following counties: New York – Nassau and Suffolk Counties (144/243); New York – Rockland, Westchester and Orange Counties (140/227); New Jersey – Monmouth and Ocean Counties (293/444); Connecticut – Fairfield County (149/247). WMBC has not put forth any story counts for Putnam, Dutchess or Ulster Counties in New York.").

[35] Tennessee Broadcasting Partners, 23 FCC Rcd 3928, ¶¶ 22-37 (MB 2008), aff'd on recon., 25 FCC Rcd. 4857 (MB 2010).

[36] The Bureau Order improperly took into account evidence submitted in KLEI's Surreply, an unauthorized pleading. See 47 C.F.R. § 76.7(d). In any event, even improper consideration of the unauthorized evidence in KLEI's Surreply does not alter the fact that it has failed to demonstrate programming expressly targeted to the specific Communities at issue. Rather, each of the programs referenced by KLEI involves topics of general or state-wide interest, or of events occurring only on the Island of Hawaii.

station provides sufficient local programming relevant to residents of the targeted communities. The Bureau Order specifically touted KLEI's "strong lineup of local programming of relevance to the inhabitants of Hawaii County and to all Hawaiians, as well as foreign language programming targeted at special groups and residents"[37] and regurgitated a list of recent programming, much of which had never actually aired at the time of the initiation of this proceeding.[38] Indeed, the record conclusively demonstrates that it was only after the commencement of this proceeding that this programming magically appeared, as KLEI abruptly overhauled its lineup to shore up its arguments.[39]

The Commission has repeatedly rejected such *post-hoc* efforts by stations to alter their offerings in an effort to demonstrate local service,[40] explaining that programming launched near or just after the pleading stage of a proceeding is of minimal value in determining local service because it has not been "broadcast on a regular basis."[41] As to promised future airing of planned programming, the Commission has stated that it will not base a market modification decision "on programming that may or may not be aired at some future date,"[42] explaining that it must evaluate the "programming a station presently provides, not what it might provide in the

[37] Bureau Order ¶ 16.

[38] See Petition at 8-9. TWC submitted the KLEI programming schedule that was available on the Station's website as of the date of TWC's filing of the Petition. See Petition at Exhibit G. That programming schedule is dated June 28, 2012. Id.

[39] KLEI's Opposition included a programming schedule for the Station dated July 30, 2012, seven days after the filing of the Petition. See Opposition of KLEI, Petition of Time Warner Entertainment Company, L.P., for Modification of DMA Station KLEI-TV, Mauna Kea Broadcasting company, Kailua Kona, Hawaii, CSR-8686-A, MB Docket No. 12-208, Exhibit B (filed Aug. 16, 2012) [hereinafter "KLEI Opposition"]. This programming schedule all of a sudden listed seven brand new shows, conveniently described as "Local Programs." The Station's website was also modified to list these new programs and to make other subtle tweaks to give the impression that the Station is not merely focused on issues relating to the Island of Hawaii. For instance, the description of KLEI's news show was changed from "Local Big Island News" to "Hawaii News."[39] Compare Petition at 9-10 with KLEI Opposition at Exhibit B.

[40] See Comcast Cablevision of Danbury, Inc., 18 FCC Rcd 274, ¶ 11 (MB 2003) (refusing to credit programming released "near the pleading stage of a market deletion proceeding").

[41] Id. at 279.

[42] TCI of Illinois, Inc., 12 FCC Rcd 23231, 23241 (CSB 1997).

future."[43] Thus, any new programming which appeared on KLEI's programming schedule after the filing of the Petition should not have been considered as part of the local programming analysis.

### C. Local Programming Available From Other Stations.

Contrary to precedent, the Bureau Order fails to provide any substantial weight to the third factor (other stations' local programming), arbitrarily ignoring Congressional direction and turning the factor on its head to create a new DMA wide non-discriminatory carriage principle, which essentially reads the market modification process out of the statute.

The third factor requires an assessment of whether other television stations carried by the cable systems provide news and other coverage of issues of concern in the relevant communities.[44] The record overwhelmingly demonstrated that TWC's Systems already provide extensive local programming from other truly local stations on a regular basis. The Bureau Order confirmed this point, noting "other stations based on Oahu do provide local programming and serve the cable system communities at issue."[45] Indeed, TWC carries multiple stations airing a plethora of local news, sports and weather programs designed to address the unique interests of residents of the Communities.[46]

There thus should have been no question that the third factor weighed heavily in favor of the Petition. More than just ignoring it, the Bureau turns the factor on its head to create, out of whole cloth, an entirely new non-discrimination doctrine. The Bureau explained:

> For example, although under the third factor of our market modification analysis, other stations based on Oahu do provide local programming and serve the cable system communities at issue, the distances between the islands ensures that the signal of each station hardly reaches farther than its island of origin. Therefore, the local story coverage provided by other

[43] Flinn, Jr., 27 FCC Rcd 985 (MB 2012).
[44] 47 U.S.C. § 534(h)(1)(C)(ii)(I).
[45] Bureau Order ¶ 17.
[46] See Petition at Exhibit A.

> stations would also likely not be viewed on different islands without the use of cable, DBS service, or satellite broadcast stations. Other Hawaiian stations are thus no different than KLEI in reach, except that KLEI currently has no cable carriage.[47]

In other words, the Bureau Order transforms the fact that other stations on Oahu overwhelmingly serve the Communities with local programming from a limiting factor for KLEI into a factor potentially mandating universal carriage of every "spoke" broadcast station throughout the state. The Bureau Order offers no explanation how this inversion of the third factor into an amorphous mandate for carriage everywhere for every station is possibly consistent with the statutory directive, and indeed such an interpretation would render the market modification process a nullity. The Bureau must reverse its action and give appropriate weight to the undeniable fact that the extensive amount of local programming tailored to the Communities that is broadcast by other stations carried by TWC is clearly a factor weighing heavily in favor of excluding the Communities from KLEI's market.

### D. <u>Other Factors Considered By The Bureau Are Without Precedent Or Were Misapplied</u>.

The Bureau Order fails in many other respects, repeatedly contravening the statute, Congressional intent and Commission precedent. For example, the Bureau Order arbitrarily treats Hawaii as somehow geographically and culturally "unique" such that the plain statutory language is inapplicable, ignoring precedent deleting stations' carriage rights where the same factors were present to much more substantial degrees. More specifically, the Bureau Order improperly relies on an asserted Hawaiian "cultural identity" to justify this special treatment, a factor which has never been recognized by the Commission in any market modification proceeding.

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[47] Bureau Order ¶ 15 (footnotes omitted). Notably, the Bureau Order erroneously asserts that "KLEI currently has no cable carriage," despite the fact TWC carries KLEI in Kona, and has offered to carry KLEI in Hilo (TWC is still waiting for KLEI to deliver a good quality signal to its Hilo headend in accordance with FCC rules). Id.

The Bureau Order also incorrectly declares that the Commission has deemed "island" DMAs to be special cases where the ordinary statutory analysis can be cast aside. To do so, the Bureau Order relies on the *WVXF* case involving a Virgin Islands station and cable carriage in eastern Puerto Rico,[48] for the expansive proposition that any island wide DMA is a unique "unified" market where a station's failure to provide signal coverage is irrelevant. But that case, as was argued in TWC's pleadings (and not addressed by the Bureau),[49] is readily distinguishable and narrow. There, the station had a long record of historic carriage by Puerto Rico cable systems, had substantial measurable Nielsen viewership, could demonstrate Grade B signal coverage of the affected communities, qualified under established criteria as a "specialty station," and had a demonstrated economic nexus with Puerto Rico as over 75 percent of the station's advertisers were located in Puerto Rico. Here, the Station cannot claim any of these connections to Communities, and it should not have been afforded similar latitude. Again, all these arguments were made by TWC in its pleadings, but were arbitrarily ignored in the Bureau Order.

The Bureau Order also failed to correctly address the total absence of business, economic, shopping and labor connections between the Station's city of license Kailua-Kona (or even just the Island of Hawaii) and the Communities. The record showed, and KLEI did not provide rebuttal evidence, that there are minimal day-to-day business and economic connections between Kailua-Kona and the Communities, and that they are in fact separate commercial zones for almost all economic sectors. KLEI also presented no rebuttal evidence whatsoever to show that any group of consumers or business people from the Communities regularly shop or do business in Kailua-Kona or *vice versa*. The local advertising market also reflects this fact. For

[48] WVXF, Charlotte Amalie, Virgin Islands, 24 FCC Rcd 8264 (MB 2009).
[49] Reply of Time Warner Entertainment Co., L.P., Petition of Time Warner Entertainment Company, L.P., for Modification of DMA Station KLEI-TV, Mauna Kea Broadcasting Company, Kailua Kona, Hawaii, CSR-8686-A, MB Docket No. 12-208, at 19-20 (filed Aug. 29, 2012).

example, TWC has separate local advertising sales and distribution functionality on each island, and two distinct zones for Hawaii County (Kona and Hilo). Advertisers with Oahu based businesses advertise in the Oahu communities, advertisers with Maui based businesses advertise in the Maui communities, and advertisers with island of Hawaii based businesses advertise in Kona and Hilo.[50] Significantly, the Bureau Order improperly claims that absent statewide carriage, KLEI "faces the possibility of curtailed revenues," yet points to no evidence of KLEI's financial health (none was provided in the record), nor any evidence that KLEI has any revenues from advertising sales to businesses that do not operate on the Big Island.

Finally, the record included data from the Census Department's County to County Worker Flow Data for Hawaii Counties which demonstrated that the number of commuters between the islands containing the Communities and the Island of Hawaii, where Kailua-Kona is located, is almost none. Remarkably, the Bureau Order relies on travel between the Islands as proof of an economic connection between residents of the Communities and KLEI. While no one doubts that the Hawaiian Islands are popular vacation destinations for out-of-state and international visitors, most of whom travel first to Oahu's hub airport before taking smaller flights to their final destinations on the other islands, such air travelers are mostly not residents of the Communities travelling between islands, but out-of-towners. As air travel by tourists dominates the figures cited by the Bureau Order, inter-island travel should have been of no relevance in determining whether residents of the Communities consider KLEI local, particularly in the face of unrebutted Census data demonstrating the absence of any appreciable commuter travel by workers residing on one island for daily employment on another. In short, there are

[50] The fact that a DMA has been divided into discrete zones for advertising purposes is yet another factor indicating that KLEI's natural economic market does not extend to islands beyond its city of license. See, e.g., Cablevision Systems, 11 FCC Rcd 6453, 6478 (CSB 1996), aff'd, WLNY-TV, 163 F.3d 137 (2d Cir. 1998).

simply no appreciable business, economic, shopping or labor connections between Kailua-Kona and the Communities to justify statewide carriage for KLEI.[51]

As shown above, the Bureau Order is based on a faulty analysis of the statutory factors that is flatly inconsistent with prior precedent, and instead relies on criteria such as the "cultural identity" of the "unified" Hawaiian television market that find no support in prior cases, and thus fall beyond the Bureau's delegated authority. By failing to even acknowledge that it has ignored long-standing precedent, let alone provide a reasoned analysis for its radical departure, the Bureau Order is arbitrary and capricious. As explained by the D.C. Circuit:

> [W]e have held that where an agency departs from its precedent, it must do so by "reasoned analysis." . . . This permits us to ensure the agency's "prior policies and standards are being deliberately changed, not casually ignored." . . . Applying the corollary of this requirement, "agency action is arbitrary and capricious if it departs from agency precedent without explanation."[52]

## II. MANDATORY CARRIAGE OF KLEI FAR OUTSIDE ITS NATURAL MARKET WOULD VIOLATE TWC'S FIRST AMENDMENT RIGHTS

It is now well established that cable operators are entitled to full protection under the First Amendment, particularly in exercising their editorial function in selecting programming to carry, as well as channel and tier placement of that programming.[53] A governmental requirement that any TWC cable system transmit speech against its will results in First Amendment injury to TWC every bit as much as a governmental requirement for a newspaper to print a "reply"

[51] The Bureau Order's reliance on the existence statewide governmental institutions, such as Hawaii's "single school district," or its state-provided medical care through the Hawaii Health System Corporation, or the reach of Hawaii's Second Congressional District, cannot save its faulty conclusion. See Bureau Order ¶ 12. There is no precedent for considering the existence of such institutions, which are hardly unique to Hawaii, relevant to the analysis.

[52] Dillmon v. National Transportation Safety Board, 588 F.3d 1085, 1089 (D.C. Cir. 2009) (quoting Ramaprakash v. FAA, 346 F.3d 1121, 1124-25 (D.C. Cir. 2003)).

[53] See, e.g., Turner Broadcasting System Inc. v. FCC, 512 U.S. 622, 636 (1994) [hereinafter "Turner I"] ("[C]able operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment.").

editorial it disagrees with[54] or forcing a public utility to include messages critical of the utility in its bills to customers.[55]

While a razor-thin plurality of the Supreme Court upheld the basic must-carry regime against a facial challenge,[56] that analysis was based on 20-year old findings that are demonstrably no longer true.[57] In any event, even if the must-carry regime remains facially valid, that does not prevent TWC from bringing an as applied First Amendment challenge, particularly under the circumstances here where government benefits have been afforded after a content-based determination regarding the subject matter of programming broadcast (or promised to be broadcast) by KLEI.

### A. The FCC's Interpretation of 47 U.S.C. § 534(h)(1)(C)(ii)(II) To Allow Content-Based Determinations Regarding The Amount Of "Local" Programming Aired By A Station Triggers Strict Scrutiny Under The First Amendment.

In Turner I, the Supreme Court found the must-carry regime under the 1992 Cable Act generally to be content-neutral, and thus subject to intermediate scrutiny under the test announced in U.S. v. O'Brien, 391 U.S. 367 (1968).[58] Notably, however, the Court "expressly declined to decide whether a market modification order motivated by a concern for localism would be content-based or content-neutral."[59] Nevertheless, the Court suggested that certain aspects of the provisions that the Court declined to reach appear to single out specific

[54] See Miami Herald Publishing v. Tornillo, 418 U.S. 241, 241 (1974).
[55] See Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal., 475 U.S. 1 (1986).
[56] Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 180-81(1997) hereinafter "Turner II"].
[57] Indeed, the District Court decision upheld in Turner II acknowledged that the record at that time was "conspicuously barren of information about still other market forces that may have vastly more significance in the immediate future, and will bear directly upon such issues as how long must-carry should constitutionally be allowed to last." Turner Broadcasting v. FCC, 910 F. Supp. 734, 754 (D.D.C. 1995) (Jackson, J., concurring). See also Turner I, 512 U.S. 622, 674 ("The must-carry provisions may ultimately prove an ineffective or needlessly meddlesome means of achieving Congress' legitimate goals.") (Blackman, J., concurring).
[58] "[T]he must-carry rules, on their face, impose burdens and confer benefits without reference to the content of speech." Turner I, 512 U.S. at 643.
[59] Cablevision, 570 F. 3d 83, 97 (2d Cir. 2009) (citing Turner I, 512 U.S. at 644, n.6).

"broadcasters for special benefits on the basis of content,"[60] a hallmark for triggering strict scrutiny.

In Cablevision, the Second Circuit found that the Supreme Court Turner decisions do not foreclose an as applied First Amendment challenge in the market modification context. At the end of the day, the Second Circuit in Cablevision found it unnecessary to address the First Amendment implications of an evaluation of a station's amount of specific local programming because "WRNN's local programming was an inconsequential factor in the FCC's ultimate decision."[61] Here, however, it is beyond dispute that the Bureau Order relied heavily on KLEI's proffer of local programming.[62] To the extent the Bureau Order on reconsideration continues to place any reliance on content-based judgments to award the special benefit of mandatory carriage, the strict scrutiny analysis avoided in Turner I must be faced squarely, and the Bureau Order will not survive judicial review.

Indeed, the approach employed by the Bureau Order goes far beyond a mere "concern for localism" that the Second Circuit in Cablevision suggested might be content-based. Rather, while ignoring prior precedent awarding credit only for programming directly focusing on the specific affected communities, the Bureau Order awarded mandatory carriage rights to KLEI far beyond its natural economic market based on an analysis of particular programs aired by KLEI. By engaging in this content-based analysis of the subject matter of KLEI's programming, the Bureau Order is subject to strict scrutiny, and will fail unless narrowly tailored to promote a compelling Government interest.[63]

On its face, the statutory provision that the Commission has construed to allow content-based assessments is fully capable of application on a content-neutral basis. The statute merely

[60] Turner I, 512 U.S. at 644, n.6.
[61] Cablevision, 570 F.3d at 97.
[62] See, e.g., Bureau Order ¶¶ 6-10, 14.
[63] See, e.g., Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126 (1989).

directs the Commission, among other factors, to consider "whether the television station [that is the subject of a market modification request as to a particular community] provides coverage or other local service to such community."[64] In applying this statutory market modification factor, the Commission has considered content-neutral indicia of "coverage or other local service," such as whether the station places a Grade B (or now a digital noise-limited) contour over the communities, or whether geographical barriers serve to limit a station's natural market.[65] However, content-based determinations regarding whether the station provides programming of specific local interest to the affected communities has also been taken into account.[66] Particularly since the statutory provision is capable of a content-neutral application, the Commission's actions to engage in content-based determinations regarding a station's level of "local" programming not only trigger strict First Amendment scrutiny, but are not entitled to the level of deference that might otherwise apply to an express Congressional directive.[67]

The Bureau Order does not suggest any "compelling" governmental interest served by requiring carriage of KLEI far outside its natural market, or that the means selected are narrowly tailored to achieve those ends, and thus fails under strict scrutiny.[68]

### B. The Bureau Order Also Fails Under Intermediate Scrutiny.

Although the Second Circuit in Cablevision declined to apply strict scrutiny, it nevertheless proceeded to evaluate the cable operator's as applied challenge to a market

[64] 47 U.S.C. § 534(h)(1)(C)(ii)(II).

[65] See supra Part.I.B.1.

[66] See supra Part.I.B.2.

[67] The Bureau Order reflects a content-based evaluation of the subject matter of various programs broadcast by KLEI. Bureau Order ¶ 9. The Bureau then awards KLEI mandatory carriage in communities far outside its natural market, at least in part, due to its "attention to local programming." Id. ¶ 15. Even if the Bureau's content-based determinations do not reflect favoritism for the particular viewpoints or messages expressed, the fact that governmental benefits were awarded due to consideration of the subject matter addressed by the programming is sufficient to trigger strict scrutiny. Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 227-29 (1987); Carey v. Brown, 447 U.S. 455, 464-68 (1980).

[68] Regulations requiring the government to "examine the content of the message that is conveyed" are subject to strict scrutiny, Ark. Writers Project, Inc., 481 U.S. at 230, and are "presumptively invalid," R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

modification decision under intermediate scrutiny, and "had no trouble" in concluding that the FCC's order "advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further these interests," *i.e.,* "the government's interest in preserving a single broadcast channel it found serves the local community."[69]

As a preliminary matter, the O'Brien analysis applied by the Second Court in Cablevision was fundamentally flawed. As the Supreme Court has made clear, the proper analysis is not whether must-carry rights are necessary to preserve the economic health of the particular stations at issue, but rather whether the lack of mandatory carriage would threaten the ability of "a base number of broadcasters [to] survive to provide service to non-cable households."[70] But even under the inapposite analysis applied by the Second Circuit, there is no evidence in this case to suggest that the economic viability of KLEI will be harmed due to lack of carriage in communities where it has never been carried, garners no audience ratings, sells no advertising to local businesses, and cannot be viewed using an off-air antenna. In particular, the Turner rationale clearly does not support a carriage duty in communities where a station cannot be received over-the-air. While mandatory carriage may have been supportable to prevent cable operator abuse of bottleneck power to prevent a station from reaching its natural audience, it was never intended to subsidize broadcasters through cable carriage in areas where their signal is unavailable.

More fundamentally, any application of the O'Brien test in this case would require a *de novo* evaluation of the continued viability of the "important governmental interests" identified by

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[69] Cablevision, 570 F.3d 83, 97 (2d Cir. 2009).
[70] Turner II, 520 U.S. 180, 222 (1997).

Congress in 1992 and upheld by the Supreme Court in Turner I and Turner II.[71] In particular, central to the Turner analysis was the notion that cable operators should not be allowed to use their "bottleneck" to deny non-cable subscribers access to over-the-air signals.[72] To the extent cable operators ever held any such monopoly or bottleneck power, this is demonstrably no longer true:

- Competition fostered by the 1992 Cable Act from DBS and large telephone companies has eliminated any market power or bottleneck control cable operators may have held in 1992.[73]
- The ability of broadcast stations to offer multiple programming streams on a single channel, coupled with the explosion of video content available on the Internet, has further undermined any justification for mandatory cable carriage, whether on diversity grounds or to "prevent any significant reduction in the multiplicity of broadcast programming sources available to noncable households."[74]
- The unleashed forces of competition, coupled with technological advances allowing cable systems to expand capacity, has led to an abundance of media voices heretofore unknown.[75]

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[71] The Supreme Court has held that constitutional burdens "must be justified by current needs," and that where "there is considerable evidence" that a decades-old statute "fails to account for current… conditions," a court must "not shrink from [its] duty 'as a bulwar[k] of a limited constitution against legislative encroachments.'" Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193, 203-06129 S. Ct. 2504, 2512, 2513 (2009) (citation omitted); see also Comcast Corp. v. FCC, 579 F.3d at 1, 9-10 (D.C. Cir. 2009) [hereinafter "Comcast"] (vacating the FCC's cable ownership cap because retaining it "would continue to burden speech protected by the First Amendment," particularly "[i]n light of the changed marketplace"); Radio-Television News Directors Dirs. Ass'n v. FCC, 184 F.3d 872, 882 (D.C. Cir. 1999) (rejecting the FCC's retention of the personal attack and political editorial rules "to the extent that it relies on a thirty-year-old conclusion that the challenged rules survive First Amendment scrutiny").

[72] *See, e.g.,* Turner I, 512 U.S. 622, 646, 649, 661 (1994).

[73] As the D.C. Circuit recently concluded, "[c]able operators… no longer have the bottleneck power over programming that concerned Congress in 1992." Comcast, 579, F.3d at 8.

[74] Turner II, 520 U.S. at 193.

[75] As the Commission has recognized, since 1992, the total number of national programming networks has grown significantly. See 2012 Program Access NPRM at App. B, Table 1. Similarly, the cable industry generally, and TWC in particular, is significantly less vertically integrated today than in 1992. In 1992, 57.4 percent of programming networks were vertically integrated with cable providers. *See* H.R. Rep. No. 102-628, at 41 (1992). The FCC's most recent data shows that, even accounting for the 2011 merger of Comcast and NBC Universal, vertical integration of satellite-delivered national programming networks with cable operators is only 14.4 percent, well below 1992 levels. Revision of the Commission's Program Access Rules, Notice of Proposed Rulemaking, MB Docket No. 12-68 et al., FCC 12-30 (rel. Mar. 20, 2012) ("2012 Program Access NPRM") at App. B, Table 1. Details regarding TWC's reduction in vertical integration are set forth in Time Warner Inc. and Time Warner Cable Inc., 24 FCC Rcd 879 (2009). Thus, must-carry can no longer be sustained as necessary to "promote the widespread dissemination of information from a multiplicity of sources." Bureau Order, n. 6 (citing Turner II, 520 U.S. 180, 189-90).

As of the third quarter of 2011, more than 146 million Americans—nearly half the entire population—watch video programming on the Internet.[76] Moreover, 75 percent of U.S. households now have a broadband connection capable of streaming online video.[77] Similarly, the advent of multicasting provides yet another avenue for a station, by entering into an arrangement with a station in another community or with superior technical facilities, to reach an audience beyond its over-the-air coverage contour.[78] The ability of a broadcast station to provide its programming on the Internet, through another station's multicast stream, or through carriage by competing MPVDs, is clearly sufficient to assure that such station's programming "remains available as a source of video programming for those without cable,"[79] and thus any requirement to carry KLEI far outside its natural economic market would fail the narrow tailoring requirement even under intermediate scrutiny. Indeed, the fact that the Bureau imposed a mandatory carriage obligation on Hawaiian Telecom, a relative new entrant, appears to concede that the "bottleneck" rationale is no longer relevant.[80]

Subsequent events demonstrate that must-carry is no longer necessary to preserve the economic viability of local broadcasting. Indeed, the percentage of stations electing retransmission consent over mandatory carriage has risen dramatically since 1992,[81] and the

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[76] Nielsen Company, State of the Media: The Cross Platform Report, Quarter 3, 2011, at 6 (2012).
[77] Id. at 2, 6.
[78] It has been estimated that there are around 150 "multicast duopolies" in which a station affiliated with one of the Big Four networks uses its multicast capacity to broadcast programming from another source. See 2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 09-182, Joint Comments of Mediacom Communications Corporation and Cequel Communications LLC d/b/a Suddenlink Communications, at n.37 (filed March 5, 2012).
[79] Turner II, 520 U.S. at 231.
[80] Bureau Order, n.6.
[81] The Commission has found that the number of stations opting for mandatory carriage in recent years has been declining steadily. Amendment of the Commission's Rules Related to Retransmission Consent, MB Docket No. 10-71, Notice of Proposed Rulemaking, 180 FCC Rcd 222, n.13 (2010).

billions in windfall profits collected by broadcasters through transmission consent have obviated the need for the First Amendment burdens imposed on cable operators through forced carriage.[82]

Subsequent events also demonstrate that preservation of each and every local station -- particularly those that are struggling even with must-carry rights in their local markets -- is no longer an important governmental interest at all, let alone an interest substantial enough to warrant intrusion on the free speech rights of cable operators. On February 22, 2012, the "Middle Class Tax Relief and Job Creation Act of 2012" ("Spectrum Act")[83] was enacted, whereby Congress authorized the FCC to "encourage" television broadcast licensees "to relinquish voluntarily some or all" of their licensed spectrum to be auctioned for wireless uses.[84]

In its proceeding to implement the Spectrum Act, the FCC observed that usage of wireless networks in the United States:

> is skyrocketing, dramatically increasing demands on both licensed and unlicensed spectrum—the invisible infrastructure on which all wireless networks depend. Our country faces a major challenge to ensure that the speed, capacity, and accessibility of our wireless networks keeps pace with these demands in the years ahead, so the networks can support the critical economic, public safety, health care, and other activities that increasingly rely on them. Meeting this challenge is essential to continuing U.S. leadership in technological innovation, growing our economy, and maintaining our global competitiveness.[85]

Recognizing that not all television stations are in a position to take full advantage of the opportunities created by the digital transition, the FCC noted that:

> Congress's mandate to conduct a broadcast television spectrum incentive auction creates alternative opportunities. Broadcasters struggling

[82] For example, SNL Kagan recently projected that retransmission consent fees paid to broadcasters will surpass $6 billion by 2018, almost triple the $2.36 billion broadcasters are expected to collect in 2012. John Eggerton, Kagan: Retrans to Top $6 Billion by 2018: Says Increased Projection is Due to Stations Getting More Money for Their Signals, Broad. & Cable, Nov. 5, 2012, available at http://www.broadcastingcable.com/article/490249-Kagan_Retrans_to_Top_6_Billion_by_2018.php.
[83] Pub. L. No. 112-96, 125 Stat. 156 (2012).
[84] 47 U.S.C. § 309(j)(8)(G)(i).
[85] Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, Notice of Proposed Rulemaking, FCC 12-118, ¶ 1 (Oct. 2, 2012) [hereinafter "Incentive Auction NPRM"].

> financially and interested in exiting the business entirely, but unable to find a buyer for their facilities, may be able to obtain compensation in an amount acceptable to them by participating in the reverse auction. Their exit from the business would reduce the overall number of broadcast television stations competing for the same limited pool of advertising revenue.[86]

In short, to the extent that the economic preservation of each and every television broadcast station was a "substantial governmental interest" back in 1992 sufficient to justify impeding the free speech rights of cable operators, it is now clear that governmental priorities have shifted.[87] Indeed, the government is now taking steps to affirmatively encourage marginal stations to relinquish their spectrum to fuel the demand for wireless networks, a goal characterized by the FCC as "essential to continuing U.S. leadership in technological innovation, growing our economy, and maintaining our global competitiveness."[88]

As explained above, the Supreme Court in Turner found that the intent of the must-carry provision was to ensure the survival of a "base number of broadcasters," not of individual stations. To the extent that goal remains valid, it would be advanced by refusal to expand a marginal station's must-carry rights well beyond its natural market, even if that encourages the station to cease operations and allow the spectrum it occupies to be repurposed for a higher and better use, a result that would "reduce the overall number of broadcast stations competing for the

[86] Id. ¶ 16.

[87] Without question, many, if not most, television stations may elect not to participate in the initial incentive auction, and some that do may enter into channel sharing arrangements designed to preserve their must-carry rights. But regardless of how many stations participate, the overreaching point is that Congress placed no limit on the number of stations that are authorized to surrender their frequencies and cease operations, and the Commission has adopted a policy affirmatively encouraging as many stations as possible to do so, particularly the marginal stations most likely to elect must-carry. Thus, it is clear that ensuring that "a base number of broadcasters survive to provide service to non-cable households," Turner II, 520 U.S. at 222, is no longer an important governmental interest, let alone a sufficiently substantial interest to pass intermediate scrutiny.

[88] Incentive Auction NPRM ¶ 1.

same limited pool of advertising revenue," thereby enhancing the economic health of broadcasting generally.[89]

## CONCLUSION

Must-carry rights were given to qualified commercial television stations in order to support broadcast programming that is local in origination and focus. TWC's Petition should be granted because it satisfies the criteria set forth in the 1992 Cable Act. In particular, KLEI is geographically removed from the Communities, and clearly does not provide local programming service to them, in contrast to the local stations carried on the Systems. In addition, KLEI has not been historically carried on the Systems and there is no record of any viewership of KLEI in the Communities. The facts demonstrated herein fall squarely within the parameters for finding that the Communities are "so far removed from a station that [they] cannot be considered part of the station's market." Therefore, the Commission should grant TWC's Petition to exclude the Communities from KLEI's DMA. The undersigned verify that they have read the foregoing Reply and, to the best of their knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact, is warranted by existing law, and is not interposed for any improper purpose.

Respectfully submitted,

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[89] Id. ¶ 16.

## CERTIFICATE OF SERVICE

I, Glenda Thompson, a secretary at the law firm of Edwards Wildman Palmer LLP, hereby certify that copies of the foregoing "Petition for Reconsideration" were served this 19th day of November, 2012 via first-class mail, postage prepaid, upon the following:

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