

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Gray Television Licensee, LLC)	MB Docket No. 18-8
)	
For Modification of the Television Market)	CSR No. 8949-A
For WYMT-TV, Hazard, Kentucky)	
)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: May 16, 2018

Released: May 16, 2018

By the Chief, Media Bureau

I. INTRODUCTION

1. Gray Television Licensee, LLC (Petitioner or Gray) filed the above-captioned Petition¹ seeking to modify the local satellite carriage television market of WYMT-TV (CBS), Hazard, Kentucky (Facility ID No. 24915) (WYMT or the Station), assigned to the Lexington, Kentucky Designated Market Area (DMA), to include eight communities (counties) in Kentucky that are assigned to out-of-state DMAs (the “Orphan Counties”)² and exclude 23 of 40 counties assigned to the Lexington, Kentucky DMA (the “Deletion Counties”).³ Neither DIRECTV, LLC (DIRECTV) nor DISH Network L.L.C. (DISH) currently carries WYMT. Instead, both satellite carriers currently carry WKYT (CBS), Lexington, Kentucky throughout the Lexington DMA. WKYT, also owned by Gray, is another CBS-affiliated station located in the Lexington DMA. The satellite carriers currently are not obligated to carry WYMT in the Lexington DMA because they are carrying WKYT and WKYT and WYMT are “duplicating affiliates” under Section 338(c)(1) of the Communications Act.⁴ For the reasons discussed below, we deny Gray’s Petition on the grounds that carriage of WYMT would not be technically and economically feasible for either DIRECTV or DISH. We also find that granting the Petition would effectively circumvent Section 338(c)(1).

¹ See *Gray Television Licensee, LLC Petition for Special Relief for Modification of the Television Market Station WYMT-TV with Respect to DISH Network and DIRECTV*, MB Docket 18-8 (filed Jan. 9, 2018) (*Petition*). The Media Bureau placed the Petition on public notice and sought public comment. *Special Relief and Show Cause Petitions*, Public Notice, Report No. 0463 (MB Jan. 16, 2018) (*Public Notice*).

² Specifically, Gray petitions to add the following eight counties in Kentucky to WYMT’s local market: Bell County and Harlan County, each assigned to the Knoxville, Tennessee DMA; Floyd County, Johnson County, Martin County, and Pike County, each assigned to the Charleston-Huntington, West Virginia DMA; and Leslie County and Letcher County counties, each assigned to the Tri-Cities, Tennessee-Virginia DMA (collectively, the “Orphan Counties”).

³ Specifically, Gray petitions to remove the following 23 counties from WYMT’s local market: Russell County, Casey County, Lincoln County, Boyle County, Garrard County, Mercer County, Jessamine County, Madison County, Estill County, Anderson County, Woodford County, Fayette County, Clark County, Montgomery County, Menifee County, Franklin County, Scott County, Bourbon County, Bath County, Rowan County, Harrison County, Nicholas County, and Fleming County (collectively, the Deletion Counties).

⁴ 47 U.S.C. § 338(c)(1).

II. BACKGROUND

2. Section 338 of the Communications Act authorizes satellite carriage of local broadcast stations into their local markets, which is called “local-into-local” service.⁵ A satellite carrier provides “local-into-local” service when it retransmits a local television signal back into the local market of that television station for reception by subscribers.⁶ Generally, a television station’s “local market” is defined by the Designated Market Area (DMA) in which it is located, as determined by the Nielsen Company (Nielsen).⁷ DMAs describe each television market in terms of a group of counties and are defined by Nielsen based on measured viewing patterns.⁸ Pursuant to Section 338, satellite carriers are not required to carry local broadcast television stations; however, if a satellite carrier chooses to carry a local station in a particular DMA in reliance on the local statutory copyright license,⁹ it generally must carry any qualified local station in the same DMA that makes a timely election for retransmission consent or mandatory carriage.¹⁰ Under Section 338(c)(1), satellite carriers are generally not required to carry a station under “carry one, carry all” if the station’s programming “substantially duplicates” that of another station carried by the satellite carrier in the DMA, and satellite carriers are not required to carry more than one affiliate station of a particular network in a DMA (even if the affiliates do not substantially duplicate their programming), unless the stations are licensed to communities in different states.¹¹

3. The STELA Reauthorization Act of 2014 (STELAR) added satellite television carriage to the Commission’s market modification authority, which previously applied only to cable television carriage.¹² Market modification, which long has existed in the cable context, provides a means for the Commission to modify the local television market of a commercial television broadcast station and thereby avoid rigid adherence to DMAs. Specifically, to better reflect market realities, STELAR permits the Commission to add communities to, or delete communities from, a station’s local television market for purposes of satellite carriage, following a written request. In the Commission’s 2015 *STELAR Market Modification Report and Order* implementing Section 102 of the STELAR, the Commission adopted satellite television market modification rules that provide a process for broadcasters, satellite carriers, and county governments to request changes to the boundaries of a particular commercial broadcast television

⁵ 47 U.S.C. § 338(a)(1).

⁶ 47 CFR § 76.66(a)(6).

⁷ See 17 U.S.C. § 122(j)(2); 47 CFR § 76.66(e) (defining a television broadcast station’s local market for purposes of satellite carriage as the DMA in which the station is located).

⁸ The Nielsen Company delineates television markets by assigning each U.S. county (except for certain counties in Alaska) to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, Nielsen includes both over-the-air and multichannel video programming distributor (MVPD) viewing.

⁹ 17 U.S.C. § 122. Satellite carriers have a statutory copyright license under the 1999 Satellite Home Viewer Improvement Act (SHVIA) for carriage of stations to any subscriber within a station’s local market. See Satellite Home Viewer Improvement Act of 1999 (SHVIA), Pub. L. No. 106-113, 113 Stat. 1501 (1999).

¹⁰ See 47 U.S.C. § 338(a)(1); 47 CFR § 76.66(b)(1). This is commonly referred to as the “carry one, carry all” requirement.

¹¹ See 47 U.S.C. § 338(c)(1); 47 CFR § 76.66(h).

¹² The STELA Reauthorization Act of 2014, § 102, Pub. L. No. 113-200, 128 Stat. 2059, 2060-62 (2014) (STELAR) (adding 47 U.S.C. § 338(l)). “STELA” refers to the Satellite Television Extension and Localism Act of 2010, Pub. L. No. 111-175.

station's local television market to include a new community located in a neighboring local market.¹³ The rules enable a broadcast television station to be carried by a satellite carrier in such a new community if the station is shown to have a local relationship to that community.

4. By extending the market modification process to satellite television, Congress, in part, sought to address the so-called "orphan county" problem. An orphan county is a county that, as a result of the structure of a local satellite market, is served exclusively, or almost exclusively, by television stations coming from a neighboring state.¹⁴ Satellite television subscribers residing in an orphan county often are not able to access their home state's news, politics, sports, emergency information, and other television programming. Providing the Commission with a means to address the orphan county through market modification was a primary factor in Congress's decision to extend market modification authority to the satellite context.¹⁵

5. Section 338(l) of the Act, added by the STELAR, creates a satellite market modification regime very similar to that in place for cable television, while adding provisions to address the unique nature of satellite television service.¹⁶ Notably, the STELAR carves out an exception to carriage obligations¹⁷ resulting from a market modification that would be technically or economically infeasible for a satellite carrier to implement. The statute provides that a market modification "shall not create additional carriage obligations for a satellite carrier if it is not technically and economically feasible for such carrier to accomplish such carriage by means of its satellites in operation at the time of the determination."¹⁸ In enacting this provision, Congress recognized that the unique nature of satellite television service may make a particular market modification difficult for a satellite carrier to effectuate using its satellites in operation at the time of the determination and thus exempted the carrier from the resulting carriage obligation under those circumstances.¹⁹ This exception applies only in the satellite context.²⁰ In the *STELAR Market Modification Report and Order*, the Commission stated that it would

¹³ *Amendment to the Commission's Rules Concerning Market Modification; Implementation of Section 102 of the STELA Reauthorization Act of 2014*; MB Docket No. 15-71, Report and Order, 30 FCC Rcd 10406 (2015) (*STELAR Market Modification Report and Order*) (revising 47 CFR § 76.59). A community is defined as a county for purposes of the satellite market modification rules. 47 CFR § 76.5(gg)(2).

¹⁴ *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10408, para. 3.

¹⁵ See generally Report from the Senate Committee on Commerce, Science, and Transportation accompanying S. 2799, 113th Cong., S. Rep. No. 113-322 (2014) (*Senate Commerce Committee Report*).

¹⁶ See 47 U.S.C. §§ 338(l), 534(h)(1)(C) (providing factors the Commission must take into account when considering satellite market modification requests). The Commission may determine that particular communities are part of more than one television market. 47 U.S.C. § 338(l)(2)(A). When the Commission modifies a station's market to add a community for purposes of carriage rights, the station is considered local and is covered by the local statutory copyright license and may assert mandatory carriage (or pursue retransmission consent) by the applicable satellite carrier in the local market. Conversely, if the Commission modifies a station's market to delete a community, the station is considered "distant" and loses its right to assert mandatory carriage (or retransmission consent) on the applicable satellite carrier in the local market.

¹⁷ See *supra* para. 2 (describing the "carry one, carry all" satellite carriage requirement).

¹⁸ 47 U.S.C. § 338(l)(3)(A).

¹⁹ *Senate Commerce Committee Report* at 11 (recognizing "that there are technical and operational differences that may make a particular television market modification difficult for a satellite carrier to effectuate.").

²⁰ In the cable context, if review of the factors and other evidence demonstrates that a community is part of a station's market, the modification is granted without reference to issues of technical or economic feasibility. As explained in the *STELAR Market Modification Report and Order*, Congress recognized "the inherent difference between cable and satellite television service" by adopting certain "provisions specific to satellite," including 47 U.S.C. 338(l)(3)(A)'s feasibility exception. 30 FCC Rcd at 10408, n.6.

not grant a satellite market modification petition if the resulting carriage would be infeasible.²¹

6. Once the threshold issue of technical and economic feasibility is resolved, Section 338(l) provides that the Commission must afford particular attention to the value of localism in ruling on requests for market modification by taking into account the following five factors, which are not intended to be exclusive:

- (1) whether the station, or other stations located in the same area—(a) have been historically carried on the cable system or systems within such community; and (b) have been historically carried on the satellite carrier or carriers serving such community;
- (2) whether the television station provides coverage or other local service to such community;
- (3) whether modifying the local market of the television station would promote consumers' access to television broadcast station signals that originate in their State of residence;
- (4) whether any other television station that is eligible to be carried by a satellite carrier 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
- (5) evidence of viewing patterns in households that subscribe and do not subscribe to the services offered by multichannel video programming distributors within the areas served by such multichannel video programming distributors in such community.²²

Each factor is valuable in assessing whether a particular community should be included in or excluded from a station's local market. The importance of particular factors will vary depending on the circumstances of each case. The Commission may also consider other relevant information.²³

7. Significantly, in the *STELAR*, Congress added the new statutory factor three quoted above, requiring consideration of access to television stations that are located in the same state as the community considered for modification.²⁴ This new factor and the legislative history reflect Congress's intent to promote consumer access to in-state and other relevant television programming. Indeed, the legislative history expresses Congress's concern that "many consumers, particularly those who reside in DMAs that cross State lines or cover vast geographic distances," may "lack access to local television programming that is relevant to their everyday lives" and indicates Congress's intent that the Commission "consider the plight of these consumers when judging the merits of a [market modification] petition ..., even if granting such modification would pose an economic challenge to various local television broadcast stations."²⁵

8. In the *STELAR Market Modification Report and Order*, the Commission determined that a satellite market modification petition must include specific evidence describing the station's relationship to the community at issue. This standardized evidence approach was based on the existing approach for

²¹ See *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10442, para. 50.

²² 47 U.S.C. § 338(l)(2)(B)(i)-(v).

²³ Section 338(h)(1)(C)(ii) of the Act directs the Commission to "afford particular attention to the value of localism by taking into account *such factors as*" those described above (emphasis added). 47 U.S.C. § 338(h)(1)(C)(ii). The Commission must also consider other relevant information, however, when necessary to develop a result that will "better effectuate the purposes" of the Act. See 47 U.S.C. § 338(l)(1); *Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, CS Docket No. 95-178, Order on Reconsideration and Second Report and Order, 14 FCC Rcd 8366, 8389, para. 53 (1999) (*Cable Market Modification Second Report and Order*).

²⁴ See 47 U.S.C. §§ 338(l)(2)(B)(iii), 534(h)(1)(C)(ii)(III).

²⁵ *Senate Commerce Committee Report* at 11.

cable market modifications.²⁶ Accordingly, the rules require that the following evidence be submitted:

- (1) A map or maps illustrating the relevant community locations and geographic features, station transmitter sites, cable system headend or satellite carrier local receive facility locations, terrain features that would affect station reception, mileage between the community and the television station transmitter site, transportation routes and any other evidence contributing to the scope of the market;
- (2) Noise-limited service contour maps delineating the station's technical service area and showing the location of the cable system headends or satellite carrier local receive facilities and communities in relation to the service areas;
- (3) Available data on shopping and labor patterns in the local market;
- (4) Television station programming information derived from station logs or the local edition of the television guide;
- (5) Cable system or satellite carrier channel line-up cards or other exhibits establishing historic carriage, such as television guide listings;
- (6) Published audience data for the relevant station showing its average all day audience (*i.e.*, the reported audience averaged over Sunday-Saturday, 7 a.m.-1 a.m., or an equivalent time period) for both multichannel video programming distributor (MVPD) and non-MVPD households or other specific audience information, such as station advertising and sales data or viewer contribution records; and
- (7) If applicable, a statement that the station is licensed to a community within the same state as the relevant community.²⁷

Petitions for special relief to modify satellite television markets that do not include the above evidence may be dismissed without prejudice and may be re-filed at a later date with the appropriate filing fee.²⁸ The Bureau may waive the requirement to submit certain evidence for good cause shown, particularly if the Bureau is in a position to resolve the petition without such evidence.²⁹ Parties may submit whatever additional evidence they deem appropriate and relevant.³⁰

9. Gray owns two CBS network-affiliated television stations in the Lexington, KY DMA: WYMT, Hazard, KY and WKYT, Lexington, KY. WKYT provides service targeted to the core urbanized area of the Lexington DMA, whereas WYMT provides service targeted to rural eastern Kentucky.³¹ Neither DIRECTV nor DISH currently carries WYMT and instead each carries WKYT throughout the Lexington, KY DMA.³² Because WKYT and WYMT are each same-network affiliates located in the same DMA and licensed to communities in the same state, they are "duplicating affiliates" under Section 338(c)(1)'s exception to the satellite "carry one carry all" requirement.³³ As such, the satellite carriers are not obligated to carry both WKYT and WYMT in the same market.

²⁶ See *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10421-22, para. 20.

²⁷ 47 CFR § 76.59(b)(1)-(7).

²⁸ *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10424, para. 22.

²⁹ *Tobacco Valley Communications*, 31 FCC Rcd 8972, 8976 n. 22 (MB 2016); 47 CFR § 1.3.

³⁰ *Id.*

³¹ Petition at 2.

³² *Id.* WKYT is carried by DIRECTV and DISH via a retransmission consent agreement. Gray Reply to Opposition to Petition of Special Relief, MB Docket 18-8 (filed February 20, 2018) at 8 (*Gray Reply to Opposition*) WYMT and WKYT each elected retransmission consent for the 2018-2020 election cycle. *Id.*

³³ 47 U.S.C. § 338(c)(1).

10. In the instant proceeding, Gray filed a Petition seeking modification of the local satellite carriage television market of WYMT to include the Orphan Counties and to remove the Deletion Counties.³⁴ Gray's Petition includes letters of support from a member of Congress,³⁵ local government officials and community leaders in the Orphan Counties.³⁶ In addition, we received more than 2,000 comments by Orphan County residents and businesses in support of the Petition.³⁷ DIRECTV filed an Opposition to the Petition³⁸ and Gray filed a reply to DIRECTV's Opposition.³⁹ Gray, DIRECTV and DISH each filed *ex parte* letters in response to Staff questions about the case.⁴⁰ In addition, DIRECTV and DISH each filed a response to Gray's pre-filing coordination request in 2016.⁴¹

11. The Commission generally must make two determinations with respect to a satellite market modification petition: (1) whether the carriage of a station resulting from a proposed market

³⁴ See *supra* at para. 1, nn.1-3.

³⁵ See Letter from Harold Rogers, U.S. House of Representatives, to Ajit Pai, Chairman, FCC dated May 2, 2018 (*Rep. Rogers Letter*). We also received a letter from Senator McConnell asking that we give the petition "full and fair consideration" and that we "take into account" the viewpoints shared in the record. See Letter from Mitch McConnell, U.S. Senate, to Ajit Pai, Chairman, FCC dated March 12, 2018.

³⁶ See Petition at Exhibits B1-B8. Elected representatives supporting this Petition include the Orphan Counties' State Senators and Representatives (see Letter from State Senate Democratic Floor Leader Ray S. Jones, II, State Senator Brandon Smith, State Senator Johnny Ray Turner, State Representative Larry D. Brown, State Representative John C. Blanton, and State Representative Rick Nelson), as well as Daniel E. Howard, City of Harlan Mayor, Jimmy Sizemore, Leslie County Judge, Jim Ward, Letcher County Judge, R.T. Daniel, Johnson County Judge, Kelly Callham, Martin County Judge, Ben Hale, Floyd County Judge, William Deskins, Pike County Judge, Albey Brock, Bell County Judge, Dan Mosley, Harlan County Judge.

³⁷ See generally MB Docket No. 18-8 and *Petitions* at Exhibits B1-B8. Commenters explain that WYMT provides viewers in the Orphan Counties with significant local programming, such as local news and sports, local weather forecasts and alerts, and in-state (Kentucky) news and political coverage, and also that the Orphan Counties receive limited local programming from stations other than WYMT. See Petition at 15-16, 21, 26, 31, 35, 40, 45, 50. See also, e.g., Comments of Brittany Bailey Stepp ("WYMT provides the most locally produced content that focuses on the needs of the residents of Eastern Kentucky. They live and work in the area. They are our neighbors and WYMT provides programming that is focused on our area, unlike the current stations we receive."); Shannon D. Charles ("WYMT is the most relevant news network for my area. We rely upon their reporting to make decisions about transportation to and from work or school. They provide information about political races that are more relevant and informative to my family. We currently receive regular news programming from several West Virginia stations and while they are informative, they lack the most in depth and relevant reporting for our local area."); Rita Miracle ("I depend on [WYMT] for all our school closing information, local news, weather.").

³⁸ *DIRECTV Opposition to Petition of Special Relief*, MB Docket 18-8 (filed February 5, 2018) (*DIRECTV Opposition*). DIRECTV supplemented its Opposition in response to a Commission staff inquiry. See *DIRECTV Response of DIRECTV, LLC to Staff Inquiry*, MB Docket 18-8 (filed April 5, 2018) (*DIRECTV April 5 Supplement*).

³⁹ *Gray Reply to Opposition to Petition of Special Relief*, MB Docket 18-8 (filed February 20, 2018) (*Gray Reply to Opposition*).

⁴⁰ See Letter from Amanda E. Potter, Assistant Vice President and Senior Legal Counsel, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 18-8 (dated April 13, 2018) (*DIRECTV April 13 Letter*); Letter from Alison A. Minea, Director & Senior Counsel, Regulatory Affairs, DISH Network L.L.C., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 18-8 (dated April 13, 2018) (*DISH April 13 Letter*); Letter from Robert J. Folliard, III, Vice President & Deputy General Counsel, Gray Television Licensee, LLC, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 18-8 (dated April 13, 2018) (*Gray April 13 Letter*).

⁴¹ See *DIRECTV Feasibility Letter and Certification* (dated November 14, 2016, filed in MB Docket No. 15-71) (*DIRECTV Feasibility Letter and Certification*); *DISH Feasibility Letter* (dated December 8, 2016, filed in MB Docket No. 15-71) (*DISH Feasibility Letter*).

modification is technically and economically feasible for each of the satellite carriers;⁴² and (2) if so, whether the Petition demonstrates that a modification to the station's local television market is warranted, based on the five statutory factors and any other relevant information.⁴³ Because we deny the Petition on the grounds that carriage of WYMT is not technically and economically feasible, we do not consider the merits of the Petition under the statutory factors.

III. DISCUSSION

12. The crux of this case is whether Gray can use the satellite market modification process to force carriage of both WYMT and WKYT, which are "duplicating network affiliates" under Section 338(c)(1) of the Communications Act. We find that it cannot. We conclude that such carriage is not technically and economically feasible, and would effectively circumvent Section 338(c)(1). That is, grant of the Petition would require the satellite carriers to add a new station to their spot beams, as opposed to simply expanding the reach of a currently carried station, and would circumvent the carriers' right not to carry a duplicating network affiliate. Therefore, we deny Gray's Petition. We are sympathetic to the plight of the Orphan Counties presented by the Petition and recognize that, unfortunately, this means satellite subscribers in the Orphan Counties will continue to lack access to local and in-state broadcast programming.⁴⁴ In establishing satellite local-into-local service, however, Congress recognized that satellite spectrum is particularly scarce. Therefore, the statute does not require satellite carriers to carry duplicating signals and duplicating affiliates. In addition, Congress expressly limited satellite carriers' carriage obligations to those that are technically and economically feasible. We believe these statutory provisions are intended to shield satellite carriers from onerous carriage obligations that could disrupt the overall provision of local-into-local service. Gray's Petition seeks to sidestep these provisions. At the same time, we understand and acknowledge the desire for local programming by the residents of eastern Kentucky, as evidenced by more than 2,000 commenters that support the Petition. We encourage Gray and the satellite carriers to explore other means of providing these viewers with in-state programming.⁴⁵ Unfortunately, the request pending before us simply is not permitted under the statutory scheme.

A. Technical and Economic Feasibility

13. Section 338(l)(3) provides that a satellite operator is not required to carry a station in response to a market modification if it is not technically and economically feasible for the carrier to accomplish the carriage by means of its satellites in operation at the time of the determination.⁴⁶ In the *STELAR Market Modification Report and Order*, the Commission concluded that the satellite carrier has

⁴² We will not grant a market modification petition if the resulting carriage would be infeasible. See *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10442, para. 50.

⁴³ 47 U.S.C. § 338(l); see also 47 CFR § 76.59.

⁴⁴ See *supra* note 37.

⁴⁵ For example, we observe that DIRECTV has offered a possible solution, explaining that it could expand its existing carriage of WKYT to the Orphan Counties. DIRECTV Opposition at 2 ("DIRECTV has the ability to extend coverage of WKYT to the Orphan Counties and is willing to do so."). While we acknowledge that WYMT may provide programming that is more local to the Orphan Counties than WKYT, WKYT would still offer some in-state programming currently lacking in the Orphan Counties. We recognize that Gray has resisted this suggestion, stating "DIRECTV's proposed 'compromise' would not serve the interests of Orphan County viewers" because "WYMT-TV serves the Orphan Counties, whereas WKYT-TV primarily serves central and southern Kentucky." Gray Reply to DIRECTV Opposition at 10. Nevertheless, we believe the in-state programming WKYT could offer to the Orphan Counties could at least partially mitigate the absence of in-state programming in the Orphan Counties.

⁴⁶ 47 U.S.C. § 338(l)(3) (A "market determination ... shall not create additional carriage obligations for a satellite carrier if it is not technically and economically feasible for such carrier to accomplish such carriage by means of its satellites in operation at the time of the determination."). See also 47 CFR § 76.59(e).

the burden to demonstrate that the resulting carriage from a market modification is infeasible.⁴⁷ The Commission requires different demonstrations of infeasibility depending on whether the claim of infeasibility is based on insufficient spot beam coverage or some other basis.⁴⁸ The Commission also concluded that a satellite carrier must raise any technical or economic impediments either in the market modification proceeding or prior to the market modification proceeding in response to a broadcaster or county government inquiry about feasibility of carriage resulting from a prospective market modification.⁴⁹

14. Satellite carriers use spot beams to offer local broadcast stations to targeted geographic areas.⁵⁰ With respect to claims of “spot beam coverage infeasibility,” the Commission concluded that “it is *per se* not technically and economically feasible for a satellite carrier to provide a station to a new community that is, or to the extent to which it is, outside the relevant spot beam on which that station is *currently carried*.”⁵¹ The Commission allows satellite carriers to demonstrate spot beam coverage infeasibility by providing a detailed and specialized certification, under penalty of perjury.⁵² With respect to other possible bases for a carrier to assert that carriage would be technically or economically infeasible, the Commission determined that it will review such assertions on a case-by-case basis.⁵³

15. DIRECTV and DISH each filed a response to Gray’s pre-filing coordination request, with DIRECTV claiming carriage of both WKYT and WYMT would be infeasible for multiple reasons and

⁴⁷ *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10435, para. 38.

⁴⁸ *Id.* at 10435-6, 10438, paras. 39, 42.

⁴⁹ *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10439-40, para. 46.

⁵⁰ *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10430, n.162 (quoting DIRECTV to explain that “[s]pot-beam technology divides up a portion of the bandwidth available to a satellite into beams that cover limited geographic areas. Doing so allows particular sets of frequencies to be reused many times. This spectral efficiency unlocked the potential for satellite carriers to offer local broadcast signals in the late 1990s, and it enables satellite carriers to offer local service today.” This is in contrast to a “CONUS” beam, which provides coverage to the entire continental United States and generally carries signals that are available and accessed by subscribers throughout that entire area).

⁵¹ *Id.* at 10429-30, para. 30 (emphasis added). This is because the only available options to implement the market modification would be: (1) to put the signal on the satellite provider’s CONUS beam (using spectrum that could otherwise be deployed for signals available to subscribers throughout the entire continental U.S.); (2) to reorient existing spot beams (which are already oriented to most efficiently serve the largest number of subscribers); or (3) to carry the same signal on a neighboring spot beam (using space for a station that could only be received by subscribers in a small part of the local market served by such spot beam.). The Commission found each of these options infeasible. *Id.* at 10431-32, para. 32.

⁵² *Id.* at 10435-36, para. 39. The Commission requires satellite carriers claiming that a market modification is technically infeasible based on spot beam coverage to submit a detailed certification that must include the following: (1) an explanation of why carriage is not technically and economically feasible, including a detailed explanation of the process by which the satellite carrier has determined whether or not the spot beam in question covers the geographic area at issue; (2) a statement that the satellite carrier has conducted this analysis in substantially the same manner and using substantially the same parameters used to determine the geographic area in which it currently offers stations carried on the spot beam in question; and (3) a supporting affidavit or declaration under penalty of perjury, as contemplated under Section 1.16 of the Commission’s Rules and 28 USC § 1746, signed and dated by an authorized officer of the satellite carrier with personal knowledge of the representations provided in the certification, verifying the truth and accuracy of the information therein. *Id.* at 10437-8, para. 41.

⁵³ *Id.* at 10438, para. 42. To demonstrate such infeasibility, the Commission requires carriers to provide detailed technical and/or economic information to substantiate its claim of infeasibility. *Id.*; see also *id.* at 10434-35, para. 36 (requiring satellite carriers to demonstrate infeasibility for reasons other than insufficient spot beam coverage “through the submission of evidence specifically demonstrating the technical or economic reason that carriage is infeasible”).

DISH asserting that it could not evaluate feasibility because it does not currently carry WYMT.⁵⁴

1. Adding the Orphan Counties to WYMT's Local Market is Per Se Not Technically and Economically Feasible

16. We find that carriage of WYMT is *per se* not technically and economically feasible because it would require the satellite carriers to add a new station to their spot beams as opposed to simply expanding the reach of a currently carried station. As explained above, in the *STELAR Market Modification Report and Order*, the Commission established a test for determining whether carriage of a particular station is technically and economically feasible.⁵⁵ Specifically, satellite carriers must evaluate whether the “relevant spot beam on which [the] station is currently carried” can reach a new community to be added to the station’s local market.⁵⁶ Gray says that because WYMT is not currently carried, the *per se* exemption should not apply and, therefore, the carriers must demonstrate infeasibility.⁵⁷ On the other hand, the satellite carriers claim that, because they do not presently carry WYMT, “there is (and can be) no ‘relevant spot beam’ on which to assess the feasibility of expanding WYMT’s local market to the Orphan Counties and, consequently, such expansion necessarily is *per se* technically and economically infeasible.”⁵⁸

17. We agree with the satellite carriers. We read the Commission’s use of the words “the spot beam on which the station is currently carried” to establish pre-existing carriage as a prerequisite to determining the feasibility of any satellite market modification.⁵⁹ We believe this means that the Commission did not intend to require satellite carriers to add a new station to a spot beam and then evaluate the technical and economic feasibility of expanding coverage to areas encompassed in a market modification petition. Instead, we read the rule to consider whether it *can be* feasible for a satellite carrier to *expand* a pre-existing carriage obligation to other areas served by the relevant spot beam.⁶⁰ If the

⁵⁴ See generally *DIRECTV Feasibility Letter and Certification*; *DISH Feasibility Letter*.

⁵⁵ *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10431-32, para. 32 (“[I]t is *per se* not technically and economically feasible for a satellite carrier to provide a station to a new community that is, or to the extent to which it is, outside the relevant spot beam on which that station is currently carried.”).

⁵⁶ See *id.* at para. 32 and n.163.

⁵⁷ Gray Reply to Opposition at 5.

⁵⁸ DIRECTV Opposition at 4. DIRECTV also argues that “because WYMT has no ‘relevant spot beam’ on DIRECTV’s system, the Lexington, KY spot beam effectively is a ‘neighboring’ spot beam for purposes of analyzing technical and economic feasibility. Moreover, even if the Bureau were to grant the Petition only as to the Orphan Counties, the only area in which WYMT could effectuate a must-carry right is in the Orphan Counties, because WYMT is a “duplicating signal” in the Lexington, KY DMA. Forced carriage of WYMT on DIRECTV’s Lexington, KY spot beam therefore would be for the benefit of the Orphan Counties alone—at the expense of non-duplicative programming that could be viewed throughout the Lexington, KY DMA. *DIRECTV April 13 Ex Parte Letter* at 2-3. In its *ex parte* filing, DISH supported DIRECTV’s argument, adding “contemporaneous carriage of a given TV station is a prerequisite for a satellite carrier to be required to provide a feasibility response.” *DISH April 13 Ex Parte Letter* at 2.

⁵⁹ DIRECTV Opposition at 4, n.6.

⁶⁰ The “relevant spot beam” refers to “the spot beam on which the station is currently carried.” *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10430, n.163. Because we find that pre-existing carriage is a prerequisite for a satellite carrier to be required to provide a feasibility response, we find that DISH’s Feasibility Letter adequately claims infeasibility on these grounds. See DISH Feasibility Letter at 1; DISH April 13 Ex Parte at 2. We disagree with Gray that DISH has not made the required showing of technical or economic infeasibility because the fact alone that the DISH does not, and is not obligated to, carry the station is sufficient. See Gray Reply to Opposition at note 3. See also DIRECTV Opposition at note 11 (arguing that “a DBS provider’s obligation to evaluate feasibility is limited to the ‘relevant spot beam,’ which, as explained above, is defined as the ‘spot beam on which the station is currently carried.’”).

relevant spot beam does not reach the new community, then carriage of the station is *per se* infeasible.⁶¹ Because WYMT is not presently carried on *any* spot beam, then, by definition, there is no way to expand the station's local service to cover additional areas that would be added to the station's local market, or delete the station's local service to remove areas that would be deleted from the station's local market.

18. This reading is consistent with the *per se* findings underlying the spot beam coverage infeasibility rule in the *STELAR Market Modification Report and Order*.⁶² Most notably, the Commission specified that satellite carriers would not be required to reserve scarce spot beam capacity on an entire "neighboring" spot beam as a result of a market modification because that capacity could otherwise be used for a new station or a multicast signal carried throughout the neighboring market.⁶³ The Commission found such a circumstance to be *per se* infeasible, noting that "it would be inefficient for the carrier to use that space on the neighboring spot beam for a station that could only be received by subscribers in a small part of the local market served by such spot beam."⁶⁴ The Commission further found that "the financial and opportunity costs associated with requiring a carrier to use scarce capacity on a second spot beam for a station that could only be received by subscribers in a small part of the local market served by such spot beam makes carriage on such spot beam *per se* infeasible."⁶⁵ Therefore, in cases where a station would have to be added to a different spot beam in order to effectuate a market modification, we do not require a detailed infeasibility showing by the satellite carrier.

19. We find that the instant case is analogous and warrants the same result. We agree with DIRECTV that, for purposes of technical and economic feasibility, the instant Petition should be viewed in the same manner as one that would require the satellite carriers to add a station to a neighboring spot beam.⁶⁶ Just as in the neighboring spot beam scenario discussed in the *STELAR Market Modification Report and Order*, if the instant Petition were granted, the satellite carriers would be obligated to add WYMT to a new spot beam for purposes of carrying it only in the Orphan Counties and not within the Lexington DMA. This is because WYMT would remain a duplicating affiliate in the Lexington DMA, but would not be a duplicating affiliate in any of the three DMAs in which the Orphan Counties are located (*i.e.*, the in-DMA affiliates for the Orphan Counties are licensed to communities in West Virginia

⁶¹ See DIRECTV Opposition at n.6 (arguing that the geographic reach of the relevant spot beam represents "the outer limit of a DBS provider's legal obligation in the market modification context."). We also agree with DIRECTV that the facts of this case "are distinguishable from, for example, a situation in which the DBS provider has historically carried a station in its local market but is unable to carry the station for a temporary period during a retransmission consent dispute." DIRECTV April 13 Ex Parte at 2. We disagree with Gray that the contrary is true. See Gray Reply to Opposition at n.12. In this case, the satellite carriers have never carried WYMT, and they have no obligation to carry WYMT as long as (1) they are carrying WKYT and (2) WYMT remains a duplicating signal or duplicating affiliate. *Id.* We acknowledge, as Gray asserts, that there may be circumstances in which a station that is not currently carried by a satellite carrier but which has a right to demand carriage on such carrier may have to wait to actually demand such carriage before it may file its market modification petition, but that is not the case here.

⁶² See *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10430-33, paras 31-32. The *per se* rule is the culmination of three underlying *per se* rules. The Commission found it would be *per se* infeasible to require a satellite carrier: (1) to place the signal on the satellite provider's CONUS beam (using spectrum that could otherwise be deployed for signals available to subscribers throughout the entire continental U.S.); (2) to reorient existing spot beams (which are already oriented to most efficiently serve the largest number of subscribers); or (3) to carry the same signal on a neighboring spot beam (using space for a station that could only be received by subscribers in a small part of the local market served by such spot beam). *Id.* at 10431-32, para. 32.

⁶³ *Id.* at para. 32.

⁶⁴ *Id.* at para. 32.

⁶⁵ *Id.* at para 32, n.180.

⁶⁶ *DIRECTV April 13 Ex Parte Letter* at 2-3 (arguing "because WYMT has no 'relevant spot beam' on DIRECTV's system, the Lexington, KY spot beam effectively is a 'neighboring' spot beam for purposes of analyzing technical and economic feasibility").

and Tennessee and, thus, are not duplicating affiliates for purposes of the statute).⁶⁷ Thus, we find placement of WYMT on the Lexington DMA spot beam would be *per se* infeasible.⁶⁸ For the same reasons, placement of WYMT on a different spot beam (other than the Lexington spot beam) also would be *per se* infeasible.

20. We acknowledge that, when read in isolation, the Commission's *per se* spot beam coverage infeasibility analysis could be read not to apply to this situation.⁶⁹ That is, it could be read to consider only whether the relevant spot beam can reach the new communities and to require a detailed certification if it does not. However, we believe a better reading of the *per se* analysis in the *STELAR Market Modification Report and Order* is that the Commission intended for infeasibility to extend to situations where a satellite carrier would need to add a station to a new spot beam in order to reach a small part of the local market served by such spot beam.⁷⁰ We believe it would not make sense to require a detailed demonstration of infeasibility in the instant case because the Commission did not require one under similar circumstances posed by its neighboring spot beam *per se* analysis. We, therefore, do not read the *per se* analysis to require such a showing. Instead, we accept the carriers' assertion that the station is not currently carried nor obligated to be carried as sufficient evidence that adding the station to a spot beam would be technically and economically infeasible.⁷¹

⁶⁷ *Gray April 13 Ex Parte Letter* at 4. It is not disputed that, because of Section 338(c)(1), WYMT would have no right to demand carriage in the Lexington DMA. *See, e.g., Gray April 13 Ex Parte Letter* at 4 ("Under Gray's proposal, WYMT-TV will obtain mandatory carriage rights only in the Orphan Counties, which are outside of the Lexington DMA."). Likewise, it is also not disputed that this means the right to demand carriage would be valid only in the eight Orphan Counties. *See, e.g., DIRECTV Opposition* at 3 (stating the Petition would "establish[] carriage rights for WYMT in the Orphan Counties").

⁶⁸ Gray argues that "[w]hile the *per se* exemption places limits on the technical feasibility of adding counties to a station's market that are outside the spot beam on which the station is carried, it says nothing about stations that are not currently carried on any of a satellite operator's spot beams." *Gray Reply to Opposition* at 5. Gray continues that "[t]he *per se* rule was designed to ensure that stations are not required to be carried on multiple spot beams, not to deter uncarrried stations from seeking market modifications to provide service to areas outside their DMAs." *Gray Reply to Opposition* at 5. We disagree that such double carriage of the station was the *only* reason for the Commission's *per se* analysis. Rather, for the reasons discussed above, we believe the Commission also weighed the costs and benefits involved in adding a new station to a spot beam in its analysis.

⁶⁹ *See Gray April 13 Ex Parte Letter* at 2 ("On its face, this *per se* exception to the rule otherwise requiring DBS providers to demonstrate technical infeasibility applies only to stations that are being carried. The Commission did not adopt such a *per se* exception for requests made by stations like WYMT-TV that are not being carried, and the Bureau has no basis for expanding the exception adopted by the Commission. Accordingly, DISH and DIRECTV must actually demonstrate technical infeasibility to preclude WYMT-TV's requested market modification."). For the reasons discussed herein, we believe the *per se* analysis also should apply in the context presented by Gray's Petition.

⁷⁰ *See DIRECTV Opposition* at n.6 (stating that "the necessary implication of the Commission's articulation of the feasibility analysis is that any market modification request that would have the effect of requiring a DBS provider to add a new signal to a local spot beam is deemed *per se* infeasible.").

⁷¹ We also note that DIRECTV argues that granting the Petition in full "would place DIRECTV in a legal catch-22," forcing "DIRECTV to choose between: (i) dropping WKYT to satisfy WYMT's must-carry election in the Orphan Counties, in violation of the Commission's carry-one, carry-all rule, the parties' retransmission consent agreement, or both; or (ii) retransmitting WKYT or WYMT (or another station currently carried in HD on the Lexington, KY spot beam) in SD, in violation of the Commission's HD carry-one, carry-all requirement. *DIRECTV April 13 Ex Parte Letter* at 2. Because we find that carriage of WYMT would be *per se* infeasible, we need not address this independent infeasibility claim.

2. Removing the 23 Deletion Counties from WYMT's Local Market Would Frustrate the Purpose of Section 338(c)(1)

21. We additionally find that the resulting carriage obligation from this market modification request would effectively circumvent the carriers' right not to carry a duplicating network affiliate on its spot beam serving the Lexington DMA. Section 338 provides an exception to a satellite carrier's must-carry/"carry-one, carry-all" obligations for duplicating signals and duplicating network affiliates. With respect to duplicating affiliates, Section 338(c)(1) provides that satellite carriers are not required to carry more than one affiliate station of a particular network in the same local market, unless the stations are licensed to communities in different states.⁷² In providing this right to satellite carriers, Congress recognized the inherent capacity constraints that satellite carriers face because they must use a single spot beam to provide local service to an entire DMA.⁷³ In its rule implementing Section 338(c)(1), the Commission specified that, in cases where there is a duplicating network affiliate within a local market, the satellite carrier gets to decide which affiliate to carry.⁷⁴ We read Section 338(c)(1) and the implementing rule to mean that satellite carriers are not obligated to carry duplicating affiliates on the spot beam serving the stations' common DMA. From the satellite carriers' perspective, the Section 338(c)(1) exception would mean little if the carrier still had to make room on its local spot beam for duplicating affiliates.

22. Yet, Gray is seeking such a result through its request to remove the 23 Deletion Counties. WYMT and WKYT are duplicating CBS-network affiliates located in the Lexington DMA. This means that DIRECTV and DISH get to decide which of these two duplicating affiliates to carry on their

⁷² 47 U.S.C. § 338(c)(1).

⁷³ In enacting this provision, Congress observed that "[b]ecause of unique technical challenges on satellite technology and constraints on the use of satellite spectrum, satellite carriers may initially be limited in their ability to deliver must carry signals into multiple markets." See Conference Report accompanying H.R. 1554, H.R. Rep. No. 106-464, at 85 (1999) (*SHVLA Conference Report*). Notably, Section 338(c)(1) differs from its cable counterpart in Section 614(b)(2)(B), which provides that if the cable operator elects to carry an affiliate of a broadcast network, such cable operator shall carry the affiliate of such broadcast network that is closest to the principal headend of the cable system. 47 U.S.C. § 614(b)(2)(B). In enacting a different provision, Congress implicitly recognized the different operational capabilities between cable and satellite. Specifically, whereas cable operators can carry duplicating affiliates on different system headends serving different parts of the same DMA without impacting headends that do not carry the signal, satellite carriers use one spot beam to provide local service to an entire DMA, meaning that a signal carried to any part of the DMA consumes some of the capacity of the spot beam used to deliver signals elsewhere in the DMA. We note that Congress continued to be concerned with satellite capacity constraints when establishing satellite market modification in 2014 and determined that carriage pursuant to a satellite market modification would only be required if it is technically and economically feasible for the carrier. 47 U.S.C. § 338(l)(3). See also Report from the Senate Committee on Commerce, Science, and Transportation accompanying S. 2799, S. Rep. No. 113-322, at 11 (2014) (*STAVRA Senate Commerce Committee Report*) (recognizing "that there are technical and operational differences that may make a particular television market modification difficult for a satellite carrier to effectuate."). Because of this, we find unpersuasive Gray's arguments regarding Nielsen county shifts. Gray Reply to DIRECTV Opposition at 8-9. We note that if Nielsen moves a county from one DMA that has local-into-local satellite service to another DMA, a satellite carrier may consider the county to be in both DMAs and provide local-into-local service from both DMAs to subscribers in that county. See *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues*, CS Docket No. 00-96; Report and Order, 16 FCC Rcd 1918, 1936, para. 39, n.88 (2000) (*DBS Broadcast Carriage Report and Order*). Such shifts are permissive, and do not require additional carriage obligations, whereas grant of this Petition would require carriage of both WKYT and WYMT on the same spot beam.

⁷⁴ 47 CFR § 76.66(h)(3); see *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues, Retransmission Consent Issues*, CS Docket Nos. 00-96 and 99-363, Report and Order, 16 FCC Rcd 1918, 1950, para 77 (2000) (*DBS Broadcast Carriage Report and Order*).

Lexington DMA spot beams.⁷⁵ Today, both carriers are exercising this right by carrying WKYT throughout the Lexington DMA and not carrying WYMT. As DIRECTV points out, the proposed removal of the 23 Deletion Counties from WYMT's local market would effectively split the Lexington DMA into two separate local markets in a manner that would force DIRECTV to carry WKYT in the 23 Deletion Counties.⁷⁶ That is, if we granted the removal of the 23 Deletion Counties from WYMT's local market, then the satellite carriers would be required to carry WKYT in the 23 Deletion Counties (because WYMT would no longer have carriage rights in such counties).⁷⁷ At the same time, the carriers would be required to carry WYMT on their Lexington DMA spot beams in order to provide the station to the Orphan Counties (for which WYMT would obtain carriage rights). Thus, grant of the Petition in full would have the effect of forcing carriage of both WYMT and WKYT – duplicating affiliates within the Lexington DMA – on the Lexington DMA spot beams, frustrating the purpose of the Section 338(c)(1) exception. And, on the other hand, if we did not allow the deletions and granted only the addition of the Orphan Counties to WYMT's market, then that would allow the satellite carriers to drop WKYT and provide only WYMT to the Lexington DMA.⁷⁸ We agree with DIRECTV that, “[i]n such circumstances, grant of the market modification could “displace service from a long-established network station” (WKYT) throughout the Lexington, KY DMA.”⁷⁹ Such service loss would have a clear adverse impact on satellite subscribers that currently watch WKYT and thus would be contrary to the public interest.

⁷⁵ Gray argues that “the duplicating signals rule applies only when two stations are rightfully assigned to the same geographic market. Neither DIRECTV nor any other party has any right to have any particular county assigned to a particular station’s market. WYMT-TV has shown that the Modification Counties should not be assigned to its market, so WYMT-TV should not be considered a “duplicating” network signal in those areas.” Gray Reply to Opposition at 9. See also Rep. Rogers Letter at 1 and Memorandum from Austin Gage to Chairman Rogers, Committee on Appropriations, U.S. House of Representatives, regarding meeting with Neil Middleton (WYMT), dated May 1, 2018. We acknowledge that if we grant the Petition in full, then WYMT would not be a duplicating affiliate in the Orphan Counties (because it is located in a different state than the in-market CBS affiliates in those counties), and it no longer would be a duplicating affiliate with respect to the 23 Deletion Counties (which would be removed from the Station’s local market). Our point, though, is that the satellite carrier has a right under Section 338(c)(1) to choose which affiliate to carry on its Lexington DMA spot beam. As explained herein, we believe Section 338(c)(1) is best read to avoid carriers from having to place to same-network affiliates on the same spot beam in order to serve a single DMA.

⁷⁶ DIRECTV Opposition at 8.

⁷⁷ The satellite carriers would also be required to carry WYMT, presumably on its Lexington DMA spot beam, in order to provide the station to the Orphan Counties (for which WYMT would obtain carriage rights via the satellite market modification).

⁷⁸ Indeed, if faced with this situation, DIRECTV says it “would seek to make room for WYMT by removing WKYT from its system, if the governing retransmission consent agreement between the parties permits such action.” *DIRECTV April 12 Ex Parte Letter* at 2.

⁷⁹ *Id.* Gray contends its Petition will not lead to a loss of WKYT, arguing that “Section 338(c)(1) applies only to mandatory carriage demands by duplicating network affiliates.” *Gray April 13 Ex Parte Letter* at 2. Gray continues that because both WKYT and WYMT have elected retransmission consent, and WYMT “has promised to waive its future mandatory carriage rights in the Lexington DMA,” that the carriage rights of the stations “will be determined through retransmission consent agreements between the parties, not by Section 338(c)(1).” *Id.* We disagree. Gray’s promise to waive its future must-carry rights in the Lexington DMA has no evidentiary weight in this proceeding. Moreover, Section 338(c)(1) means that the satellite carriers are not required to carry both stations in the Lexington DMA. Thus, the carrier would not have to carry the duplicating affiliate regardless of whether it elects must-carry or retransmission consent.

B. Conclusion

23. For the reasons discussed above, we deny Gray's Petition on the grounds that the resulting carriage obligation is not technically and economically feasible for each of the satellite carriers, and would effectively circumvent Section 338(c)(1).

IV. ORDERING CLAUSES

24. Accordingly, **IT IS ORDERED**, pursuant to Section 338 of the Communications Act, as amended, 47 U.S.C. § 338, and Section 76.59 of the Commission's rules, 47 CFR § 76.59, that the captioned petition for special relief (MB Docket No. 18-8, CSR No. 8949-A), filed by Gray Television Licensee, LLC with respect to WYMT-TV, Hazard, Kentucky, **IS DENIED**.

25. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's Rules.⁸⁰

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broecker
Senior Deputy Chief, Policy Division
Media Bureau

⁸⁰ 47 CFR § 0.283.