

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
The Electric Plant Board of the City of)	
Russellville)	
)	MB Docket No. 17-225
Cumberland Cellular, Inc. d/b/a Duo County)	CSR-8940-A
Telecom)	
)	
North Central Telephone Cooperative)	
)	
Petition for Special Relief for Modification of)	
the Television Market of Station WBKO,)	
Bowling Green, Kentucky)	

**REPLY COMMENTS OF GRAY TELEVISION GROUP, INC.
TO THE OPPOSITION OF SCRIPPS MEDIA, INC.
TO PETITION FOR SPECIAL RELIEF**

Gray Television Group, Inc., owner of Gray Television Licensee, LLC (collectively “Gray”), licensee of WBKO(TV), Bowling Green, Kentucky, hereby submits these Reply Comments to address the novel legal theories put forward by Scripps Media, Inc. (“Scripps”) that would upend decades of Commission precedent.¹ Under Scripps’ analysis, WBKO(TV)’s continuous carriage for decades on the relevant cable systems should somehow count against the Petition, and communities in Kentucky, which are assigned to the Nashville, Tennessee DMA, should not be considered true “orphan” communities. This is nonsense and unsupported by any Commission precedent.

¹ See Opposition of Scripps Media, Inc. to Petition for Special Relief, MB Docket No. 17-225, CSR-8940-A (Sept. 20, 2017) (the “Opposition”). Gray did not file comments in this proceeding either supporting or opposing the Petition for Special Relief (the “Petition”) filed in this proceeding by Electric Plant Board City of Russellville; Cumberland Cellular, Inc.; and North Central Telephone Cooperative (the “Petitioners”), but Gray is filing these Reply Comments because it is keenly interested in ensuring the Commission does not upend decades of precedent for future market modification requests.

I. The Historic and Current Carriage of WBKO(TV) Is a Significant Factor in Favor of the Petition.

Scripps spends much of its Opposition arguing that the Commission should dismiss or deny the Petition because Petitioners' cable systems already carry WBKO(TV)'s local news programming. Indeed, Scripps claims that this is a "fundamental, dispositive fact,"² yet Scripps cites to no Commission decision holding that carriage of a station's programming is a negative in a market modification proceeding. The lack of citations is not surprising because just the opposite is true: "carriage of a station by the cable system serving the subject communities is considered evidence of a close economic relationship between the station and the communities" – thus, favoring granting a market modification.³

Petitioners' cable systems have carried WBKO(TV)'s ABC program stream for decades. But several years ago, because of restrictions in WBKO(TV)'s ABC affiliation agreement, Gray informed each of the Petitioners that, despite requesting a waiver from the ABC television network, the network was unwilling to give Gray the right to grant consent for Petitioners' cable systems to continue retransmitting WBKO(TV)'s ABC programming. Rather than just dropping WBKO(TV) outright, Petitioners and Gray reached an innovative solution. Each of the cable systems would carry WBKO(TV)'s regularly scheduled local news programming during its regularly scheduled hours. Then, during non-local-news hours, the systems would switch to other programming – typically the in-market ABC affiliate's programming. Gray was happy to enter into this arrangement because WBKO(TV) has been covering local news in and around the

² Opposition at (ii).

³ *Complaints of Christian Faith Broadcast, Inc. v. Cox Communications, Time Warner Cable, Orwell Cable Television, Rapid Cable, GLW Broadband for Carriage of WGGN-TV, Sandusky, Ohio Time Warner Cable and CoxCom LLC d/b/a/ Cox Cable Cleveland Area Petitions for Modification of the Designated Market Area of Television Broadcast Station WGGN-TV, Sandusky, Ohio*, 22 FCC Rcd 16919, ¶ 7 (M.B. 2007).

Kentucky Communities for decades, and it only made sense for viewers in those rural areas to continue to receive local news from WBKO(TV). Although this arrangement was better than the alternative – dropping WBKO(TV) – it was not perfect. When news broke outside of the regularly scheduled news periods, Petitioners’ automated equipment would not switch to WBKO(TV), or when WBKO(TV) ran emergency or breaking news crawls during network or syndicated programming, Petitioners’ subscribers would not see those crawls.

Far from being a dispositive fact against Petitioner’s market modification, the local-news-only agreement between Gray and Petitioners’ strongly weighs in favor of granting the market modification. Starting with the statute (as the Commission must), historic carriage is the very first factor that Congress identifies as relevant in any market modification.⁴ If a station is carried by a cable system, it is strong evidence in favor of granting the market modification because it demonstrates a “market nexus” between the station and cable communities.⁵ In scores of market modification decisions, the station was being carried on the pertinent systems at the time the petition was filed, and, contrary to Scripps’ claims, the fact that the cable systems were voluntarily retransmitting the station’s signal was a major plus factor.⁶ Indeed, by enacting the

⁴ 47 U.S.C. § 614(h)(1)(C)(ii)(I).

⁵ *Tennessee Broadcasting Partners For Modification of the Television Market for WBBJ-TV/DT, Jackson, Tennessee*, 23 FCC Rcd 3928, ¶ 5 (M.B. 2008)

⁶ *E.g., California-Oregon Broadcasting, Inc. d/b/a Crestview Cable Communications For Modification of the DMA for Stations: KFXO, NPG of Oregon, Inc., Bend, OR; KOHD, Three Sisters Broadcasting LLC, Bend, OR; KVTZ, NPG of Oregon, Inc., Bend, OR*, 29 FCC Rcd 3833, ¶ 29 (M.B. 2014) (granting KTVZ’s market modification based upon “historic carriage” and noting that the station was carried at the time of filing); *Petition for Modification of Dayton, OH Designated Market Area with Regard to Television Station WHIO-TV, Dayton, OH*, 28 FCC Rcd 16011, ¶ 27 (M.B. 2013) (granting WHIO’s market modification for Auglaize County because of, among other things, “history of carriage” and noting that the station was carried at the time of filing); *Tennessee Broadcasting Partners For Modification of the Television Market for WBBJ-TV/DT, Jackson, Tennessee*, 23 FCC Rcd 3928, ¶¶ 6, 73 (M.B. 2008) (granting WBBJ’s market modification for a variety of communities and noting its “long history of carriage” and the fact that it was carried at the time of filing).

automatic-stay provision in Section 614(h)(1)(C)(iii) of the Communications Act, Congress recognized the importance of maintaining existing carriage while a market modification is pending.

Here, the unique local-only carriage agreement between Gray and the Petitioners provides even stronger evidence of a connection between WBKO(TV) and the Kentucky Communities than the typical FCC decision with historic carriage. To maintain WBKO(TV)'s local programming, Petitioners had to bear additional expenses of special switching equipment and accept the inevitable consumer confusion surrounding a single cable channel switching back-and-forth from one station's programming to another multiple times every day. Petitioners obviously were willing to absorb these extra equipment costs and inevitable headaches because WBKO(TV)'s local programming is valuable to its customers in the Kentucky Communities.

The Commission has never considered pre-existing carriage of a station's programming to be a negative or held that pre-existing carriage somehow counteracts what otherwise would have been a strong showing under the statutory factors. It should not accept Scripps' invitation here to overturn scores of market modification decisions that concluded that carriage of a station's programming was an important plus factor.

II. The Kentucky Communities Are Located in Quintessential "Orphan" Counties.

Scripps grudgingly admits that it is "literally true" that the Kentucky Communities satisfy the newly adopted in-state factor,⁷ but Scripps claims that Petitioners are not entitled to any enhancement because (a) several Kentucky stations provide over-the-air service to the Kentucky Communities and (b) the Petitioners are already retransmitting WBKO(TV)'s regularly

⁷ Opposition at 13.

scheduled local news programming. Once again, however, Scripps can cite to no decision supporting its novel theory.

The Kentucky Communities are located in quintessential orphan counties, and, as such, the Petition is entitled to significant enhancement under the in-state programming factor. “[T]he ‘orphan county’ problem . . . refers to the situation in which a county in one state is assigned to a neighboring state's DMA and there are few, if any, stations assigned to that DMA which are licensed to communities located in the state in which the county is located.”⁸ Solving the orphan county problem was what motivated Congress to add the in-state programming factor.⁹ The Kentucky Communities are located in Allen, Logan, and Cumberland Counties, Kentucky. Nielsen has assigned these counties to the Nashville, Tennessee DMA. All of the full-power television stations assigned to the Nashville, Tennessee DMA are licensed to Tennessee.¹⁰ Therefore, the Kentucky Communities are in orphan counties, and the local programming that WBKO(TV) brings to the Kentucky Communities is entitled to “substantial weight.”¹¹

⁸ *Implementation of Section 203 of the Satellite Television Extension and Localism Act of 2010 (STELA)*, Report and Order and Order on Reconsideration, 25 FCC Rcd 16383, ¶ 48 (2010). *See also Amendment to the Commission's Rules Concerning Market Modification*, Report and Order, 30 FCC Rcd 10406, ¶ 3 n.5 (2015) (“The Commission has sometimes referred to the situation in which a county in one state is assigned to a neighboring state's local television market and, therefore, satellite subscribers residing in such county cannot receive some or any broadcast stations that originate in-state as the ‘orphan county’ problem.”).

⁹ *Gray Television Licensee, LLC for Modification of Satellite Television Market for WSAW-TV, Wausau, Wisconsin*, 32 FCC Rcd 668, ¶ 26 (M.B. 2017) (“*Wausau Market Mod.*”) (discussing “the importance Congress placed on addressing orphan counties’ inability to receive in-state programming”).

¹⁰ *C.f. Wausau Market Mod.* at ¶ 25 (2017) (finding that Ashland and Iron Counties, Wisconsin in the Duluth-Superior DMA are orphan counties even though NBC affiliate KBJR-TV is licensed to Superior, Wisconsin). Here the Kentucky Communities are an even more compelling case because no full power stations are licensed to Kentucky.

¹¹ *Wausau Market Mod.* at ¶ 27. *See also Victory Television Network, Inc.*, DA 17-968, ¶ 23 (rel. Oct. 4, 2017) (finding that the in-state factor “weighs heavily in favor of a grant” of a petition with respect to the in-state communities).

Determining whether a station satisfies the in-state programming factor is a simple exercise, and WBKO(TV) plainly meets it. The Commission should not adopt Scripps' warped analysis that has no support under any case law.

III. Scripps' Data on Viewing Patterns in the Kentucky Communities is Meaningless and Should Be Disregarded.

Scripps provides data from Nielsen purporting to show that WBKO(TV) has minimal viewership in the Kentucky Communities. As an initial matter, when orphan communities are at issue, providing evidence of viewing patterns is unnecessary.¹² More importantly, however, Scripps' data is fundamentally flawed, and, therefore, it should be ignored.

Scripps ratings information is wholly unreliable and does not measure what it purports to measure. In the Nashville DMA (where the Kentucky Communities are located), Nielsen gathers ratings primarily by using set-top boxes. The Nielsen set-top boxes determine which station is being watched by reading a watermark in the station's signal and then send that data to Nielsen. If a station does not have a Nielsen watermark in its signal, it is invisible to the set-top box, and the set-top box will not show any ratings for that station whatsoever. WBKO(TV) did not include any Nielsen watermarks in its signal until July 2017.¹³ Therefore, any data generated from Nielsen set-top boxes from before July 2017 should be viewed with extreme suspicion because it will substantially understate the actual viewership for WBKO(TV).

¹² See *La Plata County, Colorado Petitions for Modification of the Satellite Television Markets of KDVR-TV, KCNC-TV, KMGH-TV, and KUSA-TV, Denver, Colorado*, 32 FCC Rcd 1474, ¶ 40 (M.B. 2017).

¹³ Unlike stations in the Nashville DMA, until recently WBKO(TV) had little incentive to install the expensive encoders that insert the Nielsen watermarks. The Bowling Green DMA still relies on paper diaries to calculate ratings. Using a watermark in the Bowling Green DMA is pointless because viewers handwrite in their diary the name of the station they are watching. Nevertheless, Gray began inserting the Nielsen watermark into WBKO(TV)'s signal in time for the July 2017 ratings period in anticipation of Nielsen is phasing out its diaries in 2018.

Moreover, Scripps' ratings information from the July 2017 measurement period is just as unreliable. WBKO(TV) is not carried on satellite in Allen, Cumberland, or Logan Counties. Except for Petitioners' small rural cable systems, the other cable operator in these counties no longer retransmit any of WBKO(TV)'s programming. The only carriage of WBKO(TV)'s programming in these counties in July 2017 was during the handful of hours that WBKO(TV) was airing local news programming. During the remaining hours, which cover the vast majority of the day, even if someone was watching WBKO(TV)'s channel on a Petitioner's cable system, the credit would have registered to the Nashville ABC affiliate because the cable system would have switched to its programming and the set-top box would have read that station's watermark. Therefore, it should be no wonder that WBKO(TV) did not register any significant ratings during this time.

CONCLUSION

Whatever substantive decision the Commission makes in this proceeding, it must be based on the Commission's actual precedents and not Scripps' novel legal theories which find no support in any case law.

Respectfully submitted,

Gray Television Group, Inc.

By: /s/ Robert J. Folliard, III
Robert J. Folliard, III
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October 4, 2017

Affidavit of Brad Odil

I, Brad Odil, hereby declare under penalty of perjury that I have personal knowledge of the following, which is true and correct to the best of my knowledge, information, and belief:

1. I am Vice President of Gray Television Group, Inc. ("Gray") and General Manager WBKO(TV), Bowling Green, Kentucky.
2. WBKO(TV) did not include any Nielsen watermarks in its signal until just before the July 2017 ratings period.
3. WBKO(TV) is not carried on satellite in Allen, Cumberland, or Logan Counties. Except for the small rural cable systems that are the subject of this proceeding, no cable operator in these counties retransmits any of WBKO(TV)'s programming. To my knowledge, the only carriage of WBKO(TV)'s programming in these counties in July 2017 was by Electric Plant Board City of Russellville; Cumberland Cellular, Inc.; and North Central Telephone Cooperative, and the carriage only occurred during the handful of hours that WBKO(TV) was airing local news programming.
4. Several years ago, because of restrictions in WBKO(TV)'s ABC affiliation agreement, Gray informed the cable operators in Allen, Logan, and Cumberland Counties that, despite requesting a waiver from the ABC television network, the network was unwilling to give Gray the right to grant consent for their cable systems to continue retransmitting WBKO(TV)'s ABC programming.
5. Gray entered into agreements with Electric Plant Board City of Russellville; Cumberland Cellular, Inc.; and North Central Telephone Cooperative granting those operators consent to retransmit WBKO(TV)'s local news programming on their cable systems in the Nashville DMA.
6. It is my understanding that during non-local-news hours, these systems switch to other programming – typically the in-market ABC affiliate's programming.

/s/Brad Odil

Brad Odil

October 4, 2017

CERTIFICATE OF SERVICE

I, Robert Folliard, hereby certify that a true and correct copy of the foregoing Reply to Opposition to Petition for Special Relief was sent via email on this 4th day of October 2017 to the following recipients:

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Date: October 4, 2017