BROOKS PIERCE
FOUNDED 1897

WELLS FARGO CAPITOL CENTER
150 FAYETTEVILLE STREET, SUITE 1700
RALEIGH, NC 27601

T 919.839.0300
F 919.839.0304
WWW.BROOKSPIERCE.COM

March 31, 2017

Accepted / Filed

MAR 31 2017

Federal Communications Commission
Office of the Secretary

By Hand Delivery and Electronic Filing
Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: Hearst Properties Inc., KOB-TV, LLC and Nexstar Broadcasting, Inc., Application for Review

MB Dkt. No. 16-366, CSR No. 8927-A; MB Dkt. No. 16-367, CSR No. 8928-A; MB Dkt. No. 16-368, CSR No. 8929-A; MB Dkt. No. 16-369, CSR No. 8930-A

Dear Ms. Dortch:

On behalf of Hearst Properties Inc., KOB-TV, LLC and Nexstar Broadcasting, Inc., pursuant to 47 C.F.R. § 1.115, enclosed please find an original and a copy (for each of the above-referenced dockets) of an Application for Review of the Media Bureau's March 1, 2017 Memorandum Opinion and Order in the four above-referenced dockets.

This Application for Review has also been filed electronically in the above-referenced dockets.

Please contact me with any questions.

Sincerely,

BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.

Timothy Nelson
Counsel to Hearst Properties Inc.,
KOB-TV, LLC and Nexstar Broadcasting, Inc.

Enclosures

No. of Copies rec'd 0+3
List ABCDE

Before the
Federal Communications Commission
Washington, D.C. 20544

	)	
	)	MB Docket No. 16-366
	)	CSR No. 8927-A
In the Matter of	)	
	)	MB Docket No. 16-367
La Plata County, Colorado	)	CSR No. 8928-A
	)	
Petitions for Modifications of the	)	MB Docket No. 16-368
Satellite Television Markets of KDVR-TV,	)	CSR No. 8929-A
KCNC-TV, KMGH-TV, and KUSA-TV,	)	
Denver, Colorado	)	MB Docket No. 16-369
	)	CSR No. 8930-A
	)	

Accepted / Filed

MAR 31 2017

Federal Communications Commission
Office of the Secretary

APPLICATION FOR REVIEW

Mark J. Prak
Charles F. Marshall
Elizabeth Spainhour
Timothy G. Nelson
BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, L.L.P.
150 Fayetteville Street, Suite 1700
Raleigh, North Carolina 27601
Telephone: (919) 839-0300
Facsimile: (919) 839-0304

Counsel to Hearst Properties Inc.,
KOB-TV, LLC, and Nexstar Broadcasting, Inc.

March 31, 2017

TABLE OF CONTENTS

SUMMARY i

I. QUESTION PRESENTED 2

Whether the Order erred by creating a new standard for evaluating market modification petitions that fails to give appropriate weight to all five statutory factors, conflates localized programming with programming of statewide interest, excuses the failure to meet the Commission's evidentiary requirements, and produces a result in which any petition seeking modification based on access to in-state television stations will be granted. 2

II. STANDARD OF REVIEW 3

III. BACKGROUND 3

A. The Historical Role of Localism in Market Modification Proceedings 3

B. STELAR and the Addition of the "In-State" Programming Factor 5

1. STELAR 5

2. The Commission's STELAR Order 6

C. The County's Petitions, the Albuquerque Stations' Oppositions, and the Order 8

IV. ARGUMENT 11

A. The Order Disregards the STELAR Order by Creating An Unlawful Framework That Results in a Per Se Modification Regime With Respect to Counties Allegedly Underserved by In-State Television Stations 13

1. The Order Fails to Give Appropriate Weight to the Evidence Relating to All Five Factors and Relies Solely on "In-State" Programming as Dispositive 13

2. The Order Conflates Statutory Factors Two and Three In a Manner that Disregards the Denver Stations' lack of Locally-Targeted Programming 16

3. The Bureau erred in waiving certain evidentiary requirements 19

4. The Order Fails to Account for the County's Failure to Obtain the Willing Participation of the Denver Stations 20

5. The Order Could Undermine Localism and Destabilize the DMA System 23

CONCLUSION 25

Exhibit 1: *La Plata County, Colorado, Petitions for Modification of the Satellite Television Markets of KDVR-TV, KCNC-TV, KMGH-TV, and KUSA-TV, Denver, Colorado*, Memorandum Opinion and Order, DA 17-204 (rel. Mar. 1, 2017)

SUMMARY

The four market modification requests filed by La Plata County, Colorado ("Petitioner" or the "County") to make four Denver television stations (collectively, "Stations" or "Denver Stations") available to satellite subscribers in the County provided the Media Bureau ("Bureau") with one of its first opportunities to consider a satellite market modification petition filed by an "orphan county" county government since the Federal Communications Commission ("FCC" or the "Commission") adopted rules implementing Section 102 of the Satellite Television Extension and Localism Act ("STELAR").

In the STELAR Order, the Commission clearly outlined the evidentiary and substantive rules governing requests by county governments for satellite market modifications to add those counties to the local television markets of "in-state" televisions stations. Consistent with Congress's directive, the STELAR Order specifically commands that a county petitioning for a market modification satisfy the Commission's evidentiary criteria, that the Bureau weigh *all five* statutory factors in totality, and that no single statutory factor may operate to trump the others.

The Bureau's resulting Memorandum Opinion and Order ("Order") fails to follow these instructions. Instead, the Order effectively establishes a *per se* evidentiary standard under which the "access to in-state signals" factor (new factor three) trumps all other factors in an orphan county market modification request, regardless of how far away the impacted station is from the county and even if the station lacks any meaningful connection to the county and its programming is not tailored to the specific needs and interests of viewers living there. The Order conflated "localized" programming and programming of "statewide interest" to mean the same thing, both in terms of new factor three, "access to in-state signals," and also statutory factor two, "local service." In so doing, the Order improperly gives significant and dispositive weight to any "in-state"

programming as "local" programming not once, but twice, applying the statutory factors in a manner that assures that any orphan county that wishes to receive in-state programming can obtain a market modification. The Order also wholly excuses a petitioner's failure to comply with the Commission's evidentiary requirements.

The Order, therefore, reaches a result that further subordinates the fundamental importance of programming directed to the needs and interests of specific *local* communities to programming of general *statewide* interest or programming directed to other communities hundreds of miles away. The Order makes access to such "in-state" programming a proxy for localism that supersedes the promotion of the true, localized programming that the Albuquerque Stations provide to La Plata County viewers—i.e., news, weather, and community affairs—that the Denver Stations do not.

The reasoning set forth in the Order could create serious harm to the public interest by triggering a domino effect that, if left unchecked, could eviscerate the Designated Market Area ("DMA") system in favor of markets based upon state borders, one market at a time. If La Plata County can succeed in adding the Denver Stations solely because the Denver Stations provide programming of interest to Coloradans generally, other counties can follow the same blueprint.

The Order does not account for the County's failure to secure the willing participation of the Denver Stations to provide the entirety of its programming to La Plata County. As is the case here, without such participation from affected broadcasters, grant of a market modification petition does *not* effectuate STELAR's goal of increasing consumer access to in-state programming and, instead, only wastes public and private resources of the Commission, broadcasters, multichannel video programming distributors, and even counties.

Before the
Federal Communications Commission
Washington, D.C. 20544

	)	
	)	MB Docket No. 16-366
	)	CSR No. 8927-A
In the Matter of	)	
	)	MB Docket No. 16-367
La Plata County, Colorado	)	CSR No. 8928-A
	)	
Petitions for Modifications of the	)	MB Docket No. 16-368
Satellite Television Markets of KDVR-TV,	)	CSR No. 8929-A
KCNC-TV, KMGH-TV, and KUSA-TV,	)	
Denver, Colorado	)	MB Docket No. 16-369
	)	CSR No. 8930-A
	)	

APPLICATION FOR REVIEW

Hearst Properties Inc., licensee of ABC affiliate KOAT-TV, Albuquerque, New Mexico ("KOAT"),[1] KOB-TV, LLC, licensee of NBC affiliate KOB(TV), Albuquerque, New Mexico ("KOB"), and Nexstar Broadcasting, Inc., the licensee of KRQE(TV), Albuquerque, New Mexico, which is affiliated with the CBS and FOX networks ("KRQE")[2] (collectively, the "Albuquerque Stations"), through counsel and pursuant to Rule 1.115 of the Commission's Rules, hereby seek review by the full Commission of the Media Bureau's ("Bureau") decisions set out in its March 1, 2017 Memorandum Opinion and Order (the "Order")[3] granting four satellite market modification

[1] Pursuant to Commission authority granted in FCC File No. BALCDT-20160906ABJ, the name of the licensee for KOAT-TV was changed from KOAT Hearst Television Inc. to Hearst Properties Inc.

[2] Pursuant to Commission authority granted in FCC File No. BALCDT-20170306AEL, the license for KRQE(TV) was transferred from LIN of New Mexico, LLC (which participated earlier in this proceeding) to Nexstar Broadcasting, Inc.

[3] *La Plata County, Colorado, Petitions for Modification of the Satellite Television Markets of KDVR-TV, KCNC-TV, KMGH-TV, and KUSA-TV, Denver Colorado*, Memorandum Opinion

requests filed by La Plata County, Colorado ("Petitioner" or the "County")[4] to add the County to the local television markets of four Denver television stations, KDVR-TV, KCNC-TV, KMGH-TV, and KUSA-TV (collectively, the "Stations" or the "Denver Stations").

The Order is contrary to Section 102 of STELAR,[5] its legislative history, the Commission's STELAR Order,[6] and Commission precedent and policy.[7] The Commission should grant the Application for Review and reverse the Order.

I. QUESTION PRESENTED

Whether the Order erred by creating a new standard for evaluating market modification petitions that fails to give appropriate weight to all five statutory factors, conflates localized programming with programming of statewide interest, excuses the failure to meet the Commission's evidentiary requirements, and produces a result in which any petition seeking modification based on access to in-state television stations will be granted.

---

and Order, MB Dockets 16-366, 16-367, 16-368, 16-369 (rel. Mar. 1, 2017) ("Order") (attached as Exhibit 1).

[4] *See* Petition for Special Relief (KDVR) of La Plata County, Colorado, MB Docket 16-366 (filed Sept. 7, 2016) ("KDVR Petition"); Petition for Special Relief (KCNC) of La Plata County, Colorado, MB Docket 16-367 (filed Sept. 7, 2016) ("KCNC Petition"); Petition for Special Relief (KMGH) of La Plata County, Colorado, MB Docket 16-368 (filed Sept. 7, 2016) ("KMGH Petition"); and Petition for Special Relief (KUSA) of La Plata County, Colorado, MB Docket 16-369 (filed Sept. 7, 2016) ("KUSA Petition"). KOAT and KOB filed a consolidated Opposition to the KMGH and KUSA Petitions. *See KOAT/KOB Opposition to Petitions for Special Relief*, MB Dockets 16-368 and 16-369 (filed Nov. 22, 2016) ("KOAT/KOB Opposition"). LIN of New Mexico, LLC and LIN of Colorado, LLC ("LIN") filed a consolidated Opposition to the KDVR and KCNC Petitions. *See LIN Opposition to Petitions for Special Relief*, MB Dockets 16-366 and 16-367 (filed Nov. 22, 2016) ("LIN Opposition").

[5] The STELA Reauthorization Act of 2014 (STELAR), Pub. L. No. 113-200, 128 Stat. 2059, 2060-62 (2014) ("STELAR").

[6] *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 Order").

[7] 47 C.F.R. § 1.115(b)(2)(i).

II. STANDARD OF REVIEW

In considering Applications for Review, the Commission considers whether the challenged action taken pursuant to delegated authority (i) is in conflict with statute, regulation, case precedent, or established Commission policy; (ii) involves a question of law or policy that has not previously been resolved by the Commission; (iii) involves the application of a precedent or policy that should be overturned or revised; (iv) is based on an erroneous finding as to an important or material question of fact; or (v) is marked by prejudicial procedural error.[8] The Media Bureau had the opportunity to pass on all questions of fact and law discussed herein.[9]

III. BACKGROUND

A. The Historical Role of Localism in Market Modification Proceedings.

The market modification process exists to allow the Commission to alter a television station's local television market when doing so would allow broadcasters and multichannel video programming distributors ("MVPDs") to "better serve the interests of local communities."[10] The touchstone for evaluating a market modification request is whether there is a sufficient nexus—i.e., a "local relationship"—between the television station and the relevant community.[11] To that

---

[8] 47 C.F.R. § 1.115(b)(2)(i)-(v).

[9] 47 C.F.R. § 1.115(c).

[10] STELAR Order, ¶ 7.

[11] *See, e.g.; CoxCom, LLC, for Modification of the Market of WMDE*, Memorandum Opinion and Order, Dover, Delaware, 30 FCC Rcd 10978, ¶ 3 (MB 2015) (quoting legislative history of Section 614 of the Communications Act, explaining that the original four factors "are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market"); *see also, e.g.*, Order, ¶ 5 ("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.").

end, the Commission "must afford particular attention to the value of localism"[12]—long defined as programming that "is responsive to the needs and interests of their communities of license"[13]—when judging the merits of a market modification petition.[14]

Until 2014, Congress imposed four statutory factors for the Commission to consider and weigh in evaluating the market nexus between a television station and the relevant community:

- **Historical carriage**. Whether the station, or the other stations located in the same area, have been historically carried on the cable system or systems within such community;
- **Local Service by Out-of-Market Station**. Whether the television station provides coverage or other local service to such community;
- **Local Service By In-Market Stations**. 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 of sporting and other events of interest to the community; and
- **Viewing patterns**. Evidence of viewing patterns in cable and non-cable households within the areas served by the cable system(s) in such community.[15]

To evaluate these factors, the Commission imposed evidentiary requirements relevant to establishing a market nexus between the station and the community:

- Maps illustrating the relevant community locations and geographic features, mileage between the station and the community, transportation routes, and station and cable system facilities;

---

[12] Report from the Senate Committee on Commerce, Science, and Transportation accompanying S. 2799, 113th Cong., S. Rep. No. 113-322, at 10-11 (2014) ("Senate Commerce Committee Report"); 47 U.S.C. § 338(l)(2)(B); STELAR Order, ¶ 8.

[13] *Designated Market Areas: Report to Congress Pursuant to Section 109 of the STELA Reauthorization Act of 2014*, MB Docket 15-43, DA 16-613 (MB June 3, 2016) ("2016 In-State Programming Report"), ¶ 11.

[14] Senate Commerce Committee Report, at 10-11.

[15] 47 U.S.C. § 534(h)(1)(c)(ii) (2014).

- Contour maps delineating the station's technical service area and showing the location of the cable system headends and communities in relation to the service areas;

- Available data on shopping and labor patterns in the local market;

- Television station programming information derived from station logs or local television guides;

- Cable system line-up cards or television guides demonstrating historical carriage; and

- Audience data for the relevant station for cable and non-cable households, advertising data or sales data.[16]

B. STELAR and the Addition of the "In-State" Programming Factor.

1. STELAR.

Congress enacted STELAR in 2014 to extend the market modification regime to satellite carriage. It also added a *fifth* statutory factor—access to "in state" television signals—to the existing four factors that the Commission must consider in its overall localism analysis.[17] Congress made clear, however, that it preserved the original four factors and that this new "access to in-state signals" factor is to be considered *along with* the other four factors. The new "in state" factor does not replace, subsume, or in any way change the existing four factors, or the framework for how they are to be analyzed.[18]

---

[16] 47 C.F.R. § 76.59(b)(1)-(6) (2014); *see also Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, Final Report and Order, 14 FCC Rcd 8366 (1999).

[17] Specifically, the new factor addresses "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[.]" STELAR § 102, 128 Stat. at 2060; 47 U.S.C. § 338(l)(2)(B).

[18] *See, e.g.*, Senate Commerce Committee Report, at 10-11 (explaining that all five factors must be taken into account).

Critically, Congress did not state—either explicitly or implicitly—that access to in-state programming could be dispositive in any market modification proceeding. Nor did Congress suggest that "in state" programming of statewide interest could be treated as a wholesale proxy for "local" programming with respect to counties that are purportedly underserved by "in-state" stations—especially in terms of the "local service" statutory factor.[19]

2. The Commission's STELAR Order.

Consistent with Congress's directive, the Commission launched[20] and completed a proceeding to implement Section 102 of STELAR. In the resulting STELAR Order, the Commission considered "the plight" of viewers living in orphan counties.[21] It determined how the new "access to in-state signals" statutory factor should be construed in the orphan county context, set forth the appropriate weight that factor should be given, and explained that a petitioner will be "afforded credit for satisfying this factor simply by showing that the involved station is licensed to a community within the same state as the new community."[22]

But, beyond implementing the new factor, the Commission *did not* alter or adjust the underlying test for evaluating market modification petitions. Rather, consistent with STELAR, it specifically reaffirmed that test in the context of considering access to "in-state" signals:

First, the Commission emphasized the importance of considering *all five factors* in evaluating a market modification request, noting that the new "access to in-state signals" factor "is

---

[19] 47 U.S.C. § 338(l)(2)(B)(ii).

[20] *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, Notice of Proposed Rulemaking, 30 FCC Rcd 3039 (2015) ("NPRM").

[21] *See, e.g.*, STELAR Order, ¶¶ 3, 14-15, 28.

[22] STELAR Order, ¶ 18.

not universally more important than any of the other factors[.]"[23] Importantly, the Commission noted that "the in-state factor *does not serve as a trump card* negating the other four statutory factors."[24]

Second, the Commission maintained the existing statutory framework as to the other four factors, particularly statutory factor two, "local service." It did not suggest that access to in-state signals alone would be sufficient to satisfy the existing "local service" factor where those in-state signals provide programming of general statewide interest but not programming specifically targeted to the local community. By contrast, the Commission explained the crucial difference between the "local service" second factor and the "access to in-state signals" third factor:

> [U]nder factor two, we consider whether the station has aired programming, such as news, politics, sports, weather and other emergency information, *specifically targeted to the community at issue* (*e.g.*, town council meeting, news or weather event that occurred in the community, local emergencies, etc.). Under factor three, we would consider whether the station has aired programming, such as news, politics, sports, emergency information, *specifically related to the state in which the community is located* (*e.g.*, coverage of state politics and legislative matters, state sports team coverage, state emergency information, etc.).[25]

Nothing in the STELAR Order even remotely suggests that access to programming of statewide interest, standing alone, would be sufficient to grant a market modification petition filed by "orphan" counties or counties "underserved" by in-state signals.

Third, the Commission did not waive any of the required evidentiary factors for petitions seeking to add "in-state" signals or forecast circumstances in which a waiver would even be appropriate. Rather, the Commission reaffirmed that the evidentiary showing required of a party

---

[23] STELAR Order, ¶ 18.

[24] STELAR Order, ¶ 18 (emphasis added).

[25] STELAR Order, ¶ 18 n.85 (emphasis added).

seeking a market modification remains the same.[26] The Commission expressly recognized the difficulty that county governments might have in providing the required "specific evidence to demonstrate the five statutory factors" and "strongly encourage[d] county government petitioners to enlist the aid and cooperation of the station they wish to bring to their county" in order to "avoid dismissal" due to a lack of sufficient evidence.[27] Far from excusing noncompliance with these evidentiary requirements, the Commission reaffirmed the importance of complying with them.

Finally, the Commission acknowledged that station carriage is dependent on business decisions of broadcasters and MVPDs and that "without the willing participation of the affected broadcaster, modifying the market of a particular television, in itself, would not result in consumer access to that station."[28] It warned counties against expending the time and expense of filing a petition in situations where "the involved station opposes carriage in the county."[29]

C. The County's Petitions, the Albuquerque Stations' Oppositions, and the Order.

The County's Petitions provided evidence of the Denver Stations' coverage maps, the geographic distances from La Plata County (some 330 miles),[30] and programming lineups for the Denver Stations that show general local Denver news programs—but not specific programming tailored to La Plata County.[31] The County failed to present evidence of (i) shopping and labor

---

[26] STELAR Order, ¶ 20 (requiring that market modification requests "must include" at least the seven evidentiary requirements set forth in 47 C.F.R. § 76.59(b)(1)-(7)); *id.* ¶ 22 (holding that market modification requests that do not include the required evidence will dismissed); 47 C.F.R. § 76.59(c) (same). The Commission added to the six evidentiary requirements that predated STELAR the requirement that, when applicable, the petitioner provide a statement that the station is licensed to a community within the same state. 47 C.F.R. § 76.59(b)(7).

[27] STELAR Order, ¶ 14.

[28] STELAR Order, ¶ 14.

[29] STELAR Order, ¶ 14.

[30] *See* KUSA Petition, at 5; KMGH Petition, at 5.

[31] *See, e.g.*, KOAT/KOB Opposition, at 8.

patterns between Denver and La Plata County, (ii) channel line-up cards or other guides demonstrating satellite carriage of the Denver Stations on satellite in La Plata County, or (iii) evidence of viewing patterns in the County.[32] Instead, the County requested that the Bureau waive those requirements entirely.[33]

The Albuquerque Stations provided evidence of historical carriage in La Plata County and regular programming specifically targeted to the County. The record includes references to local ski and snowboard reports, driving conditions through mountain passes, and regular local weather forecasts.[34] The record also shows that the Albuquerque Stations provided evidence of regular coverage of community issues,[35] and of substantial viewing patterns and audience share in La Plata County, as compared to negligible ratings for the Denver Stations.[36]

The Order waives the evidentiary requirements applicable to the County after determining, without any legal basis, that evidence of geographic nexus was "especially inappropriate" given the distance between the Denver Stations and La Plata County.[37] Instead, the Order determines that comments from government officials and consumers were "particularly valuable."[38] Nothing

---

[32] Order, ¶¶ 25, 34, 43, 52 (shopping and labor patterns); ¶¶ 31, 40, 49, 58 (viewing patterns).

[33] *See, e.g.*, KMGH Petition at 6, 3-4; KUSA Petition at 6, 3-4.

[34] *See* KOAT/KOB Opposition, Declaration of Mary Lynn Roper, ¶ 2, Declaration of Michael Burgess, ¶ 5; LIN Opposition, at 5-7.

[35] Such coverage included stories about a spill from Gold King Mine north of Durango, the tragic deaths Dylan Redwine and Jeff Kuss, a massive fire, a serious school bus accident, and general interest stories relating to crime, schools, and community activities in La Plata County. *See* KOAT/KOB Opposition, Declaration of Mary Lynn Roper, ¶ 2, Declaration of Michael Burgess, ¶ 5; LIN Opposition, at 5-7.

[36] *See,* KOAT/KOB Opposition, at 14

[37] Order, ¶ 22.

[38] Order, ¶ 22.

in the STELAR Order, however, supports this evidentiary approach, which wholly supplants the longstanding objective criteria relevant to market nexus.

The Order finds that statutory factors one (historical carriage), four (service from in-market stations), and five (audience shares) are "neutral,"[39] but that factors two (local service) and three (access to in-state signals) "weigh heavily" in favor of modification because of the evidence of statewide programming of interest to Coloradoans—and grants the petitions on that basis.[40]

In making this determination, the Order relies solely upon programming of *statewide* interest to support the enhancement for both factors two and three. The Order does not acknowledge or note the lack of localized programming directed to the specific communities in La Plata County relevant to statutory factor two. Rather, it conflates factors two and three into a single "statewide programming" factor. The Order also fails to ascribe any counterweight to the evidence relating to other statutory factors, especially lack of historical carriage, lack of local programming tailored to La Plata County, lack of audience share, and lack of shopping and labor patterns.

The Order also dismisses the fact that the Denver Stations offered to "negotiate terms of targeted carriage arrangements to allow delivery of local, in-state, non-duplicative programming and to increase access to in-state news by Colorado viewers."[41] Rather, the Order criticizes the approach the Denver Stations suggested as insufficient because it could result in satellite providers carrying a "special blacked out feed" during the periods when the Denver Stations air non-local, duplicating network or syndicated programming.[42] The Order fails to address the corollary

---

[39] *See* Order, ¶¶ 24, 33, 42, 51 (factor one); 30, 39, 48, 57 (factor four); 31, 40, 49, 58 (factor five).

[40] ¶¶ 32, 41, 50, 59.

[41] Letter from Colorado Broadcasters Association Members to Senator Michael Bennet and Senator Cory Gardner (Aug. 29, 2016) (included in Petitions at Exhibit H).

[42] Order, ¶ 20 n.65.

results—the potential contractual restrictions governing carriage of non-local network or syndicated programming, the resulting dilution of in-market viewership, and the impact on the economics of the current DMA system, which undergirds the local television system.

IV. ARGUMENT

The Commission had an opportunity to modify both the application of the longstanding statutory factors and the evidentiary requirements for petitions filed by orphan counties or other counties allegedly underserved by in-state programming. It did not do so. Rather, the Commission reaffirmed that (i) the new in-state programming factor was neither exclusive nor a "trump card" to defeat the other factors, (ii) the in-state programming factor was not a substitute for the "local service" factor, and (iii) the evidentiary requirements demonstrating a market nexus between the petitioning county and the station it seeks to receive have not changed.

In granting the County's Petitions, the Bureau departs from the Commission's instructions in the STELAR Order and the longstanding focus on localism that underpins the statutory factors and the Commission's evidentiary requirements. The Order creates a *per se* regime in which any county purportedly underserved by "in-state" stations can obtain a market modification. The Order accomplishes this result by failing to consider and weigh the evidence relating to all five statutory factors, conflating the second "local service" and third "access to in-state signals" factors, and disregarding the evidentiary showing required in all market modification petitions.

In this way, the Order eliminates the market nexus test that informs market modification generally in favor of a single statewide programming test. In fact, the Order's analysis makes it impossible for any station or MVPD to successfully oppose a county-initiated market modification petition seeking access to in-state programming—even where the "in-state" station has little-to-no market nexus to the county, provides little-to-no specific localized programming to the county,

and where an opposing station is already successfully serving the needs and interests of the County's viewers.

Further, the Order ignores the fact that the Petitions provided no evidence of the Denver Stations' willingness to authorize carriage of their entire signals via satellite—and it discards the value of the Denver Stations' offer to authorize carriage of their local, non-duplicative programming without the need for Commission intervention. In turning a blind eye to the County's failure to obtain the willing participation of the Denver Stations, the Order allows a result in which the parties and the Commission invested substantial resources on a proceeding that ultimately cannot produce the result the County seeks—full carriage of the Denver Stations' local, network and syndicated programming in the County.

Left unchecked, the Order sets the stage for a domino effect of market modifications based on state lines that could lead to a regulatory-sanctioned overhaul of the local television DMA system from a market-based system into a system based on state lines. The prospect that a steady decline of the DMA system may already be underway is reinforced by another recent Bureau action expanding the definition of "orphan county" to include counties that are purportedly "underserved by in-state programming," even though their DMA includes in-state counties and stations.[43] It is hard to imagine the creation of a more slippery slope that could threaten the integrity of the DMA system.[44]

---

[43] *See Gray Television Licensee, LLC for Modification of the Satellite Television Market For WSAW-TV, Wausau, Wisconsin*, MB Docket No. 16-293, CSR No. 8926-A, Memorandum Opinion and Order, DA 17-74, ¶ 25 (MB 2017) (granting satellite market modification petition to modify the Wausau-Rhinelander DMA to include two Wisconsin counties assigned to the Duluth-Superior (Minnesota) DMA, even though the Duluth-Superior DMA has five Wisconsin counties and even a station licensed to a Wisconsin community).

[44] Indeed, the Order could affect the DMA system in both states at issue here, New Mexico and Colorado. Six New Mexico counties are served by DMAs in Texas (the Amarillo and El Paso

A. The Order Disregards the STELAR Order by Creating An Unlawful Framework That Results in a Per Se Modification Regime With Respect to Counties Allegedly Underserved by In-State Television Stations.

Contrary to the Commission's directive, the Order did, in fact, rely upon access to in-state programming as a "trump card" to defeat the lack of market nexus, or "local relationship,"[45] between the County and the Denver Stations. Here's how:

1. The Order Fails to Give Appropriate Weight to the Evidence Relating to All Five Factors and Relies Solely on "In-State" Programming as Dispositive.

Under the framework the Order creates, a petitioner can fair no worse than "neutral" as to statutory factors one, four and five.[46] With respect to statutory factors two and three, the Order relies on the Denver Stations' provision of "in-state" programming of interest to Coloradans generally as sufficient to enhance *both* of those factors in the County's favor.[47] In-state programming is intended to be weighed in a petitioner's favor in terms of statutory factor three; but the Order narrowly focuses on "in-state" programming as sufficient, in and of itself, to also justify an enhancement for the second factor, pre-existing "local service"—without requiring evidence of specific local programming targeted to La Plata County. In doing so, the Order ignores the fundamental fabric of local service traditionally applied in statutory factor two and left undisturbed by the Commission in the STELAR Order.[48]

DMAs). Likewise, the Denver DMA serves counties throughout Wyoming and western Nebraska. *See* KOAT/KOB Opposition, at 16 n.44.

[45] Order, ¶ 4.

[46] *See* Order, ¶¶ 24, 33, 42, 51 (factor one); 30, 39, 48, 57 (factor four); 31, 40, 49, 58 (factor five).

[47] *See* Order, ¶¶ 26, 35, 44, 53 (factor two); 27, 36, 45, 54 (factor three).

[48] *See, e.g.*, *Tobacco Valley Communications to Exclude Eureka and Communities in North Lincoln County from the Local Market of Several Spokane, Washington Broadcasters and Include it in the Local Market of Several Missoula, Montana Broadcasters*, 31 FCC Rcd 8972, ¶ 11 (2016) ("A station's broadcasting of local programming which has a distinct nexus to the cable communities is also evidence of local service."); *Tennessee Broadcasting Partners; for*

Further, the Order does not consider and weigh the evidence relating to the other factors (one, four, and five) as a counterweight to the evidence of "in-state" programming cited exclusively with respect to factors two and three. The fact that the Albuquerque Stations demonstrated significant evidence of regular local programming tailored to the County with respect to factor four,[49] and that the County offered virtually no evidence of specific localized programming provided by the Denver Stations, is the very reason that all factors must be weighed and considered collectively.[50] Otherwise, the historical touchstones of localism in market modification petitions—geographic nexus, localized programming, shopping and labor patterns, audience share, and other factors demonstrating a market nexus—are systematically discarded.

The Order's framework makes it impossible for a station or MVPD to successfully oppose a petition seeking to add an orphan county to an in-state market—such a petition will always prevail. Three factors (one, four, and five) will be neutral at worst,[51] and two factors (two and three) will automatically weigh in favor of granting the petition given that the Order allows

---

Modification of the Television Market for WBBJ-TV/DT, Jackson, Tennessee, 23 FCC Rcd 3928, ¶ 21 (2008) (same).

[49] Under factor four, the Commission (or Bureau) is to consider "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." 47 U.S.C. § 338(l)(2)(B)(iv).

[50] *See DeSoto Broadcasting, Inc.; for Modification of the Sarasota, Florida ADI*, Memorandum Opinion and Order, 13 FCC Rcd 2769, ¶ 41 (CSB 1998) (explaining that in the context of what is now factor four, local coverage provided by in-market stations "weighs against" a market modification where the station whose market would be modified "provides no local service" to communities at issue).

[51] *See* Order, ¶¶ 24, 33, 42, 51 (factor one); 30, 39, 48, 57 (factor four); 31, 40, 49, 58 (factor five).

programming of statewide interest to support any enhancement for both factors.[52] Further, by disregarding the disparity of locally-targeted programming provided by the Denver Stations, and by failing to ascribe any counterweight to the evidence underlying each of the five factors, the Order necessarily—indeed, mathematically—renders state-based programming, without more, a trump card in the orphan county context.

This result is contrary to the Commission's STELAR Order and cannot stand. Neither Congress nor the Commission authorized the Bureau to analyze market modification requests in this manner. To the contrary, Section 338(l) of the Act requires that in considering a market modification request the Commission "*shall* afford particular attention to the value of localism by taking into account" *all five* statutory factors.[53] Congress reiterated this command when it passed STELAR, instructing the Commission that "[i]n judging the merits of a petition filed under new section 338(l), the FCC must afford particular attention to the value of localism. In so doing, it must consider [all five] factors[.]"[54]

Likewise, the Commission expressly prohibited any one factor from serving as a "trump card"[55] and further explained that the presence of an orphan county is not dispositive:

> We clarify, however, that this new factor is not universally more important than any of the other factors and its relative importance will vary depending on the circumstances in a given case. In sum, in market modification petitions involving the addition of an in-state broadcaster, the in-state factor does not serve as a trump card negating the other four statutory factors.[56]

---

[52] *See* Order, ¶¶ 26, 35, 44, 53 (factor two); 27, 36, 45, 54 (factor three).

[53] 47 U.S.C. § 338(l) (emphasis added).

[54] Senate Commerce Committee Report, at 10-11.

[55] STELAR Order, ¶ 18.

[56] STELAR Order, ¶ 18. The Commission also found that, "[u]ltimately, each petition for market modification will turn on the unique facts of the case." *Id.*

In departing from this clear standard and failing to appropriately weigh the evidence regarding all five statutory factors, the Order conflicts with STELAR, the STELAR Order, and established Commission policy and precedent.

2. The Order Conflates Statutory Factors Two and Three In a Manner that Disregards the Denver Stations' Lack of Locally-Targeted Programming.

The STELAR Order pointedly distinguished the difference between locally-targeted programming and state-related programming with respect to statutory factors two and three:

> [U]nder *factor two*, we consider whether the station has aired programming, such as news, politics, sports, weather and other emergency information, *specifically targeted to the community at issue* (*e.g.*, town council meeting, news or weather event that occurred in the community, local emergencies, etc.). Under *factor three*, we would consider whether the station has aired programming, such as news, politics, sports, emergency information, *specifically related to the state in which the community is located* (*e.g.*, coverage of state politics and legislative matters, state sports team coverage, state emergency information, etc.).[57]

The Order ignores this distinction. Indeed, the Order rejected KOAT/KOB's emphasis on this very distinction "between '*state-related* programming' and '*localized programming*'" and argued (contrary to the Commission's holding quoted immediately above) that such a distinction "simply does not exist in the orphan county context."[58]

The Order conflates statutory factors two and three by double-counting the mere existence of state-related programming as sufficient to warrant an enhancement of both statutory factors. Indeed, in considering the second "local service" factor, which is supposed to deal with local programming "specifically targeted to the community at issue,"[59] the Order redefines "local"

---

[57] STELAR Order, ¶ 18 n.85 (emphasis added).

[58] Order, ¶¶ 43, 52 (emphasis in original).

[59] STELAR Order, ¶ 18 n.85.

programming to "to include all programming 'originating from and about' [the orphan county's] home state."[60] The Order goes on to focus on the Denver Stations' "in-state" programming, "particularly Colorado-specific programming" reflected in the program logs and consumer comments.[61] Notably, the Order does not rely on specific local programming targeted to La Plata County from any Denver Station.

This new standard set forth in the Order that a petitioner will get credit—indeed, double credit—if a television station produces newscasts that broadcast state-related programming is, of course, no standard at all. Every television station will meet this threshold.[62] This double-counting erases the clear demarcation between the two factors outlined in the Commission's STELAR Order. In fact, if the "local service" in factor two previously could have been satisfied solely through evidence of in-state programming, there would have been no need for Congress to add a new "in-state" factor in Section 102 of STELAR.

The result also deals a blow to localism, which has been "a cornerstone of the Commission's broadcast regulation for decades."[63] Stated simply, the concept of localism means that broadcasters have a responsibility, as trustees of the public airwaves, to use the airwaves to serve the public interest by airing programming that "is responsive to the needs and interests of

---

[60] Order, ¶¶ 26, 35, 43, 52.

[61] *See, e.g.*, Order, ¶ 44 (stating that KMGH broadcasts daily "Colorado-produced and Colorado-focused news programs" and that, therefore, "KMGH carries a significant amount of local programming of interest to La Plata").

[62] The Order admits as much: "Therefore, in line with Congress' addition of the new third statutory factor, in orphan county situations we will give substantial weight to the local/in-state programming a petitioner proposes to bring the orphan county when determining whether a nexus to a new community has been demonstrated, and will consider the other factors, when they apply, as enhancements to a petitioner's case." Order, ¶ 22. Nothing can "count against" the petitioner.

[63] 2016 In-State Programming Report, ¶ 11.

their communities of license"[64]—and that is "relevant to the tastes, needs and desires of the public they are licensed to serve."[65] In short, there is no basis to suggest that all Coloradans—from Denver to Durango—share the same "local" needs and interests just because they live in the same state.

Congress mandated that the Commission "afford particular attention to the value of localism" in ruling on requests for market modification.[66] But the Order treats access to in-state programming, by itself, as a wholesale proxy for localism. It places no importance on in-market, or even "near-market," programming that is targeted to *local* issues, needs, interests and desires (as opposed to statewide interests), and no relevance on geographic proximity in the orphan county context.[67] This approach improperly devalues localism and the importance of programming tailored to specific local communities rather than fostering it.[68]

To be sure, some state-related programming can be a *component* of localism. But the Order goes far beyond that, *equating* "in-state" programming with "local" programming. The authority on which the Order relies to reach its "'in-state' equals 'local'" holding—language in the Senate Commerce Committee's Report on STELAR—does not support it. The portion of the Senate Commerce Committee Report to which the Order cites for the proposition that "local programming" is to include "programming originating from and about the State in which a consumer resides" does not deal with statutory factor two, or factor three, or any of the other

---

[64] 2016 In-State Programming Report, ¶ 11.

[65] *Deregulation of Radio*, Report and Order, 84 FCC 2d 968, 981, ¶ 32 (1981) (quoting *En Banc Programming Inquiry Statement*, 44 FCC 2303, 2314 (1960)).

[66] 47 U.S.C. § 338(l).

[67] Order, ¶¶ 22, 26, 35, 44, 53.

[68] Senate Commerce Committee Report, at 10-11.

factors.[69] In fact, that portion of the Senate Commerce Committee Report does not pertain to Section 102 of the Act and market modification petitions at all. Rather, it deals with Section 205 of the Act, wherein Congress explained that the Commission could consider "in-state programming" to be "local programming" *for the purposes of drafting a Commission "report to various named congressional committees on DMAs*."[70]

There is no evidence that Congress intended this "in-state equals local programming" analysis to apply in any petition for market modification, much less to the analysis of either the second or third statutory factor. To the contrary, Congress instructed the Commission as to a different, specific context in which to interpret "in-state" to mean "local." "Where Congress includes particular language in one section of a statute but omits it in another . . ., it is generally assumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[71]

3. The Bureau erred in waiving certain evidentiary requirements.

The Order also improperly excused the County's failure to meet the evidentiary requirements necessary to demonstrate a market nexus between the Denver Stations and the County and bear upon the application of the statutory factors. It did so despite the fact that the Commission in the STELAR Order specifically reaffirmed and imposed the required evidentiary standards to market modifications filed by counties in an orphan county context.[72] In summarily

---

[69] Senate Commerce Committee Report, at 15.

[70] Senate Commerce Committee Report, at 15 ("The Committee intends *that the FCC's report will interpret* local programming to include not only television programming (in particular news, sports, weather, and other programming containing content relevant to a consumer's daily life) originating from and about the DMA in which a consumer resides, but also television programming originating from and about the State in which a consumer resides." (emphasis added)).

[71] *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993).

[72] STELAR Order, ¶¶ 20, 22; 47 C.F.R. § 76.59(c) (stating that petitions that do not contain the required evidence will be dismissed).

waiving these evidentiary requirements, the Order reasoned that the need for such evidence is "diminished" in the orphan county context because orphaned counties are geographically distant from the "in-state" stations they seek to receive and, therefore, there is likely no historical carriage of the stations, or evidence of shopping patterns or other evidence of geographic nexus. But geographic nexus is a hallmark of the underlying goals of market modification because it reflects that a county is effectively served and connected by the local station and its targeted local programming. By arbitrarily waiving the evidentiary requirements without legal justification *because* of a lack of geographic nexus, the Order sidelines the fundamental principles of localism that market modification is intended to serve.

Nothing in the STELAR Order supports this unilateral waiver of the evidentiary requirements. Had the Commission intended to create a new evidentiary standard to govern market modification petitions from orphan counties, it had every ability to do so in the STELAR Order. Indeed, given that the STELAR Order specifically addresses orphan counties and the in-state programming factor, the fact that the Commission did not even contemplate changes to the evidentiary standard—much less wholesale, outcome-determinative changes—reflects the degree to which the Order runs afoul of the STELAR Order.

4. The Order Fails to Account for the County's Failure to Obtain the Willing Participation of the Denver Stations.

In the STELAR Order, the Commission explains that "station carriage relies in part on business decisions involving broadcasters and satellite carriers and that without the willing participation of the affected broadcaster, modifying the market of a particular television station, in itself, would not result in consumer access to that station."[73] The Commission therefore warned

[73] STELAR Order, ¶ 14.

counties that filing a petition without the affected station's approval would amount to an exercise in futility and a waste of resources of all parties involved.[74] But the Order ignores the Commission's warning and grants the Petitions despite evidence of the Denver Stations' refusal to provide carriage of the entirety of their signals into the County.

Obtaining affected stations' affirmative participation is especially important in order to avoid placing those stations in a predicament with their network and syndicated programming contracts. Although stations can—and do—offer to provide their local news and public affairs programming to out-of-market communities, they do not control the rights to network and syndicated programming.

Most troubling, the Order misunderstood the significance of the Denver Stations' offer to negotiate for targeted carriage arrangements to provide "local, in-state, nonduplicative broadcast programming and to increase access to in-state news by Colorado viewers."[75] Rather than view this local, in-state programming option as the effective public interest solution that it is, the Order judged this proposed solution as insufficient out of concern that the local signals would be "blacked out" during periods when the Denver Stations air non-local, duplicative network or syndicated programming.

The Bureau's suggestion that the Stations' "targeted carriage" proposal would not achieve the Petitions' purported goals of gaining for viewers access to the Stations' in-state news, weather,

---

[74] STELAR Order, ¶ 14 ("Moreover, to the extent the involved station opposes carriage in the county, a county government may not want to go through the time and expense of filing a petition to expand such station's market to include its county.").

[75] *See* Letter from Colorado Broadcasters Association Members to Senator Michael Bennet and Senator Cory Gardner (Aug. 29, 2016) (included in each of the Petitions for Special Relief, at Exhibit H).

sports and public affairs programming[76] is an erroneous finding of an important or material question of fact.[77] In fact, County viewers would gain access to precisely the Colorado-specific programming they claim to want—and that STELAR seeks to promote—through targeted carriage of "local, in-state, nonduplicative broadcast programming."

It would appear that what the County really wants, and what the Order attempts to give it, is access to the full complement of the Denver Stations' streams (including duplicative network and syndicated programming), not just their local or statewide news and public affairs programming.[78] But delivery of non-local, duplicating network and syndicated programming does nothing to advance either localism or access to programming of statewide interest—and authorizing it is contrary to the STELAR Order.[79] If anything, it serves to needlessly disrupt the economic expectations inherent in network affiliations of the Albuquerque Stations.[80]

Because the County failed to secure the willing participation of the Denver Stations to provide their full signals, this proceeding continues to result in the unnecessary expenditure of broadcaster, satellite provider, and Commission time and resources. The Order does not, and cannot, compel the Denver Stations to make the entirety of their signals—including nonlocal,

---

[76] Order, ¶ 20 n.65.

[77] 47 C.F.R. § 1.115(b)(2)(iv).

[78] This is particularly true where the Order's hasty conclusion in this regard agreed—without evidence—with the County's hypothetical contention that a satellite provider might not have the capacity to carry a targeted feed of a Denver Station into the County. Order, ¶ 20 n.65.

[79] It is also worth noting the Commission's clarification that its decision to grant county governments standing to file market modification petitions "should not be construed as affording a county government a right to demand carriage of a particular station via satellite in its county." STELAR Order, ¶ 14 n.60.

[80] *See, e.g., Guy Gannett Communications, Inc.; for Modification of the Portland-Poland Spring, Maine ADI Market*, Memorandum Opinion and Order, 13 FCC Rcd 23470, ¶ 21 (CSB, 1998) ("we are especially concerned that our decision not unduly upset the economic marketplace expectations underlying the affiliation concept").

duplicating network and syndicated programming—available to satellite carriers in La Plata County. To avoid repetition of this kind of proceeding, the Commission should reverse grant of the Petitions and do so on the additional evidentiary ground that the County failed to provide evidence of the Denver Stations' cooperation and willing participation; this is especially true in light of the Stations' offer to provide County viewers access to the very in-state programming addressed by STELAR, without resorting to a market modification."[81]

5. The Order Could Undermine Localism and Destabilize the DMA System.

The framework the Order adopts will, over time, chip away at the DMA system. The Commission rejected calls to depart from the existing Nielsen DMA market determination system just last year, finding in its 2016 In-State Programming Report that there are no economically and technically feasible alternatives exists to using DMAs to define television markets.[82] In fact, the Commission's 2016 In-State Programming Report stated that changing the DMA market system would be both disruptive and would not necessarily increase local programming:

> The current record indicates that departing from the existing Nielsen DMA market determination system could create enormous disruptions in the video programming industry disproportionate to any benefit gained, and would be unlikely to increase the amount of local programming available to viewers as a whole. Furthermore, changing the market of a particular county from one DMA to another that is potentially composed of counties from the same state as the county may not necessarily increase the amount of local programming that the county receives due to the economics of broadcast television and the ability (or inability) to serve a geographically distant, but in-state county.[83]

---

[81] STELAR Order, ¶ 46 (concluding that satellite carrier technical and economic feasibility is a threshold issue when a county government seeks a market modification).

[82] 2016 In-State Programming Report, ¶ 95.

[83] 2016 In-State Programming Report, ¶ 88.

Yet granting market modification petitions solely due to access to in-state programming, as the Order does, will jeopardize the stability of existing local television markets in favor of markets based on state boundary lines.[84] This would appear to hold true regardless of how far an in-state station is from the orphan county.[85] The Bureau nowhere in the Order even mentions the fact that Denver is *more than 300 miles and 7 hours by car away* from La Plata County;[86] remarkably, the Bureau was able to find a sufficient market nexus—a "local relationship"[87]—between the Denver Stations and the County despite their distance and the intervening Rocky Mountains.

Indeed, it would appear that the Petitioners are less interested in gaining access to *Colorado-specific* programming than *Denver-specific* programming.[88] In fact, the Denver Stations, although "in-state," are farther from La Plata County than other "in-state" Colorado television stations in both the Grand Junction-Montrose and Colorado Springs-Pueblo DMAs.

And where does it end? By the Bureau's logic, residents living in a county already assigned to an in-state DMA (i.e., not an orphaned county) could argue that the market where their state capitol is located should be modified to include their County in order to give them greater access to state government and public affairs programming or certain sports programming. Neither

---

[84] Ironically, the precedent set in the Order could be used to modify markets of Nebraska and Wyoming television stations to include counties in those states that are currently part of the Denver DMA. *See* KOAT/KOB Opposition, at 16 n.44.

[85] *See, e.g.*, Order, ¶ 22 (finding tests based on geographic proximity are of "significantly reduced relevance" in the orphan county context).

[86] *See, e.g.*, KMGH Petition, at 5-6.

[87] Order, ¶ 4.

[88] *See* KMGH Petition, at 1 (complaining that County residents cannot receive from a satellite carrier their "preferred" in-state stations); *id.* at 5 (arguing that no in-state stations carried by MVPDs "offer[] Denver- and Colorado-oriented news coverage of issues of concern to residents of the County").

Congress nor the Commission intended the market modification system to be used in this way. The Order's per se scheme leads to results that are contrary to the Commission precedent and policy which seeks to preserve the DMA system.

CONCLUSION

For the reasons set forth above, the Commission should reverse the Bureau's grant of the Petitions because it is conflict with STELAR, the Commission's STELAR Order, and Commission precedent and policy.

Respectfully submitted,

Mark J. Prak
Charles F. Marshall
Elizabeth Spainhour
Timothy G. Nelson
BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, L.L.P.
150 Fayetteville Street, Suite 1700
Raleigh, North Carolina 27601
Telephone: (919) 839-0300
Facsimile: (919) 839-0304

Counsel to Hearst Properties Inc., KOB-TV, LLC, and Nexstar Broadcasting, Inc.

March 31, 2017

Certificate of Service

The undersigned does hereby certify that I caused a copy of the foregoing **Application for Review** to be placed in the U.S. Mail, first-class postage prepaid, addressed as follows:

KASA-TV / KREZ-LD
13 Broadcast Plaza SW
Albuquerque, NM 87104

Bradford P. Blake, Chair
La Plata County Board of Commissioners
1101 E. 2nd Ave.
Durango, CO 81301

KUPT
P.O. Box 3757
Lubbock, TX 79423

KASY-TV
13 Broadcast Plaza SW
Albuquerque, NM 87104

KUSA
500 Speer Blvd
Denver, CO 80203

KWBQ
13 Broadcast Plaza SW
Albuquerque, NM 87104

KAZQ
4501 Montgomery NE
Albuquerque, NM 87109

KQDF-LP
1701 N. Market St., Ste 500
Dallas, TX 75202

KYNM
5010 4th Street NW
Albuquerque, NM 87107

KBIM-TV
214 N. Main Street
Roswell, NM 88201

KREZ-TV
190 Turner Drive, Suite G
Durango, CO 81303

KMGH-TV
123 E Speer Boulevard
Denver, CO 80203

KCHF
27556 1-25 East Frontage Rd.
Sante Fe, NM 87508

KRMU
1089 Bannock Street
Denver, CO 80204

KCNC
1044 Lincoln St.
Denver, CO 80203

KENW
1450 South Ave N
Portales, NM 88130

KRQE
13 Broadcast Plaza SW
Albuquerque, NM 87104

KDVR
100 East Speer Blvd
Denver, CO 80203

KKNJ-LP
200 S. Alto Mesa Dr.
El Paso, TX 79912

KRTN-TV
P.O. Box 3757
Lubbock, TX 79423

DIRECTV, LLC
Local-Into-Local – Market Modification
2260 East Imperial Highway
El Segundo, CA 90245

KLUZ-TV
2725-F Broadbent Pkwy NE
Albuquerque, NM 87107

KRWB-TV
13 Broadcast Plaza SW
Albuquerque, NM 87401

Ms. Alison A. Minea
Director & Senior Counsel
Regulatory Affairs
Dish Network, LLC
1110 Vermont Ave., NW

Suite 750
Washington, DC 20005

KNAT-TV
1510 Coors Road NW
Albuquerque, NM 87121

KTEL-TV
2400 Monroe NE
Albuquerque, NM 87110

KNME-TV
1130 University Blvd. NE
Albuquerque, NM 87102

KNMD-TV
1130 University Blvd. NE
Albuquerque, NM 87102

KTFA-LP
2725 Broadbent Parkway
NE Suite F
Albuquerque, NM 87107

KTFQ-DT
2725 F. Broadbent Parkway
NE
Albuquerque, NM 87107

This the 31st day of March, 2017.

Charles F. Marshall

EXHIBIT 1

La Plata County, Colorado, Petitions for Modification of the Satellite Television Markets of KDVR-TV, KCNC-TV, KMGH-TV, and KUSA-TV, Denver, Colorado, Memorandum Opinion and Order, DA 17-204 (rel. Mar. 1, 2017)

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

	)	
	)	MB Docket No. 16-366
	)	CSR No. 8927-A
In the Matter of	)	
	)	MB Docket No. 16-367
La Plata County, Colorado	)	CSR No. 8928-A
	)	
Petitions for Modification of the Satellite	)	MB Docket No. 16-368
Television Markets of KDVR-TV, KCNC-TV,	)	CSR No. 8929-A
KMGH-TV, and KUSA-TV, Denver, Colorado	)	
	)	MB Docket No. 16-369
	)	CSR No. 8930-A
	)	

MEMORANDUM OPINION AND ORDER

Adopted: March 1, 2017 **Released: March 1, 2017**

By the Acting Chief, Media Bureau

TABLE OF CONTENTS

Heading Paragraph #

I. INTRODUCTION 1
II. BACKGROUND 3
III. DISCUSSION 12
A. Technical and Economic Feasibility 14
B. Orphan County Status 19
C. KDVR-TV 24
D. KCNC-TV 33
E. KMGH-TV 42
F. KUSA-TV 51
IV. ORDERING CLAUSES 60

I. INTRODUCTION

1. La Plata County, Colorado ("Petitioner" or "La Plata County"), with the support of hundreds of its residents, has filed market modification petitions to make four Denver television stations (collectively, the "Stations") available to La Plata satellite subscribers. For historical and geographic reasons, La Plata County residents generally receive only New Mexico television stations, limiting their access to Colorado-specific news, sports, weather, and politics. With this Order, the Media Bureau grants these four petitions, and finds satellite carriage to be feasible to the extent described below.

2. Petitioner filed the above-captioned Petitions seeking to modify the local satellite carriage television markets of the Stations to include La Plata County, currently assigned to the Albuquerque-

Santa Fe Designated Market Area (DMA).[1] The Stations are: KDVR-TV, Denver, Colorado (Facility ID No. 126) ("KDVR"); KCNC-TV, Denver, Colorado (Facility ID No. 47903) ("KCNC"); KMGH-TV, Denver, Colorado (Facility ID No. 40875) ("KMGH"); and KUSA-TV, Denver, Colorado (Facility ID No. 23074) ("KUSA").[2] A consolidated Opposition to the KDVR and KCNC Petitions was filed by LIN of New Mexico, LLC and LIN of Colorado, LLC ("LIN").[3] A consolidated Opposition to the KMGH and KUSA Petitions was filed by KOAT Hearst Television Inc. and KOB-TV, LLC ("KOAT/KOB").[4] In addition, DISH Network LLC ("DISH") has filed a certification indicating that carriage of all of the Stations into La Plata in standard definition (SD) is feasible,[5] and AT&T/DIRECTV, LLC ("DIRECTV") has filed a certification indicating that SD carriage of all of the Stations into La Plata is feasible at this time, and high definition (HD) carriage is feasible in a portion of the community.[6] Each Petition has been reviewed on its individual merits. Because they were filed simultaneously, and because the Stations are identically situated with respect to the feasibility of their carriage into the county at issue, we have consolidated our decisions into this single Order for the convenience of the parties.[7] For the reasons discussed more fully below, we grant each of La Plata County's Petitions, and modify the markets of KDVR, KCNC, KMGH, and KUSA, with respect to DISH and DIRECTV, to include La Plata County. We conclude that it is feasible for DISH and DIRECTV to offer the Stations throughout La Plata in SD format, and that it is feasible for DIRECTV to do so in HD format except in the seven identified ZIP codes. As discussed below, we further conclude that after the satellite serving La Plata County in SD is decommissioned, it will continue to be feasible for DIRECTV to offer the Stations in HD except in the seven La Plata County ZIP codes identified herein.

II. BACKGROUND

3. Section 338 of the Communications Act authorizes satellite carriage of local broadcast stations into their local markets, which is called "local-into-local" service.[8] 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.[9] 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

[1] *See* Petition for Special Relief (KDVR) of La Plata County, Colorado, MB Docket 16-366 (filed Sept. 7, 2016) (*KDVR Petition*); Petition for Special Relief (KCNC) of La Plata County, Colorado, MB Docket 16-367 (filed Sept. 7, 2016) (*KCNC Petition*); Petition for Special Relief (KMGH) of La Plata County, Colorado, MB Docket 16-368 (filed Sept. 7, 2016) (*KMGH Petition*); and Petition for Special Relief (KUSA) of La Plata County, Colorado, MB Docket 16-369 (filed Sept. 7, 2016) (*KUSA Petition*) (collectively, the *Petitions*). The Media Bureau placed the Petitions on public notice and sought comment. *Special Relief and Show Cause Petitions*, Public Notice, Report No. 0448 (MB Nov. 2, 2016) (*La Plata Public Notice*).

[2] *Petitions* at 1.

[3] *LIN Opposition to Petitions for Special Relief*, MB Dockets 16-366 and 16-367 (filed November 22, 2016) (*LIN Opposition*).

[4] *KOAT/KOB Opposition to Petitions for Special Relief*, MB Dockets 16-368 and 16-369 (filed November 22, 2016) (*KOAT/KOB Opposition*).

[5] *DISH Feasibility Certification* (dated July 14, 2016, filed in MB Docket No. 15-71).

[6] *DIRECTV Feasibility Certification* (dated July 28, 2016, filed in MB Docket No. 15-71). The seven ZIP codes that DIRECTV has certified are not covered by its HD spot beam are 81137, 81301, 81302, 81303, 81326, 81328, and 81329.

[7] *See generally La Plata Public Notice*, *DISH Feasibility Certification*, and *DIRECTV Feasibility Certification*.

[8] 47 U.S.C. § 338(a)(1).

[9] 47 CFR § 76.66(a)(6).

(Nielsen).[10] DMAs describe each television market in terms of a group of counties and are defined by Nielsen based on measured viewing patterns.[11] 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,[12] it generally must carry any qualified local station in the same DMA that makes a timely election for retransmission consent or mandatory carriage.[13]

4. 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.[14] 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 station's local television market to include a new community located in a neighboring local market.[15] 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.

5. 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.[16] 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 this problem by altering the structure of, and therefore the stations located within, a local market was a primary factor in Congress' decision to extend market modification authority to the satellite context.[17]

---

[10] *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).

[11] 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.

[12] 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).

[13] *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.

[14] 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.

[15] *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).

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

[17] *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*).

6. 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, particularly issues of technical and economic feasibility that are specific to the satellite context.[18] Notably, the STELAR carves out an exception to carriage obligations[19] 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."[20] 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.[21] This exception applies only in the satellite context.[22]

7. 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:

(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.[23]

The five statutory factors are not intended to be exclusive. 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

[18] *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.

[19] *See supra* note 11 and accompanying text (describing the "carry one, carry all" satellite carriage requirement).

[20] 47 U.S.C. § 338(l)(3)(A).

[21] *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.").

[22] 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 and 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.

[23] 47 U.S.C. § 338(l)(2)(B)(i)-(v).

particular factors will vary depending on the circumstances of each case. The Commission may also consider other relevant information.[24]

8. 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.[25] 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."[26]

9. 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 cable market modifications.[27] 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.[28]

[24] 47 U.S.C. § 338(h)(1)(C)(ii) directs the Commission to "afford particular attention to the value of localism by taking into account *such factors as*" those described above (emphasis added). The Commission must also consider other relevant information, however, when necessary to develop a result that will "better effectuate the purposes" of the law. *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, ¶ 53 (1999) (*Cable Market Modification Second Report and Order*).

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

[26] *Senate Commerce Committee Report* at 11.

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

[28] 47 CFR § 76.59(b)(1)-(7).

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.[29] 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.[30] Parties may submit whatever additional evidence they deem appropriate and relevant.[31]

10. In the instant proceeding, La Plata filed four Petitions seeking modification of the local television markets of Denver Stations KDVR, KCNC, KMGH, and KUSA to include La Plata County, Colorado. The Petitions were placed on public notice on November 2, 2016.[32] During the pre-filing coordination process, the satellite carriers each filed Feasibility Certifications. DISH's certification states that SD service to the county is feasible, but that HD service is not.[33] DIRECTV's certification explains that: SD service to the county is feasible for the time being, but that the satellite carrying the relevant spot beam is scheduled to be removed from service within the next three years; and HD service is infeasible in seven ZIP codes in La Plata (reflecting the majority of the area of the county) due to insufficient spot beam coverage.[34] We received one joint opposition filed by LIN,[35] and a second filed by KOAT/KOB.[36] These parties argue that the *Petitions* should be dismissed on procedural grounds, and in the alternative that they should be denied based on analysis of the statutory factors. We received supportive comments from local government officials, both of Colorado's United States Senators, and the Congressman representing La Plata County.[37] We also received hundreds of resident comments in support of each of the Petitions.[38]

11. The Commission must make two determinations with respect to each of the Petitions: (1) whether the petition demonstrates that a modification to the station's television market is warranted, based on the five statutory factors and any other relevant information; and (2) whether the resulting carriage of the station from the proposed market modification is technically and economically feasible for each of the satellite carriers.[39] We consider the latter question first, because we will not grant a market

---

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

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

[31] *Id.*

[32] Special Relief and Show Cause Petitions, Public Notice (MB November 22, 2016).

[33] *DISH Feasibility Certification.*

[34] *DIRECTV Feasibility Certification.*

[35] *LIN Opposition.*

[36] *KOAT/KOB Opposition.*

[37] Local representatives filing in support of these petitions include: Senator Michael F. Bennett, Senator Cory Gardner, Congressman Scott R. Tipton, Director Phil Campbell of the Durango-La Plata Emergency Communications Center, and the La Plata County Board of County Commissioners (who filed the petitions on behalf of La Plata County). Long before the commencement of this proceeding, government officials were sharing concerns with the Commission about La Plata's lack of access to in-state programming. *See, e.g.*, Letter from Sen. Mark Udall, Sen. Michael Bennet, Rep. Diana DeGette, Rep. Doug Lamborn, Rep. Ed Perlmutter, Rep. Mike Coffman, Rep. Jared Polis, Rep. Cory Gardner, and Rep. Scott R. Tipton, Colorado Delegation, to Julius Genachowski, Chairman, FCC (Feb. 16, 2011) (cited in *In-State Broadcast Programming: Report to Congress Pursuant To Section 304 of the Satellite Television Extension and Localism Act of 2010*, MB Docket No. 10-238, Report, 26 FCC Rcd 11919 at 10931, n.68 (MB 2011) (*2011 In-State Report*)).

[38] *See generally* MB Docket Nos. 16-366, 16-367, 16-368, and 16-369, and *Petitions* at Exhibit I (some comments were filed in multiple dockets and/or made in reference to more than one station).

[39] 47 U.S.C. § 338(l); *see also* 47 CFR § 76.59.

modification petition if the resulting carriage would be infeasible.[40]

III. DISCUSSION

12. For the reasons set forth below, we find that the evidence weighs in favor of the expansion of KDVR, KCNC, KMGH, and KUSA's markets to include La Plata County. We therefore modify the markets of KDVR, KCNC, KMGH, and KUSA to include La Plata County, and conclude that it is feasible for DISH and DIRECTV to offer the Stations throughout La Plata in SD format. As discussed below, we further conclude that it is feasible for DIRECTV to offer the Stations in high definition (HD) except in the seven La Plata County ZIP codes identified herein.

13. As an initial matter, we waive certain of the evidentiary requirements of Section 76.59.[41] We find good cause to waive these submissions because we have ample evidence to render our decision without them. Because the petition seeks to rectify an orphan county situation, the need for some traditional market modification evidence is diminished, as discussed in more detail below.[42] Accordingly, we find that La Plata should not be held to the same evidentiary standards in this case as we would apply to a traditional petition for market modification, and we waive certain of the requirements of Section 76.59.[43]

A. Technical and Economic Feasibility

14. We find that it is technically and economically feasible for both DISH and DIRECTV to provide each of the Stations to the entirety of La Plata County. As discussed below, however, we recognize that this feasibility in most cases will be limited to the provision of SD service and in some cases will be of limited duration. Section 338(l)(3) of the Communications Act does not require a satellite operator 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.[44] In the *STELAR Market Modification Report and Order,* the Commission concluded that the satellite carrier has the burden to demonstrate that the carriage resulting from a market modification is infeasible.[45] 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.[46]

15. Satellite carriers use spot beams to offer local broadcast stations to targeted geographic

---

[40] *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10442, para. 50.

[41] Specifically, we waive 47 CFR §§ 76.59(b)(2), (3), (5), and (6) to the extent necessary; *see also supra* note 30 and accompanying text.

[42] *Infra* para. 22, discussing the reduced importance, in orphan county cases, of the specific evidence at issue here.

[43] We note that although not required by Section 76.59(b), it has become clear that detailed information about programming is extremely important in the orphan county context. Because of the reduced importance of geographic factors it has increased importance in consideration of factor two, and it is essential in determining how much weight to give to factor three. We therefore strongly encourage and expect future petitioners seeking addition of an orphan county, whether they are broadcasters or the counties themselves, to provide information about specific programming, sports, events, and news stories relevant to the community at issue that have been broadcast by the station(s) at issue, and, if relevant, to explain that they are not regularly broadcast by any station currently serving the county.

[44] 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).

[45] *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10435, para. 38 (observing that, as a practical matter, only the satellite carriers have the specific information necessary to determine if the carriage contemplated in a market modification would not be technically and economically feasible by means of their satellites in operation).

[46] *Id.* at 10435-6, 10438, paras. 39, 42.

areas.[47] 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."[48] The Commission allows satellite carriers to demonstrate spot beam coverage infeasibility by providing a detailed and specialized certification, under penalty of perjury.[49]

16. With respect to other possible bases for a carrier to assert that carriage would be technically or economically infeasible, such as costs associated with changes to customer satellite dishes to accommodate reception from different orbital locations, the Commission determined that it will review infeasibility claims on a case-by-case basis.[50] To demonstrate such infeasibility, the Commission requires carriers to provide detailed technical and/or economic information to substantiate its claim of infeasibility.[51]

17. DIRECTV and DISH each filed Feasibility Certifications in response to the County's Petition. The certifications by each satellite provider were identical for each of the Stations. Both satellite providers indicate that carriage is feasible, with certain qualifications. DISH indicates that due to its "current technical capabilities" it can provide the Stations only in SD format.[52] DIRECTV indicates that the spot beam on which it carries the Stations in HD does not serve seven of the ZIP codes in La Plata County, and that, while it can currently serve the whole county via the spot beam carrying the Stations in SD, the satellite carrying that spot beam is scheduled to be removed from service no later than 2019.[53]

---

[47] *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).

[48] *Id.* at 10410429-30, para. 30. 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 an additional spot beam (using twice as much overall spectrum for the channel at issue as for other channels, which are carried on a single spot beam whenever possible). The Commission found each of these options infeasible. *Id.* at 10431-32, para. 32.

[49] *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.

[50] *Id.* at 10438, para. 42.

[51] *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").

[52] *DISH Feasibility Certification.*

[53] *DIRECTV Feasibility Certification. See also DIRECTV, LLC Response to Petition for Special Relief (DIRECTV Response).*

We find the claims of both satellite providers to be sufficiently supported.

18. We note that, although carriage of the Stations by DIRECTV is feasible at this time, it will cease to be feasible in seven ZIP codes once they are no longer served by a relevant spot beam.[54] Because the removal from service of DIRECTV's satellite could occur as soon as next year and Petitioner has been notified of that schedule, we will not require DIRECTV to petition to remove the seven ZIP codes from the Stations' markets after service becomes infeasible.[55] Instead, DIRECTV may file updated feasibility certifications with the parties and with the Commission once plans and timing for removal of the satellite from service are finalized.[56] If there has been no change in DIRECTV's projected ability to cover the seven ZIP codes with a spot beam carrying the Stations, this updated feasibility certification should provide sufficient information for the Bureau to determine on its own motion that service to these ZIP codes is no longer feasible for DIRECTV, and to remove them from the local market of the Stations as of the date of removal from service of the satellite in question.[57]

B. Orphan County Status

19. La Plata County is one of the counties the Commission has repeatedly and specifically identified as an "orphan" county with insufficient access to in-state programming,[58] and precisely the type of community that Congress intended to assist by broadening the market modification process.[59] The approach we take in our analysis of the statutory factors, accordingly, reflects the unusual fact patterns present in an orphan county scenario. La Plata County is assigned to the Albuquerque-Santa Fe DMA, which includes 28 New Mexico counties, part of one county in Arizona, and just two Colorado counties (La Plata and Montezuma). La Plata County residents who subscribe to satellite television service are served exclusively by stations licensed to communities within the state of New Mexico.[60] The Petitioner argues that residents of La Plata County are currently underserved by the broadcast stations in the Albuquerque-Santa Fe DMA, due to those stations' focus on news and programming information of

---

[54] *DIRECTV Feasibility Certification.* The seven ZIP codes that DIRECTV has certified are not covered by its HD spot beam are 81137, 81301, 81302, 81303, 81326, 81328, and 81329. *See also DIRECTV Response* at 3. Carriage of the stations in HD into eastern La Plata County (ZIP code 81122) is currently feasible, and will remain feasible after the SD spot beam at issue is removed from service. *Id.* This may impact DIRECTV's carriage obligations if it reaches an agreement for carriage with one or more of the Stations. *See* 47 CFR § 76.66(k) ("Material Degradation").

[55] In normal circumstances, a reduction in spot beam coverage that rendered service infeasible would require a new market modification petition or petitions by the satellite carrier. *See STELAR Market Modification Report and Order*, 30 FCC Rcd at 10440, n.231. In these unique circumstances, particularly the apparent certainty that DIRECTV will decommission the satellite as scheduled, requiring DIRECTV to incur the costs of filing such additional petitions would be unnecessary.

[56] These certifications should be filed in the relevant dockets with copies sent electronically to the Chief, Media Bureau and the Chief, Policy Division, Media Bureau.

[57] The Bureau may seek additional information from the parties if there appears to have been any change in relevant circumstances.

[58] *2011 In-State Report*, 26 FCC Rcd at 12480; *Designated Market Areas: Report to Congress Pursuant to Section 109 of the STELA Reauthorization Act of 2014*, MB Docket No. 15-43, Report, 31 FCC Rcd 5463 at 5670, Appendix D. (*2016 In-State Report*)

[59] The "core purpose of this [market modification] provision of the STELAR [is] to promote consumer access to in-state and other relevant programming." *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10415, para. 12.

[60] *2016 In-State Report*, 31 FCC Rcd at 5670. The only full-power commercial broadcast stations serving residents of La Plata County over the air (KRTN-TV and KREZ-TV) are satellites rebroadcasting the signal of New Mexico-based stations.

interest to New Mexicans.[61] This claim is supported by hundreds of comments filed in the docket by county residents and their representatives.[62]

20. Neither Opposition disputes the characterization of La Plata as an "orphan county," although they argue that the stations assigned to the Albuquerque-Santa Fe DMA "[have] been providing the residents of La Plata County, Colorado with extensive coverage of local news, sports, and weather for decades,"[63] and "regularly provide coverage of local news and events in La Plata County, daily weather information, ski and snowboard reports, and other locally-oriented programming."[64] Notwithstanding these arguments, we find no ambiguity with respect to La Plata's status as an orphan county. It is clearly under-served by in-state programming, and is "in one state [] assigned to a neighboring state's local television market and, therefore, satellite subscribers residing in [La Plata] cannot receive some or any broadcast stations that originate in-state."[65]

21. With the STELAR's revisions to the market modification process, and its addition of a satellite market modification process, Congress intended to address orphan county situations like these. Indeed, the legislative history observes 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 instructs us to "consider the plight of these consumers when judging the merits of a [market modification] petition ..., even if granting such modification would pose an economic challenge to various local television broadcast stations."[66] As we observed in the *STELAR Market Modification Report and Order*, "each petition for market modification will turn on the unique facts of the case," and there is no single universal way to weight the statutory factors.[67] We analyze these factors here in light of the importance Congress placed on addressing orphan

[61] *Petitions* at 3.

[62] *See generally* MB Docket Nos. 16-366, 16-367, 16-368, and 16-369.

[63] *LIN Opposition* at 2.

[64] *KOAT/KOB Opposition* at 5-6.

[65] *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10408, n.5. We note that immediately prior to the commencement of this proceeding, the Stations submitted a letter to Colorado Senators Michael Bennet and Cory Gardner stating that they would be willing to negotiate with satellite providers for "targeted" carriage of their locally-produced news and public affairs programming, to the extent that this programming is not duplicated by an Albuquerque broadcaster. Letter from Colorado Broadcasters Association Members to Senator Michael Bennet and Senator Cory Gardner (August 29, 2016) (included in *Petitions* at Exhibit H). This kind of targeted DBS carriage would be theoretically possible even absent a market modification, because stations own the copyright in their locally produced programming. This means that a satellite carrier with rights to carry this specific programming would not need the statutory copyright license it uses to redistribute the entirety of an in-market broadcast signal (and that it would be able to rely upon in the event of a market modification). It would, however, need to devote the bandwidth of an entire satellite "channel" to each station for which it carried targeted programming, and show subscribers a blank screen on that channel during any non-local programming. KOAT/KOB argue in their Opposition that the Denver stations' willingness to negotiate for such "targeted" carriage obviates the need for grant of the Petitions, as they see "no justification why the Denver Stations' willingness to import their local news and public affairs programming would not achieve the very goals of the Petitions without the need for FCC intervention." *KOAT/KOB Opposition* at 17. However, as evidenced by passage of the STELAR, Congress did see a significant justification for FCC intervention in precisely this type of scenario. The availability of "targeted carriage" does not, in fact, achieve the "goals of the Petitions," or of Congress. As La Plata County observes, a satellite provider would be unlikely to even have the capacity to carry a "special, blacked out feed" of the Stations just to ensure that subscribers in a single county could receive a portion of those Stations' programming. *La Plata Reply to Oppositions to Petitions for Special Relief* at 6-7 (filed in dockets 16-366, 16-367, 16-368, and 16-369) (*Reply to Oppositions*).

[66] *Senate Commerce Committee Report* at 11.

[67] *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10421, para. 18.

counties' inability to receive in-state programming. We conclude that this is necessary in order to best effectuate the goals of the STELAR.[68]

22. In particular, we note that in-state programming is a type of "local" service.[69] Unlike in a traditional market modification process, in which a station might demonstrate a local connection through geographic proximity tests, in-state stations are more likely to demonstrate that they are "local" through evidence showing they seek to provide a community with access to news, politics, sports, emergency and other programming specifically related to their home state. Heavy reliance on geographic proximity tests in the context of an orphan county fact pattern seems especially inappropriate given the "remote geographic location of orphan counties"[70] and the fact that they are by definition on the outskirts of a petitioner's home state. Accordingly, we find that tests based on geographic proximity, which have historically been considered important for demonstrating a market nexus between a station and a community, are of significantly reduced relevance in the orphan county context. Similarly, we would anticipate that historic carriage of a petitioner station would be less common and its viewer ratings would be lower in an orphan county than we have found in prior successful market modification proceedings.[71] To hold orphan county market modification petitions to these pre-STELAR standards would frustrate the will of Congress, which instructed us to "consider the plight" of viewers in these counties. Therefore, in line with Congress' addition of the new third statutory factor, in orphan county situations we will give substantial weight to the local/in-state programming a petitioner proposes to bring to the orphan county

[68] We will weigh the factors in the same manner in the event of any future cable market modification petition regarding communities within an orphan county. By adding the new statutory factor number three to both new DBS modification processes and existing cable modification processes, Congress made clear that we should do so. *STELAR Market Modification Report and Order,* 30 FCC Rcd at 10420, para. 17 ("the STELAR added a fifth factor (inserted as the new third statutory factor) for both cable and satellite to 'promote consumers' access to television broadcast station signals that originate in their State of residence.'"). We note, however, that the impact of a market modification may be different in a cable context than in a satellite context, even in situations where the fact patterns are otherwise similar, and this differing impact may lead us to a different result. Although cable operators are not required to carry duplicating stations or more than one local station affiliated with a particular network, if a cable system declines to carry duplicating stations, it must at least carry the station closest to the principal headend of the cable system, even if that station is from another state. *See* 47 CFR § 76.56(b)(5). By contrast, in the satellite carriage context, if two stations are located in the same market but different states and are affiliated with the same network, the satellite carrier must carry both of them. *See* 47 U.S.C. § 338(c)(1); 47 CFR § 76.66(h)(1) (*and see* 47 CFR § 76.66(h)(2)-(3), explaining that if the duplicating stations are both in the same state, the satellite carrier may choose which to carry, regardless of their location). In both the cable and satellite contexts an operator may choose to carry multiple duplicating stations, but is unlikely to do so absent a requirement, due to bandwidth constraints. As a result of these different regimes, a cable market modification could result in the cable system dropping an established station in favor of a new station, but a satellite carrier would either be required to carry both versions of a duplicating station or could choose to carry only the already-established station. Thus, the potential for market disruption of long-established network stations is lower in the satellite context, and we are therefore more likely, even if only marginally more likely, to grant DBS orphan county market modification petitions.

[69] *See Senate Commerce Committee Report* at 15 ("The Committee intends that the FCC's report will interpret local programming to include not only television programming (in particular news, sports, weather, and other programming containing content relevant to a consumer's daily life) originating from and about the DMA in which a consumer resides, but also television programming originating from and about the State in which a consumer resides."). *See also Gray Television Licensee, LLC For Modification of the Satellite Television Market For WSAW-TV, Wausau, Wisconsin*, MB Docket No. 16-293, CSR No. 8926-A, Memorandum Opinion and Order, DA 17-74, para. 27 (MB 2017).

[70] *Id.* at 10418, para. 15.

[71] *See, e.g., Tennessee Broadcasting Partners*, 23 FCC Rcd 3928 (MB 2008). *NB*: like all pre-STELAR market modification cases, *Tennessee* is a cable case, not a DBS case. The most important difference, however, is that Petitioner's case involves an orphan county, not that the markets being modified are satellite rather than cable markets.

when determining whether a nexus to a new community has been demonstrated, and will consider the other factors, when they apply, as enhancements to a petitioner's case.[72] In particular, as the Commission explained in the *STELAR Market Modification Report and Order*, government official and consumer comments supporting a proposed market modification can be particularly valuable in demonstrating a nexus between the station and the community.[73]

23. Applying this framework to each of the simultaneously-filed KDVR, KCNC, KMGH, and KUSA Petitions, we find that each Station has a significant nexus to La Plata County, primarily demonstrated through the local/in-state programming provided by each Station and the substantial and widespread support of La Plata County residents and government officials for these modifications. We therefore grant the modifications.

C. KDVR-TV

24. *Historic Carriage.* The first factor we must consider is "whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community; or have been historically carried on the satellite carrier or carriers serving such community."[74] We find this factor to be neutral in our analysis. As discussed above, we consider this an enhancement factor in the orphan county context. LIN correctly observes that Petitioner provides no evidence with respect to historic carriage of KDVR in La Plata County.[75] Petitioner essentially concedes this point, stating that "there has not been historic carriage of the Station in the County by satellite carriers,"[76] and making no representation with respect to cable carriage.[77] Absent any evidence of historic carriage, and given that this is an enhancement factor in the orphan county context, we give it no weight in our consideration of whether to grant the Petition.

25. *Local Service.* Second, we consider "whether the television station provides coverage or other local service to the community."[78] We find that this factor weighs heavily in favor of a grant of the Petition. As explained above, we find that evidence related to distance such as contour maps and "shopping and labor patterns" are not determinative in the consideration of a market modification request involving an orphan county, though they generally must be submitted as part of a market modification

---

[72] In contrast, in market modification proceedings that do not involve the addition or deletion of an in-State broadcaster, the Media Bureau has found that the third statutory factor is inapplicable. *See COXCOM, LLC*, 30 FCC Rcd 10978, 10999, para 46 (MB 2015) ("The mere possibility that a cable system might carry in-state programming in place of the deleted station is not sufficient to make use of the in-state enhancement factor.").

[73] *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10417, n.61.

[74] 47 U.S.C. § 338(l)(2)(B)(i).

[75] *LIN Opposition* at 2.

[76] We note that the lack of historic satellite carriage will generally be irrelevant in any market modification petition, given that DBS providers are generally authorized to carry broadcast stations only in their local markets. 17 U.S.C. § 119(a)(3) (explaining that there are only narrow circumstances under which a DBS provider may receive a statutory copyright license for the importation of out-of-market (or "distant") signals). It would have been extremely difficult and unlikely for KDVR, assigned to the Denver DMA, to have obtained satellite carriage in the Albuquerque-Santa Fe DMA prior to the advent of satellite market modification.

[77] *KDVR Petition* at 6.

[78] 47 U.S.C. § 338(l)(2)(B)(ii). To show that a station provides coverage or other local service to communities at issue in a market modification petition, parties must provide "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." 47 CFR § 76.59(b)(2). A station's broadcast of programming specifically targeted to the community at issue may also serve as evidence of local service. *See, e.g.*, *Jones Cable TV Fund 12-A, Ltd.*, 14 FCC Rcd 2808, 2818, at para. 24 (Cable Services Bureau 1999).

petition[79] and may enhance a petitioner's case.[80] The LIN Opposition correctly notes that KDVR provides no over-the-air coverage of La Plata County,[81] and Petitioner declined to provide evidence of "shopping and labor patterns" between the county and Denver, KVDR's city of license.[82] LIN suggests that these omissions render support for factor two "either superficial or entirely absent."[83] This, however, is a misreading of the second statutory factor, which is not limited to the narrow presence or absence of over-the-air coverage of the community by the broadcast signal at issue, but requires us to consider the overall "local service to the community" provided by the station.[84]

26. In this case, we find that overall geographic proximity measures do not enhance the Petitioner's case, and we thus consider them neutral. Instead, to determine whether there is a sufficient nexus between KDVR and La Plata County to justify a market modification, we assess whether the programming offered by KDVR meets the informational and service needs of the local residents of La Plata County, based both on our review of specific programming and on government and consumer comments.[85] In doing so, we are mindful of Congress' intention that "local" programming under this factor should, particularly in the case of orphan counties like La Plata, be interpreted to include all programming "originating from and about" their state.[86] We hold that all programming carried on KDVR and specifically targeted to either the State of Colorado or La Plata County is relevant to our consideration of factor two, including the multiple daily Colorado-produced and Colorado-focused news programs aired by KDVR.[87] We accordingly find that KDVR carries a significant amount of local programming of interest to La Plata, particularly Colorado-specific public affairs programming, demonstrating a local connection.[88] We also give substantial weight to the hundreds of comments from residents and their government representatives supporting the Petition.[89] As the Commission noted in the *STELAR Market Modification Report and Order*, "local government and consumer comments in a market modification proceeding can help demonstrate a station's nexus to the community at issue."[90] These comments show the significance that residents place on Colorado-specific programming, and the specific

[79] 47 CFR § 76.59(b)(2), (3).

[80] *Supra* para. 22.

[81] *Lin Opposition* at 2, 5.

[82] *KDVR Petition* at 6.

[83] *LIN Opposition* at 1.

[84] This includes, in particular, locally-relevant programming. *See, e.g.*, *Jones Cable TV Fund 12-A, Ltd.*, 14 FCC Rcd 2808, 2818, at para. 24 (Cable Services Bureau 1999).

[85] *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10417, n.61.

[86] *Senate Commerce Committee Report* at 11, 15 (explaining that the "many consumers, particularly those who reside in DMAs that cross State lines or cover vast geographic distances, have expressed concerns that they lack access to local television programming that is relevant to their everyday lives" and directing the Commission to interpret local programming to include "not only television programming [. . .] originating from and about the DMA in which a consumer resides, but also television programming originating from and about the State in which a consumer resides").

[87] *KDVR Petition* at 6 and Exhibit C.

[88] *See, e.g.*, "New DMV License Rollout" (aired 4/6/16); "Oil Jobs Leaving Colorado" (aired 1/18/16); "Colorado Voters Still Approve Marijuana" (Aired 9/19/16) "Colorado 2016 Ballot Guide" (aired on multiple days and news programs prior to 11/8/2016, and discussing every statewide ballot measure in detail); "CSU Rams Heading to Bowl Game" (Aired 12/28/15).

[89] *See generally* MB Docket no. 16-366 and *KDVR Petition* at Exhibit 1.

[90] *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10417, n.61.

types of coverage they seek (which coverage, as noted immediately above, is available on a regular basis on KDVR).[91]

27. *Access to In-State Stations*. The third, post-STELAR factor we consider is "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."[92] We find that a market modification would promote La Plata County's access to an in-state television broadcast signal and enhance viewers' access to in-state local programming that is otherwise of limited availability, and therefore that this factor weighs heavily in favor of granting the Petition. This factor is satisfied by introduction of an in-state station to a community, but weighs more heavily in favor of modification if the petitioner shows that the involved station provides programming specifically related to subscribers' state of residence, and may be given even more weight if subscribers in the new community have little (or no) access to such in-state programming.[93]

28. LIN misunderstands both the purpose and the application of the third statutory factor in saying that "the weight given to the so-called [*sic*] in-state factor is minimized because the Petitioner cannot show that La Plata County residents 'had little (or no) access' to programming specifically related to La Plata County."[94] First, the in-state factor is never "minimized" so long as the station is located in the same state as the local market in question – the Commission was explicit that "a petitioner will be afforded credit for satisfying this factor simply by showing that the involved station is licensed to a community within the same state as the new community."[95] Second, the presence of "programming specifically related to La Plata County" is unnecessary in order for this factor to receive the greatest possible weight, because that weight is applied as a result of the provision of limited availability programming "specifically related to subscribers' *state* of residence,"[96] not their *county* of residence.

29. KDVR is a FOX affiliate licensed to Denver, Colorado, a community within the same state as La Plata County, Colorado. As discussed above,[97] KDVR provides programming specifically related to Colorado, the state of residence of La Plata County residents. As is made clear from the hundreds of comments supporting this petition,[98] La Plata County residents currently have "little (or no) access" to some of the Colorado-specific programming provided by KDVR. As discussed in more detail below, LIN station KRQE has aired some stories relevant to La Plata County residents.[99] LIN does not dispute,

---

[91] *See, e.g.*, Robert Winslow Comments ("There were a number of ballot issues in Colorado this year and we were not able to receive news about them since the local network newscasts originate in New Mexico. We would also like to be able to receive current news about our Colorado sports teams - not just the professional ones, but high school and college as well. There are many graduates in our area from the University of Colorado and Colorado State University and other state colleges and they would like to hear coverage of their Alma Maters."); Malcolm Perkins Comments ("I am a big Colorado sports fan. I try to keep up with the political happenings in my state, not to mention the weather forecasts, entertainment, and news of Colorado. To know more about what goes on in New Mexico than my own state is ludicrous and completely unacceptable."); Jon Powell and Linda Arndt Comments ("We need access to Denver TV for state-wide news, weather, events, and politics. Currently we receive those items only from Albuquerque NM where we can't vote").

[92] 47 U.S.C. § 338(l)(2)(B)(iii).

[93] *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10420, para. 18.

[94] *LIN Opposition* at 5.

[95] *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10420, para. 18.

[96] *Id.* (emphasis added).

[97] *Supra* note 88.

[98] *Supra* note 89.

[99] *Infra* para. 30. LIN appears to argue that its stations' provision of some locally relevant news and sports programming to La Plata County is, by itself, grounds for denial of the KDVR Petition. *See* LIN Opposition at 4,

(continued....)

however, nor does its proffered evidence refute, the claims by Petitioner and commenters that La Plata County residents lack the opportunity to regularly view state and local political and public affairs coverage specific to the State of Colorado.[100] As discussed above, KDVR offers precisely this type of Colorado-specific public affairs programming.[101]

30. *Other Local Stations*. Fourth, we consider "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."[102] We conclude that this factor is neutral in our analysis. The Commission has held that, in all market modification petitions, the fourth factor may serve to enhance a petitioner's claim if it is demonstrated that there is no other station serving the community at issue, but that the factor will neither weigh in favor of or against a modification request if another station serves that community.[103] KRQE is an Albuquerque-based broadcast station carrying both CBS and FOX programming on multiple streams. It is the primary and in most cases sole source of those networks for cable and satellite television subscribers in La Plata County. The LIN Opposition provides evidence that KRQE has aired some stories relevant to La Plata County residents in the past 18 months, though sometimes through a New Mexico-centric lens (*e.g.*, "New Mexico to sue EPA over mine spill," "Poll names New Mexico railroad best in nation").[104] The LIN Opposition also states that every regular season Denver Broncos game in the past three years has been carried on KRQE, and has as a result been available to La Plata County viewers.[105] Petitioner does not dispute these claims.[106] Because other stations, including KRQE, provide the county with coverage of local issues and carriage of local sports,

(Continued from previous page)
Section II (entitled "Evidence that LIN's La Plata County-based stations provide the area with extensive local news, weather, and sports coverage significantly outweighs the paucity of evidence in the petitions and supports denial of the market modification requests." We note that the amount of local service provided by other stations is relevant to our consideration of this factor only to the extent that it allows us to determine the degree of weight to grant it. Local service provided by other stations primarily comes into play in our consideration of factor four, below. We have previously concluded that what is now the fourth factor of market modification assessments, which concerns local programming provided by other stations, was intended to "enhance a station's [market modification] claim where it could be shown that other stations do not serve the communities at issue." *Paxson San Jose License, Inc.*, 12 FCC Rcd 17520, 17526, at para. 13 (Cable Services Bureau 1997). However, in cases where other stations do serve the communities, "this factor neither weighs against nor in favor of [Petitioner's] modification request." *Petition for Modification of the Dayton, OH Designated Market Area with respect to Television Station WHIO-TV, Dayton, OH*, 28 FCC Rcd 16011, 16019 (MB 2013) ("*Dayton*"). As such, no simple demonstration that other stations offer the community at issue access to local programming can serve as sufficient basis for the rejection of a petition for market modification.

[100] *KDVR Petition* at 4.

[101] *Supra* note 88.

[102] 47 U.S.C. § 338(l)(2)(B)(iv).

[103] *See e.g.*, *Great Trails Broadcasting Corp.*, 10 FCC Rcd 8629, 8633, para. 23 (1995); *Paxson San Jose License, Inc.*, 12 FCC Rcd 17520, 17526, para. 13 (1997).

[104] *Lin Opposition* at 5-7 (listing 23 stories aired over approximately 18 months that are arguably relevant to La Plata County viewers).

[105] *Id.* at 7.

[106] La Plata County states that they are "unaware of another in-state local broadcast station carried by a satellite provider in the County that offers Denver- and Colorado-oriented news coverage of issues of concern to residents of the County." *Reply to Oppositions* at 11. We note that, with respect to factor four, it is not important that the coverage be provided by an in-state broadcaster, or that the broadcaster in question actually be carried by a satellite provider. What matters is whether any station eligible for satellite carriage into the county provides coverage of matters of "concern" and "interest" to the county.

we find that this factor weighs neither against nor in favor of La Plata County's request to modify KDVR's market, and give it no weight in our consideration of whether to grant the Petition.

31. *Viewing Patterns.* Finally, we consider "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."[107] This factor also is neutral in our analysis. As discussed above, we consider this an enhancement factor in the orphan county context.[108] The LIN Opposition correctly observes that Petitioner provides no evidence of household viewing patterns. The Petitioner argues that, "given the lack of historical [*sic*] carriage of the Station in the County, Nielsen rating or other audience data would not be helpful in evaluating this Petition."[109] Absent any evidence with respect to viewing patterns, and given that this is an enhancement factor in the orphan county context, we give it no weight in our consideration of whether to grant the KDVR Petition.

32. *Conclusion.* The issue before us is whether to grant Petitioner's request to modify the local satellite carriage market of KDVR—of the Denver DMA—to include Colorado's La Plata County, which is currently assigned by Nielsen to the Albuquerque-Santa Fe (New Mexico) DMA.[110] Section 338(l) permits the Commission to add or exclude communities from a station's local television market to better reflect market realities and to promote residents' access to local programming from broadcasters located in their State.[111] Under this statutory provision, the Commission must afford particular attention to the value of localism.[112] We have found that the second and third statutory factors weigh heavily in favor of a grant. We have found that the first and fifth factors do not support grant of the Petition, but are given no weight because they serve exclusively as enhancement factors in a petition relating to an orphan county. We have found that the fourth factor is neutral. Overall, we are persuaded by the strength of the evidence supporting factors two and three that a sufficient market nexus exists between KDVR and La Plata County. We accordingly grant La Plata's request for market modification, and order the addition of La Plata County to the local market of KDVR on both DISH and DIRECTV.[113]

D. KCNC-TV

33. *Historic Carriage.* The first factor we must consider is "whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community; or have been historically carried on the satellite carrier or carriers serving such community."[114] We find this factor to be neutral in our analysis. As discussed above, we consider this an

[107] 47 U.S.C. § 338(l)(2)(B)(v).

[108] *Supra* para. 22.

[109] *KDVR Petition* at 6.

[110] *KDVR Petition* at 1.

[111] *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10412-13, para. 7.

[112] *Id.*

[113] This grant is subject to the limits described in the Technical and Economic Feasibility section, *supra*. We note that, importantly and contrary to the claims made by KOAT/KOB (*KOAT/KOB Opposition* at 1-2, 5, 15), the expansion of this Station's market to include La Plata County neither adds La Plata County to the Denver DMA, nor removes it from the Albuquerque-Santa Fe DMA. *See Reply to Oppositions* at 5. It also will not result in the loss of Albuquerque stations' ability to seek DBS carriage into La Plata County. *Supra* note 68 (discussing 47 U.S.C. § 338(c)(1) and 47 CFR § 76.66(h)(1)). Nor will it in any way limit access to existing pay-TV or over-the-air service from the New Mexico stations, the only concern raised by the small number of consumer commenters who did not support the Petitions. *See, e.g.*, Dell Wells Comments (Docket no. 16-366) and Greg Spradling Comments (Docket nos. 16-366, 16-367, 16-368, 16-369). Accordingly, grant of this Petition will only give more choices to viewers in La Plata County.

[114] 47 U.S.C. § 338(l)(2)(B)(i).

enhancement factor in the orphan county context. LIN correctly observes that Petitioner provides no evidence with respect to historic carriage of KCNC in La Plata County.[115] Petitioner essentially concedes this point, stating that "there has not been historic carriage of the Station in the County by satellite carriers,"[116] and making no representation with respect to cable carriage.[117] Absent any evidence of historic carriage, and given that this is an enhancement factor in the orphan county context, we give it no weight in our consideration of whether to grant the Petition.

34. *Local Service*. Second, we consider "whether the television station provides coverage or other local service to the community."[118] We find that this factor weighs heavily in favor of a grant of the Petition. As explained above, we find that evidence related to distance such as contour maps and "shopping and labor patterns" are not determinative in the consideration of a market modification request involving an orphan county, though they generally must be submitted as part of a market modification petition[119] and may enhance a Petitioner's case.[120] The LIN Opposition correctly notes that KCNC provides no over-the-air coverage of La Plata County,[121] and Petitioner declined to provide evidence of "shopping and labor patterns" between the county and Denver, KVDR's city of license.[122] LIN suggests that these omissions render support for factor two "either superficial or entirely absent."[123] This, however, is a misreading of the second statutory factor, which is not limited to the narrow presence or absence of over-the-air coverage of the community by the broadcast signal at issue, but requires us to consider the overall "local service to the community" provided by the station.[124]

35. In this case, we find that overall geographic proximity measures do not enhance the Petitioner's case, and we thus consider them neutral. Instead, to determine whether there is a sufficient nexus between KCNC and La Plata County to justify a market modification, we assess whether the programming offered by KCNC meets the informational and service needs of the local residents of La Plata County, based both on our review of specific programming and on government and consumer comments.[125] In doing so, we are mindful of Congress' intention that "local" programming under this

---

[115] *LIN Opposition* at 2.

[116] We note that the lack of historic satellite carriage will generally be irrelevant in any market modification petition, given that DBS providers are generally authorized to carry broadcast stations only in their local markets. 17 U.S.C. § 119(a)(3) (explaining that there are only narrow circumstances under which a DBS provider may receive a statutory copyright license for the importation of out-of-market (or "distant") signals). It would have been extremely difficult and unlikely for KCNC, assigned to the Denver DMA, to have obtained satellite carriage in the Albuquerque-Santa Fe DMA prior to the advent of satellite market modification.

[117] *KCNC Petition* at 6.

[118] 47 U.S.C. § 338(l)(2)(B)(ii). To show that a station provides coverage or other local service to the communities at issue in a market modification petition, parties must provide "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." 47 CFR § 76.59(b)(2). A station's broadcast of programming specifically targeted to the community at issue may also serve as evidence of local service. *See, e.g.*, *Jones Cable TV Fund 12-A, Ltd.*, 14 FCC Rcd 2808, 2818, at para. 24 (Cable Services Bureau 1999).

[119] 47 CFR § 76.59(b)(2), (3).

[120] *Supra* para. 22.

[121] *Lin Opposition* at 2, 5.

[122] *KCNC Petition* at 6.

[123] *LIN Opposition* at 1.

[124] This includes, in particular, locally-relevant programming. *See, e.g.*, *Jones Cable TV Fund 12-A, Ltd.*, 14 FCC Rcd 2808, 2818, at para. 24 (Cable Services Bureau 1999).

[125] *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10417, n.61.

factor should, particularly in the case of orphan counties like La Plata, be interpreted to include all programming "originating from and about" their state.[126] We hold that all programming carried on KCNC and specifically targeted to either the State of Colorado or La Plata County is relevant to our consideration of factor two, including the multiple daily Colorado-produced and Colorado-focused news programs aired by KCNC.[127] We accordingly find that KCNC carries a significant amount of local programming of interest to La Plata, particularly Colorado-specific public affairs programming, demonstrating a local connection.[128] We also give substantial weight to the hundreds of comments from residents and their government representatives supporting the Petition.[129] As the Commission noted in the *STELAR Market Modification Report and Order*, "local government and consumer comments in a market modification proceeding can help demonstrate a station's nexus to the community at issue."[130] These comments show the significance that residents place on Colorado-specific programming, and the specific types of coverage they seek (which coverage, as noted immediately above, is available on a regular basis on KCNC).[131]

36. *Access to In-State Stations*. The third, post-STELAR factor we consider is "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."[132] We find that a market modification would promote La Plata County's access to an in-state television broadcast signal and enhance viewers' access to in-state local programming that is otherwise of limited availability, and therefore that this factor weighs heavily in favor of granting the Petition. This factor is satisfied by introduction of an in-state station to a community, but weighs more heavily in favor of modification if the petitioner shows the involved station provides programming specifically related to subscribers' state of residence, and may be given even more weight if subscribers in the new community have little (or no) access to such in-state programming.[133]

37. LIN misunderstands both the purpose and the application of the third statutory factor in saying that "the weight given to the so-called [*sic*] in-state factor is minimized because the Petitioner cannot show that La Plata County residents 'had little (or no) access' to programming specifically related

---

[126] *Senate Commerce Committee Report* at 11, 15 (explaining that the "many consumers, particularly those who reside in DMAs that cross State lines or cover vast geographic distances, have expressed concerns that they lack access to local television programming that is relevant to their everyday lives" and directing the Commission to interpret local programming to include "not only television programming [. . .] originating from and about the DMA in which a consumer resides, but also television programming originating from and about the State in which a consumer resides").

[127] *KCNC Petition* at 6 and Exhibit C.

[128] *See, e.g.*, October 20, 2016 story on the first national election in which all Colorado voters could vote by mail; December 9, 2016 story on the uncertain status of several Colorado ballot measures; April 1, 2016 story on a partial end to the Colorado ban on letting a car run without anyone inside to warm it up; July 24, 2015 story on Colorado marijuana legalization leading to CDC warnings about pot edibles.

[129] *See generally* MB Docket no. 16-367 and *KCNC Petition* at Exhibit I.

[130] *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10417, n.61.

[131] *See, e.g.*, Kari Plante Comments ("I do not know what is going on in the state that I live in. It is hard to vote if one does not know who the candidates are."); Jill Fischer Comments ("How are we expected to be educated voters if the only information we receive comes out of New Mexico! We need Colorado news to know what is going on in our state!"); James Ottman Comments ("We have never seen our Governor on TV, expect [*sic*] when he is on national news."); Chris Mimmack Comments ("I would like to be able to be educated on the political figures that represent the state of Colorado as well as any law changes or amendments that affect the residents of Colorado.").

[132] 47 U.S.C. § 338(l)(2)(B)(iii).

[133] *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10420, para. 18.

to La Plata County."[134] First, the in-state factor is never "minimized" so long as the station is located in the same state as the local market in question – the Commission was explicit that "a petitioner will be afforded credit for satisfying this factor simply by showing that the involved station is licensed to a community within the same state as the new community."[135] Second, the presence of "programming specifically related to La Plata County" is totally unnecessary in order for this factor to receive the greatest possible weight, because that weight is applied as a result of the provision of limited availability programming "specifically related to subscribers' *state* of residence,"[136] not their *county* of residence.

38. KCNC is a CBS owned and operated station licensed to Denver, Colorado, a community within the same state as La Plata County, Colorado. As discussed above,[137] KCNC provides programming specifically related to Colorado, the state of residence of La Plata County residents. As is made clear from the hundreds of comments supporting this petition,[138] La Plata County residents currently have "little (or no) access" to some of the Colorado-specific programming provided by KCNC. As discussed in more detail below, LIN station KRQE has aired some stories relevant to La Plata County residents.[139] LIN does not dispute, however, nor does its proffered evidence refute, the claims by Petitioner and commenters that La Plata County residents lack the opportunity to regularly view state and local political and public affairs coverage specific to the State of Colorado.[140] As discussed above, KCNC offers precisely this type of Colorado-specific public affairs programming.[141]

39. *Other Local Stations*. Fourth, we consider "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."[142] We conclude that this factor is neutral in our analysis. The Commission has held that, in all market modification petitions, the fourth factor may serve to enhance a petitioner's claim if it is demonstrated that there is no other station serving the community at issue, but that the factor will neither weigh in favor of or against a modification request if

---

[134] *LIN Opposition* at 5.

[135] *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10420, para. 18.

[136] *Id.* (emphasis added).

[137] *Supra* note 128.

[138] *Supra* note 129.

[139] *Infra* para. 39. LIN appears to argue that its stations' provision of some locally relevant news and sports programming to La Plata County is, by itself, grounds for denial of the KDVR Petition. *See LIN Opposition* at 4, Section II (entitled "Evidence that LIN's La Plata County-based stations provide the area with extensive local news, weather, and sports coverage significantly outweighs the paucity of evidence in the petitions and supports denial of the market modification requests." We note that the amount of local service provided by other stations is relevant to our consideration of this factor only to the extent that it allows us to determine the degree of weight to grant it. Local service provided by other stations primarily comes into play in our consideration of factor four, below. We have previously concluded that what is now the fourth factor of market modification assessments, which concerns local programming provided by other stations, was intended to "enhance a station's [market modification] claim where it could be shown that other stations do not serve the communities at issue." *Paxson San Jose License, Inc.*, 12 FCC Rcd 17520, 17526, at para. 13. However, in cases where other stations do serve the communities, "this factor neither weighs against nor in favor of [Petitioner's] modification request." *Dayton*, 28 FCC Rcd at 16019. As such, no simple demonstration that other stations offer the community at issue access to local programming can serve as sufficient basis for the rejection of a petition for market modification.

[140] *KCNC Petition* at 4.

[141] *Supra* note 128.

[142] 47 U.S.C. § 338(l)(2)(B)(iv).

another station serves that community.[143] KRQE is an Albuquerque-based broadcast station carrying both CBS and FOX programming on multiple streams. It is the primary and in most cases sole source of those networks for cable and satellite television subscribers in La Plata County. The LIN Opposition provides evidence that KRQE has aired some stories relevant to La Plata County residents in the past 18 months, though sometimes through a New Mexico-centric lens (*e.g.*, "New Mexico to sue EPA over mine spill," "Poll names New Mexico railroad best in nation").[144] The LIN Opposition also states that every regular season Denver Broncos game in the past three years has been carried on KRQE, and has as a result been available to La Plata County viewers.[145] Petitioner does not dispute these claims.[146] Because other stations, including KRQE, provide the county with coverage of local issues and carriage of local sports, we find that this factor weighs neither against nor in favor of La Plata County's request to modify KCNC's market, and give it no weight in our consideration of whether to grant the Petition.

40. *Viewing Patterns*. Finally, we consider "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."[147] This factor also is neutral in our analysis. As discussed above, we consider this an enhancement factor in the orphan county context.[148] The LIN Opposition correctly observes that Petitioner provides no evidence of household viewing patterns. The Petitioner argues that, "given the lack of historical [*sic*] carriage of the Station in the County, Nielsen rating or other audience data would not be helpful in evaluating this Petition."[149] Absent any evidence with respect to viewing patterns, and given that this is an enhancement factor in the orphan county context, we give it no weight in our consideration of whether to grant the KCNC Petition.

41. *Conclusion*. The issue before us is whether to grant Petitioner's request to modify the local satellite carriage market of KCNC—of the Denver DMA—to include Colorado's La Plata County, which is currently assigned by Nielsen to the Albuquerque-Santa Fe (New Mexico) DMA.[150] Section 338(l) permits the Commission to add or exclude communities from a station's local television market to better reflect market realities and to promote residents' access to local programming from broadcasters located in their State.[151] Under this statutory provision, the Commission must afford particular attention to the value of localism.[152] We have found that the second and third statutory factors weigh heavily in favor of a grant. We have found that the first and fifth factors do not support grant of the Petition, but are given no

[143] *See e.g.*, *Great Trails Broadcasting Corp.*, 10 FCC Rcd 8629, 8633, para. 23 (1995); *Paxson San Jose License, Inc.*, 12 FCC Rcd 17520, 17526, para. 13 (1997).

[144] *Lin Opposition* at 5-7 (listing 23 stories aired over approximately 18 months that are arguably relevant to La Plata County viewers).

[145] *Id.* at 7.

[146] La Plata County states that they are "unaware of another in-state local broadcast station carried by a satellite provider in the County that offers Denver- and Colorado-oriented news coverage of issues of concern to residents of the County." *Reply to Oppositions* at 11. We note that, with respect to factor four, it is not important that the coverage be provided by an in-state broadcaster, or that the broadcaster in question actually be carried by a satellite provider. What matters is whether any station eligible for satellite carriage into the county provides coverage of matters of "concern" and "interest" to the county.

[147] 47 U.S.C. § 338(l)(2)(B)(v).

[148] *Supra* para. 22.

[149] *KCNC Petition* at 6.

[150] *KCNC Petition* at 1.

[151] *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10412-13, para. 7.

[152] *Id.*

weight because they serve exclusively as enhancement factors in a petition relating to an orphan county. We have found that the fourth factor is neutral. Overall, we are persuaded by the strength of the evidence supporting factors two and three that a sufficient market nexus exists between KCNC and La Plata County. We accordingly grant La Plata's request for market modification, and order the addition of La Plata County to the local market of KCNC on both DISH and DIRECTV.[153]

E. KMGH-TV

42. *Historic Carriage.* The first factor we must consider is "whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community; or have been historically carried on the satellite carrier or carriers serving such community."[154] We find this factor to be neutral in our analysis. As discussed above, we consider this an enhancement factor in the orphan county context. KOAT/KOB correctly observes that Petitioner provides no evidence with respect to historic carriage of KMGH in La Plata County.[155] Petitioner essentially concedes this point, stating that "there has not been historic carriage of the Station in the County by satellite carriers,"[156] and making no representation with respect to cable carriage.[157] Absent any evidence of historic carriage, and given that this is an enhancement factor in the orphan county context, we give it no weight in our consideration of whether to grant the Petition.

43. *Local Service.* Second, we consider "whether the television station provides coverage or other local service to the community."[158] We find that this factor weighs heavily in favor of a grant of the petition. As explained above, distance tests such as contour maps are not determinative in the consideration of a market modification request involving an orphan county, though they may enhance a Petitioner's case.[159] KOAT/KOB notes that KMGH provides no over-the-air coverage of La Plata

[153] This grant is subject to the limits described in the Technical and Economic Feasibility section, *supra*. We note that, importantly and contrary to the claims made by KOAT/KOB (*KOAT/KOB Opposition* at 1-2, 5, 15), the expansion of this Station's market to include La Plata County neither adds La Plata to the Denver DMA, nor removes it from the Albuquerque-Santa Fe DMA. *See Reply to Oppositions* at 5. It also will not result in the loss of Albuquerque stations' ability to seek DBS carriage into La Plata County. *Supra* note 68 (discussing 47 U.S.C. § 338(c)(1) and 47 CFR § 76.66(h)(1)). Nor will it in any way limit access to existing pay-TV or over-the-air service from the New Mexico stations, the only concern raised by the small number of consumer commenters who did not support the Petitions. *See, e.g.*, Dell Wells Comments (Docket no. 16-366) and Greg Spradling Comments (Docket nos. 16-366, 16-367, 16-368, 16-369). Accordingly, grant of this Petition will only give more choices to viewers in La Plata County.

[154] 47 U.S.C. § 338(l)(2)(B)(i).

[155] *KOAT/KOB Opposition* at 9. Evidence of historic carriage of KOAT and KOB, however, is irrelevant to our analysis under this factor.

[156] We note that the lack of historic satellite carriage will generally be irrelevant in any market modification petition, given that DBS providers are generally authorized to carry broadcast stations only in their local markets. 17 U.S.C. § 119(a)(3) (explaining that there are only narrow circumstances under which a DBS provider may receive a statutory copyright license for the importation of out-of-market (or "distant") signals). It would have been extremely difficult and unlikely for KMGH, assigned to the Denver DMA, to have obtained satellite carriage in the Albuquerque-Santa Fe DMA prior to the advent of satellite market modification.

[157] *KMGH Petition* at 6.

[158] 47 U.S.C. § 338(l)(2)(B)(ii). To show that a station provides coverage or other local service to the communities at issue in a market modification petition, parties must provide "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." 47 CFR § 76.59(b)(2). A station's broadcast of programming specifically targeted to the community at issue may also serve as evidence of local service. *See, e.g.*, *Jones Cable TV Fund 12-A, Ltd.*, 14 FCC Rcd 2808, 2818, at para. 24 (Cable Services Bureau 1999).

[159] *Supra* para. 22.

County[160] and is quite distant from La Plata County geographically,[161] and that Petitioner declined to provide evidence of shopping and labor patterns in the County.[162] Although KOAT/KOB recognizes the importance to our analysis of determining whether KMGH carries programming with a demonstrated nexus to the community,[163] it avers that this nexus can only be demonstrated by "local programming from [KMGH] that is specifically directed to news and issues *in La Plata County*."[164] As discussed above, this is an overly narrow reading of factor two of our statutory analysis, particularly in the orphan county context.[165] Rather, we must consider all of the "local service to the community" provided by the station, and in doing so we must be mindful of Congress' intention that "local" programming under this factor should, particularly in the case of orphan counties like La Plata, be interpreted to include all programming "originating from and about" their home state.[166] KOAT/KOB emphasizes a distinction between "*state-related* programming" and "*localized* programming" that simply does not exist in the orphan county context.[167]

44. In this case, we find that overall geographic proximity measures do not enhance the Petitioner's case, and we thus consider them neutral.[168] Instead, we assess whether the programming offered by KMGH meets the informational and service needs of the local residents of La Plata County, based both on our review of specific programming and on government and consumer comments.[169] We hold that all programming carried on KMGH and specifically targeted to either the State of Colorado or La Plata County is relevant to our consideration of factor two, including the multiple daily Colorado-produced and Colorado-focused news programs aired by KMGH.[170] We find that KMGH carries a significant amount of local programming of interest to La Plata, particularly Colorado-specific public affairs programming, demonstrating a local connection.[171] We also give substantial weight to the hundreds of comments from residents of La Plata County and their government representatives supporting

[160] *KOAT/KOB Opposition* at 11 (observing that translator coverage is not the same as coverage by the station itself for market modification purposes); *see, e.g., Petition for Reconsideration, Petition of Time Warner Cable for Modification of Market of Television Station WGOT-TV, Merrimack, New Hampshire*, CSR 4917-A, 14 FCC Rcd 12118 at 12119, para. 4 (Cable Services Bureau 1999) ("The Commission has held that translator coverage does not lessen the relevance of the parent station's failure to place technical signal coverage over the subject communities").

[161] *Id.*

[162] *Id.* at 11-12 (citing *KMGH Petition* at 6). *See also* 47 CFR §§ 76.59(2), (3).

[163] *Id.* at 10.

[164] *Id.* at 12 (emphasis added).

[165] *Supra* para. 22.

[166] *Senate Commerce Committee Report* at 11, 15 (explaining that the "many consumers, particularly those who reside in DMAs that cross State lines or cover vast geographic distances, have expressed concerns that they lack access to local television programming that is relevant to their everyday lives" and directing the Commission to interpret local programming to include "not only television programming [. . .] originating from and about the DMA in which a consumer resides, but also television programming originating from and about the State in which a consumer resides").

[167] *KOAT/KOB Opposition* at 4 (emphasis in original).

[168] *Supra* para. 22.

[169] *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10417, n.61.

[170] *KMGH Petition* at 6 and Exhibit C.

[171] *See, e.g.*, November 3, 2016 story on a major deployment of Colorado soldiers; November 9, 2016 story on a data breach by the VA involving Colorado veterans; July 1, 2016 story on 25 new statewide laws going into effect that day; April 22, 2016 story on the Republican primary race for Colorado Senate; November 16, 2015 story on Colorado Gov. Hickenlooper welcoming the resettling of Syrian refugees in the state.

the Petition.[172] As the Commission noted in the *STELAR Market Modification Report and Order*, "local government and consumer comments in a market modification proceeding can help demonstrate a station's nexus to the community at issue."[173] These comments show the significance that residents place on Colorado-specific programming, and the specific types of coverage they need (which coverage, as noted immediately above, is available on a regular basis on KMGH).[174]

45. *Access to In-State Stations*. The third, post-STELAR factor we consider is "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."[175] We find that a market modification would promote La Plata County's access to an in-state television broadcast signal and enhance viewers' access to in-state local programming that is otherwise of limited availability, and that this factor accordingly weighs heavily in favor of granting the Petition. As noted above, this factor is satisfied by introduction of an in-state station to a community, but weighs more heavily in favor of modification if the petitioner shows the involved station provides programming specifically related to subscribers' state of residence, and may be given even more weight if subscribers in the new community have little (or no) access to such in-state programming.[176]

46. KOAT/KOB misapprehends the in-state statutory factor when it argues that "there should be no enhancement for this factor in this case" because "access to in-state Denver Stations" might only give La Plata County residents "certain news programming of statewide interest to all Coloradans in general (including news from the state capitol)."[177] What KOAT/KOB is describing represents the complete fulfillment of Congress' intent in adopting the new third statutory factor in STELAR.[178] Residents of La Plata County, a quintessential orphan county, have little to no access to programming "of statewide interest to all Coloradans in general (including news from the state capitol)," because all of their broadcast stations originate in New Mexico. Congress saw this as a problem of sufficient significance to justify a change to the entire market modification process, and the Commission was explicit that the in-state connection was so important that "a petitioner will be afforded credit for satisfying this factor simply by showing that the involved station is licensed to a community within the same state as the new community."[179] KOAT/KOB argues that "there is no evidence that [KMGH's] programming focuses on

[172] *See generally* MB Docket no. 16-368 and *KMGH Petition* at Exhibit I.

[173] *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10417, n.61.

[174] *See, e.g.*, Carol Cure Comments ("As a resident of La Plata County, Colorado, I am dismayed that we are unable to access Denver-area/Colorado news, political commentary, public affairs information and sports. ... During the election season this past few months, we were even denied news about our Colorado candidates that could have assisted us in making decisions as voters, and this was deplorable."); Gail Lovell Comments ("I want to see the news from Denver about issues affecting me. I live in the state of CO and expect to get news about my state."); Carrie Slifka and Travis Willschau Comments ("We need Colorado news to be aware of government issues, election topics, and so much more."); Jeannine Angle Dobbins Comments ("We know nothing about the political candidates from Colorado that we are voting for.").

[175] 47 U.S.C. § 338(l)(2)(B)(iii).

[176] *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10420, para. 18.

[177] *KOAT/KOB Opposition* at 15.

[178] *Senate Commerce Committee Report* at 11 ("The Committee is aware that many consumers, particularly those who reside in DMAs that cross State lines or cover vast geographic distances, have expressed concerns that they lack access to local television programming that is relevant to their everyday lives. The Committee intends that the FCC should consider the plight of these consumers when judging the merits of a petition filed under the process created by this subsection (as well as a petition filed using the process already in place for cable operators under section 614(h)) of the Communications Act, even if granting such modification would pose an economic challenge to various local television broadcast stations.").

[179] *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10420, para. 18.

responding to local issues, needs and interests—community news, weather, sports, and public affairs—in La Plata."[180] Such evidence is unnecessary in order for this factor to receive the greatest possible weight, because that weight is applied as a result of the provision of limited availability programming "specifically related to subscribers' *state* of residence,"[181] not their *county* of residence. Despite misunderstanding the function of the in-state factor, KOAT/KOB is correct that the "new factor is neither exclusive nor dispositive—rather, it is just one of several statutory factors bearing on the ultimate goal of localism."[182] The weight given to that factor can be substantial, however, and as the Commission explained in implementing this new statutory factor, "each petition for market modification will turn on the unique facts of the case."[183]

47. KMGH is an ABC affiliate licensed to Denver, Colorado, a community within the same state as La Plata County, Colorado. As discussed above,[184] KMGH provides programming specifically related to Colorado, the state of residence of La Plata County residents. As is made clear from the hundreds of comments supporting the Petition,[185] La Plata County residents currently have "little (or no) access" to the types of Colorado-specific programming provided by KMGH. As discussed in more detail below, KOAT and KOB have aired a number of stories relevant to La Plata County residents.[186] KOAT/KOB does not dispute, however, nor does its proffered evidence refute, the claims by Petitioner and commenters that La Plata County residents lack the opportunity to regularly view state and local political and public affairs coverage specific to the State of Colorado.[187] As discussed above, and as KOAT/KOB acknowledges, KMGH offers precisely this type of Colorado-specific public affairs programming.[188]

48. *Other Local Stations*. Fourth, we consider "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."[189] We conclude that this factor is neutral in our analysis. The Commission has held that, in all market modification petitions, the fourth factor may serve to enhance a petitioner's claim if it is demonstrated that there is no other station serving the community at issue, but that the factor will weigh neither in favor of nor against a modification request if

[180] *KOAT/KOB Opposition* at 15.

[181] *Id.* (emphasis added).

[182] *KOAT/KOB Opposition* at ii.

[183] *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10420, para. 18.

[184] *Supra* note 171.

[185] *Supra* note 172.

[186] *Infra* para. 48. We note that the amount of local service provided by other stations is relevant to our consideration of this factor only to the extent that it allows us to determine the degree of weight to grant it. Local service provided by other stations primarily comes into play in our consideration of factor four, below. We have previously concluded that what is now the fourth factor of market modification assessments, which concerns local programming provided by other stations, was intended to "enhance a station's [market modification] claim where it could be shown that other stations do not serve the communities at issue." *Paxson San Jose License, Inc.*, 12 FCC Rcd 17520, 17526, at para. 13. However, in cases where other stations do serve the communities, "this factor neither weighs against nor in favor of [Petitioner's] modification request." *Dayton*, 28 FCC Rcd at 16019. As such, no simple demonstration that other stations offer the community at issue access to local programming can serve as sufficient basis for the rejection of a petition for market modification.

[187] *KMGH Petition* at 4.

[188] *Supra* note 171; *KOAT/KOB Opposition* at 15.

[189] 47 U.S.C. § 338(l)(2)(B)(iv).

another station serves that community.[190] KOAT and KOB are Albuquerque-based broadcast stations carrying ABC and NBC programming, respectively. They are the primary and in most cases sole source of those networks for cable and satellite television subscribers in La Plata County. The KOAT/KOB Opposition provides evidence that they have aired dozens of stories relevant to La Plata County residents in the past 18 months (including at least one apparently discussing this very proceeding).[191] Petitioner does not dispute these claims.[192] Because other stations, including KOAT and KOB, provide the County with coverage of local issues and carriage of local sports, we find that this factor weighs neither against nor in favor of La Plata County's request to modify KMGH's market, and give it no weight in our consideration of whether to grant the Petition.

49. *Viewing Patterns.* Finally, we consider "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."[193] As discussed above, we consider this an enhancement factor in the orphan county context.[194] This factor also is neutral in our analysis. KOAT/KOB correctly observes that Petitioner provides no evidence of household viewing patterns.[195] The Petitioner argues that, "given the lack of historical [*sic*] carriage of the Station in the County, Nielsen rating or other audience data would not be helpful in evaluating this Petition."[196] KOAT/KOB has provided Nielsen data showing low (but measurable) ratings for KMGH in La Plata County.[197] We agree with the opposition that these ratings "do not support any enhancement" under this factor.[198] Accordingly, we give this factor no weight in our consideration of whether to grant the KMGH Petition.

50. *Conclusion.* The issue before us is whether to grant Petitioner's request to modify the local satellite carriage market of KMGH—of the Denver DMA—to include Colorado's La Plata County, which is currently assigned by Nielsen to the Albuquerque-Santa Fe (New Mexico) DMA.[199] Section 338(l) permits the Commission to add or exclude communities from a station's local television market to better reflect market realities and to promote residents' access to local programming from broadcasters located in their State.[200] Under this statutory provision, the Commission must afford particular attention to the value of localism.[201] We have found that the second and third statutory factors weigh heavily in favor of a grant. We have found that the first and fifth factors do not support grant of the Petition, but are given no

[190] *See e.g.*, *Great Trails Broadcasting Corp.*, 10 FCC Rcd 8629, 8633, ¶ 23 (1995); *Paxson San Jose License, Inc.*, 12 FCC Rcd 17520, 17526, ¶ 13 (1997).

[191] *KOAT/KOB Opposition* at Exhibit A, Attachments 1-3 and Exhibit B, Attachments 1-2.

[192] La Plata County states that they are "unaware of another in-state local broadcast station carried by a satellite provider in the County that offers Denver- and Colorado-oriented news coverage of issues of concern to residents of the County." *Reply to Oppositions* at 11. We note that, with respect to factor four, it is not important that the coverage be provided by an in-state broadcaster, or that the broadcaster in question actually be carried by a satellite provider. What matters is whether any station eligible for satellite carriage into the county provides coverage of matters of "concern" and "interest" to the county.

[193] 47 U.S.C. § 338(l)(2)(B)(v).

[194] *Supra* para. 22.

[195] *KOAT/KOB Opposition* at 14.

[196] *KMGH Petition* at 6.

[197] *KOAT/KOB Opposition* at 14, Exhibit E.

[198] *KOAT/KOB Opposition* at 14.

[199] *KMGH Petition* at 1.

[200] *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10412-13, para. 7.

[201] *Id.*

weight because they serve exclusively as enhancement factors in a petition relating to an orphan county. We have found that the fourth factor is neutral. Overall, we are persuaded by the strength of the evidence supporting factors two and three that a sufficient market nexus exists between KMGH and La Plata County. We accordingly grant La Plata's request for market modification, and order that La Plata County be added to the local market of KMGH on both DISH and DIRECTV.[202]

F. KUSA-TV

51. *Historic Carriage.* The first factor we must consider is "whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community; or have been historically carried on the satellite carrier or carriers serving such community."[203] We find that this factor weighs slightly in favor of granting the Petition. As discussed above, we consider this an enhancement factor in the orphan county context. KOAT/KOB argues that Petitioner provides no evidence with respect to historic carriage of KUSA in La Plata County.[204] Petitioner, however, points out that while "there has not been historic carriage of the Station in the County by satellite carriers,"[205] the local cable system does simulcast a daily news program broadcast by KUSA.[206] As noted above, we would expect historic carriage to be uncommon in orphan county situations. And indeed, the historic carriage demonstrated by Petitioner is minimal. Nonetheless, that KUSA has any historic carriage at all is noteworthy evidence of a nexus between the Station and the county.

52. *Local Service.* Second, we consider "whether the television station provides coverage or other local service to the community."[207] We find that this factor weighs heavily in favor of a grant of the petition. As explained above, we find that distance tests such as contour maps are not determinative in the consideration of a market modification request involving an orphan county, though they may enhance

---

[202] This grant is subject to the limits described in the Technical and Economic Feasibility section, *supra*. We note that, importantly and contrary to the claims made by KOAT/KOB (*KOAT/KOB Opposition* at 1-2, 5, 15), the expansion of this Station's market to include La Plata County neither adds La Plata to the Denver DMA, nor removes it from the Albuquerque-Santa Fe DMA. *See Reply to Oppositions* at 5. It also will not result in the loss of Albuquerque stations' ability to seek DBS carriage into La Plata County. *Supra* note 68 (discussing 47 U.S.C. § 338(c)(1) and 47 CFR § 76.66(h)(1)). Nor will it in any way limit access to existing pay-TV or over-the-air service from the New Mexico stations, the only concern raised by the small number of consumer commenters who did not support the Petitions. *See, e.g.*, Dell Wells Comments (Docket no. 16-366) and Greg Spradling Comments (Docket nos. 16-366, 16-367, 16-368, 16-369). Accordingly, grant of this Petition will only give more choices to viewers in La Plata County.

[203] 47 U.S.C. § 338(l)(2)(B)(i).

[204] *KOAT/KOB Opposition* at 9. Evidence of historic carriage of KOAT and KOB, however, is irrelevant to our analysis under this factor.

[205] We note that the lack of historic satellite carriage will generally be irrelevant in any market modification petition, given that DBS providers are generally authorized to carry broadcast stations only in their local markets. 17 U.S.C. § 119(a)(3) (explaining that there are only narrow circumstances under which a DBS provider may receive a statutory copyright license for the importation of out-of-market (or "distant") signals). It would have been extremely difficult and unlikely for KUSA, assigned to the Denver DMA, to have obtained satellite carriage in the Albuquerque-Santa Fe DMA prior to the advent of satellite market modification.

[206] *KUSA Petition* at 6.

[207] 47 U.S.C. § 338(l)(2)(B)(ii). To show that a station provides coverage or other local service to the communities at issue in a market modification petition, parties must provide "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." 47 CFR § 76.59(b)(2). A station's broadcast of programming specifically targeted to the community at issue may also serve as evidence of local service. *See, e.g.*, *Jones Cable TV Fund 12-A, Ltd.*, 14 FCC Rcd 2808, 2818, at para. 24 (Cable Services Bureau 1999).

a Petitioner's case.[208] KOAT/KOB notes that KUSA provides no over-the-air coverage of La Plata County[209] and is quite distant from La Plata County geographically,[210] and that Petitioner declined to provide evidence of shopping and labor patterns in the County.[211] Although KOAT/KOB recognizes the importance to our analysis of determining whether KUSA carries programming with a demonstrated nexus to the community,[212] it avers that this nexus can only be demonstrated by "local programming from [KUSA] that is specifically directed to news and issues *in La Plata County*."[213] As discussed above, this is an overly narrow reading of factor two of our statutory analysis, particularly in the orphan county context.[214] Rather, we must consider all of the "local service to the community" provided by the station, and in doing so we must be mindful of Congress' intention that "local" programming under this factor should, particularly in the case of orphan counties like La Plata, be interpreted to include all programming "originating from and about" their home state.[215] KOAT/KOB emphasizes a distinction between "*state-related* programming" and "*localized* programming" that simply does not exist in the orphan county context.[216]

53. In this case, we find that overall geographic proximity measures do not enhance the Petitioner's case, and we thus consider them neutral.[217] Instead, we assess whether the programming offered by KUSA meets the informational and service needs of the local residents of La Plata County, based both on our review of specific programming and on government and consumer comments.[218] We hold that all programming carried on KUSA and specifically targeted to either the State of Colorado or La Plata County is relevant to our consideration of factor two, including the multiple daily Colorado-produced and Colorado-focused news programs aired by KUSA.[219] We find that KUSA carries a significant amount of local programming of interest to La Plata, particularly Colorado-specific public affairs programming, demonstrating a local connection.[220] We also give substantial weight to the

---

[208] *Supra* para. 22.

[209] *KOAT/KOB Opposition* at 11 (observing that translator coverage is not the same as coverage by the station itself for market modification purposes) ; *see, e.g., Petition for Reconsideration, Petition of Time Warner Cable for Modification of Market of Television Station WGOT-TV, Merrimack, New Hampshire*, CSR 4917-A, 14 FCC Rcd 12118 at 12119, para. 4 (Cable Services Bureau 1999) ("The Commission has held that translator coverage does not lessen the relevance of the parent station's failure to place technical signal coverage over the subject communities").

[210] *Id.*

[211] *Id.* at 11-12 (citing KUSA Petition at 6). *See also* 47 CFR §§ 76.59(2), (3).

[212] *Id.* at 10.

[213] *Id.* at 12 (emphasis added).

[214] *Supra* para. 22.

[215] *Senate Commerce Committee Report* at 11, 15 (explaining that the "many consumers, particularly those who reside in DMAs that cross State lines or cover vast geographic distances, have expressed concerns that they lack access to local television programming that is relevant to their everyday lives" and directing the Commission to interpret local programming to include "not only television programming [. . .] originating from and about the DMA in which a consumer resides, but also television programming originating from and about the State in which a consumer resides").

[216] *KOAT/KOB Opposition* at 4 (emphasis in original).

[217] *Supra* para. 22.

[218] *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10417, n.61.

[219] *KUSA Petition* at 6 and Exhibit C.

[220] *See, e.g.*, October 12, 2016 coverage of the only televised 2016 Colorado Senate debate, sponsored by KUSA; August 16, 2016 coverage of Colorado marijuana taxes; September 24, 2016 story on wildfire danger throughout Colorado; May 11, 2016 story on passage by Colorado House of grocery store sales bill; March 14, 2016 story on the Colorado Senate race and an upcoming Republican Senate primary debate; November 18, 2015 story on

(continued....)

hundreds of comments from residents of La Plata County and their government representatives supporting the Petition.[221] As the Commission noted in the *STELAR Market Modification Report and Order*, "local government and consumer comments in a market modification proceeding can help demonstrate a station's nexus to the community at issue."[222] These comments show the significance that residents place on Colorado-specific programming, and the specific types of coverage they need (which coverage, as noted immediately above, is available on a regular basis on KUSA).[223]

54. *Access to In-State Stations*. The third, post-STELAR factor we consider is "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."[224] We find that a market modification would promote La Plata County's access to an in-state television broadcast signal and enhance viewers' access to in-state local programming that is otherwise of limited availability, and that this factor accordingly weighs heavily in favor of granting the Petition. As noted above, this factor is satisfied by introduction of an in-state station to a community, but weighs more heavily in favor of modification if the petitioner shows the involved station provides programming specifically related to subscribers' state of residence, and may be given even more weight if subscribers in the new community have little (or no) access to such in-state programming.[225]

55. KOAT/KOB misapprehends the in-state statutory factor when it argues that "there should be no enhancement for this factor in this case" because "access to in-state Denver Stations" might only give La Plata County residents "certain news programming of statewide interest to all Coloradans in general (including news from the state capitol)."[226] What KOAT/KOB is describing represents the complete fulfillment of Congress' intent in adopting the new third statutory factor in STELAR.[227] Residents of La Plata County, a quintessential orphan county, have little to no access to programming "of statewide interest to all Coloradans in general (including news from the state capitol)," because all of their

(Continued from previous page)
potential future Colorado water shortage.

[221] *See generally* MB Docket no. 16-369 and *KUSA Petition* at Exhibit I.

[222] *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10417, n.61.

[223] *See, e.g.*, Gretchen T. Wilson Comments ("As a 40 year resident and educator in La Plata County ...[i]t is challenging to teach our students about state affairs when we can only receive Albuquerque, New Mexico stations."); Mike and Lois Demming Comments ("We vote in Colorado, pay taxes in Colorado and yet we only see what the elections are doing in New Mexico. We would like to be informed voters. ...We want to see what is going on in our state capital."); Tom Petit Comments (during the recent election season "all television news we received on political candidates, campaign initiatives, updates, early voter results and final election results came from [New Mexico]... Beyond that there is also important news [we] miss on public safety such as forest fires, flooding, extreme winter storms, drought, virus alerts, crime alerts, Amber Alerts, government updates from Denver, etc. Last we also do not get the updates we deserve on the sports teams that SW Colorado residents follow such as the NFL World Champion Denver Broncos, NBA Denver Nuggets, MLB Denver Rockies, NHL Denver Avalanche as well Colorado colleges, high schools, etc."); Jeff Weiss and Jocelyn Skill Comments ("We have no visibility into the candidates in our home state").

[224] 47 U.S.C. § 338(l)(2)(B)(iii).

[225] *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10420, para. 18.

[226] *KOAT/KOB Opposition* at 15.

[227] *Senate Commerce Committee Report* at 11 ("The Committee is aware that many consumers, particularly those who reside in DMAs that cross State lines or cover vast geographic distances, have expressed concerns that they lack access to local television programming that is relevant to their everyday lives. The Committee intends that the FCC should consider the plight of these consumers when judging the merits of a petition filed under the process created by this subsection (as well as a petition filed using the process already in place for cable operators under Section 614(h)) of the Communications Act, even if granting such modification would pose an economic challenge to various local television broadcast stations.").

broadcast stations originate in New Mexico. Congress saw this as a problem of sufficient significance to justify a change to the entire market modification process, and the Commission was explicit that the in-state connection was so important that "a petitioner will be afforded credit for satisfying this factor simply by showing that the involved station is licensed to a community within the same state as the new community."[228] KOAT/KOB argues that "there is no evidence that [KUSA's] programming focuses on responding to local issues, needs and interests—community news, weather, sports, and public affairs—in La Plata."[229] Such evidence is unnecessary in order for this factor to receive the greatest possible weight, because that weight is applied as a result of the provision of limited availability programming "specifically related to subscribers' *state* of residence,"[230] not their *county* of residence. Despite misunderstanding the function of the in-state factor, KOAT/KOB is correct that the "new factor is neither exclusive nor dispositive—rather, it is just one of several statutory factors bearing on the ultimate goal of localism."[231] The weight given to that factor can be substantial, however, and as the Commission explained in implementing this new statutory factor, "each petition for market modification will turn on the unique facts of the case."[232]

56. KUSA is an NBC affiliate licensed to Denver, Colorado, a community within the same state as La Plata County, Colorado. As discussed above,[233] KUSA provides programming specifically related to Colorado, the state of residence of La Plata County residents. As is made clear from the hundreds of comments supporting the Petition,[234] La Plata County residents currently have "little (or no) access" to the types of Colorado-specific programming provided by KUSA. As discussed in more detail below, KOAT and KOB have aired a number of stories relevant to La Plata County residents.[235] KOAT/KOB does not dispute, however, nor does its proffered evidence refute, the claims by Petitioner and commenters that La Plata County residents lack the opportunity to regularly view state and local political and public affairs coverage specific to the State of Colorado.[236] As discussed above, and as KOAT/KOB acknowledges, KUSA offers precisely this type of Colorado-specific public affairs programming.[237]

57. *Other Local Stations*. Fourth, we consider "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

---

[228] *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10420, para. 18.

[229] *KOAT/KOB Opposition* at 15.

[230] *Id.* (emphasis added).

[231] *KOAT/KOB Opposition* at ii.

[232] *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10421, para. 18.

[233] *Supra* note 220.

[234] *Supra* note 221.

[235] *Infra* para. 57. We note that the amount of local service provided by other stations is relevant to our consideration of this factor only to the extent that it allows us to determine the degree of weight to grant it. Local service provided by other stations primarily comes into play in our consideration of factor four, below. We have previously concluded that what is now the fourth factor of market modification assessments, which concerns local programming provided by other stations, was intended to "enhance a station's [market modification] claim where it could be shown that other stations do not serve the communities at issue." *Paxson San Jose License, Inc.*, 12 FCC Rcd 17520, 17526, at para. 13. However, in cases where other stations do serve the communities, "this factor neither weighs against nor in favor of [Petitioner's] modification request." *Dayton*, 28 FCC Rcd at 16019. As such, no simple demonstration that other stations offer the community at issue access to local programming can serve as sufficient basis for the rejection of a petition for market modification.

[236] *KMGH Petition* at 4.

[237] *Supra* note 220; *KOAT/KOB Opposition* at 15.

of sporting and other events of interest to the community."[238] We conclude that this factor is neutral in our analysis. The Commission has held that, in all market modification petitions, the fourth factor may serve to enhance a petitioner's claim if it is demonstrated that there is no other station serving the community at issue, but that the factor will weigh neither in favor of nor against a modification request if another station serves that community.[239] KOAT and KOB are Albuquerque-based broadcast stations carrying ABC and NBC programming, respectively. They are the primary and in most cases sole source of those networks for cable and satellite television subscribers in La Plata County. The KOAT/KOB Opposition provides evidence that they have aired dozens of stories relevant to La Plata County residents in the past 18 months (including at least one apparently discussing this very proceeding).[240] Petitioner does not dispute these claims.[241] Because other stations, including KOAT and KOB, provide the County with coverage of local issues and carriage of local sports, we find that this factor weighs neither against nor in favor of La Plata County's request to modify KUSA's market, and give it no weight in our consideration of whether to grant the Petition.

58. *Viewing Patterns.* Finally, we consider "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."[242] As discussed above, we consider this an enhancement factor in the orphan county context.[243] This factor also is neutral in our analysis. KOAT/KOB correctly observes that Petitioner provides no evidence of household viewing patterns.[244] The Petitioner argues that, "given the lack of historical [*sic*] carriage of the Station in the County (other than the limited evening news broadcast [*sic*] on Charter), Nielsen rating or other audience data would not be helpful in evaluating this Petition."[245] KOAT/KOB has provided Nielsen data showing low (but measurable) ratings for KUSA in La Plata County.[246] We agree with the opposition that these ratings "do not support any enhancement" under this factor.[247] Accordingly, we give this factor no weight in our consideration of whether to grant the KUSA Petition.

59. *Conclusion.* The issue before us is whether to grant Petitioner's request to modify the local satellite carriage market of KUSA—of the Denver DMA—to include Colorado's La Plata County, which is currently assigned by Nielsen to the Albuquerque-Santa Fe (New Mexico) DMA.[248] Section 338(l) permits the Commission to add or exclude communities from a station's local television market to better reflect market realities and to promote residents' access to local programming from broadcasters located

[238] 47 U.S.C. § 338(l)(2)(B)(iv).

[239] *See e.g., Great Trails Broadcasting Corp.*, 10 FCC Rcd 8629, 8633, ¶ 23 (1995); *Paxson San Jose License, Inc.*, 12 FCC Rcd 17520, 17526, ¶ 13 (1997).

[240] *KOAT/KOB Opposition* at Exhibit A, Attachments 1-3 and Exhibit B, Attachments 1-2.

[241] La Plata County states that they are "unaware of another in-state local broadcast station carried by a satellite provider in the County that offers Denver- and Colorado-oriented news coverage of issues of concern to residents of the County." *Reply to Oppositions* at 11. We note that, with respect to factor four, it is not important that the coverage be provided by an in-state broadcaster, or that the broadcaster in question actually be carried by a satellite provider. What matters is whether any station eligible for satellite carriage into the county provides coverage of matters of "concern" and "interest" to the county.

[242] 47 U.S.C. § 338(l)(2)(B)(v).

[243] *Supra* para. 22.

[244] *KOAT/KOB Opposition* at 14.

[245] *KUSA Petition* at 6.

[246] *KOAT/KOB Opposition* at 14, Exhibit E.

[247] *KOAT/KOB Opposition* at 14.

[248] *KUSA Petition* at 1.

in their State.[249] Under this statutory provision, the Commission must afford particular attention to the value of localism.[250] We have found that the second and third statutory factors weigh heavily in favor of a grant, and that the first weighs slightly in favor of a grant. We have found that the fifth factor does not support grant of the Petition, but is given no weight because it serves exclusively as an enhancement factor in a petition relating to an orphan county. We have found that the fourth factor is neutral. Overall, we are persuaded by the strength of the evidence supporting factors one, two, and three that a sufficient market nexus exists between KUSA and La Plata County. We accordingly grant La Plata's request for market modification, and order that La Plata County be added to the local market of KUSA on both DISH and DIRECTV.[251]

[249] *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10412-13, para. 7.

[250] *Id.*

[251] This grant is subject to the limits described in the Technical and Economic Feasibility section, *supra*. We note that, importantly and contrary to the claims made by KOAT/KOB (*KOAT/KOB Opposition* at 1-2, 5, 15), the expansion of this Station's market to include La Plata County neither adds La Plata to the Denver DMA, nor removes it from the Albuquerque-Santa Fe DMA. *See Reply to Oppositions* at 5. It also will not result in the loss of Albuquerque stations' ability to seek DBS carriage into La Plata County. *Supra* note 68 (discussing 47 U.S.C. § 338(c)(1) and 47 CFR § 76.66(h)(1)). Nor will it in any way limit access to existing pay-TV or over-the-air service from the New Mexico stations, the only concern raised by the small number of consumer commenters who did not support the Petitions. *See, e.g.*, Dell Wells Comments (Docket no. 16-366) and Greg Spradling Comments (Docket nos. 16-366, 16-367, 16-368, 16-369). Accordingly, grant of this Petition will only give more choices to viewers in La Plata County.

IV. ORDERING CLAUSES

60. 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. 16-366, CSR-8927-A), filed by La Plata County, Colorado with respect to KDVR-TV, Denver, Colorado (Facility ID No. 126), **IS GRANTED**.

61. **IT IS FURTHER 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. 16-366, CSR-8927-A), filed by La Plata County, Colorado with respect to KCNC-TV, Denver, Colorado (Facility ID No. 47903), **IS GRANTED**.

62. **IT IS FURTHER 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. 16-366, CSR-8927-A), filed by La Plata County, Colorado with respect to KMGH-TV, Denver, Colorado (Facility ID No. 40875), **IS GRANTED**.

63. **IT IS FURTHER 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. 16-366, CSR-8927-A), filed by La Plata County, Colorado with respect to KUSA-TV, Denver, Colorado (Facility ID No. 23074), **IS GRANTED**.

64. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's Rules.[252]

FEDERAL COMMUNICATIONS COMMISSION

Michelle M. Carey
Acting Chief, Media Bureau

[252] 47 CFR § 0.283.