



April 13, 2018

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th St., NW
Washington, D.C. 20554

Re: Modification of the Television Market for WYMT-TV, Hazard, Kentucky, MB 18-8
Ex Parte Presentation

Dear Ms. Dortch:

Gray Television Licensee, LLC (“Gray”) hereby responds to a number of issues raised by Media Bureau staff in the above-referenced proceeding in correspondence dated April 9, 2018 and on a telephone conference that included representatives of Gray, DIRECTV, LLC (“DIRECTV”), and DISH Network L.L.C. (“DISH”) on April 11, 2018.¹

The record in this proceeding amply supports grant of Gray’s market modification request for WYMT-TV in full. Residents of the six Orphan Counties identified by Gray currently lack a source of local, in-state broadcast programming. WYMT-TV serves these viewers today with an over-the-air signal and substantial amounts of locally-directed programming, and the station already is carried by local cable operators in these Orphan Counties. At the same time, WYMT-TV’s continued inclusion in 23 counties in Western Kentucky cannot be justified under the market modification criteria adopted by Congress and implemented by the Commission. None of these points is in dispute.

Lack of Current Carriage of WYMT-TV Is Not a Bar to Grant of the Petition

Both DIRECTV and DISH claim that the Commission’s *STELAR Implementation Order* mandates that the Commission can grant a satellite market modification only for a station that is already

¹ While Gray consented to DISH’s participation in the Commission’s efforts to gain additional insights into issues raised by the WYMT-TV market modification request, Gray noted that DISH has not filed any documents in MB Docket No. 18-8 and therefore is not a party to this proceeding. The participants in the telephone conference included the undersigned, Holly Saurer, Evan Baranoff, and Steven Broecker of the FCC, Amanda Potter representing DIRECTV, and Alison Minea representing DISH.

being carried by a satellite operator.² In reality, the Commission said only 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.”³ On its face, this *per se* exception to the rule otherwise requiring DBS providers to demonstrate technical infeasibility applies only to stations that are being carried. The Commission did not adopt such a *per se* exception for requests made by stations like WYMT-TV that are not being carried, and the Bureau has no basis for expanding the exception adopted by the Commission. Accordingly, DISH and DIRECTV must actually demonstrate technical infeasibility to preclude WYMT-TV’s requested market modification.

DISH and DIRECTV have Failed To Demonstrate Technical Infeasibility

DISH and DIRECTV each has failed its burden of demonstrating technical infeasibility. DISH concedes that it is technically feasible to launch WYMT-TV in High Definition (“HD”) in most of the Orphan Counties and in Standard Definition (“SD”) in the counties located in the Tri-Cities DMA. Likewise, DIRECTV concedes that it is technically feasible to launch the station in SD throughout the Orphan Counties. There is no merit to either company’s claim that technical infeasibility is demonstrated if a DBS provider can launch a signal only in SD and cannot comply with HD carriage obligations with respect to a station. The main point of STELAR’s market modification provisions is to make local, in-state programming available in orphan counties. It would be irrational for the Commission to interpret the statute to allow DISH and DIRECTV to avoid providing WYMT-TV’s local programming to Orphan County viewers merely because they only have the capacity to deliver that programming in SD format. The more faithful result here would be to require DISH and DIRECTV to deliver WYMT-TV to the Orphan Counties to the maximum extent they are technically capable, including in SD if necessary.

In any event, Gray maintains that any claims of lack of satellite capacity by DIRECTV in this case are highly suspect and should be subject to close Commission scrutiny. Today, DIRECTV’s local-into-local service in the Lexington DMA contains only seven HD local broadcast stations and one SD station (WKYT, WDKY, WTVQ, WLEX, WUPX, WKLE, WLJC and WKYT-D2 in SD). There are many local markets where DIRECTV provides more television stations on a local spot beam, so clearly each spot beam can carry more local television stations when DIRECTV makes the effort. Moreover, in Gray’s experience, DIRECTV routinely upgrades the hardware at its local receive facilities (“LRFs”) to solve spot beam capacity issues. DIRECTV has not shown that such a hardware upgrade is infeasible for WYMT-TV or, indeed, that there would be any cost associated with adding the station. In other contexts where a station has a statutory carriage right, the FCC has set a high hurdle to claim that the expense of equipment changes renders a request technically infeasible.⁴ DIRECTV’s parent AT&T is the largest MVPD in the county with consolidated

² See Amendment to the Commission’s Rules Concerning Market Modification, 30 FCC Rcd 10406, para. 30 (2015).

³ See *id.* (citations omitted).

⁴ See, e.g., WXTV License Partnership. G.P, *Order on Reconsideration*, 15 FCC Rcd 3308, 3310, 3311-3312 (2000) (requiring detailed costs of substantial costs to substantiate

revenues last year exceeding \$160 Billion.⁵ For it to ignore the outcry from several thousand local residents in rural Kentucky because it does not want to complete a routine hardware upgrade would be shameful.⁶

No Basis Exists for Keeping 23 Western Kentucky Counties in WYMT-TV's Market

The undisputed evidence in the record shows that Gray does not serve the counties it requested the Commission delete from WYMT-TV's market. Deleting these counties would be consistent with STELAR, which specifically permits deletion of counties from a market where, as here, the statutory factors are satisfied.⁷ And it is consistent with the facts, which show that WYMT-TV does not deliver a signal to these counties, does not produce programming directed at Western Kentucky viewers, or achieve and cable carriage or ratings there. No party has raised an argument that removing these counties renders carriage of WYMT-TV in the Orphan Counties technically infeasible. To the extent DIRECTV has raised objections to deletion of these counties, those objections seem to be related to creating an individualized market for WYMT-TV. These objections are contrary to Congress's intent in STELAR, which was to give the Commission the tools to do just that in cases like this one where viewers will be better served by a modified satellite carriage market. The Commission has excluded counties from television stations' carriage markets in countless cable market modification cases.⁸ The Bureau should do the same here.

Section 338(c)(1) Is Irrelevant to Gray's Request

Gray's market modification request will not lead to a loss of WYMT-TV's sister station, WKYT-TV, which primarily serves Western Kentucky. DIRECTV has suggested that if the FCC grants WYMT-TV and WKYT-TV overlapping carriage markets in the Lexington DMA, then it would have the option under 47 U.S.C. §338(c)(1) to drop WKYT-TV and carry WYMT-TV instead. This is incorrect because Section 338(c)(1) applies only to mandatory carriage demands by duplicating network affiliates. Both WKYT-TV and WYMT-TV have elected retransmission

technical infeasibility showing in channel positioning case); WUPW Broadcasting, LLC, *Memorandum Opinion and Order*, 25 FCC Rcd 2678 (2010) (rejecting technical infeasibility argument in network non-duplication case despite operator showing of nearly \$4 Million in costs).

⁵ See *AT&T Report Fourth-Quarter and Full-Year Results*, available at http://about.att.com/story/att_fourth_quarter_earnings_2017.html.

⁶ The Bureau should give no weight to DIRECTV's expressed concerns that if it uses bandwidth to launch WYMT, it might not have sufficient bandwidth to launch some other programming service it desires more. The law is clear that the statutory carriage rights of broadcasters override MVPDs' choices about which services they prefer to carry. See 47 U.S.C. § 338(a); 47 C.F.R. § 76.66.

⁷ STELA Reauthorization Act of 2014, Pub. L. No. 113-200, 128 Stat. 2059, §102(a) (2014).

⁸ See, e.g., Comcast Cable Communications, LLC, 26 FCC Rcd 14453 (2011).

consent for the 2018-2020 election cycle and WYMT-TV has promised to waive its future mandatory carriage rights in the Lexington DMA. The rights of Gray and DIRECTV with respect to both stations in the Lexington DMA will be determined through retransmission consent agreements between the parties, not by Section 338(c)(1).

Under Gray's proposal, WYMT-TV will obtain mandatory carriage rights only in the Orphan Counties, which are outside of the Lexington DMA. If Gray exercises those rights, Section 338 will remain irrelevant, because DIRECTV does not have the right to choose among duplicating network stations if those stations are located in different states. That will be the case in every conceivable mandatory carriage scenario for WYMT-TV because the in-DMA affiliates for the Orphan Counties are licensed to communities in West Virginia and Tennessee.

* * *

Gray submits that the record in this proceeding overwhelmingly supports grant of the Petition in all respects. Thousands of the station's viewers have let the Commission know that WYMT-TV's service is valued in the station's market and there is no basis for DIRECTV and DISH to continue denying this service to their customers there. Gray requests that the Bureau act expeditiously to grant the Petition.

Sincerely,



Robert J. Folliard, III
Vice President & Deputy General Counsel