



Amanda E. Potter
Assistant Vice President-
Senior Legal Counsel

AT&T Services, Inc.
1120 20th Street, NW
Suite 1000
Washington, DC 20036

Phone: 202.457.2103
E-mail: amanda.potter@att.com

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VIA ECFS/FIRST-CLASS MAIL

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Gray Television Licensee, LLC For Modification of the Television Market for WYMT-TV, Hazard, Kentucky, Facility Identification Number 24915, MB Docket No. 18-8, CSR-8949-A*

Dear Ms. Dortch:

On April 11, 2018, at the request of Media Bureau (“Bureau”) staff, Stacy Fuller and the undersigned, on behalf of DIRECTV, LLC (“DIRECTV”), met with Holly Saurer, Evan Baranoff, Martha Heller, and (by telephone) Steven Broeckaert, all of the Media Bureau, to discuss the petition (“Petition”) filed by Gray Television Licensee, LLC (“Gray”) in the above-referenced proceeding.¹ Alison Minea, of DISH Network LLC (“DISH”), also attended the meeting, and Robert Folliard, of Gray, participated by telephone. At the request of staff, DIRECTV submits this letter summarizing the positions we discussed in the meeting.

While we reaffirmed DIRECTV’s willingness to provide in-state CBS broadcasts to the Orphan Counties, we reiterated our opposition to the modification of WYMT’s local market, as further detailed in DIRECTV’s prior submissions in the proceeding.² We explained that Gray’s request to add the Orphan Counties to WYMT’s local market is *per se* technically and economically infeasible, because DIRECTV lacks sufficient capacity to add a new signal in high-definition (“HD”) format to the spot beam serving the Lexington, KY DMA. We stated that standard-definition (“SD”) carriage also is infeasible, because DIRECTV has reserved the limited remaining capacity on the Lexington, KY spot beam to satisfy anticipated carriage obligations.³ A market modification decision that would force DIRECTV to carry WYMT on

¹ *Gray Television Licensee, LLC For Modification of the Television Market for WYMT-TV, Hazard, Kentucky, Facility Identification Number 24915, Petition for Special Relief* (filed Jan. 9, 2018) (“Petition”).

² *See generally* Opposition of DIRECTV, LLC to Petition for Special Relief, MB Docket No. 18-8 (filed Feb. 5, 2018) (“DIRECTV Opposition”); Response of DIRECTV, LLC to Staff Inquiry, MB Docket No. 18-8 (filed Apr. 5, 2018).

³ Significantly, an order compelling SD carriage in this case would be unlike prior market modification cases, in which feasibility was limited to a particular format (HD or SD) as a result

the Lexington, KY spot beam—separate and apart from violating DIRECTV’s statutory and constitutional rights, as discussed below—thus would jeopardize DIRECTV’s existing business plans for that capacity.

We detailed how, from a spot beam capacity standpoint, Gray’s Petition raises serious legal and policy concerns at every turn. For example, in the event the Bureau were to grant Gray’s market modification request as to the Orphan Counties (but otherwise deny the Petition), DIRECTV would seek to make room for WYMT by removing WKYT from its system, if the governing retransmission consent agreement between the parties permits such action. In such circumstances, grant of the market modification would “displace service from a long-established network station” (WKYT) throughout the Lexington, KY DMA.⁴

Meanwhile, granting the Petition in full (or in the event DIRECTV cannot delete WKYT under its retransmission consent agreement) would place DIRECTV in a legal catch-22. Indeed, such an outcome would force DIRECTV to choose between: (i) dropping WKYT to satisfy WYMT’s must-carry election in the Orphan Counties, in violation of the Commission’s carry-one, carry-all rule, the parties’ retransmission consent agreement, or both; or (ii) retransmitting WKYT or WYMT (or another station currently carried in HD on the Lexington, KY spot beam) in SD, in violation of the Commission’s HD carry-one, carry-all requirement.

We also urged the Bureau to clarify that in cases such as this one, where a DBS provider has no obligation to carry a station in the station’s local market and, in fact, does not carry the station, carriage is *per se* technically and economically infeasible under the satellite market modification regime.⁵ We explained that such circumstances are distinguishable from, for example, a situation in which the DBS provider has historically carried a station in its local market but is unable to carry the station for a temporary period during a retransmission consent dispute.⁶ Here, DIRECTV has never carried WYMT, and DIRECTV has no obligation to carry WYMT as long as: (a) DIRECTV is carrying WKYT, and (b) WYMT remains a “duplicating signal.”

The Commission can and should make this determination based on the record developed for, and the language of, the *Satellite Market Modification Order*.⁷ In particular, because WYMT has no “relevant spot beam” on DIRECTV’s system, the Lexington, KY spot beam effectively is a “neighboring” spot beam for purposes of analyzing technical and economic

of the different locations/coverage areas of HD and SD spot beams/satellites, but pre-existing carriage was not at issue. *See, e.g., 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, 32 FCC Rcd 1474 (MB 2017). In this case, an order requiring SD carriage of WYMT would necessitate the launch of a new station on a spot beam, and in a manner contrary to the Commission’s HD carry-one, carry-all requirement.

⁴ *Amendment to the Commission’s Rules Concerning Market Modification*, Report and Order, 30 FCC Rcd 10406 ¶ 18 n.88 (2015) (“*Satellite Market Modification Order*”).

⁵ *See* DIRECTV Opposition at 3-4 & n.6.

⁶ *See* Reply to Opposition of DIRECTV, LLC to Petition for Special Relief, MB Docket No. 18-8, at 4 n.12 (filed Feb. 20, 2018) (“Gray Reply”).

⁷ *See* DIRECTV Opposition at 3-4 & n.6 (explaining that WYMT has no “relevant spot beam” on DIRECTV’s network).

feasibility.⁸ Moreover, even if the Bureau were to grant the Petition only as to the Orphan Counties, the *only* area in which WYMT could effectuate a must-carry right is in the Orphan Counties, because WYMT is a “duplicating signal” in the Lexington, KY DMA. Forced carriage of WYMT on DIRECTV’s Lexington, KY spot beam therefore would be for the benefit of the Orphan Counties *alone*—at the expense of non-duplicative programming that could be viewed throughout the Lexington, KY DMA. The Commission was clear in the *Satellite Market Modification Order* that carriage in such circumstances is infeasible, stating: “We find that the financial and opportunity costs associated with requiring a carrier to use scarce capacity on a second spot beam for a station that could only be received by subscribers in a small part of the local market served by such spot beam makes carriage on such spot beam *per se* infeasible.”⁹ And while DIRECTV of course is sympathetic to the desire of customers to receive in-state CBS broadcasts, it would be an inefficient use of scarce spectral resources to devote capacity on the Lexington, KY spot beam for carriage of a station that would only be available to a handful of communities in a neighboring DMA, particularly when there is another in-state CBS—WKYT—available that could serve the Orphan Counties without further burdening DIRECTV’s spot beam capacity.¹⁰

By the same token, Gray’s efforts to invite the Commission to second guess and override DIRECTV’s business decisions regarding the use of its limited remaining spot beam capacity warrant further consideration and caution.¹¹ Granting Gray’s Petition would abrogate DIRECTV’s rights vis-à-vis “duplicating signals” and would represent an unprecedented expansion of DIRECTV’s mandatory carriage obligations.¹² Thus, as DIRECTV noted in its Opposition, DIRECTV’s constitutionally protected right of editorial discretion is at issue in this proceeding.¹³ DIRECTV also disagrees with Gray’s unsupported assertion that the “duplicating signals” exception is limited to must-carry stations.¹⁴ We explained that, by the plain language of the statute and the Commission’s rules, the “duplicating signals” exception applicable to satellite carriers extends to any station that would qualify as a “duplicating signal” within a DMA.¹⁵ Moreover, because WKYT and WYMT qualify as “duplicating signals,” DIRECTV reiterated its opposition to using the satellite market modification procedure *either* to abrogate its right to choose between in-state CBS affiliates in the Lexington, KY DMA (specifically, in the 23 Counties Gray proposes to delete from WYMT’s local market), *or* to create a new must-carry obligation when the station at issue has no present right under the “duplicating signals” exception to demand carriage on DIRECTV’s system *at all*.

⁸ *Id.* at 5-6 & n.16.

⁹ *Satellite Market Modification Order* ¶ 32 n.180.

¹⁰ *See id.* ¶ 32 (concluding, in direct response to DIRECTV’s explanation that “it ‘would have to reserve capacity on the entire ‘neighboring’ spot beam – capacity that could otherwise be used for a new station or a multicast signal carried throughout the neighboring market,’” that “it would be inefficient for the carrier to use that space on the neighboring spot beam for a station that could only be received by subscribers in a small part of the local market served by such spot beam”).

¹¹ *See* Gray Reply at 6.

¹² *See* DIRECTV Opposition at 7-11.

¹³ *Id.* at 8-9.

¹⁴ Gray Reply at 9 n.33.

¹⁵ 47 U.S.C. § 338(c)(1); 47 C.F.R. § 76.66(h).

Please contact the undersigned should you have any questions regarding this letter.

Respectfully submitted,

/s/ Amanda E. Potter

Amanda E. Potter

cc: Holly Saurer
Evan Baranoff
Steven Broeckaert
Martha Heller
Alison Minea*
Robert Folliard*

*Served via first-class mail.

CERTIFICATE OF SERVICE

I, Loretia Hill, hereby certify that on this thirteenth day of April, 2018, a true and correct copy of the foregoing letter was served, via first-class mail, upon the following:

Robert J. Folliard, III
Gray Television Licensee, LLC
Assistant Secretary
4370 Peachtree Road, NE
Atlanta, GA 30319

Alison Minea
DISH Network LLC
Director & Senior Counsel, Regulatory Affairs
1110 Vermont Ave, NW
Suite 750
Washington, DC 20005

/s/ *Loretia Hill*
Loretia Hill