

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

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

To: The Commission

**APPLICATION FOR REVIEW**

**GRAY TELEVISION LICENSEE, LLC**

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June 15, 2018

## SUMMARY

Gray filed its Petition in this case seeking to improve service to satellite subscribers in East Kentucky by modifying WYMT-TV's satellite carriage market to correctly reflect the station's actual audience. Gray proposed addition of eight (8) orphan counties where WYMT-TV is the only Kentucky station providing local programming and the deletion of twenty-three (23) Kentucky counties that are served by WYMT-TV's sister station, WKYT-TV. Gray demonstrated full satisfaction of the statutory factors governing market modifications and made a thorough showing that grant of the petition would serve the public interest. The Petition garnered the support of thousands of East Kentucky residents that identify WYMT-TV as their most trusted source for local news and information.

The *Order* below rejected Gray's request, adopting a new pre-existing carriage requirement that is not in the governing statute and cannot be found in any Commission Order. Further, the Media Bureau accused Gray of trying to manipulate the Commission's processes to achieve overlapping carriage of WYMT-TV and its sister station WKYT-TV. Rather than evaluate WYMT-TV's request on the merits, the Bureau adopted a procedural bar designed to protect AT&T/DIRECTV and DISH Network from having to use spot beam bandwidth on WYMT-TV at the expense of improved service to East Kentucky television viewers. The Bureau reached this decision despite admissions by both AT&T/DIRECTV and DISH that carriage of WYMT-TV in the orphan counties is in fact technically and economically feasible.

In adopting this new pre-existing carriage requirement, the Bureau misinterpreted the Communications Act and the Commission's implementing order regarding satellite market modifications. The Commission must act to reestablish the balance Congress intended between expanding service to underserved viewers and satellite providers' legitimate claims of unfair

burdens on their spot beams. The facts in this case are clear that Gray's Petition is fully justified under the Commission's market modification criteria and can be granted without inappropriately burdening AT&T/DIRECTV or DISH. The Commission should reverse the Order, eliminate the Bureau's pre-existing carriage requirement, grant the Petition, and bring truly local service to East Kentucky satellite subscribers, as Congress intended.

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Gray Television Licensee, LLC (“Gray”), licensee of WYMT-TV, Hazard Kentucky, pursuant to Section 1.115(a) of the Commission’s rules, hereby files this Application for Review of the above-captioned Media Bureau decision denying Gray’s Petition for Modification of WYMT-TV’s satellite carriage market.<sup>1</sup>

**I. INTRODUCTION**

Gray requests that the Commission reverse the *Order* and modify the satellite carriage market of WYMT-TV, Hazard, Kentucky. The requested changes include: (i) the addition of viewers in eight (8) orphan counties in Kentucky that currently lack a local, in-state broadcast television station; and (ii) exclusion of twenty-three (23) Kentucky counties that WYMT-TV does not serve and that receive ample local in-state programming from other stations, including WYMT-TV’s sister station, Gray owned WKYT-TV.<sup>2</sup>

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<sup>1</sup> 47 C.F.R. § 1.115; *See Gray Television Licensee, LLC*, MB Docket 18-8, DA 18-500 (rel. May 16, 2018) (the “*Order*”). *See also* Gray Television Licensee, LLC Petition for Special Relief for Modification of the Television Market Station WYMT-TV with Respect to DISH Network and DIRECTV, MB Docket 18-8 (filed Jan. 9, 2018) (the “*Petition*”).

<sup>2</sup> *See Order* at ¶ 1 & nn.2, 3. The Petition seeks to add the following eight counties in Kentucky to WYMT’s local market: Bell County and Harlan County, each assigned to the Knoxville, Tennessee DMA; Floyd County, Johnson County, Martin County, and Pike County, each assigned to the Charleston-Huntington, West Virginia DMA; and Leslie County and Letcher County counties, each assigned to the Tri-Cities, Tennessee-Virginia DMA (collectively,

Gray submits that the Petition satisfies each of the standards established by Sections 338 and 614 of the Communications Act (the “Act”) as amended by the STELA Reauthorization Act of 2014, and that the *Order* misconstrued the statute and the Commission’s implementing orders in denying the Petition.<sup>3</sup> Thousands of East Kentucky television viewers have taken the time to write to the Commission in support of modifying WYMT-TV’s market, highlighting the considerable public interest benefits inherent in the Petition. Gray urges the Commission to correct the errors in the *Order* and help deliver in-state, local service to these thousands of viewers as Congress intended.<sup>4</sup>

## II. BACKGROUND AND MEDIA BUREAU DECISION

The important facts in this case are undisputed. WYMT-TV is a CBS-affiliated station that provides exemplary local television service, **including large quantities of its own unique hyperlocal news**, to East Kentucky television viewers. Assigned to the Lexington, Kentucky DMA, WYMT-TV historically has served only the southeastern portion of that Nielsen market, and its service always has extended to Kentucky viewers in the neighboring Charleston-Huntington, West Virginia DMA, Tri-Cities, Tennessee/Virginia DMA, and Knoxville, Tennessee DMA. Indeed, in most years more than sixty percent of WYMT-TV’s advertising revenue can be traced to these Orphan Counties outside of the Lexington DMA. For this reason, and because the Nielsen DMA boundaries so poorly reflected the actual market served by

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the “Orphan Counties”). The 23 counties that Gray sought to remove from WYMT-TV’s market are referred to herein as the “Removal Counties.”

<sup>3</sup> See 47 U.S.C. § 338(l), 534(h)(1)(C); The STELA Reauthorization Act of 2014, § 102, Pub. L. No. 113-200, 128 Stat. 2059, 2060-62 (2014) (“STELAR”).

<sup>4</sup> 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*”).

WYMT-TV, Nielsen took the unusual step of creating a special trading area unique to WYMT-TV.<sup>5</sup>

This is the classic orphan county case: WYMT-TV provides over-the-air coverage and countless hours of news dedicated to the needs and concerns of viewers in the Orphan Counties. But due to the quirks of Nielsen's DMA boundaries and the FCC's carriage rules, WYMT-TV did not initially have any carriage rights in the Orphan Counties, where a sizable percentage of its viewers and a majority of its advertising dollars reside. For cable subscribers, WYMT-TV successfully modified its market to add most of the cable communities in the Orphan Counties.<sup>6</sup> Federal copyright law, however, prevented WYMT-TV from achieving satellite carriage in the Orphan Counties.<sup>7</sup> As a result, satellite subscribers in East Kentucky have been deprived of the best source of in-state, local, and relevant programming in the region.

In 2014, Congress sought to fix exactly this type of problem by authorizing requests for satellite market modifications and adding the provision of in-state service as a factor in the market modification process.<sup>8</sup> Broadcasters and the Commission have successfully used these new rules to eliminate orphan county problems in many markets across the country.<sup>9</sup>

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<sup>5</sup> See Petition, Exhibit A.

<sup>6</sup> Kentucky Central Television, Inc., Hazard, Kentucky for Modification of Station WYMT-TV's ADI, *Memorandum Opinion and Order*, 10 FCC Rcd 3401 (1995).

<sup>7</sup> See 17 U.S.C. § 122 (providing a statutory copyright license for satellite carriers only for a station's "local market"). The local market for WYMT-TV is the Lexington DMA and, unless the Petition is granted, does not include any of the Orphan Counties.

<sup>8</sup> See 47 U.S.C. § 534(h)(1)(C)(ii)(III).

<sup>9</sup> See, e.g., Harrison County, Texas, *Memorandum Opinion and Order*, MB Docket No. 18-24, DA 18-573 (rel. June 1, 2018); Entravision Holdings, LLC, *Memorandum Opinion and Order*, MB Docket No. 17-306, et al., DA 18-239 (rel. Mar. 12, 2018); Monongalia County, West Virginia and Preston County, West Virginia, *Memorandum Opinion and Order*, 33 FCC Rcd 1168 (Med. Bur. 2018); Gray Television Licensee, LLC, *Memorandum Opinion and Order*, 32 FCC Rcd 668 (Med. Bur. 2017).

The Petition included a detailed and fulsome showing that WYMT-TV satisfies all of the statutory factors justifying a market modification – in both the Orphan Counties and the Removal Counties. In the Orphan Counties, Gray showed that WYMT-TV provides an over-the-air signal and is highly rated; that many cable operators have recognized the value of WYMT-TV to their subscribers by including the station on their channel lineups; and that WYMT-TV has provided thousands of hours of local news programming addressing the Orphan Counties, while not a single television station in the three neighboring DMAs claimed to serve them. Thousands of East Kentucky viewers filed comments in support of the requested market modification.<sup>10</sup>

For the Removal Counties, Gray showed that WYMT-TV’s signal generally does not reach those areas; that it has little, if any, cable carriage there; and, consequently, negligible West Kentucky viewership. Gray further showed that WYMT-TV does not generally focus on areas of concern to viewers in the Removal Counties, and that those viewers are amply served by stations that are located closer to the core of the Lexington DMA, including Gray’s WKYT-TV.

No party even sought to refute Gray’s satisfaction of the factors laid out in STELAR and Section 614 of the Act. Instead, both AT&T/DIRECTV and DISH relied solely on the entirely novel claim that Gray’s request is *per se* technically infeasible because neither carries WYMT-TV today.<sup>11</sup> Basically, both argued that STELAR mandates that if a station is not carried by a satellite operator at the time the station applies for a market modification, then the market modification cannot be granted.

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<sup>10</sup> See *Order* at ¶ 12 (acknowledging more than 2,000 citizen comments in support of the Petition).

<sup>11</sup> Opposition of DIRECTV, LLC to Petition of Special Relief, MB Docket 18-8, filed February 5, 2018, at 4 (“DIRECTV Opposition”); Letter from Alison A. Minea, Director & Senior Counsel, Regulatory Affairs, DISH Network L.L.C., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 18-8, dated April 13, 2018, at 2 (“DISH *Ex Parte*”).



Notably, both AT&T/DIRECTV and DISH have admitted that retransmitting WYMT-TV in the Orphan counties is *in fact* technically feasible. In response to a specific question from the Media Bureau, DISH admitted that it “is unaware of any factors that render it ‘technically infeasible’ or ‘economically infeasible’ . . . for DISH to launch WYMT” in HD format in six of the Orphan Counties and in SD format in the remaining two Orphan Counties.<sup>12</sup> Meanwhile, AT&T/DIRECTV acknowledged that it could retransmit WYMT-TV on a neighboring spot beam<sup>13</sup> and that it could launch WYMT-TV in SD format on the same spot beam carrying the Lexington DMA stations.<sup>14</sup> Moreover, AT&T/DIRECTV never countered Gray’s contention that AT&T/DIRECTV could add WYMT-TV in HD format by performing a routine hardware upgrade as it has done in dozens of other markets over the last several years.<sup>15</sup> All told, the evidence overwhelmingly demonstrated that retransmitting WYMT-TV was both technically and economically feasible.

To avoid this undeniable conclusion, both satellite carriers relied on a manufactured technicality in the rules that they claimed renders carriage of WYMT-TV technically infeasible *as a matter of law*.<sup>16</sup> Indeed, DISH didn’t even bother to file an opposition to the Petition, relying solely on its pre-filing letter to Gray explaining it isn’t even required to evaluate the

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<sup>12</sup> DISH *Ex Parte* at 2 (emphasis added).

<sup>13</sup> DIRECTV Opposition at 4.

<sup>14</sup> Letter from Amanda E. Potter, Assistant Vice President-Senior Legal Counsel, AT&T Services, Inc. to Marlene H. Dortch, Secretary, FCC, MB Docket No. 18-8, dated April 13, 2018, at 1-2.

<sup>15</sup> Letter from Robert J. Folliard, III, Vice President & Deputy General Counsel, Gray Television Group, Inc. to Marlene H. Dortch, Secretary, FCC, MB Docket No. 18-8, dated April 13, 2018, at 2-3.

<sup>16</sup> *See id.*

technical and economic feasibility of carriage because WYMT-TV is not currently carried.<sup>17</sup>

AT&T/DIRECTV also argued that grant of the Petition would violate Section 338(c)(1) of the Act by obligating AT&T/DIRECTV to carry duplicating network-affiliates in the same DMA.<sup>18</sup>

While STELAR and Section 614 of the Act do not make current carriage of a station a prerequisite to requesting a market modification, the Media Bureau nonetheless adopted AT&T/DIRECTV's position and denied the petition.<sup>19</sup> The Bureau held that if a station is not currently carried on a satellite system, then any request for a market modification is *per se* technically and economically infeasible. Since AT&T/DIRECTV and DISH do not currently carry WYMT-TV, the Bureau reasoned that Gray's market modification request was procedurally barred. Neither STELAR nor the Commission's orders include any such exemption, and the Bureau's adoption of a new *per se* rule limiting market modification requests should be reversed.

Moreover, the Bureau erred in finding that Section 338(c)(1)'s limitation on mandatory carriage of duplicate network affiliates prohibits grant of the Petition. That section does not apply to stations like WYMT-TV and WKYT-TV that have elected retransmission consent. For the reasons detailed below, Gray requests that the Commission reverse the *Order* and grant the Petition.

### **III. QUESTIONS PRESENTED**

1. Is current signal carriage by a satellite operator a prerequisite for a station to seek a modification of its satellite carriage market under STELAR?

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<sup>17</sup> DISH Feasibility Letter, MB Docket No. 15-71, dated December 8, 2016. DISH later filed a supplemental letter at the invitation of Media Bureau staff. *See* n.10, *supra*.

<sup>18</sup> DIRECTV Opposition at 7.

<sup>19</sup> *See Order* at ¶ 19.

2. Does Section 338(c)(1) of the Act apply to limit satellite operators' carriage obligations with respect to duplicate network-affiliated television stations that have elected retransmission consent or concluded retransmission consent agreements that require retransmission of a station's signal?

Gray submits that this Application for Review should be granted because the *Order* conflicts with Sections 338(c)(1), 338(l), and 614(h) of the Communications Act,<sup>20</sup> and involves questions of law and policy that have not previously been resolved by the Commission.<sup>21</sup>

#### **IV. CARRIAGE OF WYMT-TV IS NOT *PER SE* TECHNICALLY INFEASIBLE UNDER THE ACT OR THE COMMISSION'S RULES.**

The Media Bureau erred in adopting a new pre-existing carriage requirement for satellite market modification requests.<sup>22</sup> STELAR permits satellite carriers to assert technical and economic infeasibility as a defense against a requested market modification.<sup>23</sup> In its order implementing STELAR, the Commission interpreted this exception to permit satellite operators to avoid carriage obligations if a requested market modification would require a station to be added to a neighboring spot beam in addition to the spot beam on which the station already is carried.<sup>24</sup> The Bureau wrongly concluded that this same *per se* carriage exception should be extended to apply to stations that are not currently carried on any spot beam.<sup>25</sup>

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<sup>20</sup> See 47 C.F.R. § 1.115(b)(2)(i).

<sup>21</sup> See *id.* at § 1.115(b)(2)(i).

<sup>22</sup> See *Order* at ¶ 16.

<sup>23</sup> See 47 U.S.C. § 338(l)(3).

<sup>24</sup> See Amendment to the Commission's Rules Concerning Market Modification; Implementation of Section 102 of the STELA Reauthorization Act of 2014; *Report and Order*, 30 FCC Rcd 10406, 10431-32 (2015) ("*STELAR Implementation Order*").

<sup>25</sup> See *Order* at ¶ 19.

As the *Order* acknowledges, STELAR does not include this new *per se* exemption, and the Commission never directly adopted a pre-existing carriage requirement.<sup>26</sup> Congress's primary intent in STELAR was to improve service to Orphan Counties, not to protect satellite operators' spotbeam capacity. Since *per se* exemptions defeat Congress's intent in STELAR they should be adopted only when absolutely necessary to avoid unfair and impermissible demands on satellite operators' spectrum. Instead, the *Order* extended the *per se* exemption based on spotbeam burden far beyond what Congress or the Commission previously approved.

The Bureau's pre-existing carriage requirement is not a reasonable extension of the "neighboring spotbeam" exemption. The Commission adopted the *per se* neighboring spotbeam exemption for cases where carriage in the requested modification area would require a satellite operator to put the station on two different spot beams.<sup>27</sup> The Commission found that requiring a satellite provider to carry the same signal on two spot beams is inefficient and unduly taxes satellite channel capacity.<sup>28</sup> Addition of an uncarried station like WYMT-TV to a single satellite spot beam does not raise anything like the bandwidth issues the Commission designed the neighboring spotbeam exemption to address. The *per se* exemption adopted here, which defeats Congress's intent to serve orphan counties, is an unreasonable response to the minor imposition on satellite spectrum that would be necessitated by grant of the Petition.

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<sup>26</sup> See *id.* at ¶ 20.

<sup>27</sup> See *STELAR Implementation Order*, 30 FCC Rcd at 10431-32. While Congress did not include that exemption in Section 338, the Commission adopted it in recognition of Congress's express desire to protect scarce satellite spot beam capacity. See *id.* at 1429-1432 ¶¶ 30-32 (citing Report from the Senate Committee on Commerce, Science, and Transportation accompanying S. 2799, 113<sup>th</sup> Cong., S. Rep. No. 113-322, at 11 (2014))

<sup>28</sup> See *STELAR Implementation Order*, 30 FCC Rcd at 10431-32.

The Bureau also erred in concluding that previous Commission statements amounted to a current carriage requirement. The Bureau cited language in the *Implementation Order* making reference to the “relevant spot beam on which [the] station is currently carried” in Commission’s discussion of the technical and economic infeasibility exemption. The Bureau considered this sufficient support for adopting a brand new *per se* exemption from the market modification requirements.<sup>29</sup> In reality, the Commission’s use of that phrase does not clearly establish a preexisting carriage requirement. The more reasonable reading of the *Implementation Order* in view of Congress’s intent in STELAR is that the “relevant spot beam” language applies only to technical feasibility determinations for stations that are being carried and is entirely silent with respect to stations like WYMT-TV that are not. In any event, the Commission’s use of that phrase is an entirely insufficient basis for extending a *per se* exemption that defeats a station’s statutory market modification rights.

The Media Bureau’s decision threatens to wipe out significant service improvements to orphan counties around the country. The Bureau’s new rule effectively holds that *any* incremental burden on satellite capacity should be deemed *per se* technically or economically infeasible. That rule is frankly irrational when considered in light of Congress’s clear intent in the statute. The point of the STELAR amendment was to expand satellite operators’ carriage obligations. While Congress had due regard for satellite capacity limitations, it recognized those limits by giving them the opportunity to prove technical or economic infeasibility. It is unimaginable that Congress meant to expand satellite operators’ obligations without any incremental burden on satellite spot beams. The Media Bureau’s conclusion to the contrary is simply at odds with Congress’s manifest intent in STELAR and must be reversed.

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<sup>29</sup> See *Order* at ¶ 17.

The Commission should adopt an approach to uncarried stations that is consistent with Congress's intent. The rule governing uncarried stations should start from the unassailable positions that (1) Congress intended all stations to be eligible for orphan county-solving market modifications; (2) Congress would have reasonably expected that expanding carriage of stations to new areas would result in some incidental imposition on satellite capacity; and (3) that Congress adopted the technical and economic infeasibility exception to allow satellite operators to argue that a particular imposition is too much. It follows from these propositions that an uncarried station should not be barred from seeking a market modification unless a satellite operator can demonstrate that such an addition is actually technically or economically infeasible. This approach respects the statutory rights of both broadcasters and satellite operators while avoiding the Bureau's approach of simply disqualifying all uncarried stations from seeking market modifications regardless of whether carriage is actually technically infeasible.

Had the Bureau followed this reasonable approach in this case, it would have granted the Petition because both AT&T/DIRECTV and DISH conceded that retransmission of WYMT-TV is technically feasible in the orphan counties. The Commission should reverse the *Order*, eliminate the Bureau's pre-existing carriage requirement, and grant the Petition.

**V. THE MEDIA BUREAU'S FINDING THAT THE PETITION IS BARRED BY SECTION 338(c)(1) IS CLEAR LEGAL ERROR.**

The Media Bureau clearly erred in finding that grant of the Petition would result in duplicate carriage of WYMT-TV and WKYT-TV that is prohibited by Section 338(c)(1).<sup>30</sup> This conclusion was based on the Bureau's mistaken view that Section 338(c)(1) prohibits carriage of

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<sup>30</sup> See *id.* at ¶¶12, 21-22.

duplicating network affiliates assigned to the same DMA under any circumstances.<sup>31</sup> This is simply false. The limitation in Section 338(c)(1) applies only when a satellite operator is considering carriage requests pursuant to must-carry.<sup>32</sup> Section 338(c)(1) does not apply where, as in the case of WYMT-TV and WKYT-TV, the duplicate affiliates both have elected retransmission consent.

If the Bureau were correct, then a satellite operator would have the statutory right to choose to retransmit only one of a pair of duplicating network affiliates even if the operator freely entered into retransmission consent agreements obligating it to carry both. Nothing in the Act suggests that Section 338(c)(1) could be read or was intended to override private retransmission consent agreements entered into under Section 325(b). Indeed, in at least five television markets, both DISH and AT&T/DIRECTV currently retransmit two stations affiliated with the same network.<sup>33</sup> The *Order* would appear to override those privately negotiated

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<sup>31</sup> See *id.* at ¶ 22 & n.79 (“Moreover, Section 338(c)(1) means that the satellite carriers are not required to carry both stations in the Lexington DMA. Thus, the carrier would not have to carry the duplicating affiliate regardless of whether it elects must-carry or retransmission consent.”).

<sup>32</sup> Section 338(a)(1) expressly makes the terms of Section 338 “subject to section 325(b),” which governs stations operating under retransmission consent. 47 U.S.C. §338(a)(1). Section 325(b) likewise makes clear that only Section 325(b) govern retransmission consent stations, whereas Section 338 governs stations electing mandatory carriage. See 47 U.S.C. §325(b)(1)(C). In addition, Section 338(a)(4) expressly distinguishes mandatory carriage pursuant to Section 338 and retransmission consent pursuant to Section 325(b), stating that “[w]ithin 1 year after December 8, 2004, the Commission shall promulgate regulations concerning elections by television stations in such State between mandatory carriage pursuant to this section and retransmission consent pursuant to section 325(b) of this title, which shall take into account the schedule on which local television stations are made available to viewers in such State.”

<sup>33</sup> AT&T/DIRECTV and DISH both retransmit the following duplicate affiliates in the following markets:

<b>DMA</b>	<b>Affiliation</b>	<b>Station</b>	<b>Duplicate Station</b>
Boston (Manchester)	ABC	WCVB, Boston, MA	WMUR, Manchester, NH
Tampa-St. Petersburg (Sarasota)	ABC	WFTS, Tampa, FL	WWSB, Sarasota, FL

agreements calling for such carriage and would disrupt well-settled industry and viewer expectations. Since both WYMT-TV and WKYT-TV have elected retransmission consent for the 2018-2020 election cycle, Section 338(c)(1) cannot be read to apply to either station's carriage in the Lexington DMA today.

The Bureau compounded this error by rejecting out-of-hand Gray's offer to waive its future mandatory carriage rights in the areas of the Lexington DMA where WYMT-TV and WKYT-TV's satellite carriage rights overlap.<sup>34</sup> Gray's proposed solution would ensure that the mandatory carriage rules would never create any Section 338(c)(1) issue with respect to satellite operators' carriage of WYMT-TV and WKYT-TV. Yet the Bureau found that Gray's proposal had "no evidentiary weight" in this proceeding. In the past, the Media Bureau has accepted such prospective waivers to resolve concerns about duplicative carriage, and it provided no reason for rejecting Gray's waiver here.<sup>35</sup>

In any event, Gray's offer not to assert mandatory carriage rights in areas where WKYT-TV might be carried entirely defeats the Media Bureau's chosen narrative that Gray is trying to game the system to force carriage of both WYMT-TV and WKYT-TV throughout the Lexington DMA. The only areas where Gray is seeking to establish mandatory satellite carriage is in the

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Grand Rapids-Kalamazoo-Battle Creek	ABC	WZZM, Grand Rapids, MI	WOTV, Battle Creek, MI
Waco-Temple Bryan	CBS	KWTX, Waco, TX	KBTX, Bryan, TX
Lincoln & Hastings-Kearney	ABC	KLKN, Lincoln, NE	KHGI, Kearney, NE

<sup>34</sup> See *Order* at ¶ 22 & n.79.

<sup>35</sup> See *Gray Television Licensee, Inc., For Modification of the Harrisonburg, Virginia DMA, Memorandum Opinion and Order*, 21 FCC Rcd 8719, 8728 (2006).



Orphan Counties, just as Congress intended when it enacted STELAR and expanded its market modification policies to include satellite carriers.<sup>36</sup>

The Bureau also mistakenly concluded that the Petition is barred because Section 338(c)(1) prohibits a satellite provider from ever being required to include two duplicate affiliates from the same DMA on a single spot beam. The Bureau assumed that granting the Petition would necessarily lead to placement of WYMT-TV on the “Lexington spot beam” along with WKYT-TV and concluded that such a result is barred by Section 338(c)(1).<sup>37</sup> This conclusion was both legally flawed and factually unsupportable.

On the legal side, Section 338(c)(1) protects satellite operators against being required to deliver duplicating affiliates to consumers under mandatory carriage, but it has never been held to protect against placement of duplicating signals on a spot beam if that was necessary for a satellite provide to satisfy its contractual and statutory obligations. Section 338(c)(1) says nothing about the circumstance where both duplicating network affiliates elect retransmission consent and a satellite carrier enters into an agreement to carry both. And it says nothing about the scenario where one station elects retransmission consent and the other mandatory carriage and the satellite operator enters into an agreement to carry the retransmission consent station. In each of those cases, a satellite carrier would end up with both duplicating affiliates on the same spot beam, but it wouldn’t be “required” to do so by the statute; it would be choosing to do so. Indeed, as explained above, both AT&T/DIRECTV and DISH currently retransmit duplicating affiliates in at least five markets.

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<sup>36</sup> The Bureau correctly recognized that Section 338(c)(1) could not apply to this request in the Orphan Counties because each of them is located in a different state than WYMT-TV. *See Order* at ¶ 22 & n.75.

<sup>37</sup> *See Order* at ¶ 19.

On the factual side, there is no evidence in the record that there is such a thing as a “Lexington spot beam” or whether one or more spot beams is used to serve the Orphan Counties. And there is no evidence in the record that either AT&T/DIRECTV or DISH would have to add WYMT-TV to the same spot beam as WKYT-TV in order to deliver WYMT-TV to the Orphan Counties.<sup>38</sup> These facts aren’t in the record because the Bureau did not require AT&T/DIRECTV or DISH to provide an actual technical or economic feasibility analysis. Absent this factual predicate, even if the Media Bureau were reading Section 338(c)(1) correctly as a matter of law (and it was not), it was arbitrary and capricious for the Media Bureau to conclude that the Petition is barred because both WYMT-TV and WKYT-TV would have to be placed on the same spot beam.

**VI. GRANT OF THE PETITION WOULD FULFILL CONGRESS’S INTENT TO FOSTER SATELLITE SERVICE TO ORPHAN COUNTIES.**

The Media Bureau’s misapplication of Sections 338 and 534 of the Act require reversal of the *Order*. The Bureau’s finding that the Petition was subject to a *per se* bar was clear error, and there are no facts in the record demonstrating that carriage of WYMT-TV in the Orphan Counties is actually technically or economically infeasible. In fact, the evidence in the record overwhelmingly points to the opposite conclusion. Both AT&T/DIRECTV and DISH admitted that carriage of WYMT-TV in the Orphan Counties was feasible,<sup>39</sup> and both had multiple opportunities to provide actual evidence of infeasibility. Instead, they chose to rely on manufactured legal technicalities to derail service to the Orphan Counties.

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<sup>38</sup> As described above, since Gray offered to waive its mandatory carriage rights in the Lexington portion of its post-modification market, the Bureau’s conclusion that the satellite carriers would have to place WYMT-TV and WKYT-TV on the same spot beam cannot be deduced from the fact that some Lexington DMA counties would remain in WYMT-TV’s market.

<sup>39</sup> See text accompanying notes 12-15, *supra*.

On the other hand, Gray's proof that it satisfies all of the statutory criteria governing satellite market modifications is both ample and unopposed. Grant of the Petition would expand local, in-state television service to East Kentucky residents that have literally cried out for that service in this very docket. Under these circumstances, the only course available to the Commission is to reverse the *Order*, grant the Petition, and fulfill Congress's mandate in STELAR to expand local television service to the Orphan Counties.

## **VII. CONCLUSION**

For the reasons stated herein, Gray requests that the Commission grant this Application for Review, reverse the order, and grant the Petition.

Respectfully submitted,

**GRAY TELEVISION LICENSEE, LLC**



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June 15, 2018

## **CERTIFICATE OF SERVICE**

I, Robert J. Folliard, III, hereby certify that a true and correct copy of the foregoing Application for Review was placed in first class U.S. mail, postage prepaid, except where otherwise indicated, on this 15<sup>th</sup> day of June 2018, addressed to the following:

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

Ms. Michelle Carey\*  
Chief, Media Bureau  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Ms. Holly Saurer, Esq.\*  
Associate Bureau Chief, Media Bureau  
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Ms. Martha Heller, Esq.\*  
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Mr. Evan Baranoff, Esq.\*  
Attorney-Advisor, Policy Division, Media Bureau  
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DIRECTV, LLC Local-Into-Local-Market Modification  
Attention: Amanda E. Potter, Assistant Vice President, Senior Legal Counsel  
2260 East Imperial Highway  
El Segundo, California 90245

DISH Network L.L.C.  
Attention: Ms. Alison A. Minea, Director & Senior Counsel, Regulatory Affairs  
1110 Vermont Ave NW, Suite 750  
Washington, DC 20005



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Robert J. Folliard, III

\*Sent via courier