

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

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

OPPOSITION OF DISH NETWORK L.L.C. TO APPLICATION FOR REVIEW

Pursuant to Section 1.115(d) of the Commission’s rules, 47 C.F.R. § 1.115 (d), DISH Network L.L.C. (“DISH”) respectfully opposes the Application for Review filed by Gray Television Licensee, LLC (“Gray”) in the above-captioned proceeding.¹ In its *Order*² denying Gray’s proposed satellite market modification, the Media Bureau got it right on both the facts and the law. DISH therefore respectfully asks the Commission to reject Gray’s request to overturn it.

I. BACKGROUND

Gray sought a market modification for WYMT-TV, Hazard, KY (“WYMT”) pursuant to the procedures set forth in the Federal Communications Commission’s (“FCC”) rules governing market modifications for satellite carriers under the STELA Reauthorization Act of 2014

¹ See Application for Review filed by Gray Television Licensee, LLC, MB Docket 18-8 (June 15, 2018) (“*AFR*”).

² See Gray Television Licensee, LLC, MB Docket 18-8, DA 18-500 (rel. May 16, 2018) (the “*Order*”).

(“STELAR”).³ WYMT is a CBS affiliate assigned to the Nielsen-defined designated market area (“DMA”) of Lexington, KY. Gray filed its market modification petition (“Petition”) with the Commission on January 9, 2018.⁴ The Petition asked the Commission to craft a customized local market for WYMT by (1) shaving off certain counties from its Lexington, KY DMA, and (2) adding to WYMT’s local market eight counties picked from three neighboring DMAs (the “Additional Counties”).⁵

Prior to filing its Petition, Gray sought an analysis from DISH addressing whether it would be technically and economically feasible for DISH to commence carrying WYMT in the partial areas of Lexington and the Additional Counties.⁶ DISH responded that DISH did not, at that time, carry WYMT in any DMA (and does not do so today), and DISH therefore was not in a position to evaluate the technical or economic feasibility of extending or changing the carriage footprint of a non-carried station.⁷

³ See Amendment to the Commission’s Rules Concerning Market Modification, Implementation of Section 102 of the STELA Reauthorization Act of 2014, *Report and Order*, MB Docket No. 15-71, FCC 15-111, ¶ 47 (Sept. 2, 2015) (“*Satellite Market Modification Order*”). See also STELA Reauthorization Act of 2014 (STELAR), § 102, Pub. L. No. 113-200, 128 Stat. 2059, 2060-62 (2014) (codified at 47 U.S.C. § 338(l)).

⁴ Gray Television Licensee, LLC for Modification of the Television Market for WYMT-TY, Hazard, Kentucky, Petition for Special Relief, filed Jan. 9, 2018 (the “Petition”).

⁵ Notably, WYMT has a sister station, WKYT, in the Lexington, KY DMA. Both WYMT and WKYT are CBS affiliates owned by Gray. But Gray has not sought a market modification for WKYT to serve the Additional Counties. DISH currently carries WKYT in the Lexington DMA but does not carry WYMT, whose content substantially duplicates that of its sister affiliate. The proposed market modification would result in a customized market for WYMT that overlaps in part with the local market for WKYT.

⁶ Letter from Robert J. Folliard, III, Gray Television Licensee, LLC to Alison A. Minea, DISH, Sept. 29, 2016.

⁷ Letter from Alison A. Minea, DISH to Robert J. Folliard, III, Gray Television Licensee, LLC, Dec. 8, 2016.

The plain language of the implementing order for the FCC’s market modification rules makes it clear that contemporaneous carriage of a given TV station is a prerequisite for a satellite carrier to be required to provide a feasibility response. Under STELAR and the Commission’s rules, a satellite carrier is not required to comply with a satellite market modification request if it would be technically or economically infeasible to do so.⁸ When determining if a proposed market modification is technically or economically feasible, the *Satellite Market Modification Order* states that feasibility is determined based on “the relevant spot beam on which th[e] station is currently carried.”⁹ To ensure its meaning was clear, the Commission reiterated as follows: “[W]e will refer to the spot beam on which the station is currently carried as the ‘relevant spot beam.’”¹⁰

As stated in DISH’s response to Gray’s pre-filing coordination letter, DISH did not then (and does not now) carry WYMT on any spot beam on DISH’s direct broadcast satellite service.¹¹ There is thus no “relevant spot beam” on which DISH could have assessed the feasibility of accommodating WYMT’s desire to be carried in parts of its current Nielsen-assigned DMA (Lexington) or the Additional Counties.

Media Bureau staff nonetheless requested that DISH provide a response on whether it could, absent legal or regulatory considerations, support the market modification that Gray had proposed. While reserving all rights and preserving all arguments for reconsideration and/or appeal, DISH provided the following information in response to an information request from the

⁸ *Satellite Market Modification Order* ¶ 4.

⁹ *Id.* ¶ 30 (emphasis added).

¹⁰ *Id.* ¶ 30 n. 163.

¹¹ DISH Response to Gray Pre-Filing Coordination at 1.

Media Bureau: “Based upon DISH’s current satellites and spot beam configurations, at this time, DISH is unaware of any factors that render it ‘technically infeasible’ or ‘economically infeasible’ pursuant to 47 C.F.R. § 76.59(e) for DISH to launch WYMT.”¹² Notwithstanding DISH’s response, and considering the statute, rules, and implementing order, the Media Bureau correctly denied the Petition on several legal and policy grounds. There is no basis for the Commission to overturn the Bureau’s well-reasoned conclusion.

II. PRE-EXISTING CARRIAGE IS A PREREQUISITE TO GRANTING A MARKET MODIFICATION

Gray cannot circumvent the retransmission consent cycle by using the market modification process. Such a result would turn an established and important process on its head and is not necessary to implement Congress’ intent for satellite market modifications. Gray argues that the Media Bureau erred in denying the Petition because, in Gray’s view, “the evidence overwhelmingly demonstrated that retransmitting WYMT-TV was both technically and economically feasible” for both DISH and DIRECTV. But Gray misrepresents the Media Bureau’s *Order*. The Media Bureau **did not** find it feasible for DISH and DIRECTV to carry the station. In fact, the Media Bureau found that carriage was “*per se* infeasible.”¹³ The Media Bureau reached this conclusion because it correctly determined that pre-existing satellite carriage of a given TV station is a prerequisite to determining the feasibility of any satellite market modification.¹⁴ Both DISH and DIRECTV placed evidence in the record that neither satellite

¹² See Letter from Alison Minea, DISH, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 18-8 (April 13, 2018) (“DISH Response to MB Staff”).

¹³ *Order* ¶ 17 (emphasis in original).

¹⁴ *Id.*

carrier was carrying WYMT at the time the Petition was filed, nor in the past when Gray requested pre-filing coordination.¹⁵

The Media Bureau correctly interpreted the Commission’s implementing order in finding that the Commission “did not intend to require satellite carriers to add a new station to a spot beam and then evaluate the technical and economic feasibility of expanding coverage to areas encompassed in a market modification petition.”¹⁶ Instead, as the Bureau properly reasoned, it must consider “whether it *can* be feasible for a satellite carrier to *expand* a pre-existing carriage obligation to other areas served by the relevant spot beam.”¹⁷ And here there is nothing to expand. Without existing carriage, then carriage of the station is “*per se* infeasible.”¹⁸

There is nothing in statute or rule that can be used to compel a satellite carrier to launch a station on its system for the first time when that station chose not to elect mandatory carriage in its Nielsen-assigned DMA. And for good reason. Contrary to Gray’s assertions, carriage of a new station is hardly “incidental.” According to Gray, “[t]he Bureau’s new rule effectively holds that any incremental burden on satellite capacity should be deemed *per se* technically or economically infeasible,” an outcome that Gray perceives to be “frankly irrational.”¹⁹ But Gray misconstrues the *Order*. The Bureau rightfully addressed a serious logistical and operational issue that satellite carriers would face under Gray’s view of the law.

¹⁵ DISH Response to MB Staff at 2; Opposition of DIRECTV, LLC to Petition for Special Relief, MB Docket No. 18-8 (Feb. 5, 2018), at 4.

¹⁶ *Order* ¶ 17.

¹⁷ *Id.* (emphasis in original).

¹⁸ *Id.* (emphasis in original).

¹⁹ AFR at 9.

Under the Communications Act and the Commission’s implementing orders, eligible TV stations have the choice to elect mandatory carriage with satellite carriers on a three-year election cycle.²⁰ Among other things, this allows a satellite carrier to work with predictable time windows to manage potential new or changed carriage obligations in each DMA it serves, and to plan spot beam capacity accordingly. To DISH’s knowledge, Gray has not attempted to seek mandatory carriage for WYMT in the station’s Nielsen-assigned DMA of Lexington, KY. And DISH takes no position here on the hypothetical outcome had Gray chosen to pursue such carriage. But in any event, Gray’s interpretation would give Gray and any TV station an unlimited “second bite at the apple” for satellite carriage outside the normal election cycle. The Bureau correctly found that satellite market modifications may be sought only for *extending* the geographic reach of a presently carried station by a satellite carrier, not for forcing station launches.

III. THE BUREAU CORRECTLY INTERPRETED SECTION 338(c)(1) TO BAR DUPLICATE NETWORK AFFILIATES

The Bureau correctly found that Section 338(c)(1)’s limitation on mandatory carriage of duplicate network affiliates prohibits grant of the Petition. Were it otherwise, satellite carriers could be forced to carry duplicate networks in overlapping territories, a result in direct conflict with Section 338(c)(1) of the Communications Act.

Gray attempts to sidestep the relevant question by postulating that when two duplicating network affiliates have both elected retransmission consent, nothing bars a satellite operator from

²⁰ 47 U.S.C. 338; 47 C.F.R. § 76.66.

carrying both, and therefore Section 338(c)(1) does not apply.²¹ But Gray's premise is flawed. Section 338 provides an exception to the must-carry/carry-one, carry-all obligations of satellite for "duplicating signals."²² "Duplicating signals" include broadcast stations that are located in the same state and in the same local market, and which are affiliated with the same television network. The satellite carrier may choose which duplicating signal/network affiliate to carry.²³ Gray does not dispute that the two Gray-owned CBS affiliates (WKYT and WYMT) meet the definition of "duplicating signals" within the Lexington, KY DMA, and DISH has chosen to retransmit only WKYT to its Lexington customers. But again, Gray seeks to co-opt the satellite market modification rules to force DISH to carry duplicating affiliate WYMT when Gray has otherwise waived any applicable mandatory carriage rights it might have had through the normal triennial carriage election cycle. Gray's purported offer²⁴ to waive rights it may or may not have in areas where WKYT and WYMT overlap is beside the point. The Media Bureau correctly applied the law and found that Section 338(c)(1)'s exception for duplicating signals independently bars Gray's Petition.

²¹ AFR at 11 ("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).")

²² 47 U.S.C. § 338(c)(1) ("[A] satellite carrier shall not be required to carry upon request ... the signals of more than one local commercial television broadcast station in a single local market that is affiliated with a particular television network unless such stations are licensed to communities in different States.")

²³ 47 C.F.R. §§ 76.66(h)(2)-(3) ("A satellite carrier may select which duplicating signal [or network affiliate] in a market it shall carry.").

²⁴ AFR at 12.

IV. CONCLUSION

For the foregoing reasons, the Commission should reject the AFR and uphold the Media Bureau's findings in the *Order*.

Respectfully submitted,

_____/s/
Alison A. Minea
Director & Senior Counsel
Regulatory Affairs
DISH NETWORK L.L.C.
1110 Vermont Avenue NW,
Suite 750
Washington, DC 20005
(202) 463-3709

June 29, 2018

CERTIFICATE OF SERVICE

I hereby certify that, on this 29th day of June 2018, a copy of the foregoing **OPPOSITION OF DISH NETWORK L.L.C. TO APPLICATION FOR REVIEW** was filed electronically with the Commission by using the ECFS system and that a copy of the foregoing was served upon the parties below via first class U.S. mail, postage prepaid:

DIRECTV, LLC
Attention: Amanda E. Potter
1120 20th Street, NW, Suite 1000
Washington, DC 20036

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

/s/ _____
Alison A. Minea