Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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 Facility Identification Number 24915	)	CSR-8949-A

OPPOSITION OF DIRECTV, LLC TO APPLICATION FOR REVIEW

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SUMMARY

DIRECTV, LLC ("DIRECTV") has long been sympathetic to the concerns of "orphan counties" that lack access to in-state local broadcast stations. DIRECTV supported legislation extending the cable market modification regime to satellite, and it supported the Commission's proposed rule changes to implement that legislation. Likewise, DIRECTV has worked cooperatively with local communities and broadcast stations, alike, to facilitate market modifications in numerous "orphan counties." In the instant proceeding, however, Gray Television Licensee, LLC ("Gray") attempts to subvert the market modification process to serve its own economic interests. Specifically, under the guise of serving DIRECTV customers in eight Kentucky counties (the "Orphan Counties"), which currently lack access to in-state CBS broadcasts, Gray seeks to force DIRECTV to carry *two* CBS affiliates licensed in the Lexington, KY designated market area ("DMA")—WYMT-TV ("WYMT"), based in Hazard, KY, as well as WKYT-TV ("WKYT"), based in Lexington, KY—both of which are owned by Gray.

As the Bureau rightfully held below, the law does not permit such a satellite market modification. In particular, consistent with the plain language of the *Satellite Market Modification Order* and Section 338(l) of the Communications Act of 1934, as amended (the "Act"), Gray's proposed modifications of WYMT's market are *per se* technically and economically infeasible, because DIRECTV does not presently carry (and is under no legal obligation to carry) WYMT *in any market*. Independently, albeit relatedly, the Bureau's *Order* concludes appropriately that modifying WYMT's market in the manner requested by Gray would unlawfully circumvent DIRECTV's right to decline carriage of "duplicating signals" under Section 338(c)(1) of the Act. Because of these and other serious constitutional and legal impediments, detailed further herein and in the record below, the Commission should deny the Application for Review.

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DIRECTV hereby submits its opposition to the Application for Review submitted by Gray,[1] which seeks Commission review of the Media Bureau's denial of Gray's proposed modification of the local market of WYMT.[2]

BACKGROUND

Congress and the Commission have long recognized the unique and inherent capacity constraints and coverage limitations of direct broadcast satellite ("DBS") providers. Dating back to the Satellite Home Viewer Act of 1999 ("SHVIA"), Congress and the Commission have carefully considered the characteristics of satellite-based television service and tailored the scope of carriage burdens imposed on DBS providers accordingly.[3] The Act and the Commission's rules pertaining to satellite carriage thus acknowledge and accommodate the technical limitations of DBS networks. Likewise, they reflect Congress's and the Commission's acceptance of the settled, long-term investment and planning decisions of DBS providers—including important tradeoffs that DBS providers must make between coverage and capacity, among other factors.

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1 *Gray Television Licensee, LLC For Modification of the Television Market For WYMT-TV, Hazard, KY*, Application for Review, MB Docket No. 18-8 (filed June 15, 2018) ("Application for Review").

2 *Gray Television Licensee, LLC For Modification of the Television Market For WYMT-TV, Hazard, KY*, Memorandum Opinion and Order, MB Docket No. 18-8, CSR No. 8949-A, DA 18-500 (MB rel. May 16, 2018) ("*WYMT Order*" or "*Order*").

3 Satellite Home Viewer Act of 1999, Pub. Law 106-113, 113 Stat. 1501 (Nov. 29, 1999).

Section 338 of the Act, as well as the Commission's implementing rules and precedent, provide no shortage of examples confirming these principles. For example, unlike the must carry obligations applicable to cable operators, the decision to provide local broadcast service generally is *voluntary* for DBS providers.[4] Further, neither Congress nor the Commission requires DBS providers to offer local signals throughout, or in any particular part of, a station's DMA.[5]

Even in DMAs where the carry-one, carry-all requirement applies, Section 338 and the Commission's rules provide an exception for "duplicating signals."[6] Specifically, Section 338(c)(1) provides that DBS providers are not required to carry any local broadcast station if it "substantially duplicates" the signal of another station that the DBS provider carries in the same market.[7] DBS providers also are not required to carry "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."[8] Under the Commission's rules and precedent, DBS providers have discretion to decide which duplicating signal/network affiliate to carry.[9] Of course, this flexibility does not prohibit a DBS provider from carrying stations that qualify as "duplicating signals," provided such carriage is subject to a valid must carry election or the broadcast station's grant of retransmission consent.

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4 47 U.S.C. § 338(a)(1); 47 C.F.R. § 76.66(b); *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues, Retransmission Consent Issues*, Report and Order, 16 FCC Rcd 1918 ¶ 14 (2000) ("*SHVIA Order*").

5 *See SHVIA Order* ¶ 42 (observing that "Section 338 does not require a satellite carrier to serve each and every county in a television market").

6 47 U.S.C. § 338(c)(1); *see also* 47 C.F.R. § 76.66(h).

7 47 U.S.C. § 338(c)(1); 47 C.F.R. § 76.66(h)(6) (defining "substantially duplicates").

8 47 U.S.C. § 338(c)(1).

9 47 C.F.R. § 76.66(h); *SHVIA Order* ¶¶ 77, 80 (providing that, "due to the fundamental operational differences between cable and satellite service, a satellite carrier may choose which duplicating signal it is not required to carry" or, in the case of duplicating network affiliates, "which network affiliate it wants to carry"). The Commission's rules also afford DBS providers the right to remove a station from their channel line-ups if the station "meets the substantial duplication criteria." 47 C.F.R. § 76.66(h)(4).

Most recently, when Congress amended Section 338 in 2014 to add a market modification procedure for satellite systems,[10] Congress again took the deliberate step of including language to accommodate the unique position of DBS providers. Specifically, Section 338(l) provides that satellite market modifications would be limited to those circumstances in which the proposed modification "is technically and economically feasible."[11] Further, the legislative history demonstrates that "Congress continued to be concerned with satellite capacity constraints."[12]

In the subsequent rulemaking, the Commission adopted rules detailing the manner in which it would conduct satellite market modification proceedings, including by requiring DBS providers to provide information regarding their spot beam coverage in detailed certifications, under penalty of perjury, to aid the Commission's analysis of the feasibility of a proposed market modification.[13] Over the objection of broadcasters,[14] the Commission confined the detailed certification requirement to an analysis of the "relevant spot beam on which th[e] station is *currently carried*."[15] The *Satellite Market Modification Order* thus makes clear that DBS

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10 *See* 47 U.S.C. § 338(l). The satellite market modification procedure was adopted as part of the STELA Reauthorization Act of 2014, Pub. L. No. 113-200, 128 Stat. 2059 (2014) ("STELAR").

11 47 U.S.C. § 338(l)(3).

12 *WYMT Order* ¶ 22 n.73 (citing Report from the Senate Committee on Commerce, Science, and Transportation accompanying S. 2799, S. Rep. No. 113-322, at 11 (2014)).

13 *See, e.g.*, *Amendment to the Commission's Rules Concerning Market Modification*, Report and Order, 30 FCC Rcd 10406 ¶¶ 36-39, 41-42, 47 (2015) ("*Satellite Market Modification Order*").

14 *See, e.g.*, *id.* ¶ 32 & n.180 (disagreeing with NAB "that a satellite carrier should be required to show that the station could not be added to a spot beam different than the one on which the station is currently carried that does cover the new community").

15 *Id.* ¶ 30 (emphasis added); *see also WYMT Order* ¶ 17 n.60. As explained in DIRECTV's Opposition, the *Satellite Market Modification Order* took the further step of defining "relevant spot beam" as "the spot beam on which the station is currently carried." *Gray Television Licensee, LLC For Modification of the Television Market For WYMT-TV, Hazard, KY*, Opposition of DIRECTV, LLC to Petition for Special Relief, MB Docket No. 18-8, CSR-8949-A, at 4 (filed Feb. 5, 2018) ("DIRECTV Opposition") (citing *Satellite Market Modification Order* ¶ 30 n.163).

providers' detailed certifications need not consider whether, or demonstrate that, carriage on a "neighboring" spot beam is infeasible to avoid an adverse market modification determination.[16]

Consistent with these limitations, the Commission also concluded that, if "the relevant spot beam does not provide coverage to the [modified market area proposed in a market modification petition], then that is a *per se* demonstration of infeasibility."[17] The Commission further outlined other carriage scenarios that it concluded were *per se* technically and economically infeasible, including *per se* rules applicable to neighboring spot beams and CONUS beams.[18] In making these *per se* determinations, the Commission expressed particular concern regarding the "inefficient" use of spot beam capacity, including the forced use of capacity on a 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."[19]

It is against this legal and regulatory backdrop that the Bureau denied Gray's petition to modify the market of WYMT. WYMT is a CBS affiliate owned by Gray and licensed in Hazard, KY, which is located in the Lexington, KY DMA.[20] DIRECTV does not presently carry, and has never carried, WYMT. Over the years, DIRECTV has repeatedly declined carriage of WYMT based on its status as a "duplicating signal." DIRECTV instead carries another Lexington-based CBS affiliate, WKYT-TV ("WKYT"), which Gray also owns.

DIRECTV therefore opposed the Petition, relying on the *per se* rules adopted in the *Satellite Market Modification Order*, as well as the "duplicating signals" exception, among other

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16 *See Satellite Market Modification Order* ¶ 32 (clarifying that, because a market modification involving a neighboring spot beam is deemed *per se* technically and economically infeasible, "a carrier would not need to show that there is no space on a neighboring spot beam" in its detailed certification or in the context of a market modification proceeding); DIRECTV Opposition at 5 & n.11.

17 *Satellite Market Modification Order* ¶ 32; *see also WYMT Order* ¶ 14 & n.51.

18 *WYMT Order* ¶ 18 n.62.

19 *Id.* ¶ 18 (quoting *Satellite Market Modification Order* ¶ 32).

20 *Gray Television Licensee, LLC For Modification of the Television Market for WYMT-TV, Hazard, KY,* Petition for Special Relief (filed Jan. 9, 2018) ("Petition").

legal and factual arguments. In particular, DIRECTV explained that taken together, the separate modification requests included in Gray's Petition would split the market of WYMT and WKYT in such a way that would force DIRECTV to carry *both* WKYT and WYMT.[21] Adopting much of the legal analysis presented by DIRECTV, the Bureau issued an order denying the Petition. For the reasons discussed herein, as well as on the basis of the record developed before the Bureau, the Commission should deny the Application for Review.

ARGUMENT

I. THE BUREAU PROPERLY CONCLUDED THAT THE PROPOSED MARKET MODIFICATION IS *PER SE* TECHNICALLY AND ECONOMICALLY INFEASIBLE

DIRECTV explained in response to Gray's pre-filing coordination letter that, while DIRECTV "currently does not carry the requested station, WYMT (CBS)," DIRECTV's engineering team nevertheless evaluated Gray's request using its Lexington, KY spot beam, on which DIRECTV carries WKYT.[22] As DIRECTV explained to Gray, DIRECTV ultimately concluded that carriage of WYMT to the Orphan Counties would be infeasible,[23] and the Bureau agreed. Gray takes issue with the *Order*, asserting that DIRECTV conceded that it could carry WYMT on a neighboring spot beam. That is simply false. Gray also argues that, notwithstanding the Commission's considered judgment in the *Satellite Market Modification Order* that DBS providers would not be required to devote scarce spectral resources in a manner

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21 DIRECTV Opposition at 3.

22 *See* Letter from DIRECTV to Robert J. Folliard, III, Gray, at 1 (Nov. 7, 2016) ("Because DIRECTV currently does not carry the requested station, WYMT (CBS), DIRECTV has reviewed the request to add the above counties to WYMT (CBS)'s local television market based upon DIRECTV's carriage of Gray Television's station WKYT (CBS), which is assigned to the same Lexington KY DMA and is currently carried by DIRECTV."); *id.* ("DIRECTV's engineering staff was given the areas to evaluate for our Lexington, KY spot beam.").

23 *Id.*

that is highly inefficient, DIRECTV should be required to do just that. As discussed below, neither assertion provides a basis on which to overturn the *WYMT Order*.

A. Gray's Efforts To Force DIRECTV To Launch Carriage of WYMT on a Neighboring Spot Beam Are Both Factually and Legally Deficient.

At the threshold, the Application for Review sows unnecessary confusion by attempting to place DIRECTV's network configuration in issue. For example, Gray makes inconsistent and factually incorrect arguments, asserting, on the one hand, that DIRECTV somehow conceded that it could carry WYMT on a neighboring spot beam, while suggesting, on the other hand, that there is no such thing as a "Lexington spot beam."[24] The reality is much more straightforward and reveals Gray's motivation to force DIRECTV's carriage of WYMT, without regard to the facts or the law.

DIRECTV retransmits local broadcast stations into the Lexington, KY DMA on its Lexington, KY spot beam. Accordingly, DIRECTV never "acknowledged that it could retransmit WYMT-TV on a neighboring spot beam."[25] Far from it. Notwithstanding the fact that DIRECTV does not carry (and never has carried) WYMT, DIRECTV limited its engineering evaluation in response to Gray's pre-filing coordination letter to its Lexington, KY spot beam, as it is the only spot beam on which DIRECTV would consider launching WYMT if it were to choose to do so in the normal course of business.[26]

It is unclear whether the Application for Review takes issue with (a) the adequacy of DIRECTV's detailed certification, (b) the Commission's underlying determination, in the

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[24] *Compare* Application for Review at 5 (claiming that DIRECTV "acknowledged that it could retransmit WYMT-TV on a neighboring spot beam") *with id.* at 14 (claiming that "there is no evidence in the record that there is such a thing as a 'Lexington spot beam'").

[25] Application for Review at 5.

[26] As noted above, the *Satellite Market Modification Order* limits the feasibility analysis required of DBS providers to an evaluation of the "relevant spot beam," which is defined as the spot beam on which the station is currently carried. *See WYMT Order* ¶ 17 n.60 (citing DIRECTV Opposition at 5 n.11).

Satellite Market Modification Order, that carriage on neighboring spot beams is *per se* technically and economically infeasible, or (c) both. In any case, Gray's arguments are procedurally, substantively, and/or factually deficient. Gray never questioned the adequacy of the scope of DIRECTV's detailed certification regarding WYMT below. To the extent Gray now takes such a position, Gray was required to first raise such alleged inadequacies to the Bureau. On this ground, the Application for Review is procedurally defective.[27] In any event, DIRECTV's detailed certification satisfied the Commission's requirements.[28]

Furthermore, the reasonableness of the Commission's *per se* rule applicable to neighboring spot beams is unassailable.[29] The Commission has long recognized and accepted that DBS providers face unique "service constraints associated with the use of spot beams."[30] Indeed, if DIRECTV were to carry WYMT on the spot beams that currently serve the Orphan Counties, it would be required 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 Orphan Counties' respective DMAs.[31] The *Satellite Market Modification Order* thus recognizes that such forced carriage would be a tremendous waste of scarce spectral resources and would upset the long-settled business decisions and planning of the respective DBS

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27 *See* 47 C.F.R. § 1.115(c) ("No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.").

28 As the Bureau recognized below, the *Satellite Market Modification Order* does not require DBS providers to evaluate the coverage and capacity of neighboring spot beams as part of the pre-filing coordination process. *See WYMT Order* at 9 n.60 (citing DIRECTV Opposition at 5 n.11).

29 Moreover, the Application for Review's requests for relief rest on Sections 1.115(b)(2)(i) and (ii) of the Commission's rules. *See* Application for Review at 7. To the extent Gray now seeks to rescind the *per se* determinations regarding the feasibility of carriage on "neighboring" spot beams, it failed to properly assert such a claim pursuant to Section 1.115(b)(2)(iii) and any such claim should be rejected on that basis. *See* 47 C.F.R. § 1.115(b)(2) (requiring that an application for review "specify with particularity, from among the [enumerated] factors, the factor(s) which warrant Commission consideration of the questions presented").

30 *Satellite Market Modification Order* ¶ 32 & n.184 (citing precedent).

31 Comments of DIRECTV, LLC, MB Docket No. 15-71, at 9 (filed May 13, 2015); *Satellite Market Modification Order* ¶ 32 n.179 (citing DIRECTV).

provider.[32] Significantly, the Commission explicitly considered and *rejected* the argument of NAB that Congress intended for the Commission to modify markets in situations that would involve carriage on neighboring spot beams.[33] Even if it weren't procedurally defective, the Application for Review offers nothing in support of its obfuscated effort to overturn the Commission's analysis and conclusion regarding the feasibility of carriage on neighboring spot beams and thus should be rejected.

B. Gray Utterly Fails To Demonstrate That the *Order* Is Based on Legal Analysis That Is Either Unsettled by the *Satellite Market Modification Order* or Inconsistent with the Act.

Gray's biggest gripe appears to be with the Bureau's conclusion that the Commission's *per se* analysis in the *Satellite Market Modification Order* establishes pre-existing carriage as a prerequisite to feasibility for a satellite market modification.[34] As DIRECTV argued, and the Bureau held, such a conclusion is the most faithful application of, and entirely consistent with, the *Satellite Market Modification Order* and the Act.

1. Requiring Pre-Existing Carriage as a Prerequisite for Feasibility Is the Only Reasonable Interpretation of the *Satellite Market Modification Order*.

Gray attempts to characterize the *Order* as an "extension" of the *per se* rule.[35] Not true. The *Satellite Market Modification Order* defines "relevant spot beam" as "the spot beam on which the station is currently carried,"[36] and further limits the Commission's feasibility analysis for a given broadcast station to an evaluation of "the relevant spot beam on which that station is currently carried."[37] Applying this plain language to the facts involving WYMT, "'there is (and

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32 *WYMT Order* ¶ 18 & n.62 (citing *Satellite Market Modification Order* ¶¶ 31-32).

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

34 *WYMT Order* ¶ 17; *id.* ¶ 20 ("[W]e accept the carriers' assertion that the station is not currently carried nor obligated to be carried as sufficient evidence that adding the station to a spot beam would be technically and economically infeasible.").

35 Application for Review at 8.

36 *Satellite Market Modification Order* ¶ 30 n.163.

37 *Id.* ¶ 30.

can be) no 'relevant spot beam' on which to assess the feasibility of expanding WYMT's local market to the Orphan Counties and, consequently, such expansion necessarily is *per se* technically and economically infeasible.'"[38]

Indeed, as the *WYMT Order* recognizes, such an interpretation is the only one that "make[s] sense" in light of the *per se* rule for neighboring spot beams.[39] As DIRECTV explained below, 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 feasibility.[40] Indeed, if the scope of the *per se* rule applicable to neighboring spot beams were limited to cases where the DBS provider *already* carries the station in question on a spot beam covering its home market, the resulting regulatory regime would impose a higher evidentiary burden on a DBS provider to demonstrate infeasibility for stations for which the provider has *no independent legal obligation* to carry than the burden applied in proceedings where the DBS provider *is* legally required to carry the station.[41]

Gray appears to believe that such a result would be appropriate. According to Gray, the Commission's sole purpose in establishing the *per se* rule applicable to neighboring spot beams was to prevent carriage of "the same signal on two spot beams"—i.e., "double carriage."[42] The *Satellite Market Modification Order* proves otherwise. The Commission made abundantly clear

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38 *WYMT Order* ¶ 16 (quoting DIRECTV Opposition at 4).

39 *WYMT Order* ¶ 20.

40 Letter from Amanda E. Potter, AT&T Services, Inc., to Ms. Marlene H. Dortch, FCC, MB Docket No. 18-8, CSR-8949-A, at 2-3 (filed Apr. 13, 2018) ("DIRECTV Letter"); *WYMT Order* ¶ 16 n.58.

41 *See WYMT Order* ¶ 20 ("We believe it would not make sense to require a detailed demonstration of infeasibility in the instant case because the Commission did not require one under similar circumstances posed by its neighboring spot beam *per se* analysis."); *cf. Satellite Market Modification Order* ¶ 39 ("We agree … with DIRECTV that it would be anomalous to require compendious and detailed evidentiary showings for spot beam coverage of *modified* local markets when such showings are not (and have never been) required for the provision of local service to *unmodified* markets." (emphasis in original)).

42 Application for Review at 8; *WYMT Order* ¶ 19 n.68 ("We disagree that such double carriage of the station was the *only* reason for the Commission's *per se* analysis. Rather, … we believe the Commission also weighed the costs and benefits involved in adding a new station to a spot beam in its analysis." (emphasis in original)).

that the *per se* rules were intended to avoid the "inefficient" outcome of requiring DBS providers to use spot beam capacity to carry a station that only a "small part of the local market served by such spot beam" would receive, at the expense of "a new station or multicast signal carried throughout the neighboring market."[43] As a practical matter, such an inefficient outcome would result in a scenario where a DBS provider is forced to launch a station to effectuate a market modification, regardless of whether the DBS provider already carries the station on another spot beam. Thus, contrary to Gray's limited view of the *per se* rules, "double carriage" was not the touchstone of the Commission's *per se* analysis.[44]

It also is worth noting that the Commission considered carriage on neighboring spot beams through the same lens it evaluated carriage on CONUS beams.[45] The Commission has long recognized "that 'to carry a local channel on a transponder designed for CONUS would be particularly inefficient as that channel could only be permissibly viewed in a single DMA.'"[46] The Commission plainly wasn't concerned with "double carriage" in the context of CONUS beam carriage, as no rational DBS provider would choose to carry a station on a CONUS beam *and* a spot beam where the CONUS beam also serves the spot beam coverage area. Rather, it was the prospect of a DBS provider being forced to allocate capacity on its CONUS beam in

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43 *Satellite Market Modification Order* ¶ 32 ("[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.").

44 Put another way, the question of whether a station *also* is carried on the spot beam serving the station's home DMA (or not) is of no consequence to the Commission's *per se* analysis. Because capacity on each individual spot beam is zero-sum, capacity devoted to carriage of one station necessarily forecloses carriage of another station. Thus, the burden and inefficiency of using scarce capacity on a spot beam to serve only a handful of customers covered by that spot beam—the precise inefficiency the Commission sought to avoid—would be the same for the spot beam on which a DBS provider is forced to launch a new station, regardless of whether the DBS provider also carries the station on a different spot beam.

45 *Satellite Market Modification Order* ¶ 32 (adopting *per se* rules for CONUS beams and neighboring spot beams based on the same considerations).

46 *Id.* ¶ 32 n.177 (citation omitted). *But see id.* (establishing an exception to the *per se* rule applicable to CONUS beams "if the station seeking the market modification was already being carried on a CONUS satellite").

such a highly inefficient manner that was the problem the Commission sought to address. The critical point is that the Commission was not focused solely (or even primarily) on avoiding the inefficiencies associated with the duplicative carriage of local broadcast signals. On the contrary, the *Satellite Market Modification Order* reflects the Commission's sound legal and policy judgment that DBS providers should not be forced to reserve scarce spot beam capacity—duplicative or not—for a station that would only be received in at most a handful of communities covered by that spot beam.[47] Accordingly, the Bureau's conclusion that the *Satellite Market Modification Order*'s *per se* analysis necessarily contemplates pre-existing carriage as a prerequisite for feasibility was entirely sufficient and reasonable.

2. The *WYMT Order* Is Consistent with the Act.

As a straightforward application of the *per se* analysis in the *Satellite Market Modification Order*, the pre-existing carriage requirement identified in the *WYMT Order* comports with the Act in the same manner as the *Satellite Market Modification Order* itself. Indeed, while Gray claims that the pre-existing carriage requirement is "new," Gray also concedes that the *per se* feasibility determinations established in the *Satellite Market Modification Order* are consistent with STELAR and legislative intent.[48] But as demonstrated above, the pre-existing carriage requirement is not "new." Accordingly, Gray's effort to undermine the *Satellite Market Modification Order* also fails.[49]

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47 *WYMT Order* ¶ 19 n.68 ("[W]e believe the Commission also weighed the costs and benefits involved in adding a new station to a spot beam in its analysis."); *Satellite Market Modification Order* ¶ 32 & nn.178-80 (citing DIRECTV).

48 *See* Application for Review at 8 (stating that Congress and the Commission "previously approved" the *per se* exemption based on spotbeam burden).

49 Even if the Commission were to view the pre-existing carriage requirement as an expansion of the *per se* analysis, such expansion is permitted under the Administrative Procedure Act. *See Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 96-97 (1995) (internal citations omitted) ("The APA does not require that all specific applications of a rule evolve by further, more precise rules rather than by adjudication."); *Cassell v. FCC*, 154 F.3d 478, 486 (D.C. Cir. 1998) ("It is well settled that an agency 'is not precluded from announcing new principles in an adjudicative proceeding.'" (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974))).

Gray also apparently is confused regarding the legislative intent behind the satellite market modification procedure. Gray at first suggests that the Bureau's interpretation of the *Satellite Market Modification Order*'s *per se* analysis should disregard the capacity constraints of DBS providers.[50] But almost immediately Gray acknowledges, as it must, that the *per se* rules adopted in the *Satellite Market Modification Order* were established "in recognition of Congress's *express desire to protect scarce satellite spot beam capacity*."[51] Precisely. While Congress obviously sought to address the orphan county problem where it could—and it should be noted that DIRECTV has every motivation, and has endeavored, to deliver the local stations its customers want where feasible—Section 338(l) reflects Congress's longstanding recognition of the unique challenges and limitations of satellite service.[52] The *Satellite Market Modification Order* and now the *WYMT Order* incorporate that careful, balanced approach and, as a result, the Application for Review should be denied.[53]

II. THE BUREAU CORRECTLY INTERPRETED AND APPLIED THE "DUPLICATING SIGNALS" EXCEPTION

A. Gray's Overly Constrained View of the "Duplicating Signals" Exception Has No Basis In Law.

The Commission also should deny the Application for Review on the separate ground that the proposed market modification would unlawfully circumvent DIRECTV's rights under the "duplicating signals" exception. The thrust of Gray's argument is that the "duplicating

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50 *See* Application for Review at 8.

51 *Id.* at 8 n. 27 (emphasis added).

52 *See WYMT Order* ¶ 5 (recounting the legislative history and intent behind Section 338(l)); *see also id.* ¶ 21 n.73 ("We note that Congress continued to be concerned with satellite capacity constraints when establishing satellite market modification in 2014 and determined that carriage pursuant to a satellite market modification would only be required if it is technically and economically feasible for the carrier.").

53 Indeed, DIRECTV submits that the *per se* analysis underlying the *Satellite Market Modification Order* and the *WYMT Order* satisfies even the standard proffered by Gray: denial of Gray's Application for Review is "absolutely necessary to avoid unfair and impermissible demands on satellite operators' spectrum." Application for Review at 8.

signals" exception applies only when one or more of the duplicating network affiliates (or "substantially duplicat[ing]" stations) in a market elects must carry status.[54] Thus, in Gray's view, WKYT and WYMT do not qualify as "duplicating signals" in their home market of Lexington, KY, and, as a result, its Petition does not implicate DIRECTV's rights under Section 338(c)(1).[55]

Notwithstanding the fact that the Application for Review marks the third time Gray has made this argument, Gray fails to cite any precedent in support of its narrow construction of the "duplicating signals" exception.[56] Nor could it. The plain language of the statute and the Commission's rules and precedent dictate that the "duplicating signals" exception applies to stations regardless of carriage election. As DIRECTV explained below, the "duplicating signals" exception applies to stations (including, *inter alia*, WYMT and WKYT) that are: (a) located in the same state, (b) licensed in the same local market, and (c) affiliated with the same television network.[57] The Bureau also was correct to conclude that "the Section 338(c)(1) exception would mean little if the carrier still had to make room … for duplicating signals."[58] Further, DIRECTV has identified no precedent that limits the "duplicating signals" exception in the manner

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54 Reply to Opposition of DIRECTV, LLC to Petition for Special Relief, MB Docket No. 18-8, at 9 n.33 (filed Feb. 20, 2018) ("Gray Reply"); *see also* Application for Review at 10-11.

55 *See* Application for Review at 12 ("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.").

56 *See* Gray Reply at 9 n.33; Letter from Robert J. Folliard, III, Gray, to Marlene H. Dortch, FCC, MB Docket No. 18-8, at 3-4 (filed Apr. 13, 2018); Application for Review at 10-14.

57 DIRECTV Letter at 3; DIRECTV Opposition at 7-8.

58 *WYMT Order* ¶ 21. DIRECTV notes that the *WYMT Order* could be read to limit the reach of the "duplicating signals" exception to situations in which a DBS provider would otherwise be "obligated to carry duplicating affiliates *on the spot beam serving the stations' common DMA*," but leaving open the possibility that the exception would not insulate the provider from carriage of a duplicating signal on a different satellite or spot beam (whether CONUS or a neighboring spot beam). *Id.* (emphasis added). Out of an abundance of caution, DIRECTV states that it disagrees that Section 338(c)(1) in any way so limits DIRECTV's statutory right to decline carriage of a "duplicating signal." DIRECTV therefore requests that, in its order denying the Application for Review, the Commission clarify and confirm that the rights conferred to DBS providers pursuant to Section 338(c)(1) are not limited to the spot beam(s) used to serve the DMA in which the relevant station is licensed.

proposed in the Application for Review. On the contrary, had Congress intended such a limitation, the Commission and the numerous parties participating in the rulemaking proceeding implementing SHVIA inevitably would have addressed the issue, but DIRECTV has found no such evidence that Gray's novel (not to mention unreasonable) interpretation was even raised, much less considered, in the *SHVIA Order*.[59]

B. Constitutional and Other Legal Uncertainty Further Compels Denial of the Application for Review.

The Bureau's interpretation of the "duplicating signals" exception, and its conclusion that Gray may not circumvent that exception via the satellite market modification process, also are compelled as a matter of constitutional law. As DIRECTV has explained, Gray's proffered interpretation of Section 338(c)(1) would represent an unprecedented expansion of DIRECTV's mandatory carriage obligations.[60] Thus, the prospect of DIRECTV's compelled carriage of WYMT places DIRECTV's constitutionally protected right of editorial discretion at issue in this proceeding.[61] Given the dramatic changes in the marketplace, as recognized by numerous courts in recent years, the question of whether *any* broadcast carriage can be compelled is, at best, uncertain.[62] The Commission thus should take care to avoid imposing additional carriage

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59 *See SHVIA Order* ¶ 73 *et seq*. Moreover, contrary to Gray's suggestion, DIRECTV's carriage of "duplicating signals" elsewhere is irrelevant to Gray's attempt to force such carriage here. The Bureau did not take the view that "Section 338(c)(1) *prohibits* carriage of duplicating network affiliates." Application for Review at 10-11 (emphasis added). Rather, the *WYMT Order* applies Section 338(c)(1) in accordance with the language of the Act and the Commission's rules, which provides merely that a satellite carrier "shall not be *required* to carry" more than one station in a market that qualifies as a "duplicating signal." 47 U.S.C. § 338(c)(1) (emphasis added); 47 C.F.R. § 76.66(h)(1). Such language plainly *permits* satellite carriage of multiple duplicating signals, but it necessarily forecloses legal maneuvers, such as Gray's proposed market modification, that would "*require*[]" such carriage. In any event, Gray misidentifies the Boston, MA DMA as one in which DIRECTV retransmits "duplicating signals." *See* Application for Review at 11 n.33. The stations identified (WMUR and WCVB) do not qualify as such under Section 338(c)(1). *See SHVIA Order* ¶ 81.

60 *See* DIRECTV Letter at 3.

61 *See id.*; DIRECTV Opposition at 8-9.

62 *See, e.g., Agape Church, Inc. v. FCC*, 738 F.3d 397, 413 (D.C. Cir. 2013) (Kavanaugh, J., concurring) ("The dramatically changed marketplace that the Commission aptly recognized in this case undermines the constitutional foundation of the Viewability Rule and, indeed, of the broader must-carry regime as well."); *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 161 (2d Cir. 2013) (recognizing that "the video

burdens on DBS providers. Indeed, in analogous circumstances, the Commission has applied the doctrine of constitutional avoidance in cases "where the record establishes a reasonable, less burdensome alternative that meets the statutory objectives."[63] DIRECTV submits that, should the Commission determine statutory ambiguity exists, the Commission should proceed in the same manner in this proceeding.[64]

By the same token, it is not surprising that Gray avoids mention of the other significant factual and legal issues that would be raised in the event the Commission were to grant the market modification Gray seeks. In particular, to the extent DIRECTV were forced to carry WYMT in the Orphan Counties, DIRECTV would seek to make room for WYMT by removing WKYT, if the governing retransmission consent agreement between the parties permits such action.[65] The Bureau concluded that any "[s]uch service loss would have a clear adverse impact on satellite subscribers that currently watch WKYT and thus would be contrary to the public interest."[66] Consistent with Bureau precedent, DIRECTV urges the Commission to avoid such an outcome.[67] Additionally, as DIRECTV explained below, due to the capacity limitations of its existing spot beam satellites, modification of WYMT's market as requested by Gray would place

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programming industry has changed significantly over the last two decades" and stating that, "[i]f the trend continues, a day may well come when the anticompetitive concerns animating Congress's enactment of § 616(a)(3) and (5) will so effectively be eliminated or reduced as to preclude government intrusion on MVPDs' carriage decisions"); *United States v. AT&T Inc.*, No. 17-2511, 2018 WL 2930849, at *8-10 (D. D.C. June 12, 2018) (discussing industry trends, including, among others, the "rise and innovation of over-the-top, vertically integrated video content services" and "declining MVPD subscriptions resulting from an increasingly competitive industry landscape").

63 *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Fifth Report and Order, FCC 12-59 ¶ 11 (2012).

64 For avoidance of doubt, while the foregoing assumes, *arguendo*, that sufficient ambiguity exists that would enable the Commission to construe Section 338(c)(1) as Gray suggests and/or that the Commission could lawfully interpret Section 338(l) in a manner to compel DIRECTV to carry WYMT, DIRECTV makes no such concessions. *See Clark v. Martinez*, 543 U.S. 371, 385 (2005) ("The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as *a means* of *choosing between them.*" (emphasis in original)).

65 DIRECTV Letter at 2.

66 *WYMT Order* ¶ 22.

67 *See Satellite Market Modification Order* ¶ 18 n.88 (citing cases).

DIRECTV in the untenable position of choosing between: (a) 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 (b) retransmitting WKYT or WYMT (or another station currently carried in high-definition ("HD") format on the Lexington, KY spot beam) in standard definition, in violation of the Commission's HD carry-one, carry-all requirement.[68] While the Commission need not reach these issues to deny the Application for Review, they demonstrate the complex nature of this case and the additional hurdles that Gray failed to (and cannot) overcome.

CONCLUSION

For the foregoing reasons, and consistent with DIRECTV's arguments below, DIRECTV respectfully requests that the Commission deny the Application for Review.

Respectfully submitted,

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June 29, 2018

[68] *See WYMT Order* ¶ 20 n.71 (citing DIRECTV Letter at 2).

CERTIFICATE OF SERVICE

I, Laura V. Taylor, hereby certify that on this 29th day of June, 2018, a true and correct copy of the foregoing Opposition of DIRECTV, LLC to the Application for Review was served, via first-class mail, upon the following:

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