Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of:	)	
	)	
Telepak Networks, Inc. d/b/a C Spire Fiber	)	
	)	MB Docket No. 19-159
v.	)	CSR-8978-C
	)	
Gray Television Group, Inc.	)	
	)	

To: The Office of the Secretary
Attn: Media Bureau

REPLY TO OPPOSITION

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TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY

Telepak Networks, Inc. d/b/a C Spire Fiber ("C Spire") hereby responds to Gray Television Group, Inc.'s ("Gray") Opposition to C Spire's Retransmission Consent Complaint and Petition for Declaratory Ruling ("Complaint").[1]

The issue in this matter cuts to the heart of the Commission's purpose as an independent agency – whether the Commission can carry out Congress' statutory directives or whether its decisions will be nullified by the practices of the industry it is empowered to regulate. The facts here are not in dispute. In April 2019, the Commission, pursuant to its authority under Section 614(h)(1)(C) of the Communications Act, modified the local market of WLOX to include the community of Diamondhead, Mississippi.[2] C Spire, a cable operator seeking to provide service to citizens in Diamondhead, then sought to confirm it had consent under its existing retransmission consent agreement with Gray, licensee of WLOX, to retransmit WLOX's programming streams in Diamondhead. However, to Gray, the Commission's decision did not change the Designated Market Area ("DMA") boundaries; therefore, Gray informed C Spire that pursuant to its CBS network affiliation agreement, it could not grant consent for C Spire to retransmit WLOX's programming stream affiliated with the CBS network in Diamondhead. In other words, despite the Commission's market modification decision, Gray would continue to treat WLOX as an out-of-market station for retransmission consent purposes. C Spire and Gray spoke further, but Gray refuses to permit C Spire to retransmit WLOX's CBS programming

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[1] *Telepak Networks, Inc. d/b/a C Spire Fiber, Retransmission Consent Complaint and Petition for Declaratory Ruling*, Answer to Retransmission Consent Complaint, MB Docket No. 19-159 (filed June 24, 2019) ("Gray Opposition").

[2] *Telepak Networks, Inc., d/b/a C Spire Fiber, For Modification of the Television Markets of Stations WLOX(DT), Biloxi, MS and WXXV-TV, Gulfport, MS to include Diamondhead, MS*, Memorandum Opinion and Order, MB Docket No. 18-381, (rel. Apr. 18, 2019) ("WLOX and WXXV Market Modification Order").

stream unless C Spire also agrees to retransmit WWL, the New Orleans DMA station owned by Tegna Inc. and affiliated with CBS. Gray – and CBS itself – are making a mockery of the Commission's market modification process and ability to make changes to broadcast market areas to protect viewers' interests. For the Commission's market modification decisions to carry any weight and ensure that the broadcast industry does not subvert the intent of Congress, the Commission must find that Gray has failed to negotiate retransmission consent in good faith.

In its Opposition, Gray argues that the Complaint does not demonstrate a lack of good faith. Gray's attempts to refute C Spire's strong factual showings, which weigh overwhelmingly in favor of granting the Complaint, are based on a fundamental misunderstanding of Commission law and policy and would undermine the intent of Congress. C Spire does not dispute that a broadcaster, such as Gray, can condition its consent to retransmit its signals, and even insist on carriage of other commonly owned stations. What Gray cannot do, since WLOX is now a local station in Diamondhead, is continue to treat WLOX as an out-of-market station and condition its consent upon C Spire negotiating for, reaching an agreement with, and then retransmitting a non-commonly owned station. Gray further incorrectly states that it went above and beyond any obligation it had to negotiate with C Spire. Because Diamondhead is now part of WLOX's local market for must-carry and retransmission consent purposes, Gray cannot solely request that CBS waive its restriction on out-of-market carriage.

Finally, C Spire's Complaint was timely filed. An existing retransmission consent agreement, first executed in 2014 and later amended in 2017, does not negate the possibility that Gray could later fail to negotiate in good faith, for a different station, under a scenario that did not exist at either time. Gray's timeliness defense is an attempt to avoid a Commission decision on the merits.

As C Spire demonstrated in its Complaint,[3] Gray failed to negotiate in good faith for retransmission consent rights regarding WLOX in violation of the Communications Act and the Commission's rules. The Commission must act expeditiously.

II. PERMITTING BROADCASTERS TO IGNORE COMMISSION MARKET MODIFICATION DECISIONS WILL RENDER MARKET MODIFICATION PROCEEDINGS IRRELEVANT

Gray's interpretation of the weight and effect of a successful market modification cannot be sustained without eradicating the ability of the Commission to carry out Congress' statutory directives and ensure that communities have access to relevant in-state programming. The practices between networks and their affiliates cannot preempt Commission actions and its good faith rules.

In enacting must carry, Congress made clear its desire to preserve local broadcast television, finding that there was a "substantial governmental interest in ensuring" the continuation of "locally originated television broadcasting" and that television stations are "an important source" of local programming, especially for "local news and public affairs programming."[4] Commercial television stations are therefore entitled to assert mandatory carriage rights on cable systems located within a station's market, and a station's default market for this purpose is its DMA as defined by Nielsen. Nonetheless, consistent with the preservation of localism, Congress recognized that in certain circumstances, a DMA may not reflect a particular station's actual market of interest to viewers,[5] and provided that the Commission may:

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[3] *Telepak Networks, Inc. d/b/a C Spire Fiber, Retransmission Consent Complaint and Petition for Declaratory Ruling*, Retransmission Consent Complaint and Petition for Declaratory Ruling, MB Docket No. 19-159 (filed June 3, 2019).

[4] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, §§ 2(10)-(11), 106 Stat. 1460, 1-2 (1992) (emphasis added).

[5] *See House Committee on Energy and Commerce, Cable Television Consumer Protection and Competition Act of 1992*, H.R. Rep. No. 102-628, at 97 (1992) ("House Committee Report").

> [W]ith respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.[6]

Market modification, therefore, "provides a means for the Commission to modify the local television market of a commercial television broadcast station and thereby avoid rigid adherence to DMAs."[7]

In 2014, Congress added a statutory factor to the market modification process – whether modifying the market of the television station would promote consumers' access to television broadcast station signals that originate in their State of residence – and amended Section 325 of the Communications Act to "prohibit a television broadcast station from limiting the ability of [an MVPD] to carry into the local market . . . of such station a television signal that has been deemed significantly viewed . . . or any other television broadcast signal such distributor is authorized to carry under section 338, 339, 340, or 534 of this title. . . ."[8] In implementing these provisions, the Commission stated that the "very purpose of [the in-state market modification] provision of the STELAR is to provide consumers with access to news, politics, sports, emergency and other programming specifically related to their home state."[9] And although the Commission was focused on the new satellite market modification process, it emphasized that

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[6] 47 U.S.C. § 534(h)(1)(C)(i). In directing the Commission to consider changes to a station's television market, Congress emphasized that "where the presumption in favor of [DMA] carriage would result in cable subscribers losing access to local stations because they are outside the [DMA] in which a local cable system operates, the [Commission] may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the area in which they serve and which form their economic market." *See* House Committee Report at 97.

[7] *See, e.g., Harrison County, Texas, Petition for Modification of the Satellite Television Markets of KLTV, Tyler, Texas and KFXK-TV, Longview Texas,* Memorandum Opinion and Order, 33 FCC Rcd 5272, ¶ 4 (2018) (emphasis added**).**

[8] STELAR at 2062.

[9] *Amendment to the Commission's Rules Concerning Market Modification, Implementation of Section 102 of the STELA Reauthorization Act*, Report and Order, 30 FCC Rcd 10406, ¶ 28 (2015).

"we expect broadcasters and satellite carriers alike will make the needs and expectations of orphan county consumers the priority in negotiating retransmission consent following a successful modification petition. We will monitor this situation closely and will take further action if such monitoring indicates that the purpose of this provision is not being effectuated."[10]

To Gray, however, its affiliation agreement with CBS – which discusses markets in terms of DMAs – governs its ability to grant consent in Diamondhead, not the Commission's determination that WLOX is a local station. To support its position, Gray claims that 76.65(b)(1)(ix) of the Commission's rules would not apply.[11] Gray not only declares that the Commission's Order "adding Diamondhead to WLOX's local television market is irrelevant," but that Section 76.65(b)(1)(ix) does not apply "to a station controlled by the broadcaster itself" or "to carriage of a signal considered part of the same local market under the FCC's rules."[12] Were these statements true, the Commission's ability to effectuate market modifications and the protections Congress added in STELAR to ensure access to in-state programming would be nullified.

To make such a claim, Gray blatantly ignores Congress's statement that the language in STELAR – codified in Section 76.65(b)(1)(ix) of the Commission's rules – was intended, in part, to "prohibit the use of retransmission consent agreements to limit the ability of an MVPD to carry . . . signals added to a TV market through the market modification process."[13] In fact, Gray

[10] *Id*. (emphasis added).

[11] Gray Opposition at 11-16. Section 76.65(b)(1)(ix) incorporated the protections for significantly viewed and other television signals established in Section 103(b) of STELAR. *Implementation of Sections 101, 103 and 105 of the STELA Reauthorization Act of 2014*, Order, 30 FCC Rcd 2380, ¶ 5 (2015).

[12] Gray Opposition at 12-14.

[13] *Senate Committee Report on Satellite Television Access and Viewer Rights Act*, S. 2799 Rep No. 113-322, at 7 (2014) ("STAVRA also proposes a number of changes to video policy under the Communications Act. . . . Second, it would bar the practice of joint retransmission consent negotiations by independent broadcast television stations in the same market, prohibit the use of retransmission

ignores the entire point of a market modification – Commission action to ensure a television station's market is accurate for must-carry and retransmission consent purposes.[14] It is unambiguous under the Communications Act that not only does a commercial television broadcast station's "local market" include communities within the same DMA,[15] but that the Commission may also modify a station's local market, which the Commission has done here.[16] WLOX is a local, significantly viewed station that C Spire is authorized to negotiate with for in-market carriage and as such it qualifies for the purposes of the good faith *per se* violation contained in Section 76.65(b)(1)(ix). Gray cannot treat WLOX as an out-of-market station and condition its consent on C Spire reaching an agreement with Tegna, a party whose actions Gray cannot control, and subsequently retransmitting this non-commonly owned station.[17]

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consent agreements to limit the ability of an MVPD to carry other broadcast television signals they are otherwise authorized to carry under the Communications Act (such as importing significantly viewed TV signals, distant signals, or signals added to a TV market through the market modification process), and direct the FCC to consider additional changes to its rules that govern retransmission consent negotiations as part of a rulemaking to update its totality of the circumstances test for good faith.") (emphasis added).

[14] Gray also discounts the fact that the "authorized to carry" language is used, consistent with Congress's intent, to refer to a station in its local market, whether the station elected must-carry or retransmission consent. *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, ¶ 24 n.76 (2017) (explaining that "DBS providers are generally authorized to carry broadcast stations only in their local markets"). Moreover, modifying a station's market "effects a change to the market of an entire station, not just of a particular stream or signal provided by that station." *Gray Television Licensee, LLC, For Modification of the Satellite Television Market for WSAW-TV, Wausau, Wisconsin*, Memorandum Opinion and Order, 32 FCC Rcd 668, ¶ 23 (2017).

[15] 47 U.S.C. § 534(h)(1)(A); 47 C.F.R. § 76.55(e)(2).

[16] 47 U.S.C. § 534(h)(1)(C); 47 C.F.R. § 76.59(a); WLOX and WXXV Market Modification Order, ¶ 19 ("We accordingly grant the requests for market modification, and order the addition of Diamondhead to the local markets of Stations WLOX(DT) and WXXV-TV").

[17] Gray claims that if the Commission adopts C Spire's interpretation of Section 76.65(b)(1)(ix), it would undermine retransmission consent by precluding a broadcaster from imposing any conditions on the retransmission of its signal. *See* Gray Opposition at 15-16. This argument is a blatant red herring. C Spire does not dispute that a broadcaster, such as Gray, can condition its consent to retransmit its signals, or even insist on carriage of other commonly owned stations. What Gray cannot do, under Section 76.65(b)(1)(ix), is continue to treat WLOX as an out-of-market station in Diamondhead and require carriage of a non-commonly owned station.

Commission precedent supports C Spire's Complaint. The Commission has granted market modification where a station was similarly restricted from granting retransmission consent under a network affiliation agreement.[18] In that case, the Media Bureau's Order noted that ABC had advised the station that it "can no longer grant retransmission consent for out-of-market carriage."[19] Amongst the factors the Media Bureau found germane was that "absent must carry status," the station's "carriage would be jeopardized in the subject communities due to the ABC Network's ruling that [the station] can no longer seek carriage via a retransmission consent agreement as it has done in the past."[20] The Commission surely did not believe ABC could ignore its Order as it related to the station's ability to make a must-carry election after the modification. And although the programming at issue in that market modification was carried on the station's primary programming stream (thus subject to must carry), the fact that C Spire cannot negotiate for CBS network and local programming here without limitation because it is broadcast on a station's multicast stream is patently absurd. Stations deemed local through a market modification have no less of a status for retransmission consent purposes as stations deemed local by Nielsen.[21]

For these reasons and others provided in C Spire's Complaint, Gray has failed to negotiate retransmission consent in good faith under Section 76.65(b)(1)(ix).

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[18] *In the Matter of Commonwealth Broadcasting Group, Inc. for Modification of the Greenwood/Greenville, Mississippi DMA*, Memorandum Opinion & Order, 25 FCC Rcd 213, ¶ 21 (2010).

[19] *Id.*, ¶ 14.

[20] *Id.*, ¶ 21. WLOX was similarly carried in Diamondhead by the incumbent operator until recently.

[21] If the Commission permits stations to ignore a market modification because an affiliation is broadcast on a multicast programming stream, there is nothing to prevent networks and stations from moving a desirable affiliation to a multicast stream to avoid Commission action.

III. CONTRARY TO GRAY'S ASSERTIONS, C SPIRE DEMONSTRATED THAT GRAY HAS FAILED TO NEGOTIATE RETRANSMISSION CONSENT IN GOOD FAITH

Beyond erroneously arguing that Section 76.65(b)(1)(ix) of the Commission's rules does not apply, Gray alleges that its behavior was neither unreasonable nor bad faith under Sections 76.65(b)(1)(i) and (b)(1)(iv) of the Commission's rules. In particular, Gray claims that it had "no obligation to renegotiate its existing [agreement] with C Spire for carriage of WLOX's CBS multicast stream," and that Gray went "above and beyond" any obligation it had to "provide C Spire with an option to carry that stream." These arguments fail both factually and legally.

First, Gray offers no evidence that C Spire intended to renegotiate the existing retransmission consent agreement between the parties. And for good reason. C Spire's sole request in this matter is to retransmit WLOX's CBS multicast stream as a local station under the terms of the existing retransmission consent agreement and not as an out-of-market station. Subject to the Commission finding in C Spire's favor, C Spire would retransmit WLOX under the terms and conditions of its agreement with Gray, including the consideration that the parties have negotiated for carriage of programming streams affiliated with the Big-4 networks (ABC, CBS, NBC and Fox). C Spire does not seek to renegotiate the per-subscriber fees it owes Gray. Rather, it is CBS who seeks double compensation from Diamondhead citizens.[22] Accordingly, Gray's speculation concerning the potential danger to retransmission consent agreements, and the Commission's long-held desire to avoid "abrogat[ing] a bargained-for and agreed-to

[22] Networks increasingly receive reverse retransmission compensation from their affiliates. *See, e.g.*, Daniel Frankel, *Moonves: CBS to make $2B per year in retrans fees and reverse compensation by 2020*, FIERCEVIDEO (Aug. 6, 2015), *available at* https://www.fiercevideo.com/cable/moonves-cbs-to-make-2b-per-year-retrans-fees-and-reverse-compensation-by-2020 (last visited July 2, 2019); Michael Grotticelli, *Reverse Compensation Could Strain Network-Affiliate Relations*, TVTECHNOLOGY (July 7, 2011), *available at* https://www.tvtechnology.com/news/reverse-compensation-could-strain-networkaffiliate-relations (lasted visited July 2, 2019).

contractual provision between a broadcaster and [MVPD]" is unfounded and an attempt to distract the Commission from the true issue presented – did Gray violate the good faith rules by conditioning carriage of the local CBS stream on additional carriage of a non-commonly owned station from a different state.[23]

Second, Gray incorrectly believes, despite the Commission's market modification decision, that WLOX continues to be an out-of-market station for retransmission consent purposes, and therefore that its sole obligation in this case is to ask CBS to waive a restriction on out-of-market carriage. This claim is unmistakably wrong. As explained above, WLOX is now a local, in-market station for retransmission consent purposes in Diamondhead, and it is well-settled that the retransmission consent good faith obligations for broadcasters and cable operators are more rigorous when negotiating for carriage within the station's local market.[24] Therefore, Gray cannot claim that its sole obligation is to request that CBS waive a restriction on out-of-market carriage.

Accordingly, because Gray refuses to grant consent for WLOX's CBS multicast stream unless C Spire also agrees to retransmit WWL, the Tegna New Orleans CBS station, a station that Gray does not own or operate, and will not negotiate further unless such condition is met, Gray has refused to negotiate retransmission consent, a violation of 47 C.F.R. § 76.65(b)(1)(i),

[23] As the Media Bureau noted, Hancock County, where Diamondhead is located, is an orphan county "with insufficient access to in-state programming." WLOX and WXXV Market Modification Order. ¶ 7. Therefore, it concluded that "C Spire demonstrate[d] that Diamondhead residents have been deprived of the ability to receive their preferred in-state Mississippi television broadcast stations and instead are relegated to local broadcast content that is oriented to Louisiana." *Id*.

[24] *Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004, Reciprocal Bargaining Obligation*, Report and Order, 20 FCC Rcd 10,339, ¶ 29 (2005) ("We emphasize that, although the reciprocal bargaining obligation applies without geographic limitation, that does not mean it will apply exactly the same way in all negotiations. Rather, we conclude that Section 325(b)(3)(C) and the inherent nature of a good faith obligation permit the Commission to account for the distinction between in-market and out-of-market signals . . . .").

and refused to put forth more than a single, unilateral proposal, a violation of 47 C.F.R. § 76.65(b)(1)(iv). Gray's arguments must be rejected.

IV. C SPIRE'S COMPLAINT WAS TIMELY FILED

Contrary to the assertion in Gray's Opposition, the fact that the parties have a pre-existing retransmission consent agreement, first executed in 2014 and later amended in 2017, does not render C Spire's claim untimely.[25]

As the Commission has explained, its intent in adopting a statute of limitation for the filing of retransmission consent complaints was to ensure that complainants do not sit on grievances and that they bring good faith complaints in a timely manner.[26] Modeled on the program carriage and program access complaint statutes of limitations, Section 76.65(e)(2)(iii) was intended to ensure that complaints were filed "within one year of the act that allegedly violated" the rules.[27] The bad faith conduct by Gray occurred in May, less than two months ago. C Spire in no way delayed asking the Commission to adjudicate its grievance – even Gray pointed out the timeliness of C Spire's filing when they acknowledged that the Complaint was

[25] As C Spire highlighted in its Complaint, a party may bring a good faith complaint under Section 76.65(e)(2) within one year of (i) the complainant entering into a retransmission consent agreement that the complainant alleges to violate one or more of the good faith rules; (ii) a television broadcast station or MVPD engages in retransmission consent negotiations with a complainant that the complainant alleges to violate one or more of the good faith rules, and such negotiation is unrelated to any existing contract between the complainant and the television broadcast station or multichannel video programming distributor; or (iii) the complainant has notified the television broadcast station or MVPD that it intends to file a complaint with the Commission based on a request to negotiate retransmission consent that has been denied, unreasonably delayed, or unacknowledged in violation of one or more of the good faith rules. *See* 47 C.F.R. § 76.65(e).

[26] *Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, Order on Reconsideration, 16 FCC Rcd. 15599, ¶ 10 (2001).

[27] *See, e.g.*, *Revision of the Commission's Program Carriage Rules*, Second Report and Order in Docket No. 07-42 and Notice of Proposed Rulemaking in MB Docket No. 11-131, 26 FCC Rcd 11494, ¶ 39 (2011) (discussing concerns that complaints would be timely if filed within one year of notice of a violation, not the actual violation, and proposing to amend the Commission's rules so that complaints must be filed within one year of the act that allegedly violated the program carriage rules).

filed within one hour of the conclusion of the private negotiations between the parties.[28] Moreover, the existing retransmission consent agreement was originally negotiated for a different station, in a different market, and only came to control C Spire's retransmission of WLOX through Gray's acquisition of Raycom and the prevalence of "after-acquired" provisions in retransmission consent agreements, a practice the Commission has questioned as potentially inconsistent with good faith bargaining.[29] Gray's argument would have required C Spire to bring its claim by the end of 2018 (*i.e.*, within one year of the parties amending the agreement), one month prior to Gray acquiring WLOX, over four months before the Media Bureau released its Order modifying WLOX's market, and over five months prior to Gray violating the Commission's good faith rules. The controversary simply did not exist in the timeframe Gray refers to and the bringing of such a "hypothetical" claim would have led Gray to rightly claim that C Spire was wasting Commission resources.

Resolving C Spire's Complaint on its merits is important because Diamondhead citizens are being told that their receipt of a "local" station is conditioned upon the carriage (and almost certain payment) for a non-commonly owned station carrying duplicate network programming. Earlier this year, Congress recognized that despite its reforms in STELAR, many communities continue to struggle with obtaining access to local programming, and directed the Commission to provide a full analysis of its treatment of market modification petitions.[30] In short, Congress

[28] Gray Opposition at 8.

[29] Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test, Notice of Proposed Rulemaking, 30 FCC Rcd 10327, ¶ 15 (2015) ("[W]e seek comment on whether a broadcaster's insistence on bundling a local broadcast signal with one or more prospective programming channels should be considered evidence of bad faith under the totality of the circumstances test.").

[30] *See House Committee Report on Financial Services and General Government Appropriations Bill, 2019*, H.R. Rep. No. 115-792, at 46-47 (2019) ("[T]he FCC should provide a full analysis to ensure

instructed the Commission to make sure that viewers can obtain access to local news, sports, politics and emergency information that originate in their own state. The Commission should act on the merits of a Complaint relevant to these issues to effectuate Congress' directive

In short, the Commission's rules do not foreclose the filing of a retransmission consent complaint, so long as the complaint is filed within one year of an act that allegedly violates the Commission's good faith negotiation rules. Gray's attempt to avoid a decision on the merits based on the failure to bring an action that did not exist when the retransmission consent agreement was signed or amended should be summarily dismissed.

V. CONCLUSION

As detailed in its Complaint and this Reply to Opposition, Gray has failed to negotiate in good faith with C Spire for retransmission consent rights regarding WLOX in violation of the Act and Commission rules. The Commission must therefore grant the Complaint.

Respectfully submitted,

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July 3, 2019

decisions on market modification are comprehensively reviewed and STELAR's intent to promote localism is retained.").

The signatory has read the Reply to Opposition and, to the best of his knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law and is not interposed for any improper purpose.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kelsey Rejko, hereby certify that a true and correct copy of the foregoing Reply to Opposition was delivered by me to the United States Postal Service Office on July 3, 2019 to be delivered to the person listed below via first-class, postage-prepaid mail:

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Dated: July 3, 2019