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

REPLY TO OPPOSITIONS

Gray Television Licensee, LLC ("Gray"), licensee of WYMT-TV, Hazard Kentucky, pursuant to Section 1.115(d) of the Commission's rules, hereby files this Reply to the Oppositions of DIRECTV, LLC ("DIRECTV") and DISH Network, LLC ("DISH") in the above-captioned proceeding.[1]

I. INTRODUCTION AND SUMMARY

The facts of this case present the Commission with a stark and simple choice: will the Commission modify WYMT-TV's market to provide DBS viewers in the Orphan Counties with access to local news and information for the first time or will it torture the language of Section 338 of the Act to over-protect the allegedly scarce spot beam spectrum of two of the biggest, richest national MVPDs? Congressional intent and the language of Section 338 are clear that the Commission should grant Gray's request and reject the flawed reading of the statute adopted by

[1] *See* 47 C.F.R. § 1.115(d). *See also* Opposition of DIRECTV, LLC to Application for Review, MB Docket 18-8, filed June 29, 2018 (the "DIRECTV Opposition"); Opposition of DISH Network, LLC (the "DISH Opposition"), MB Docket 18-8, filed June 29, 2018; Gray Television Licensee, LLC, Application for Review, filed June 15, 2018 (the "Application for Review"). *See also 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").

the Bureau and endorsed by DISH and DIRECTV. The public policy here is equally clear. People – and their access to relevant local news and critical lifesaving information – are more important than satellite spectrum. The Commission should rule in favor of the thousands of residents of the Orphan Counties that took the time to reach out to the Commission to express their need for WYMT-TV's programming and against DISH and DIRECTV, each of which wants those viewers' monthly subscriber payments but don't care whether they ever receive relevant local news or information.

The issues in this case have been briefed exhaustively and the issues are ripe for a Commission decision. In making that decision, the Commission should keep in mind the following essential points:

1. Both DISH and DIRECTV have conceded that some level of retransmission of WYMT-TV in the Orphan Counties is technically feasible. Their fervent efforts to avoid providing local service to the Orphan Counties rest entirely on their manufactured exceptions to STELAR's requirements – not on any actual infeasibility.

2. The Commission never has said that pre-existing retransmission is a prerequisite to granting a market modification. The Media Bureau created a new *per se* exemption under Section 338, and no amount of citation to the *STELAR Implementation Order* can change that fact. This is a question of first impression for the Commission, and the issue should be resolved in favor of viewers, not satellites.

3. The satellite operators' construction of Section 338(c)(1), which the Bureau adopted, is nonsensical and directly contrary to the language of the statute. The Commission must reject it.

While the pleadings in this matter and the record below make these issues and their proper resolution abundantly clear, Gray hereby responds to a number of erroneous points and arguments raised by DISH and DIRECTV in their oppositions.

II. DIRECTV AND DISH HAVE, IN FACT, CONCEDED THAT RETRANSMISSION OF WYMT-TV IS TECHNICALLY FEASIBLE.

The most important fact in this case is that both DISH and DIRECTV have admitted that carriage of WYMT-TV in the Orphan Counties is technically and economically feasible – and

each repeats that fact again in its Opposition.[2] Though each admits that retransmission of WYMT-TV is feasible in fact, they continue to insist that the Commission should deny such carriage as a matter of law. In other words, DISH and DIRECTV aren't asking for a *per se* exemption because of any actual infeasibility; they're asking for a freebie – an exemption for no reason other than that they want it.

As an initial matter, despite multiple opportunities to dispute it, DIRECTV has never countered Gray's repeated assertion that carriage of WYMT-TV in HD format would be feasible if DIRECTV would merely perform a routine hardware upgrade – the type that DIRECTV conducts many times a year at different local receive facilities throughout the country. And, if DIRECTV performed such an upgrade, it could launch WYMT-TV without dropping or downgrading service for any other station in the Lexington DMA. DIRECTV's continued silence on this issue is damning.

Instead of addressing Gray's contention that DIRECTV could easily launch WYMT-TV in HD format with a minimal investment in equipment, DIRECTV focuses on whether the Commission's carry-one, carry-all rule prevents the Commission from granting a market modification if DIRECTV is only capable of retransmitting WYMT-TV in standard definition.[3] As Gray has explained, DIRECTV's position is anti-viewer and completely divorced from

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[2] *See* DIRECTV Opposition at 16; DISH Opposition at 3-4. DIRECTV tries and fails to make an issue of Gray's assertion that DIRECTV admitted that carriage of WYMT-TV was technically feasible on a "neighboring spot beam." Gray's recollection of the Media Bureau call is that DIRECTV acknowledged that an SD launch was technically feasible using one of the spot beams serving either Lexington or the Orphan Counties. If that recollection is incorrect, then it is incorrect. The idea that Gray's assertion "reveals Gray's motivation to force DIRECTV's carriage of WYMT, without regard to the facts or the law" is patently absurd. DIRECTV Opposition at 6.

[3] DIRECTV Opposition at 15-16 (citing 47 C.F.R. §76.66(k)).

Congressional and Commission policy.[4] The requirement that satellite carriers offering local-into-local service in high definition do so for all local stations is a right of stations that can be waived by stations.[5] Gray offered to waive this requirement and accept carriage in standard definition if, in fact, HD carriage is technically infeasible. Ultimately, Gray's purpose here is to get WYMT-TV's local service to satellite viewers in the Orphan Counties.[6] Although Gray is aware of many times that DIRECTV has performed a routine hardware upgrade to launch a new station in high definition and although Gray believes DIRECTV's silence on this issue is telling, perhaps carriage truly is only feasible in standard definition format. If so, Section 76.66(k) should not stand in the way of expanding the reach of local programming to the Orphan Counties. The Commission and the Media Bureau have all the authority they need to grant a market modification but limit the relief only to what is actually and proven to be technically feasible. That is exactly what should be done in this case.

If, as DIRECTV claims, it is dedicated to "work[ing] cooperatively with local communities and broadcast stations, alike, to facilitate market modifications in numerous

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[4] Letter from Robert J. Folliard, III to Marlene H. Dortch, Secretary, FCC, MB Docket No, 18-8, filed Apr. 13, 2018, at 2 (the "Gray Letter").

[5] 47 C.F.R. §76.66(k). As noted in Gray's Application for Review, all the requirements of Section 338 and Section 76.66 of the Commission's rules are subject to the terms of Section 325(b) governing retransmission consent. This means that DISH and DIRECTV can carry a retransmission consent station only if they enter into a retransmission consent agreement, and a retransmission consent agreement can vary the terms of Section 76.66(k) or any other provision of Section 76.66 at the parties' agreement. Moreover, even for must-carry stations, Section 76.66 is not self-executing and all rights thereunder are waivable. Section 76.66 is enforced only if a station brings a complaint within a specified period. See 47 C.F.R. §76.66(m). If a station decides not to raise such a complaint within the required period that right is waived.

[6] Gray Letter at 2. To be sure, Gray did and does believe that DIRECTV's burden for showing technical infeasibility should be higher than what the Media Bureau required in this case, but the record reflects that Gray was willing to accept less than full carriage in order to get WYMT-TV to viewers in the Orphan Counties.

'orphan counties,'"[7] it's hard to understand why this solution wouldn't have been suitable for DIRECTV. But the Commission should notice a pattern here: in order to achieve carriage of WYMT-TV in the Orphan Counties, Gray offered to waive future must-carry rights and accept SD carriage. Repeatedly, Gray has offered solutions to address legitimate issues raised by DIRECTV and DISH. Yet DISH and DIRECTV continue to claim, and the Media Bureau actually found, that the Petition is just a plot to circumvent the rules. It wasn't and it isn't. Gray is requesting that WYMT-TV be carried by DISH and DIRECTV in the Orphan Counties. DISH and DIRECTV admit that result is technically feasible.[8] That should be the end of the inquiry.

III. THE COMMISSION SHOULD REVERSE THE MEDIA BUREAU'S EXPANSION OF THE *PER SE* TECHNICAL INFEASIBILITY EXEMPTION.

Despite admitting that retransmission of WYMT-TV is technically feasible, in fact, DISH and DIRECTV spend the bulk of their Oppositions defending the Media Bureau's expansion of the *per se* technical and economic feasibility exemption.[9] But no matter how many times DISH and DIRECTV cite to the same ambiguous passages from the *STELAR Implementation Order*, that Order does not and never will say that preexisting carriage is a prerequisite to granting a market modification. This is purely a policy question for the Commission, and affirming the Media Bureau's expansion of this exemption would defeat the purpose of STELAR's market modification provisions.

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7 DIRECTV Opposition, Summary at i.

8 Unlike DIRECTV, and to its credit, DISH does not try to deny it admitted carriage of WYMT-TV in the Orphan Counties is technically feasible. DISH Opposition at 4. DISH's campaign not to carry WYMT-TV in the Orphan Counties relies solely on the legal loopholes addressed in the next two sections.

9 DIRECTV Opposition at 5-10; DISH Opposition at 1-6.

DIRECTV argues that the Bureau's expansion of the *per se* exemption is consistent with the rules the Commission adopted regarding "neighboring spot beams" and CONUS satellites.[10] The only thing these three issues have in common is that each involves an additional imposition on satellite capacity. The neighboring spot beam policy was adopted to avoid forcing a DBS provider to carry the same signal on two spot beams, and the CONUS policy was designed to ensure that DBS providers are not required to carry a local television station on a satellite serving a large regional area.[11] Both those policies are reasonable accommodations to DBS providers' spectrum needs. DISH and DIRECTV, however, want more; they argue that the same policy of protecting satellite capacity above all else must apply to any request that involves any additional burden on satellite capacity.[12] There is no evidence in STELAR or its legislative history that Congress intended this result, and nothing in the *STELAR Implementation Order* goes this far. There is a good reason for that. The recent STELAR amendments were focused on expanding local service, not on protecting DIRECTV and DISH from all inconvenience at any cost. There is simply no reason viewers in the Orphan Counties should have to forgo the service Congress intended them to receive so that the Commission can maximally protect DBS providers' spot-bream capacity from any encroachment – particularly, not in a case where both companies admit that carriage is actually technically feasible.

Both DIRECTV and DISH make the borderline nonsensical argument that the *per se* exemption must apply to uncarried stations because if it doesn't there is no "relevant spot beam"

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10 DIRECTV Opposition at 8-10.

11 As DIRECTV points out, the Media Bureau stated its "belie[f]" that the "neighboring spot beam" policy was founded in part on the Commission's consideration of "the costs and benefits involved in adding a new station to a spot beam." DIRECTV Opposition at 9 & n.42 (citing *Order*, ¶ 19 n.68). There is nothing in the *STELAR Implementation Order* that supports the Bureau's belief.

12 DIRECTV Opposition at 8-9; DISH Opposition at 5.

to use to judge whether or not carriage is technically feasible.[13] While the Bureau agreed with this argument, DIRECTV and DISH understandably struggle to explain why there needs to be a "relevant spot beam" to determine technical or economic infeasibility. After all, both DISH and DIRECTV actually conducted technical feasibility analyses for WYMT-TV even though the station isn't carried by either operator. DIRECTV finds it incongruous that it should be required to make a technical feasibility showing to avoid adding a new station when it doesn't have to make one in the (as explained, inapposite) neighboring spot beam scenario.[14] DISH simply argues around in circles that a *per se* exemption must apply to uncarried stations because they are uncarried and the Bureau found that a STELAR market modification can only be used to expand the area of a station already carried.[15] Of course neither of these arguments even acknowledge, let alone address, the central problem that it makes no sense to adopt a *per se* exemption from a carriage scenario that faces no actual technical and economic impediment.[16]

On the other hand, DIRECTV and DISH completely ignore the harm that the Media Bureau's new *per se* exemption will cause. As this case demonstrates, a new *per se* exemption will ensure that Orphan County satellite subscribers will remain without access to local programming, directly contrary to Congress's intent. The Commission should reverse the Media Bureau and find that existing carriage is not a prerequisite to a STELAR market modification.

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13 DIRECTV Opposition at 8-9; DISH Opposition at 3.

14 DIRECTV Opposition at 9.

15 DISH Opposition at 4-5.

16 DISH adds that carriage of WYMT-TV should be *per se* technically infeasible because granting the Petition would give Gray a "second" chance to elect mandatory carriage for WYMT-TV, when it already elected retransmission consent for the 2018-2020 election cycle. DISH Opposition at 6. This argument has nothing to do with technical or economic infeasibility. In any event, Gray has sought the right to elect mandatory carriage only for counties outside the Lexington DMA – counties where it never made a previous carriage election. Gray Ex Parte at 4. And, as indicated in the proceeding below, Gray has offered to waive its future must-carry rights for the Lexington DMA. *See id.*

IV. THE MEDIA BUREAU'S CONSTRUCTION OF SECTION 338(c)(1) IS CLEAR ERROR THAT MUST BE REVERSED.

DISH and DIRECTV also furiously, but unsuccessfully, try to defend the Bureau's finding that Section 338(c)(1)'s non-duplication provision bars grant of the Petition. While DIRECTV and DISH can't accept it, the Bureau clearly erred in finding that the non-duplication provision applies to retransmission consent stations. Section 338(c)(1) reads (in relevant part):

> Notwithstanding [the carry-one, carry-all requirement], a satellite carrier shall not be ***required*** to carry ***upon request*** the signal of any local commercial television broadcast station that substantially duplicates the signal of another local commercial television broadcast station which is secondarily transmitted by the satellite carrier within the same local market, or 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.[17]

DISH and DIRECTV wrongly argue that this language applies to all stations – whether asserting mandatory carriage or electing retransmission consent.[18] In reality, the highlighted language above can only apply to mandatory carriage stations because (1) satellite carriers can't be *required* to carry a retransmission consent station by anyone; they do so pursuant to voluntary contracts; and (2) only mandatory carriage stations are entitled to carriage *upon request*; satellite operators have no obligation at all to honor a carriage request by a station electing retransmission consent absent a voluntary retransmission agreement. Section 338(c)(1) simply couldn't be clearer that it applies only to station that have the ability to require DBS operators to carry them upon request, *i.e.* must-carry stations. The Media Bureau failed to recognize this mandatory construction of Section 338(c)(1), and its error must be corrected.

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17 47 U.S.C. §338(c)(1) (emphasis supplied).

18 DIRECTV Opposition at 13; DISH Opposition at 5.

DIRECTV's attempt to save the Media Bureau's misinterpretation of the statute by pointing out that the Commission has never addressed this issue before is unavailing.[19] The Media Bureau's obvious misreading of a statute that is clear on its face can't be saved by the fact that the Commission has never said anything to the contrary. Nor is DIRECTV's assertion of the doctrine of Constitutional avoidance relevant here because Congress's intent is clear on its face. There is no ambiguity, no room for interpretation, and therefore nothing to avoid. If Section 338(c)(1) is a Constitutionally infirm – and no reading of any existing court precedent remotely suggests that it is – then the Commission has no authority to try to save it by reading out of the statute the words "required" and "upon request," which Congress chose.

It is understandable that DISH and DIRECTV would like the Commission to affirm a Media Bureau ruling that says Section 338(c)(1) can override voluntarily negotiated retransmission consent agreements that would require retransmission of duplicate affiliates in the same market. In reality, Congress drafted the statute to avoid that absurd result, and the Commission has no choice but to reverse the Media Bureau on this point.

In any event, the record in this proceeding is abundantly clear that Section 338(c)(1) will never force DISH or DIRECTV to carry both WKYT-TV and WYMT-TV because Gray offered to waive its future mandatory carriage rights in the Lexington DMA and WKYT-TV has no carriage rights at all in the Orphan Counties outside the Lexington DMA. This entire line of argument was a red herring from the beginning, and the Commission should correct the Media Bureau's error in this case.

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[19] DIRECTV Opposition at 13-14.

IV. CONCLUSION

For the foregoing reasons, Gray requests that the Commission deny the Oppositions of DIRECTV and DISH and grant the Petition.

Respectfully submitted,

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July 12, 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 12th day of July 2018, addressed to the following:

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