

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
)	
Amendment to the Commission’s Rules Concerning Market Modification)	MB Docket No. 15-71
)	
Implementation of Section 102 of the STELA Reauthorization Act of 2014)	

COMMENTS OF GRAY TELEVISION, INC.

Gray Television, Inc. (“Gray”), submits these comments in response to the Notice of Proposed Rulemaking¹ issued by the Federal Communications Commission (the “FCC” or the “Commission”) requesting comment on the implementation of Section 102 of the Satellite Television Extension and Localism Act (STELA) Reauthorization Act of 2014.² Gray supports the FCC’s proposals to adopt an efficient and effective satellite market modification process that will ensure that television viewers receive truly local content as Congress intended.

I. Introduction

Gray owns and operates seventy-seven television stations in twenty-four states across the country. Gray believes that success starts by creating unparalleled local content for the viewers it serves. Today, Gray stations operate in forty-four Designated Market Areas (“DMAs”). Of

¹ Amendment to the Commission’s Rules Concerning Market Modification: Implementation of Section 102 of the STELA Reauthorization Act of 2014, *Notice of Proposed Rulemaking*, MB Docket No. 15-71, FCC 15-34 (rel. Mar 26, 2015) (the “NPRM”). These comments are timely filed. *See also* Media Bureau Announces Comment and Reply Comment Dates for DBS Market Modification Notice of Proposed Rulemaking, *Public Notice*, DA 15-453 (rel. Apr. 13, 2015).

² The STELA Reauthorization Act of 2014, §§ 102, Pub. L. No. 113-200, 128 Stat. 2059, 2060-62 (2014) (codified at 47 U.S.C. § 338(l)).

those markets, a Gray station provides the top-ranked newscast in thirty-one.³ Gray stations also make substantial investments in and commitment to local and regional sports, weather, and other informational programming valued by its viewers. Thanks to Gray's historic focus on college towns, its stations have unmatched access to, and provide unparalleled coverage of, the athletic programs of colleges and universities. Moreover, in many markets, Gray stations air Friday night high school sports "wrap up" shows. Interest in the news and high school and college sports that Gray stations cover is not limited by Nielsen's DMA boundaries for the station's market and often stretches to nearby communities and counties.

An efficient and effective satellite market modification process will ensure that satellite subscribers that would value Gray's exciting local content will be more likely to receive it. Several Gray stations are assigned to relatively small DMAs but serve, with their over-the-air signal and cable carriage, nearby counties assigned to much larger DMAs. In such counties, the "local" station in the county's "home" market is centered on a far-away city – often in another state. The local news and sports airing on the nearby Gray stations is more valuable and relevant to these viewers than the offerings of stations located in a distant metropolis. Congress recognized that this is a nation-wide problem that impacts millions of TV viewers. If properly implemented, the changes Congress has directed the FCC to make could help ensure that these geographically isolated TV viewers will receive the truly local TV service that they want and deserve.

Towards that end, Gray urges the Commission to adopt the following rules and principles to create a satellite market modification process that is fair, efficient, and serves the interest of the viewers for whom it was intended:

- Satellite markets should be subject to modification on a county-by-county basis;

³ Gray broadcasts the second-rated newscast in another 10 of its markets, meaning that in forty-one of its forty-four markets, a Gray station provides news ranked either first or second.

- If the FCC has previously modified a station's cable market, the station should be entitled to a presumption that its satellite market should be modified to include the relevant county(ies);
- The FCC should limit the statutory "technical infeasibility" exception to bona fide, demonstrable instances of the unavailability of spot beam capacity; and
- The FCC's "substantial duplication" rules should not be interpreted to permit satellite providers to avoid the results of market modification decisions.

II. The FCC Should Permit Requests to Modify Satellite Markets on a County-by-County Basis.

The Commission should permit, but not require, petitioners to request the modification of satellite markets to add or remove particular counties. The NPRM requested comment on this approach, which Gray fully supports.⁴ In the satellite market modification context, a departure from the community-by-community approach used for cable market modification requests is both appropriate and necessary.⁵

First, the county-by-county approach would best carry out Congress's intent to give the FCC the tools necessary to solve the "orphan county" problem in appropriate cases. A Commission conclusion that a market modification would promote consumers' access to in-state signals necessarily would apply equally to all viewers in the county at issue, because county boundaries do not cross state lines. Proceeding on a community-by-community basis for satellite market modifications would needlessly complicate the process of granting viewers access to in-state local news and other programming.

Second, a county-by-county approach better suits the way that satellite providers actually provide service. Satellite operators provide service throughout the nation and, thus, throughout each county in the country. Satellite providers do not provide service to specific communities, but rather vary their channel line-ups on a DMA-by-DMA basis or, in some cases, on a county-

⁴ *NPRM* at para. 25.

⁵ Gray notes that a county-by-county approach likely would be more efficient and useful in the cable market modification context as well because DMAs are, after all, defined by county boundaries. Nonetheless, such a change is beyond the scope of this rulemaking and these comments.

by-county basis based on significantly-viewed status for carried stations. So the question of whether a community served by a Direct Broadcast Satellite (“DBS”) provider is part of a television station’s natural market has little meaning because DBS systems simply do not target their service in that way. Third, the justifications for approaching cable market modifications on a community-by-community basis simply do not apply to satellite. Cable operators historically have been franchised on a community-by-community basis, and many counties are served by multiple cable operators. Analysis of some of the statutory factors, such as historical cable carriage, can be logically analyzed only on a more granular community-by-community basis. Such concerns are absent in the satellite context, where community-by-community service is absent.

Fourth and finally, many satellite subscribers, especially those in the rural counties Congress was most interested in, live many miles from the nearest “cable community” and have no access to cable. For these viewers, a community-by-community market modification analysis would be at best artificial and at worst impossible. A community-by-community approach likely would prejudice the TV viewers that Congress was most trying to help through its legislation expanding the FCC’s market modification authority. The FCC should avoid this absurd result by adopting its proposal to evaluate satellite market modifications on a county-by-county basis.

III. Previous Cable Market Modifications Should Create a Presumption that Satellite Market Modification Requests Should Be Granted.

Gray also supports the proposal set forth in the NPRM that previously-decided cable market modifications presumptively apply to satellite market modification requests.⁶ If a previous market modification proceeding has resulted in the assignment of additional communities to a television station’s cable carriage market, the FCC should presume that the county or counties in which those communities are located should be added to the station’s DBS

⁶ *NPRM* at para. 17.

market. This logical and efficient approach will lead to the right results and avoid needless expenditure of resources by stations, DBS providers, and the FCC.

When a satellite market modification is requested for a county or counties where a previous cable market modification has been granted, the FCC should require only that a petitioner file a simple request that the station's satellite market be modified to include the counties that include the communities associated with the earlier modification.⁷ Any party opposing the modification would have the burden of demonstrating that, notwithstanding the outcome of the earlier proceeding, the statutory factors do not support a market modification in the satellite context. A petitioner would then, of course, have an opportunity to rebut the opponent's showing. This burden-shifting approach would be efficient while ensuring that satellite operators were provided an opportunity to demonstrate that circumstances had changed since the Commission's initial decision.

This approach would achieve the best substantive results because it would recognize the substantial party and FCC work done in earlier cases to analyze the geographic extent of individual TV station's markets. Cable market modification proceedings typically involve an exhaustive analysis of the social and economic ties between a station and a particular geographic area. The conclusions the FCC draws are based on an extensive record and a thorough analysis. There is no reason to repeat this process or expect a different result merely because the video provider is a satellite company.

A proposed streamlined procedure for applying existing cable modifications to satellite would conserve staff resources and eliminate unnecessary expense for all parties. Petitioners invest significant time and money preparing the detailed evidentiary showing required to support market modification requests. Likewise, substantial Commission resources are required to review and decide such requests. Where previous party and FCC efforts have resulted in a

⁷ In connection with a modification request made on a county-wide basis, the presumption would apply to any county containing a community that has been added to a station's cable market.

modification of a station's market, the Commission's process should give presumptive weight to such determination.

IV. The FCC Should Strictly Limit the Use of the "Technical Infeasibility" Exception to Cases Where Infeasibility Is Conclusively Demonstrated.

The Commission should ensure that the "technical infeasibility" exception to carriage obligations relating to a satellite market modification is available only if properly asserted, only to the extent conclusively demonstrated, and only for such time as the demonstrated infeasibility continues. Gray understands and appreciates the technical burdens that satellite operators face in adding signals to their satellite systems, but the existence of these burdens must not prevent the satellite market modification process from bringing truly local content to viewers. Satellite operators therefore should be permitted to claim this exemption only in limited circumstances.

First, the rules should require satellite providers to assert technical infeasibility before broadcasters go through the trouble and expense of preparing a market modification petition. Gray proposes the following process: broadcasters considering requesting a market modification should notify the satellite provider and the FCC of the modification that may be sought. If a DBS provider wishes to assert "technical infeasibility" it would be required to do so within a specified period of receiving this notice, *e.g.*, 30 or 45 days. A satellite operator's claim of "technical infeasibility" would take the form of a signed certification to the broadcaster and the FCC, under penalty of perjury, that the carriage obligations that would result from a contemplated modification would be technically infeasible. Failure to assert "technical infeasibility" at this stage of the process would foreclose the satellite provider from later claiming technical infeasibility. This process would allow a broadcaster to wait to file a market modification petition until it could be certain that carriage pursuant to the requested modification would be feasible for the satellite provider, conserving the resources of petitioners, the Commission, and parties that might oppose a petition.

Second, satellite operators should be required to conclusively demonstrate technical infeasibility as part of their assertion of infeasibility in response to broadcasters' pre-filing

notice. If a broadcaster wishes to challenge the satellite operator's showing, it should be permitted to do so either before filing a market modification petition or concurrent with a petition as part of the market modification proceeding. As the Commission noted in the NPRM, Congress intended the "technical infeasibility" exception to apply only when infeasibility is "well substantiated and carefully examined by the [Commission]."⁸ The FCC should establish demonstrable standards for technical infeasibility and should consider appointing an independent, third-party arbitrator with expertise in satellite engineering to review claims of infeasibility. And there should be a procedure for resolving disputes over technical infeasibility before broadcasters invest in making the necessary market modification showing.

Third, Gray agrees with the Commission's proposal that satellite operators should have an obligation to report when carriage obligations imposed by a market modification become technically feasible.⁹ Cable systems subject to the "small system" (*i.e.*, those with fewer than 1000 subscribers) exemption to the network non-duplication rules are required to notify broadcasters and comply with the network non-duplication rules once they have grown too large to claim the exemption.¹⁰ Satellite operators likewise should be required to notify broadcasters and the FCC within sixty days of any change that results in previously infeasible carriage becoming feasible. Gray also believes that, until carriage is feasible, satellite operators should be required to submit periodic reports, *e.g.*, annually, to the Commission and affected broadcasters, under penalty of perjury, affirming that previously-asserted claims of infeasibility remain accurate.

⁸ *NPRM* at para. 19, citing Report from the Senate Committee on Commerce, Science, and Transportation accompanying S. 2799, 113th Cong., S. Rep. No. 113-322 (2014) at 11.

⁹ *NPRM* at para. 20.

¹⁰ 47 C.F.R. § 76.95(a).

V. The FCC’s Post-Modification Rules and Procedures Should Protect the Benefits to Viewers That Should Result from Grant of a Market Modification Petition.

The Commission should ensure that its satellite carriage rules do not prevent viewers from enjoying the benefit of modified satellite markets. The rules should permit broadcasters to promptly make a carriage election upon the conclusion of a proceeding and should not impose roadblocks that would prevent viewers from receiving the benefit of a modification.

For example, Gray agrees with the Commission’s tentative conclusion in the NPRM that it should adopt the straightforward procedural requirements set forth therein with respect to carriage elections after a market modification decision.¹¹ Analogous procedures have worked well in the cable context, and there is no reason why they should be problematic for satellite operators.

In addition, the “substantial duplication” exceptions to the satellite must-carry rules should not apply to stations in communities that have been added to their markets via the market modification process.¹² If it did, satellite operators likely would deny network-affiliated stations carriage in such areas if they already carry an affiliate of the same network from the same state, depriving viewers there the benefit of news and event coverage that is truly local and relevant, contrary to Congress’ intent. Consider Gray’s CBS affiliate KBTX-TV licensed to Bryan, Texas. The Commission could conclude that satellite subscribers in neighboring Walker County, Texas, assigned to the Houston, DMA, would consider nearby KBTX-TV, with its substantial coverage of Texas A&M, more “local” than any of the Houston stations and modify KBTX-TV’s market accordingly. In such a circumstance, however, unless the “substantial duplication” rules were modified, the satellite carriers could deny Walker County viewers the right to receive KBTX-TV because the DBS operators already retransmit a CBS affiliate licensed to Houston, Texas. Such a result would undermine the efforts of the Commission and the intent of Congress.

¹¹ *NPRM* at para. 18.

¹² *See* 47 C.F.R. § 76.66(h)(1).

VI. Conclusion

For all these reasons, Gray respectfully requests that the Commission act in accordance with these comments.

Respectfully submitted,

Gray Television, Inc.

/s/ _____

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