

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

In the Matter of

**AMENDMENT TO THE COMMISSION'S RULES
CONCERNING MARKET MODIFICATION**

**IMPLEMENTATION OF SECTION 102 OF THE
STELA REAUTHORIZATION ACT OF 2014**

MB Docket No. 15-71

COMMENTS OF DIRECTV, LLC

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SUMMARY

DIRECTV has long supported legislation to address the problem of so-called “orphan counties” with no *in-state* local broadcast stations. It thus welcomed Congress’s decision to include in recent satellite television legislation language that would apply the longstanding cable “market modification” regime to satellite. While this regime will by no means address the entire orphan county problem, it represents a very real step in the right direction.

DIRECTV’s principal concern with this regime relates to the localized “spot beams” with which it offers local service. Although DIRECTV has strived to design its spot beams to cover the entirety of the local markets they serve, it has not always been able to achieve that goal in every local market. Those who live outside of DIRECTV’s spot beams do not receive local service. This is perfectly legal, as recognized by both the Commission and Congress.

DIRECTV, moreover, need not make any showing with respect to spot-beam coverage. It simply offers local signals where the spot beam delivers a sufficiently strong signal and does not where the spot beam lacks coverage. The system has worked this way for nearly fifteen years, without anybody ever suggesting it should be changed.

The same will hold true for markets “modified” under the new rules. If a station seeks to add a community to its local market, and the spot beam on which DIRECTV carries the station reaches that community, DIRECTV can deliver the station in that community. If the spot beam does not reach that community, DIRECTV cannot deliver the station there, whether or not the Commission grants a proposed modification. Fortunately, the Commission need not change any of its rules, or require any showing at all, to resolve this situation. Rather, it can grant or not grant proposed modifications based on evidence presented by stations, and satellite carriers can

carry or not carry those stations in their “as modified” markets based on spot-beam coverage—just as they do today in unmodified markets.

Stations, of course, may well want to know the extent of satellite carriers’ spot-beam coverage *before* spending the time and money pursuing a market modification. DIRECTV is willing to provide this information if asked. It is even willing to certify that it has calculated spot-beam coverage for the requesting station in the same manner that it calculates spot-beam coverage on that beam in the ordinary course of business for other stations. This would create an efficient process and minimize cost and hassle for all parties concerned.

The Commission should not, however, require detailed, on-the-record evidentiary showings regarding spot-beam coverage in order to find that carriage outside of the spot beam is infeasible. It would be anomalous, to say the least, to create *more* process for modified-market carriage than exists today for non-modified markets. And there would be no reason to create such burdens, as satellite carriers have no reason to not carry stations everywhere permitted by law. The Commission also should not require ongoing reporting, as spot-beam coverage will not increase during the life of a satellite. Nor should DIRECTV be required to design new spot-beam satellites to cover communities in modified markets. None of these requirements exist today in the absence of market modification, and there is no reason to change that.

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DIRECTV, LLC (“DIRECTV”) files these comments in response to the Commission’s proposed “market modification” rules,¹ implementing Congress’s most recent satellite television legislation reauthorization.² DIRECTV supports the principle behind this provision of increasing in-state programming to “orphan counties.” Yet it can provide service into modified markets only where its spot beams permit it to do so. Fortunately, the regime already in place for local carriage contemplates *exactly* these circumstances, as satellite carriers for years have offered local service only within the coverage of their spot beams. The Commission should maintain

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, 2015 WL 1397096 (rel. Mar. 26, 2015) (“Notice”).

² The STELA Reauthorization Act of 2014 (“STELAR”), § 102, Pub. L. No. 113-200, 128 Stat. 2059, 2060-62 (2014) (codified at 47 U.S.C. § 338(l)). STELAR was enacted on December 4, 2014 (H. R. 5728, 113th Cong.). This proceeding implements STELAR § 102 (titled “Modification of television markets to further consumer access to relevant television programming”), 128 Stat. at 2060-62, and the related statutory copyright license provisions in STELAR § 204 (titled “Market determinations”), 128 Stat. at 2067 (codified at 17 U.S.C. § 122(j)(2)(E)).

this regime rather than implementing burdensome and unnecessary new carriage rules for modified markets.

I. BACKGROUND

A. DIRECTV's Spot Beams Do Not Cover All Areas of Local Markets

DIRECTV carries all of its national programming on satellite beams that cover the entire contiguous United States (“CONUS”). It cannot as a practical matter, however, use CONUS capacity to provide local broadcast channels.³ As the Commission has found, “for satellite carriers, the capacity used for local channels is separate from the capacity used for national channels and the two are generally not interchangeable.”⁴ Thus, “to carry a local channel on a transponder designated for CONUS service would be particularly inefficient as that channel could only be permissibly viewed in a single DMA.”⁵

DIRECTV instead uses spot beams to offer local channels. Spot-beam technology divides up a portion of the bandwidth available to a satellite into beams that cover limited geographic areas. Doing so allows particular sets of frequencies to be reused many times. This spectral efficiency unlocked the potential for satellite carriers to offer local broadcast signals in the late 1990s, and it enables satellite carriers to offer local service today.

³ See e.g., *Satellite Broad. and Commc'ns Ass'n v. FCC*, 275 F.3d 337, 359 (4th Cir. 2001) (“*SBCA*”) (describing at length the difficulties inherent in satellite carriage of local broadcast stations). DIRECTV carries New York and Los Angeles stations on CONUS beams, but only because those stations are offered throughout the country as distant signals pursuant to 17 U.S.C. § 119 and 47 U.S.C. § 339.

⁴ *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules; Implementation of the Satellite Home Viewer Improvement Act of 1999: Local Broadcast Signal Carriage Issues and Retransmission Consent Issues*, 23 FCC Rcd. 5351, ¶ 11 (2008).

⁵ *Id.* ¶ 11 n.46.

Spot-beam technology, however, involves substantial tradeoffs. Both the amount of bandwidth allocated to individual spot beams and the geographic area covered by an individual spot beam vary inversely with the number of spot beams that can be placed on a satellite. Satellites, in other words, can be designed with more spot beams covering more local markets—each with relatively lower capacity and geographic coverage. Or they can be designed with fewer spot beams covering fewer local markets—each with relatively greater capacity and geographic coverage.

Satellite carriers thus face two significant challenges when designing spot-beam satellites:

- **Capacity.** If individual beams are designed with more capacity than required to comply with the “carry-one, carry-all” rule,⁶ the satellite can serve fewer local markets, and excess capacity lies fallow. If, however, beams are designed with less capacity, the provider may not be able to carry all television stations in a market. DIRECTV thus generally designs spot beams with enough bandwidth to carry only the primary signals of existing channels in the local market or markets covered by the beam. When new television stations appear, DIRECTV faces extraordinary difficulty carrying them.
- **Geographic coverage.** If individual beams cover more geographic territory than the local market or markets to which they are assigned, the satellite can serve fewer local markets and potential capacity lies fallow. On the other hand, if beams are designed not to cover additional territory they necessarily cannot reach all subscribers *inside* a local market

⁶ 47 C.F.R. § 76.66(b)(1) (“Each satellite carrier providing, under section 122 of title 17, United States Code, secondary transmissions to subscribers located within the local market of a television broadcast station of a primary transmission made by that station, shall carry upon request the signals of all television broadcast stations located within that local market, subject to section 325(b) of title 47, United States Code, and other paragraphs in this section.”).

because local markets come in odd shapes. In practice, *while DIRECTV strives to design spot beams covering the entirety of the local markets they serve, some spot beams do not do so*. Thus, for example, DIRECTV subscribers in Gillette, Wyoming live in the Denver local market but do not receive local stations.

The latter constraint—geographic coverage—pertains most directly to this proceeding, as the Commission appears to contemplate that satellite carriers might be obligated to offer local service in newly-modified areas absent a finding of technical infeasibility.⁷ This is not, however, how the rules work today. When it first wrote rules for local service, the Commission specifically held otherwise, finding that the Communications Act “does not require a satellite carrier to serve each and every county in a television market.”⁸ Citing the “geographically expansive” nature of some markets, the Commission found that “[a] spot beam may not be able to cover the entire DMA in these instances, and to make the satellite carrier reconfigure its spot beam may deprive it of capacity to serve additional markets with local-into-local coverage.”⁹ This has been the law ever since.¹⁰

Congress, in turn, recognized this limitation when it created the “no-distant-where-local” rule, which prohibits satellite carriers from offering new distant signal service to subscribers to whom the satellite carrier “makes available” a local station affiliated with the same network.¹¹ It

⁷ Notice ¶ 19 (proposing that satellite carriers bear the burden of demonstrating infeasibility).

⁸ *Implementation of Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues*, 16 FCC Rcd. 1918, ¶ 42 (2000).

⁹ *Id.*

¹⁰ *New York Times Mgmt. Servs. v. DIRECTV, Inc.*, 19 FCC Rcd. 12070, ¶ 5 (2004) (“As an initial matter, contrary to assertions by New York Times, there is no requirement in either the statute or our rules that satellite carriers must serve every part of a particular DMA.”).

¹¹ 47 U.S.C. § 339(a)(2)(C).

specified that a satellite carrier does not “make available” local stations to subscribers outside of the spot beam on which the station is carried,¹² and so can thus offer them distant signals if they are otherwise eligible. Clearly Congress understands that spot beams do not always cover the entire local market served by a satellite carrier.

B. DIRECTV Determines Which Communities It Can Serve Based on Spot-Beam Performance

Because some of DIRECTV’s spot beams¹³ do not cover all communities within a given local market, DIRECTV must determine which communities it can and cannot serve. It does so both when it commences service on a particular spot beam and again when, for example, Nielsen Media revises local market boundaries. It begins this analysis by looking at predicted satellite transmit power (otherwise known as EIRP) contours for the spot beams provided by the satellite manufacturer. These contours, however, give DIRECTV only a rough idea of where the satellite manufacturer *predicts* spot-beam coverage will reach. They do not account for actual satellite performance. Nor do they account for any anomalies in the satellite that might reduce coverage from that predicted.

Before DIRECTV decides whether or not it can serve a particular community, DIRECTV measures two aspects of actual performance using diagnostic tools provided by the satellite manufacturer:

- Average system availability (including rain).
- Overall signal-to-noise ratio (including interference).

¹² 47 U.S.C. § 339(a)(2)(H) (“For purposes of this paragraph, a satellite carrier makes available a local signal to a subscriber or person if the satellite carrier offers that local signal to other subscribers who reside in the same zip code as that subscriber or person.”).

¹³ DIRECTV has separate spot beams for standard-definition and high-definition coverage. Those beams have distinct coverage areas.

More specifically, for each community in question, DIRECTV measures these criteria and compares them against a target availability figure specific to the satellite. If *both* of the criteria exceed the target availability figure, DIRECTV considers the location “served” by the spot beam, and provides customers in that community with local broadcast signals. If either does not, however, DIRECTV considers the location “unserved” by the spot beam.

Two additional details pertain to spot-beam coverage. First, DIRECTV has engineered its billing and conditional access systems to make geographic distinctions based primarily on five digit zip codes.¹⁴ Thus, for example, in order to place subscribers in a particular local market, DIRECTV first assigns particular zip codes to that market, then provides subscribers local programming based on their zip code.¹⁵ Likewise, DIRECTV makes spot-beam coverage determinations based on five-digit zip codes. More precisely, DIRECTV determines whether an *entire zip code* falls within the spot beam. If so, subscribers within that entire zip code receive local service. If not, none of them do.

Second, spot-beam coverage is fixed on all of the satellites DIRECTV uses to provide local service, which typically operate for 15 to 20 years after launch. DIRECTV cannot effectively enlarge the area served by a spot beam without reducing the number of stations the beam carries; nor can it move a spot beam without obviously unacceptable consequences.¹⁶ Any

¹⁴ *New York Times*, *supra*, ¶¶ 3-4.

¹⁵ For some limited purposes, DIRECTV has developed the ability to enhance this analysis with county boundaries, in order to more accurately place subscribers living in so called “split zip codes” that straddle county lines. *See* Comments of DIRECTV, Inc. MB Docket No. 05-49, at 4-5 (filed Apr. 8, 2005). DIRECTV has not, however, integrated county boundary functionality with its analysis of spot-beam coverage.

¹⁶ DIRECTV now carries some local markets on its SPACEWAY satellites, which can move spot beams. Moving spot beams, however, by definition entails eliminating service to some in order to provide it to others. Moreover, DIRECTV launched the D14 satellite last year, which is in the process of replacing local service on the SPACEWAY satellites. This new satellite, just like all DIRECTV satellites other than SPACEWAY, cannot move *individual* spot beams. They can slightly

determination that a spot beam covers or does not cover a particular zip code thus should not change during the life of the satellite in question, absent technical problems with the satellite itself—in which case DIRECTV might lose the ability to serve a particular area.¹⁷

II. DISCUSSION

A. The Commission Need Not Adopt New “Feasibility” Rules Related to Spot-Beam Coverage

STELAR provides that “[a] market determination ... shall not create additional carriage obligations for a satellite carrier if it is not technically and economically feasible for such carrier to accomplish such carriage by means of its satellites in operation at the time of the determination.”¹⁸ From DIRECTV’s perspective, the principal question of feasibility—and spot-beam coverage¹⁹—lies at the heart of the market modification process. If a station²⁰ seeks to add a community to its local market,²¹ and that area lies within the spot beam on which DIRECTV

adjust the *entire array* of spot beams on the satellite simultaneously. This, of course, would disrupt service across dozens of markets, and negate DIRECTV’s efforts to optimize population coverage.

¹⁷ Notice ¶ 20 (“We also seek specific comment from satellite carriers on the complexities and expense that may be associated with reconfiguring a spot beam to cover additional communities added to the market served by the spot beam by operation of the market modification process. In addition, in the event of a Commission finding of technical or economic infeasibility, we seek comment on whether we should impose a reporting requirement on satellite carriers to notify the affected broadcaster if circumstances change at a later time making it technically and economically feasible for the carrier to carry the station.”).

¹⁸ 47 U.S.C. § 338(I)(3)(A).

¹⁹ Notice ¶ 19 (asking “[u]nder what circumstances would the limitations or coverage of a spot beam be a sufficient basis for a satellite carrier to prove that carriage of a station in the community at issue is not technically and economically feasible”).

²⁰ DIRECTV agrees strongly that, as is the case for cable market modifications, only stations and satellite carriers should be able to seek market modifications. Notice ¶ 8. DIRECTV sees no reason why franchise authorities—which have no authority to regulate satellite carriers—should be served with any such requests. *Id.* ¶ 10; *see also* 47 U.S.C. § 303(v) (giving the Commission exclusive authority to regulate direct-to-home satellite services).

²¹ DIRECTV would not expect either stations or satellite carriers to seek *reductions* in stations’ local markets. Stations, presumably, want their local markets to be as large as possible. And, as discussed

already carries the station, DIRECTV can provide that station to subscribers in the modified territory. If, however, a station seeks to add to its local market a community that lies *outside* of the spot beam on which DIRECTV carries the station, DIRECTV cannot provide the station to subscribers in that community.²²

Nor are there any feasible alternatives to carriage on the spot beam. As the Commission has recognized, it would be a substantially inefficient use of resources to devote a CONUS beam, which can be seen throughout the United States, to provide coverage to a single or handful of communities.²³ Even if the community in question happens to be covered by a *different* spot beam than the one on which the station is carried, DIRECTV cannot add the station to that other spot beam. As discussed above, it would almost certainly lack room on the “neighboring” beam to carry the new station.²⁴ Moreover, even if there were space, DIRECTV would have to reserve capacity on the *entire* “neighboring” spot beam—capacity that could otherwise be used for a new

throughout these Comments, satellite carriers have no reason to reduce local markets because they are not required to carry stations throughout them. If, however, the Commission were to reduce a station’s local market, satellite carriers should then be able to important distant signals for which subscribers are otherwise eligible, into that area. *See Notice*, ¶ 22 (“We seek comment on whether Section 338(l)(5) also means that the deletion of a local station from a local television market by operation of a market modification would not make otherwise ineligible subscribers now eligible to receive a distant station of the same network.”). Nothing about new 47 U.S.C. § 338(l)(5) would prevent this. That section provides that “[n]o modification of a commercial television broadcast station’s local market pursuant to this subsection shall have any effect on the eligibility of households in the community affected by such modification to receive distant signals pursuant to section 339 of this title, notwithstanding subsection (h)(1) of this section.” This, plainly, was meant to ensure that households would not *lose* eligibility to distant signals for which they were eligible prior to modification. It cannot reasonably be interpreted as denying distant signals to subscribers who newly become eligible for them *because they have lost their local signals in a modification*.

²² In some cases, a station may fall within a standard-definition spot beam but outside a high-definition spot beam, or *vice versa*.

²³ *See* n.4, *supra*.

²⁴ As discussed above, DIRECTV has designed its spot beams to carry only the primary signals of stations within the local markets they cover. The vast majority of its spot beams are now currently full. In most cases, DIRECTV could not add a station to a “neighboring” spot beam without removing one of the stations already on that beam.

station or a multicast signal carried throughout the neighboring market. Reserving spot-beam capacity for a station that could only be received in at most a handful of communities would represent a significant waste of spectral resources. It would, in other words, prove both “technically” and “economically” infeasible. Accordingly, the Commission should confirm that it is *per se* technically and economically infeasible for a satellite carrier to provide a station to subscribers who live in an area outside of the spot beam on which that station is currently carried.

Such a regime, moreover, obviates the need for detailed “feasibility” rules related to spot-beam coverage. Today, DIRECTV carries local stations only within their assigned spot beams. It has done so for more than fifteen years without ever once making an “evidentiary showing” to the Commission or to the local stations so carried. Both the Commission and Congress have explicitly recognized and approved this practice. And, to DIRECTV’s knowledge, not a single station has disputed DIRECTV’s spot-beam coverage.

Such a regime would work just as well for modified markets as it does for unmodified ones. Each satellite carrier would carry each local station in the station’s local market, *as that market may or may not be modified*, but only in areas covered by the applicable spot beam. The Commission would be free to modify a station’s market for *both* satellite carriers as it saw fit—and each satellite carrier would carry the station as it is able to do so based on its own spot-beam patterns. Stations would not, in other words, have to seek modification for one satellite carrier or another based on spot-beam coverage.²⁵

²⁵ Notice ¶ 16 (“For example, a modification may not always appropriately apply to both carriers because their spot beams may be different, even though they are serving the same market and thus one may have an infeasibility defense while the other may not.”).

DIRECTV sees no need for additional, more burdensome Commission involvement in the process, such as requirements governing when and how satellite carriers can object on the basis of feasibility.²⁶ From DIRECTV's perspective, it makes little sense to require such showings in modified markets where they are not required in unmodified ones. Nor is there a plausible concern that DIRECTV might use spot-beam coverage as an excuse not to carry a station in a modified market. The fact that no station has ever disputed DIRECTV's spot-beam coverage in the fifteen years that DIRECTV has provided local service provides powerful evidence in this regard. DIRECTV, moreover, would be willing to certify to spot-beam coverage capabilities, as discussed in more detail below. If the FCC deems that a technical showing is necessary, moreover, it can rely on this certification.

Certainly, the Commission should not require ongoing monitoring or reporting of spot-beam issues.²⁷ As discussed above, absent technical problems *reducing* spot-beam coverage,²⁸ spot beams remain static for the life of the satellite. Any new spot-beam satellites will take into consideration the geographic boundaries of the local markets, as well as adjacent spot beams, spectrum availability, and service quality. DIRECTV, however, is neither required to design its

²⁶ *Notice* ¶ 19-20 (suggesting that a satellite carrier should “raise any technical or economic impediments in the market modification proceeding” and that they should “provide spot beam contour diagrams to show whether a particular spot beam can be used to cover a particular community”).

²⁷ *Notice* ¶ 20 (“In addition, in the event of a Commission finding of technical or economic infeasibility, we seek comment on whether we should impose a reporting requirement on satellite carriers to notify the affected broadcaster if circumstances change at a later time making it technically and economically feasible for the carrier to carry the station. Would such changes in circumstances be sufficiently public so as to not necessitate the burden of such a reporting requirement?”).

²⁸ The possibility of technical problems reducing spot-beam coverage serves as yet another reason why satellite carriers should not lose “rights” to assert feasibility issues if they do not raise them during a market modification proceeding. *Notice* ¶ 19.

spot beams to cover any particular part of the local market today nor to report its spot-beam design decisions to the Commission.²⁹ Nothing about market modification should change this.

B. The Commission Could Encourage Communications Between Satellite Carriers and Stations Prior to the Filing of an Application

While DIRECTV should not have to make any particular feasibility showing with respect to spot-beam coverage, stations will certainly want to know whether DIRECTV's spot beam covers the communities they would like to add to their local markets. Such information, moreover, would prove of most value to stations *before* they undergo the time and effort of filing a market modification petition. Stations should not have to hire lawyers and engineers to create maps and assemble labor and shopping data, programming information, and ratings data³⁰ only to then learn that a satellite carrier cannot comply with a successful petition.

Thus, the most efficient process regarding feasibility would be for a station that is considering filing a market modification petition to first ask the two satellite carriers if they can provide the station in the communities proposed.³¹ DIRECTV would then conduct the appropriate spot-beam analysis within a reasonable period of time. If the spot-beam analysis shows that DIRECTV cannot carry the station in the community or communities in question, DIRECTV could then certify to the station, under penalty of perjury, that it has conducted the analysis in the ordinary course of its business, as it does for determining the coverage of the spot

²⁹ DISH was required in 2010 to certify that its spot beams cover 90 percent of the population of all 210 local markets as a condition of reinstating its distant signal license, which it lost as a result of significant copyright violations. 47 U.S.C. § 342(a)(2)(A). Congress was presumably concerned that DISH might claim to serve additional markets without really doing so. Even in these circumstances, however, Congress did *not* require DISH to serve entire markets. That requirement, moreover, applied only to DISH, and only as part of a specific reinstatement process that has long since been completed.

³⁰ *Notice* ¶ 12 (setting forth proposed showings for market modification petitioners).

³¹ *Id.* ¶ 21 (discussing possibility of an “initial determination”).

beam in question for other purposes. If the broadcaster decides to nonetheless pursue a market modification (because, for example, DISH's spot beam *does* cover the area in question), it could then present such certification to the Commission as part of any proceeding.

C. The Commission Should Use Zip Codes for Market Modifications

As discussed above, DIRECTV determines spot-beam coverage entirely based on zip codes. Thus, DIRECTV can only determine whether it can comply with a proposal to modify a market if it knows the zip codes involved. This suggests strongly both that stations should provide DIRECTV with the zip codes that correspond with any proposed modification, and that the Commission should grant any such modification in areas defined by zip codes.³² Any other formulation, such as using cable communities or other municipal boundaries,³³ would reduce DIRECTV's ability to accurately determine whether it can provide the service requested, as well as its ability to provide local service only to subscribers in authorized areas.

D. The Commission Should Permit Channel Changes If Required by Market Modifications

It is at least theoretically possible that a market modification could create circumstances in which two local channels offered to subscribers have the same channel number. Thus, suppose WXYZ Channel 4 in market A wants to modify its market to include Springfield, a town in market B. Suppose further that market B has its own "Channel 4," WPDQ. Were the Commission to grant the proposed modification, subscribers in Springfield would have two stations on channel 4. In such case, satellite carriers should have the ability to offer a station

³² *Id.* ¶ 25.

³³ *Id.*

