

**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 DISH NETWORK L.L.C.

I. INTRODUCTION AND SUMMARY

DISH Network L.L.C. (“DISH”) submits these comments in response to the Notice of Proposed Rulemaking (“*Notice*” or “*NPRM*”) in the above-captioned proceeding to implement Section 102 of the Satellite Television Extension and Localism Act Reauthorization Act of 2014 (“*STELAR*”).¹ DISH shares Congress’s and the Commission’s goal to address satellite subscribers’ inability to receive in-state programming in certain areas, sometimes called “orphan counties,” and recognizes that the new satellite market modification rules under consideration in this proceeding present a possible remedy.² In developing these rules, the Commission should, among other things, adopt procedures that limit the administrative and cost burdens on all parties involved.

DISH generally supports the Commission’s proposed rules for standing, eligibility, and market determinations, with some modifications. The carriage procedures and timelines for

¹ See Amendment to the Commission’s Rules Concerning Market Modification, Implementation of Section 102 of the STELA Reauthorization Act of 2014, *Notice of Proposed Rulemaking*, FCC 15-34, MB Docket No. 15-71 (rel. Mar. 26, 2015) (“*Notice*” or “*NPRM*”).

² *Id.* ¶ 1.

market modifications should be based upon the well-established rules in Section 76.66 of the Commission’s rules (governing satellite carriage of broadcast stations), with additional time to enable satellite carriers to come into compliance with a market modification. DISH suggests using counties as the geographic framework for market modifications requests, given that the problem Congress sought to fix is defined as orphan *counties*. Such an approach is also consistent with the existing statutory fixes built into STELAR’s predecessor, the 2010 satellite reauthorization bill.

As directed by STELAR, a satellite carrier must be relieved of the obligation to comply with a market modification if it would be technically or economically infeasible to do so. To demonstrate infeasibility, a satellite carrier should be able to issue a certification that it has analyzed a potential market modification and has determined that it is either technically or economically infeasible to implement it. The Commission should not require satellite carriers to submit business-sensitive documents or analysis to support determinations of infeasibility.

DISH also brings to the Commission’s attention an additional issue not raised in the *Notice* – the possibility that a satellite carrier will have to pay additional retransmission consent fees when a TV broadcast station is authorized for one or more new counties as the result of a market modification. A satellite carrier should not be required to pay retransmission consent fees for two different stations affiliated with the same network in the same geographic area as the result of a market modification.

II. DISH SUPPORTS THE COMMISSION’S PROPOSED RULES FOR STANDING, ELIGIBILITY, MARKET DETERMINATIONS, AND STANDING, WITH SMALL MODIFICATIONS

DISH supports the proposals contained in the *Notice* to establish standing, eligibility, market determination, and carriage procedures, with small modifications. As the Commission recognized, Congress’s intent in adopting Section 102 was “to promote consumer access to in-

state and other relevant television programming” and to “address satellite subscribers’ inability to receive in-state programming in certain areas, sometimes called ‘orphan counties.’”³ DISH makes the proposals below to ensure the Commission implements rules consistent with the statutory goals of STELAR.

Requesting a Market Modification. DISH supports the Commission’s proposal to allow only a commercial broadcast television station or satellite carrier to submit market modification requests.⁴ As the *Notice* recognizes, such an approach will provide parity with the standing rules in place for market modifications in the cable context,⁵ wherein the Commission concluded that broadcasters and cable operators “are the only appropriate parties to file market modification requests.”⁶ Consistent with this approach, DISH also agrees with the Commission’s tentative conclusion to “limit the participation of local governments and individuals to filing comments in support of, or in opposition to, particular market modification requests.”⁷ As the Commission notes, “a market modification would serve little purpose without the cooperation of the involved broadcaster or MVPD having carriage rights or obligations.”⁸ DISH agrees.

Statutory Factors and Evidentiary Requirements. DISH supports adopting the four existing statutory factors that already apply in the cable context for evaluating satellite market modification requests.⁹ DISH further supports the proposed additional statutory factor that seeks

³ *Id.*

⁴ *Id.* ¶ 8.

⁵ *Id.* ¶¶ 8-9.

⁶ *Id.* ¶ 8, *citing* FN 47.

⁷ *Id.* ¶ 9.

⁸ *Id.* ¶ 9.

⁹ *Id.* ¶ 12.

to promote consumer access to in-state programming. DISH agrees that, in accordance with this new factor, a petitioner should have to “show that the station at issue is licensed to a community within the state in which the modification is requested and that the DMA at issue lacks any (or an adequate number of) in-state stations.”¹⁰

In addition, DISH supports the Commission’s proposed list of evidentiary requirements to support and evaluate market modification petitions.¹¹ In response to the Commission’s request for proposals to support the new statutory factor imposed by STELAR and explained above, DISH suggests that the Commission require the party filing the market modification request to also submit evidence to demonstrate that a substantial portion of the population in the geographic area covered by the request supports the change. Among other things, such evidence could include letters written to a TV station or satellite carrier asking to receive the station in question.

Market Determinations. As the Commission notes, “market modification determinations are fact-specific” and turn on, among other things, whether a particular television station serves the needs of a community, the service areas involved, as well as the technical capabilities of the carriers at issue.¹² DISH therefore supports the Commission’s proposal to consider cable and satellite market modification requests separately.¹³ As the Commission explains, separate consideration of these requests makes sense, given the differences in service area and community sizes between cable and satellite systems.¹⁴ DISH further agrees that prior market

¹⁰ *Id.* ¶ 13.

¹¹ *Id.* ¶ 12.

¹² *Id.* ¶¶ 16-17.

¹³ *Id.* ¶ 16.

¹⁴ *Id.*

determinations made in the cable context should not automatically apply to satellite carriers.¹⁵ Finally, DISH supports limiting the applicability of market modification determinations to the satellite carrier named in the requests.¹⁶ Among other things, there are differences in the architecture of each carrier's systems that may dictate different outcomes regarding the technical feasibility of a given market modification request.¹⁷

Carriage After a Market Modification. DISH agrees with the Commission's proposal to require a commercial TV broadcast station whose market has been modified to elect retransmission consent or must-carry with the applicable satellite carrier for the new geographic area within 30 days of the Commission's market modification order.¹⁸ Such a procedure will give satellite carriers certainty about when they will need to begin making the system changes necessary to accommodate the market modification. DISH further proposes that requests for carriage follow the procedures outlined in 47 C.F.R. § 76.66 (d)(3), which govern written requests for carriage by new stations. Adherence to these practices will provide consistency with existing Commission rules, thus enabling the orderly election by any stations whose markets have been modified.

The Commission has proposed a 90-day deadline for satellite carriers to commence carriage after receiving a request for carriage pursuant to a market modification.¹⁹ However, 90 days may not provide sufficient time for a satellite carrier to undertake the steps necessary to launch a broadcast station in a new or additional geographic area. In order to effectuate a

¹⁵ *Id.* ¶17.

¹⁶ *Id.* ¶ 16.

¹⁷ *Id.*

¹⁸ *Id.* ¶18.

¹⁹ *Id.*

modification, there may be time-consuming technical or billing changes, among other things, necessary for the satellite carrier to undertake. DISH therefore recommends that a satellite carrier be given at least 120 days to launch a station, beginning on the date of the letter electing carriage pursuant to the market modification.

Definition of Community. Consistent with the direction in STELAR, the Commission seeks comment on how to define a “satellite community” for purposes of market modification requests.²⁰ The Commission should require that satellite market modifications be county-based.²¹ This approach mirrors the existing statutory special exceptions in Section 122 designed to address orphan counties, such as the provision allowing a satellite carrier to provide in-state local broadcast stations to two counties in Vermont that are assigned to out-of-state DMAs.²² As a result – and consistent with existing statutory exceptions – a county-based definition will most effectively promote consumer access to in-state programming.

No Effect on Eligibility to Receive Distant Signals. DISH agrees with Commission’s interpretation of the statute that “the addition of a new local station to a local television market by operation of a market modification (which might otherwise restrict a subscriber’s eligibility to receive a distant station) would not disqualify an otherwise eligible satellite subscriber from receiving a distant station of the same network.”²³

²⁰ *Id.* ¶¶ 23-25.

²¹ *Id.* ¶ 25.

²² *See* 17 U.S.C. § 122(a)(4)(B).

²³ *Notice* ¶ 22.

III. TECHNICAL AND ECONOMIC FEASIBILITY SHOULD BE DETERMINED BASED ON A SATELLITE CARRIER CERTIFICATION

As the *Notice* explains, Section 338(1)(3) 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.”²⁴ This is an important limitation, because a satellite carrier may be unable as a technical matter to modify its facilities (for example: in space, on the ground, and/or in customer homes) to accommodate a market modification. Or, the cost to comply with a market modification could be economically infeasible. In either scenario, the satellite carrier that is the subject of a proposed market modification request has the best information to determine technical or economic feasibility. Therefore DISH supports the Commission’s proposal that “the satellite carrier has the burden to demonstrate technical or economic infeasibility.”²⁵

However, the Commission should limit the required showing to a certification from the satellite carrier that it has analyzed the proposed market modification and has determined that it is not technically and economically feasible for such carrier to accomplish such carriage. A certification should be sufficient, because the types of evidence that the Commission might request could be technically or competitively sensitive, such as spot beam contour maps, cost of equipment upgrades, and subscriber numbers in a given geographic area.

DISH agrees that the “complexities and expense that may be associated with reconfiguring a spot beam to cover additional communities added to a market”²⁶ should be given

²⁴ *Id.* ¶ 19, citing 47 U.S.C. § 338(1)(3).

²⁵ *Id.* ¶ 19.

²⁶ *Id.* ¶ 20.

great weight when determining feasibility. The Commission must also recognize that satellite carriers have limited ability to change spot beam contours. In addition to the general standard for technical and economic feasibility, the Commission should also explicitly clarify in its rules that a satellite carrier should never be required to implement a market modification if doing so would cause it to fall out of compliance with any ongoing “qualified carrier” obligations pursuant to Section 119(g)(4).²⁷

Once a satellite carrier has demonstrated by certification that a proposed market modification is either technically or economically infeasible (or both), there should be no ongoing requirement for the satellite carrier to update that determination. DISH therefore opposes the Commission’s proposed reporting requirement²⁸ on satellite carriers to notify an affected broadcaster if circumstances change at a later time that make the satellite carrier able to accommodate a market modification that was previously found to be technically or economically infeasible. Such a requirement would be unduly burdensome for the satellite carrier because it would require a carrier to constantly track and reevaluate an unknown number of market modification requests.

In addition, any finding of technical or economic infeasibility should excuse a satellite carrier entirely from accommodating a market modification request, even if the satellite carrier can provide the station at issue to some, but not all, relevant subscribers.²⁹ It would be burdensome and cause customer confusion for a satellite carrier to target the carriage of a station

²⁷ See 17 U.S.C. § 119(g)(4)-(7); 47 U.S.C. § 342(e)(2) (defining “good quality signal”).

²⁸ See Notice ¶ 20.

²⁹ *Id.* ¶ 20.

down to such a granular level, for example by providing a different local broadcast station to a subset of subscribers within a particular county or zip code.

IV. SATELLITE CARRIERS SHOULD NOT HAVE TO PAY ADDITIONAL RETRANSMISSION CONSENT FEES FOR ANY PORTION OF A DMA RESULTING FROM A MARKET MODIFICATION

STELAR Section 102 authorizes the Commission to modify a commercial television broadcast station's local television market for purposes of satellite carriage rights, upon a request by either a commercial broadcast station or a satellite carrier.³⁰ However, a market modification could result in, among other things, two different stations affiliated with the same broadcast network being authorized for satellite local-into-local carriage in the same geographic area. The Commission must recognize that this, in turn, could result in a satellite carrier being required to pay retransmission consent fees to a station newly added to given geographic area. There is no evidence that Congress intended such a result.

For example, assume that County A is currently assigned by Nielsen to DMA 1, and receives the ABC-affiliated TV station assigned to DMA 1. Assume that the ABC-affiliated station in the neighboring DMA 2 successfully petitions the FCC for County A to be moved from DMA 1 to DMA 2. A satellite carrier would then be obligated (if technically and economically feasible) to provide the ABC affiliate from DMA 2 into County A. In this scenario, the satellite carrier should be permitted, but not required, to continue to provide the ABC affiliate from DMA 1 to County A.

Any other result would cause the satellite carrier to provide two different ABC stations in County A, meaning that for each subscriber in that county, the satellite carrier would pay retransmission consent fees to two different affiliates of the same network. Given the well-

³⁰ *Id.* ¶ 8.

documented increases in retransmission consent fees in recent years, a satellite carrier faces potentially substantial cost increases if, for example, it is required to pay for an extra network-affiliated station for a given subscriber. This would not be in the public interest.

Nothing in Section 102 of STELAR indicates that Congress intended for satellite carriers to be burdened with paying additional fees for network stations in geographic areas impacted by a market modification request. Indeed, STELAR explicitly states that a market modification could operate both to add communities to a station's local market and to "exclude communities from [a] station's local market."³¹ The Commission should ensure that its rules explicitly prevent an outcome that requires a satellite carrier to pay additional retransmission fees for a geographic area impacted by a market modification.

V. CONCLUSION

DISH shares Congress's and the Commission's goal to address the problem of orphan counties, and recognizes that the new satellite market modification rules being developed in this proceeding present a possible remedy. In developing these rules, the Commission should, among other things, adopt procedures that limit the administrative and cost burdens on all parties involved.

³¹ 47 U.S.C. § 338(l)(1).

Respectfully submitted,

/s/

Jeffrey H. Blum
Senior Vice President and
Deputy General Counsel
Alison A. Minea
Director and Senior Counsel
Hadass Kogan
Corporate Counsel
DISH Network L.L.C.
1110 Vermont Avenue, NW, Suite 750
Washington, DC 20005
(202) 293-0981

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