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Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
9300 E. Hampton Dr.
Capitol Heights, MD 20743**Re: Block Communications, Inc.; Reply to Opposition to Application for
Review; CSR-8824-A; Docket No. 13-201**

Dear Ms. Dortch:

On behalf of Block Communications, Inc. ("BCI"), consistent with 47 C.F.R. § 1.115, we enclose an original and four copies of BCI's Reply to Opposition to Application for Review ("Reply"). We have submitted this Reply electronically in MB Docket 13-201 as well.

We also enclose an additional copy of the filing and kindly request that you date-stamp and return it in the enclosed postage-paid envelope.

Sincerely,

Alma Hoxha
Paralegal

Enclosure

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JAN 28 2014

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

In the Matter of)
)
Petition for Modification of Dayton, OH) CSR-8824-A
Designated Market Area With Regard to) Docket No. 13-201
Television Station WHIO-TV, Dayton, OH)

REPLY TO OPPOSITION TO
APPLICATION FOR REVIEW

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LIMA COMMUNICATIONS
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**REPLY TO OPPOSITION TO
APPLICATION FOR REVIEW**

Block Communications, Inc. ("BCI"), Lima Communications Corporation and West Central Ohio Broadcasting Corporation (collectively, "BCI Lima Stations"), by their attorneys hereby submit this Reply to Opposition to Application for Review.¹

I. INTRODUCTION AND SUMMARY

BCI has demonstrated that Commission action is required to preserve the value of localism and correct the multiple factual and legal errors underlying the Media Bureau's decision to add the Auglaize County communities to the market of WHIO-TV, Dayton, Ohio ("WHIO"). On each of the three claimed statutory factors that Cox Media Group and Miami Valley Broadcasting Corporation (collectively "CMG") claimed supported the modification, BCI demonstrated that the Bureau erred either by misapplying evidence, failing to properly weigh evidence, failing to correctly apply relevant precedent, or a combination of one or

¹ *Petition for Modification of Dayton, OH Designated Market Area With Regard to Television Station WHIO-TV, Dayton, OH, CSR-8824-A, Docket No. 13-201, Memorandum Opinion and Order, DA 13-2250 (MB rel. Nov. 25, 2013) ("WHIO Order" or "Order").* BCI respectfully requests a waiver of Section 1.115(f) of the Commission's rules regarding the length of this pleading for the good cause that CMG raised complex and numerous issues in its Opposition necessitating additional space for BCI to provide an adequate response. See 47 C.F.R. §§ 1.3, 1.115(f).

more of these failings. Cumulatively, these errors led to the flawed conclusion that WHIO had carried its burden of proof on the statutory factors.

The Commission should give little credence to CMG's claim that the Bureau's decision to grant WHIO must-carry rights does nothing more than maintain the status quo by preserving the ability of viewers in the Auglaize County communities to receive WHIO's signal via cable without any detriment to BCI's Lima CBS station. WHIO's market modification and its consequences will indisputably upset the status quo, harm the economic expectations underlying BCI's network affiliation agreement with CBS, and undermine localism. For these reasons, the decision must be reversed.

If the decision to allow Dayton-based WHIO to assert must-carry rights in Auglaize County has no impact other than preserve the status quo, it is difficult to fathom why CMG invoked Commission resources to make this modification as the record failed to contain a shred of evidence that the status quo was in any way threatened. CMG's actions instead seem motivated by a desire to send a message to Nielsen that its assignment of Auglaize County to the Lima DMA for the 2013-14 television-year based on ratings is somehow wrong. The Commission should decline CMG's invitation to use its market modification process in this fashion.

The Commission should also decline to accept CMG's claim that BCI's arguments based on the statutory factors are "red herrings" because a market modification proceeding is not a "comparative hearing." Given the weakness of CMG's showing on the statutory factors, such arguments are perhaps not surprising, but they should not deter the Commission from the task of correcting the Bureau's erroneous factual findings. Finally, CMG disingenuously and without explanation asserts that BCI is seeking nothing more than

protection from competition from WHIO by opposing this market modification, and that Commission policy is to the contrary. BCI is merely requesting that the statutory factors be applied properly and precedent be followed. Denial of CMG's request would result in both CBS stations remaining on equal footing in the Auglaize County communities. It is CMG that is using the regulatory process to gain a competitive advantage.

When properly interpreted, consistent with applicable precedent, the record evidence demonstrates that CMG failed to carry its burden of proof on the statutory factors and on its claim of economic nexus to the Auglaize County communities. CMG now seeks to distract the Commission's attention from the failing of the Bureau to properly analyze the record evidence and properly apply applicable precedent. Comparisons are very much a part of the market modification determination, and in this case, had they been correctly performed, would have led to the denial rather than grant of the Petition.

II. ARGUMENT

A. CMG Is Wrong that Comparisons are Inappropriate in a Market Modification Proceeding.

Commission precedent unambiguously demonstrates the propriety of comparing in-market and out-of-market affiliates when analyzing a market modification according to the statutory factors. In every case, the question is whether the petitioner has carried its burden of proof. The cases show that this determination can only be made by comparing the evidence produced by each party to see whether the opposition's evidence has sufficiently rebutted the petitioner's evidence such that a factor cannot be found in the petitioner's favor.

CMG is wrong to argue that BCI is treating this as a comparative hearing.² Given the weakness of CMG's showing on each element, it is perhaps not surprising that it wishes to avoid such comparisons, as the evidence, when properly viewed under applicable precedent and policy, clearly demonstrates that the communities are *not* part of WHIO's natural television market. The fact remains that a comparative analysis of in-market and out-of-market affiliates is an integral part of a market modification determination.

CMG claimed in its Petition that modification of WHIO's market was warranted under the second statutory factor based on three elements – signal coverage, proximity and its provision of local service to the Auglaize County communities. BCI responded with evidence that it provided better signal coverage, was far more proximate to each community and provides substantially more and better local service – facts that the Bureau and Commission have previously found probative.³ The question before the Bureau on this record thus became whether CMG had carried its burden of proof on the second statutory factor, and the correct answer is that it had not. On review, the Commission must make clear that evidence of the in-market station's provision of local service can be presented in rebuttal to a petitioner's claim under the second statutory factor.

CMG also argues that communities may be part of more than one market and asserts that the question before the Bureau was not whether the Auglaize County

² CMG Opposition to Application for Review at 5 (filed Jan. 14, 2014) (“Opposition”).

³ The Bureau has recognized that comparisons are necessary in some cases involving in- and out-of-market affiliates on matters such as an in-market station's coverage of communities with Grade A signal, and which station is physically closer to the communities. See, e.g., *Dominion Broadcasting, Inc.*, 18 FCC Rcd 2882, ¶ 10 (MB 2003) (a Toledo, Ohio broadcaster's request to modify its market to include communities in Michigan is bolstered because “all of the Cable Communities requested for inclusion are located on the south western edge of the Detroit market closest to the Toledo, Ohio DMA”).

communities are part of BCI's television market (the Lima DMA), but whether they also should be a part of WHIO's market.⁴ BCI does not dispute that a community can be part of more than one television market. BCI's evidence instead demonstrates why allowing WHIO to add the Auglaize County communities to its market undermines Congress' intent that market assignments reflect periodic changes in ratings, and, above all, value localism.⁵

B. CMG Errs in Arguing that the Decision Will Cause BCI No Harm and that BCI's Motivation is Protection from Competition.

CMG paints the picture that its request for a market modification will have no effect on BCI and that it should have been granted by the Bureau as a matter of course.⁶ The record shows that CMG's claim of "no harm" is flawed, along with its incongruous suggestion that BCI is seeking nothing more than protection from competition.

CMG's argument that BCI is somehow seeking inappropriate "protectionist policies" against competition is deeply ironic.⁷ Protectionism is exactly what CMG has accomplished by securing must-carry status for WHIO, despite Nielsen repeatedly assigning Auglaize County to the Lima DMA since the BCI Lima CBS station began broadcasting in 2002.

1. Modification of WHIO's Market Significantly Disrupts the Status Quo.

CMG asserts that the Order maintains the status quo because WHIO will continue to be available in the Auglaize County communities without encroaching on BCI's operations or

⁴ Opposition at 6.

⁵ See *infra* Section II.C.

⁶ See Opposition at 6-7.

⁷ See *id.* at 8.

BCI's right to negotiate carriage of its stations with cable systems in Auglaize County.⁸ The status quo, however, cannot be considered simply "maintained" where WHIO is acquiring must carry rights that it did not have under Nielsen's latest DMA assignment.

Before the Order, each CBS affiliate was on equal footing in terms of seeking carriage from local cable operators through the retransmission consent process; after the Order, WHIO alone has the backstop of must carry status. If acquiring must carry rights on Auglaize County cable systems does not alter the status quo, then CMG seemingly would have had no reason to request this market modification in the first place. If indeed this market modification did not bestow upon CMG a valuable right, the only explanation for putting the Commission and BCI through this process must be CMG's desire to send a message to Nielsen not to assign Auglaize County to the Lima DMA.⁹ The Commission should reject use of its processes for this purpose.

2. Modification of WHIO's Market Harms the BCI Lima CBS Station's Economic Expectations under its Network Affiliation Agreement.

CMG's claim that BCI's economic expectation that no other CBS affiliate would have must carry rights within the Lima DMA is "unrealistic" lacks merit.¹⁰ In support, CMG states that BCI's CBS affiliation agreement doesn't change the fact that the two CBS affiliates serve the same area; Auglaize cable systems have historically carried WHIO; viewers in those communities prefer to get their local news from WHIO; and that Nielsen usually

⁸ *Id.* at 6-7.

⁹ The Order also changes the status quo because it effectively freezes the Auglaize County community's television market irrespective of Nielsen ratings, which could have previously been used as a basis to adjust DMA assignments.

¹⁰ *Id.* at 8.

assigns Auglaize County to the Dayton, not the Lima, DMA.¹¹ BCI has been clear in its arguments that its economic expectation was not that it would have “exclusive” carriage rights, but rather that it would have the ability to compete on a level playing field with no other CBS affiliate having a must-carry advantage within the Lima DMA according to Nielsen ratings and DMA assignments.

Further, in making this argument, CMG mischaracterizes the facts. Auglaize County viewers do not categorically prefer WHIO local news.¹² Rather, BCI’s Lima NBC station (WLIO) had the highest rated Early News (6-6:30pm) and the highest rated Late News (11-11:30pm) in Auglaize County for 2012.¹³ BCI suffers harm if its ability to reach the audience that values its news the most is weakened. Granting WHIO must carry status in the 23 Auglaize County communities will directly undermine the economics of the model BCI uses to bring the programming of the four major broadcast networks to the tiny Lima DMA, harming localism.

Finally, CMG incorrectly relies on 38 years of DMA assignment history, back to when BCI’s NBC station was the only network station in the Lima DMA, in claiming that Nielsen usually assigns Auglaize County to the Dayton DMA.¹⁴ The proper comparison is the recent 13-year period the Lima DMA has been home to affiliates of the four major networks. During this period Nielsen assigned Auglaize County to the Lima DMA a total of eight out of

¹¹ *Id.* at 8-9.

¹² *Id.* at 4 (“In 2012, WHIO was *the most-watched station in Auglaize County* across all dayparts, and particularly for local news.”) (emphasis in original).

¹³ Ratings based on Nielsen 2012 NSI Diary County Coverage. Both newscasts are simulcast on BCI’s CBS and ABC affiliates.

¹⁴ See Opposition at 4.

13 times, including its most recent assignment to the Lima DMA for the 2013-2014 television year.¹⁵

3. Precedent Supports Denial of WHIO's Request to Protect the Economic Expectations Underlying BCI's Network Affiliation Agreement.

CMG advances two flawed legal arguments suggesting that BCI's economic expectations from its network affiliation agreement deserve no protection. CMG first emphasizes that the "cases cited by BCI in support of [its economic expectations argument] are all Bureau decisions" and that it is "not aware of any decision by the Commission that adopts or endorses the protectionist policies advocated by BCI."¹⁶ CMG's argument misses the mark. BCI is seeking Commission review of the Bureau's decision in the Order because, among other things, the *Bureau* did not appropriately apply its own precedent. The fact that the Commission has not previously reviewed a Bureau decision failing to appropriately protect an affiliate's economic expectations does not mean that the Commission may *never* find that the Bureau has erred in this manner.¹⁷

CMG's only support for its theory is the *Media Venture* case where, based on the facts before it, the Commission did not believe that the in-market affiliate's economic

¹⁵ CMG Petition for Special Relief, Exhibit C (filed July 26, 2013); BCI Opposition to Petition for Special Relief, Exhibit E (filed Sept. 3, 2013) ("BCI Opposition to Petition").

¹⁶ Opposition at 7.

¹⁷ CMG's arguments that the Commission's abolition of the *Carroll* doctrine and UHF impact policy affect the economic expectations and core communities principles in market modification proceedings also fail. *Id.* at 7-8. The *Carroll* doctrine relates to the licensing of new broadcast stations; the Commission explicitly stated that its abolishment of the doctrine "addresses the *Carroll* doctrine only as it applies to broadcast service." *Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations*, 3 FCC Rcd 638 ¶ 1 n.2 (1988). A market modification affects cable carriage and not broadcast station licensing. The UHF impact policy served to promote UHF as a broadcast band; the Commission's subsequent decision that this policy was no longer necessary did not suggest that its findings would affect market modifications. *Id.* at ¶¶ 1, 30.

expectations sufficiently overrode other factors warranting modification.¹⁸ Contrary to CMG's suggestion, this case did not categorically suggest that the Commission would cease protecting economic expectations of network affiliates. Instead, the Commission only made a fact-specific finding that protecting the in-market affiliate's economic expectations was not appropriate in the context of reviewing a *must carry complaint* decision.¹⁹ Further, the market modification portion of the Commission's order did not turn on the issue of harm to economic expectations, but rather was decided based on the Commission's reluctance to disturb the Bureau's previous finding concerning the economic nexus of the out-of-market affiliate to the subject community.

CMG's attempts to distinguish the precedent cited by BCI also fail.²⁰ CMG focuses on a few immaterial factual differences, but overlooks the cases' common theme of protecting the economic expectations of in-market affiliates from unwarranted incursion. For example, CMG contends that the ratings of stations seeking market modification result in a material distinction, but neglects to note that in each of these cases ratings were only one of four factors by which the Bureau determined that it was appropriate to protect an affiliate's economic expectations.²¹ Further, the cases do not, and should not, turn on whether the in-

¹⁸ Opposition at 7-8, citing *Media Venture Management v. Time Warner Cable*, 18 FCC Rcd 16065, 16067 (2003) ("*Media Venture*").

¹⁹ *Media Venture*, ¶ 6 (denying the Application for review where a broadcast station had attempted to gain carriage on a cable system in a market that had been previously modified to include the out-of-market affiliate). The Commission did not find that the economic expectations outweighed other factors in that context, but nevertheless noted that the applicant broadcaster "remained free to pursue its own market modification proceeding" to achieve its requested relief. *Id.*

²⁰ See Opposition at 9-10.

²¹ See *id.* at 9 n.27; see also *Free State Communications, LLC*, 24 FCC Rcd 7339 ¶ 22 (MB, 2009); *Harron Communications Corp.*, 14 FCC Rcd 4547 ¶ 28 (CSB 1999); *Guy Gannett Communications, Inc.*, 13 FCC Rcd 23470 ¶ 25 (CSB 1998); *Broad Street Television*, 10 FCC Rcd 5576 ¶ 12 (CSB

market station is entitled to mandatory carriage, and none implied that they would have been decided differently had they involved communities which had previously been assigned to a different DMA.²²

4. The Auglaize County Communities Are Core to the Lima DMA.

CMG argues that because the BCI Lima CBS affiliate is not carried on cable systems in seven of the 23 Auglaize communities they cannot be considered core to its market.²³ CMG cites no supporting precedent and imposing such a test would be directly contrary the directive from Congress that the Commission evaluate the statutory factors by “afford[ing] particular attention to the value of localism.”²⁴ Current carriage on the local cable system is not a litmus test for determining whether a community is part of the core of a DMA; rather, it is the myriad of factors outlined by the regulations and past precedent that are determinative.²⁵ The record evidence refutes CMG’s assertion that the Auglaize County

1995). Moreover, BCI is not seeking review of the Order because of a disagreement with the Bureau about whether the ratings spread between BCI and WHIO was sufficiently large.

²² See Opposition at 10 n.30. CMG misses the point of decisions it cites. In each case, the Bureau sought to preserve the ability of the stations to be carried in their home markets; the fact that the stations were entitled to must carry was an arguably illustrative but not a necessary fact. CMG’s other distinctions are unavailing as they point to irrelevant factual distinctions in cases that BCI primarily cited as examples of Bureau policy to aid the Commission’s analysis. See BCI Application for Review at 9, 11 (referring to *Group W Television*) (filed Dec. 23, 2013) (“Application”); *id.* at 13 (referring to *Channel 33*); *id.* at 16-17 & n.40 (referring to *Greater Worcester Cablevision*); *id.* at 18 & n.43 (referring to *Tennessee Broadcasting Partners*). Contrary to CMG’s suggestion, the Bureau has not ceased to protect core communities just because an out-of-market station places a Grade B signal over them. See, e.g., *Free State*, ¶ 22. The sole distinguishing factor cited in the WHIO Order, that BCI’s CBS affiliate is broadcast on the secondary channel of a low-power station, is an unwarranted departure from established precedent and should not be used as a reason to disadvantage BCI in the instant proceeding. See Application at 24.

²³ Opposition at 8.

²⁴ See 47 U.S.C. § 534(h)(1)(C)(ii).

²⁵ See Application at 10; BCI Opposition to Petition at 11-22.

communities are not “core” to the Lima DMA in an attempt to minimize the economic injury that the Order will cause BCI.²⁶

C. The Bureau Order Will Harm Localism and is Not Necessary to Protect Cable Viewer Access to WHIO’s Signal.

CMG mischaracterizes BCI’s argument by suggesting that BCI is concerned with protection from competition and incorrectly suggests that localism will automatically be deemed protected if it satisfies the three statutory factors upon which it bases its Petition.²⁷

The Commission has recognized numerous times that the statutory factors provide a starting point, but other evidence is relevant as well.²⁸ BCI has shown not only that CMG failed to carry its burden on the statutory factors under applicable precedents, but that evidence of economic nexus also militates against grant of the petition, and most importantly, that economic harm to BCI’s CBS affiliate weighs heavily against modification.

Finally, the Commission should reject CMG’s attempt to suggest that a market modification is necessary to additional “voices,”²⁹ or preserve consumer access to WHIO.³⁰ Diversity of voices is *not* a consideration in market modification proceedings.³¹ CMG has never presented any evidence supporting a claim that WHIO’s carriage is at risk, evidence

²⁶ Opposition at 8. CMG here relies on irrelevant evidence, as discussed above, by arguing that Auglaize County DMA assignments over a 38-year period demonstrate why the subject communities are not “core” to the Lima DMA, whereas the relevant comparison period must begin with the advent of the four network-affiliated stations beginning service in the Lima DMA, after which Nielsen assigned Auglaize County to the Lima DMA in 8 out of 13 years. *See id.* at 8-9. The assignment to the Lima DMA reflects the long standing economic ties between Lima and Auglaize County as demonstrated also by the record in this case.

²⁷ *See* Opposition at 11. CMG also makes no attempt to reconcile the obvious inconsistency in its arguments that if BCI allegedly will not suffer any harm, there is nothing from which it would be “protecting” itself.

²⁸ *See, e.g., Cablevision Systems Corporation*, 12 FCC Rcd 12262, ¶ 10 (1997).

²⁹ Opposition at 11-12.

³⁰ *Id.* at 12-13.

³¹ *See* BCI Surreply to Petition for Special Relief at 5-6 (filed Sept. 30, 2013).

that it surely would have in its possession.³² BCI has explained in detail how the market modification could injure its carriage in its home DMA to the detriment of localism.³³

III. CONCLUSION

The WHIO Order departs from established Commission policy and precedent and should be reversed. It will indisputably upset the status quo, harm the ability of BCI's Lima CBS station to continue to provide their high level of local service, cause viewers who access the signal via cable to lose access to a station that Nielsen ratings show to be their local hometown CBS affiliate, and undermine the investment incentives in smaller markets.

Respectfully submitted,

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January 24, 2014

³² For example, WHIO has never claimed that its network affiliation agreement prohibits out-of-market retransmission consent. See BCI Opposition to Petition at 5-6.

³³ See Application at 22-23.

CERTIFICATE OF SERVICE

I, Alma Hoxha, hereby certify that on this 24rd day of January, 2014, a true and correct copy of the foregoing Reply to Opposition to Application for Review was served, via first-class mail (except as otherwise indicated), upon the following:

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