

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

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In the Matter of	)	
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Monongalia County, West Virginia and	)	MB Docket No. 17-274
Preston County, West Virginia	)	CSR No. 8941-A
	)	
Petitions for Modification of the Satellite	)	MB Docket No. 17-275
Television Markets of WDTV, Weston, West	)	CSR No. 8942-A
Virginia, and WBOY-TV and WVFX, Clarksburg,	)	
West Virginia	)	
	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: February 6, 2018**

**Released: February 7, 2018**

By the Senior Deputy Chief, Media Bureau, Policy Division

**I. INTRODUCTION**

1. Monongalia County, West Virginia and Preston County, West Virginia (Petitioners or the Counties), with the support of their residents, have filed two market modification petitions to make three West Virginia television stations (collectively, the Stations) available to satellite subscribers in the Counties. For historical and geographic reasons, residents in the Counties generally receive only Pennsylvania television stations, limiting their access to West Virginia-specific news, sports, weather, and politics. With this Order, the Media Bureau grants both Petitions in full.

2. Petitioners filed the above-captioned Petitions seeking to modify the local satellite carriage television markets of the Stations to include Monongalia County and Preston County, currently assigned to the Pittsburgh Designated Market Area (DMA).<sup>1</sup> The Stations are: WDTV(TV), Weston, West Virginia (Facility ID No. 70592) (CBS) (WDTV); WBOY-TV, Clarksburg, West Virginia (Facility ID No. 71220) (NBC and ABC) (WBOY); and WVFX(TV), Clarksburg, West Virginia (Facility ID No. 10976) (FOX) (WVFX).<sup>2</sup> A joint letter in support of the Petitions was filed by Nexstar Broadcasting, Inc. and Gray

<sup>1</sup>See *Monongalia County, W. Va. and Preston County, W. Va. Petition for Special Relief for Modification of the Television Market of Stations WDTV and WVFX with Respect to DISH Network and DIRECTV*, MB Docket 17-275 (filed Sept. 25, 2017) (*WDTV/WVFX Petition*); *Monongalia County, W. Va. and Preston County, W. Va. Petition for Special Relief for Modification of the Television Market of Station WBOY-TV with Respect to DISH Network and DIRECTV*, MB Docket 17-274 (filed Sept. 25, 2017) (*WBOY Petition*) (collectively, the *Petitions*). The Media Bureau placed the Petitions on public notice and sought comment. *Special Relief and Show Cause Petitions*, Public Notice, Report No. 0458 (MB Oct. 13, 2017) (*Public Notice*).

<sup>2</sup> *Petitions* at 1.

Television, Inc., licensees of the Stations (Licensees).<sup>3</sup> The Petitions are unopposed. In addition, DISH Network LLC (DISH) and AT&T/DIRECTV, LLC (DIRECTV) have filed certifications indicating that carriage of the Stations into the Counties is feasible.<sup>4</sup> Each Petition has been reviewed on its individual merits. Because they were filed simultaneously, and because the Stations are identically situated with respect to the feasibility of their carriage into the Counties, we have consolidated our decisions into this single Order for the sake of administrative efficiency.<sup>5</sup>

## II. BACKGROUND

3. Section 338 of the Communications Act authorizes satellite carriage of local broadcast stations into their local markets, which is called “local-into-local” service.<sup>6</sup> A satellite carrier provides “local-into-local” service when it retransmits a local television signal back into the local market of that television station for reception by subscribers.<sup>7</sup> Generally, a television station’s “local market” is defined by the Designated Market Area (DMA) in which it is located, as determined by the Nielsen Company (Nielsen).<sup>8</sup> DMAs describe each television market in terms of a group of counties and are defined by Nielsen based on measured viewing patterns.<sup>9</sup> Pursuant to Section 338, satellite carriers are not required to carry local broadcast television stations; however, if a satellite carrier chooses to carry a local station in a particular DMA in reliance on the local statutory copyright license,<sup>10</sup> it generally must carry any qualified local station in the same DMA that makes a timely election for retransmission consent or mandatory carriage.<sup>11</sup>

4. The STELA Reauthorization Act of 2014 (STELAR) added satellite television carriage to the Commission’s market modification authority, which previously applied only to cable television carriage.<sup>12</sup>

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<sup>3</sup> Letter from Elizabeth Ryder, Executive Vice President & General Counsel, Nexstar Broadcasting, Inc., and Robert J. Folliard, Vice President and Deputy General Counsel, Gray Television, Inc. to Michelle Carey, Chief, FCC Media Bureau (Nov. 2, 2017), MB Docket Nos. 17-274 and 17-275 (*Licensee Letter*).

<sup>4</sup> *DISH Network L.L.C. STELAR Feasibility Certification, Market Modification Pre-Filing Coordination Letter for Monongalia County, West Virginia* (dated May 23, 2017, filed in MB Docket No. 15-71) and *DISH Network L.L.C. STELAR Feasibility Certification, Market Modification Pre-Filing Coordination Letter for Preston County, West Virginia* (dated March 24, 2017, filed in MB Docket No. 15-71) (collectively, *DISH Certifications*); Letter from DIRECTV to Monongalia County Commission (Mar. 9, 2017), available in Exhibit A of the Petitions (*DIRECTV Monongalia Certification*) and *AT&T/DIRECTV Preliminary Evaluation of a Potential Market Modification for Preston County, WV* (dated January 26, 2017, filed in MB Docket No. 15-71) (*DIRECTV Preston Certification*) (collectively, *DIRECTV Certifications*).

<sup>5</sup> See generally *Public Notice, DISH Certifications, and DIRECTV Certifications*.

<sup>6</sup> 47 U.S.C. § 338(a)(1).

<sup>7</sup> 47 CFR § 76.66(a)(6).

<sup>8</sup> See 17 U.S.C. § 122(j)(2); 47 CFR § 76.66(e) (defining a television broadcast station’s local market for purposes of satellite carriage as the DMA in which the station is located).

<sup>9</sup> The Nielsen Company delineates television markets by assigning each U.S. county (except for certain counties in Alaska) to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, Nielsen includes both over-the-air and multichannel video programming distributor (MVPD) viewing.

<sup>10</sup> 17 U.S.C. § 122. Satellite carriers have a statutory copyright license under the 1999 Satellite Home Viewer Improvement Act (SHVIA) for carriage of stations to any subscriber within a station’s local market. See *Satellite Home Viewer Improvement Act of 1999 (SHVIA)*, Pub. L. No. 106-113, 113 Stat. 1501 (1999).

<sup>11</sup> See 47 U.S.C. § 338(a)(1); 47 CFR § 76.66(b)(1). This is commonly referred to as the “carry one, carry all” requirement.

<sup>12</sup> The STELA Reauthorization Act of 2014, § 102, Pub. L. No. 113-200, 128 Stat. 2059, 2060-62 (2014) (STELAR) (adding 47 U.S.C. § 338(l)). “STELA” refers to the Satellite Television Extension and Localism Act of 2010, Pub. L. No. 111-175.

Market modification, which long has existed in the cable context, provides a means for the Commission to modify the local television market of a commercial television broadcast station and thereby avoid rigid adherence to DMAs. Specifically, to better reflect market realities, STELAR permits the Commission to add communities to, or delete communities from, a station's local television market for purposes of satellite carriage, following a written request. In the Commission's 2015 *STELAR Market Modification Report and Order* implementing Section 102 of the STELAR, the Commission adopted satellite television market modification rules that provide a process for broadcasters, satellite carriers, and county governments to request changes to the boundaries of a particular commercial broadcast television station's local television market to include a new community located in a neighboring local market.<sup>13</sup> The rules enable a broadcast television station to be carried by a satellite carrier in such a new community if the station is shown to have a local relationship to that community.

5. By extending the market modification process to satellite television, Congress sought to address the so-called "orphan county" problem. An orphan county is a county that, as a result of the structure of a local satellite market, is served exclusively, or almost exclusively, by television stations coming from a neighboring state.<sup>14</sup> Satellite television subscribers residing in an orphan county often are not able to access their home state's news, politics, sports, emergency information, and other television programming. Providing the Commission with a means to address this problem by altering the structure of, and therefore the stations located within, a local market was a primary factor in Congress' decision to extend market modification authority to the satellite context.<sup>15</sup>

6. Section 338(l) of the Act, added by the STELAR, creates a satellite market modification regime very similar to that already in place for cable television, while adding provisions to address the unique nature of satellite television service, particularly issues of technical and economic feasibility that are specific to satellite operations.<sup>16</sup> The STELAR carves out an exception to carriage obligations<sup>17</sup> resulting from a market modification that would be technically or economically infeasible for a satellite carrier to implement. The statute provides that a market modification "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."<sup>18</sup> In enacting this provision, Congress recognized that the unique nature of satellite television service may make a particular market modification difficult for a satellite carrier to effectuate using its satellites in

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<sup>13</sup> *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, Report and Order, 30 FCC Rcd 10406 (2015) (*STELAR Market Modification Report and Order*) (revising 47 CFR § 76.59). A community is defined as a county for purposes of the satellite market modification rules. 47 CFR § 76.5(gg)(2).

<sup>14</sup> *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10408, para. 3.

<sup>15</sup> See generally Report from the Senate Committee on Commerce, Science, and Transportation accompanying S. 2799, 113<sup>th</sup> Cong., S. Rep. No. 113-322 (2014) (*Senate Commerce Committee Report*).

<sup>16</sup> See 47 U.S.C. §§ 338(l), 534(h)(1)(C) (providing factors the Commission must take into account when considering satellite market modification requests). The Commission may determine that particular communities are part of more than one television market. 47 U.S.C. § 338(l)(2)(A). When the Commission modifies a station's market to add a community for purposes of carriage rights, the station is considered local and is covered by the local statutory copyright license and may assert mandatory carriage (or pursue retransmission consent) with the applicable satellite carrier in the local market. Conversely, if the Commission modifies a station's market to delete a community, the station is considered "distant" and loses its right to assert mandatory carriage (or retransmission consent) on the applicable satellite carrier in the local market.

<sup>17</sup> See *supra* note 11 and accompanying text (describing the "carry one, carry all" satellite carriage requirement).

<sup>18</sup> 47 U.S.C. § 338(l)(3)(A).

operation at the time of the determination and thus exempted the carrier from the resulting carriage obligation under those circumstances.<sup>19</sup> This exception applies only in the satellite context.<sup>20</sup>

7. Once the threshold issue of technical and economic feasibility is resolved, Section 338(l) provides that the Commission must afford particular attention to the value of localism in ruling on requests for market modification by taking into account the following five factors:

- (1) whether the station, or other stations located in the same area—(a) have been historically carried on the cable system or systems within such community; and (b) have been historically carried on the satellite carrier or carriers serving such community;
- (2) whether the television station provides coverage or other local service to such community;
- (3) whether modifying the local market of the television station would promote consumers' access to television broadcast station signals that originate in their State of residence;
- (4) whether any other television station that is eligible to be carried by a satellite carrier in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
- (5) evidence of viewing patterns in households that subscribe and do not subscribe to the services offered by multichannel video programming distributors within the areas served by such multichannel video programming distributors in such community.<sup>21</sup>

The five statutory factors are not intended to be exclusive. Each factor is valuable in assessing whether a particular community should be included in or excluded from a station's local market. The importance of particular factors will vary depending on the circumstances of each case. The Commission may also consider other relevant information.<sup>22</sup>

8. Significantly, in the STELAR, Congress added the new statutory factor three quoted above, requiring consideration of access to television stations that are located in the same state as the community considered for modification.<sup>23</sup> This new factor and the legislative history reflect Congress's intent to promote consumer access to in-state and other relevant television programming. Indeed, the legislative history expresses Congress's concern that "many consumers, particularly those who reside in DMAs that cross State lines or cover vast geographic distances," may "lack access to local television programming that is relevant to their everyday lives" and indicates Congress's intent that the Commission "consider the plight of these consumers when judging the merits of a [market modification] petition ..., even if granting such modification would pose an economic challenge to various local television broadcast stations."<sup>24</sup>

<sup>19</sup> *Senate Commerce Committee Report* at 11 (recognizing "that there are technical and operational differences that may make a particular television market modification difficult for a satellite carrier to effectuate.").

<sup>20</sup> In the cable context, if review of the factors and other evidence demonstrates that a community is part of a station's market, the modification is granted without reference to issues of technical and economic feasibility. As explained in the *STELAR Market Modification Report and Order*, Congress recognized "the inherent difference between cable and satellite television service" by adopting certain "provisions specific to satellite," including 47 U.S.C. § 338(l)(3)(A)'s feasibility exception. 30 FCC Rcd at 10408, n.6.

<sup>21</sup> 47 U.S.C. § 338(l)(2)(B)(i)-(v).

<sup>22</sup> Section 338(h)(1)(C)(ii) of the Act directs the Commission to "afford particular attention to the value of localism by taking into account *such factors as*" those described above (emphasis added). 47 U.S.C. § 338(h)(1)(C)(ii). The Commission must also consider other relevant information, however, when necessary to develop a result that will "better effectuate the purposes" of the law. See 47 U.S.C. § 338(l)(1); *Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, CS Docket No. 95-178, Order on Reconsideration and Second Report and Order, 14 FCC Rcd 8366, 8389, para. 53 (1999) (*Cable Market Modification Second Report and Order*).

<sup>23</sup> See 47 U.S.C. §§ 338(l)(2)(B)(iii), 534(h)(1)(C)(ii)(III).

<sup>24</sup> *Senate Commerce Committee Report* at 11.

9. In the *STELAR Market Modification Report and Order*, the Commission determined that a satellite market modification petition must include specific evidence describing the station's relationship to the community at issue. This standardized evidence approach was based on the existing approach for cable market modifications.<sup>25</sup> Accordingly, the rules require that the following evidence be submitted:

- (1) A map or maps illustrating the relevant community locations and geographic features, station transmitter sites, cable system headend or satellite carrier local receive facility locations, terrain features that would affect station reception, mileage between the community and the television station transmitter site, transportation routes and any other evidence contributing to the scope of the market;
- (2) Noise-limited service contour maps delineating the station's technical service area and showing the location of the cable system headends or satellite carrier local receive facilities and communities in relation to the service areas;
- (3) Available data on shopping and labor patterns in the local market;
- (4) Television station programming information derived from station logs or the local edition of the television guide;
- (5) Cable system or satellite carrier channel line-up cards or other exhibits establishing historic carriage, such as television guide listings;
- (6) Published audience data for the relevant station showing its average all day audience (*i.e.*, the reported audience averaged over Sunday-Saturday, 7 a.m.-1 a.m., or an equivalent time period) for both multichannel video programming distributor (MVPD) and non-MVPD households or other specific audience information, such as station advertising and sales data or viewer contribution records; and
- (7) If applicable, a statement that the station is licensed to a community within the same state as the relevant community.<sup>26</sup>

Petitions for special relief to modify satellite television markets that do not include the above evidence may be dismissed without prejudice and may be re-filed at a later date with the appropriate filing fee.<sup>27</sup> The Bureau may waive the requirement to submit certain evidence for good cause shown, particularly if the Bureau is in a position to resolve the petition without such evidence.<sup>28</sup> Parties may submit whatever additional evidence they deem appropriate and relevant.<sup>29</sup>

10. In the instant proceeding, the Counties filed two Petitions seeking modification of the local television markets of West Virginia Stations WDTV, WBOY, and WVFX to include Monongalia County, West Virginia and Preston County, West Virginia. During the pre-filing coordination process, the satellite carriers each filed Feasibility Certifications with respect to each County. DISH's certifications state that both standard definition (SD) and high definition (HD) service to all residents in both Counties is feasible

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<sup>25</sup> See *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10421-22, para. 20.

<sup>26</sup> 47 CFR § 76.59(b)(1)-(7).

<sup>27</sup> *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10424, para. 22.

<sup>28</sup> *Tobacco Valley Communications*, 31 FCC Rcd 8972, 8976 n.22 (MB 2016); 47 CFR § 1.3.

<sup>29</sup> *Id.* We note that although not required by Section 76.59(b), it has become clear that detailed information about programming is extremely important in the orphan county context. Because of the reduced importance of geographic factors, programming information has increased importance in consideration of factor two, and it is essential in determining how much weight to give to factor three. We therefore strongly encourage and expect that petitioners seeking addition of an orphan county, whether they are broadcasters or the counties themselves, will follow the example of the Counties which filed these Petitions and provide information about specific programming, sports, events, and news stories relevant to the community at issue that have been broadcast by the station(s) at issue, and, if relevant, also explain that such programming is not regularly broadcast by any station currently serving the county.

via coverage provided by two separate spot beams.<sup>30</sup> DIRECTV's certifications explain that HD service to all residents in both Counties is feasible via a single HD spot beam, but that no SD spot beam carrying the Stations serves the Counties.<sup>31</sup> Both satellite providers indicate that some subscribers in the Counties may need adjusted or upgraded equipment in order to receive the Stations in HD.<sup>32</sup> We received supportive comments from local government officials, both of West Virginia's United States Senators, and the Congressman representing the Counties.<sup>33</sup> We also received scores of resident comments in support of the Petitions.<sup>34</sup>

11. The Commission must make two determinations with respect to each of the Petitions: (1) whether the carriage of a station resulting from a proposed market modification is technically and economically feasible for each of the satellite carriers; and (2) if so, whether the petition demonstrates that a modification to the station's television market is warranted, based on the five statutory factors and any other relevant information.<sup>35</sup> We will not grant a market modification petition if the resulting carriage would be infeasible.<sup>36</sup>

### III. DISCUSSION

12. For the reasons set forth below, we find that it is feasible for both DISH and DIRECTV to carry WDTV, WBOY, and WVFX throughout the Counties. We further conclude that the evidence weighs in favor of expanding the markets for each of the Stations to include the Counties. We therefore modify the markets of WDTV, WBOY, and WVFX to include Monongalia County, West Virginia and Preston County, West Virginia.

#### A. Technical and Economic Feasibility

13. We find that it is technically and economically feasible for both DISH and DIRECTV to provide each of the Stations to the entirety of the Counties. Section 338(l)(3) does not require a satellite operator to carry a station in response to a market modification request if it is not technically and economically feasible for the carrier to accomplish the carriage by means of its satellites in operation at the time of the determination.<sup>37</sup> In the *STELAR Market Modification Report and Order*, the Commission concluded that the satellite carrier has the burden to demonstrate that the carriage resulting from a market modification is infeasible.<sup>38</sup> The Commission requires different demonstrations of infeasibility depending on whether the claim of infeasibility is based on insufficient spot beam coverage or some other basis.<sup>39</sup>

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<sup>30</sup> *DISH Certifications* at 1.

<sup>31</sup> *DIRECTV Monongalia Certification* at 1; *DIRECTV Preston Certification* at 2.

<sup>32</sup> *DISH Certifications* at 1-2; *DIRECTV Monongalia Certification* at 1; *DIRECTV, LLC Response to Petitions for Special Relief*, MB Docket Nos. 17-274 and 17-275 at 2-3 (Nov. 2, 2017) (*DIRECTV Response*).

<sup>33</sup> Elected representatives supporting these petitions include the Counties' United States Senators and Representatives (see Letter from Senator Joe Manchin III, Senator Shelley Moore Capito, and Congressman David B. McKinley to Ajit Pai, Chairman, FCC (Oct. 16, 2017), MB Docket Nos. 17-274 and 17-275), as well as Edward Hawkins of the Monongalia County Commission (who co-filed the Petitions on behalf of Monongalia County), and Craig Jennings of the Preston County Commission (who filed the Petitions on behalf of Preston County).

<sup>34</sup> See generally MB Docket Nos. 17-274 and 17-275 and *Petitions* at Exhibit D (some comments were filed in multiple dockets and/or made in reference to more than one Station).

<sup>35</sup> 47 U.S.C. § 338(l); see also 47 CFR § 76.59.

<sup>36</sup> *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10442, para. 50.

<sup>37</sup> 47 U.S.C. § 338(l)(3) (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."). See also 47 CFR § 76.59(e).

<sup>38</sup> *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10435, para. 38 (observing that, as a practical matter, only the satellite carriers have the specific information necessary to determine if the carriage contemplated in

14. Satellite carriers use spot beams to offer local broadcast stations to targeted geographic areas.<sup>40</sup> With respect to claims of “spot beam coverage infeasibility,” the Commission concluded that “it is *per se* not technically and economically feasible for a satellite carrier to provide a station to a new community that is, or to the extent to which it is, outside the relevant spot beam on which that station is currently carried.”<sup>41</sup> The Commission allows satellite carriers to demonstrate spot beam coverage infeasibility by providing a detailed and specialized certification, under penalty of perjury.<sup>42</sup> With respect to other possible bases for a carrier to assert that carriage would be technically or economically infeasible, such as costs associated with changes to customer satellite dishes to accommodate reception from different orbital locations, the Commission determined that it will review infeasibility claims on a case-by-case basis.<sup>43</sup> To demonstrate such infeasibility, the Commission requires carriers to provide detailed technical and/or economic information to substantiate its claim of infeasibility.<sup>44</sup>

15. DIRECTV and DISH each filed Feasibility Certifications during the pre-filing coordination stage. With respect to delivery of each of the Stations into both Counties, both satellite providers indicate that there is no “spot beam infeasibility,” and that relevant spot beam(s) cover all of both Counties. Both providers also have indicated that some subscribers in the Counties may need adjusted or upgraded equipment in order to receive the Stations,<sup>45</sup> a situation which has arisen in a number of satellite market modification proceedings to date.<sup>46</sup> DISH indicates that even though the Stations are available on both

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a market modification would not be technically and economically feasible by means of their satellites in operation).

<sup>39</sup> *Id.* at 10435-6, 10438, paras. 39, 42.

<sup>40</sup> *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10430, n.162 (quoting DIRECTV to explain that “[s]pot-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.” This is in contrast to a “CONUS” beam, which provides coverage to the entire continental United States and generally carries signals that are available and accessed by subscribers throughout that entire area).

<sup>41</sup> *Id.* at 10429-30, para. 30. This is because the only available options to implement the market modification would be: (1) to put the signal on the satellite provider’s CONUS beam (using spectrum that could otherwise be deployed for signals available to subscribers throughout the entire continental U.S.); (2) to reorient existing spot beams (which are already oriented to most efficiently serve the largest number of subscribers); or (3) to carry the same signal on an additional spot beam (using twice as much overall spectrum for the channel at issue as for other channels, which are carried on a single spot beam whenever possible). The Commission found each of these options infeasible. *Id.* at 10431-32, para. 32.

<sup>42</sup> *Id.* at 10435-36, para. 39. The Commission requires satellite carriers claiming that a market modification is technically infeasible based on spot beam coverage to submit a detailed certification that must include the following: (1) an explanation of why carriage is not technically and economically feasible, including a detailed explanation of the process by which the satellite carrier has determined whether or not the spot beam in question covers the geographic area at issue; (2) a statement that the satellite carrier has conducted this analysis in substantially the same manner and using substantially the same parameters used to determine the geographic area in which it currently offers stations carried on the spot beam in question; and (3) a supporting affidavit or declaration under penalty of perjury, as contemplated under Section 1.16 of the Commission’s rules and 28 USC § 1746, signed and dated by an authorized officer of the satellite carrier with personal knowledge of the representations provided in the certification, verifying the truth and accuracy of the information therein. *Id.* at 10437-8, para. 41.

<sup>43</sup> *Id.* at 10438, para. 42.

<sup>44</sup> *Id.*; see also *id.* at 10434-35, para. 36 (requiring satellite carriers to demonstrate infeasibility for reasons other than insufficient spot beam coverage “through the submission of evidence specifically demonstrating the technical or economic reason that carriage is infeasible”).

<sup>45</sup> *Supra* note {32}.

<sup>46</sup> See, e.g., *Gray Television Licensee, LLC For Modification of the Satellite Television Market For WSAW-TV, Wausau, Wisconsin*, MB Docket No. 16-293, Memorandum Opinion and Order, 32 FCC Rcd 668, paras. 17-19 (MB

SD and HD spot beams serving the Counties, 15-20 percent of its subscribers would need to adjust or upgrade their equipment in order to receive the Stations.<sup>47</sup> DISH does not explain, however, why this is the case or what the specific upgrades needed would be. Nonetheless, DISH argues, as it has unsuccessfully argued in other satellite market modification proceedings,<sup>48</sup> that it is technically and/or economically infeasible to serve subscribers in this situation.<sup>49</sup> DIRECTV explains that SD subscribers in the Counties would need to switch to HD in order to receive the Stations, and they would need new equipment in order to do so, but DIRECTV does not assert that this consideration makes carriage infeasible.<sup>50</sup>

16. DISH has not provided a detailed cost analysis in this proceeding, and we have been given no reason to believe that the costs involved in carrying the Stations are meaningfully different from those discussed in previous cases. We therefore reject DISH's argument that the costs of providing subscribers access to the Stations amount to technical or economic infeasibility. As we did in *Gray*, we recognize that that "a service change, particularly one involving a service visit and potential new equipment, could create some burden on the few subscribers" not currently able to receive the Stations from one of the relevant spot beams.<sup>51</sup> Therefore, as we did in *Gray*, we specify here that if either satellite provider ultimately carries any or all of the Stations after the grant of this Petition, it must do so immediately for subscribers who require only "operational and billing changes" and for new subscribers, but may roll out service at a more measured, non-dilatory pace to existing subscribers who will require a service visit and/or new equipment.<sup>52</sup>

#### **B. Orphan County Status**

17. Monongalia and Preston Counties are "orphan" counties with insufficient access to in-state programming, and precisely the type of communities that Congress intended to assist by broadening the market modification process.<sup>53</sup> The Counties are assigned to the Pittsburgh DMA, which includes 13 Pennsylvania counties, one county in Maryland, and just two West Virginia counties (Monongalia and Preston). Monongalia County and Preston County residents who subscribe to satellite television service are served exclusively by stations licensed to communities within the states of Pennsylvania and Maryland.<sup>54</sup> The Petitioner argues that residents of the Counties are currently underserved by the broadcast stations in the Pittsburgh DMA, due to those stations' focus on news and programming

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2017) (*Gray*); *Victory Television Network, Inc. For Modification of the Satellite Television Market For KVTJ-DT, Jonesboro, Arkansas*, MB Docket No. 17-157, Memorandum Opinion and Order, 32 FCC Rcd 7389, para. 16 (MB 2017) (*VTN*).

<sup>47</sup> *DISH Certifications* at 1-2.

<sup>48</sup> See, e.g., *Gray* at para. 20, *VTN* at para. 18.

<sup>49</sup> *Dish Certifications* at 2-3.

<sup>50</sup> *DIRECTV Response* at 2-3.

<sup>51</sup> *Gray* at para 20.

<sup>52</sup> *Id.* (as we did in *Gray*, we also make clear here that the satellite providers "must ensure that any new customers in [the Counties] who subscribe to local-into-local service after the grant of this market modification are capable of receiving all local signals [they have] the right to provide immediately upon beginning service, including [the Stations] if [they are] carried after grant of this Petition").

<sup>53</sup> The "core purpose of this [market modification] provision of the STELAR [is] to promote consumer access to in-state and other relevant programming." *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10415, para. 12.

<sup>54</sup> *Petitions* at 1.



information of interest to Pennsylvanians.<sup>55</sup> This claim is supported by numerous comments from County residents and their representatives.<sup>56</sup>

18. With the STELAR's revisions to the market modification process, and its addition of a satellite market modification process, Congress intended to address orphan county situations like these. Indeed, the legislative history observes that "many consumers, particularly those who reside in DMAs that cross State lines or cover vast geographic distances," may "lack access to local television programming that is relevant to their everyday lives" and instructs us to "consider the plight of these consumers when judging the merits of a [market modification] petition ..., even if granting such modification would pose an economic challenge to various local television broadcast stations."<sup>57</sup> As we observed in the *STELAR Market Modification Report and Order*, "each petition for market modification will turn on the unique facts of the case," and there is no single universal way to weight the statutory factors.<sup>58</sup> In order to best effectuate the goals of the STELAR, we place a strong emphasis on Congress' concern about orphan county situations in analyzing the factors in this case. We therefore will give substantial weight to the local and in-state programming a petitioner proposes to bring to the orphan counties, as well as to government official and consumer comments supporting a proposed market modification.<sup>59</sup>

19. Monongalia and Preston are orphan counties in the unusual circumstance of having both geographic proximity to, and historic cable carriage of, the in-state Stations in this proceeding. As we have explained previously, heavy reliance on geographic proximity tests, which are central to a traditional market modification analysis, is often inappropriate in orphan county cases, given the "remote geographic location of orphan counties"<sup>60</sup> and the fact that they are by definition on the outskirts of a petitioner's home state. Similarly, we generally anticipate that historic carriage of a petitioner station would be less common, and its viewer ratings would be lower, in an orphan county than we have found in prior successful market modification proceedings.<sup>61</sup> The fact that the Counties can make strong showings on even these issues enables them to make a particularly strong case in favor of a grant of the Petitions.

### C. WDTV

20. *Historic Carriage.* The first factor we must consider is "whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community; or have been historically carried on the satellite carrier or carriers serving such community."<sup>62</sup> WDTV has been carried by cable systems in Monongalia County since 1965, and successfully petitioned in 2006 to modify its cable market to include communities throughout the

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<sup>55</sup> *Petitions* at 3.

<sup>56</sup> See generally MB Docket Nos. 17-274 and 17-275 and *Petitions* at Exhibit D.

<sup>57</sup> *Senate Commerce Committee Report* at 11.

<sup>58</sup> *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10421, para. 18.

<sup>59</sup> *Id.* at 10417, n.61.

<sup>60</sup> *Id.* at 10418, para. 15.

<sup>61</sup> See, e.g., *Tennessee Broadcasting Partners*, 23 FCC Rcd 3928 (MB 2008). NB: like all pre-STELAR market modification cases, *Tennessee* is a cable case, not a DBS case. The most important difference, however, is that Petitioner's case involves orphan counties, not that the markets being modified are satellite rather than cable markets.

<sup>62</sup> 47 U.S.C. § 338(l)(2)(B)(i).

County.<sup>63</sup> WDTV has been carried on cable systems in Preston County since at least 1999.<sup>64</sup> Because we do not necessarily expect strong evidence of historic carriage in orphan counties, this evidence is particularly notable. We therefore find that the first statutory factor weighs strongly in favor of the requested modification.

21. *Local Service.* Second, we consider “whether the television station provides coverage or other local service to the community.”<sup>65</sup> This factor includes, in part, consideration of “a station’s signal contour coverage and whether the station places at least a Grade B contour over the cable communities, the station’s proximity to the communities in terms of mileage, and whether it broadcasts local programming with a distinct nexus to the Communities.”<sup>66</sup> Petitioners demonstrate that the Counties are fully within WDTV’s service contour.<sup>67</sup> They also provide evidence that Morgantown and Kingwood (the county seats of Monongalia County and Preston County), are approximately 60 and 70 miles, respectively, from WDTV’s community of license (Weston, county seat of Lewis County, WV).<sup>68</sup> In both cases, this is closer than Pittsburgh, PA, the largest city in the Pittsburgh DMA.<sup>69</sup>

22. To determine the overall “local service to the community” provided by a station, we look beyond evidence relating to geographic proximity.<sup>70</sup> In particular, we assess whether the programming offered by WDTV meets the informational and service needs of the local residents of the Counties, based both on our review of specific programming and on government and consumer comments.<sup>71</sup> Petitioners state that “WDTV airs local news weekdays from 5:30-7:00 am and at noon, 4:55 pm, 5:30 pm, 6:00 pm, and 11:00 pm and weekends at 6:00 pm and 11:00 pm,”<sup>72</sup> and that the Station covers the Counties’ high school sports, major storms and their aftermath in the Counties, and “[o]ther County-specific stories” such as “human interest pieces, . . . major arrests or crime spree, road closures and other traffic issues, and economic development projects that aim to improve various neighborhoods in the Counties,” among numerous other examples.<sup>73</sup> We accordingly find that WDTV carries a significant amount of local programming of interest to the Counties, demonstrating a local connection. We also give substantial weight to the scores of comments from residents and their government representatives supporting the

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<sup>63</sup> *Withers Broadcasting Company of West Virginia, Licensee of WDTV(TV), Weston, West Virginia CSR-6981-A Petition for Modification of the Clarksburg-Weston, West Virginia DMA*, Memorandum Opinion and Order, 21 FCC Rcd 5909, paras. 1, 16 (MB 2006).

<sup>64</sup> *WDTV/WVFX Petition* at Exhibit G.

<sup>65</sup> 47 U.S.C. § 338(l)(2)(B)(ii). To show that a station provides coverage or other local service to communities at issue in a market modification petition, parties must provide “noise-limited service contour maps . . . delineating the station’s technical service area and showing the location of the cable system headends or satellite carrier local receive facilities and communities in relation to the service areas.” 47 CFR § 76.59(b)(2). A station’s broadcast of programming specifically targeted to the community at issue may also serve as evidence of local service. *See, e.g., Jones Cable TV Fund 12-A, Ltd.*, 14 FCC Rcd 2808, 2818, at para. 24 (CSB 1999).

<sup>66</sup> *See Mountain Broadcasting Corporation; For Modification of the Television Market for WMBC-TV, Newton, New Jersey*, Memorandum Opinion and Order, 27 FCC Rcd 2231, 2236, para. 10 (MB 2012).

<sup>67</sup> *WDTV/WVFX Petition* at 8 and Exhibit E.

<sup>68</sup> *WDTV/WVFX Petition* at Exhibit F.

<sup>69</sup> Pittsburgh is also the community of license of the Pittsburgh DMA’s CBS network affiliate, KDKA-TV.

<sup>70</sup> *See, e.g., Jones Cable TV Fund 12-A, Ltd.*, 14 FCC Rcd 2808, 2818, at para. 24 (CSB 1999).

<sup>71</sup> *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10417, n.61.

<sup>72</sup> *WDTV/WVFX Petition* at 6.

<sup>73</sup> *WDTV/WVFX Petition* at 7 and Exhibit C.

Petition.<sup>74</sup> These comments amply demonstrate the significance of locally-focused television programming to Monongalia and Preston residents.<sup>75</sup>

23. As discussed above, evidence related to geographic proximity is not determinative in the consideration of a market modification request involving an orphan county, and we generally expect to look more to evidence of relevant programming and community support than to evidence of proximity in orphan county cases.<sup>76</sup> In the instant case, however, WDTV provides not only complete over-the-air coverage of the Counties within its service contour, but extensive evidence of local service through its programming and connection to the Counties. We thus find that the second statutory factor weighs strongly in favor of the requested modification.

24. *Access to In-State Stations.* The third factor we consider is “whether modifying the local market of the television station would promote consumers’ access to television broadcast station signals that originate in their State of residence.”<sup>77</sup> This factor is satisfied by introduction of an in-state station to a community, but weighs more heavily in favor of modification if the petitioner shows that the involved station provides programming specifically related to subscribers’ state of residence, and may be given even more weight if subscribers in the new community have little (or no) access to such in-state programming.<sup>78</sup> WDTV is a CBS affiliate licensed to Weston, West Virginia, a community within the same state as both Monongalia County and Preston County. It provides programming specifically related to West Virginia. Petitioners cite news coverage of state politics, national political stories “with a West Virginia focus,” and extensive coverage of West Virginia University’s “flagship campus” in Monongalia County itself, including WVU sports.<sup>79</sup> Petitioners note that fewer than five percent of households in the Pittsburgh DMA are in West Virginia, and explain that, as a result, this kind of West Virginia-focused programming is simply not available from the Pittsburgh-based broadcasters currently serving the Counties.<sup>80</sup> The scores of resident comments supporting this Petition<sup>81</sup> further emphasize that Monongalia

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<sup>74</sup> See generally MB Docket no. 17-275 and *WDTV/WVFX Petition* at Exhibit D; see also *supra* note {33}, identifying government representative support. As the Commission noted in the *STELAR Market Modification Report and Order*, “local government and consumer comments in a market modification proceeding can help demonstrate a station’s nexus to the community at issue.” *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10417, n.61.

<sup>75</sup> See, e.g., Comments of Sandy and Harold Moore in MB Docket No. 17-275 (“I live in WV I want my LOCAL news, weather, sports, Pittsburgh stations do not offer this. Clarksburg station[] WDTV do[es] offer this.”) (*sic*); Comments of William Braun in MB Docket No. 17-275 (“I support the adding of ...WDTV... I can't get local news relvent to me since I live in WV and not Pittsburgh Pennsylvania, which is what we are told are our "local" stations. I cannot easily get morgantown traffic and news events unless the Pittsburgh station deems it on interest to Pittsburgh viewers and only happens when the news is negative, since we are only a very small part of their local network.”) (*sic*); Comments of Tammy Ashcraft in MB Docket No. 17-275 (“I support adding WDTV”); citizen comments included in the *WDTV/WVFX Petition* at Exhibit D (“THE PITTSBURGH TV STATION DO NOT COVER NEWS IN MON AND PRESTON COUNTIES.” – David McCormick; “It doesn’t make sense how you view channels from a state that you do not live in. I personally would like local channels to be inform about your local area.” – Tommy Rosado; “[S]omething could happen in our back yard and we would not know it because our news and weather comes from Pittsburgh” – Donna M. Tennant; “We want to hear commercials from our state so that we can buy from our state” – Nadine; “I should not have to rely on trying to get local (WV) news through other avenues such as Facebook.” – Shana Kennedy) (*sic*).

<sup>76</sup> *Supra* para. {19}.

<sup>77</sup> 47 U.S.C. § 338(l)(2)(B)(iii).

<sup>78</sup> *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10420, para. 18.

<sup>79</sup> *WDTV/WVFX Petition* at 6-7; see also *supra* note {76} and accompanying text (referencing WDTV’s extensive coverage of local issues, which are also themselves “specifically related to” West Virginia).

<sup>80</sup> *WDTV/WVFX Petition* at 10.

<sup>81</sup> *Supra* note {78}.

and Preston County residents currently have “little (or no) access” to the types of West Virginia-specific programming provided by WDTV.<sup>82</sup> Therefore, we give the third statutory factor the greatest possible weight in favor of the requested modification.

25. *Other Local Stations.* Fourth, we consider “whether any other television station that is eligible to be carried by a satellite carrier in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community.”<sup>83</sup> In general, the Commission has interpreted this factor as enhancing a station’s market modification petition if other stations do not sufficiently serve the communities at issue; however, other stations’ service to the communities rarely has counted against a petition.<sup>84</sup> Petitioners acknowledge that “the Counties receive limited local programming from stations in their current DMA,” and suggest that, at a minimum, this factor should not count against the Petition.<sup>85</sup> Because other stations provide at least some coverage of the Counties, we will not weigh this factor either in favor of or against the Petition, and give it no weight in our consideration of whether to grant the Petition.

26. *Viewing Patterns.* Finally, we consider “evidence of viewing patterns in households that subscribe and do not subscribe to the services offered by multichannel video programming distributors within the areas served by such multichannel video programming distributors in such community.”<sup>86</sup> In virtually all market modification cases, evidence of viewing patterns is demonstrated with ratings data assembled and provided by Nielsen.<sup>87</sup> Since at least the 2009-2010 ratings year, Nielsen has gathered ratings data in Monongalia and Preston Counties exclusively through the use of “People Meters.” People Meters electronically measure viewership in Nielsen households by looking for specialized “watermarks” in programming. As the Licensees have explained, the cost of including these watermarks means they are generally only added to broadcast programming in People Meter markets, which the Clarksburg-Weston DMA is not.<sup>88</sup> As a result, WDTV does not include a Nielsen watermark in its programming, and Nielsen has been unable to track or rate its viewership in the Counties for almost ten years.<sup>89</sup> Because this information is unavailable, we will not penalize Petitioners for failing to provide it.<sup>90</sup> We therefore will

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<sup>82</sup> There is no evidence in the record indicating that broadcast stations currently carried in the Counties provide a significant amount of West Virginia-focused programming.

<sup>83</sup> 47 U.S.C. § 338(l)(2)(B)(iv).

<sup>84</sup> See, e.g., *Petition for Modification of Dayton, OH Designated Mkt. Area with Regard to Television Station WHIO-TV, Dayton, OH*, Memorandum Opinion and Order, 28 FCC Rcd 16011, 16019, para. 22 (MB 2013); see also, e.g., *Petition of Tennessee Broad. Partners for Modification of the Television Market for WBBJ-TV/DT, Jackson, Tennessee*, Memorandum Opinion and Order, 23 FCC Rcd 3928, 3947, para. 49 (MB 2008).

<sup>85</sup> *WDTV/WVFX Petition* at 11.

<sup>86</sup> 47 U.S.C. § 338(l)(2)(B)(v).

<sup>87</sup> See, e.g., *Smith Television of New York, Inc. Elmira, New York for Modification of WETM-TV’s ADI*, 10 FCC Rcd. 7127, 7129 (1995); *BBC License Subsidiary, L.P. for Modification of the Bakersfield, California ADI*, 16 FCC Rcd. 18756, 18761 (2001) (“The viewership information which is of more relevance in modification proceedings is the viewership data prepared by an accredited organization such as A.C. Nielsen”); *WSBS Licensing, Inc. for Modification of the Television Market for WSBS-TV, Key West, Florida*, 32 FCC Rcd. 4159, 4165 (2017).

<sup>88</sup> Letter from Elizabeth Ryder, Executive Vice President & General Counsel, Nexstar Broadcasting, Inc. and Robert J. Folliard, Vice President and Deputy General Counsel, Gray Television, Inc. to Michelle Carey, Chief, FCC Media Bureau (Jan. 30, 2018), MB Dockets 17-274 and 17-275 (*Second Licensee Letter*).

<sup>89</sup> *Id.*

<sup>90</sup> See also *The Electric Plant Board for the City of Russellville, et al., for Modification of the Television Market for WBKO(TV)*, 32 FCC Rcd 10255, 10263, para. 15 (2017) (acknowledging the difficulty of providing viewership data for non-watermarked stations in People Meter areas). We also waive 47 CFR § 76.59(b)(6) to the extent necessary. We find good cause to waive the requirement to submit published audience data because evidence in the record

not weigh this factor either in favor of or against the Petition, and give it no weight in our consideration of whether to grant the Petition.

27. *Conclusion.* The issue before us is whether to grant Petitioner's request to modify the local satellite carriage market of WDTV—of the Clarksburg-Weston DMA—to include West Virginia's Monongalia and Preston Counties, which are currently assigned by Nielsen to the Pittsburgh, PA DMA.<sup>91</sup> Section 338(l) permits the Commission to add or exclude communities from a station's local television market to better reflect market realities and to promote residents' access to local programming from broadcasters located in their State.<sup>92</sup> Under this statutory provision, the Commission must afford particular attention to the value of localism.<sup>93</sup> We have found that the first, second, and third statutory factors weigh heavily in favor of a grant. We have found that the fourth and fifth factors are neutral. Overall, we are persuaded by the strength of the evidence that a sufficient market nexus exists between WDTV and the Counties. We accordingly grant the request for market modification, and order the addition of Monongalia County and Preston County to the local market of WDTV on both DISH and DIRECTV.

#### D. WBOY

28. *Historic Carriage.*<sup>94</sup> WBOY has been carried on cable systems in Monongalia County and Preston County since at least 1999.<sup>95</sup> Because we do not necessarily expect strong evidence of historic carriage in orphan counties, this evidence is particularly notable. We find that the first statutory factor weighs in favor of the requested modification.<sup>96</sup>

29. *Local Service.*<sup>97</sup> Petitioners demonstrate that the Counties are fully within WBOY's service contour.<sup>98</sup> They also provide evidence that Morgantown and Kingwood (the county seats of Monongalia

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indicates that it is simply unavailable. We also note that we have ample evidence to render our decision without it. *See supra* note {28} and accompanying text.

<sup>91</sup> *KDVR Petition* at 1.

<sup>92</sup> *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10412-13, para. 7.

<sup>93</sup> *Id.*

<sup>94</sup> The first factor we must consider is “whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community; or have been historically carried on the satellite carrier or carriers serving such community.” 47 U.S.C. § 338(l)(2)(B)(i).

<sup>95</sup> *WBOY Petition* at Exhibit G.

<sup>96</sup> The record indicates that station WBOY has been carried via cable in the Counties for under 20 years. While this is ample justification for giving positive weight to the “historic carriage” factor, we do not give it the same “strong” weight as we have done with respect to station WDTV, which has more than 50 years of historic cable carriage. *See supra* para. {20}.

<sup>97</sup> Second, we consider “whether the television station provides coverage or other local service to the community.” 47 U.S.C. § 338(l)(2)(B)(ii). To show that a station provides coverage or other local service to communities at issue in a market modification petition, parties must provide “noise-limited service contour maps ... delineating the station's technical service area and showing the location of the cable system headends or satellite carrier local receive facilities and communities in relation to the service areas.” 47 CFR § 76.59(b)(2). This factor includes, in part, the consideration of “a station's signal contour coverage and whether the station places at least a Grade B contour over the cable communities, the station's proximity to the communities in terms of mileage, and whether it broadcasts local programming with a distinct nexus to the Communities.” *See Mountain Broadcasting Corporation; For Modification of the Television Market for WMBC-TV, Newton, New Jersey*, Memorandum Opinion and Order, 27 FCC Rcd 2231, 2236, para. 10 (MB 2012). A station's broadcast of programming specifically targeted to the community at issue may also serve as evidence of local service. *See, e.g., Jones Cable TV Fund 12-A, Ltd.*, 14 FCC Rcd 2808, 2818, at para. 24 (CSB 1999). To determine the overall “local service to the community” provided by the station, we also look beyond the evidence relating to geographic proximity. *See, e.g., Jones Cable TV Fund 12-A, Ltd.*, 14 FCC Rcd 2808, 2818, at para. 24 (CSB 1999). In particular, we assess whether the programming offered by WBOY meets the informational and service needs of the local residents of the Counties, based both on our review of

County and Preston County), are approximately 40 and 50 miles, respectively, from WBOY's community of license (Clarksburg, county seat of Harrison County, WV).<sup>99</sup> In both cases, this is significantly closer than Pittsburgh, PA, the largest city in the Pittsburgh DMA.<sup>100</sup>

30. In addition, Petitioners state that WBOY, which is affiliated with both NBC and ABC, "simulcasts local news weekdays on both feeds from 5-7:00 am, [at] noon, and [at] 11:00 pm, while WBOY-TV 12.1 airs news at 5:00 pm and WBOY-TV 12.2 airs news at 6:00pm. WBOY-TV 12.1 also airs ... weekend newscasts at 6:00 pm and 11:00 pm."<sup>101</sup> Petitioners also note that the Station covers the Counties' high school sports, major storms and their aftermath in the Counties, and "[o]ther County-specific stories" such as locally relevant human interest stories, "coverage of accidents, crime spree, and arrests, road closures and other traffic issues, and economic development projects," among numerous other examples.<sup>102</sup> We accordingly find that WBOY carries a significant amount of local programming of interest to the Counties, demonstrating a local connection. We also give substantial weight to the scores of comments from residents and their government representatives supporting the Petition,<sup>103</sup> which demonstrate the importance that residents of the Counties place on receiving on locally focused television programming.<sup>104</sup>

31. As discussed above, evidence related to geographic proximity is not determinative in the consideration of a market modification request involving an orphan county, and we generally expect to look more to evidence of relevant programming and community support than to evidence of proximity in orphan county cases.<sup>105</sup> In the instant case, however, WBOY provides not only complete over-the-air coverage of the Counties within its service contour, but extensive evidence of local service through its programming and connection to the Counties. We thus find that the second statutory factor weighs

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specific programming and on government and consumer comments. *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10417, n.61.

<sup>98</sup> *WBOY Petition* n at 8 and Exhibit E.

<sup>99</sup> *WBOY Petition* at Exhibit F.

<sup>100</sup> Pittsburgh is also the community of license of the Pittsburgh DMA's NBC network affiliate, WPXI, and its ABC network affiliate, WTAE-TV.

<sup>101</sup> *WBOY Petition* at 6.

<sup>102</sup> *WBOY Petition* at 7 and Exhibit C.

<sup>103</sup> See generally MB Docket no. 17-274 and *WBOY Petition* at Exhibit D; see also *supra* note {33}, identifying government representative support. As the Commission noted in the *STELAR Market Modification Report and Order*, "local government and consumer comments in a market modification proceeding can help demonstrate a station's nexus to the community at issue." *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10417, n.61.

<sup>104</sup> See, e.g., Comments of Deborah and Robert McConnell in MB Docket No. 17-274 ("Channel 11 in Pittsburgh does not focus on the northern part of West Virginia. Weather forecasts rarely mention Morgantown weather and often byline bands are moving across the bottom of the TV screen so you can't even see the WV map. Also, Channel 11 advertising pertains only to businesses in the Pittsburgh area."); Comments of Helen Ashenfelter in MB Docket No. 17-274 ("Wboy should be considered a local channel for Morgantown. It carries local news.") (*sic*); Comments of Gary and Vickie Pavelko in MB Docket No. 17-274 ("We want WBOY back instead of WPXI for NBC programming. We are 35 mi[l]es from WBOY which gives news coverage for West Virginia and the Morgantown area and 75 miles from WPXI which gives coverage of Pittsburgh and Pennsylvania."); citizen comments included in the *WBOY Petition* at Exhibit D ("This summer has been plagued with numerous intense storms. I can't watch my dish TV and receive vital important weather condition updates for my family's safety. Sad to hear the next day about tornado warnings for my area that I was unaware of because pittsburgh news reporting sunny skies for anyone going to kennywood." – Kenny Farrell; "I vote in WV. I am uneducated when it comes to voting because I hear all of the ads from PA." – Laura DeBardi; "I would love to have WV stations so that I am informed on the local news and particularly the weather during the winter." – Melissa Patterson) (*sic*).

<sup>105</sup> *Supra* para. {19}.

strongly in favor of the requested modification.

32. *Access to In-State Stations*.<sup>106</sup> WBOY is an NBC and ABC affiliate licensed to Clarksburg, West Virginia, a community within the same state as both Monongalia County and Preston County. It provides programming specifically related to West Virginia. Petitioners cite news coverage of state politics, national political stories “with a West Virginia focus,” and extensive coverage of West Virginia University’s “flagship campus” in Monongalia County itself, including WVU sports.<sup>107</sup> Petitioners note that fewer than five percent of households in the Pittsburgh DMA are in West Virginia, and explain that, as a result, this kind of West Virginia-focused programming is simply not available from the Pittsburgh-based broadcasters currently serving the Counties.<sup>108</sup> The scores of resident comments supporting this Petition<sup>109</sup> further emphasize that Monongalia and Preston County residents currently have “little (or no) access” to the types of West Virginia-specific programming provided by WBOY.<sup>110</sup> Therefore, we give the third statutory factor the greatest possible weight in favor of the requested modification.

33. *Other Local Stations*.<sup>111</sup> Petitioners acknowledge that “the Counties receive limited local programming from stations in their current DMA,” and suggest that, at a minimum, this factor should not count against the Petition.<sup>112</sup> Because other stations provide at least some coverage of the Counties, we will not weigh this factor either in favor of or against the Petition, and give it no weight in our consideration of whether to grant the Petition.

34. *Viewing Patterns*.<sup>113</sup> In virtually all market modification cases, evidence of viewing patterns is demonstrated with ratings data assembled and provided by Nielsen.<sup>114</sup> Since at least the 2009-2010 ratings year, Nielsen has gathered ratings data in Monongalia and Preston Counties exclusively through

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<sup>106</sup> The third factor we consider is “whether modifying the local market of the television station would promote consumers’ access to television broadcast station signals that originate in their State of residence.” 47 U.S.C. § 338(l)(2)(B)(iii). This factor is satisfied by introduction of an in-state station to a community, but weighs more heavily in favor of modification if the petitioner shows that the involved station provides programming specifically related to subscribers’ state of residence, and may be given even more weight if subscribers in the new community have little (or no) access to such in-state programming. *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10420, para. 18.

<sup>107</sup> *WBOY Petition* at 6-7; see also *supra* note {105} and accompanying text (referencing WBOY’s extensive coverage of local issues, which are also themselves “specifically related to” West Virginia).

<sup>108</sup> *WBOY Petition* at 10.

<sup>109</sup> *Supra* note {107}.

<sup>110</sup> There is no evidence in the record indicating that broadcast stations currently carried in the Counties provide a significant amount of West Virginia-focused programming.

<sup>111</sup> Fourth, we consider “whether any other television station that is eligible to be carried by a satellite carrier in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community.” 47 U.S.C. § 338(l)(2)(B)(iv). In general, the Commission has interpreted this factor as enhancing a station’s market modification petition if other stations do not sufficiently serve the communities at issue; however, other stations’ service to the communities rarely has counted against a petition. See, e.g., *Petition for Modification of Dayton, OH Designated Mkt. Area with Regard to Television Station WHIO-TV, Dayton, OH*, Memorandum Opinion and Order, 28 FCC Rcd 16011, 16019, para. 22 (MB 2013); see also, e.g., *Petition of Tennessee Broad. Partners for Modification of the Television Market for WBBJ-TV/DT, Jackson, Tennessee*, Memorandum Opinion and Order, 23 FCC Rcd 3928, 3947, para. 49 (MB 2008).

<sup>112</sup> *WBOY Petition* at 10.

<sup>113</sup> Finally, we consider “evidence of viewing patterns in households that subscribe and do not subscribe to the services offered by multichannel video programming distributors within the areas served by such multichannel video programming distributors in such community.” 47 U.S.C. § 338(l)(2)(B)(v).

<sup>114</sup> See *supra* note {87}.

the use of “People Meters.” People Meters electronically measure viewership in Nielsen households by looking for specialized “watermarks” in programming. As the Licensees have explained, the cost of including these watermarks means they are generally only added to broadcast programming in People Meter markets, which the Clarksburg-Weston DMA is not.<sup>115</sup> As a result, WBOY does not include a Nielsen watermark in its programming, and Nielsen has been unable to track or rate its viewership in the Counties for almost ten years.<sup>116</sup> Because this information is simply unavailable, we will not penalize Petitioners for failing to provide it.<sup>117</sup> We therefore will not weigh this factor either in favor of or against the Petition, and give it no weight in our consideration of whether to grant the Petition.

35. *Conclusion.* The issue before us is whether to grant Petitioner’s request to modify the local satellite carriage market of WBOY—of the Clarksburg-Weston DMA—to include West Virginia’s Monongalia and Preston Counties, which are currently assigned by Nielsen to the Pittsburgh, PA DMA.<sup>118</sup> Section 338(l) permits the Commission to add or exclude communities from a station’s local television market to better reflect market realities and to promote residents’ access to local programming from broadcasters located in their State.<sup>119</sup> Under this statutory provision, the Commission must afford particular attention to the value of localism.<sup>120</sup> We have found that the first statutory factor weighs in favor of a grant, and that the second and third factors weigh heavily in favor of a grant. We have found that the fourth and fifth factors are neutral. Overall, we are persuaded by the strength of the evidence that a sufficient market nexus exists between WBOY and the Counties. We accordingly grant the request for market modification, and order the addition of Monongalia County and Preston County to the local market of WBOY on both DISH and DIRECTV.

#### E. WVFX

36. *Historic Carriage.*<sup>121</sup> WVFX has been carried on cable systems in Monongalia County and Preston County for approximately 10 years.<sup>122</sup> Because we do not necessarily expect strong evidence of historic carriage in orphan counties, this evidence is particularly notable. We therefore find that the first statutory factor weighs in favor of the requested modification.<sup>123</sup>

37. *Local Service.*<sup>124</sup> Petitioners demonstrate that the Counties are fully within WVFX’s service

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<sup>115</sup> *Second Licensee Letter.*

<sup>116</sup> *Id.*

<sup>117</sup> See also *The Electric Plant Board for the City of Russellville, et al., for Modification of the Television Market for WBKO(TV)*, 32 FCC Rcd 10255, 10263, para. 15 (2017) (acknowledging the difficulty of providing viewership data for non-watermarked stations in People Meter areas). We also waive 47 CFR § 76.59(b)(6) to the extent necessary. We find good cause to waive the requirement to submit published audience data because evidence in the record indicates that it is simply unavailable. We also note that we have ample evidence to render our decision without it. See *supra* note {28} and accompanying text.

<sup>118</sup> *KDVR Petition* at 1.

<sup>119</sup> *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10412-13, para. 7.

<sup>120</sup> *Id.*

<sup>121</sup> The first factor we must consider is “whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community; or have been historically carried on the satellite carrier or carriers serving such community.” 47 U.S.C. § 338(l)(2)(B)(i).

<sup>122</sup> *WDTV/WVFX Petition* at Exhibit G.

<sup>123</sup> The record indicates that station WVFX has been carried via cable in the Counties for almost 10 years. While this is sufficient justification for giving positive weight to the “historic carriage” factor, we do not give it the same “strong” weight as we have done with respect to station WDTV, which has more than 50 years of historic cable carriage. See *supra* para. {20}.

<sup>124</sup> Second, we consider “whether the television station provides coverage or other local service to the community.” 47 U.S.C. § 338(l)(2)(B)(ii). To show that a station provides coverage or other local service to communities at issue



contour.<sup>125</sup> They also provide evidence that Morgantown and Kingwood (the county seats of Monongalia County and Preston County), are approximately 40 and 50 miles, respectively, from WVFX's community of license (Clarksburg, county seat of Harrison County, WV).<sup>126</sup> In both cases, this is significantly closer than Pittsburgh, PA, the largest city in the Pittsburgh DMA.<sup>127</sup>

38. In addition, Petitioners state that WVFX "airs local news each weekday at 10:00 pm,"<sup>128</sup> and covers the Counties' high school sports, major storms and their aftermath in the Counties, and "[o]ther County-specific stories" such as locally relevant human interest stories, "major arrests or crime spree, road closures and other traffic issues, and economic development projects that aim to improve various neighborhoods in the Counties," among numerous other examples.<sup>129</sup> We accordingly find that WVFX carries a significant amount of local programming of interest to the Counties, demonstrating a local connection. We also give substantial weight to the scores of comments from residents and their government representatives supporting the Petition,<sup>130</sup> which demonstrate the importance that residents of the Counties place on receiving on locally focused television programming.<sup>131</sup>

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in a market modification petition, parties must provide "noise-limited service contour maps ... delineating the station's technical service area and showing the location of the cable system headends or satellite carrier local receive facilities and communities in relation to the service areas." 47 CFR § 76.59(b)(2). This factor includes, in part, the consideration of "a station's signal contour coverage and whether the station places at least a Grade B contour over the cable communities, the station's proximity to the communities in terms of mileage, and whether it broadcasts local programming with a distinct nexus to the Communities." See *Mountain Broadcasting Corporation; For Modification of the Television Market for WMBC-TV, Newton, New Jersey*, Memorandum Opinion and Order, 27 FCC Rcd 2231, 2236, para. 10 (MB 2012). A station's broadcast of programming specifically targeted to the community at issue may also serve as evidence of local service. See, e.g., *Jones Cable TV Fund 12-A, Ltd.*, 14 FCC Rcd 2808, 2818, at para. 24 (CSB 1999). To determine the overall "local service to the community" provided by the station, we also look beyond the evidence relating to geographic proximity. See, e.g., *Jones Cable TV Fund 12-A, Ltd.*, 14 FCC Rcd 2808, 2818, at para. 24 (CSB 1999). In particular, we assess whether the programming offered by WVFX meets the informational and service needs of the local residents of the Counties, based both on our review of specific programming and on government and consumer comments. *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10417, n.61.

<sup>125</sup> *WDTV/WVFX Petition* at 8 and Exhibit E.

<sup>126</sup> *WDTV/WVFX Petition* at Exhibit F.

<sup>127</sup> Pittsburgh is also the community of license of the Pittsburgh DMA's Fox network affiliate, WPGH-TV.

<sup>128</sup> *WDTV/WVFX Petition* at 6.

<sup>129</sup> *WDTV/WVFX Petition* at 7 and Exhibit C.

<sup>130</sup> See generally MB Docket no. 17-275 and *WDTV/WVFX Petition* at Exhibit D; see also *supra* note {33}, identifying government representative support. As the Commission noted in the *STELAR Market Modification Report and Order*, "local government and consumer comments in a market modification proceeding can help demonstrate a station's nexus to the community at issue." *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10417, n.61.

<sup>131</sup> See, e.g., Comments of Phillip Kirk in MB Docket No. 17-275 ("I want my local stations to get my local news, sports, weather and school closings which Pittsburgh stations do not offer, and which Clarksburg stations do.") (*sic*); citizen comments included in the *WDTV/WVFX Petition* at Exhibit D ("Honestly, having local channels would definitely benefit alot of the Preston county residents especially during the winter months." – Tracy Kirk; "We would love to receive...WVFX on our satellite system...We have lived here for 12 years and never know what our local news is, if there is an emergency we never know unless someone calls us. The only local channel we get it out of Pittsburgh." – Donna and Charles Turner; "I have lived in Preston Co. for 22 years...and have never seen a W.V. T.V. station in my home! I couldn't tell you what is happening around my own area. I don't know my politicians, if there's a killer on the loose, or anything." – Rosetta Greathouse; "I would love to have WV stations so that I am informed on the local news and particularly the weather during the winter." – Melissa Patterson; I would much prefer to receive local stations rather than Pittsburgh news. Pittsburgh is about a 2 hour drive from my home, and what they are reporting is irrelevant to the community in which I live in. Weather forecasts and school

39. As discussed above, evidence related to geographic proximity is not determinative in the consideration of a market modification request involving an orphan county, and we generally expect to look more to evidence of relevant programming and community support than to evidence of proximity in orphan county cases.<sup>132</sup> In the instant case, however, WVFX provides not only complete over-the-air coverage of the Counties within its service contour, but extensive evidence of local service through its programming and connection to the Counties. We thus find that the second statutory factor weighs strongly in favor of the requested modification.

40. *Access to In-State Stations.*<sup>133</sup> WVFX is a Fox affiliate licensed to Clarksburg, West Virginia, a community within the same state as both Monongalia County and Preston County. It provides programming specifically related to West Virginia. Petitioners cite news coverage of state politics, national political stories “with a West Virginia focus,” and extensive coverage of West Virginia University’s “flagship campus” in Monongalia County itself, including WVU sports.<sup>134</sup> Petitioners note that fewer than five percent of households in the Pittsburgh DMA are in West Virginia, and explain that, as a result, this kind of West Virginia-focused programming is simply not available from the Pittsburgh-based broadcasters currently serving the Counties.<sup>135</sup> The scores of resident comments supporting this Petition<sup>136</sup> further show that Monongalia and Preston County residents currently have “little (or no) access” to the types of West Virginia-specific programming provided by WVFX.<sup>137</sup> Therefore, we give the third statutory factor the greatest possible weight in favor of the requested modification.

41. *Other Local Stations.*<sup>138</sup> Petitioners acknowledge that “the Counties receive limited local programming from stations in their current DMA,” and suggest that, at a minimum, this factor should not count against the Petition.<sup>139</sup> Because other stations provide at least some coverage of the Counties, we will not weigh this factor either in favor of or against the Petition, and give it no weight in our

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delays/closings are not reported for my area via the Pittsburgh channels. To be honest, I feel disconnected from my community because I do not get to hear of all the things happening in my area.” – Anthea Rhoades) (*sic*).

<sup>132</sup> *Supra* para. {19}.

<sup>133</sup> The third factor we consider is “whether modifying the local market of the television station would promote consumers’ access to television broadcast station signals that originate in their State of residence.” 47 U.S.C. § 338(l)(2)(B)(iii). This factor is satisfied by introduction of an in-state station to a community, but weighs more heavily in favor of modification if the petitioner shows that the involved station provides programming specifically related to subscribers’ state of residence, and may be given even more weight if subscribers in the new community have little (or no) access to such in-state programming. *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10420, para. 18.

<sup>134</sup> *WDTV/WVFX Petition* at 6-7; *see also supra* note {132} and accompanying text (referencing WVFX’s extensive coverage of local issues, which are also themselves “specifically related to” West Virginia).

<sup>135</sup> *WDTV/WVFX Petition* at 10.

<sup>136</sup> *Supra* note {134}.

<sup>137</sup> There is no evidence in the record indicating that broadcast stations currently carried in the Counties provide a significant amount of West Virginia-focused programming.

<sup>138</sup> Fourth, we consider “whether any other television station that is eligible to be carried by a satellite carrier in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community.” 47 U.S.C. § 338(l)(2)(B)(iv). In general, the Commission has interpreted this factor as enhancing a station’s market modification petition if other stations do not sufficiently serve the communities at issue; however, other stations’ service to the communities rarely has counted against a petition. *See, e.g., Petition for Modification of Dayton, OH Designated Mkt. Area with Regard to Television Station WHIO-TV, Dayton, OH*, Memorandum Opinion and Order, 28 FCC Rcd 16011, 16019, para. 22 (MB 2013); *see also, e.g., Petition of Tennessee Broad. Partners for Modification of the Television Market for WBBJ-TV/DT, Jackson, Tennessee*, Memorandum Opinion and Order, 23 FCC Rcd 3928, 3947, para. 49 (MB 2008).

<sup>139</sup> *WDTV/WVFX Petition* at 10.

consideration of whether to grant the Petition.

42. *Viewing Patterns*.<sup>140</sup> In virtually all market modification cases, evidence of viewing patterns is demonstrated with ratings data assembled and provided by Nielsen.<sup>141</sup> Since at least the 2009-2010 ratings year, Nielsen has gathered ratings data in Monongalia and Preston Counties exclusively through the use of “People Meters.” People Meters electronically measure viewership in Nielsen households by looking for specialized “watermarks” in programming. As the Licensees have explained, the cost of including these watermarks means they are generally only added to broadcast programming in People Meter markets, which the Clarksburg-Weston DMA is not.<sup>142</sup> As a result, WVFX does not include a Nielsen watermark in its programming, and Nielsen has been unable to track or rate its viewership in the Counties for almost ten years.<sup>143</sup> Because this information is simply unavailable, we will not penalize Petitioners for failing to provide it.<sup>144</sup> We therefore will not weigh this factor either in favor of or against the Petition, and give it no weight in our consideration of whether to grant the Petition.

43. *Conclusion*. The issue before us is whether to grant Petitioner’s request to modify the local satellite carriage market of WVFX—of the Clarksburg-Weston DMA—to include West Virginia’s Monongalia and Preston Counties, which are currently assigned by Nielsen to the Pittsburgh, PA DMA.<sup>145</sup> Section 338(l) permits the Commission to add or exclude communities from a station’s local television market to better reflect market realities and to promote residents’ access to local programming from broadcasters located in their State.<sup>146</sup> Under this statutory provision, the Commission must afford particular attention to the value of localism.<sup>147</sup> We have found that the first statutory factor weighs in favor of a grant, and that the second and third factors weigh heavily in favor of a grant. We have found that the fourth and fifth factors are neutral. Overall, we are persuaded by the strength of the evidence that a sufficient market nexus exists between WVFX and the Counties. We accordingly grant the request for market modification, and order the addition of Monongalia County and Preston County to the local market of WVFX on both DISH and DIRECTV.

#### IV. ORDERING CLAUSES

44. Accordingly, **IT IS ORDERED**, pursuant to Section 338 of the Communications Act, as amended, 47 U.S.C. § 338, and Section 76.59 of the Commission’s rules, 47 CFR § 76.59, that the captioned petition for special relief (MB Docket No. 17-274, CSR No. 8941-A), filed by Monongalia County, West Virginia and Preston County, West Virginia with respect to WBOY-TV, Clarksburg, West Virginia (Facility ID No. 71220), **IS GRANTED**.

45. **IT IS FURTHER ORDERED**, pursuant to Section 338 of the Communications Act, as amended, 47 U.S.C. § 338, and Section 76.59 of the Commission’s rules, 47 CFR § 76.59, that the

<sup>140</sup> Finally, we consider “evidence of viewing patterns in households that subscribe and do not subscribe to the services offered by multichannel video programming distributors within the areas served by such multichannel video programming distributors in such community.” 47 U.S.C. § 338(l)(2)(B)(v).

<sup>141</sup> See *supra* note {87}.

<sup>142</sup> *Second Licensee Letter*.

<sup>143</sup> *Id.*

<sup>144</sup> See also *The Electric Plant Board for the City of Russellville, et al., for Modification of the Television Market for WBKO(TV)*, 32 FCC Rcd 10255, 10263, para. 15 (2017) (acknowledging the difficulty of providing viewership data for non-watermarked stations in People Meter areas). We also waive 47 CFR § 76.59(b)(6) to the extent necessary. We find good cause to waive the requirement to submit published audience data because evidence in the record indicates that it is simply unavailable. We also note that we have ample evidence to render our decision without it. See also *supra* note {28} and accompanying text.

<sup>145</sup> *KDVR Petition* at 1.

<sup>146</sup> *STELAR Market Modification Report and Order*, 30 FCC Rcd at 10412-13, para. 7.

<sup>147</sup> *Id.*

captioned petition for special relief (MB Docket No. 17-275, CSR No. 8942-A), filed by Monongalia County, West Virginia and Preston County, West Virginia with respect to WDTV(TV), Weston, West Virginia and WVFX(TV), Clarksburg, West Virginia (Facility ID Nos. 70592 and 10976, respectively), **IS GRANTED.**

46. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's Rules.<sup>148</sup>

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert  
Senior Deputy Chief, Media Bureau, Policy Division

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<sup>148</sup> 47 CFR § 0.283.