

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

In the Matter of)
) MB Docket No. 12-_____
Gray Television Licensee, LLC)
) CSR No. _____
For Modification of the Television Market)
For WSAW-TV, Wausau, Wisconsin)
Facility Identification Number 6867)

To: Office of the Secretary
Attn.: Chief, Policy Division, Media Bureau

PETITION FOR SPECIAL RELIEF

Robert J. Folliard, III
Assistant Secretary
GRAY TELEVISION LICENSEE, LLC

September 7, 2016

SUMMARY

This petition seeks modification of the local satellite carriage market for station WSAW-TV, Wausau, Wisconsin, to include Ashland and Iron Counties in northern Wisconsin. Gray seeks this modification to remedy the orphan county problem that has arisen from the assignment of those two counties to the Duluth-Superior DMA. When Congress adopted STELAR, it recognized that Nielsen DMA assignments often fall short of providing viewers with an in-state source for programming that they most often desire. Congress granted the FCC authority to remedy this problem by modifying the satellite carriage market of in-state stations to add these orphan counties. Grant of this petition will accomplish Congress's ends.

Viewers in Ashland and Iron Counties, Wisconsin suffer the harms associated with living in orphan counties. In this case, the two counties are located in the Duluth-Superior DMA and the stations assigned to that DMA understandably focus their news and information on programming of interest to Minnesotans because most of their viewers are Minnesotans. Of particular concern to viewers in Ashland and Iron Counties is their frequent inability to watch Green Bay Packers football games. This limitation arises because the Fox affiliate in the Duluth DMA chooses to air Minnesota Vikings when the Packers and the Vikings play at the same time. As Senator Johnson explained in his letter to Chairman Wheeler, choosing to air the Vikings over the Packers anywhere in Wisconsin causes a great deal of frustration amongst his constituents.

Gray is ready, willing, and able to be part of the solution to the plight of TV viewers in Iron and Ashland Counties. First, by modifying the local satellite market for WSAW-TV, viewers in Ashland and Iron Counties will have access to the top-ranked Wausau DMA station. Second, satellite subscribers will be able to watch their beloved Green Bay Packers, instead of

the rival Minnesota Vikings. Lastly, as demonstrated herein, Gray's instant Petition meets the other statutory factors to support the modification of the local satellite market for WSAW-TV.

The Commission should reject the technical and economic infeasibility claims made by DISH Network and DIRECTV. The arguments raised by both satellite providers fail to meet the Commission's requirement that DBS carriers offer detailed explanations for the basis of such infeasibility. Moreover, the claims of infeasibility appear to be self-serving and would limit Gray's ability to provide local news, sports, and weather information to viewers in Ashland and Iron Counties.

As described more fully herein, grant of this petition would solve the orphan county problem in Iron and Ashland Counties and satisfy the other statutory factors Congress requires the FCC to evaluate in market modification proceedings. Gray therefore requests that the FCC grant this petition without delay.

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- Exhibit M: Letter from Jason E. Rademacher, Counsel for Gray, to Stanton Dodge, Executive Vice President and General Counsel, DISH Network, dated July 6, 2016
- Exhibit N: Letter from Jason E. Rademacher, Counsel to Gray, to Linda Burakoff, Vice President, Content & Programming, Executive Vice President and General Counsel, DISH Network, dated July 6, 2016
- Exhibit O: Letter from Alison Minea, Director & Senior Counsel, Regulatory Affairs to Jason E. Rademacher, Counsel for Gray, dated Aug. 19, 2016
- Exhibit P: Letter from DIRECTV to Jason E. Rademacher, counsel for Gray, dated Aug. 11, 2016
- Exhibit Q: Zip Code map of Ashland County

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PETITION FOR SPECIAL RELIEF

Gray Television Licensee, LLC (“Gray”), licensee of WSAW-TV, Wausau, Wisconsin, hereby files this Petition for Special Relief, seeking modification of WSAW-TV’s local market for satellite carriage to include two “orphan counties” – Iron County and Ashland County, Wisconsin (collectively, the “Orphan Counties”).¹

I. SUMMARY AND INTRODUCTION

The Orphan Counties are quintessential examples of the problem Congress was trying to solve when it authorized the FCC to modify local television signal carriage markets for direct broadcast satellite (“DBS”) providers to ensure that viewers have access to adequate amounts of

¹ See 47 U.S.C. § 534(h); 47 C.F.R. §§ 76.7, 76.59. An “orphan county” is a county that is assigned by Nielsen to a local designated market areas (“DMA”) that predominantly consists of counties in another state. The result is that viewers in the orphan county are deprived of access to local programming produced by stations that are located in the same state as orphan county viewers. These viewers lack access to sufficient local programming produced in their home state. Amendment to the Commission’s Rules Concerning Market Modification, *Report and Order*, 30 FCC Rcd 10406, 10408 n. 5 (2015) (“*STELAR Order*”). This request applies to carriage of WSAW-TV by DISH Network and DIRECTV in Ashland and Iron Counties, Wisconsin.

local news, sports, weather, and other informational programming produced by in-state television stations.² Assigned to the Duluth, Minnesota – Superior, DMA (“Duluth DMA”), Iron and Ashland County viewers receive almost exclusively Minnesota-focused local programming. The one station in the Duluth DMA licensed to a Wisconsin community is NBC affiliate KJBR-TV. KJBR-TV is licensed to Superior, Wisconsin, a city that is only one-tenth the size of Duluth and located just four miles away from that much larger city. Unsurprisingly, the small, mostly rural communities in Ashland and Iron Counties receive very little local programming relevant to their daily lives compared to communities with a full complement of in-state local television stations.

The plight of viewers in the Orphan Counties has drawn the attention of Wisconsin Senator Ron Johnson.³ Late in 2015, Senator Johnson wrote to Chairman Wheeler relating the frustration that his constituents in Iron and Ashland Counties feel at their limited access to Wisconsin news and sports programming.⁴ He specifically highlighted that many Wisconsinites lack access to Green Bay Packers National Football League games carried on the FOX network, and that they instead receive the “in-market” games of the arch rival Minnesota Vikings.⁵ In a state where the Packers are publicly owned and religiously followed, Orphan County viewers feel an affront akin to forcing Washington football fans to watch nothing but Dallas Cowboys

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

³ See Letter from Senator Ron Johnson to Chairman Tom Wheeler, dated Dec. 14, 2015, available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-338173A2.pdf (the “Johnson Letter”). See also Letter from Chairman Tom Wheeler to Senator Ron Johnson, dated Mar. 1, 2016, available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-338173A1.pdf. Senator Johnson’s Letter and Chairman Wheeler’s response are attached hereto as Exhibit A.

⁴ See Johnson Letter (discussing constituent complaints from Hurley and Ashland, Wisconsin, which are located in Iron County and Ashland County, respectively).

⁵ See *id.* (“[I]ast year, Wisconsinites missed Packers games *six times* as their media market played the Vikings game rather than the Packer game” (emphasis in original)).

games.⁶ In any event, Senator Johnson rightly pointed out that Wisconsin viewers should have access to Wisconsin television stations and that STELAR directed the FCC to accomplish that goal.

Gray is ready, willing, and uniquely able to be part of the solution to the service shortcomings faced by TV viewers in Iron and Ashland Counties. Gray's television station WSAW-TV is the exclusive distributor of CBS network programming in the Wausau, Wisconsin DMA. Gray's low power digital station, WZAW-LD is the exclusive distributor of FOX programming in the Wausau DMA. The Wausau DMA borders both Iron and Ashland Counties immediately to the south. WSAW-TV broadcasts 22.5 of local, Wisconsin-focused news every week.⁷ And WZAW-LD also airs local news and is the local distributor of Green Bay Packers games aired by the FOX network. WZAW-LD's programming is carried on a digital subchannel of WSAW-TV. The natural solution to the lack of access to local programming of viewers in the Orphan Counties would be to make the programming aired on WSAW-TV and WZAW-LD available to those viewers. To effectuate this solution, Gray proposes to add Ashland and Iron Counties to the satellite carriage market for WSAW-TV. This would make local Wisconsin and national CBS and FOX programming on WSAW-TV's main and multicast channels available to satellite viewers in the Orphan Counties.

⁶ See generally, *The Packers, Vikings, and a Bitter Border Rivalry Since 1961*, PACKERLAND: TITLETOWN USA (Nov. 14, 2014), available at <http://www.packerlandtittletownusa.com/index.php/2014/11/14/the-packers-vikings-and-a-bitter-border-rivalry-since-1961/>; *Cowboys and Redskins Offer a Historic and Renowned Rivalry*, SPORTS THEN AND NOW, December 7, 2015, available at <http://sportsthenandnow.com/2015/12/07/cowboys-and-redskins-offer-a-historic-and-renowned-rivalry/>.

⁷ Gray also operates a Washington, DC news bureau that provides an important outlet for Wisconsin's lawmakers in Washington to reach their constituents back home. Gray's seasoned reporters in the Washington news bureau complement the local reporting from WSAW-TV personnel by bringing a Washington perspective to stories of local importance.

As described below, Gray’s proposal both solves the orphan county problem in Iron and Ashland Counties and satisfies the other statutory factors Congress requires the FCC to evaluate in market modification proceedings. Gray therefore requests that the FCC modify WSAW-TV’s satellite carriage market to include the Orphan Counties.

II. BACKGROUND

A. Satellite Market Modifications Under STELAR.

Section 338 of the Communications Act permits a satellite carrier to retransmit the signals of local broadcast television stations into the DMA to which those stations are assigned under certain specific circumstances.⁸ Generally speaking, the Nielsen Company (“Nielsen”) defines these DMAs (which are comprised of groups of counties based on Nielsen’s measured viewing patterns) and assigns stations to them.⁹ DMAs do not follow state boundaries, and a number of DMAs comprise counties located in two or more states.¹⁰

Congress has long recognized that Nielsen is not infallible and that in some instances, adjustments to Nielsen’s determinations of a station’s local market are necessary to ensure that market assignments properly reflect the wants and needs of local television viewers. In the 1992 Cable Act, Congress designed and authorized a process for stations and cable operators to seek

⁸ 47 U.S.C. § 338(a)(1).

⁹ *STELAR Order*, 30 FCC Rcd at 10411-12.

¹⁰ Examples of this phenomenon just in the state of Wisconsin and its border states include: the Chicago DMA (Illinois and Indiana); the Minneapolis-St. Paul (Minnesota and Wisconsin); the Duluth DMA (Minnesota and Wisconsin), the Fargo-Valley City DMA (North Dakota and Minnesota), the LaCrosse-Eau Claire DMA (Wisconsin and Minnesota), the Rochester-Mason City-Austin DMA (Minnesota and Iowa), the Wausau-Rhinelanders DMA (Wisconsin and Michigan) the Davenport-Rock Island-Moline DMA (Illinois and Iowa), and the Green Bay-Appleton DMA (Wisconsin and Michigan).

modifications to Nielsen’s market determinations.¹¹ In STELAR, Congress expanded the FCC’s market modification authority to include the power to modify local markets for satellite carriage by adding or subtracting counties to Nielsen’s defined markets.¹² Congress also expanded the market modification test to provide the FCC with the necessary authority to modify both cable and satellite markets to remedy “orphan county” situations.¹³ In 2015, the FCC adopted rules implementing STELAR’s requirements.¹⁴

Under STELAR and the FCC’s implementing rules, in response to a request for modification of a local market for satellite carriage, the FCC must evaluate the following factors:

- (I) 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;
- (II) whether the television station provides coverage or other local service to such community;
- (III) 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;
- (IV) 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
- (V) evidence of viewing patterns in households that subscribe and do not subscribe to the services offered by MVPDs within the areas served by such MVPDs in such community.¹⁵

¹¹ See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Must Carry and Retransmission Consent Requirements, *Report and Order*, 8 FCC Rcd 2965 (1993).

¹² See STELAR at § 102.

¹³ See *id.*

¹⁴ See *STELAR Order*, 30 FCC Rcd at 10406.

¹⁵ 47 U.S.C. § 338(l)(2)(B)(i)-(v).

The first, second, fourth, and fifth factors of this test are familiar tests applied numerous times in the cable market modification context.¹⁶ STELAR, however, added a new third factor – “promoting consumers’ access to television broadcast station signals that originate in their State of Residence.”¹⁷

In giving the FCC authority to address the orphan county problem, Congress expressed concern that “many consumers, particularly those who reside in DMAs that cross State lines” may “lack access to local television programming that is relevant to their everyday lives.”¹⁸ Congress instructed the Commission to “consider the plight of these consumers when judging the merits of a [market modification] petition.”¹⁹ To satisfy this criterion, a petitioner need only demonstrate that the local television station is “licensed to a community within the same state as the new community,”²⁰ but additional showings may be made to increase the weight the Commission gives to this factor.²¹

As both Congress and the FCC have long maintained, a market modification petitioner need not satisfy all of the listed factors; indeed, Congress did not intend for these factors to be exclusive, and the Commission may consider other facts relevant to whether a community is part

¹⁶ See, e.g., Petition of Tobacco Valley Communications to Exclude Eureka and Communities in North Lincoln County from the Local Market of Several Spokane, Washington Broadcasters and Include it in the Local Market of Several Missoula, Montana Broadcasters, *Memorandum Opinion and Order*, DA 16-931, MB Docket No. 15-152 (rel. Aug 15, 2016); KAZN-TV Licensee, LLC for Modification of the Television Market for KILM, Barstow, California, *Memorandum Opinion and Order*, 30 FCC Rcd 8126 (2015); Pine Telephone T.V. For the Market Modification of the Television Markets for KBOI-TV and KTVB, Boise Idaho; KIVI-TV and KTRV-TV of Nampa, Idaho; and KNIN-TV of Caldwell, Idaho, *Memorandum Opinion and Order*, 29 FCC Rcd 9520 (2014).

¹⁷ 47 U.S.C. § 534(j)(1)(C)(ii)(III).

¹⁸ S. REP. NO. 113-322 (Senate Commerce Committee Report) at 11 (2014) (the “Senate Report”).

¹⁹ *Id.* at 11.

²⁰ *STELAR Order*, 30 FCC Rcd at 10419.

²¹ *Id.*

of a station's natural local market.²² In the cable context, the FCC routinely has given weight to other factors demonstrating a market nexus between the station and the cable communities at issue.²³ The same considerations should apply in satellite market modifications as well.

B. The Orphan Counties.

Ashland and Iron Counties are located in northern Wisconsin, bordering Lake Superior to the north and the Upper Peninsula of Michigan to the northeast.²⁴ Both of the Orphan Counties border WSAW-TV's Wausau-Rhinelanders DMA (the "Wausau DMA") to the south. The Orphan Counties are rural and relatively sparsely populated. Ashland County is home to approximately 15,843 residents, while Iron County's population is 5,794.²⁵

Ashland County is renowned for its outdoor and recreational activities, such as world class fishing, hiking, and birding in the warmer months and snow machining and skiing in winter. Ashland County may best be known for the majestic ice caves in the Apostle Islands, to which more than 138,000 visitors traveled to in 2014. Like Ashland County, Iron County is known for its pristine natural beauty, including the 300 lakes across the county. As the county name suggests, mining of iron ore has been and continues to be a significant source of employment and exports from the county.²⁶

²² H.R. Rep. No. 102-268, at 97 (1992); Market Modifications and the New York Area of Dominant Influence, *Memorandum Opinion and Order*, 12 FCC Rcd 12262, 12267 at para. 10 (1997) (the "New York ADI Order"), *aff'd*, *WLNY-TV, Inc. v. FCC*, 163 F.3d 137 (2d Cir. 1998).

²³ See 47 C.F.R. §76.59(b).

²⁴ Gray believes that Dish Network and DIRECTV have receive sites in Superior and Wausau, Wisconsin.

²⁵ See Exhibit B (U.S. Census Bureau, QuickFacts, Ashland County, Wisconsin, <http://www.census.gov/quickfacts/table/PST045215/55003,55>; and U.S. Census Bureau, QuickFacts, Iron County, Wisconsin, <http://www.census.gov/quickfacts/table/PST045215/55051,55003,55>).

²⁶ Ashland County also includes 18 of the 22 Apostle Islands, a group of islands in Lake Superior.

While Ashland and Iron Counties are located in the Duluth DMA, neither is geographically proximate to Duluth or Superior. Duluth and Superior are located just four miles apart on either side of the Minnesota/Wisconsin border, far from the heartland of Wisconsin where the Orphan Counties are situated. Neither county's residents show any social or economic orientation towards those cities. Few residents of Ashland County and no residents of Iron County commute to Duluth for work.²⁷ Transportation links between Duluth and the Orphan Counties are limited, with no Interstate highways linking the areas and only a single U.S. Highway that runs across the northern part of Ashland and Iron Counties and then continues on to Duluth.²⁸ Cultural ties between these areas appear also to be limited or non-existent. Indeed, other than Nielsen's DMA assignment, there is little or no relationship between TV viewers in the Orphan Counties and the Duluth-Superior DMA. Moreover, the stations that serve the Duluth DMA are almost exclusively located in Minnesota and primarily focus their programming on matters of local importance to Minnesotans.²⁹

As Senator Johnson noted in a letter to the FCC last year, the assignment of the Orphan Counties to a Minnesota-based DMA ends up shutting TV viewers in the Orphan Counties out of participation in Wisconsin civic life by depriving them of Wisconsin-focused news, weather, sports, and other informational programming. Indeed, assignment to the Duluth DMA means that viewers in the Orphan Counties are forced to watch Minnesota Vikings football games as "local" games. As Senator Johnson pointed out and as anyone who has ever been to Wisconsin

²⁷ See Exhibit C (Wisconsin Department of Workplace Development, County-to-County Workflows in Wisconsin at 4, 28 (May 2013), http://worknet.wisconsin.gov/worknet_info/publications/commuting.pdf). While a handful of people do travel from Ashland County to Douglas County, where Superior is located, no residents of Iron County do so. See *id.*

²⁸ See Exhibit D (road map of Wisconsin and eastern Minnesota).

²⁹ Eight of the nine full power stations (including satellite stations) assigned to the Duluth DMA are licensed to communities in Minnesota. The ninth station is licensed to Superior, Wisconsin, which is just a few miles from Duluth across the narrow Saint Louis Bay.

knows, calling the Vikings the “local” team anywhere in Wisconsin causes a great deal of frustration and unhappiness.

Moreover, the problem of lack of broadcast access to Packers games has gained so much local political urgency that the mayor of the city of Ashland in Ashland County, Debra Lewis, penned a lengthy Facebook post on the topic promising her constituents a solution.³⁰ The post also expressed the difficulty the City was having in dealing with the FCC’s processes for fixing this problem. This petition offers a permanent solution to the problem identified by Senator Johnson and Mayor Lewis.

C. WSAW-TV

Gray’s station WSAW-TV has served central and northern Wisconsin, including parts of the Orphan Counties, for more than two decades with a wide range of local news, sports, weather, and other informational programming. WSAW-TV has dedicated itself to providing all of its viewers with the highest quality local news and entertainment services, and that commitment has grown stronger over the years as fierce competition and new media platforms have required the station to continually refine its services to best serve its audience. From sign on to sign off, WSAW-TV is the top ranked station in the Wausau-Rhineland Designated Market Area (“DMA”), because it provides the region’s strongest local news, traffic, weather, sports, and entertainment programming, as well as CBS-affiliated national news, sports, and entertainment fare.

Gray’s Wausau-based low-power television station WZAW-LD is the Wausau affiliate of the FOX network. In addition to its stand-alone operations, WZAW-LD’s signal is simulcast on a digital subchannel of WSAW-TV. Both WSAW-TV and WZAW-LD air local news

³⁰ See Exhibit E. Debra Lewis Ashland Wisconsin Mayor, Facebook (July 17, 2014), <https://www.facebook.com/deblewisformayor/posts/1451802871739729>.

programming in addition to their network offerings. These attributes uniquely position Gray to solve the orphan county problem in Ashland and Iron Counties. If the FCC modifies the satellite carriage market of WSAW-TV to include both Ashland and Iron Counties, then viewers in those markets will obtain access to significant amounts of local news, weather, sports, and entertainment programming. Moreover, since WSAW-TV retransmits WZAW-LDs signal as a multicast, Ashland and Iron County viewers would obtain access to FOX network programming – including Packers football games – as well.

III. WSAW-TV SATISFIES EACH OF THE MARKET MODIFICATION CRITERIA ESTABLISHED BY CONGRESS.

A. WSAW-TV and Other Wausau DMA Stations Have Historically Been Carried in Portions of the Orphan Counties.

In assessing market modification requests, the Commission first considers whether the station or other stations located in the same area historically have been carried on cable systems or by satellite carriers serving the communities at issue.³¹ That factor is satisfied here because WSAW-TV long has been carried on cable systems serving portions of the Orphan Counties.³²

The attached Exhibit F shows that some cable systems in the Orphan Counties have chosen to carry stations assigned to the Wausau-Rhineland DMA. For example, Packerland Broadband carries WSAW-TV (CBS affiliate), WZAW-TV (Fox affiliate), and WJFW-TV (NBC affiliate) on its Glidden cable system in Ashland County.³³ Packerland Broadband also carries WSAW-TV, WJFW-TV, WZAW-TV, and WYOW(TV) (ABC affiliate) on its Butternut

³¹ 47 U.S.C. § 338(1)(2)(B)(i).

³² Gray is unaware of any prior satellite carriage of WSAW-TV in the Orphan Counties. This is unsurprising because the station is not located in the same DMA as the Orphan Counties, nor is it listed on the FCC's Significantly View List.

³³ See Exhibit F.

cable system in Ashland County.³⁴ As demonstrated by Exhibit F, Ashland County cable operators have consistently carried WSAW-TV to Ashland County viewers for decades.³⁵ Gray's research indicates that some Ashland County cable systems have carried WSAW-TV since at least 1985.³⁶

WSAW-TV and other Wausau market affiliates likewise have enjoyed historical carriage in portions of Iron County. Karban TV Systems currently carries WSAW-TV, WZAW-LD and each of Wausau's other Big Four affiliates on its Mercer, Wisconsin system.³⁷ Gray's research indicates that the Karban TV Systems cable system in Mercer has carried WSAW-TV since 1991. These decades of cable carriage in the Orphan Counties make clear that WSAW-TV and the other stations assigned to the Wausau DMA are of local interest to viewers in Ashland and Iron Counties.

B. WSAW-TV Provides Significant Local Programming for the Orphan Counties.

The second statutory factor requires the FCC to determine whether a station requesting a market modification provides local service to the communities at issue.³⁸ While the placement of the Orphan Counties outside WSAW-TV's DMA naturally reduces the station's focus on those communities, WSAW-TV does provide significant local service to these areas. First, the attached contour study using Longley-Rice methodology shows that WSAW-TV's signal exceeds its predicted 36 dBu contour to the north, covering portions of both Ashland and Iron

³⁴ *See id.*

³⁵ *See id.*

³⁶ It appears that cable carriage of WSAW-TV has been continuous in Butternut since 1989 and in Glidden since 1985. Moreover, WSAW-TV historically was carried by Packerland Broadband in Mellen, which is in Ashland County, from 1982-1987 and 1994-2002, although that carriage does not continue today. *See id.*

³⁷ *See id.*

³⁸ *See* 47 U.S.C. § 338(l)(2)(B)(ii).

Counties.³⁹ In past cases, the FCC has recognized that signal coverage of a given community weighs in favor of a determination that a station provides local service to that area under the market modification test.⁴⁰ WSAW-TV satisfies that test here.

Second, WSAW-TV provides local programming content that covers events and issues of concern to viewers in the Orphan Counties. WSAW-TV is a news leader in the Wausau DMA, providing local newscasts Monday through Friday from 4:30-7 AM, 12-12:30 PM, 5-5:30 PM, 6-6:30 PM and 10-10:30 PM; Saturdays from 6-6:30 PM and 10-10:30 PM; and Sundays from 7-8:00 AM and 10-10:30PM. In addition, WZAW-TV airs a half-hour local news program on weeknights at 9 PM. These newscasts frequently include stories originating in the Orphan Counties. Indeed, since the beginning of 2014, WSAW-TV has included at least 186 stories on-air and online concerning breaking news, local sports, economic matters, and political issues in the Orphan Counties.⁴¹ For example, WSAW-TV provided in-depth coverage of recent flooding that killed two people, caused power outages to thousands of residents, and resulted in millions of dollars' worth of damage to infrastructure in and around the Orphan Counties.⁴²

³⁹ See Exhibit G (WSAW-TV Contour Study).

⁴⁰ See, e.g., *Tennessee Broadcasting Partners, Order on Reconsideration*, 25 FCC Rcd 4857 ¶ 6 (Med. Bur. 2010).

⁴¹ See Exhibit H (Compendium of Local News Stories Concerning the Orphan Counties Aired on WSAW-TV and WZAW-TV or Included on the WSAW-TV website).

⁴² See *id.* See also WSAW-TV, *Update: Power Slowly Restored to Thousands in Northwoods* (July 12, 2016, 1:44 PM), <http://www.wsaw.com/content/news/DEVELOPING-15K-without-power-in-Northwoods-386436041.html>; WSAW-TV, *Heavy Rain Closes Roads in 4 Counties in Northwestern Wisconsin* (July 12, 2016, 1:57 PM), <http://www.wsaw.com/content/news/Heavy-rain-closes-roads-in-4-counties-in-northwestern-Wis-386512611.html>; WSAW-TV, *Severe Storms Wash Out Northern Wisconsin Roads* (July 12, 2016, 5:30 PM), <http://www.wsaw.com/content/news/Severe-storms-wash-out-northern-Wisconsin-roads-386496151.html>; WSAW-TV, *Some Roads Still Impassible Due to Flooding* (July 14, 2016, 5:17 PM), <http://www.wsaw.com/content/news/-Some-roads-still-impassible-due-to-flooding-386873781.html>; WSAW-TV, *Gov. Walker Seeks Federal Flood Damage Assessment* (July 18, 2016, 6:13 PM), <http://www.wsaw.com/content/news/Gov-Walker-seeks-federal-flood-damage-assessment-387283681.html>; WSAW-TV, *Gov. Walker Seeks Federal Flood Damage Assessment* (July 19, 2016, 9:30 AM),

In addition, since WSAW-TV and the Orphan Counties are both located in Wisconsin's 7th United States Congressional District, WSAW-TV's political coverage of local and national politics is directly relevant to voters in the Orphan Counties.⁴³ WSAW-TV has, for example, closely covered Congressional Representative Sean Duffy's many public discussions on the 2016 Presidential election.⁴⁴ All of this is news – particularly the political news – that the out-of-state stations in the Duluth DMA are unlikely to cover at all, let alone in any depth.

In addition to its news stories covering the Orphan Counties, WSAW-TV routinely airs local weather forecasts, alerts, and warnings concerning Ashland and Iron Counties.⁴⁵ The Orphan Counties are included on local and regional weather maps used in daily weather reports during the station's newscasts. Since the beginning of 2014, WSAW-TV has aired alerts for severe weather events impacting the Orphan Counties, including severe thunderstorm, flood, and blizzard warnings, and many more for lesser weather events like heat and frost advisories.⁴⁶

WSAW-TV's coverage of news, weather, and sports in the Orphan Counties – despite the fact that those areas currently are outside the station's DMA – demonstrates WSAW-TV's commitment to providing strong and consistent local service to the Orphan Counties. If the Orphan Counties are added to WSAW-TV's local satellite market, its focus on serving viewers

<http://www.wsaw.com/content/news/Gov-Walker-seeks-federal-flood-damage-assessment-387462611.html>; WSAW-TV, *Sheriffs Officials: 2 People Have Died in Wisconsin Floods* (July 13, 2016, 9:42 AM), <http://www.wsaw.com/content/news/Sheriffs-officials-2-people-have-died-in-Wisconsin-floods-386636351.html>.

⁴³ See Exhibit I (Wisconsin 7th District Congressional District Map).

⁴⁴ See Exhibit H.

⁴⁵ See, e.g. Exhibit J (examples of weather alerts and stories covering the Orphan Counties).

⁴⁶ See *id.*

there undoubtedly would increase. This commitment entirely satisfies the local service prong of the Commission's market modification test.⁴⁷

C. The Requested Market Modification Will Promote Access To In-State Local Programming.

The third statutory factor that the FCC considers was introduced by STELA and considers whether grant of the requested market modification will enhance viewers' access to in-state local programming.⁴⁸ As described above, Ashland and Iron Counties are quintessential orphan counties, lacking access to almost all of the local television programming produced by television stations licensed to Wisconsin communities. The only Wisconsin station in the Duluth DMA is licensed to a small Wisconsin city (Superior) that is essentially a suburb of Duluth, which is located just four miles away. Adding the Orphan Counties to WSAW-TV's market will dramatically increase the amount of locally-produced programming available to citizens of the Orphan Counties.

⁴⁷ As part of the second statutory market modification factor, the FCC typically examines the distance between the station and the relevant communities compared to other stations in those communities DMA. *See, e.g.*, Time Warner Entertainment-Advance/Newhouse Partnership, 22 FCC Rcd 13642 ¶ 9 (Med. Bur. 2007) (denying market modification petition to exclude communities between 93 and 106 miles away from station transmitter). In this case, that metric for measuring local service is of limited utility because no stations in either the Duluth or Wausau DMAs share a close proximity to either of the Orphan Counties. *See* Exhibit K (Comparison of Driving Distances Between Select Ashland and Iron Counties, WSAW-TV, and Stations in Duluth DMA). WSAW-TV's transmitter site is located approximately 107.7 miles from the center of Ashland County and 95 miles from the center of Iron County. Duluth stations, on the other hand, are located as far away as 151 miles from the center of Ashland County, and an average of 93 miles distant from that location. Similarly, Duluth DMA stations are located as much as 172.4 miles from the center of Iron County and an average of 116.6 miles from Iron County's center. Looking at individual communities in the Orphan Counties does not change the analysis. Hurley, the county seat in the northeast section of Iron County is about the same distance from Duluth as it is from Wausau. *See id.* But many other Iron County communities, like Mercer, are substantially closer to Wausau than they are to Duluth. In this case, WSAW-TV and the stations in the Duluth DMA are practically equidistant from the Orphan Counties, indicating that the FCC should rely on the other factors in Congress's test, each of which decisively supports Gray's request in this case.

⁴⁸ *See* 47 U.S.C. § 338(l)(2)(B)(iii).

Every viewer should receive local news from a diverse set of television stations, and the requested market modification would triple the number of Wisconsin-licensed television stations available to viewers in the orphan Counties. Adding the local, Wisconsin-centric CBS and FOX program streams on WSAW-TV to the Orphan Counties' local market will further this important policy that Congress codified in STELAR.

D. The Orphan Counties Receive Limited, If Any, Local Programming from Stations Other Than WSAW-TV.

The fourth statutory market modification factor asks whether other television stations also provide local service to the cable communities at issue.⁴⁹ In this case, viewers in the Orphan Counties have the unfortunate experience of being located on the fringes of Duluth DMA and too far from other regional cities to receive significant coverage of local issues there. As noted above, WSAW-TV provides some service, but it is unaware that any other station does as much or more.

Even if some other station did provide some local service, however, this factor would not weigh heavily in this case. The Commission has held repeatedly that such other service is irrelevant when a broadcaster is seeking to add communities to its DMA. As the Bureau has explained, "Congress did not intend this criterion to bar a station's DMA modification claim, but instead [this factor] was intended to enhance its claim where it could be shown that other stations do not serve the communities at issue."⁵⁰ Likewise, in this case the fourth statutory factor does not detract from WSAW-TV's showing that it provides local service to the Orphan Counties in satisfaction of the Commission's market modification criteria.

⁴⁹ See 47 U.S.C. § 338(1)(2)(B)(iv).

⁵⁰ See, e.g., *Seal Rock Broadcasters, LLC*, 12 FCC Rcd 16262, ¶ 9 (MB 2003).

E. WSAW-TV's Ratings in the Orphan Counties Demonstrate Significant Viewership.

The fifth statutory factor concerns evidence of viewing patterns in households that subscribe to multichannel video services and those that do not.⁵¹ This factor requires non-specialty stations like WSAW-TV to demonstrate that they achieve at least “moderate” viewership in the subject cable communities,⁵² which the Commission has generally found to be satisfied by stations demonstrating a measurable viewing audience.⁵³

WSAW-TV achieves more than sufficient viewership in the Orphan Counties to satisfy the FCC's ratings criteria. WSAW-TV purchased from Nielsen a report illustrating the station's ratings in the Orphan Counties for the period beginning with the February 2015 sweeps period and ending with the recent July 2016 sweeps period.⁵⁴ While Nielsen's data has some limitations due to the small number of diaries in these unmetered areas, the data Nielsen compiled shows that WSAW-TV has a measurable audience in both Ashland and Iron Counties.

Over the entire period, for Ashland County WSAW-TV has averaged a 1 percent share in cable households and a 0.5 percent share in all households and an average cumulative audience reach of 2.9 percent among all households, with a five percent cume in MVPD households and a 1.6 percent cume in non-MVPD households.⁵⁵ During the period, WSAW-TV's share of the

⁵¹ See 47 U.S.C. § 338(1)(2)(B)(iv).

⁵² See *Ackerley Media Group*, 18 FCC Rcd 16199 ¶ 10 (Med. Bur. 2003) (citing *KSBW License, Inc.*, 11 FCC Rcd 2368, 2371 (Cab. Serv. Bur. 1996)).

⁵³ See, e.g., *Commonwealth Broadcasting Group, Inc.*, 25 FCC Rcd 213 n. 103 (Med. Bur. 2010) (finding sufficient viewership where station demonstrated ratings shares and weekly cumulative ratings of 0/7, 1/34 and 1/25 in the relevant counties); *Ackerley*, 18 FCC Rcd 16199 ¶¶ 6, 11 (finding moderate viewership based on a showing of ratings share between two and three percent).

⁵⁴ See Exhibit L (Summary of Nielsen Ratings for WSAW-TV in Ashland and Iron Counties). Nielsen's ratings were compiled for the 7 AM – 1 AM daypart, Monday-Sunday.

⁵⁵ See *id.*

Ashland County audience reached a high of 4 percent of cable households and 3 percent of all households in the July 2015 sweeps period. During that period, WSAW-TV achieved a cumulative audience reach of well over 5 percent for all households in Ashland County and a nearly fifteen percent cume in cable households there.⁵⁶ These ratings are well in line with those the FCC has deemed adequate viewership in previous market modification cases.

In Iron County, WSAW-TV's ratings are even higher. Averaged over all sweeps periods since the beginning of 2015, WSAW-TV has achieved a share of 2 percent in all households, and almost 3 percent in non-cable households, with an average cumulative audience reach of more than 13 percent.⁵⁷ This includes an average cume of 17 percent of non-MVPD households, and a cume of over 4 percent in cable households. In the May 2016 sweeps, WSAW-TV's Iron County ratings reached a sample-period peak of nearly 4 percent of all viewing households and almost 7 percent of non-cable households.⁵⁸ During that month, WSAW-TV drew a cumulative audience share more than 37 percent of non-MVPD households and more than 25 percent for all households.⁵⁹ Again, WSAW-TV's Iron County ratings are more than sufficient to satisfy this prong of the market modification test.

The ratings WSAW-TV achieves are particularly significant because today the station is unavailable from either DirecTV or DISH, which collectively control approximately 42 percent of the households in the Duluth-Superior DMA where the Orphan Counties are located.⁶⁰ That means WSAW-TV's ratings have been achieved despite the fact that more than 40 percent of the

⁵⁶ *See id.*

⁵⁷ *See id.* These ratings were achieved despite the fact that in several sweeps periods, Nielsen lacked sufficient diaries to determine ratings for either or both stations.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *See* SNL, Duluth, MN-Superior, WI (Current DMA Rank: 135) Video Subscribers, <https://www.snل.com/InteractiveX/BriefingBook/TvMarket/VideoSubscribers.aspx?id=137>.

market cannot receive the station's signal from their preferred video provider. Clearly, viewers in the Orphan Counties are watching WSAW-TV where and when they can receive it. As Gray's showing with respect to the other statutory factors, WSAW-TV's demonstrated viewership in the Orphan Counties illustrates why the FCC should reassign Ashland and Iron Counties to the local satellite carriage market for WSAW-TV.

IV. THE FCC SHOULD NOT LET UNSUBSTANTIATED CLAIMS OF TECHNICAL INFEASIBILITY STAND IN THE WAY OF PROVIDING LOCAL SERVICE TO THE ORPHAN COUNTIES.

In accordance with the procedures the FCC established by the FCC for satellite market modifications, Gray provided both DISH and DirecTV notice of Gray's intention to seek the instant market modification and a request that each company provide an initial feasibility determination.⁶¹ Both DIRECTV and DISH Network ("DISH") provided brief responses to these inquiries, each claiming technical and/or economic infeasibility with respect to some or all of Gray's request.⁶² While the FCC permitted satellite providers to assert technical or economic infeasibility, it also required that DBS carriers "must explain in detail the basis for such infeasibility."⁶³ For the reasons stated below, the technical and economic infeasibility arguments raised by DIRECTV and DISH are woefully inadequate and the FCC should reject them.

⁶¹ See *STELAR Order*, 30 FCC Rcd. at ¶ 47. See also Exhibit M (Letter from Jason E. Rademacher, Counsel for Gray, to Stanton Dodge, Executive Vice President and General Counsel, DISH Network, dated July 6, 2016); Exhibit N (Letter from Jason E. Rademacher, Counsel to Gray, to Linda Burakoff, Vice President, Content & Programming, Executive Vice President and General Counsel, DISH Network, dated July 6, 2016).

⁶² See Exhibit O (Letter from Alison Minea, Director & Senior Counsel, Regulatory Affairs, DISH to Jason E. Rademacher, Counsel for Gray, dated Aug. 19, 2016); Exhibit P (Letter from DirecTV to Jason E. Rademacher, counsel for Gray, dated Aug. 11, 2016).

⁶³ See *STELAR Order*, 30 FCC Rcd at 10440.

A. DIRECTV

In its response, DIRECTV concedes that it is technically feasible to provide WSAW-TV's signal to viewers in Iron County and four of the eleven Zip Codes covering Ashland County.⁶⁴ DIRECTV claims, however, that in the other seven Ashland County Zip Codes, it is unable to provide service.⁶⁵ But DIRECTV shares practically no information about how it arrived at its determination that it cannot provide service to those areas of Ashland County. On its face, DIRECTV's claim is implausible. At least geographically, there is no rhyme or reason to which Ashland County Zip Codes DIRECTV claims are serviceable and which are not. For example, DirecTV asserts that Zip Codes 54806, 54855, and 54846 are not serviceable, but makes no such claim with respect to Zip Code 54559, a salient of which is surrounded on three sides by the allegedly unservable Zip Codes. Surely such an unusual distribution of DIRECTV's spot beams deserves some explanation, but DIRECTV provides none.

The limited justification that DIRECTV does provide for the claimed technical infeasibility of carrying WSAW-TV in portions of Ashland County is practically impossible to evaluate. DIRECTV's feasibility determination relies on signal availability standards that apparently are entirely of DIRECTV's creation and are just as entirely undisclosed.⁶⁶ This falls far short of the detailed explanation that the FCC expected of satellite carriers, and the FCC should reject DIRECTV's unexplained findings and give them no weight in its market modification determination.

⁶⁴ See Exhibit P. DIRECTV claims that it cannot provide service to Zip Codes 5417, 54806, 54846, 54850, 54855, 54856, and 54861. That leaves Ashland County Zip Codes 54546, 54527, 54514, and 54559 where DirecTV apparently can provide service. See Exhibit Q (Zip Code map of Ashland County).

⁶⁵ See *id.*

⁶⁶ See *id.*

B. DISH Network

DISH claims that carriage of WSAW-TV is technically infeasible in the entirety of both of the Orphan Counties.⁶⁷ But DISH's proffered justifications for its assertions of technical and economic infeasibility are no more well-founded or persuasive than DirecTV's. First, although DISH claims that adding WSAW-TV is technically infeasible, it offers no support for that assertion. Instead, DISH concedes that its spot beams cover the Orphan Counties and that customers with properly oriented antennas could receive WSAW-TV's signal.⁶⁸ DISH's objection is that providing WSAW-TV to viewers in the Orphan Counties would be very expensive for DISH because DISH would have to help its customers reorient their antennas to receive the signal.⁶⁹ DISH does not define the cost of the necessary changes to implement a market modification order in this case or provide any evidence of those alleged costs.

DISH's unsubstantiated claims should not be sufficient to deprive orphan County viewers of local programming, and accepting DISH's argument would be inconsistent with FCC precedent. The FCC always has set a very high bar for showings of the economic infeasibility of complying with the agency's rules.⁷⁰ This is because large companies like DISH should not be permitted to stand in the way of improved service to everyday Americans merely because the change will create a short-run expense.⁷¹ DISH has demonstrated only that offering the Orphan

⁶⁷ See Exhibit O.

⁶⁸ See *id.*

⁶⁹ See *id.*

⁷⁰ See, e.g., WUPW broadcasting, LLC, *Memorandum Opinion and Order*, 25 FCC Rcd 2678, 2690-91 (2010) (rejecting technical infeasibility claim based on unsubstantiated "laundry list of costs" absent specific evidence for such costs).

⁷¹ See, e.g., Chicago Newsweb Corporation/WNDZ, Inc., *Letter*, 24 FCC Rcd 10852 (MB 2009) (showing that will not enhance the public interest but is intended to principally benefit an FCC licensee financially does not amount to technical infeasibility); Radio Redentor, Inc., *Letter*, 14

Counties appropriate local programming may lead to some unspecified costs to DISH. DISH's inconvenience is no excuse for failing to expand the Orphan County viewers' access to Wisconsin-centric programming as Congress intended. This showing simply fails to demonstrate technical infeasibility and should be rejected.

V. CONCLUSION

For the foregoing reasons, Gray requests that the FCC modify WSAW-TV's television market for satellite carriage for DIRECTV and DISH Network to include Iron and Ashland Counties.

Respectfully submitted,

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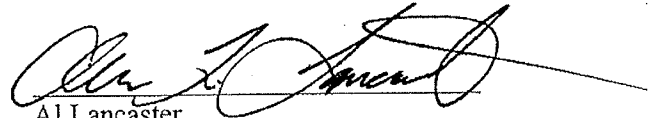
Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

In the Matter of)
) MB Docket No. 12- _____
Gray Television Licensee, LLC)
) CSR No. _____
For Modification of the Television Market)
For WSAW-TV, Wausau, Wisconsin)
Facility Identification Number 6867)

DECLARATION OF AL LANCASTER

1. My name is Al Lancaster and I am Vice President and General Manager of WSAW-TV for Gray Television Licensee, LLC ("Gray").
2. I have read the foregoing "Petition for Special Relief" (the "Petition") and I am familiar with the contents thereof.
3. The facts contained herein and within the foregoing Petition are true and correct to the best of my knowledge, information, and belief formed after reasonable inquiry, that the Reply is well grounded in fact, that it is warranted by existing law or a good-faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose.
4. I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 7, 2016



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