

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

In the Matter of:	)	
	)	
Montezuma County, Colorado,	)	MB Docket No. 20-98
Board of Commissioners	)	CSR 8988-A
	)	
For Modification of the Satellite Television Market	)	
of Station KUSA, Denver, Colorado	)	

**ORDER**

**Adopted: May 18, 2020**

**Released: May 18, 2020**

By the Senior Deputy Chief, Policy Division, Media Bureau:

**I. INTRODUCTION**

1. The Montezuma County, Colorado, Board of Commissioners (Montezuma or Petitioner) filed the above-captioned Petition seeking to modify the satellite television market of KUSA, Colorado (KUSA or Station) to include Montezuma County (County) in Southwest Colorado with respect to satellite television provider DISH Network (DISH).<sup>1</sup> The Petitioner states that the County is assigned to the Albuquerque, New Mexico designated market area (DMA).<sup>2</sup> The Petitioner asserts that the County is an “orphan county” due to its assignment to an out-of-state DMA, and is deprived of the ability to receive from a satellite carrier its preferred in-state television broadcast stations.<sup>3</sup> Montezuma’s Petition includes very limited evidence supporting its request. In light of Commission precedent directing petitioners to strictly adhere to the evidentiary requirements of the market modification rules,<sup>4</sup> the Bureau must dismiss

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<sup>1</sup> *Montezuma County, Colorado, Board of Commissioners for Modification of the Television Market of KUSA (NBC), Channel 9, with respect to DISH Network*, Petition for Special Relief, MB Docket No. 20-98 (*Petition*). The Media Bureau placed the Petition on Public Notice, Report No. 0491 (MB Apr. 10, 2020) (*Public Notice*). KOB-TV LLC, licensee of KOB-TV, Albuquerque, New Mexico (KOB) filed a Limited Opposition to the Petition (Limited Opposition). KOB’s Limited Opposition was late-filed by one day “due to an error by legal counsel, in part based on disruptions caused by the COVID-19 epidemic.” *Limited Opposition* at n.1. We accept KOB’s Limited Opposition due to these reasons and for the purpose of amassing a complete record in this case. KOB, along with being the licensee of NBC affiliate KOB-TV, is also the licensee of full-power satellite television stations KOB(TV), Farmington, New Mexico and KOBR(TV), Roswell, New Mexico, along with many TV translator stations broadcasting in, and licensed to, communities in southwest Colorado, such as Cortez and Durango, Colorado. *Id.* at 1. DISH filed a Response to the Limited Opposition (DISH Response) (objecting to a portion of KOB’s Limited Opposition regarding its ability to blackout some of KUSA’s programming).

<sup>2</sup> *Petition* at 1. The Station is licensed in the Denver, Colorado DMA, which is in the same state as the County. *Id.* at 3.

<sup>3</sup> *Id.*; see *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, 10408, para. 3 (2015) (*STELAR Market Modification Report and Order*).

<sup>4</sup> *La Plata County, Colorado Petitions for Modification of the Satellite Television Markets of KDVR-TV, KCNC-TV, KMGH-TV, and KUSA-TV, Denver, Colorado*, MB Docket Nos. 16-366, 16-367, 16-368, and 16-369, Memorandum

the Petition without prejudice.<sup>5</sup>

## II. BACKGROUND

2. Market modification provides a means for the Commission to expand or contract the local television market of a commercial television broadcast station. Broadcasters and pay TV providers, and in satellite market modification cases county governments, may request changes to the boundaries of a particular commercial broadcast television station's local television market to include a new community or communities in the same or an adjacent DMA. A television station may be carried by a cable operator or satellite carrier in such a new community if the station is shown to have a local relationship to that community based on an analysis that includes five statutory factors.<sup>6</sup> The Commission requires that any market modification petition include specific evidence describing the station's relationship to the community at issue.<sup>7</sup> Market modification petitions that do not include the required evidence will be

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Opinion and Order, 34 FCC Rcd 5030, 5038, para. 16 (2019) (*La Plata*); *see also infra* para. 3 (discussing the *La Plata* decision).

<sup>5</sup> As noted below, Montezuma may refile its petition along with the necessary additional evidence as described below. *See infra*, para. 11.

<sup>6</sup> The five statutory factors are:

- (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.

47 U.S.C. § 534(h)(1)(C)(ii)(I)-(V).

<sup>7</sup> The Commission's 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,

dismissed without prejudice and may be refiled with additional supporting evidence.<sup>8</sup>

3. In *La Plata*, the Commission affirmed the Bureau's decision, made on delegated authority, to grant a group of related market modification petitions.<sup>9</sup> The Commission found that the Bureau had erred, however, in waiving the evidentiary requirements of section 76.59 of the rules.<sup>10</sup> The Commission's rules direct that petitions failing to make a complete evidentiary showing "shall be dismissed without prejudice."<sup>11</sup> The Commission stated an expectation in *La Plata* that "future petitioners seeking modification of a station's market . . . [would] adhere to the requirements of section 76.59."<sup>12</sup> It therefore directed the Bureau to "dismiss without prejudice" petitions that did not include all evidence required by the Commission's rules, unless the Petition demonstrates that a good faith effort was made to obtain that evidence in order to justify a waiver of the dismissal requirement.<sup>13</sup> The decision does note that the Bureau should apply this approach "only to petitions filed after [*La Plata's*] release date."<sup>14</sup> In the instant Petition, filed after the release of *La Plata*, Montezuma provides evidence that is fully responsive to only two of the seven evidentiary requirements in our rules.

4. The Petitioner argues that because of its status as an orphan county, consumers in the County have been unable to receive from a satellite carrier important news from their state capitol, and have been unable to receive any direct information from Colorado's Governor "regarding statewide and citizen directives concerning the COVID-19 pandemic."<sup>15</sup> Further, in light of the upcoming Presidential election, the Petitioner contends that "constituents in the County have an interest in seeing their own state officials and news regarding state political campaigns" on satellite television.<sup>16</sup> Additionally, the Petitioner asserts that Colorado sports fans in the County have had fewer opportunities to enjoy sporting events, including Denver Bronco football games.<sup>17</sup> The Petitioner maintains that its market modification request satisfies the third statutory factor by delivering an in-state NBC-affiliated local broadcast station from the state capital of Denver to consumers who have historically been unable to receive it from a

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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.

47 CFR § 76.59(b)(1)-(7) (governing both cable and satellite market modification petitions).

<sup>8</sup> *Id.* § 76.59(c).

<sup>9</sup> *La Plata*, 34 FCC Rcd at 5030, para. 1.

<sup>10</sup> *Id.* at 5037, paras. 13-14.

<sup>11</sup> 47 CFR § 76.59(c).

<sup>12</sup> *La Plata*, 34 FCC Rcd at 5038, para. 16.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Petition* at 1.

<sup>16</sup> *Id.* at 4.

<sup>17</sup> *Id.* at 1.

satellite carrier.<sup>18</sup>

5. In its Limited Opposition, KOB states that it provides local programming for southwest Colorado, including to and for Montezuma County, along with other northern areas of its DMA.<sup>19</sup> KOB argues that its “long-time dedication to local programming to southwest Colorado would be jeopardized by the importation of the Denver NBC service to Montezuma County,” while residents there would not be the beneficiaries of any additional Denver Broncos football games.<sup>20</sup> Accordingly, KOB opposes “importation of the entire signal of KUSA,” the Denver NBC affiliate,<sup>21</sup> which it argues is a second identical channel of NBC network programming.<sup>22</sup>

### III. DISCUSSION

6. We find that the evidence submitted by Montezuma does not adhere to the evidentiary standards established in the Commission’s rules. Nor does the County seek any necessary waivers or demonstrate that it made a good faith effort to obtain the missing evidence. Montezuma must address these deficiencies in order for the Commission to fully conduct its analysis.

7. While we recognize the importance of consumers receiving local broadcast news from their state, particularly in light of the COVID-19 health crisis, even these unusual circumstances do not justify an action that is contrary to Commission directives, especially in light of the fact that the effects of granting this Petition will extend well beyond this crisis. We individually address each of Montezuma’s evidentiary deficiencies in the Petition below.

8. Montezuma does not provide evidence to satisfy five of the seven evidentiary requirements. The Petitioner provides two Exhibits containing maps in an effort to address our evidentiary requirements under section 76.59(b)(1)-(2) of our rules.<sup>23</sup> With respect to the first evidentiary standard, 76.59(b)(1), the Petitioner provides a map indicating the approximate highway distance between the County and KUSA’s main transmitter site near Lookout Mountain in Golden, Colorado.<sup>24</sup>

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<sup>18</sup> *Id.* at 3.

<sup>19</sup> *Limited Opposition* at 1.

<sup>20</sup> *Id.* at 2.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 4. KOB states that it “would not object to the importation of the local (not national) news broadcasts of KUSA, including special coverage of Colorado news, such as statements of the Governor into Montezuma County.” *Id.* at n.5. Further, KOB states that “DISH has the technical ability to do this, or otherwise blackout all KUSA programming which duplicates KOB programming.” *Id.* DISH responds that its “satellite broadcast system is generally not configured to blackout specific time slots for local broadcast channels [and] DISH customers do not want to receive channels that show a black screen for most of the day.” *DISH Response* at 2. DISH further asserts that, among other things, the market modification process is designed “[t]o extend the areas in which a local broadcast station may be carried in its entirety, not to compel a satellite carrier to provide a modified version of a channel to certain counties.” *Id.* As discussed herein, in light of our decision to dismiss Montezuma’s market modification Petition at this time, we need not address the merits of KOB’s Limited Opposition or the DISH Response.

<sup>23</sup> 47 CFR § 76.59(b)(1)-(2). *Petition* at Exhibits A and B.

<sup>24</sup> *Id.* at 5. According to the Petitioner, the map shows that the County is “roughly 400 miles away by car” from KUSA’s main transmitter site in the Denver DMA. *Id.* This submission appears to be the result of an online search for directions and it indicates that there it is “a 6 hour and 51 minute (378 mile)” drive from Golden, Colorado to Montezuma County.

This addresses only one component of section 76.59(b)(1), however, and fails to “illustrat[e] the relevant . . . evidence contributing to the scope of the market” as required by the rule. With respect to the second evidentiary standard, section 76.59(b)(2), the Petitioner provides “a map illustrating the location of the County and indicating KUSA’s coverage area based on over-the-air signal strength.”<sup>25</sup> This map, however, does not specifically identify the station’s noise-limited service contour delineating the station’s technical service area. Nor does it show the location of satellite carrier local receive facilities and communities in relation to the service areas as required by section 76.59(b)(2).<sup>26</sup> With respect to the third evidentiary standard, section 76.59(b)(3), Montezuma argues that data about shopping and labor patterns in the local market “should not impact” review of the Petition, given that the County “is several hundred miles and approximately 7 hours by car away from KUSA’s transmitter site.”<sup>27</sup> This suggests, according to Montezuma, “that residents of the County likely do not regularly commute to the Denver area for work or conduct daily shopping errands in that area.”<sup>28</sup>

9. With respect to the fifth evidentiary standard, section 76.59(b)(5) of our rules, which requires cable system or satellite carrier channel line-up cards or other exhibits establishing historic carriage, such as television guide listings, the Petitioner submits that there has not been historic carriage by satellite carriers, and therefore “no evidence is being submitted for this element with respect to satellite.”<sup>29</sup> The Petition does not address the possibility of historic *cable* carriage as required by our rules. With respect to the sixth evidentiary standard, section 76.59(b)(6), Montezuma does not provide published audience data for the Station in the Communities.<sup>30</sup> The Petitioner states that “given the lack of historical carriage of the Station in the County, Nielsen rating[s] or other audience data would not be helpful in evaluating this Petition.”<sup>31</sup>

10. We note that Montezuma does provide sufficient evidence to satisfy the television station programming requirements of the fourth evidentiary standard, section 76.59(b)(4).<sup>32</sup> In this regard, it submits an Exhibit with the “programming lineup for KUSA, which shows the Station broadcasts a local news program with Colorado news, sports and weather several times a day, with “DENVER 9 KUSA NEWS” airing at 5:30 am, 6:00 am, 12:00 pm, 4:00 pm, 5:00 pm, 6:00 pm, and 10:00 pm local time.”<sup>33</sup> With respect to the seventh evidentiary standard, section 76.59(b)(7), the Petition does identify the community of license of KUSA as being in the same state as the county.<sup>34</sup>

11. As our rules state and as the Commission has recently affirmed, Petitions for special relief to modify television markets that do not include all of the evidence specifically required by our

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<sup>25</sup> *Petition* at 5. The Exhibit B submission contains a “Contour Map” from TV Station Profile for KUSA, which appears to be based on a map obtained from the Station’s Online Public Inspection File.

<sup>26</sup> The note to 47 CFR § 76.59(b)(2) also states that “Service area maps using Longley-Rice (version 1.2.2) propagation curves may also be included to support a technical service exhibit.” *See* Note to Paragraph (b)(2).

<sup>27</sup> *Petition* at 5.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at Exhibit C (KUSA NBC 9 Channel Program Guide).

<sup>33</sup> *Id.* at 5.

<sup>34</sup> *Id.* at 1.

rules must be dismissed without prejudice, though they may be refiled at a later date. Moreover, parties may submit whatever additional evidence they deem appropriate and relevant with the new Petition when it is refiled. In view of the foregoing, we dismiss Montezuma's Petition without prejudice, and invite them to refile a petition that conforms to the guidance provided herein.<sup>35</sup>

#### IV. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED**, pursuant to section 338 of the Communications Act of 1934, as amended, 47 U.S.C. § 338, and section 76.59 of the Commission's rules, 47 C.F.R. § 76.59, that the captioned petition for special relief (MB Docket No. 20-98, CSR 8988-A) filed by Montezuma County, Colorado, Board of Commissioners **IS DISMISSED WITHOUT PREJUDICE**.

13. This action is taken pursuant to authority delegated by section 0.283, 47 C.F.R. § 0.283, of the Commission's rules.<sup>36</sup>

FEDERAL COMMUNICATIONS COMMISSION

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

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<sup>35</sup> Montezuma does provide a showing regarding the technical and economic feasibility of carriage of KUSA by DISH, but we decline to discuss the merits of this showing in light of our dismissal of the Petition on the grounds stated herein.

<sup>36</sup> 47 CFR § 0.283.