

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

In the Matter of	)	
	)	
Implementation of Section 203 of the	)	MB Docket No. 10-148
Satellite Television Extension and	)	
Localism Act of 2010 (STELA)	)	
	)	
Amendments to Section 340 of the	)	
Communications Act	)	

**REPLY COMMENTS OF THE
BROADCASTER ASSOCIATIONS**

NATIONAL ASSOCIATION OF BROADCASTERS

ABC TELEVISION AFFILIATES ASSOCIATION

CBS TELEVISION NETWORK AFFILIATES ASSOCIATION

FBC TELEVISION AFFILIATES ASSOCIATION

NBC TELEVISION AFFILIATES

August 27, 2010

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The National Association of Broadcasters, the ABC Television Affiliates Association, the CBS Television Network Affiliates Association, the FBC Television Affiliates Association, and the NBC Television Affiliates (collectively, the “Broadcaster Associations”)¹ hereby reply to comments submitted in response to the Notice of Proposed Rulemaking (“*Notice*”) released on July 23, 2010, in the above-captioned proceeding.

¹ The National Association of Broadcasters is a nonprofit trade association that advocates on behalf of free, local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the Courts. The ABC Television Affiliates Association is a nonprofit trade association representing television stations affiliated with the ABC Television Network. The CBS Television Network Affiliates Association is a nonprofit trade association representing television stations affiliated with the CBS Television Network. The FBC Television Affiliates Association is a nonprofit trade association representing television stations affiliated with the FOX Television Network. The NBC Television Affiliates is a nonprofit trade association representing television stations affiliated with the NBC Television network. Collectively, the four network affiliate trade associations represent approximately 750 television stations affiliated with the four major broadcast television networks.

I. Introduction and Summary

In their Comments,² the Broadcaster Associations observed that the principal congressional modification in STELA to the eligibility restrictions of Section 340's significantly viewed ("SV") provisions was to replace the requirement that a satellite carrier carry the "equivalent or entire bandwidth" of a local station with a requirement that the satellite carrier carry the signal of the local network station in a high definition ("HD") format, if available, as a condition precedent to importation in HD format of a distant SV station affiliated with the same network.

The Broadcaster Associations demonstrated that the *Notice's* tentative conclusion that Congress also deleted the requirement that a satellite carrier actually retransmit the signal of the local network affiliate as a condition precedent to importation of a distant SV signal affiliated with the same network was incorrect. To the contrary, the "same network affiliate" language of existing law is, in fact, retained by STELA, and, together with unamended Sections 340(b)(3) and 340(b)(4), the fundamental existing statutory structure in this respect remains the same. Nothing in STELA evinced a congressional intent to abandon the Act's basic and fundamental requirement that satellite carriage of a local network station is a pre-condition to importation of a distant SV station affiliated with the same network. To the contrary, Congress was plainly aware of the Commission's careful interpretation of these provisions in the Commission's *SHVERA Significantly Viewed Report and Order*,³ and STELA's enactment is a legislative confirmation of

² Comments of the Broadcaster Associations, MB Docket No. 10-148 (filed Aug. 17, 2010) ("Broadcaster Comments").

³ *Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004; Implementation of Section 340 of the Communications Act*, Report and Order, 20 FCC Rcd (continued . . .)

that interpretation. Proper application of the principles of statutory construction urged by DIRECTV demonstrates why STELA requires carriage of the specific local affiliate of the same network.

The Broadcaster Associations have also demonstrated that the HD format requirement applies if a local station's network-affiliated channel is a "multicast" channel, a position with which DIRECTV agrees. The word "signal," as used in amended Section 340(b)(2), encompasses *both* primary and multicast channels or streams within its ambit. DISH Network's argument to the contrary is inconsistent with the principle of statutory construction on which DISH relies and also ignores Congress's choice to use a general term, "signal," even though it, for sure, knew how to specify a particular term, "primary stream," had that been its intent—and, in fact, did so in other portions of STELA.

Combined with the HD format carriage requirement for both primary and multicast channels, Sections 340(b)(1) and 340(b)(2), as amended by STELA, require that a satellite carrier delivering a distant SV network station in a particular local market must (1) provide local-into-local service in the local market, (2) retransmit in SD format the local network station's signal, whether a primary or multicast channel, as a condition precedent to importation of an SV duplicating distant network signal, and (3) retransmit in HD format, if available, the local network station's signal, whether a primary or multicast channel, as a condition precedent to importation of an SV duplicating distant network signal in HD format.

With respect to the statutory exceptions to subscriber eligibility limitations in Sections 340(b)(3) and 340(b)(4), the Broadcaster Associations agreed in their Comments that

(continued . . .)

17278 (2005) ("*SHVERA Significantly Viewed Report and Order*").

the statutory exceptions should continue to apply as they have before. However, the Broadcaster Associations strenuously disagreed that the Commission's prior application of the exceptions is consistent with the Commission's new, revised, tentative interpretation of amended Sections 340(b)(1) and 340(b)(2), and that the Commission's new, tentative exceptions could be read to allow SV carriage in a local market if local-into-local satellite service is not yet offered by the satellite carrier in a subscriber's market. We demonstrated how these expansive re-interpretations of the unamended Sections 340(b)(3) and 340(b)(4) were without support in the statute and were inconsistent with the Commission's prior determination in the *SHVERA Significantly Viewed Report and Order*.

The Broadcaster Associations further demonstrated how STELA retains the SV compulsory license requirement that subscribers "receive" the local-into-local signals under 17 U.S.C. § 122(a)(1) as a condition precedent to statutory licensing; hence, local-into-local service must be provided in a market as a condition precedent to satellite importation of SV signals into that market. Both DIRECTV and DISH appear to agree with the Broadcaster Associations that SV carriage is not permitted in a local market if local-into-local service is not offered by the satellite carrier in that market.

Nothing in the comments filed by others in this proceeding provides a basis to deviate from the Broadcaster Associations' construction of the statute. In fact, the satellite carriers make it clear that their preferred interpretations of amended Section 340 are motivated by a desire to affect retransmission consent negotiations. There is no evidence of any kind in STELA's legislative history in support of the notion that Congress intended in STELA to give a competitive retransmission consent negotiating advantage to satellite carriers. Moreover, the Commission, just as it did earlier in the *SHVERA Significantly Viewed Report and Order*, should

reject DIRECTV's and DISH's invitation to interpret amended Section 340 on the basis of an unrelated policy matter—one for which there is already an open proceeding in MB Docket No. 10-71—particularly when well-established canons of statutory construction require the Commission to interpret amended Section 340 in the same way as the Commission has previously interpreted it, taking into account the new HD format requirement.

In addition, DISH has petitioned for a further rulemaking to (1) prohibit local stations from negotiating in retransmission consent agreements limitations or conditions on satellite carriage of SV stations and (2) amend the Commission's SV rules to automatically designate as "significantly viewed" in so-called out-of-market "orphan counties" certain in-state stations from "neighboring" markets.

Both of DISH's proposals should be summarily rejected. The Commission lacks the authority to adopt DISH's retransmission consent proposals, and DISH provides no evidence to support its claim either that consumers or the public interest suffer in the absence of its proposed rule. In fact, the Broadcaster Associations refute in the Commission's open proceeding in MB Docket No. 10-71 any basis for DISH's proposal for government interference in retransmission consent negotiations.

DISH's "orphan county" market modification proposal is a blatant attempt to obtain from the Commission through the back door that which Congress clearly considered and flatly rejected. Moreover, DISH's proposal is inconsistent with the statutory license in Section 122(a). And as a matter of policy DISH's market modification proposal would have significant adverse consequences for local broadcast service and local stations, particularly in small, rural markets, as well as reconfiguring local television markets in derogation both of natural viewing patterns and the economic foundation of local broadcast service.

II. STELA Amended Section 340 to Address a Technical Implementation Concern; STELA Otherwise Left Section 340 As Congress Enacted It and As the Commission Had Interpreted It

A. STELA Replaced SHVERA's "Equivalent or Entire Bandwidth" Requirement with an HD Format Requirement

The commenting parties appear to agree with the *Notice's* implementation of STELA's replacement of the "equivalent or entire bandwidth" requirement.⁴ This change, together with updating Section 340(b)(1) and (b)(2) to take account of the DTV transition, are the only substantive amendments Congress made to Section 340.

B. STELA Requires Carriage of Specific Local Affiliates of the Same Network

DIRECTV and DISH argue that STELA eliminated the requirement that a satellite carrier retransmit the signal of the local affiliate as a condition precedent to retransmission of the duplicating signal of an SV station. As the Broadcaster Associations pointed out in their Comments, application of fundamental principles of statutory construction confirm that Congress, in fact, re-enacted this carriage requirement.⁵

DIRECTV's own comments illustrate why DIRECTV's proposed interpretation is wrong. DIRECTV admits that reading the HD format requirement, Section 340(b)(2), on its face compels the conclusion that Congress did *not* eliminate the carriage requirement. DIRECTV states:

But the new "high definition format" language could be read as

⁴ See Broadcaster Comments at 5-7; DIRECTV Comments at 4; DISH Comments at 4.

⁵ See Broadcaster Comments at 7-14.

doing precisely the opposite. Read in isolation, it could mean that a satellite carrier must retransmit a particular local station's high definition feed as an absolute precondition of carrying a significantly viewed station's high definition feed.⁶

The fact is, there is nothing ambiguous about amended Section 340(b)(2). That provision's language "only if such carrier also retransmits," 47 U.S.C. § 340(b)(2), clearly requires carriage of the local affiliate "as an absolute precondition" of carrying the SV station. Congress could not have stated it with more precision.

DIRECTV suggests that, "[h]aving removed the 'same network service' requirement in one section, Congress surely did not intend to render that removal 'superfluous, void, or insignificant' in another section."⁷ But, as the Broadcaster Associations demonstrated in their Comments, Congress did *not* remove the "same network service" requirement.⁸ Amended Sections 340(b)(1) and (b)(2) maintain the same fundamental statutory structure as they did in SHVERA, updated only for the DTV transition and the replacement of the "equivalent or entire bandwidth" requirement with the HD format requirement. By "harmonizing" Sections 340(b)(1) and (b)(2), DIRECTV would have the Commission read out of the statute the very clear "same network affiliate" carriage requirement in Section 340(b)(2). *See U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 504 (1993) ("To equate laws 'enacted . . . for the purpose of regulating the business of insurance' with the 'business of insurance' itself, as petitioner urges us to do, would be to read words out of the statute. This we refuse to do."); *Senior Res. v. Jackson*, 412 F.3d

⁶ DIRECTV Comments at 4.

⁷ DIRECTV Comments at 5.

⁸ *See* Broadcaster Comments at 8-10.

112, 117-18 (D.C. Cir. 2005) (rejecting reading of statute that “would read the term ‘expressed’ out of the statute—a result contrary to the basic principles of statutory construction”). But DIRECTV’s reading, obviously, *would* render the carriage requirement “superfluous, void, or insignificant,” in violation of a “cardinal principle of statutory construction.”⁹

DIRECTV asserts that the Commission must read Sections 340(b)(1) and (b)(2) “in parallel”¹⁰ and reminds the Commission of the rule of construction that “[w]e do not . . . construe statutory phrases in isolation; we read statutes as a whole.”¹¹ We agree. DIRECTV, however, conveniently seems to have forgotten Sections 340(b)(3) and (b)(4). It is the provision as a whole—all of Sections 340(b)(1)-(4)—that must be read together. Sections 340(b)(3) and (b)(4), as well as Section 340(b)(2), all contain the “same network affiliate” language. DIRECTV would have the Commission read that requirement out of three of the four subparagraphs of the provision. The only cogent and sensible reading of the entirety of Section 340(b) is that Congress did not remove the “same network affiliate” language in STELA and that, instead, Congress re-enacted that requirement, as interpreted by the Commission following SHVERA.

This holistic interpretation is precisely the approach the Commission took in the *SHVERA Significantly Viewed Report and Order*. There the Commission construed Sections 340(b)(3)

⁹ DIRECTV Comments at 5 (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)).

¹⁰ DIRECTV Comments at 5. DIRECTV complains, however, that the Commission had, in fact, read the provisions “in parallel” in the *SHVERA Significantly Viewed Report and Order*. See DIRECTV Comments at 3 (“The Commission had (mistakenly, in our view) read the two sections in parallel . . .”).

¹¹ DIRECTV Comments at 6 (quoting *United States v. Morton*, 467 U.S. 822, 828 (1984)).

and (b)(4), in conjunction with Section 340(b)(1), to require satellite retransmission of the local station's signal as a condition precedent to satellite retransmission of the SV signal:

Section 340(b)(3) permits subscribers to receive a significantly viewed signal of an out-of-market network affiliate if there is no local affiliate of that network in the subscriber's local market. It states that the limitation in Section 340(b)(1) "shall not prohibit a retransmission under this section to a subscriber located in a local market in which there are no network stations *affiliated with the same television network* as the station whose signal is being retransmitted pursuant to this section." If Section 340(b)(1) only required receipt of any local-into-local service as a prerequisite to receiving significantly viewed signals, as opposed to receiving the local affiliate of the network with which the significantly viewed station is affiliated, there would be no need for Section 340(b)(3) to apply to Section 340(b)(1). Using similar contextual reasoning, we consider Section 340(b)(4), which provides authority for the network station in the local market in which the subscriber is located, and that is *affiliated with the same television network*, to grant station-specific waivers. If Section 340(b)(1) only required receipt of any local-into-local service as a prerequisite to receiving significantly viewed signals, there would be no reason for Congress to allow for waivers from specific network stations. Statutory requirements should be read to have meaning and not be superfluous. The best reading of subsection (b)(1), therefore, is to require subscriber receipt of the local station affiliated with the same network as the significantly viewed signal sought to be carried.¹²

Not only is this interpretation sound, fundamentally, as a matter of statutory construction, but if Congress had, in fact, intended to reverse the Commission's interpretation, it would have done so affirmatively—not passively. Congress maintained the "same network affiliate"

¹² *SHVERA Significantly Viewed Report and Order* at ¶ 71 (footnotes omitted) (citing *Zimmerman v. Cambridge Credit Counseling Corp.*, 409 F.3d 473, 476 (1st Cir. 2005), for the principle of statutory construction that "all words and provisions of statutes are intended to have meaning and are to be given effect, and no construction should be adopted which would render statutory words or phrases meaningless, redundant, or superfluous" and citing *Preston v. State*, 735 N.E.2d 330, 334 (Ind. App. 2000) for the proposition that "there is a strong presumption that the legislature did not enact a useless provision").

language in three of the four subparagraphs and never suggested in any way in the legislative history that it intended to overrule or reverse the Commission's five-year interpretation in this respect. *See National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) ("We will not infer a statutory repeal unless the later statute 'expressly contradict[s] the original act' or unless such a construction 'is absolutely necessary . . . in order that [the] words [of the later statute] shall have any meaning at all.'" (citations and quotation omitted)). Indeed, the fact that DIRECTV claims it brought two anomalous Commission interpretations of SHVERA to Congress's attention (the "equivalent or entire bandwidth" requirement and the "same network affiliate" requirement),¹³ but Congress only expressly dealt with one of the two (i.e., "equivalent or entire bandwidth" requirement), is unmistakable evidence that Congress *rejected* DIRECTV's assertion that the Commission's 2005 interpretation of the "same network affiliate" language was inconsistent with congressional intent.

**C. STELA's Eligibility Restrictions for Carriage of SV Stations
Apply Fully to Multicast Channels**

DIRECTV agrees with the Broadcaster Associations that the HD format requirement applies to multicast channels. As DIRECTV states, "once a satellite carrier carries a local network affiliate (primary or multicast) it must carry that affiliate in high-definition format in order to carry the corresponding significantly viewed signal in that format."¹⁴

DISH, however, disagrees and argues that because "Congress called out multicast

¹³ See DIRECTV Comments at 3 & n.2 (citing congressional testimony of Derek Chang).

¹⁴ DIRECTV Comments at 5. *See also id.* at 5 n.14 ("[W]e believe the statutory language requires that, if a satellite carrier offers the in-market multicast at all, it must do so in HD in order to deliver the significantly viewed station in HD." (emphasis omitted)).

streams specifically” in some changes in STELA but did not do so in Section 340, Congress did not intend the HD format requirement to apply to multicast channels.¹⁵ DISH claims that the rule of statutory construction which presumes that “Congress acts intentionally and purposefully in the disparate inclusion or exclusion” requires this interpretation of Section 340.¹⁶

DISH is mistaken. It is the very fact that Congress knew the distinction between the specific terms “primary stream” and “multicast stream,” on the one hand, and the general term “signal,” on the other hand, that confirms that Congress intended that the general term “signal” in Section 340(b)(2) applies to both types of streams. Had Congress intended for the HD format requirement to apply only to primary streams, it would have said so. Although this is not really an exclusion/inclusion construction issue, to the extent it is, it is the *exclusion* of the term “primary stream” from Section 340(b)(2) that is critical in this context. The correct reading is that the word “signal” should be read the same way in Section 340(b)(2) as it is in 17 U.S.C. § 119(d)(10)(A). *See, e.g., Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) (“A term appearing in several places in a statutory text is generally read the same way each time it appears.”). Moreover, as the Broadcaster Associations pointed out in their Comments, this interpretation is consistent with the Commission’s prior construction of the term in implementing SHVERA.¹⁷

In short, the HD format requirement applies to both primary and multicast streams.

¹⁵ DISH Comments at 6.

¹⁶ DISH Comments at 6 (quoting *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993)).

¹⁷ *See* Broadcaster Comments at 19-20.

D. STELA Does Not Permit Satellite Carriage of SV Stations in Markets Where Local-Into-Local Is Not Yet Offered

DISH agrees with the Broadcaster Associations that STELA requires that a satellite carrier offer local-into-local service in a television market as a condition precedent to importation of any SV signals. DISH states: “[T]he ground rule is that a satellite carrier must make some local service available in a local market in order to import an SV station. This means that, if the carrier does not offer any local stations, it may not import an SV station”¹⁸

DIRECTV appears to agree, stating “Section 340(b)(1) sets forth which subscribers are qualified to receive significantly viewed stations (those who receive local service)”¹⁹

It therefore appears the commenters are in agreement that STELA does not permit satellite carriage of SV stations in markets where local-into-local is not offered. The *Notice*’s suggestion that the exceptions in Sections 340(b)(3) and (b)(4) could permit that possibility should be rejected for the reasons set forth in detail in the Broadcaster Associations’ Comments.²⁰

III. STELA Did Not Amend Section 340 to Affect Retransmission Consent Negotiations

Both satellite carriers’ preferred interpretations of amended Section 340 are motivated by a desire to affect retransmission consent negotiations.²¹ STELA, however, evinces no

¹⁸ DISH Comments at 5.

¹⁹ DIRECTV Comments at 5.

²⁰ See Broadcaster Comments at 22-25.

²¹ See DIRECTV Comments at 4-5; DISH Comments at 7-8.

congressional intent to affect retransmission consent negotiations in the ways desired by the satellite carriers. The only, and very limited, portion of STELA dealing with retransmission consent is the amendment to Section 325 of the Communications Act extending for an additional five years the good faith negotiating requirement and the prohibition on exclusive retransmission consent carriage contracts.²² The fact that Congress made these very limited revisions extending long-standing retransmission consent policies in Section 202 of STELA, and then made only technical amendments to the SV provisions in Section 203 of STELA, is a strong indication that Congress did not intend to use STELA as a vehicle to make major revisions to retransmission consent through the back door of the SV provision as the satellite carriers suggest.

Moreover, when the Commission was adopting regulations to implement Section 340 as enacted by SHVERA, DIRECTV and DISH made essentially the same policy arguments to interpret Section 340 in such a way as to affect retransmission consent negotiations. The Commission rejected all “policy considerations to influence the interpretation of Section 340(b)(1) based on the impact of the interpretation on retransmission consent.”²³ Rather, the Commission concluded that, “[i]n light of our reading of the statutory requirements, it is not necessary to rely on these policy issues.”²⁴ That same approach should be followed here. Well-established canons of statutory construction require the Commission to interpret amended Section 340 in the same way as the Commission previously interpreted it, apart from the new HD

²² See STELA, § 202, Pub. L. No. 111-175, 124 Stat. 1218, 1245 (2010) (amending 47 U.S.C. § 325(b)(3)(C)).

²³ *SHVERA Significantly Viewed Report and Order* at ¶ 74.

²⁴ *SHVERA Significantly Viewed Report and Order* at ¶ 74.

format requirement. The Commission should reject DIRECTV's and DISH's invitation to interpret amended Section 340 on the basis of an unrelated policy matter, especially in view of the lack of any evidence of legislative intent to skew retransmission consent negotiations in favor of satellite carriers.

Furthermore, DISH's explicit recognition that retransmission consent issues are more suitably dealt with in a different rulemaking proceeding is tantamount to an acknowledgment by DISH that it is inappropriate to address those issues in this proceeding.²⁵ In fact, the Commission has an open proceeding on retransmission consent in MB Docket No. 10-71. That is the context in which retransmission consent policy issues should be addressed, not in a STELA implementation proceeding which is lacking in both statutory language and congressional intent to effectuate retransmission consent policy changes.

Nevertheless, DISH argues that the HD format requirement language "whenever such format is available from such station" must mean that Congress intended to affect retransmission consent rights because "available" means the station either elected must carry or granted retransmission consent and also provides a good quality signal.²⁶ This construction re-writes the statutory language, and it is inconsistent with STELA's usage of the term "available" in other provisions of the Act. For example, the "if local, no distant" principle, as implemented in both the Copyright Act and the Communications Act, prohibits the delivery of a distant network signal to a new subscriber if the satellite carrier "makes available" to that subscriber the local station affiliated with the same network pursuant to the statutory license under Section 122 of the

²⁵ See DISH Comments at 8-12.

²⁶ See DISH Comments at 7.

Copyright Act.²⁷ The use of the word “available” in this context clearly means that the satellite carrier is or could be *retransmitting* the relevant local signal. It does *not* mean that the subscriber must subscribe to the local-into-local package on the satellite carrier’s terms, only that such subscriber is ineligible for a duplicating distant network signal regardless of whether the subscriber subscribes to the local-into-local package. Similarly, new Section 342(e)(2)(A)(i), 47 U.S.C. § 342(e)(2)(A)(i), in the qualified satellite carrier certification provision, speaks in terms of the “availability level” of a satellite signal. The use of the word “availability” in this context also means that the satellite carrier is *retransmitting* the satellite signal in a manner to satisfy the “good quality satellite signal” requirements. It does not depend on the satellite carrier’s interaction with other parties or on whether any particular household can actually receive the satellite signal.

The word “available” in Section 340(b)(2), then, means in this context “whenever the television station is *transmitting* or *broadcasting* the relevant channel in HD format.” This use of “available” is consistent with its plain meaning. See AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 127 (3d ed. 1996) (defining “available” as “1. Present and ready for use; at hand; accessible . . . 2. Capable of being gotten; obtainable”). DISH’s interpretation would graft additional requirements onto the word that are inconsistent with its plain meaning and its use elsewhere in STELA. See, e.g., *Perrin v. United States*, 444 U.S. 37, 42 (1979) (“A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.”). Surely Congress would have either used a different term or at least indicated in legislative history that it intended an

²⁷ See 17 U.S.C. § 119(a)(3)(C)(i); 47 U.S.C. § 339(a)(2)(C)(i).

unorthodox meaning if that had been its intention. *See Lopez v. Gonzales*, 549 U.S. 47, 54-55 (2006) (“Congress can define an aggravated felony of illicit trafficking in an unexpected way. But Congress would need to tell us so, and there are good reasons to think it was doing no such thing here.”).

Finally, although we do not believe the Commission should address the retransmission consent policy arguments of the satellite carriers in this proceeding, if it did, the Commission should reject the satellite carriers’ proposed interpretation of amended Section 340. Both satellite carriers suggest that a local station would withhold retransmission consent just to prevent the satellite carrier from importing the distant SV signal into the local affiliate’s market.²⁸ The notion that a local station would preclude carriage by a satellite carrier of its own signal in its own local market just to “block” importation of a distant significantly viewed signal defies common and economic sense.

Just as importantly, the Broadcaster Associations have demonstrated that a condition precedent to delivery of a duplicating out-of-market SV station is that a subscriber “receive” the local affiliate.²⁹ The statute nowhere creates exceptions for failure of the local affiliate and the satellite carrier to reach a retransmission consent agreement or otherwise. An exception to the statute cannot be manufactured out of thin air. *See Chickasaw Nation v. United States*, 534 U.S. 84, 95 (2001) (noting well-settled rule against “interpreting federal statutes as providing tax exemptions unless those exemptions are clearly expressed”); *Midlantic Nat’l Bank v. New Jersey Dep’t of Env’tl. Prot.*, 474 U.S. 494, 501 (1986) (“If Congress wishes to grant the trustee an

²⁸ *See* DIRECTV Comments at 4, 5; DISH Comments at 7-8.

²⁹ *See* Broadcaster Comments at 7-14.

extraordinary exemption from nonbankruptcy law, ‘the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt.’”) (quoting *Swarts v. Hammer*, 194 U.S. 441, 444 (1904)). Congress sought to protect localism through this “receive” requirement and also to prevent satellite carriers from by-passing local stations or using the threat of delivery of out-of-market stations to extract more favorable retransmission consent terms. The “L” in STELA, after all, stands for “Localism.” It would be reversible error for the Commission to ascribe to the statute a meaning and result plainly at odds with the will of Congress. See, e.g., *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 376 (1986) (reversing FCC decision regarding telephone depreciation practices as contrary to language, structure, and legislative history of Communications Act and “admonish[ing]” Commission that “only Congress can rewrite this statute”).

In sum, the Commission should reject the satellite carriers’ entreaties to hijack this proceeding to augment their leverage in retransmission consent negotiations.

IV. DISH’s Request for a Further Rulemaking Should Be Summarily Denied

In addition to comments, DISH has petitioned for a further rulemaking to (1) prohibit local stations from negotiating in retransmission consent agreements limitations or conditions on satellite carriage of SV stations and (2) amend the Commission’s SV rules to automatically designate as “significantly viewed” in so-called out-of-market “orphan counties” certain in-state stations from “neighboring” markets. Both of DISH’s proposals should be summarily rejected. The Commission lacks the statutory authority to adopt its retransmission consent proposals, and DISH provides no evidence to support its claim either that consumers or the public interest suffer in the absence of its proposed rules.

DISH asserts that “STELA recognizes the fundamentally local nature of SV stations even more clearly and accurately than its predecessor.”³⁰ Not so. The House Judiciary Report, upon which DISH relies,³¹ clearly states the opposite:

Since *significantly viewed signals are by definition a subset of distant signals*, SHVERA included this provision in Section 119, the distant signal license. However, since significantly viewed signals do not incur royalties, the Committee believes it should be moved to Section 122, which governs all other royalty-free satellite transmissions under the compulsory license. The bill accordingly incorporates the significantly viewed provision, previously in Section 119(a)(3), into Section 122(a).³²

The satellite significantly viewed provisions have never been intended to enable MVPDs to favor out-of-market stations or to replace or discriminate against local stations.

DISH’s first proposal, to rewrite the good faith negotiating requirements and place the government’s thumb on the satellite carriers’ side of marketplace negotiations, should be rejected for several reasons. *First*, as noted above, the Commission already has an open proceeding on retransmission consent in MB Docket No. 10-71. There is no need for the Commission to open another proceeding, duplicate efforts, and give DISH and others more bites at the apple. If DISH did not raise these issues there, it had every opportunity to do so. Furthermore, as the Broadcaster Associations showed in that proceeding, (1) the private marketplace of retransmission consent rights promotes the public interest by supporting the free, over-the-air broadcast system; (2) DISH has failed to show there is any marketplace failure; (3) the

³⁰ DISH Comments at 8.

³¹ See DISH Comments at 9 (citing H.R. Rep. No. 111-319 (2009), at 4).

³² H.R. REP. NO. 111-319 (2009), at 10 (emphasis added).

Commission's complaint process provides a sufficient remedy were DISH to allege that a broadcaster had failed to negotiate in good faith concerning carriage of an SV station; and (4) DISH's proposed SV rule would effectively modify the program exclusivity rules which Congress just affirmed in STELA.³³ DISH's predicate for additional rulemakings is without merit and should be rejected.

Second, on the merits, DISH has provided no basis for adopting a proposal that would reverse long-standing Commission policy. DISH argues that it is a violation of the good faith bargaining obligations if a local station attempts to negotiate with a satellite carrier *not* to import SV signals into its local DMA.³⁴ While the Commission's *Good Faith Order* implementing the good faith bargaining obligations imposed by SHVIA does not specifically address the negotiating proposal about which DISH complains, it does address an analogous bargaining proposal with sound logic that should dispose of DISH's request here. In its *Good Faith Order*, the Commission found that it would be presumptively inconsistent with competitive marketplace considerations and the good faith negotiation requirement for a broadcast station to offer a proposal that "specifically foreclose[s] carriage of other programming services by the MVPD that *do not substantially duplicate the proposing broadcaster's programming*."³⁵ Inherent in the Commission's finding is that it is *not* inconsistent with competitive marketplace considerations

³³ See *generally* Reply Comments of the Broadcaster Associations, MB Docket No. 10-71 (filed June 3, 2010).

³⁴ See DISH Comments at 10-11.

³⁵ *Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, 15 FCC Rcd 5445 (2000) ("*Good Faith Order*"), at ¶ 58 (emphasis added).

and the good faith negotiation requirement for a local broadcast station to offer a proposal that forecloses carriage of other programming services by the MVPD that would substantially duplicate the local broadcast station's programming. Otherwise, the Commission would not have qualified its finding in the manner that it did. The Commission is well aware of the importance of program exclusivity to the economic viability of local broadcast stations:

Network nonduplication and syndicated exclusivity rights protect the exclusivity that broadcasters have acquired from their program suppliers, including their network partners, while retransmission consent allows broadcasters to control the redistribution of their signals. Both policies promote the continued availability of the over-the-air television system, a substantial government interest in Congress' view.³⁶

It is critical to local broadcast stations that they be permitted to negotiate at arm's length with MVPDs to protect the exclusivity of their programming from duplicating programming.

In addition, DISH's claim that an SV station cannot refuse to grant retransmission consent, even if required by the station's contractual obligations to its network and other program suppliers,³⁷ is directly contrary to the Communications Act and to long-established Commission precedent. Section 325(b)(6) of the Act expressly states that the retransmission consent right shall not be construed as affecting "video programming licensing agreements between broadcasting stations and video programmers."³⁸ Furthermore, in implementing the

³⁶ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues*, Memorandum Opinion and Order, 9 FCC Rcd 6723 (1994), at ¶ 114. See also generally *Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, 3 FCC Rcd 5299 (1988) ("Program Exclusivity Order").

³⁷ See DISH Comments at 11.

³⁸ 47 U.S.C. § 325(b)(6).

1992 Cable Act, the Commission recognized this principle and expressly concluded that retransmission consent rights “may be bargained away by broadcasters” to program suppliers³⁹:

[W]e interpret the statutory provision holding that existing or future licensing agreements are to be unaffected by retransmission consent means that programmers can negotiate such limitations with broadcast stations, separate and apart from any copyright arrangements.⁴⁰

For nearly twenty years, television stations and program suppliers have, accordingly, negotiated retransmission consent rights at arm’s length in private marketplace transactions. DISH would have the Commission upend thousands of private contracts for its own commercial advantage.

Moreover, there are significant elements of reciprocity in this context. *First*, satellite carriers are neither required to retransmit local commercial broadcast stations that substantially duplicate the programming of another local commercial broadcast station⁴¹ nor required to retransmit a distant broadcast station that is significantly viewed and that broadcasts programming that is duplicative of programming aired by a local broadcast station.⁴² Because the good faith negotiation requirement also applies to satellite carriers (and other MVPDs),⁴³ and satellite carriers are not legally required to retransmit duplicating signals (whether significantly

³⁹ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965 (1993), at ¶ 173.

⁴⁰ *Id.* at ¶ 174 (emphasis in original).

⁴¹ See 47 U.S.C. § 338(c)(1) (providing exception to general carry one, carry all local station carriage requirement by not requiring carriage of signal of local commercial broadcast station that substantially duplicates the signal of another local commercial broadcast station).

⁴² See 47 U.S.C. § 340(d)(1) (providing that carriage of significantly viewed signals is not mandatory).

⁴³ See 47 U.S.C. § 325(b)(3)(C)(iii).

viewed or otherwise), satellite carriers have no obligation to bargain in good faith with a broadcast station for carriage of a duplicating signal. Given this freedom, and in the interest of regulatory parity, there can be no restriction on a broadcast station bargaining to prevent importation of a duplicating SV signal whose carriage is not legally mandated.

Second, because satellite carriers are not legally required to export the signal of a commercial broadcast station out of its local DMA and into the areas in adjacent markets in which the station is significantly viewed, it is presumptively consistent with competitive marketplace considerations for a satellite carrier to refuse to export a station's signal in the context of a retransmission consent negotiation. Surely, then—and again in the interest of regulatory reciprocity and parity—local stations should not be prohibited from negotiating with satellite carriers to prevent the importation of a distant duplicating SV station into their local markets.

In short, it would be inappropriate for the Commission to intervene in the complex contractual negotiations entered into at arm's length by sophisticated private parties. Localism and the public interest would best be served by allowing local stations and MVPDs to determine the extent to which distant duplicating SV signals may be imported into a DMA or local duplicating signals exported outside a DMA into areas in which they are significantly viewed, subject only to the constraints of the copyright laws.

DISH's second proposal to open a new rulemaking proceeding—its “orphan county” proposal—is an obvious attempt to obtain from the Commission through the back door a “market modification” provision which Congress expressly considered and clearly rejected. Several individual Members of the Senate and House sought to amend STELA to alter television market

structures, including with respect to “orphan counties.”⁴⁴ None of these amendments was adopted by Congress. Instead, STELA included a provision requiring the Commission to prepare a *report* examining, *inter alia*, the extent to which consumers have access to in-state programming either over the air or via an MVPD.⁴⁵ The consideration, but ultimate rejection, of market modification proposals by Congress is indisputable proof that Congress did not intend for STELA to effectuate DISH’s market modification proposal. *See, e.g., Chickasaw Nation*, 534 U.S. 84, 93 (2001) (“We ordinarily will not assume that Congress intended ‘to enact statutory language that it has earlier discarded in favor of other language.’”) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 443 (1987)). Moreover, the directive to the Commission to examine access to in-state programming and to report to Congress is a clear indication by Congress that it does not intend for the Commission to address this issue in a rulemaking before Congress has an opportunity to consider the Commission’s report. *See American Bankers Ass’n v. SEC*, 804 F.2d 739, 750 (D.C. Cir. 1986) (holding that SEC had no authority to regulate banks as broker-dealers in part because “rather than authorize appropriate rulemaking if, in its expertise, the SEC concluded that banks should be subject to broker-dealer regulation, Congress directed the agency to report back to Congress ‘with *recommendations for legislation* as it deems advisable’”) (emphasis in original) (quoting 15 U.S.C. § 78k-1(e)).

⁴⁴ *See, e.g., Markup on “H.R. 2994, a Bill to Reauthorize the Satellite Home Viewer Extension and Reauthorization Act of 2004” Before the House Subcommittee on Communications, Technology, and the Internet, Committee on Energy and Commerce*, 111th Cong. (June 25, 2009) (transcript), at 29 l. 520 – 33 l. 624 (colloquy between Rep. Deal and Rep. Boucher discussing “orphan county” issue); Draft amendment to S. 2764 intended to be proposed by Sen. McCaskill (designated GRA09973); Committee amendment [staff working draft] to S. 2764 intended to be proposed by Sen. Udall (N.M.) (Nov. 17, 2009).

⁴⁵ *See STELA*, § 304, 124 Stat. 1218, 1256 (2010).

Moreover, even if the Commission could open a rulemaking and did adopt DISH's proposal, it would be of no effect. The statutory license governing significantly viewed signals in Section 122(a)(2) of the Copyright Act requires that the SV "signal has been determined by the Federal Communications Commission to be significantly viewed in such community, pursuant to the rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976, applicable to determining with respect to a cable system whether signals are significantly viewed in a community." 17 U.S.C. § 122(a)(2)(A). DISH's "automatically significantly viewed status" regime would be contrary to the Commission's SV status qualifications in effect on April 15, 1976, and satellite carriers would be prohibited from using the statutory license to retransmit such signals. In addition, Congress's reference in STELA, enacted in May 2010, to the Commission's 34 year-old rules plainly shows that Congress intends for that long-existing regime to remain in place.

Finally, notwithstanding the above insurmountable barriers to DISH's proposals, the proposals constitute bad public policy.

Television markets are based on actual, natural viewing patterns, which have evolved over many years, and they are intricately linked to copyright law. Those markets, in turn, are the basis for the complex and intrinsically interrelated contracts, network affiliation agreements, syndicated programming agreements, sports programming agreements, and music licensing agreements—all negotiated in the free market—that govern broadcast television programming production and distribution. Artificial manipulation of television markets through the SV rules will have significant adverse ramifications—not all foreseeable—in the free market that drives the television industry and that makes it possible for viewers, virtually everywhere, to receive the widest diversity of national and local broadcast television programming in the world.

The wholesale importation of duplicating out-of-market entertainment and sports programming will fragment the viewing choices of local television stations and harm them economically—and with no meaningful offsetting consumer benefits. No legitimate purpose is served by allowing *duplicating* programming from an out-of-market station with no legitimate over-the-air viewership to be imported into a local market when that same programming can already be seen on a truly local station. The stations most adversely affected will be small, rural market local stations on which local viewers depend, not only for entertainment and sports programming, but also for local news, political, public affairs, and critically important weather and public safety information.

Moreover, DISH's in-state SV proposal is not necessary to allow the importation by satellite of *news, weather, public affairs, and sports programming* from out-of-market stations in any particular state. DISH may import that kind of locally-produced and locally-owned programming from a distant station by simply asking the distant station for consent to do so. And such requests would be entirely consistent with long-standing Commission rules governing network non-duplication and syndicated exclusivity.

The Commission should reject DISH's invitation to depart from the rulemaking Congress authorized in STELA.

Conclusion

For the reasons set forth above and in the Broadcaster Associations' Comments, STELA requires that a satellite carrier wishing to retransmit an out-of-market SV signal in a particular local market must (1) provide local-into-local service in the local market; (2) retransmit in SD format the signal, whether a primary or multicast channel, of the local station affiliated with the same network as the SV signal if the satellite carrier retransmits the SV signal in SD format only;

and (3) retransmit in HD format, whenever it is available, the signal, whether a primary or multicast channel, of the local station affiliated with the same network as the SV signal if the satellite carrier retransmits the SV signal in HD format at any time.

The Broadcaster Associations respectfully request that the Commission implement the amendments to Section 340 consistent with the recommendations of the Broadcaster Associations and to deny DISH's request to open further rulemaking proceedings.

Respectfully submitted,

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