

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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

**REPLY COMMENTS OF DIRECTV, INC.**

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TABLE OF CONTENTS

	<u>Page</u>
<b>I. CONGRESS REMOVED THE “SAME NETWORK SERVICE” REQUIREMENT .....</b>	<b>3</b>
<b>II. BROADCASTERS’ OTHER ARGUMENTS ARE UNPERSUASIVE.....</b>	<b>8</b>
<b>III. THE COMMISSION SHOULD READ THE HD FORMAT REQUIREMENT AS APPLYING ONLY TO CARRIED STATIONS.....</b>	<b>11</b>

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**REPLY COMMENTS OF DIRECTV, INC.**

DIRECTV, Inc. (“DIRECTV”) hereby replies to the comments filed by the Broadcaster Associations<sup>1</sup> on how best to interpret the law concerning satellite carriage of “significantly viewed” stations imported from neighboring Designated Market Areas (“DMAs”).<sup>2</sup> This debate should be familiar to those who have followed the issue. Satellite carriers have always believed that Congress intended these provisions both to enable satellite carriage of significantly viewed stations (just as cable operators have long done) and also to prevent satellite carriers from favoring such stations over local stations in the manner of carriage.<sup>3</sup> Broadcasters, by contrast, believe that Congress meant to “protect” local stations by *requiring their carriage* where such carriage would not otherwise be required.<sup>4</sup> This debate, of course, doesn’t matter to local

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<sup>1</sup> Comments of the Broadcaster Associations (“Broadcaster Comments”); *see also* Comments of DISH Network, L.L.C. (“DISH Network Comments”). Unless otherwise indicated, all comments referenced in this reply were filed in MB Docket No. 10-148 on August 17, 2010.

<sup>2</sup> *Implementation of Section 203 of the Satellite Television Extension and Localism Act of 2010 (STELA)*, Notice of Proposed Rulemaking, FCC 10-130, MB Docket No. 10-148 (rel. July 23, 2010) (“*Notice*”).

<sup>3</sup> *See Notice*, ¶ 7 (describing Congress as wanting “to prevent a satellite carrier from favoring SV stations over traditional local market stations”).

<sup>4</sup> More generally, Broadcasters claim that the significantly viewed provisions were meant to favor local broadcasters over significantly viewed stations. Broadcaster Comments at 3 (“From a policy perspective, there are far greater benefits to satellite delivery of local, as opposed to non-local SV, network stations.”). This is

broadcasters that elect must carry or that reach retransmission consent agreements—they are carried in any event. The Broadcasters’ position, instead, is all about gaining unfair leverage in retransmission consent negotiations. They would like to be able to threaten satellite carriers not only with loss of their own signals, but with the additional requirement to discontinue carriage of a neighboring, same-network significantly viewed station as well.

That *has* been the law, because the Commission had interpreted the statute that way. And in part because this has been the law, satellite carriers now offer almost no significantly viewed stations. Upon learning that its intent had been thwarted over the last five years, Congress changed the law to address this very issue.<sup>5</sup>

The Supreme Court has held that, “[w]hen Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.”<sup>6</sup> The Commission was thus correct in proposing to change its rules to give effect to Congress’s changes.<sup>7</sup> The broadcasters nonetheless argue that essentially nothing has changed, spending twenty-five pages attempting to distract the Commission from what Congress actually did. These efforts are unavailing.

- By eliminating the “same network service” requirement, Congress removed the basis on which the Commission had previously found a separate “local service” requirement to require carriage of the same network local station.

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inconsistent with Congress’s decision to move the significantly viewed provision into the *local* copyright statutory license. *See* H. Rep. No. 111-98, at 5 (2009) (noting that the significantly viewed provision “relates to the ability to receive locally-oriented programming”).

<sup>5</sup> The Satellite Television Extension and Localism Act of 2010 (“STELA”), Pub. L. No. 111-175, 124 Stat. 1218, 1245, § 203 (2010); *see also, e.g.* H. Rep. No. 111-349, at 16 (2009) (“The Commission’s implementation of section 340, including its interpretation of the ‘equivalent bandwidth’ requirement, has generally served to discourage satellite carriers from using section 340 to provide significantly viewed signals to qualified households.”)

<sup>6</sup> *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 701 (1995).

<sup>7</sup> *Notice*, ¶ 22.

- Congress thus did not “legislatively reenact” the Commission’s prior interpretation of the local service requirement. Indeed, the whole notion of legislative reenactment functioning to restrict an agency’s authority to implement and interpret a statute that it is charged with administering makes no sense.
- Because Congress eliminated the “same network service” requirement, its new “HD format” requirement is best viewed as only applying to stations *once they are carried*. This interpretation best effectuates Congressional intent because, among other reasons, (1) DIRECTV offers some stations only in HD and thus could not “downrez” them in compliance with the broadcasters’ interpretation of the law; and (2) new multicast affiliates sprout up like mushrooms, meaning that, under the Broadcasters’ interpretation, DIRECTV would have to cut off significantly viewed service without notice whenever a new multicast affiliate appeared.

For these reasons, the Commission should both confirm its tentative conclusion that Congress eliminated the same network service requirement and apply the HD format requirement only to stations once they are carried.

#### **I. CONGRESS REMOVED THE “SAME NETWORK SERVICE” REQUIREMENT**

The Broadcasters claim that, in order to retransmit a significantly viewed network affiliate, a satellite carrier must “retransmit the local station (if one exists) that is affiliated with the same network.”<sup>8</sup> In STELA, however, Congress removed this language.

More specifically, the significantly viewed provision formerly contained two separate limitations. One, for analog signals, contemplated that a satellite carrier must offer *local service* in order to carry significantly viewed stations:

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<sup>8</sup> Broadcaster Comments at 5.

(1) Analog service limited to subscribers taking local-into-local service. With respect to a signal that originates as an analog signal of a network station, this section shall apply only to retransmissions to subscribers of a satellite carrier who receive retransmissions of *a signal* that originates as an analog signal of *a local network station* from that satellite carrier pursuant to section 338.<sup>9</sup>

The other, for digital signals, contemplated that satellite carriers must offer the *same network local station* before carrying significantly viewed stations:

(2) Digital service limitations. With respect to a signal that originates as a digital signal of a network station, this section shall apply only if . . . the subscriber receives from the satellite carrier pursuant to section 338 the retransmission of the digital signal of a network station in the subscriber's local market *that is affiliated with the same television network*; and [equivalent or entire bandwidth].<sup>10</sup>

Now that broadcasters have largely completed their transition to digital transmission, Congress determined that there was no longer a need for separate analog and digital provisions. It was thus faced with a choice. It could have adopted the formulation more favorable to broadcasters from the prior digital provision. Or it could have adopted the formulation more favorable to consumers from the prior analog provision. It chose the latter, and the relevant provision now reads as follows:

(1) Service limited to subscribers taking local-into-local service. This section shall apply only to retransmissions to subscribers of a satellite carrier who receive retransmissions of *a signal* from that satellite carrier pursuant to section 338.<sup>11</sup>

Thus, the statutory language no longer contains a “same network service” requirement. The Commission recognized this in tentatively concluding that its rules should reflect this change.<sup>12</sup>

Faced with this clear statutory change, the broadcasters are forced to argue indirectly. They do so in two ways. First, they point out that the Commission interpreted the former analog

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<sup>9</sup> 47 U.S.C. § 340(b)(1) (2005) (emphasis added).

<sup>10</sup> 47 U.S.C. § 340(b)(1) (2005) (emphasis added).

<sup>11</sup> 47 U.S.C. § 340(b)(1) (emphasis added).

<sup>12</sup> *Notice*, ¶ 17.

provision as in fact containing a same-network service requirement (even though the statutory language itself contained no such requirement).<sup>13</sup> Because the language of that provision did not materially change, they argue, the Commission’s interpretation should not change. Second, they argue that Congress, by not changing the analog provision, implicitly endorsed the Commission’s former interpretation.<sup>14</sup> Neither claim is correct.

***Commission Interpretation.*** The Commission did, as the Broadcasters point out, interpret the former analog provision as having a same service requirement, despite the fact that the provision itself contains no such language.<sup>15</sup> But that interpretation cannot survive Congress’s enactment of STELA. To begin, the former analog provision itself has changed. Congress removed from it the phrase “that originates as an analog signal of a local network station” following the word “signal.” To the extent that the Commission thought this phrase allowed it to interpret the analog provision to contain a same network service requirement, that interpretation cannot stand.<sup>16</sup> All that remains in the provision as amended is the requirement that a subscriber receive “a signal” delivered pursuant to the local service provisions of the Communications Act.

Even if that change were deemed immaterial,<sup>17</sup> something *else* has changed—namely, Congress removed the digital provision from which the Commission derived its interpretation of the analog provision in the first place. In 2005, the Commission looked at the analog and digital

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<sup>13</sup> Broadcaster Comments at 8, citing *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. 17,278, ¶¶ 71-73 (2005) (“*SHVERA SV Order*”).

<sup>14</sup> *Id.* at 12.

<sup>15</sup> *SHVERA SV Order*, ¶¶ 70-72.

<sup>16</sup> *See id.* ¶ 70 (discussing dispute over the meaning of the phrase “a local signal”).

<sup>17</sup> *See* Broadcasters Comments at 11 n. 25 (suggesting that the deletion of this phrase “has no substantive effect on the meaning of Section 340,” and claiming that “the Commission’s Construction of Section 340” instead “turned on the ‘same network affiliate’ language” discussed above).

provisions together and reasoned that Congress “intended [them] to achieve similar ends.”<sup>18</sup> The Commission thus, in a sense, overrode the plain language of the analog provision because it thought Congress did not intend for analog and digital signals to be treated differently.<sup>19</sup> As the Commission recognizes, however, there are no longer two provisions to interpret in parallel. The Commission, assuming as it must that Congress “acted intentionally and purposely when it chose to discard” the more broadcaster-friendly provision, correctly concluded that it must now give effect to the plain language of the remaining provision.<sup>20</sup> Because Congress removed the foundation beneath the Commission’s former interpretation, the Commission is obliged to revisit that interpretation.

As the Broadcasters observe, the Commission also justified its former interpretation of the analog provision based on its interaction with two exceptions. One, the “no network affiliate” exception, permits subscribers to receive a significantly viewed signal of an out-of-market network affiliate if they are “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.”<sup>21</sup> The other, the “waiver exception,” permits same-network stations to grant waivers of the restrictions.<sup>22</sup> The Commission previously engaged in “contextual reasoning,” concluding that, because the two exceptions concerned “same network” local stations, they worked better if the analog service restriction was interpreted as requiring carriage

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<sup>18</sup> *SHVERA SV Order*, ¶ 72 (citing legislative history).

<sup>19</sup> *Id.*

<sup>20</sup> *Notice*, ¶ 17 (citing cases).

<sup>21</sup> 47 U.S.C. § 340(b)(3).

<sup>22</sup> 47 U.S.C. § 340(b)(4).

of such station.<sup>23</sup> According to the Broadcasters, because neither exception has changed, the Commission’s prior interpretation should not change either.<sup>24</sup>

Of course, now that there is no longer even an indirect *textual* basis to support a same network service requirement, the basis on which the Commission engaged in *contextual* reasoning regarding the former analog provision has also disappeared. And, as the Commission itself now recognizes, the exceptions work perfectly well with the actual statutory language.<sup>25</sup> If DIRECTV seeks to import a significantly viewed ABC affiliate into a local market it does not yet serve, it can do so either if there is no ABC affiliate in that market or if the ABC affiliate grants a waiver. This interpretation is not merely possible. It goes to the heart of what Congress was trying to achieve in these provisions—seeking to encourage satellite carriers to offer local *service*,<sup>26</sup> without giving local *stations* the right to force satellite carriers to drop other stations.

***Legislative “reenactment.”*** The Broadcasters also claim that by not changing language that the Commission had previously interpreted as containing a same network services requirement, Congress essentially “re-enacted” the Commission’s prior interpretation and eliminated the agency’s discretion to change it.<sup>27</sup> Again, this ignores the fact that Congress *did* change something—the very foundation on which that interpretation had been built. It should go without saying that when statutory language changes, an agency is free to change its interpretation of the statute. Indeed, as in the present case, the agency is often obliged to change its interpretation in the face of relevant congressional amendments. But even if Congress were to

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<sup>23</sup> *SHVERA SV Order*, ¶ 71.

<sup>24</sup> Broadcaster Comments at 10-11.

<sup>25</sup> *Notice*, ¶ 18.

<sup>26</sup> Congress thought that offering local *service* was so important that it was willing to re-activate DISH Network’s suspended statutory copyright license for distant signals once it offered local service in all 210 markets. *See* 17 U.S.C. § 119(g).

<sup>27</sup> Broadcasters Comments at 12.

amend a statute *without* changing any language relevant to an agency interpretation—which was not the case here—that would not mean that the agency is obliged for all time to maintain its initial interpretation. As long as the agency provides a reasonable explanation for the change, as the FCC has plainly done here, the fact that Congress at most failed to reject one interpretation does not mean that no other interpretation is permissible. It is therefore not surprising that nothing about the cases cited by the Broadcasters suggests that Congress’s failure to amend a particular phrase means that the agency’s interpretation of that phrase is forever frozen in place.<sup>28</sup>

## II. BROADCASTERS’ OTHER ARGUMENTS ARE UNPERSUASIVE

The Broadcasters make several other arguments, each to some extent derivative of a “same network services” requirement that no longer exists. For example, they argue that “a satellite carrier *must* retransmit the signal of the local station if it retransmits the distant duplicating SV signal *in any format*.”<sup>29</sup> This would be true only if the statute still required satellite carriers to offer the same-network local station as a prerequisite to offering a significantly viewed station—which, as described above, the statute no longer requires.

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<sup>28</sup> For example, in *Isaacs v. Bowen*, 865 F.2d 468 (2d Cir. 1989), the court *declined* to reflexively follow this canon in the manner proposed by the Broadcasters. “Mere enactment is insufficient” for legislative reenactment, the court held. *Id.* at 473. Rather, “[i]t must also appear that Congress expressed approval of the agency interpretation.” *Id.* “[T]he doctrine applies when Congress indicates not only an awareness of the administrative view, but also takes an affirmative step to ratify it.” *Id.* (citing cases). In that case, the court concluded that a Congressional change of language limiting certain benefits from “not more than \$500” to “less than \$500” was an affirmative step to ratify an earlier administrative interpretation, where Congressional awareness of the problem was also demonstrated from Congressional testimony. *Id.* at 474. *See also Lorrillard v. Pons*, 434 U.S. 575, 580-81 (1978) (“legislative enactment” of prior *judicial* interpretation of prior statute, only parts of which were expressly incorporated into new law); *United States v. Ramirez-Ferrer*, 82 F.3d 1131, 1137 (1<sup>st</sup> Cir. 1996) (rejecting the government’s claim that one provision of drug importation law was enacted to address types of importation not covered by a second, earlier provision where there was no evidence that courts had ever interpreted second provision to create such gaps); *Emerson Elec. Supply Co. v. Estes Express Lines Corp.*, 451 F.3d 179, 187 (3d Cir. 2006) (finding that minor changes to Interstate Commerce Act were not intended to change longstanding *judicial* interpretation); *Casey v. Commissioner of Internal Revenue*, 830 F.2d 1090, 1095 (10<sup>th</sup> Cir. 1987) (employing doctrine where agency sought to defend *unchanged* regulation against charges that it was inconsistent with statutory provision that had repeatedly been reenacted without change).

<sup>29</sup> Broadcasters Comments at 15 (emphasis in original).

The Broadcasters also argue that a satellite carrier may not offer a significantly viewed station where it does not provide local service—even if the same-network local affiliate grants a waiver or even if there is no such affiliate.<sup>30</sup> Before discussing the legal merits of this argument, DIRECTV must note that it fails to understand what policy reason the Broadcasters might have to advance it in the first place. Presumably, if the same-network broadcaster grants a waiver, it has determined that it would benefit from the delivery of the neighboring station (perhaps because of other terms offered to it in commercial negotiations). If there is no such broadcaster, there is nobody to be harmed even in theory.

In any event, the Broadcasters’ interpretation does not comport with the statute. This could not be clearer with respect to waivers. The provision reads:

Authority to grant station-specific waivers. [The “local service” and “HD formatting” requirements] shall not prohibit a retransmission of a network station to a subscriber if and to the extent that the network station in the local market in which the subscriber is located, and that is affiliated with the same television network, has privately negotiated and affirmatively granted a waiver from the requirements of [such requirements] to such satellite carrier with respect to retransmission of the significantly viewed station to such subscriber.<sup>31</sup>

Nowhere in this text is there any suggestion that stations in local markets not served by satellite cannot grant such waivers. Indeed, such an interpretation would render the exception a nullity—it would limit waivers of the local service requirement to markets in which such waivers would, by definition, be unnecessary.

The same holds true for the “no network affiliate” exception, which provides:

Limitation not applicable where no network affiliates. [The “local service” and “HD formatting” requirements] 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

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<sup>30</sup> Broadcasters Comments at 24.

<sup>31</sup> 47 U.S.C. § 340(b)(4).

the same television network as the station whose signal is being retransmitted pursuant to this section.<sup>32</sup>

Nothing in this language suggests it does not apply in markets where satellite carriers do not yet offer local service.

Here, however, the Broadcasters make another indirect argument. They point out that the Copyright Act’s provision granting a statutory license for significantly viewed service, when read alone, applies only where the satellite carrier offers local service—and that the provision does not appear to have a “no network affiliate” exemption.<sup>33</sup> As the Broadcasters also point out, the Commission previously read the two provisions in conjunction to limit the “no network affiliate” exception to markets where the satellite carrier offers local service.<sup>34</sup>

Now that Congress has amended the “same network service” requirement to be a “local service” requirement, this interpretation no longer makes sense. It would, again, render the exception a nullity. Under the Broadcasters’ interpretation, the exception would apply only in circumstances where satellite carriers offer local service—circumstances in which, by definition, it is not needed.

Moreover, the Commission’s former interpretation does not reflect the best understanding of how the Copyright and Communications Acts should work together. The Copyright Act provision cited by the Broadcasters is immediately followed by a waiver provision under which the same-network station can waive that provision *and is deemed to have granted such a waiver*

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<sup>32</sup> 47 U.S.C. § 340(b)(3).

<sup>33</sup> “A secondary transmission of a performance or display of a work embodied in a primary transmission of a television broadcast station *to subscribers who receive secondary transmissions of primary transmissions under paragraph (1)* [related to local service] shall be subject to statutory licensing under this paragraph if the secondary transmission is of the primary transmission of a network station or a non-network station to a subscriber who resides outside the station’s local market but within a community in which the signal has been determined by the Federal Communications Commission to be significantly viewed. . . .” 17 U.S.C. § 122(a)(2)(A) (emphasis added).

<sup>34</sup> *SHVERA SV Order*, ¶ 80.

*if it fails to respond.*<sup>35</sup> If a satellite carrier seeks to provide significantly viewed service where it does not yet offer local service, it would be nonsensical to allow same-network stations to grant waivers, and even to assume they have granted waivers in many cases, but to forbid such service where there is no station to ask for such a waiver in the first place. The Communications Act makes clear that this not the case. Thus, rather than reading the Communications Act liberally in order to comport with the Copyright Act (as the Commission did in 2005), a judge would very likely do just the opposite and conclude that the Communications Act’s explicit “no network affiliate” exception is implied in the Copyright Act. The Commission should so conclude here and, as discussed above, such a conclusion is consistent with Congress’s passage of STELA.<sup>36</sup>

### **III. THE COMMISSION SHOULD READ THE HD FORMAT REQUIREMENT AS APPLYING ONLY TO CARRIED STATIONS**

In its initial comments, DIRECTV argued that, since Congress had eliminated the “same network service” requirement, it did not intend to recreate a similar requirement through its “HD format” language.<sup>37</sup> Rather, that language is best understood as imposing format restrictions on stations already carried. The Broadcasters, perhaps unsurprisingly, disagree with this interpretation.<sup>38</sup>

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<sup>35</sup> “A subscriber who is denied the secondary transmission of the primary transmission of a network station or a non-network station under subparagraph (A) may request a waiver from such denial by submitting a request, through the subscriber’s satellite carrier, to the network station or non-network station in the local market affiliated with the same network or non-network where the subscriber is located. The network station or non-network station shall accept or reject the subscriber’s request for a waiver within 30 days after receipt of the request. If the network station or non-network station fails to accept or reject the subscriber’s request for a waiver within that 30-day period, that network station or non-network station shall be deemed to agree to the waiver request.” 17 U.S.C. § 122(a)(2)(B).

<sup>36</sup> See Part I, above.

<sup>37</sup> “A satellite carrier may retransmit to a subscriber in high definition format the signal of a station determined by the Commission to be significantly viewed under subsection (a) only if such carrier also retransmits in high definition format the signal of a station located in the local market of such subscriber and affiliated with the same network whenever such format is available from such station.” 47 U.S.C. § 340(b)(2).

<sup>38</sup> Broadcasters Comments at 14.

DIRECTV stands by its earlier reasoning as well as that offered by DISH Network.<sup>39</sup>

There are, moreover, two additional policy reasons in favor of DIRECTV's approach that we did not discuss in our initial comments. First, DIRECTV offers some stations, particularly in smaller markets, only in high definition.<sup>40</sup> In such cases, DIRECTV cannot "downrez" a neighboring station to comply with the rule in the event of a retransmission consent dispute with a local station. Under the Broadcasters' interpretation of the law, DIRECTV would have to black out the station entirely in areas where it is significantly viewed—an outcome consistent with the local Broadcasters' commercial goals but inconsistent with the intent of Congress and the greater public interest.

Second, the Broadcasters' preferred interpretation would exacerbate what DIRECTV thinks of as the "mushroom" problem with respect to multicast stations. Stations in "short" markets (so called because they lack one or more network affiliates) often decide to add the "missing affiliate" as a multicast feed. From DIRECTV's perspective, this can happen on a moment's notice—a new network multicast affiliate can appear as quickly as a mushroom on the lawn after a rainy night. If the Broadcasters were correct, then the moment a new multicast network affiliate appeared, DIRECTV would either have to carry it in HD or drop a same network significantly viewed station that it had been carrying. Moreover, because it takes time to negotiate carriage agreements with new multicast affiliates, and because DIRECTV

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<sup>39</sup> DISH Network reaches a similar conclusion through alternative, but equally valid, means. First, it concludes that the HD format requirement does not require carriage of multicast feeds because Congress did not explicitly mention those feeds, as it did elsewhere in the statute. DISH Network Comments at 6. Second, it concludes that the HD format requirement does not require carriage of stations that withhold retransmission consent because it applies only "whenever such format is available from such station." *Id.* at 7, *citing* 47 U.S.C. § 340(b)(2).

<sup>40</sup> Subscribers without high-definition televisions can nonetheless view this programming so long as they have MPEG-4 set-top boxes.

