

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 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 DISH NETWORK L.L.C.**

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## I. INTRODUCTION AND SUMMARY

DISH Network L.L.C. (“DISH”) submits these Reply Comments in response to the filings made in the above-captioned proceeding to amend the Commission’s satellite television “significantly viewed” (“SV”) rules in order to implement Section 203 of the Satellite Television Extension and Localism Act of 2010 (“STELA”).<sup>1</sup> The record contains broad support for the initiation of a further rulemaking to facilitate the satellite provision of in-state stations to so-called “orphan counties” under the auspices of the SV rules. The statutory grounds of the Communications Act and Copyright Act afford the Commission the necessary flexibility to provide relief to the residents of these counties. The record also supports Commission action to amend its rules to clarify that it is per se bad faith for broadcasters to tie retransmission consent to restrictions on the provision of SV stations to eligible satellite subscribers. With changes to bring SV stations to orphan counties and to prevent anti-competitive tying arrangements, the Commission’s interpretation of Section 203 should help bring SV stations closer to a reality for satellite subscribers.

In addition, the *Notice* correctly applies one of the most fundamental rules of statutory interpretation in concluding that Congress acted intentionally when it deleted any requirement for satellite carriers to provide the local affiliate of the SV network in order to provide the SV station itself. That rule is that Congress does not delete words from laws by accident. For the contrary claim, the broadcasters put forth every conceivable argument other than the law’s plain text. Remarkably, the broadcasters rely primarily on the Commission’s 2005 interpretation of the statutory language that Congress has now deleted. There is, moreover, good reason why

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<sup>1</sup> Implementation of Section 203 of the Satellite Television Extension and Localism Act of 2010 (STELA), MB Docket No. 10-148, *Notice of Proposed Rulemaking*, FCC 10-130 (rel. July 23, 2010) (“*Notice*”).

Congress eliminated that prerequisite to the retransmission of SV stations: failure to receive retransmission consent from the local affiliate of the same network as the SV station has been one of the chief reasons why satellite carriers' provision of SV stations has not "taken off" to anything close to the extent that Congress had hoped. There are about 948 stations in this country that are significantly viewed in at least one community outside their designated market area ("DMA") and approximately 14,600 instances in which a particular station can be imported into a county as significantly viewed. Of these, DIRECTV today retransmits only a handful of SV stations into these communities; from 2004 to 2006, DISH retransmitted a similarly low percentage. Accepting the broadcasters' argument risks perpetuating a regime that not only flouts the statutory change but actively undermines Congress' intent to make SV stations available to satellite subscribers. Consistent with the deletion of the "same network affiliate" requirement, Congress did not intend to restrict high definition ("HD") imports of an SV station when the local station has elected and withheld retransmission consent.

Finally, contrary to the broadcasters' assertions, local broadcast on a multicast stream in HD format does not trigger STELA's HD carriage requirement. Congress' treatment of multicast streams in other portions of STELA, combined with an understanding of the essentially local nature of SV stations, indicates that multicast streams are not on par with primary broadcast streams and should therefore not serve to restrict satellite carriers' retransmission of SV stations in HD.

## **II. THE RECORD SUPPORTS A FURTHER NOTICE OF PROPOSED RULEMAKING**

### **A. The Record Supports Commission Action to Address the “Orphan County” Problem**

The record shows clear support for Commission action to address the plight of so-called orphan counties – counties consigned by Nielsen to out-of-state DMAs and unable to receive their in-state network stations by satellite. The problem is not restricted to a single county or state. As Senator Russell Feingold pointed out in his July 28, 2010 letter to the Commission, the citizens of western and northern Wisconsin are unable to receive in-state broadcasts by satellite.<sup>2</sup> And as Representative John Salazar and his state counterparts have made known to the Commission, Nielsen designations also prevent citizens of southwestern Colorado from receiving their in-state networks via satellite.<sup>3</sup> Forty three other states also have counties assigned to out-of-state DMAs.<sup>4</sup> Individuals residing in these counties who are directly affected by their “orphan” status have also asked the Commission in this proceeding to amend the SV station rules in order to enable such citizens to receive local news, cultural, and entertainment programming from in-state networks.<sup>5</sup> The broadcasters themselves rightly point out in another proceeding that citizens want “their *own* uniquely local news, weather, emergency, public safety, political, public affairs, and public service programming.”<sup>6</sup> And providing in-state local stations

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<sup>2</sup> Letter from Senator Russell D. Feingold to Julius Genachowski, Chairman, Federal Communications Commission (July 28, 2010).

<sup>3</sup> Comments of U.S. Representative John T. Salazar (filed Aug. 17, 2010); Notice of Ex Parte of Colorado State Senator Bruce Whitehead (filed Aug. 17, 2010); Comments of Colorado State Representative Ellen Roberts (filed Aug. 13, 2010).

<sup>4</sup> *Hearing on Ensuring Television Carriage in the Digital Age Before S. Comm. on Judiciary* (Feb. 25, 2009) (statement of Charlie Ergen, President, DISH Network L.L.C.).

<sup>5</sup> *See, e.g.*, Comments of Paul and Carolyn Staby (filed Aug. 12, 2010).

<sup>6</sup> Comments of the Broadcaster Associations, ET Docket Nos. 10-152, 06-94, at 3 (filed Aug. 24, 2010).

to orphan counties will put more in-state eyeballs on the advertising of the in-state stations, thus preserving “the ability of local stations to fund their free, over-the-air, local service.”<sup>7</sup> DISH agrees completely with the broadcasters in these respects. The remedies DISH has proposed will ensure that viewers in orphan counties get local programming that is truly relevant to their interests, as opposed to out-of-state programming.

As DISH has pointed out in this proceeding,<sup>8</sup> although Commission freedom in this area is not unconstrained, there are a number of avenues that the Commission could pursue. First, the Commission could amend its rules, as suggested by other parties.<sup>9</sup> It could also create a rebuttable presumption that in-state, neighboring DMA networks are SV stations in orphan counties.<sup>10</sup> Similarly, the Commission may utilize waivers to designate as significantly viewed in-state stations in orphan counties on the basis of all television households, not just those households receiving the relevant signal over-the-air.

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<sup>7</sup> *Id.*

<sup>8</sup> Comments of DISH Network L.L.C. at 11-12 (filed Aug. 12, 2010); Notice of Ex Parte of DISH Network L.L.C. at 1-2 (filed Aug. 23, 2010).

<sup>9</sup> See Notice of Ex Parte of Colorado State Senator Bruce Whitehead at 2; Notice of Ex Parte of La Plata County Board of Commissioners (filed Aug. 19, 2010) (“We wholeheartedly support the recommendation of DISH Network LLC that the FCC initiate further rulemaking to amend the [SV] rules to bring in-state local channels to subscribers who reside in orphan counties.”).

<sup>10</sup> The broadcaster would be free to rebut the presumption by submitting precisely the type of survey contemplated by the rules showing that the station is not significantly viewed. In other words, the burden of proof would merely lie with the local broadcaster, not the significantly viewed station or the satellite carrier.

**B. The Record Supports Commission Action to Address Bad Faith Tying Arrangements**

The record also supports Commission action to amend its retransmission consent rules to address broadcaster practices in tying retransmission consent to restrictions on the carriage of SV stations.<sup>11</sup> As DISH has stated,<sup>12</sup> such tying arrangements work against the interests of local stations and viewers alike, and should be per se bad faith under Section 76.65(b)(1) of the Commission's rules.

**C. Commission Action Is Needed in Light of Very Low Availability of SV Stations to Satellite Subscribers**

As DISH noted, further Commission action is required in order to realize Congress' goal of making SV stations available to satellite subscribers.<sup>13</sup> When it was permitted to do so, DISH offered SV stations in certain counties of only seven DMAs. DIRECTV's experience has been similar: "In the five years since Congress first permitted DIRECTV to offer [SV] stations, we have offered only a handful of them – in nearly all cases, where the local station has agreed to waive the equivalent bandwidth rule."<sup>14</sup> These low numbers are consistent with the warnings issued by DISH and DIRECTV years ago regarding the challenges to offering SV stations posed by the Commission's problematic interpretation of the Satellite Home Viewer Extension and

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<sup>11</sup> See Notice of Ex Parte of U.S. Representative John T. Salazar (filed Aug. 19, 2010) ("I ask that the FCC support Dish Network's request . . . to amend the Commission's retransmission rules . . . Also needed . . . are reform rules that ensure the fair implementation of the list so that [SV] stations can actually be carried by satellite and other providers once they are placed on the list."); Notice of Ex Parte of Colorado State Representative Ellen Roberts (filed Aug. 20, 2010) ("I am endorsing Dish Network's filing in this matter . . . and particularly those comments concerning [SV] station rules and the request to change the retransmission consent rules to clarify that it is presumptively not good faith to condition local-into-local carriage on any restriction with respect to SV stations.").

<sup>12</sup> Comments of DISH Network L.L.C. at 10-11.

<sup>13</sup> *Id.* at 3-4, 11.

<sup>14</sup> Comments of DIRECTV at 2.

Reauthorization Act of 2004 (“SHVERA”).<sup>15</sup> Given the total number of SV stations currently identified by the Commission – in excess of 948 – and the immense number of instances in which an SV station could be imported – in excess of 14,600 – the very limited offerings of SV stations by DISH and DIRECTV allows only one conclusion: the SV program that Congress spearheaded has not succeeded.<sup>16</sup>

Commission action to make it easier for satellite subscribers to receive SV stations would in fact advance the broadcasters’ goal of promoting “uniquely local news, weather, emergency, public safety, political, public affairs, and public service programming” to viewers to whom such programming best applies.<sup>17</sup> After all, SV stations have their SV status precisely because they are essentially “local” in the relevant market, despite the artificial boundaries drawn by Nielsen. Consumers should not be “gerrymandered” away from their viewing choices. Unfortunately, the broadcasters proffer an interpretation of STELA that fails to promote their self-professed goal and which would instead continue to restrict the availability of SV stations to satellite subscribers.

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<sup>15</sup> *See id.* at 1-2 and n.5.

<sup>16</sup> FCC, *Significantly Viewed List* (last updated July 13, 2010), available at <http://www.fcc.gov/mb/significantviewedstations071310.pdf>.

<sup>17</sup> *See* Comments of the Broadcaster Associations at 3 (filed Aug. 17, 2010).

### III. THE BROADCASTERS' INTERPRETATION OF STELA CONTRADICTS CONGRESSIONAL INTENT AND WOULD DISENFRANCHISE VIEWERS

#### A. The Broadcasters' Interpretation of the Lack of "Same Network Affiliate" Language Strains Credulity

Somehow, despite reams of precedent on what statutory deletions mean, the broadcasters come to the conclusion that Congress intended to retain the "same network affiliate" requirement, no matter that Congress deleted the relevant language from the statute in STELA.<sup>18</sup>

The original SV provisions of SHVERA, which are now replaced by STELA, provided, in relevant part (emphasis added):

Section 340(b)(1). 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.

Section 340(b)(2). With respect to a signal that originates as a *digital signal* of a network station, this section shall only apply if—

(A) the subscriber receives from the satellite carrier pursuant to section 338 of this title 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

(B) either (i) the retransmission of the local network station occupies at least the equivalent bandwidth as the digital signal retransmitted pursuant to this section; or (ii) the retransmission of the local network station is comprised of the entire bandwidth of the digital signal broadcast by such local network.

What happened then is simple. Under SHVERA, the Commission read Sections 340(b)(1) and 340(b)(2)(A) in conjunction with each other to determine that before receiving an SV station affiliated with a network, in either analog or digital, a satellite subscriber had to be

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<sup>18</sup> See *id.* at 7-15.

receiving the satellite retransmission of the local affiliate of that same network.<sup>19</sup> In doing so, the Commission relied on the “same network affiliate” requirement for digital signals found in SHVERA’s Section 340(b)(2)(A).<sup>20</sup> The Commission reasoned that Congress did not intend to treat analog and digital signals differently for SV stations.<sup>21</sup> Five years later, Congress in STELA took that language out. The amended Section 340(b) now provides:

Section 340(b)(1). 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.

Section 340(b)(2). 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.

The broadcasters somehow reason that the changes to Section 340(b) were only intended to replace the equivalent bandwidth requirement found in the old Section 340(b)(2)(B) with the HD carriage requirement found in the new Section 340(b)(2) and to update terminology to reflect the digital transition.<sup>22</sup> This reasoning ignores the fact that the *revised Section 340(b) now contains no language* conditioning a subscriber’s eligibility for the receipt of an SV station upon that subscriber’s receipt of the local station associated with the SV station’s network affiliate. The broadcasters’ assertion to the contrary (“Both [the old and new Section 340(b)(2)] continue to contain the ‘same network affiliate’ language[.]”) is misleading at best. The “same network affiliate” language in the current statute to which the broadcasters refer is the language contained

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<sup>19</sup> See Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004, *Report and Order*, 20 FCC Rcd. 17278, 17305-07 ¶¶ 70-72 (2005) (“*SHVERA SV Report and Order*”).

<sup>20</sup> See *id.* at 17307 ¶ 72.

<sup>21</sup> See *id.*

<sup>22</sup> See Comments of the Broadcaster Associations at 11.

in the new Section 340(b)(2), which speaks only to when a satellite carrier may provide the *HD* signal of an SV station.<sup>23</sup> The amended Section 340(b)(2) is no longer composed of subparts (A), which addressed general subscriber eligibility, and (B), which addressed signal nondiscrimination. Instead, Congress has placed general eligibility restrictions entirely within STELA’s Section 340(b)(1), which includes no language conditioning SV station eligibility to subscribers receiving the local network affiliate, and Section 340(b)(2) now solely addresses signal nondiscrimination by replacing the equivalent bandwidth requirement with the more general HD carriage condition.

The Commission itself, DISH, and DIRECTV all agree that Congress acted deliberately when it eliminated the “same network affiliate” condition from STELA. The Supreme Court tells us that “[w]hen Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.”<sup>24</sup> The removal of language is no exception.<sup>25</sup> Where Congress removes language, it is presumed to have acted “intentionally and purposefully in the disparate inclusion or exclusion.”<sup>26</sup> Congress’ elimination of the “same network affiliate” language therefore cannot be discounted as an accident, as the Commission observes.<sup>27</sup>

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<sup>23</sup> See 47 U.S.C. § 340(b)(2) (“A satellite carrier may retransmit to a subscriber [an SV station] in [HD] format . . . only if such carrier also retransmits in [HD] 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.”).

<sup>24</sup> *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 701 (1995).

<sup>25</sup> See *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 341 (2005) (“We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply . . . .”); *Chickasaw Nation v. United States*, 534 U.S. 84, 93 (2001) (noting that courts 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)).

<sup>26</sup> See *Moshe Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1990) (“[Where] Congress includes particular language in one section of a statute but omits it in another section of the same

The broadcasters attempt to divert the Commission by citing, no less than six times, to the Commission's reasoning in its 2005 decision first implementing the satellite SV station rules.<sup>28</sup> These arguments are inapposite, because the rules proposed in the *Notice* are based upon the critically changed language. The broadcasters are wrong that STELA does not evince an intent for the Commission to "completely reverse its existing interpretation."<sup>29</sup> Congress' eraser is no less dispositive than its pen. It was the deleted language on which the Commission's prior interpretation had relied.

As the Commission also correctly notes, Section 340(b)(2) does indeed now restrict the ability of a satellite carrier to retransmit an SV station in HD unless it also retransmits the local affiliate of such station in HD "whenever such format is available from such station."<sup>30</sup> The broadcasters assert that this HD "nondiscrimination" carriage condition somehow implies that a satellite carrier may not retransmit an SV station in standard definition if it does not also carry the local affiliate on its local-into-local service. They argue that eliminating the "same network affiliate" requirement would be logically inconsistent with requiring HD carriage of the local affiliate whenever the carrier retransmits the corresponding SV station in HD. To reach this conclusion, however, the broadcasters ignore the coda on the HD carriage condition: "whenever such format is available from such station." The satellite carrier need not carry the local affiliate in HD *whenever* it retransmits an SV station in HD, only when such format is "available." Such

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Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal citations omitted); *Russello v. United States*, 464 U.S. 16, 23 (1983) (same).

<sup>27</sup> *Notice* ¶ 18 n.75; *Motion Picture Ass'n of Am. v. FCC*, 309 F.3d 796, 799 (D.C. Cir. 2002).

<sup>28</sup> See Comments of the Broadcaster Associations at 7-15.

<sup>29</sup> *Id.* at 11.

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

format is not “available” when the local affiliate has elected and withheld retransmission consent. Similarly, when a local affiliate elects and withholds retransmission consent, a subscriber receiving the local-into-local service in that DMA may also receive an SV station sharing a network affiliation with the missing local channel. Such a result is fully consistent with the HD nondiscrimination carriage condition.

The view taken by the Commission, DISH, and DIRECTV ensures that the local broadcaster cannot, by withholding retransmission consent, deprive satellite subscribers of a significantly viewed station. STELA removes any requirement that the subscriber also receive the specific local affiliate in order to receive the corresponding SV station and only requires that the subscriber receive the satellite carrier’s available local service.<sup>31</sup> The plain language of the statute itself directly supports this proposition. Both DISH and DIRECTV agree with the Commission’s tentative conclusion that “requir[ing] only that a subscriber receive the satellite carrier’s local-into-local service as a pre-condition for the subscriber to receive SV stations is consistent with Congressional intent.”<sup>32</sup>

#### **B. HD Multicast Stations Do Not Trigger the HD Carriage Restriction**

DISH vigorously disagrees with the broadcasters’ contention that the statute’s use of the word “signal” compels satellite carriage of a station’s multicast stream in HD as a condition of importing an affiliated SV station in HD. The broadcasters are mistaken. The statute’s use of “signal” is, at least, ambiguous, and excluding multicast stations from the HD carriage requirement better comports with the purpose of the statute.

As an initial matter, neither the Copyright Act nor the Communications Act, as amended by STELA, includes a definition of “signal.” The term is undefined. The broadcasters, in

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<sup>31</sup> See Notice ¶ 17.

<sup>32</sup> Comments of DIRECTV at 3 (internal quotation marks omitted).

pushing to further encumber SV station retransmission, attempt to draw a “clear” definition from the context of the word’s use. The broadcasters draw two lessons from the context of the use of “signal”: (1) that the word “signal” necessarily encompasses both primary and secondary streams; and (2) that Congress used “signal” to denote the combination of primary and secondary streams.<sup>33</sup> Both are refuted by the broadcaster’s own primary example: STELA’s definition of “unserved household.”<sup>34</sup>

Under STELA, an unserved household is one that cannot receive an “over-the-air signal containing the primary stream or, on or after the qualifying date, the multicast stream.”<sup>35</sup> To take the broadcasters at their word – that “signal” must mean both primary and secondary signals – one must read this definition as awkwardly verbose. After all, if “signal” naturally includes both primary and secondary streams, Congress could have simply stopped at “over-the-air signal.” Further, in suggesting that Congress used “signal” to denote the combination of primary and secondary streams, broadcasters ignore the disjunctive “or.” Under the provision, a household is unserved if it cannot receive a signal containing the primary stream *or* a signal containing the multicast stream. This suggests that “signal” means either the primary stream or the multicast stream, depending on the qualifying adjective or context in which it is used. Indeed, such a reading also has the benefit of making the definition’s use of “primary stream” and “multicast stream” non-superfluous.

The broadcasters next refer to the Commission’s interpretation of SHVERA’s Alaska-Hawaii must-carry provision as proof that “signal,” when used by itself, always includes both primary and multicast streams. Specifically, they point to the Commission’s statement that

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<sup>33</sup> Comments of the Broadcaster Associations at 19.

<sup>34</sup> *Id.* at 17.

<sup>35</sup> 17 U.S.C. § 119(d)(10).

Congress' choice to use "signals" in this context, rather than "primary video" as it did for must-carry in the continental United States, meant that Congress intended must-carry obligations to extend to multicast channels. But yet again, the broadcasters are waylaid by their own example.

In the *Alaska-Hawaii Must Carry Order*, the Commission was very pointedly not interpreting the word "signal" – singular – but rather "signals" – plural. And the full context of that usage is key: "signals originating as digital signals of each such station."<sup>36</sup> As the Commission put it, Congress' "use of the plural term 'signals' in requiring carriage of 'signals originating as digital signals' [] unambiguously mean[t] carriage of the entire free over-the-air digital broadcast, without limitation, being transmitted by a broadcaster."<sup>37</sup> This, to continue belaboring the point, is inconsistent with the broadcasters' view that "signal" – singular – necessarily includes both primary and secondary streams. Of course, the broadcasters' argument also ignores the Commission's express statement that its finding in the *Alaska-Hawaii Must Carry Order* "is limited to section 338(a)(4) of the Act and does not interpret any other statutory provision that regulates cable or satellite carriage obligations."<sup>38</sup>

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<sup>36</sup> 47 U.S.C. § 338(a)(4) (emphasis added).

<sup>37</sup> Implementation of Section 210 of the Satellite Home Viewer Extension and Reauthorization Act of 2004, *Report and Order*, 20 FCC Rcd. 14242, 14250 ¶ 16 (2005) ("*Alaska-Hawaii Must Carry Order*").

<sup>38</sup> *Id.* at 14250 ¶ 18.

#### IV. CONCLUSION

For the foregoing reasons, the Commission should initiate further proceedings in connection with SV stations and should give STELA's SV provisions their natural and intuitive meaning.

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