WILTSHIRE & GRANNIS LLP

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BY ELECTRONIC FILING

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445 12th Street, S.W.
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Washington, DC 20554

Re: Implementation of Section 203 of the Satellite Television Extension and Localism Act of 2010 (STELA), MB Docket No. 10-148

Establishment of a Model for Predicting Digital Broadcast Television Field Strength Received at Individual Locations, ET Docket No. 10-152; Measurement Standards for Digital Television Signals Pursuant to the Satellite Home Viewer Extension and Reauthorization Act of 2004, ET Docket No. 06-94

Dear Ms. Dortch:

Representatives of DIRECTV, Inc. ("DIRECTV") and DISH Network LLC ("DISH Network") met yesterday and today with Commission staff to discuss issues related to the two STELA implementation proceedings captioned above. Present on behalf of the satellite carriers were Alison Minea of DISH Network and Stacy Fuller and Andrew Reinsdorf on behalf of DIRECTV, accompanied by DIRECTV's outside counsel Michael Nilsson. Present at yesterday's meeting was Eloise Gore of Commissioner Clyburn's office. Present at today's meeting was Marilyn Sonn of Chairman Genachowski's office.

These discussions reflected DIRECTV's and DISH Network's prior submissions in these proceedings, as set forth in the attached talking points. Please note that prior versions of one of those talking points contained two insubstantial errors in the "redline" superimposing STELA's changes over prior law. Those errors are corrected in this version.

Should you have any questions, please do not hesitate to contact me.

Respectfully submitted,

/s/
Michael Nilsson

Attachment
cc: Eloise Gore
Marilyn Sonn

Unserved Household Talking Points

I. THE COMMISSION SHOULD NOT IGNORE CONGRESS'S EXPLICIT AND DELIBERATE CHANGES TO THE ANTENNA STANDARD.

A. People have known for years that the model is inaccurate.

B. NAB's *own* website stated that 40 percent of those predicted *ineligible* for distant signals could not receive local signals using any antenna.

C. Responding to this, Congress changed the key language *twice*.

1. In the Copyright Act, a household used to be "unserved" if it could receive a local signal "through the use of a conventional, stationary, outdoor rooftop receiving antenna." Now it is unserved if it cannot receive a local signal "through the use of an antenna."

2. In the Communications Act, the original bill language had "conventional, stationary, outdoor rooftop receiving antenna." The final bill has "through the use of an antenna."

3. As the Supreme Court has made clear, "[w]hen Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." Thus, the one thing Congress could *not* have meant is for distant signal eligibility to continue to be based on the use of a "conventional, stationary, outdoor rooftop receiving antenna."

D. The Commerce Committee expects the Commission to consider the types of antennas that are *readily available for purchase* by consumers.

II. THE BROADCASTERS' ARGUMENTS IN FAVOR OF IGNORING CONGRESS ARE MISPLACED.

A. Broadcasters urge the Commission to ignore the Copyright Act's changes because they (allegedly) do not appear in the Communications Act. But the Commission has not and cannot ignore the Copyright Act – which is incorporated by reference in the Communications Act in any event.

B. The Communications Act does not contradict the Copyright Act.

1. Section 339 explicitly incorporates the definition of unserved household from Section 119; this, in turn, is the definition changed by STELA.

2. Congress used the same "antenna" phrase in the Communications Act.

3. Reference to receiving signals "in accordance with the signal intensity standard in section 73.622(e)(1)" does not require rooftop outdoor antenna.

   i. "Signal intensity standard" is just a number. Even if the number was derived for other purposes with assumptions about height and location, nothing in *the number itself* says anything about antenna height and location.

   ii. Nothing in that section says anything about height and antenna location in any event.

4. Requirement that, "in prescribing such model, the Commission shall rely on" prior ILLR model does not mean "use a rooftop antenna."

   i. "Such" model means model predicting receipt of signal through use of antenna.

   ii. "Rely on" does not mean "use without changes." It means simply to "rely on as a starting point."

   iii. Congress changed "antenna" language precisely because of the FCC report expressing concerns that changing "noise limited" standard itself would have unwanted effects.

III. THE COMMISSION SHOULD PRESCRIBE A CONSUMER-FRIENDLY PREDICTIVE MODEL AS REQUIRED BY THE STATUTE

A. Indoor antennas can be easily incorporated into the predictive model.

1. The variations of the indoor environment are actually less extensive than the variations observed in the outdoors.

B. Time variability should be set at 99%.

1. Time variability of 99% is equivalent to the 99.7% that STELA's Section 342 demands for satellite local-into-local service to new DMAs.

2. It is all the more appropriate here because the accuracy of the prediction is already mitigated by the 50% confidence factor (there is only 50% confidence that the household is served and only 50% confidence that it is unserved).

C. The predictive model should be adjusted for various obstruction factors.

1. Co-channel interference can easily be accounted for in the model.

2. Land use and land cover. Contrary to the broadcasters' assertion, the satellite carriers have offered concrete, immediately executable suggestions for improving the recognition of land use and land cover losses.

IV. THE COMMISSION SHOULD PRESCRIBE A CONSUMER-FRIENDLY MEASUREMENT METHODOLOGY AS REQUIRED BY THE STATUTE

A. Must be focused on minimizing consumer burden.

1. STELA requires that the focus of on-location testing be minimizing the burden to consumers.

2. Indoor antennas are easier to install.

3. Indoor antennas are less expensive.

4. For these reasons, consumers deploy them overwhelmingly more often than outdoor antennas.

B. Indoor testing does not raise the risk of manipulation.

1. The testers would need to satisfy the requirement of independence. A tester whose compensation does not depend on test results does not have an incentive to manipulate the results.

2. The supposed problems arising from the possibility of many television sets and other variables are also easily resolved through the protocol recommended by Mr. Kurby, which would require the agent that measures the area for TV reception to submit a report describing the building, the rooms in general, the room measured, the locations measured, the measured and calculated results, and the equipment used. This would provide a sufficient recordkeeping and audit device to help ensure and measure the integrity of the measurement standards.

V. RECEPTION TESTING IS ALLOWED AND INDEED REQUIRED UNDER THE STATUTE

A. The statute does not only say "signal" and "intensity." It also says "receive." Reception of a watchable signal is an explicit statutory prerequisite to a household being disqualified from receiving distant service. It should also be an obvious one. If a consumer cannot receive a viewable signal over-the-air, no matter that its intensity is high, her plight is as exactly as serious as that of her neighbor who cannot receive it because the signal intensity is low. Congress did not intend either category of consumer to be disenfranchised.

B. The question of whether a signal is received may have been a subjective one for analog television; with the zeroes and ones of digital television, however, a consumer that does not receive a picture cannot be said to receive anything.

Appendix
Redline of Key Provisions

17 U.S.C. § 119(d)

(10) Unserved household. The term "unserved household", with respect to a particular television network, means a household that--

(A) cannot receive, through the use of a**n**~~**conventional, stationary, outdoor rooftop receiving**~~ antenna, an over-the-air signal **containing** ~~**of a**~~**the** primary **stream, or, on or after the qualifying date, the multicast stream, originating in that household's local market and** ~~**network station**~~ affiliated with that network of—

(i) **if the signal originates as an analog signal,** Grade B intensity as defined by the Federal Communications Commission ~~**under**~~ **in** section 73.683(a) of title 47**,**~~**of the**~~ Code of Federal Regulations, as in effect on January 1, 1999; **or**

(ii) **if the signal originates as a digital signal, intensity defined in the values for the digital television noise-limited service contour, as defined in regulations issued by the Federal Communications Commission (section 73.622(e) of title 47, Code of Federal Regulations), as such regulations may be amended from time to time;**

47 U.S.C. § 339(c)(3)

(A) Predictive model.—Within **270** days after the date of the enactment of the Satellite **Television Extension and Localism Act of 2010**~~**Home Viewer Improvement Act of 1999 [enacted Nov. 29, 1999]**~~, the Commission shall ~~**take all actions necessary, including any reconsideration, to**~~ develop and prescribe by rule a point-to-point predictive model for reliably and presumptively determining the ability of individual locations**, through the use of an antenna,** to receive signals in accordance with the signal intensity standard in **section 73.622(e)(1) of title 47, Code of Federal Regulations, or a successor regulation, including to account for the continuing operation of translator stations and low power television stations**~~**effect under section 119(d)(10)(A) of title 17, United States Code**~~. In prescribing such model, the Commission shall rely on the Individual Location Longley-Rice model set forth by the ~~**Federal Communications**~~ Commission in **CS** Docket No. 98-201**, as previously revised with respect to analog signals, and as recommended by the Commission with**

respect to digital signals in its Report to Congress in ET Docket No. 05-182, FCC 05-199 (released December 9, 2005). ~~**and ensure that such model takes into account terrain, building structures, and other land cover variations.**~~ The Commission shall establish procedures for the continued refinement in the application of the model by the use of additional data as it becomes available.

(B) On-location testing.—The Commission shall issue an order completing its rule-making proceeding in ET Docket No. 06-94 within 270 days after the date of enactment of the Satellite Television Extension and Localism Act of 2010. In conducting such rulemaking, the Commission shall seek ways to minimize consumer burdens associated with on-location testing.

Significantly Viewed Talking Points

DIRECTV and DISH Network are concerned that the Commission might—once again and despite explicit Congressional instructions to the contrary—adopt rules regarding carriage of significantly viewed stations that make it impractical to offer such stations to satellite subscribers. As explained below, the right to carry significantly viewed stations does not diminish a satellite provider's desire to carry local stations. Rather, satellite carriers can now offer small segments of a market the same broadcast stations that have always been available from cable operators. For satellite carriers to operate on equal footing with cable operators, however, they must be confident that their subscribers' service won't be unduly and arbitrarily disrupted. Unless the rules are crafted in a manner that can be practically implemented, satellite carriers will not be able to be as competitive in these overlap areas as Congress intended.

I. Introduction

A. Broadcast stations that are significantly viewed outside of their own generally have this status only in small portions of neighboring markets. Thus, satellite carriers could not use significantly viewed stations to replace local stations in other markets. Treating satellite carriers like cable operators with respect to significantly viewed service would not give satellite carriers undue leverage in retransmission consent negotiations.

B. Satellite providers will not seek to offer significantly viewed stations if they cannot reasonably ensure that their customers' service will not be disrupted through black outs and downrezzing to a standard definition signal. It is particularly difficult to ensure customer satisfaction when a disruption is caused by something unrelated to the station in question, such as a retransmission consent dispute with an entirely different station in a different market or the launch of a new multicast stream of a different station in a different market—all of which would happen under the broadcasters' restrictive interpretation of the statute.

C. Because the Commission's previous interpretation of the law did not provide this assurance, it effectively precluded satellite carriers' provision of significantly viewed service. Congress has now changed the law to address this problem.

II. Congress removed the "same network services" requirement.

A. Prior law contained two separate limitations.

1. One, for analog signals, contemplated that a satellite carrier must offer *local service* in order to carry SV stations.

2. Another, for digital signals, contemplated that satellite carriers must offer the *same network local station* before carrying SV stations.

B. In light of the digital transition, Congress could have removed one or the other. It chose to remove the "same network" language. Thus, all that remains is a "local service" requirement.

II. Prior Commission interpretations are no longer valid and were not enacted by Congress.

A. The Commission interpreted the "local service" provision of the former analog requirement as containing a "same network services" requirement, even though the language didn't say that. Two things have since changed:

1. Congress removed the phrase "that originates as an analog signal of a local network station" – which the Commission thought required carriage of a particular station.

2. Congress removed the former digital provision, which was the basis for the Commission's interpretation of the former analog provision.

B. Commission also engaged in "contextual reasoning," concluding that "same network services" language worked better with two exceptions to the local service requirement.

1. By removing the *textual* basis for such an interpretation, Congress has removed the basis for *contextual* reasoning.

2. Exceptions work perfectly well with the statute as written.

C. "Legislative reenactment" doesn't work to limit agency discretion in any event. Even if Congress *hadn't* changed relevant language, the fact that Congress at most failed to reject one interpretation does not mean that no other interpretation is permissible.

III. Broadcasters misunderstand the two exceptions to the local service requirement.

A. Satellite carriers may deliver SV stations where they do not offer local service in two circumstances – where the same-network broadcaster grants a waiver, and where there is no same-network broadcaster.

B. The broadcasters argue that the exceptions only apply where a satellite carrier offers local service. This makes no sense – the exceptions are only *needed* where the satellite carrier does not offer local service.

C. A Copyright Act provision limits significantly viewed service to markets in which local service is offered.

1. But that provision both permits waivers and automatically grants them if the same-network broadcaster does not respond.

2. This implies that, if there is no same-network station to give a waiver in the first place, the satellite carrier can deliver SV service.

IV. The Commission should interpret the HD format requirement as applying only to "carried" stations.

A. Broadcasters claim that satellite carriers cannot offer SV stations in HD unless they carry the local station in HD. Under this interpretation, in the event of a retrans dispute, the satellite carrier must downrez or black out the SV station.

B. But it is difficult to imagine that Congress simultaneously eliminated the "same network service" requirement then reimposed it through the backdoor.

C. The HD formatting requirement applies only "whenever such format is available from [the local] station" —i.e., subject to a retransmission consent agreement or mandatory carriage election. 47 U.S.C. § 340(b)(2). Thus, where a station withholds retransmission consent, or where a new multicast HD station is first launched (and the satellite carrier and the station have not reached an agreement for carriage), the HD format is not "available" from such station and the satellite carrier is under no restriction with respect to the format of a significantly viewed signal it also imports.

D. Every broadcast station that has an HD feed and is carried by a satellite carrier makes the HD feed "available" to the satellite carrier—even if the satellite carrier does not retransmit the HD format of that station to its subscribers. This is because, as a technical matter, the satellite carrier offers standard definition ("SD") service in such situations by taking the HD signal and downrezzing it to standard definition. Thus, the HD signal is "available to the satellite carrier," but the satellite carrier does not "retransmit to a subscriber in high definition format the signal of [such] station"—exactly the situation in which Congress meant to restrict the format of significantly viewed importation. So, if a satellite carrier offered an entire market in SD format only, it could not import a significantly viewed station in HD format because the HD format of the in-market station is "available to" it.

E. The broadcasters seem to think that a HD signal is "available to" satellite carriers simply because it is being broadcast, in part because other parts of the statute define a satellite signal as being "available" where it is transmitted. Those other provisions, however, deal with the relationship between the satellite carrier and the subscriber—so Congress naturally defined availability in terms of what a satellite carrier offers its subscribers. Here, however, the relevant provision deals with the relationship between the broadcaster and the satellite carrier. A broadcast signal is legally unavailable to a satellite carrier lacking retransmission consent, and it makes perfect sense for the Commission to interpret the HD formatting requirement to reflect this reality.

F. DIRECTV's and DISH's interpretation of the law reflects realities of satellite local carriage.

1. Satellite carriers must obtain retransmission consent to carry stations in areas where they are significantly viewed. Those agreements may not permit satellite carriers to downrez the significantly viewed signal if they do not offer the local signal in HD, but satellite carriers could be required to do exactly that under the broadcasters' interpretation of the law.

2. Satellite carriers offer local service in some markets only in HD. Thus, with respect to carriage of a significantly viewed station originating from such market, there would only be one HD feed of the station on the satellite beam, and that satellite beam would cover both the station's local and significantly viewed areas. There is no technical way for the satellite carrier to downrez such signal only in its significantly viewed area. Moreover, a satellite carrier would likely not have the capacity on its spot beam to add a duplicative, SD version of the station. It would therefore likely be forced to disrupt the service entirely for the viewers in the neighboring market or downrez the signal in the significantly viewed station's home market as well. Neither alternative is a workable solution.

3. New multicast "network affiliates" appear every day, almost like mushrooms. Under the broadcasters' interpretation of the law, DIRECTV and DISH would have to black out SV stations the minute a new station appears – even though it takes months to carry such new stations (assuming DIRECTV and DISH even have room on their spot beams to do so).

Appendix
Redline of 47 U.S.C. § 340(b)

(b) Limitations.

(1) **Service** ~~**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, t**~~**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.

(2) ~~**Digital s**~~**S**ervice limitations.~~—**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.** ~~**With respect to a signal that originates as a digital signal of a network station, this section shall apply only if**~~

~~**(A) 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**~~

~~**(B) either**~~

~~**(i)the retransmission of the local networks 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 station.**~~

(3) Limitation not applicable where no network affiliates. The limitations in paragraphs (1) and (2) shall not prohibit a retransmission under this section to a subscriber located in a local market in which there are no network station affiliated with the same television network as the station whose signal is being retransmitted pursuant to this section.

(4) Authority to grant station-specific waivers. Paragraphs (1) and (2) shall not prohibit a retransmission of a network station in a 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 paragraph (1) and (2) to such satellite carrier with respect to retransmission of the significantly viewed station to such subscriber.