



October 7, 2010

Marlene H. Dortch, Esq.  
Secretary  
Federal Communications Commission  
445 12th Street SW  
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 the National Association of Broadcasters (NAB) met yesterday with Commission staff to discuss issues related to the two STELA implementation proceedings captioned above. Present on behalf of NAB were Jane Mago and Ben Ivins, accompanied by outside counsel David Kushner and Thomas Olson. Present at yesterday's meetings were Eloise Gore of Commissioner Clyburn's office, and Alan Stillwell and Ira Keltz of the Office of Engineering and Technology.

NAB raised points consistent with their earlier submissions in these proceedings as reflected in the attached talking points.

Sincerely,

A handwritten signature in black ink that reads "Benjamin F.P. Ivins". The signature is written in a cursive, flowing style.

Benjamin F.P. Ivins  
Senior Associate General Counsel  
Legal and Regulatory Affairs

Attachments

cc: Eloise Gore  
Alan Stillwell  
Ira Keltz

**National Association of Broadcasters  
ILLR Model Talking Points**

**I. STELA Requires the Commission to Continue to Rely on an Outdoor Antenna Standard to Determine Whether a Household Is Unserved**

- A. Section 339(c)(3)(A) requires the FCC to adopt the digital ILLR model it recommended to Congress in 2005. In that model, the FCC relied on use of an outdoor antenna and expressly rejected reliance on indoor antennas for modeling stations' coverage.
- B. The statute says the Commission "shall rely on" its recommended digital ILLR model. The carriers claim that that language only means "as a starting point," but there is no support for such an unorthodox interpretation of plain language. In fact, Section 119(a)(2)(B)(ii)(II) also requires that courts "shall rely on" a particular site measurement methodology, and the D.C. Circuit (at the Commission's urging) held neither carriers nor courts could deviate from it. See *EchoStar Satellite L.L.C. v. FCC*, 457 F.3d 31, 41 (D.C. Cir. 2006) ("EchoStar points to nothing in the statute to support its conclusion that it may bypass the procedures in § 339 by conducting its own on-site testing; nor do we see how one can square the above-referenced instructions to courts with any procedure other than that in § 339.").
- C. Section 339(c)(3)(A) also requires the FCC to prescribe a predictive model for determining the ability of individual households to receive signals in accordance with the signal intensity standard in Section 73.622(e)(1) of the FCC's rules. That rule is predicated on outdoor antennas.
- D. Section 205(b) of STELA requires the FCC to continue to use its pre-STELA rules for analog LPTV and translator stations. Those rules obviously require reliance on an outdoor antenna, and it would make no sense to require an outdoor antenna standard for analog signals but not for digital signals.

**II. The Carriers' Arguments That STELA Imposed an Indoor Antenna Requirement Are Without Merit**

- A. Congress could have said "indoor antenna" if that was its intent. But it did not. And there is no legislative history indicating that Congress intended to mandate reliance on indoor antennas for either predictions or testing.
- B. The congressional report on which the carriers rely to assert that Congress mandated use of an indoor antenna accompanied a bill that was never passed. And that report told the FCC to study the issue, not to mandate use of an indoor antenna.

- C. The carriers' reliance on the removal of certain words in the Copyright Act ignores STELA's mandate in the Communications Act to adopt the FCC's proposed ILLR model, which relies on outdoor antennas.
- D. The carriers also ignore that the Copyright Act likewise references the 2005 digital ILLR model, which (as just mentioned) relies on outdoor antennas.
- E. The Communications Act frequently imposes more restrictions on carriers than the Copyright Act does, so it is not unusual that Section 339 mandates a digital ILLR model with an outdoor antenna standard, even if the "unserved household" definition in Section 119 is less specific.
- F. Congress' purpose in deleting the words qualifying "antenna" in STELA's revisions to the Copyright Act was to eliminate unnecessary words, not to eliminate the Commission's reliance on an outdoor antenna.
- G. At most, deletion of the words qualifying "antenna" meant that Congress was leaving it up to the Commission to determine whether the outdoor antenna standard should be abandoned, and it has tentatively, and correctly, determined it should not do so.
- H. The most natural reading of "an antenna" in Section 119 is "**any** antenna." Thus, Congress' use of the unqualified term "antenna" in Section 119 means that if a household can receive the signal through use of any antenna, whether outdoor or indoor, whether conventional or not, whether stationary or not, the household is served.
- I. By choosing to rely on an outdoor antenna, the Commission is making it *easier* for households to be considered unserved than if it said that a household was unserved only if **no** antenna of any type could receive the signal at that location – not even one on top of a 200-foot tower.

### **III. Adoption of an Indoor Antenna Standard Would Be Discriminatory and Patently Unfair**

- A. An indoor antenna standard is radically inconsistent with the idea of nearly universal television service. The Commission was well aware of this in designing both analog service areas (in the 1950s) and digital service areas (over the last 20 years). The carriers' proposal is thus inconsistent with the fundamental premises of the American broadcast TV system.
- B. An indoor antenna standard would reduce program exclusivity protection and the need to obtain retransmission consent.
- C. Broadcasters spent billions converting to a digital allocation scheme based upon outdoor antennas, and it would be grossly unfair to change the rules of the game now.

- D. The carriers' customers must use outdoor antennas, but they claim that broadcasters should be saddled with an unworkable indoor antenna standard.
- E. DIRECTV's own website tells consumers they may need an outdoor antenna.

**IV. Adoption of an Indoor Antenna Standard Would be Contrary to the Public Interest**

- A. An indoor antenna standard would seriously impair stations' ability to fulfill their local public service obligations.
- B. To serve their current coverage areas under an indoor antenna standard, stations would need unimaginably large amounts of electricity and would create massive interference with each other's signals.

**V. A Predictive Model Relying on Indoor Antennas Would Violate Statutory Requirements That the Model Be "Reliable" and "Accurate"**

- A. It would be, literally, impossible to administer an indoor antenna standard.

**VI. No Changes Are Needed to Any of the ILLR Model's Inputs**

- A. The ILLR model is highly accurate—95%. It does a very good job balancing overpredictions and underpredictions. The carriers' claim that "people have known for years that the model is inaccurate" is completely incorrect.
- B. NAB's website does *not* contradict the accuracy of the ILLR model.
- C. Land use and land cover has already been properly dealt with by the Commission. DISH previously litigated—and lost—this very issue in 2006.
- D. There is no need for any adjustment to address interference. The FCC has found that modern receivers do an excellent job of defeating interference. See 2005 Report to Congress at ¶ 103. Similarly, there is no need to require additional signal strength to deal with multipath. The FCC has also found that DTV receivers provide service under most multipath conditions they encounter. See 2005 Report to Congress at ¶ 77.
- E. The FCC has already considered, and correctly rejected, the carriers' proposal to increase time variability from 90% to 99%.

**VII. The Carriers' Proposed Indoor Testing Model Is Fatally Flawed**

- A. The carriers' proposal would allow gaming of the system, since most households have multiple TVs in various locations.

- B. The carriers' proposal does not require testing equipment to be calibrated, which is contrary to existing testing standards in Section 73.683(d)(2)(i) of the FCC's rules.
- C. The carriers' proposal would have a tester wielding a nearly 9 foot half-wave dipole antenna in subscribers' living rooms.
- D. The carriers' proposal would have the testing antenna placed on the floor.
- E. The carriers' proposal calls for the testing antenna to be intentionally misoriented.
- F. The carriers' proposal is contrary to STELA's requirement that the FCC seek ways to minimize consumer burdens associated with on-location testing.

**VIII. "Reception" Testing Is Fundamentally Contrary to the Act, As the Courts Have Repeatedly Concluded**

**National Association of Broadcasters  
Significantly Viewed Talking Points**

- I. **The Only Significant Change STELA Made to Significant Viewing Was to Replace the “Equivalent or Entire Bandwidth” Requirement with the HD Format Requirement with Respect to the Manner in Which Local Stations Must Be Carried If Significantly Viewed Stations of the Same Network Are Provided**
  
- II. **Contrary to the NPRM’s Tentative Conclusion, Congress Did Not Delete the Requirement that Carriers Must Actually Transmit the Signal of a Local Network Affiliate As a Condition Precedent to Importation of a Distant Significantly Viewed Signal Affiliated with the Same Network**
  - A. STELA did not alter the “same network affiliate” requirement pursuant to which carriers must transmit the local station affiliated with the same network before providing a distant SV station of that network. DIRECTV acknowledged in its comments that the statute, on its face, “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.” DIRECTV Comments at 4.
  - B. Prior Section 340(b)(2) and Amended Section 340(b)(2) both contain “affiliated with the same network” language. This is the operative language upon which the Commission concluded in its 2005 SHVERA Significantly Viewed R&O that local carriage is a condition precedent to SV importation.
  - C. This interpretation is compelled by reading Sections 340(b)(1)-(4) as a whole, as the FCC did in its SHVERA Significantly Viewed R&O.
  - D. Since carriers misconstrue STELA’s textual changes to Section 340(b), their claim that the Commission’s “contextual reasoning” no longer applies is without merit.
  - E. There is nothing in STELA’s legislative history to suggest that Congress objected to the Commission’s carriage requirement interpretation; rather, all of STELA’s legislative history suggests that Congress intended *only* to remedy the “equivalent or entire bandwidth” requirement and to update the statute for DTV transition purposes. In amending STELA as Congress did, the Commission should presume not only that Congress was aware of the carriage requirement interpretation the agency had given to Section 340 under SHVERA, but also that Congress’s failure to expressly amend the statute to alter that interpretation (unlike with respect to the “equivalent or entire bandwidth” requirement) is tantamount to a legislative re-enactment of that interpretation.

**III. STELA Requires Carriage of Local Stations in SD Format If a Carrier Retransmits a Significantly Viewed Station Only in SD Format**

**IV. The Requirement That Carriers Must Carry a Local Station in an HD Format, If Available, and If It Imports a Significantly Viewed Station of the Same Network, Applies to Multicast Channels**

- A. Section 340(b) uses the inclusive term “signal.” Had Congress intended to differentiate between multicast and primary channels in Section 340, it would have done so, just as it did in other sections of STELA.
- B. DIRECTV agrees with this interpretation. See DIRECTV Comments at 5 & 5 n.14.
- C. Case-by-case HD multicast determinations would be discriminatory and would violate the Act.

**V. STELA Did Not, in Any Way, Change the Statutory Exceptions to the Eligibility Limitations on Subscribers Receiving Significantly Viewed Stations.**

- A. These exceptions do not permit SV carriage in a local market if a carrier does not yet offer local-into-local service.
- B. Both carriers stated in their comments that they agree. See DISH Comments at 5; DIRECTV Comments at 5.
- C. Section 340(b)(3) permits SV carriage into a local-into-local market when there is no local affiliate of the same network present in that market (i.e., a short market).
- D. Section 340(b)(4) permits local stations in a local-into-local market to waive either the carriage requirement or the HD format requirement.

**VI. Congress Did Not Intend for STELA to Affect Retransmission Consent Negotiations**

- A. The carriers’ claim that STELA be construed such that a local station is not “available” for local-into-local carriage if it is in a retransmission consent dispute with a carrier is contrary to Congress’ intent not to use STELA as a vehicle to change the playing field for retransmission consent negotiations.
- B. The pre-condition that a subscriber “receive” the local affiliate before an SV station of the same network be imported defeats the carriers’ claim that they need not carry such a station with which there is a retransmission consent dispute.

- C. The Commission properly and correctly rejected such carrier overtures in implementing SHERVA and should do so here.
- D. The Commission has another open proceeding more appropriate to deal with retransmission consent issues.

**VII. A Satellite Carrier Delivering a Distant Significantly Viewed Network Station to a Local Market Must:**

- A. provide local-into-local service in the local market,
- B. 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
- C. 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.

**VIII. The Carriers Want the Commission to Interpret a Statutory Structure That Congress Did Not Enact, and They Repeatedly Ignore a Fundamental Premise of STELA and Its Predecessors—the Protection of Localism**

- A. The carriers complained about the onerous nature of the “entire or equivalent bandwidth” requirement, and Congress amended the statutory scheme to ameliorate that problem. But now the carriers want the Commission to interpret STELA in ways that are contrary to STELA’s basic structure.
- B. The carriers concede that “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.” Joint DIRECTV and DISH Significantly Viewed Talking Points, IV.D. They then say, however, that they should not be required to “downrez” an SV signal that is only carried in HD format in the SV area because it is not technically possible. See *id.* IV.F. So while the carriers acknowledge what the law requires, they want the Commission to do something different. Congress, however, was primarily concerned with protecting localism. The obvious solution is not to let the carriers violate the express HD format requirement of the statute, but for the carriers not to carry SV signals where they cannot, or would rather not, comply with the law.
- C. Similarly, the carriers complain that they may be contractually obligated not to “downrez” an SV signal. The Commission has, wisely, stayed out of such private contractual matters. Again, the obvious solution is not to carry the SV signal where the carrier cannot comply with the law.
- D. The carriers also complain that “[n]ew multicast ‘network affiliates’ appear every day, almost like mushrooms.” Joint DIRECTV and DISH

Significantly Viewed Talking Points, IV.F. Hyperbole aside, DIRECTV acknowledged in its Comments that STELA applies equally to multicasts. See DIRECTV Comments at 5 & 5 n.14. To foster localism, STELA and its predecessors' policy preferred local stations over distant stations. The statutory structure is intended to encourage satellite carriage of the multicast channel throughout the entire DMA for the benefit of all viewers, not to undermine the multicast's economic viability by permitting a duplicating SV signal to be imported into a portion of the market.

**IX. DISH's Request for a Further Rulemaking to Limit Stations' Retransmission Consent Negotiating Rights and to Alter Market Modification Rules Should Be Summarily Denied**

- A. The Commission already has an open rulemaking proceeding to deal with retransmission consent issues.
- B. It is *not* inconsistent with competitive marketplace considerations and the good faith negotiation requirement for a local station to offer a proposal that forecloses carriage of other programming services by the MVPD that would substantially duplicate the local station's programming. Moreover, DISH ignores significant elements of reciprocity, and there is no restriction on a local station bargaining to prevent importation of a duplicating SV signal whose carriage is not legally mandated.
- C. DISH's proposal that an SV station be precluded from refusing to grant retransmission consent, even if required by the station's contractual obligations to its network and other program suppliers, is directly contrary to Section 325(b)(6) of the Communications Act and to long-established Commission precedent.
- D. 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).