

October 22, 2010

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: *Ex Parte* Letter

Establishment of a Model for Predicting 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

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

Dear Ms. Dortch:

Through this letter, DIRECTV and DISH Network respond to certain legal arguments raised by the National Association of Broadcasters, the ABC Television Affiliates Association, the CBS Television Affiliates Association, the Fox Broadcast Company Affiliates Association, the NBC Television Affiliates, and the Association for Maximum Service Television (the “Broadcasters”) in reply comments and during the *ex parte* period in connection with the two STELA implementation proceedings listed above.

In both proceedings, the Broadcasters ascribe motives to Congress diametrically opposed to Congress’s actual intent. Congress did not mean to forbid distant signals to anybody who could receive local signals if they erected a 200 foot antenna on their house. Nor did it mean to make subscribers’ access to significantly viewed stations subject to disruption based on *another* station’s withholding of retransmission consent. In both cases, Congress enacted changes to help consumers receive the television programming they want but which outdated provisions had prevented them from getting.

I. Predictive Model and Measurement Standards

For years, a household has been “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.”

The Broadcasters, however, would turn Congress's intent on its head:

- They first argue that “antenna” means “any antenna,” so if a household could theoretically erect an antenna on a 200-foot tower and could receive a strong signal based on that hypothetical skyscraping equipment, the household would count as “served.”¹
- They next argue that Congress's purpose in deleting the words qualifying “antenna” “was to eliminate unnecessary words.”²
- They also argue that 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.³

Reading these arguments in tandem gives the distinct impression that the Broadcasters are asking the Commission to read the deletion in any conceivable way other than the way in which it is read by the satellite carriers – so long as the carriers and consumers do not obtain any relief.

These arguments cannot all be right; in fact they are all either incorrect or inconsistent with the satellite carriers' view that indoor rabbit ears should be permitted. Congress did not mean for the Commission to base the unserved household standard on a 200 foot antenna. Rather, if the deletion means that Congress intended “any” antenna, then it means simply that use of “any” antenna, including rabbit ears antennas, is permitted to determine if a household is unserved. This is precisely the satellite carriers' view.⁴ Nor was this a case of eliminating unnecessary words. The Commission must assume that Congress meant something through its changes, and even the broadcasters concede that these words are necessary by insisting that the Commission maintain an “outdoor” standard. And, while the Broadcasters are correct in pointing out the Commission's considerable authority in promulgating an antenna standard, that authority does not permit the Commission to simply ignore statutory changes.

¹ National Association of Broadcasters, ILLR Model Talking Points at 2 (attachment to *ex parte* notice filed October 7, 2010) (“NAB ILLR Talking Points”).

² *Id.*

³ *Id.*

⁴ The Broadcasters dismiss the legislative history cited by the satellite carriers on the ground that it pertains to a different bill. While this is true, the quoted language explains what the deletion of “outdoor” was intended to mean in that bill, and raises an inescapable inference for the meaning of the same deletion in the finally-enacted law. Legislative history from predecessor bills can be a valuable aid in statutory construction. *See, e.g., Jerman v. Carlisle*, 130 S. Ct. 1605, 1620 n.14 (2010) (“To similar effect, a House Report on an earlier version of the bill explained the need for new legislation”); *United States v. Ellis*, 949 F.2d 952, 953-54 (8th Cir. 1991) (interpreting a statute based on the “[t]he Senate Report for one of the predecessor bills . . . which contains the relevant portion of [the statute]”).

The Broadcasters next argue that by instructing the Commission to “rely on the Individual Location Longley-Rice model set forth by the Commission in CS Docket No. 98–201,” Congress has prohibited the Commission from altering the model (including the model’s current assumption of an outdoor antenna).⁵ The satellite carriers believe that “rely on” does not mean “incorporate without changes,” and there is nothing “unorthodox” about this reading. When an agency is told to rely on a model, it is not told to use the model without alterations. *Merriam-Webster’s* defines “rely” as “to be dependent [as in] <the system on which we [rely] for water>.”⁶ This definition does not add any requirement that the thing relied upon be forever unchanging. To use *Merriam’s* example, a city does not cease being dependent upon its water system simply because it upgrades its pumping station to a newer, more reliable model; the upgrade does not change the water system into something else, something foreign. Consistent with the dictionary definition, “rely on” in this context means simply that the Commission must use the ILLR digital predictive model as a basis.

The Broadcasters argue that the D.C. Circuit interpreted “rely on” to mean “use” in *EchoStar Satellite L.L.C. v. FCC*, and that the Commission must do the same here.⁷ This is incorrect. The Court was not interpreting the words “rely on,” but completely different statutory words entirely. Congress had provided for a test “if” a subscriber’s request for a waiver was denied. EchoStar wanted to be able to conduct tests before denial of a waiver request. The Court held simply that such a test was not consistent with the sequence spelled out in Section 339.⁸ “Rely on” had nothing to do with it.

In sum, Congress intended to permit use of an indoor antenna in unserved household determinations, and the Commission should likewise do so.

II. Significantly Viewed

The Broadcasters accuse the satellite carriers of seeking to inject retransmission consent into the significantly viewed proceeding.⁹ But satellite carriers have always argued that retransmission consent disputes with one station should not affect subscribers’ ability to view significantly viewed stations. During the STELA reauthorization legislative process, Congress heard the satellite carriers’ concerns that they simply cannot offer significantly viewed service if they cannot reasonably ensure that this service will not be disrupted in the event of a retransmission consent dispute with another station. Because the Commission’s prior

⁵ See Reply Comments of the Broadcasters’ Associations at 12-13 (filed Sept. 3, 2010) (“Broadcasters’ Reply Comments”).

⁶ *Merriam-Webster’s Dictionary* (11th ed. 2008).

⁷ NAB ILLR Talking Points at 2.

⁸ *EchoStar Satellite L.L.C. v. FCC*, 457 F.3d 31, 41 (D.C. Circuit 2006).

⁹ National Association of Broadcasters, Significantly Viewed Talking Points at 4 (filed as an attachment to *ex parte* notice filed October 7, 2010) (“NAB SV Talking Points”).

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 prevent local stations from blocking significantly viewed stations during retransmission consent disputes. Here again, however, the Broadcasters argue that Congress meant something else entirely. According to the Broadcasters, if satellite carriers do not wish to disrupt significantly viewed service, the "obvious solution" is "for the carriers not to carry SV signals" in the first place.¹⁰ This indeed is what many broadcasters would like,¹¹ but it is not what Congress intended.

The satellite carriers have addressed the substance of the Broadcasters' arguments in prior submissions:

- Prior law contained two restrictions, one requiring the satellite carrier to offer *local service* before significantly viewed service; the other requiring the *same-network station* to be offered.
- Congress deliberately chose to eliminate the second, same-network restriction.
- The Commission's interpretation of SHVERA was based on the previous statutory language, including the same-network restriction, which has now been deleted.
- All that remains is the local service requirement and a new HD formatting requirement.
- The HD formatting requirement applies only "whenever such format is available from [the local] station" – *i.e.*, whenever a signal with the format has been made available to the carrier under either a retransmission consent agreement or a proper carriage election.

The Broadcasters' only new argument regarding significantly viewed service relates to HD formatting being "available from [the local] station." They argue, first, that the satellite carriers' interpretation of this language as meaning "available to the satellite carrier" (*i.e.*, subject to an agreement or an election) is inconsistent with an alleged Congressional intent not to interfere with retransmission consent negotiations.¹² Again, Congress did not mean to interfere with such negotiations; it simply meant to prevent such negotiations from "interfering" with satellite carriage of unrelated significantly viewed stations.

¹⁰ *Id.* at 3.

¹¹ *See id.* at 4 (suggesting that local stations can bargain to prohibit satellite carriers from offering significantly viewed service entirely).

¹² NAB SV Talking Points at 2.

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The Broadcasters also argue that the requirement that a subscriber “receive” the network affiliate “defeats” the satellite carriers’ interpretation.¹³ This is not so. The Broadcasters are misstating the requirement – the requirement is to receive some local service under Section 122, *not* the specific network. The subscriber need only “receive” the signal from the satellite carrier if the broadcaster makes it “available” to that carrier in the first place. Where the satellite carrier offers an HD signal, it does so because the broadcaster has made the signal available to it. But where the broadcaster withholds retransmission consent, the HD-formatted signal is no longer “available to” the satellite carrier, and thus there is no requirement that the subscriber “receive” it in order to continue to receive significantly viewed stations without disruption.

* * *

In both proceedings, Congress made deliberate choices to help consumers. The Broadcasters seek to undo those choices here. The Commission should not let them do so.

Respectfully submitted,

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¹³ *Id.*