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October 22, 2010

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

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

Dear Ms. Dortch:

Yesterday, Jane Mago, General Counsel of the National Association of Broadcasters (NAB), David Kushner and I met with Commission staff to discuss issues related to the STELA implementation proceeding referenced above. Commission staff members present were Evan Baranoff, Eloise Gore, and Mary Beth Murphy of the Media Bureau and Susan Aaron of the Office of General Counsel, and, in a separate meeting, Marilyn Sonn of Chairman Genachowski's office.

We discussed points consistent with earlier submissions in the proceeding as reflected in the attached talking points. We also provided the staff with the attached tables reflecting the extent to which out-of-market, duplicating network stations are "significantly viewed" in several local markets. We also discussed how Congress continues to view significantly viewed satellite signals as a subset of *distant* signals, not as local signals.¹

¹ See H.R. REP. NO. 111-319 (2009), at 10 (emphasis added):

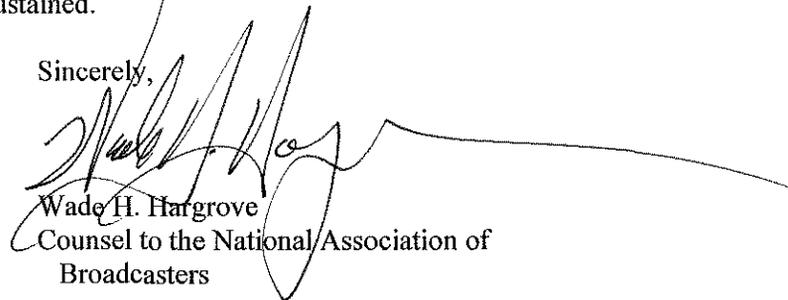
Since *significantly viewed signals are by definition a subset of distant signals*, SHVERA included this provision in Section 119, the distant

continued

With the Media Bureau staff and Ms. Aaron, we explained that the phrase “makes available” in Section 340(b)(2) means that a local network station is, in fact, broadcasting the relevant network programming. This is consistent with the use of the word “available” and “availability” elsewhere in the Communications Act and in Section 119 of the Copyright Act, as well as with the dictionary definition that “available” means “capable of being gotten.” We discussed how availability is not dependent on the contractual relationship between the entity that “makes available” the broadcast signal or the satellite signal, as the case may be, and a downstream third party, such as a satellite carrier in the case of a television station “making available” network programming, regardless of whether a satellite carrier agrees to retransmit it, or a satellite subscriber in the case of a satellite carrier “making available” a local signal package to which the subscriber is not obligated to subscribe.

We discussed how the fundamental structure of Section 340(b) upon which the Commission relied in 2005 in implementing SHVERA was *not* amended by STELA. In particular, the Commission in 2005 relied on the “same network affiliate” language in STELA’s Sections 340(b)(3) and (b)(4) to require satellite carriage of the local station as a prerequisite to carriage of a duplicating, out-of-market significantly viewed station in Section 340(b)(1), *see SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd 17278 (2005), at ¶ 71, and that the very same language is carried forward in STELA. We pointed out that Section 340(b)(2) also contains “same network affiliate” language as a secondary factor that supported the Commission’s 2005 interpretation of the overall structure of Section 340(b). *See id.* at ¶ 72. Because STELA *did not* amend in any way either Section 340(b)(3) or Section 340(b)(4) (and Section 340(b)(2) still contains the “same network affiliate” language), logic compels the same construction be placed on Section 340(b) in implementing STELA as the Commission placed on that language in 2005 in implementing SHVERA, and that a different construction of essentially identical language could not, as a matter of law, be rationally sustained.

Sincerely,



Wade H. Hargrove
Counsel to the National Association of
Broadcasters

cc: Ms. Susan Aaron
Mr. Evan Baranoff
Ms. Eloise Gore
Ms. Mary Beth Murphy
Ms. Marilyn Sonn

continued

signal license. However, since significantly viewed signals do not incur royalties, the Committee believes it should be moved to Section 122, which governs all other royalty-free satellite transmissions under the compulsory license. The bill accordingly incorporates the significantly viewed provision, previously in Section 119(a)(3), into Section 122(a).

**Significantly Viewed Out-Of-Market Stations
In The Dayton DMA**

County	Station	Network	DMA
Champaign	WCMH	NBC	Columbus
	WSYX	ABC	Columbus
	WBNS	CBS	Columbus
	WTTE	FOX	Columbus
Clark	WCMH	NBC	Columbus
	WSYX	ABC	Columbus
	WBNS	CBS	Columbus
Darke	WCPO	ABC	Cincinnati
	WSTR	My Network TV	Cincinnati
Greene	WCPO	ABC	Cincinnati
	WKRC	CBS	Cincinnati
Logan	WCMH	NBC	Columbus
	WSYX	ABC	Columbus
	WBNS	CBS	Columbus
	WTTE	FOX	Columbus
Mercer	WANE	CBS	Ft. Wayne (Indiana)
	WPTA	ABC	Ft. Wayne (Indiana)
	WKJG ¹	NBC	Ft. Wayne (Indiana)
	WFFT	FOX	Ft. Wayne (Indiana)
	WLIO	NBC	Lima
	WTLW	Family	Lima
Miami	N/A		
Montgomery	WCPO	ABC	Cincinnati
	WKRC	CBS	Cincinnati
Preble	WLWT	NBC	Cincinnati
	WCPO	ABC	Cincinnati
	WKRC	CBS	Cincinnati
	WXIX	FOX	Cincinnati
	WSTR	My Network TV	Cincinnati
Shelby	N/A		

¹ WKJG's call sign changed to WISE in 2003.

**Significantly Viewed Out-Of-Market Stations
In The Lansing DMA**

County	Station	Network	DMA
Clinton	WNEM	CBS	Flint-Saginaw-Bay City
	WJRT	ABC	Flint-Saginaw-Bay City
	WSMH	FOX	Flint-Saginaw-Bay City
	WOOD	NBC	Grand Rapids-Kalamazoo-Battle Creek
	WXMI	FOX	Grand Rapids-Kalamazoo-Battle Creek
Eaton	WJRT	ABC	Flint-Saginaw-Bay City
	WWMT	CBS	Grand Rapids-Kalamazoo-Battle Creek
	WOOD	NBC	Grand Rapids-Kalamazoo-Battle Creek
	WXMI	FOX	Grand Rapids-Kalamazoo-Battle Creek
Hillsdale	WWMT	CBS	Grand Rapids-Kalamazoo-Battle Creek
	WOOD	NBC	Grand Rapids-Kalamazoo-Battle Creek
	WXMI	FOX	Grand Rapids-Kalamazoo-Battle Creek
	WTOL	CBS	Toledo
	WTVG	ABC	Toledo
Ingham	WUPW	FOX	Toledo
	WJRT	ABC	Flint-Saginaw-Bay City
	WWMT	CBS	Grand Rapids-Kalamazoo-Battle Creek
Jackson	WOOD ¹	NBC	Grand Rapids-Kalamazoo-Battle Creek
	WJBK	FOX	Detroit
	WDIV	NBC	Detroit
	WXYZ	ABC	Detroit

¹ WOOD's significantly viewed status in Ingham County has been waived for the cable communities of Lansing and East Lansing, MI.

**Significantly Viewed Out-Of-Market Stations
In The Sherman-Ada DMA**

County	Station	Network	DMA
Atoka	N/A		
Bryan	KDFW	FOX	Dallas-Ft. Worth
	WFAA	ABC	Dallas-Ft. Worth
	KTVT	CBS	Dallas-Ft. Worth
Carter	KWTV	CBS	Oklahoma City
	KFDX	NBC	Wichita Falls & Lawton
	KAUZ	CBS	Wichita Falls & Lawton
Choctaw	KTVT	CBS	Dallas-Ft. Worth
Coal	KFOR	NBC	Oklahoma City
Johnston	N/A		
Love	KDFW	FOX	Dallas-Ft. Worth
	WFAA	ABC	Dallas-Ft. Worth
	KTVT	CBS	Dallas-Ft. Worth
	KFDX	NBC	Wichita Falls & Lawton
	KAUZ	CBS	Wichita Falls & Lawton
	KSWO	ABC	Wichita Falls & Lawton
Marshall	KDFW	FOX	Dallas-Ft. Worth
Pontotoc	KFOR	NBC	Oklahoma City
	KOCO	ABC	Oklahoma City
	KWTV	CBS	Oklahoma City
	KOKH	FOX	Oklahoma City
	KAUT	My Network TV	Oklahoma City
Pushmataha	N/A		
Grayson (TX)	KDFW	FOX	Dallas-Ft. Worth
	KXAS	NBC	Dallas-Ft. Worth
	WFAA	ABC	Dallas-Ft. Worth
	KTVT	CBS	Dallas-Ft. Worth
	KTXA	IND	Dallas-Ft. Worth

**Significantly Viewed Out-Of-Market Stations
In The Hartford & New Haven DMA**

County	Station	Network	DMA
Hartford	N/A		
Litchfield	WCBS	CBS	New York
	WNBC	NBC	New York
	WNYW	FOX	New York
	WPIX	CW	New York
Middlesex	WNYW	FOX	New York
New Haven	WCBS*	CBS	New York
	WNBC	NBC	New York
	WNYW*	FOX	New York
	WABC*	ABC	New York
	WWOR*	My Network TV	New York
	WPIX	CW	New York
New London	WTEV ¹	ABC	Providence-New Bedford
	WJAR	NBC	Providence-New Bedford
	WPRI	CBS	Providence-New Bedford
	WCVB	ABC	Boston (Manchester)
Tolland	WBZ	CBS	Boston (Manchester)
	WGGB	ABC/FOX	Springfield-Holyoke
Windham	WLNE	ABC	Providence-New Bedford
	WJAR	NBC	Providence-New Bedford
	WPRI	CBS	Providence-New Bedford
	WBZ	CBS	Boston (Manchester)
	WCVB	ABC	Boston (Manchester)
	WHDH	NBC	Boston (Manchester)

* Station's significantly viewed status has been waived for certain communities in the identified county.

¹ WTEV's call sign changed to WLNE in 1980.

**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).