



November 18, 2010

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

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

Dear Ms. Dortch:

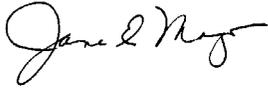
Yesterday, the undersigned met with Austin Schlick, Julie Veach and Susan Aaron of the Office of the General Counsel to discuss issues related to the STELA implementation proceeding referenced above.

Ms. Mago presented the arguments in the attached document. In particular, she emphasized that the fundamental structure of the provision of the Communications Act that governs the ability of satellite carriers to provide significantly viewed broadcast signals to their subscribers, Section 340, had not changed since the Commission interpreted it in the SHVERA Significantly Viewed Report and Order, 20 FCC Rcd 17278 (2005). She argued that in 2005, the Commission had correctly interpreted Section 340(b)(1), based on its structure, relationship to the Copyright Act, and legislative history to require that subscribers receive a local station as a prerequisite to receiving a significantly viewed station affiliated with the same network. She further noted that the Commission must now recognize that Congress was aware of the agency's interpretation and effectively ratified that interpretation because nothing in the STELA statute or its legislative history suggest an intent to overturn the Commission's interpretation.

Marlene H. Dortch, Esq.
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Please direct any questions regarding this matter to the undersigned.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jane E. Mago". The signature is fluid and cursive, with the first name "Jane" and last name "Mago" clearly distinguishable.

Jane E. Mago
Executive Vice President and General Counsel
Legal and Regulatory Affairs

Attachment

cc: Susan Aaron
Joshua Cinelli
Eloise Gore
Dave Grimaldi
Rosemary Harold
Louis Peraertz
Austin Schlick
Marilyn Sonn
Julie Veach

**STELA Left the Fundamental Structure of Section 340 Unchanged, and the
Commission’s 2005 Interpretation of That Structure Compels
That Section 340 Be Interpreted the Same Way Now:
A Satellite Subscriber Must Receive the Local, In-Market
Network Station As a Condition Precedent to Satellite Importation
of a Distant Duplicating SV Station Affiliated with the Same Network**

With respect to significantly viewed (“SV”) signals, the 2010 Act (“STELA”) made only three changes, *none* of which altered the fundamental structure of the statutory scheme established by Congress in SHVERA in 2004 (and confirmed by the Commission in 2005), that require, as a condition precedent to satellite importation of a distant duplicating SV network station, the satellite carrier must first retransmit the local, in-market station affiliated with the same network.

First, STELA moved the significantly viewed compulsory license from Section 119 to Section 122 of the Copyright Act. Nothing in this change affects the obligation of the satellite operators to carry local signals. As the legislative history makes clear, Congress continues to view SV signals as a subset of *distant* signals, not as local signals:

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

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

Second, STELA amended Section 340 to replace the “equivalent or entire bandwidth” requirement in subsection (b)(2) with an “HD” format requirement. As the *Notice* observes,¹ in

¹ See Implementation of Section 203 of the Satellite Television Extension and Localism Act of 2010 (STELA); Amendments to Section 340 of the Communications Act, *Notice of Proposed Rulemaking*, MB Docket No. 10-148 (released July 23, 2010) (“*Notice*”), at ¶ 11.

making this change, Congress accepted arguments from satellite carriers that the Commission's implementation of the 2004 Act's "equivalent or entire bandwidth" requirement had proved "impractical" for satellite carriers.²

Third, and finally, STELA amended Section 340 (as it did other provisions of the Act) to eliminate outdated references to "analog" and "digital" to reflect the DTV transition that occurred between the 2004 Act's enactment and 2010.

What STELA did *not* do is amend or alter *in any way* Section 340(b)'s requirement relating to carriage of distant duplicating SV network stations upon which the Commission relied in 2005 when implementing Section 340(b) of the 2004 Act.

The chart below compares side-by-side the language of Section 340(b) as initially enacted as part of SHVERA in 2004 and as amended by STELA in 2010. This comparison shows, consistent with the amendments discussed above, that:

- (i) Congress eliminated the unnecessary references in subsections (b)(1) and (b)(2) to "analog" and "digital" to implement the DTV transition;
- (ii) Congress replaced in subsection (b)(2) the "equivalent or entire bandwidth" requirement with an "HD" format requirement;
- (iii) Congress did not impose in subsection (b)(1) in either the 2004 Act or the 2010 Act an "affiliated with the same television network" requirement, but, instead, in both Acts required that a subscriber only "receive" local-into-local satellite retransmissions;
- (iv) Congress retained in the 2010 Act the 2004 Act's subsection (b)(2) "affiliated with the same television network" language;
- (v) Congress retained in the 2010 Act the *identical* subsection (b)(3) from the 2004 Act with its "affiliated with the same network" language and the exception for "short markets;" and
- (vi) Congress retained in the 2010 Act the *identical* subsection (b)(4) language from the 2004 Act that contains a provision for station-granted waivers of the "affiliated with the same television network" requirement.

² H.R. REP. NO. 111-349 (2009), at 16 (reporting on H.R. 2994).

<p style="text-align: center;">(2004 Act) 47 U.S.C. § 340(b)</p>	<p style="text-align: center;">(2010 Act) 47 U.S.C. § 340(b)</p>
<p>Subsection (1)-Analog service limited to subscribers taking local-into-local service:</p> <p>“With respect to a signal that originates as an analog signal of a network station, this section shall apply to retransmissions to subscribers of a satellite carrier who <i>receive retransmissions</i> of a signal that originates as an analog signal of a local network station from that satellite carrier pursuant to section 338 of this title.” (Emphasis supplied.)</p>	<p>Subsection (1)-Service limited to subscribers taking local-into-local service:</p> <p>“This section shall apply only to retransmissions to subscribers of a satellite carrier who <i>receive retransmissions</i> of a signal from that satellite carrier pursuant to section 338 of this title.” (Emphasis supplied.)</p>
<p>Subsection (2)-Digital service limitations:</p> <p>“With respect to a signal that originates as a digital signal of a network station, this section shall only apply if—</p> <p style="padding-left: 40px;">(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 <i>affiliated with the same television network</i>; and</p> <p style="padding-left: 40px;">(B) [satisfies the “equivalent or entire bandwidth” requirement].” (Emphasis supplied.)</p>	<p>Subsection (2)-Service limitations:</p> <p>“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 <i>affiliated with the same network</i> whenever such format is available from such station.” (Emphasis supplied.)</p>
<p>Subsection-(3) Limitation not applicable where no network affiliates:</p> <p>“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 stations <i>affiliated with the same television network</i> as the station whose signal is being retransmitted pursuant to this section.” (Emphasis supplied.)</p>	<p>Subsection (3)-Limitation not applicable where no network affiliates:</p> <p>“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 stations <i>affiliated with the same television network</i> as the station whose signal is being retransmitted pursuant to this section.” (Emphasis supplied.)</p>
<p>Subsection (4)-Authority to grant station-specific waivers:</p> <p>“Paragraphs (1) and (2) shall not prohibit a retransmission of a network station to a subscriber if and to the extent that the network station in the local market in which the subscriber is located, and that is <i>affiliated with the same television network</i>, has privately negotiated and affirmatively granted a waiver from the requirements of paragraph[s] (1) and (2) to such satellite carrier with respect to retransmission of the significantly viewed station to such subscriber.” (Emphasis supplied.)</p>	<p>Subsection (4)-Authority to grant station-specific waivers:</p> <p>“Paragraphs (1) and (2) shall not prohibit a retransmission of a network station to a subscriber if and to the extent that the network station in the local market in which the subscriber is located, and that is <i>affiliated with the same television network</i>, has privately negotiated and affirmatively granted a waiver from the requirements of paragraph[s] (1) and (2) to such satellite carrier with respect to retransmission of the significantly viewed station to such subscriber.” (Emphasis supplied.)</p>

Thus, in implementing the 2004 Act, the Commission was confronted with one portion of Section 340(b) that did not, when read literally and in isolation, appear to require *receipt* by satellite subscribers of the analog signal of the local station affiliated with the same network as a condition precedent to receipt of the SV signal. Nevertheless, the Commission concluded, when Section 340(b) was read, *in its entirety*, that subscriber *receipt* of the local affiliate *was*, in fact, required under subsection (b)(1) because the structure of the remainder of Section 340(b), i.e., the “short market” exception in subsection (b)(3) and the waiver provision in subsection (b)(4), compelled that interpretation. The Commission in 2005 in construing, in context, Section 340(b) said:

70. We find that Section 340(b)(1) requires that subscribers receive a specific local network station before they may receive a significantly viewed station that is affiliated with the same network as the local station, subject to the statutory exemption described below. Subscriber receipt of “local-into-local” service is unambiguously required by the statute. Subscriber receipt of a specific local network affiliate, as a condition precedent for eligibility to receive the significantly viewed signal of an out-of-market affiliate of that network, is the best reading of Section 340(b)(1) in the overall context of Section 340. . . .

71. We believe the better reading of the statute is that receipt of the local network station is required before a subscriber may receive the significantly viewed station affiliated with the same network. The meaning of Section 340(b)(1) becomes clear when considered in context with related statutory provisions and legislative history. First, the legislative history repeatedly reflects Congressional concern that the amendments permitting carriage of out-of-market significantly viewed signals not detract from localism. Specifically, the House Commerce Committee Report said “absent section 340(b)(1), a satellite operator could retransmit into a market a distant significantly viewed signal of a network affiliate without also retransmitting a signal of any local affiliate of the network.” Moreover, the satellite carriers’ “definite article” argument overlooks the language in Sections 340(b)(3) and (4). As described below, Section 340(b)(3) permits subscribers to receive a significantly viewed signal of an out-of-market network affiliate if there is no local affiliate of that network in the subscriber’s local market. It states that the limitation in Section 340(b)(1) “shall not prohibit a retransmission under this

section to a subscriber located in a local market in which there are no network stations *affiliated with the same television network* as the station whose signal is being retransmitted pursuant to this section.” If Section 340(b)(1) only required receipt of any local-into-local service as a prerequisite to receiving significantly viewed signals, as opposed to receiving the local affiliate of the network with which the significantly viewed station is affiliated, there would be no need for Section 340(b)(3) to apply to Section 340(b)(1). Using similar contextual reasoning, we consider Section 340(b)(4), which provides authority for the network station in the local market in which the subscriber is located, and that is *affiliated with the same television network*, to grant station-specific waivers. If Section 340(b)(1) only required receipt of any local-into-local service as a prerequisite to receiving significantly viewed signals, there would be no reason for Congress to allow for waivers from specific network stations. Statutory requirements should be read to have meaning and not be superfluous. The best reading of subsection (b)(1), therefore, is to require subscriber receipt of the local station affiliated with the same network as the significantly viewed signal sought to be carried.³

Therefore, the *primary* reason the Commission in 2005 interpreted subsection (b)(1) to require subscriber receipt of the local affiliate is because the structure of subsections (b)(3) and (b)(4) compelled no other result. In other words, any other construction would have rendered those two subsections superfluous—which, of course, continues to be the case.

In further support of its interpretation in 2005, the Commission observed that subsection (b)(2) also contained “affiliated with the same television network” language, which, combined with the legislative history of the provision (which was grounded in “localism”), reinforced this interpretation of subsection (b)(1):

The legislative history indicates that Congress intended Sections 340(b)(1) and 340(b)(2)(A) to achieve similar ends. The House Commerce Committee Report provides: “*Like section 340(b)(1), section 340(b)(2)(A) protects localism by helping ensure that the satellite operator cannot retransmit into a market a significantly viewed digital signal of a network broadcast station from a distant*

³ *SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd 17278 (2005), at ¶¶ 70-71 (footnotes omitted) (emphases in original).

market without also retransmitting into the market a digital signal of any local affiliate *from the same network.*”

73. In sum, we are persuaded that the statute does not allow a satellite carrier to retransmit a significantly viewed signal to a subscriber receiving local-into-local service but which local service does not include an affiliate of the network with which the significantly viewed station is affiliated, unless the exemption in Section 340(b)(3) or the waiver provision in Section 340(b)(4) applies. We thus revise our proposed rule to reflect our conclusion.⁴

Because the 2010 Act *did not amend the basic structure of Section 340(b)*—subsection (b)(1) —again, as in 2004—does not appear, literally on its face, to require subscriber receipt of the local affiliate. However, subsections (b)(3) and (b)(4) were not amended in the 2010 Act and, therefore, continue now just as they appeared in the 2004 Act, and subsection (b)(2) while restructured to accommodate the change from “equivalent bandwidth” to “high definition format,” still contains the “affiliated with the same network” language. Fundamental logic—and the most basic rules of statutory construction—compel the Commission to place the same construction of Section 340(b) now as it placed on the same language in 2005. A diametrically different construction of essentially identical language cannot, as a matter of law, be rationally sustained.

Nothing in the 2010 Act evinces an intent by Congress for the Commission to reverse its 2005 interpretation of 340(b)’s statutory scheme that requires carriage of the specific local network station as a condition precedent to importation of a *duplicating* SV station affiliated with the same network. Rather, *all* of the 2010 Act’s legislative history suggests that Congress

⁴ *SHVERA Significantly Viewed Report and Order* at ¶¶ 72-73 (footnotes omitted) (emphases in original).

intended *only* to remedy the “equivalent or entire bandwidth” requirement of Section 340(b) and to update the provision for the DTV transition. There is not a shred of legislative history to suggest otherwise.

Thus, in now construing the 2010 Act, the Commission *must* presume that Congress was aware of the carriage interpretation the Commission had given to Section 340(b) in 2005. *See, e.g., Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (where “Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute”); *United States v. Ramirez-Ferrer*, 82 F.3d 1131, 1137 (1st Cir. 1996) (“Courts must presume that Congress knows of prior judicial or executive branch interpretations of a statute when it reenacts or amends a statute.”).

In addition, the Commission *must* assume that the failure of Congress to expressly amend Section 340(b) to alter that interpretation (unlike with respect to the “equivalent or entire bandwidth” provision) is a legislative re-enactment of the Commission’s interpretation. This principle of statutory construction, too, is well-established. *See, e.g., Isaacs v. Bowen*, 865 F.2d 468, 474 (2d Cir. 1989) (“by not using the opportunity when amending the section to address the agency’s interpretation, Congress must be presumed to have considered and approved the implementing regulations”); *Emerson Elec. Supply Co. v. Estes Express Lines Corp.*, 451 F.3d 179, 187 (3d Cir. 2006) (because of the presumption that “Congress will use clear language if it intends to alter an established understanding about what a law means,” the lack of legislative history revealing a congressional intent to alter the judicial interpretation means that the requirements of the judicial interpretation must continue). *See also Casey v. Commissioner of Internal Revenue*, 830 F.2d 1092, 1095 (10th Cir. 1987) (“When Congress is, or should be, aware of an interpretation of a statute by the agency charged with its administration, Congress’s

amendment or reenactment of the statutory scheme without overruling or clarifying the agency’s interpretation is considered as approval of the agency interpretation.”); *cf. In re Letters of Rogatory Issued by the Director of Inspection of the Gov’t of India*, 385 F.2d 1017, 1020 (2d Cir. 1967) (an “amendment must be interpreted in terms of the mischief it was intended to rectify”).

Not only is this interpretation sound as a matter of statutory construction, but if Congress had, in fact, intended to reverse the Commission’s interpretation, plainly, it would have expressly and affirmatively done so. Congress maintained the “affiliated with same network” language in three of the four subparagraphs and never—not once—suggested in the 2010 Act’s legislative history that it intended to overrule or reverse the Commission’s five-year interpretation of this provision. *See National Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (“We will not infer a statutory repeal unless the later statute ‘expressly contradict[s] the original act’ or unless such a construction ‘is absolutely necessary . . . in order that [the] words [of the later statute] shall have any meaning at all.’” (citations and quotation omitted)).

Finally, the 2010’s amendments to Section 340(b) must be read in the context of the overarching intent of Congress in the 2004 reauthorization in conditioning the importation of out-of-market duplicating SV network signals “to prevent satellite carriers from favoring an SV network station over the in-market (local) station affiliated with the same network.”⁵ As the Commission has recognized, “the legislative history repeatedly reflects Congressional concern that the amendments permitting carriage of out-of-market significantly viewed signals not detract from localism.”⁶ Any interpretation of amended Section 340(b) that would read out of the statutory framework the local carriage requirement would also read out both the long-standing policy of Congress and the Commission to foster, encourage, and promote broadcast localism

⁵ *Notice* at ¶ 2.

⁶ *SHVERA Significantly Viewed Report and Order* at ¶ 71.

and local television service. There is no reasonable basis or evidence of any kind to suggest that Congress in the 2010 Act intended to reverse the fundamental policy premises of *localism* and *local television service* underlying the first enactment of this legislation in 1988 and each successive reauthorization. The “L” in STELA stands for “Localism”—signifying and underscoring, once again, the bedrock principle of *localism* on which the satellite legislation is predicated.

* * *