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**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| | ) | |
| Implementation of Section 203 of the Satellite Television Extension and Localism Act of 2010 (STELA) | ) | MB Docket No. 10-148 |
| | ) | |
| Amendments to Section 340 of the Communications Act | ) | |
| | ) | |
| Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA) | ) | MB Docket No. 05-49 |
| | ) | |
| Implementation of Section 340 of the Communications Act | ) | |

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# REPORT AND ORDER
# AND ORDER ON RECONSIDERATION

**Adopted: November 22, 2010** **Released: November 23, 2010**

By the Commission:

## TABLE OF CONTENTS

Heading Paragraph #

I. INTRODUCTION ..... 1
II. BACKGROUND ..... 4
III. DISCUSSION ..... 9
A. The STELA Directs the Commission to Create a Workable Framework That Will Enable Satellite Carriers to Offer Both the SV and Local Stations to Consumers ..... 12
B. The STELA Eliminates the Requirement to Receive A Local Station Affiliated with the Same Network as the SV Station and Requires Instead that Subscribers Receive Local-Into-Local Service ..... 16
C. The STELA Eliminates the "Equivalent or Entire Bandwidth" Requirement and Replaces it with an "HD Format" Requirement ..... 24
1. "HD format" requirement applies only where a satellite carrier retransmits the SV station in HD format ..... 28
2. "HD format" requirement applies when a local station makes itself technically and legally "available" to satellite carrier ..... 31
3. "HD format" requirement applies to a local station's HD multicast signal ..... 41
D. Statutory Exceptions to the Subscriber Eligibility Limitations ..... 45
E. Dish Petition for Further Rulemaking ..... 48
F. Housecleaning Rule Changes ..... 49
G. *Order on Reconsideration* Dismisses Pending Petition as Moot ..... 52
IV. CONCLUSION ..... 55

V. PROCEDURAL MATTERS ..... 56
A. Final Regulatory Flexibility Act Analysis ..... 56
B. Final Paperwork Reduction Act of 1995 Analysis ..... 57
C. Congressional Review Act ..... 58
D. Additional Information ..... 59
VI. ORDERING CLAUSES ..... 60
APPENDIX A – List of Commenters
APPENDIX B – Final Rule Changes
APPENDIX C – Final Regulatory Flexibility Act Analysis

## I. INTRODUCTION

1. With this Report and Order ("*R&O*"), we modify our satellite television "significantly viewed" rules to implement Section 203 of the Satellite Television Extension and Localism Act of 2010 (STELA).[1] Section 203 of the STELA amends Section 340 of the Communications Act of 1934 ("Communications Act" or "Act"), which gives satellite carriers the authority to offer out-of-market but "significantly viewed" broadcast television stations as part of their local service to subscribers.[2] We initiated this proceeding on July 23, 2010 by issuing a Notice of Proposed Rulemaking (NPRM).[3] We received 20 comments and reply comments (from 17 parties) in response to our NPRM.[4] With this *R&O*, we satisfy the STELA's mandate that the Commission promulgate final rules in this proceeding on or before November 24, 2010.[5] In addition, in this *Order on Reconsideration*, we dispose of the pending petition for reconsideration of the 2005 *SHVERA Significantly Viewed Report and Order*.[6]

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[1] The Satellite Television Extension and Localism Act of 2010 (STELA) § 203, Pub. L. No. 111-175, 124 Stat. 1218, 1245 (2010) (§ 203 codified as amended at 47 U.S.C. § 340, other STELA amendments codified in scattered sections of 17 and 47 U.S.C.). The STELA was enacted on May 27, 2010 (S. 3333, 111th Cong.). This proceeding to implement STELA § 203 (titled "Significantly Viewed Stations"), 124 Stat. at 1245, and the related statutory copyright license provisions in STELA § 103 (titled "Modifications to Statutory License for Satellite Carriers in Local Markets"), 124 Stat. at 1227-28, is one of a number of Commission proceedings that are required to implement the STELA.

[2] 47 U.S.C. § 340. We note that the nature of SV carriage under Section 340 is permissive (and not mandatory), meaning a satellite carrier may choose to carry an SV station. The statute also requires that the SV station grant consent in order for its signal to be carried. *Id.* at § 340(d).

[3] *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, Notice of Proposed Rulemaking, FCC 10-130 (rel. Jul. 23, 2010) ("*STELA-Significantly Viewed NPRM*").

[4] We identify the list of commenters and reply commenters to this docket in Appendix A. We also received *ex parte* submissions in this docket. All of the filings made in this docket are available to the public both online via the Commission's Electronic Comment Filing System ("ECFS") at http://www.fcc.gov/cgb/ecfs/ and during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, S.W., CY-A257, Washington, D.C., 20554.

[5] The STELA requires the Commission to implement the amendments within 270 days after the date of the enactment. STELA § 203(b). The STELA establishes February 27, 2010 as its effective date or "date of enactment," even though the law was enacted by Presidential signature on May 27, 2010. STELA § 307. Congress passed four short-term extensions of the distant signal statutory copyright license (December 19, 2009, March 2, March 25 and April 15, 2010) before passing STELA to reauthorize the compulsory license for distant signal carriage for five years. STELA § 107(a).

[6] *Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004, Implementation of Section 340 of the Communications Act*, MB Docket No. 05-49, Report and Order, 20 FCC Rcd 17278 (2005) ("*SHVERA Significantly Viewed Report and Order*"). *See* DIRECTV and EchoStar Satellite L.L.C. (now Dish) (continued....)

2. Significantly viewed ("SV") stations are television broadcast stations that the Commission has determined have sufficient over-the-air (*i.e.*, non-cable or non-satellite) viewing[7] to be considered local for certain purposes and so are not constrained by the boundary of the stations' local market or Designated Market Area ("DMA").[8] The individual TV station, or cable operator or satellite carrier that seeks to carry the station, may petition the Commission to obtain "significantly viewed" status for the station,[9] and placement on the SV List.[10] The designation of "significantly viewed" status allows a station assigned to one market to be treated as a "local" station with respect to a particular cable or satellite community[11] in another market, and, thus, enables it to be carried by cable or satellite in that community in the other market.[12] In general, SV status applies to only some communities or counties in a DMA and does not apply throughout an entire DMA. In contrast, the "local" station designation based on Nielsen's assignment to a particular DMA applies to the entire market.[13] Whereas cable operators have

(Continued from previous page)
Joint Petition for Reconsideration in MB Docket No. 05-49 (filed Jan. 26, 2006) ("*2006 DIRECTV-EchoStar Joint Petition*").

[7] To qualify for significantly viewed status (*i.e.*, for placement on the significantly viewed list or "SV List," *see infra* note 10), an SV station can be either a "network" station or an "independent" station, with network stations requiring a higher share of viewing hours. 47 C.F.R. § 76.5(i)(1)-(2). The Commission's rules define network station as one of the "three major national television networks" (*i.e.*, ABC, CBS or NBC). 47 C.F.R. § 76.5(j) and (k). Parties may demonstrate that stations are significantly viewed either on a community basis or on a county-wide basis. 47 C.F.R. § 76.54(b), (d).

[8] *See* 17 U.S.C. § 122(j)(2)(A) (defining "local market").

[9] *See* 47 C.F.R. §§ 76.5, 76.7, 76.54. A TV station, cable operator or satellite carrier that wishes to have a station designated significantly viewed must file a petition pursuant to the pleading requirements in 47 C.F.R. § 76.7(a)(1) and use the method described in 47 C.F.R. § 76.54 to demonstrate that the station is significantly viewed as defined in 47 C.F.R. § 76.5(i).

[10] The significantly viewed list or "SV List" identifies the list of stations the Commission has determined to be significantly viewed in specified counties and communities. The list applies to both cable and satellite providers. The Commission updates this list as necessary upon the appropriate demonstrations by stations or cable or satellite providers. A station, satellite carrier or cable operator may petition the Commission, either to add eligible stations or communities pursuant to 47 C.F.R. § 76.54, or to restrict carriage of eligible stations through application of the Commission's network non-duplication or syndicated exclusivity rules in 47 C.F.R. §§ 76.122(a), (j) and 76.123(a), (k). Generally, a station's SV status is only challenged when another station seeks to exercise its rights under the network non-duplication or syndicated program exclusivity rules, and the SV station asserts its SV status, which is an exception to both requirements. *See* 47 C.F.R. § 76.92(f) (SV exception in cable network non-duplication rules); § 76.106(a) (SV exception in cable syndicated program exclusivity rules); § 76.122(j) (SV exception in satellite network non-duplication rules); and 76.123(k) (SV exception to satellite syndicated program exclusivity rules). If a station's SV status is challenged, and it is demonstrated that the station is no longer significantly viewed in a particular community or county, the station's listing is modified to indicate that it is subject to programming deletions in those communities or counties. *See SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd at 17286, ¶ 14. The current SV List is available on the Media Bureau's website at http://www.fcc.gov/mb/.

[11] *See* 47 C.F.R. §§ 76.5(dd) (defining cable "community unit") and 76.5(gg) (defining a "satellite community").

[12] For copyright purposes, significantly viewed status means that cable and satellite providers may carry the out-of-market but SV station with the reduced copyright payment obligations applicable to local (in-market) stations. *See* 17 U.S.C. §§ 111(a), (c), (d), and (f), as amended by STELA § 104 (relating to cable statutory copyright license) and 122(a)(2), as amended by STELA § 103 (relating to satellite statutory copyright license).

[13] 17 U.S.C. § 122(j)(2)(C) (defining DMA as "a designated market area, as determined by Nielsen Media Research and published in the 1999-2000 Nielsen Station Index Directory and Nielsen Station Index United States Television Household Estimates or any successor publication").

had carriage rights for SV stations since 1972,[14] satellite carriers have had such authority only since 2004[15] and may only retransmit SV network stations to "eligible" satellite subscribers.[16] These satellite subscriber eligibility restrictions are intended to prevent satellite carriers from favoring an SV network station over the in-market (local) station affiliated with the same network.[17]

3. Section 203 of the STELA changes the restrictions on subscriber eligibility to receive SV network stations from satellite carriers.[18] To implement the STELA, we revise our satellite subscriber eligibility rules as follows:

- We find that the local service requirement in amended Section 340(b)(1) requires only that a satellite subscriber receive local-into-local satellite service as a precondition for that subscriber to receive SV stations. We find that the statute no longer requires a satellite subscriber to receive the specific local network station as a precondition for that subscriber to receive an SV station affiliated with the same network.
- We find that amended Section 340(b)(2) no longer requires that a satellite carrier offer "equivalent bandwidth" to the local and SV network station pair and instead imposes an "HD format" requirement. We find that the HD format requirement in amended Section 340(b)(2) requires that, in order to carry an SV station in high definition (HD) format, a satellite carrier must carry the local station affiliated with the same network in HD whenever such format is available from the local station.
    - The HD format requirement applies only where a satellite carrier retransmits to a subscriber the SV station in HD format. This requirement does not restrict a satellite carrier from retransmitting to a subscriber the SV station in standard definition (SD) format.
    - For purposes of the HD format requirement, the corresponding local (in-market) station will be considered "available" to the satellite carrier when the station: (1) elects mandatory carriage or grants retransmission consent; (2) provides a good quality signal to the satellite carrier as required by Section 76.66(g) of the rules; and (3) is otherwise in compliance with the "good faith negotiation" and carriage provisions set forth in Sections 76.65 and 76.66 of the rules. However, the HD signal of the corresponding local station will be deemed "available" despite failure to reach agreement on the terms of retransmission if the satellite carrier is not in compliance with Section 76.65.

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[14] *See Cable Television Report and Order*, 36 FCC 2d 143, 174, ¶ 83 (1972) ("*1972 Cable R&O*") (adopting the concept of "significantly viewed" signals to differentiate between otherwise out-of-market television stations "that have sufficient audience to be considered local and those that do not").

[15] Section 202 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA) created Section 340 of the Communications Act, which authorized satellite carriage of Commission-determined SV stations. *See* SHVERA § 202, Pub. L. No. 108-447, 118 Stat 2809, 3393 (2004) (codified in 47 U.S.C. § 340). *See also SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd 17278.

[16] *See* 47 U.S.C. § 340(b) and 47 C.F.R. § 76.54(g)-(h). *See also infra* ¶ 8 (for background).

[17] 47 U.S.C. § 340(b)(1)-(2). *See SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd at 17314, ¶ 94. The Copyright Act's definitions of "network station" and "non-network station" will apply for purposes of determining subscriber eligibility to receive an SV network station. *See* 47 U.S.C. § 339(d) and 47 U.S.C § 122(j)(4), as amended, applying the definitions of such terms in 47 U.S.C § 119(d)(2) and (9). Unlike the definition in the Commission's rules, which specifically include only ABC, CBS and NBC (*see supra* note 7), the Copyright Act definition of "network station" may include other stations. *See SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd at 17294, ¶¶ 35-36 and n. 102.

[18] 47 U.S.C. § 340(b)(1)-(2).

- The HD format requirement requires satellite carriage of a secondary HD stream of a local station's multicast signal if that stream is affiliated with the same network as an SV station retransmitted in HD to satellite subscribers in the local market.

- We modify the Commission's 2005 interpretation of the Section 340(b)(3) exception, which is unchanged by the STELA, and find that, in the context of the newly revised statute, this exception permits a satellite carrier to offer an SV network station to a subscriber when there is no local affiliate of the same network present in the local market, even if the subscriber does not receive local-into-local service.

## II. BACKGROUND

4. In May 2010, Congress passed and the President signed the STELA, which amends the 1988 copyright laws[19] and the Communications Act of 1934[20] to "modernize, improve and simplify the compulsory copyright licenses governing the retransmission of distant and local television signals by cable and satellite television operators."[21] Congress intended for the STELA to increase competition between cable and satellite providers, increase service to satellite subscribers, and update the law to reflect the completion of the digital television (DTV) transition.[22] Notably, the STELA reauthorizes the statutory copyright license for satellite carriage of SV stations and moves that license from the distant signal statutory copyright license provisions to the local signal statutory copyright license provisions.[23]

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[19] *See* 17 U.S.C. §§ 119 and 122. 17 U.S.C. § 119 contains the statutory copyright license for satellite carriage of "distant" network stations (limited to "unserved households") and 17 U.S.C. § 122 contains the statutory copyright license for satellite carriage of "local" stations (generally defined as stations and subscribers in the same DMA but which now also includes SV stations, which are treated as "local" for copyright royalty purposes, even though such stations are not in the same DMA as the subscribers and are not entitled to mandatory carriage). The STELA also amended 17 U.S.C. § 111, the statutory copyright license for cable carriage of broadcast stations.

[20] *See* 47 U.S.C. §§ 325, 338, 339 and 340.

[21] *See* House Judiciary Committee Report dated Oct. 28, 2009, accompanying House Bill, H.R. 3570, 111th Cong. (2009), H.R. REP. NO. 111-319, at 4 ("*H.R. 3570 Report*"). *See also* House Energy and Commerce Committee Report dated Dec. 12, 2009, accompanying House Bill, H.R. 2994, 111th Cong. (2009), H.R. REP. NO. 111-349, at 16 ("*H.R. 2994 Report*"); and Senate Judiciary Committee Report dated Nov. 10, 2009, accompanying Senate Bill, S. 1670, 111th Cong. (2009), H.R. REP. NO. 111-98, at 5 ("*S. 1670 Report*"). There was no final Report issued to accompany the final version of the STELA bill (S. 3333) as it was enacted. *See* Senate Bill, S. 3333, 111th Cong. (2010) (enacted). Therefore, for the relevant legislative history, we look to the Reports accompanying the various predecessor bills (*e.g.*, H.R. 3570, H.R. 2994, and S. 1670). These Reports reflect Congressional intent with respect to the SV provisions, which were enacted as drafted in the House and Senate bills. (*see* STELA §§ 203, 103). Finally, also relevant are certain remarks made in floor statements in passing the bill (S. 3333). *See* "House of Representatives Proceedings and Debates of the 111st Congress, Second Session," 156 Cong. Rec. H3317, H3328-3330 (daily ed. May 12, 2010) (statements of Reps. Conyers and Smith) ("*House Floor Debate*") and "Senate Proceedings and Debates of the 111st Congress, Second Session," 156 Cong. Rec. S3435, (daily ed. May 7, 2010) (statement of Sen. Leahy) ("*Senate Floor Debate*"). We also find relevant certain remarks made in floor statements in passing the House Bill, H.R. 3570. *See* Chairmen Waxman's and Boucher's Floor Statements on the Satellite Home Viewer Reauthorization Act of 2009, 155 Cong. Rec. H13428, H13441-13442 (Dec. 2, 2009) ("*H.R. 3570 Waxman* and/or *Boucher Floor Statement(s)*").

[22] *See H.R. 3570 Report* at 5 and *H.R. 2994 Report* at 16. As of the June 12, 2009 statutory DTV transition deadline, all full-power television stations stopped broadcasting in analog and are broadcasting only digital signals. 47 U.S.C. § 309(j)(14)(A).

[23] STELA § 103 (moving the SV signal statutory copyright license from § 119(a)(3) to § 122 (a)(2) of title 17). In doing so, Congress now defines SV signals as another type of local signal, rather than as an exception to distant signals. The move also means that the SV signal license does not expire on December 31, 2014, when the distant signal license will expire. STELA § 107(a).

5. The STELA is the fourth in a series of statutes that address satellite carriage of television broadcast stations. In the 1988 Satellite Home Viewer Act ("1988 SHVA"), Congress established a statutory copyright license to enable satellite carriers to offer subscribers who could not receive the over-the-air signal of a broadcast station access to broadcast programming via satellite.[24] The 1988 SHVA was intended to protect the role of local broadcasters in providing over-the-air television by limiting satellite delivery of network broadcast programming to subscribers who were "unserved" by over-the-air signals. The 1988 SHVA also permitted satellite carriers to offer distant "superstations" to subscribers.[25]

6. In the 1999 Satellite Home Viewer Improvement Act ("SHVIA"), Congress expanded satellite carriers' ability to retransmit local broadcast television signals directly to subscribers.[26] A key element of the SHVIA was the grant to satellite carriers of a statutory copyright license to retransmit local broadcast programming, or "local-into-local" service, to subscribers. A satellite carrier provides "local-into-local" service when it retransmits a local television signal back into the local market of that television station for reception by subscribers.[27] Generally, a television station's "local market" is the DMA in which it is located.[28] Each satellite carrier providing local-into-local service pursuant to the statutory copyright license is generally obligated to carry any qualified local television station in the particular DMA that requests carriage and complies with Commission rules, unless the station's programming is duplicative of the programming of another station carried by the carrier in the DMA or the station does not provide a good quality signal to the carrier's local receive facility.[29] This is commonly referred to as the "carry one, carry all" requirement. The Commission implemented the SHVIA by adopting rules for satellite carriers with regard to carriage of broadcast signals, retransmission consent, and program exclusivity that generally paralleled the requirements for cable service.[30]

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[24] The Satellite Home Viewer Act of 1988 (SHVA), Pub. L. No. 100-667, 102 Stat. 3935, Title II (1988) (codified at 17 U.S.C. §§ 111, 119). The 1988 SHVA was enacted on November 16, 1988, as an amendment to the copyright laws. The 1988 SHVA gave satellite carriers a statutory copyright license to offer distant signals to "unserved" households. 17 U.S.C. § 119(a).

[25] *See id.* § 119(a)(1) (2009). The STELA § 102(g) replaces the term "superstation" with the term "non-network station." This change in wording has no substantive impact on our rules. A non-network station (previously superstation) is defined as a television station, other than a network station, licensed by the Commission that is retransmitted by a satellite carrier. As the term would suggest, non-network stations are still not considered "network stations" for copyright purposes. *See id.* § 119(d)(9); *see also supra* notes 7 and 17.

[26] The Satellite Home Viewer Improvement Act of 1999 (SHVIA), Pub. L. No. 106-113, 113 Stat. 1501 (1999). The SHVIA was enacted on November 29, 1999, as Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999 ("IPACORA") (relating to copyright licensing and carriage of broadcast signals by satellite carriers). In the SHVIA, Congress amended both the copyright laws, 17 U.S.C. §§ 119 and 122, and the Communications Act, 47 U.S.C. §§ 325, 338 and 339.

[27] 47 C.F.R. § 76.66(a)(6).

[28] *See* 17 U.S.C. §122(j)(2)(A); 47 U.S.C. § 340(i)(1). DMAs, which describe each television market in terms of a unique geographic area, are established by Nielsen Media Research based on measured viewing patterns. *See* 17 U.S.C. § 122(j)(2)(A)-(C).

[29] *See* 47 U.S.C. § 338.

[30] *See* Implementation of the Satellite Home Viewer Improvement Act 1999: Broadcast Signal Carriage Issues, CS Docket No. 00-96, Retransmission Consent Issues, CS Docket No. 99-363, Report and Order, 16 FCC Rcd 1918 (2000) ("*SHVIA Signal Carriage Order*"); Technical Standards for Determining Eligibility For Satellite-Delivered Network Signals Pursuant To the Satellite Home Viewer Improvement Act, ET Docket No. 00-90, Report, 15 FCC Rcd 24321 (2000); Implementation of the Satellite Home Viewer Improvement Act of 1999: Application of Network Non-Duplication, Syndicated Exclusivity, and Sports Blackout Rules To Satellite Retransmissions of Broadcast Signals, CS Docket No. 00-2, Report and Order, 15 FCC Rcd 21688 (2000) ("*Satellite Exclusivity Order*"); Implementation of the Satellite Home Viewer Improvement Act of 1999, Enforcement Procedures for Retransmission Consent Violations, Order, 15 FCC Rcd 2522 (2000); Implementation of the Satellite Home Viewer (continued....)

7. In the 2004 Satellite Home Viewer Extension and Reauthorization Act ("SHVERA"), Congress established the framework for satellite carriage of "significantly viewed" stations.[31] Specifically, the SHVERA expanded the statutory copyright license to allow satellite carriers to retransmit an out-of-market network station as part of their local service to subscribers where the Commission determined that distant station to be "significantly viewed" (based on over-the-air viewing).[32] In providing this authority to satellite carriers, Congress sought to create parity with cable operators, who had already had such authority to offer SV stations to subscribers for more than 38 years.[33] The Commission implemented the SHVERA's significantly viewed provisions by publishing a list of SV stations[34] and adopting rules in the satellite context for stations to attain eligibility for significantly viewed status and for subscribers to receive SV stations from satellite carriers.[35] The SHVERA mandated that the Commission apply the same station eligibility requirements (*i.e.*, rules and procedures for parties to show that a station qualifies for significantly viewed status) to satellite carriers that already applied to cable operators.[36] However, to prevent a satellite carrier from favoring SV stations over traditional local market

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Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity, CS Docket No. 99-363, First Report and Order, 15 FCC Rcd 5445 (2000).

[31] The Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA), Pub. L. No. 108-447, 118 Stat 2809 (2004) (codified in scattered sections of 17 and 47 U.S.C.). The SHVERA was enacted on December 8, 2004 as title IX of the "Consolidated Appropriations Act, 2005." The SHVERA contained additional mandates requiring Commission action, but not relevant to this proceeding. *See Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004; Reciprocal Bargaining Obligation*, MB Docket No. 05-89, Report and Order, 20 FCC Rcd 10339 (2005) ("*Reciprocal Bargaining Order*") (imposing a reciprocal good faith retransmission consent bargaining obligation on multichannel video programming distributors); *Implementation of Section 210 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 to Amend Section 338 of the Communications Act*, MB Docket No. 05-181, Report and Order, 20 FCC Rcd 14242 (2005) (requiring satellite carriers to carry local TV broadcast stations in Alaska and Hawaii); *Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004, Procedural Rules*, Order, 20 FCC Rcd 7780 (2005) ("*Procedural Rules Order*") (adopting procedural rules concerning satellite carriers' notifications to TV broadcast stations and obligations to conduct signal testing); *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, dated Sept. 8, 2005, available at http://www.fcc.gov/mb/policy/shvera.html (Report analyzing comments received in MB Docket No. 05-28 and addressing impact of certain rules and statutory provisions on competition in the television marketplace).

[32] In the SHVERA, Congress again amended both the Communications Act, 47 U.S.C. §§ 325, 338, 339 and 340, and the copyright laws, 17 U.S.C. §§ 119 and 122. In creating a statutory copyright license for satellite carriers to offer significantly viewed stations to subscribers, Congress distinguished between out-of-market stations that had significant over-the-air viewership in another market (*i.e.*, significantly viewed stations) and truly "distant" stations.

[33] *See SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd at 17280-1, ¶ 2. In 1972, the Commission adopted the concept of "significantly viewed" stations for cable television to differentiate between out-of-market television stations "that have sufficient audience to be considered local and those that do not." *1972 Cable R&O*, 36 FCC 2d at 174, ¶ 83. The Commission concluded at that time that it would not be reasonable if choices on cable were more limited than choices over-the-air, and gave cable carriage rights to stations in communities where they had significant over-the-air (non-cable) viewing. *Id.*

[34] *See supra* note 10 (for background on SV List).

[35] *See* 47 C.F.R. §§ 76.5(ee) (revised), 76.5(gg) (added), 76.54(a)-(c) (revised), 76.54(e)-(k) (added), 76.122(a) and (j) (revised), and 76.123(a) and (k) (revised).

[36] *See* 47 U.S.C. § 340(a). As mandated by the SHVERA, the Commission required satellite carriers or broadcast stations seeking SV status for satellite carriage to follow the same petition process now in place for cable carriage. *See* 47 C.F.R. §§ 76.5, 76.7 and 76.54(a)-(d).

stations, the SHVERA also imposed subscriber eligibility requirements that applied only to satellite carriers.[37]

8. The SHVERA limited subscribers' eligibility to receive SV digital television stations from satellite carriers in two key ways. First, the SHVERA allowed a satellite carrier to offer SV stations only to subscribers that received the carrier's "local-into-local" service (the "local service" requirement).[38] The Commission interpreted this local service requirement to further require that the subscriber receive the local station affiliated with a particular network (as part of the carrier's "local-into-local" service) in order for that subscriber to also receive an SV station affiliated with the same network (the "same network affiliate" requirement).[39] Second, the SHVERA allowed a satellite carrier to offer an SV digital station to a subscriber only if the carrier also provided to that subscriber the local station affiliated with the same network in a format that used either (1) an "equivalent" amount of bandwidth for the local and SV network station pair, or (2) the "entire" bandwidth of the local station (the "equivalent or entire bandwidth" requirement).[40] The Commission interpreted this provision to require an objective comparison of each station's use of its bandwidth in terms of megabits per second (mbps) or bit rate.[41] The SHVERA provided for two exceptions to the local service limitations, contained in 47 U.S.C. § 340(b)(3) and (b)(4). Section 340(b)(3) allows satellite carriage of an SV network station to a subscriber when there is no local station affiliated with the same television network as the SV station present in the local market. Section 340(b)(4) allows a satellite carrier to negotiate privately with the local network station to obtain a waiver of the subscriber eligibility restrictions in Sections 340(b)(1) and 340(b)(2).

## III. DISCUSSION

9. We adopt rules in this *R&O* to implement the STELA's amendments to Section 340(b) of the Communications Act. Our discussion below addresses the two substantive changes to Section 340(b)(1) and (b)(2), as well as how these amended provisions will work with the existing statutory exceptions in Section 340(b)(3) and (b)(4). We decline to address here the merits of Dish's petition for

[37] 47 U.S.C. § 340(b) (2004). The eligibility requirements also addressed the different carriage requirements that apply to cable (*i.e.*, "must carry" for all cable systems) as compared with satellite (*i.e.*, "carry one, carry all"). In the cable context, where mandatory carriage rules apply as opposed to satellite's carry one, carry all requirements, it was not necessary to include subscriber eligibility requirements, as it was presumed that all cable subscribers receive local broadcast stations as part of their cable package.

[38] The Commission found that "subscriber receipt of 'local-into-local' service [was] unambiguously required by the statute." *SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd at 17304-5, ¶ 68.

[39] *Id.* at 17308, ¶ 76 (discussing digital service limitations). The SHVERA's language differed with respect to the analog and digital service limitations. In 2004, television stations were transitioning from analog to digital service and most stations were broadcasting both analog and digital signals. Consequently, the SHVERA specified that certain provisions applied to analog signals and other, often different, provisions applied to digital signals. *See id.* at §§ 340(b)(1) (analog service limitations) and (b)(2)(A) (digital service limitations) (2004). The Commission noted that, "[u]nlike the ambiguity in its sister analog provision [of 47 U.S.C. § 340(b)(1) (2004)], Section 340(b)(2)(A) of the Act, 47 U.S.C. § 340(b)(2)(A) (2004), is clear in requiring a subscriber to receive "the digital signal of a network station in the subscriber's local market that is affiliated with the same television network." *Id. See also id.* at 17305, ¶ 70 (discussing analog service limitations).

[40] 47 U.S.C. § 340(b)(2)(B) (2004) ("With respect to a signal that originates as a digital signal of a network station, this section shall apply only if – ... (B) either – (i) the retransmission of the local network 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."). Congress sought to prevent satellite carriers from offering the local network station's digital signal "in a less robust format" than the significantly viewed affiliate station's digital signal). *SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd at 17314, ¶ 94.

[41] *See SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd at 17315, ¶ 96.

further rulemaking filed with its comments, as those issues are beyond the scope of this proceeding.[42] Finally, we adopt some non-substantive, "housecleaning" rule changes.

10. The STELA amended Section 340(b) to read as follows:[43]

> (1) SERVICE LIMITED TO SUBSCRIBERS TAKING LOCAL-INTO-LOCAL SERVICE.—This section shall apply only to retransmissions to subscribers of a satellite carrier who receive retransmissions of a signal from that satellite carrier pursuant to section 338.
>
> (2) SERVICE 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.
>
> (3) 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 affiliated with the same television network as the station whose signal is being retransmitted pursuant to this section.
>
> (4) 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 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.

11. These amendments simplify the significantly viewed provisions in Section 340(b) of the Communications Act to make it easier for satellite carriers to offer SV stations to subscribers.[44] Specifically, the STELA made two key changes to Section 340(b).[45] First, the STELA eliminated the language in Section 340(b)(2)(A) that had required that subscribers receive the same local network affiliate and, instead, retains only the language requiring that the subscriber receive local-into-local satellite service in order to be eligible to receive SV stations.[46] Second, the STELA replaces the

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[42] Dish requested the Commission to undertake a rulemaking to revise the retransmission consent rules as they apply to carriage of SV stations. *See* Dish Comments (Petition) at 9.

[43] 47 U.S.C. § 340(b) (2010), as amended by the STELA § 203(a). *See also* 17 U.S.C. § 122(a)(2), as amended by STELA § 103(b).

[44] *See H.R. 3570 Report* at 4.

[45] STELA § 203(a) (amendments to be codified at 47 U.S.C. § 340(b)(1)-(2)). We note that the subscriber eligibility limitations in 47 U.S.C. § 340(b)(1)-(2), which are amended by the STELA § 203, do not apply to cable subscribers. We do not substantively amend our significantly viewed rules and procedures that satellite carriers share with cable operators. *See* 47 C.F.R. §§ 76.54(a)-(d). Furthermore, we note that the STELA § 203 does not amend the significantly viewed provisions in the Communications Act governing the eligibility of a television broadcast station to qualify for "significantly viewed" status. *See* 47 U.S.C. §§ 340(a), (c)-(g). We do not make any substantive (non-"housecleaning") changes to our rules and procedures implementing the significantly viewed station eligibility requirements. *See* 47 C.F.R. §§ 76.54(a)-(f), (j)-(k). *See infra* Section III.F. (discussing housecleaning changes).

[46] Section 340(b)(1) as amended retains the reference to "a" signal carried pursuant to Section 338 and the explanatory heading referring to "subscribers taking local-into-local service." Congress removed from this section (continued....)

"equivalent or entire bandwidth" requirement applicable to digital service, which was previously contained in Section 340(b)(2)(B), with an "HD format" requirement. The STELA did not amend the statutory exceptions in Sections 340(b)(3) and (b)(4) to the subscriber eligibility restrictions in Sections 340(b)(1) and (2).

### A. The STELA Directs the Commission to Create a Workable Framework That Will Enable Satellite Carriers to Offer Both the SV and Local Stations to Consumers

12. We find that, in the STELA, Congress intended that the Commission create a workable framework for the satellite carriage of SV stations.[47] Congress intended the 2004 SHVERA to promote parity with cable,[48] while protecting localism by preventing satellite carriers from favoring an SV network station over the local in-market station affiliated with the same TV network.[49] However, very few SV stations made their way into the living rooms of satellite TV consumers.[50] The Satellite Carriers attribute this to the Commission's "restrictive" interpretation of Section 340(b) in the 2005 *SHVERA Significantly Viewed Report and Order*,[51] which they maintain made satellite carriage of SV stations impractical or technically infeasible.[52]

13. Congress seemed to agree. As stated in one House Report:

> The Commission's implementation of section 340, including its interpretation of the "equivalent bandwidth" requirement, has generally

(Continued from previous page)
the phrase "that originates as an analog signal of a local network station" following the word "signal." *See* DIRECTV Reply at 5.

[47] *See STELA-Significantly Viewed NPRM*, *supra* note 3, at ¶¶ 2, 11.

[48] *See, e.g.*, 2004 House Commerce Committee Report dated July 22, 2004, accompanying House Bill, H.R. 4501, 108th Cong. (2004), H.R. Rep. No. 108-634, at 1 and 9 (2004) ("*2004 House Commerce Committee Report*") (noting purpose of the SHVERA included "increasing regulatory parity by extending to satellite carriers the same type of authority cable operators already have to carry 'significantly viewed' signals into a market"). *See also, e.g.*, House of Representatives Floor Debate on the Satellite Home Viewer Extension and Reauthorization Act of 2004, House Bill H.R. 4518, 150 Cong. Rec. H8210, H8217-8219 (dated Oct. 6, 2004) ("*H.R. 4518 Floor Debate*"). In a statement in the floor debate, Rep. Joe Barton (Chairman, House Energy and Commerce Committee) stated: "The bill [H.R. 4518] would extend to satellite operators the authority to carry such significantly viewed signals on comparable terms as cable operators." *Id.* at H8219. *See also* The Honorable Joe Barton, Chairman, House Energy and Commerce Committee, "Floor Statement" on the Satellite Home Viewer Extension and Reauthorization Act of 2004, House Bill H.R. 4518, (dated Oct. 6, 2004) ("*Barton Floor Statement*") ("In implementing Section 340, the [Commission] should treat satellite operators in a comparable fashion to cable operators to the greatest extent possible with respect to carriage of significantly viewed stations, in terms of both current and future significantly viewed rulings.")

[49] *See 2004 House Commerce Committee Report* at 12 (noting that former "Section 340(b)(2)(B) prevents the satellite operator from retransmitting a local affiliate's digital signal in a less robust format than a significantly viewed digital signal of a distant affiliate of the same network, such as by down-converting the local affiliate's signal but not the distant affiliate's signal from high-definition digital format to analog or standard definition digital format").

[50] *See* DIRECTV Comments at 2 (noting that it has "offered only a handful" of SV stations since satellite carriage of such stations was authorized by SHVERA) and Dish Reply at 5 (noting that "when permitted to do so, Dish offered SV stations in certain counties of only seven DMAs").

[51] DIRECTV Comments at 1-2 and Dish Reply at 5 (noting that "the SV program that Congress spearheaded has not succeeded").

[52] DIRECTV and Dish *ex parte* (dated Sept. 22, 2010) Significantly Viewed Talking Points Appendix at 1 ("DIRECTV and Dish *Sept. 22 SV Talking Points*") (expressing concern that the Commission might adopt rules for SV carriage "that make it impractical to offer such stations").

> served to discourage satellite carriers from using section 340 to provide significantly viewed signals to qualified households.[53]

To achieve more widespread carriage of SV stations, the STELA amends Sections 340(b). As discussed below, Congress eliminated both the former Section 340(b)(2)(A), which required that digital local service subscribers receive the same network affiliate, and the former Section 340(b)(2)(B), which contained the "equivalent or entire bandwidth" requirement.[54] Based on these changes to the statutory text, Congress intended more than merely to fix a technical implementation issue with the equivalent bandwidth requirement, as the Broadcaster Associations contend,[55] but rather sought to simplify the law and increase service to satellite subscribers by encouraging SV carriage.[56] In reauthorizing the SHVERA and mostly retaining its framework for the carriage of SV stations, the STELA also retains the key goals of its predecessor statute –to foster localism and promote parity between cable and satellite service.[57]

14. The STELA's relocation of the statutory copyright license for SV stations into the "local" license provisions of the Copyright Act indicates that Congress considered the SV compulsory license to be more like the local license than like the distant signal license, recognizing that the SV station is "local" to the community in which it is significantly viewed.[58] SV stations have SV status because they have been viewed over-the-air by a sufficient number of households in the community in the relevant market. The Senate Report notes that the SV provision "relates to the ability to receive locally-oriented programming."[59] Furthermore, satellite TV consumers deserve access to the same locally-oriented

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[53] *H.R. 2994 Report* at 16. The use of the word "including" implies that Congress' dissatisfaction with the Commission's prior implementation of Section 340 was not limited to the "equivalent bandwidth" requirement.

[54] *See* 47 U.S.C. § 340(b)(2)(A) and (B). *See infra* Sections III.B. and III.C..

[55] Broadcaster Associations Comments at 4 (arguing STELA's statutory changes only "address a technical implementation concern" with the "equivalent or entire bandwidth" requirement).

[56] *See H.R. 3570 Report* at 4 (noting STELA's general intent to "increase competition and service to satellite and cable consumers").

[57] *See, e.g., H.R. 2994 Report* at 15 (noting that "the 'significantly viewed' provision was adopted in SHVERA to create parity with cable operators") and *also H.R. 3570 Report* at 10. *See SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd at 17306-7, ¶¶ 71-2 (noting statutory intent "to protect localism" by citing to the *2004 House Commerce Committee Report*).

[58] *See S. 1670 Report* at 5 (noting "The [STELA] moves locally-oriented provisions out of the distant signal license and places them into the permanent local license. These provisions include significantly viewed, special exception, and low-power stations. Shifting these provisions into the local license will ensure that the distant signal license is focused purely on providing truly distant signals to consumers unserved by their local broadcasters."). This makes sense given STELA's intent to create parity with cable, which characterizes SV signals as those with "sufficient audience to be considered local." *See 1972 Cable R&O*, 36 FCC 2d at 174, ¶ 83. *But see H.R. 3570 Report* at 10 (stating "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)."). The Broadcaster Associations argue that this statement means STELA considers SV signals to be distant by definition. *See* Broadcaster Associations Reply at 18. We disagree that these Congressional characterizations are necessarily at odds. The context of the *H.R. 3570 Report* referred to SHVERA's treatment of SV signals. In contrast, STELA intended to treat SV signals like "all other royalty-free satellite transmissions," *i.e.*, like local signals. The change in license and treatment is also consistent with the statutory copyright license for cable retransmission of SV signals, which also treats them, for royalty purposes, as local signals. *See* 17 U.S.C. §§ 111(a), (c), (d), and (f), as amended by STELA § 104.

[59] *See S. 1670 Report* at 4. *See also* DIRECTV Reply at 1, n.4; Dish Reply at 6.

programming – including SV stations – as their cable-subscribing neighbors.[60] Moreover, providing satellite carriers parity with cable was a core goal of the SHVERA in 2004 and it remains one today in the STELA.[61]Therefore, our implementation of the statutory changes to Section 340(b) focuses on enabling satellite TV consumers to receive both the local in-market and SV stations from their carriers, as is the intent of Section 340.[62] To achieve this objective, our interpretation of the statute reflects the practical realities of satellite local carriage, in accordance with Congress's intent to remove barriers to SV carriage.[63]

15. In the STELA, Congress directs us to implement Section 340 in a practical way that will better enable satellite carriers to offer SV stations to their subscribers. We find that carriage of both the SV and local in-market stations will best foster localism and promote parity with cable, and so, in implementing the law we must balance protection of local in-market stations against the cost of making SV carriage technically infeasible or impractical.

### B. The STELA Eliminates the Requirement to Receive A Local Station Affiliated with the Same Network as the SV Station and Requires Instead that Subscribers Receive Local-Into-Local Service

16. We adopt our proposal to eliminate the requirement that a subscriber receive the local station affiliated with a specific network in order for that subscriber to also receive an SV station affiliated with the same network, and require instead that the subscriber receive local-into-local satellite service.[64] We clarify, however, that a satellite carrier must comply with Section 76.65 of our rules, which codifies the requirement for good faith in retransmission consent negotiations, in order for it to carry an SV station. In the record, the Satellite Carriers support our proposal, while the Broadcaster Associations oppose it.[65]

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[60] *See, e.g., H.R. 4518 Floor Debate* (on SHVERA bill) , *supra* note 48, at H8223 (in which Rep. Conyers states that the SHVERA bill [H.R. 4518] "address[ed] the desires of consumers in that it permits the satellite companies to retransmit a significantly viewed local signal to a customer"); *Id.* at H8217 (in which Rep. Sensenbrenner states that the SHVERA bill, H.R. 4518, "changes both the copyright and communications acts to ensure, first, that consumers will have greater choice in programming; second, that satellite providers will have greater freedom to deliver the content consumers desire"); and *Id.* at H8219 (in which Rep. Barton states that "[b]y extending the expiring provisions, increasing parity, and promoting further competition, this legislation [H.R. 4518] will continue to enhance service to consumers.")

[61] *See, e.g., H.R. 3570 Waxman Floor Statement* (on STELA bill), *supra* note 21, at H13441 (calling the bill [H.R. 3570] "an important step forward for consumers," Chairman Waxman notes, among other things, that the "bill makes changes to the existing rules on 'significantly viewed' signals in an effort to promote competition between satellite and cable companies"); and *H.R. 4518 Floor Debate* (on 2004 SHVERA bill), *supra* note 48, at H8223 (in which Rep. Dingell states that the bill [H.R. 4518] will not only "increase regulatory parity between cable and satellite providers" but that such "increased parity should help spur greater competition between cable and satellite providers and ultimately benefit consumers in the form of lower prices and better service"). Contrary to the Broadcaster Associations' argument, there is nothing in the record to suggest that cable carriage of SV stations has harmed localism over more than 30 years. *See* NAB *ex parte* (dated Oct. 7, 2010) Significantly Viewed Talking Points Appendix at 3 ("*NAB Oct. 7 SV Talking Points*") (claiming the Satellite Carriers ignore STELA's goal to protect localism).

[62] As discussed above in *supra* ¶ 1, the purpose of Section 340 is to give satellite carriers the authority to offer SV stations as part of their local service to their subscribers.

[63] *See* DIRECTV and Dish *ex parte* (dated Sept. 20, 2010) Significantly Viewed Talking Points Appendix at 1 ("DIRECTV and Dish *Sept. 20 SV Talking Points*").

[64] *STELA-Significantly Viewed NPRM, supra* note 3, at ¶ 14.

[65] Broadcaster Associations Comments at 7 and Reply at 6; DIRECTV Comments at 3 and Reply at 3; Dish Comments at 4 and Reply at 7.

17. In the 2004 SHVERA, Congress authorized satellite carriers to offer SV stations to subscribers, but crafted Sections 340(b)(1) and 340(b)(2)(A) of the Act to protect localism by requiring that these subscribers also receive the local network affiliate (called the "local service" requirement).[66] These two provisions, however, contained different language. Whereas the analog local service requirement in Section 340(b)(1)[67] required only that the subscriber receive local service "pursuant to Section 338" – referring to the "carry one, carry all" carriage requirements that pertain to local stations,[68] the digital local service requirement in Section 340(b)(2)(A)[69] contained additional language that expressly required the subscriber to receive the local digital station that was "affiliated with the same television network" as the SV station (hereinafter referred to as the "same network affiliate" language). Thus, while each of these provisions explicitly required a subscriber to at least receive the satellite carrier's local-into-local service before that subscriber could receive an SV station, it was unclear (when considering the two provisions together) whether Section 340(b)(1) also required a subscriber to receive the specific local analog network station before that subscriber could receive the SV station affiliated with the same network.[70] For example, it was unclear how the statute applied where there was a local network analog station, but such station failed to request local carriage, refused to grant retransmission consent, or was otherwise ineligible for local carriage.[71]

18. In the 2005 *SHVERA Significantly Viewed Report and Order*, the Commission interpreted former Sections 340(b)(1) and 340(b)(2)(A) to require that the subscriber receive the specific local station that is affiliated with the same network as the SV station, whether the station's signal was analog or digital.[72] Although former Section 340(b)(1) lacked the express "same network affiliate" language as that contained in its digital counterpart, the Commission interpreted the two provisions together and read the "same network affiliate" requirement into former Section 340(b)(1), based largely on the concept that Congress intended the two provisions to achieve similar ends.[73] Accordingly, the Commission adopted

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[66] 47 U.S.C. §§ 340(b)(1) and (b)(2)(A) (2004). Congress intended for these provisions to protect 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 market without also retransmitting into the market a digital signal of any local affiliate from the same network." *SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd at 17306-7, ¶¶ 71-2.

[67] 47 U.S.C. § 340(b)(1) (2004), as enacted in 2004, stated: "With respect to a signal that originates as an analog signal of a network station, 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."

[68] 47 U.S.C. § 338. *See also supra* ¶ 6 (discussing the "carry one, carry all" requirement).

[69] 47 U.S.C. § 340(b)(2)(A) (2004), as enacted in 2004, stated: "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 ....."

[70] *SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd at 17304-8, ¶¶ 68, 70-73.

[71] *See id.* at 17304, ¶ 67.

[72] *Id.* at 17305 and 17308, ¶¶ 70 and 76. In the *2006 DIRECTV-EchoStar Joint Petition*, the Satellite Carriers challenged the Commission's interpretation of the *analog* service limitation provision in 47 U.S.C. § 340(b)(1). With the end of analog full-power broadcasting, this issue is now moot. *See infra* Section III.G. (discussing Order on Reconsideration).

[73] *See SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd at 17307, ¶ 72. We note that the Commission also stated that its interpretation of Section 340(b)(1) was necessary to give meaning to the statutory exceptions in Sections 340(b)(3)-(4); *see supra* ¶ 10 (for statutory text). As discussed, *infra*, in ¶¶ 46-47 and note 167, we find the statutory exceptions remain meaningful to, and are consistent with, our interpretation of Section 340(b)(1) as amended by STELA.

Section 76.54(g) of the rules, based on the "same network affiliate" language in former Section 340(b)(2)(A).[74]

19. As we tentatively concluded in the NPRM, new Section 340(b)(1) requires only that the subscriber receive local-into-local satellite service and no longer requires carriage of the local affiliate of the same network.[75] New Section 340(b)(1) applies "only to retransmissions to subscribers of a satellite carrier who receive retransmissions of a signal from that satellite carrier pursuant to Section 338."[76] By providing simply that a subscriber must receive "a" signal from the satellite carrier pursuant to Section 338 before receiving a SV signal, the statute removes any precondition that a subscriber receive "the" local affiliate of the same network as the SV station. In drafting new Section 340(b)(1) for the STELA, Congress eliminated the "same network affiliate" language that appeared in the provision enacted as part of the SHVERA in 2004.[77] Our interpretation that the new Section 340(b)(1) requires only that the subscriber receive local-into-local service is also consistent with the provision's heading: "Service Limited To Subscribers Taking Local-Into-Local Service," as well as with the statutory copyright license for SV stations, which allows a satellite carrier to retransmit SV stations to subscribers that receive signals pursuant to the statutory copyright license for local signals but says nothing about the subscriber having to receive the signal of the local affiliate of the same network .[78]

20. Based on the language of the amended text, Congress' purposes of facilitating SV carriage and achieving closer parity between cable and satellite providers, and the shift of the SV copyright license from the distant license to the local license,[79] we conclude that the best interpretation of new Section 340(b)(1) is that the subscriber need only receive a local station pursuant to Section 338 in order to be eligible to receive SV stations, and that it need not receive the network affiliate affiliated with the same network as the SV station.[80] The Broadcaster Associations disagree with the NPRM's

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[74] 47 C.F.R. § 76.54(g) states: "(g) Signals of analog or digital significantly viewed television broadcast stations may not be retransmitted by satellite carriers to subscribers who do not receive local-into-local service, including a station affiliated with the same network as the significantly viewed station, pursuant to §76.66 of this chapter; except that a satellite carrier may retransmit a significantly viewed signal of a television broadcast station to a subscriber who receives local-into-local service but does not receive a local station affiliated with the same network as the significantly viewed station, if: (1) There is no station affiliated with the same television network as the station whose signal is significantly viewed; or (2) The station affiliated with the same television network as the station whose signal is significantly viewed has granted a waiver in accordance with 47 U.S.C. § 340(b)(4)."

[75] *STELA-Significantly Viewed NPRM*, *supra* note 3, at ¶ 14.

[76] 47 U.S.C. § 340(b)(1) (referring to retransmissions "pursuant to 47 U.S.C. § 338"). Each satellite carrier providing a local station pursuant to the statutory copyright license is generally obligated to carry any qualified local television station in the same DMA that has requested carriage. 47 U.S.C. § 338.

[77] In STELA, Congress eliminated most references distinguishing the treatment of "analog" versus "digital" signals or stations in light of the completion of the digital television transition for full power stations. In Section 340, Congress eliminated the text of the digital provision (former section 340(b)(2)(A), which had said: "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 of this title 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) the retransmission complies with either the (i) equivalent or (ii) entire bandwidth requirement." (*Emphasis* added.)

[78] 17 U.S.C. § 122(a)(2)(A) (providing a statutory copyright license to support satellite carriage of SV stations provided the subscriber is receiving stations pursuant to the statutory copyright license for local stations). *See* 17 U.S.C. § 122(a)(1).

[79] We note that SV stations are treated as "local" for copyright purposes in 17 U.S.C. § 111 (the cable copyright license). *See supra* note 58.

[80] This conclusion affirms our tentative conclusion in the NPRM. *See STELA-Significantly Viewed NPRM*, *supra* note 3, at ¶¶ 14-17. *See also* DIRECTV Comments at 3-4 and Reply at 3-8; Dish Comments at 2 and Reply at 7.

interpretation of new Section 340(b)(1) and argue that the Commission should retain the interpretation it applied to the SHVERA, notwithstanding the change in the statutory language as enacted in the STELA.[81] They note that, in implementing the SHVERA in 2005, the Commission interpreted the former analog local service provision in former Section 340(b)(1) and the former digital local service provision in former Section 340(b)(2)(A) to require that a satellite subscriber must receive the local affiliate of a specific network in order to be eligible to receive the SV station affiliated with the same network.[82] The SHVERA, in contrast to the STELA, included language expressly requiring receipt of the "same network affiliate" in the provision applying to eligibility for a digital SV station.[83] The Commission, relying on the language in the former digital provision, applied the requirement to subscriber eligibility for both analog and digital SV stations.[84] The Broadcaster Associations contend that we should retain the former interpretation and apply it to the new STELA provision despite the removal of the old language.[85] They argue that nothing has materially changed with respect to the local service requirement, other than the completion of the DTV transition and, therefore, that the Commission's prior interpretation of Section 340(b)(1) should not change.[86] They argue that Congress "re-enacted" the Commission's 2005 interpretation of former Section 340(b)(1) because it did not substantively change that provision, thereby giving its "implicit approval" of that interpretation.[87] We reject these arguments as they ignore that the STELA does, in fact, materially change the SHVERA's local service requirements.[88]

21. The Broadcaster Associations assert that we must presume that Congress was aware of the Commission's prior interpretation of the local service provision.[89] By the same reasoning, however, we must also presume that Congress was aware of the basis for that interpretation: namely, the "same network affiliate" language in the former *digital* local service requirement in former Section 340(b)(2)(A). Congress intentionally removed that requirement when it chose to strike that language in favor of the former analog local service limitation language. As we said in the NPRM, Congress chose to discard the "same network affiliate" language in the former digital local service requirement in Section 340(b)(2)(A), which the Commission had relied upon for its more restrictive interpretation of the former analog local service requirement in Section 340(b)(1).[90] As Dish notes: "Congress' eraser is no less dispositive than its pen."[91] Moreover, our interpretation is consistent with Congress' intent to facilitate carriage and availability of SV stations for more satellite subscribers, and, thereby, to achieve closer parity with cable carriage of SV stations.

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[81] Broadcaster Associations Comments at 8 (arguing that the "prior Section 340(b)(1) never contained the 'same network affiliate' requirement" and, therefore, "the same interpretation and the same result must apply here.").

[82] *See* Broadcaster Associations Comments at 8. *See also SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd at 17306-7, ¶¶ 71-3.

[83] *See* 47 U.S.C. § 340(b)(2)(A).

[84] *See SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd at 17306-7, ¶¶ 71-2.

[85] *See* Broadcaster Associations Comments at 8-11.

[86] *Id.* at 9 (arguing "the *only* substantive change to the provision is the removal of references to 'analog signal'").

[87] *Id.* at 12 (arguing that "Congress's failure to expressly amend the statute to alter that interpretation ... is tantamount to a legislative re-enactment of that interpretation.").

[88] *See* DIRECTV Reply at 5-6; Dish Reply at 7-8.

[89] Broadcaster Associations Comments at 12.

[90] *See NPRM* at ¶ 16 (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

[91] Dish Reply at 10.

22. The Broadcaster Associations also argue that because both the former and new Section 340(b)(2) contain the "same network affiliate" language, the need to reconcile these two provisions remains.[92] Moreover, they argue that because three out of four of the Section 340(b) provisions contain the "same network affiliate" language, we should read that language into the one that does not: the new local service requirement.[93] We reject both claims. New Section 340(b)(2) is a different requirement from the other provisions of Section 340(b), and addresses only when a satellite carrier may provide the HD signal of an SV station.[94] Moreover, contrary to the Broadcaster Associations' assertion, we find that Congress's inclusion of the "same network affiliate" language in three out of four of the Section 340(b) provisions and not in the amended digital local service provision indicates that such exclusion was intentional.[95]

23. We recognize that there may be tension in some circumstances between the goals of protecting localism, on the one hand, and achieving closer parity between pay television providers and increasing SV carriage, on the other. Specifically, our interpretation below of the STELA's amendments to Sections 340(b)(1) and (b)(2) makes it possible for a satellite carrier to carry an SV network station, even in HD format, without also carrying the corresponding local in-market affiliate if that local station has not granted retransmission consent. The Broadcaster Associations argue that this undermines local service.[96] However, because SV status generally applies to only some areas in a DMA and not throughout an entire DMA, we find it unlikely that an SV station could permanently substitute for a local in-market station, even in the provision of network programming to the market.[97] Moreover, because most viewers want to watch their local stations, we do not think that carriage of only SV stations would satisfy most subscribers for an extended time. Furthermore, as the Broadcaster Associations have noted in a different proceeding, retransmission consent impasses resulting in loss of a local station are relatively rare[98] and, when they do occur, they are usually short-lived. Although the Broadcaster Associations do provide a few examples of markets where they have concerns that satellite carriers could rely on carriage of an SV station to the exclusion of the local in-market station, the record does not reflect instances in which an SV station has supplanted an in-market station in the cable or satellite context.[99] Therefore, we will monitor

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[92] Broadcaster Associations Comments at 8 (claiming "[t]hat requirement appeared in prior Section 340(b)(2), and that very same requirement still appears in new Section 340(b)(2).").

[93] Broadcaster Associations Reply at 9-10 ("Congress maintained the 'same network affiliate' language in three of the four subparagraphs").

[94] Dish Reply at 9.

[95] *See, e.g.*, *Duncan v. Walker*, 533 U.S. 167, 173 (2001) (*quoting Bates v. U.S.*, 522 U.S. 23, 29-30 (1997)) ("where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion"). *See also supra* note 90.

[96] *See* Broadcaster Associations Reply at 14. The Commission recognized in the SHVERA Significantly Viewed Report and Order that "the legislative history repeatedly reflects Congressional concern that the amendments permitting carriage of out-of-market significantly viewed signals not detract from localism." *See SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd at 17306-7, ¶¶ 71-2 (noting statutory intent "to protect localism" by citing to the *2004 House Commerce Committee Report*).

[97] *See* DIRECTV and Dish *Sept. 20 SV Talking Points*.

[98] *See, e.g.*, Opposition of the Broadcaster Associations in MB Docket No. 10-71 (dated May 18, 2010) at vii and 43, n. 148 (citing Bernstein Research, Cable and Satellite: Asymmetrical "Retrans" Leverage Favors Cable over Satellite and Telcos) (Mar. 21, 2006) (finding that "negotiating impasses that cause interruptions in access to broadcast signals are extremely rare").

[99] *See* NAB *ex parte* (dated Oct. 22, 2010) at 1, 3-6 ("NAB *Oct. 22 ex parte*") (suggesting local stations in four DMAs – Dayton, OH; Hartford-New Haven, CT; Lansing, MI; and Sherman, TX-Ada, OK – are at risk of being overshadowed by a SV station from an adjacent, larger market). In its *ex parte*, NAB provided staff with tables (continued....)

how the rules adopted in this order are working to determine if there are abuses, unintended consequences, or misuse of the rules that might lead to violations of the good faith requirements associated with retransmission consent negotiations.[100] Now that we have established a practical framework for satellite carriage of SV stations, we expect Satellite Carriers to offer SV stations to consumers wherever possible. However, if our implementation of Section 340(b) results in satellite carriers using SV stations to supplant, rather than supplement, their carriage of local in-market stations, we will reexamine our rules and our statutory analysis here in light of Congress' goals. In light of our conclusion that the new language in the STELA no longer requires subscriber receipt of a specific local station, we revise Section 76.54(g).[101] The amended rule requires that a subscriber receive the satellite carrier's local-into-local service as a precondition for the subscriber to receive SV stations.

### C. The STELA Eliminates the "Equivalent or Entire Bandwidth" Requirement and Replaces it with an "HD Format" Requirement

24. We adopt our proposal to eliminate the "equivalent or entire bandwidth" requirement and to provide, in its place, that a satellite carrier may retransmit the HD signal of an SV station to a subscriber only if such carrier also retransmits the HD signal of the local station affiliated with the same network whenever that signal is available in HD format. Both the Broadcaster Associations and Satellite Carriers agree with this conclusion. The commenters disagree, however, how to interpret and implement the new "HD format" requirement.

25. In the 2004 SHVERA, Congress enacted the "equivalent or entire" bandwidth requirement to prevent a satellite carrier from using technological means to discriminate against a local network station in favor of the SV network affiliate.[102] The Commission codified these requirements in Section 76.54(h) of the rules, which tracks the language of SHVERA.[103] In implementing that provision, the Commission strictly interpreted the statutory requirement for "equivalent bandwidth." As a result, satellite carriers have been required to ensure equality between the satellite bandwidth allocated to carriage of the local station and the SV stations on virtually a minute-by-minute basis, making carriage of SV stations so burdensome that they are rarely carried.[104]

(Continued from previous page)
"reflecting the extent to which out-of-market duplicating network stations are 'significantly viewed' in several local markets." *Id.*

[100] *See* 47 C.F.R. § 76.65 (requiring broadcasters and MVPDs to negotiate in good faith).

[101] *See* Appendix B final rule 47 C.F.R. § 76.54(g)(1).

[102] 47 U.S.C. § 340(b)(2)(B) (2004). The law reflects Congress' intent to prevent a satellite carrier from offering the local digital station "in a less robust format" than the SV digital station). *SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd at 17314, ¶ 94.

[103] 47 C.F.R. § 76.54(h) states: "Signals of significantly viewed network stations that originate as digital signals may not be retransmitted to subscribers unless the satellite carrier retransmits the digital signal of the local network station, which is affiliated with the same television network as the network station whose signal is significantly viewed, in either (1) at least the equivalent bandwidth of the significantly viewed station or (2) the entire bandwidth of the digital signal broadcast by such local station."

[104] *See supra* ¶ 13 (quoting *H.R. 2994 Report* at 16). *See also* Testimony of Bob Gabrielli, Senior Vice President, Broadcasting Operations and Distribution, DIRECTV, Inc., before the U.S. House of Representatives Subcommittee on Communications, Technology and the Internet, Hearing on Reauthorization of the of the Satellite Home Viewer Extension and Reauthorization Act, at 9 (Feb. 24, 2009) ("*Gabrielli Testimony*") (asserting that it is "infeasible" for DIRECTV to "carry local stations in the same format as SV stations every moment of the day").

26. The STELA eliminated the "equivalent or entire bandwidth" requirement from the statute,[105] and replaced it with "HD format."[106] In doing so, Congress intended to facilitate satellite carriage of SV stations, which Congress thought was thwarted by the Commission's implementation of the predecessor provision.[107] The legislative history also shows that Congress wanted to simplify the law and increase service to satellite consumers.[108] Congress' principal concern was simply to clarify that a satellite carrier may provide an SV station in HD format as long as the carrier also carries the corresponding local network affiliate in HD format if it is available in HD format.[109]

27. Accordingly, we revise Section 76.54(h) to eliminate the "equivalent or entire bandwidth" requirement and to provide that a satellite carrier may retransmit the HD signal of an SV station to a subscriber only if such carrier also retransmits the HD signal of the local station affiliated with the same network whenever that signal is available in HD format.[110] This part of the rule tracks the amended statutory language.[111] In addition, as discussed below, we adopt additional rules to interpret and implement the new "HD format" requirement.

#### 1. "HD format" requirement applies only where a satellite carrier retransmits the SV station in HD format

28. We adopt our tentative conclusion in the NPRM that the "HD format" requirement in Section 340(b)(2) applies only where a satellite carrier retransmits the SV station in HD format and does not restrict satellite carriage of the SV station in SD format.[112] The Satellite Carriers support this conclusion, while the Broadcaster Associations oppose it.[113]

29. The Broadcaster Associations object to the additional language in our proposed Section 76.54(g)(2) clarifying that the "HD format" requirement does not apply to satellite carriage of an SV station in SD format.[114] They argue that the statute requires satellite carriage of a local station in SD format if the satellite carrier retransmits the SV station in SD format. We disagree. As discussed above, the amended local service requirement in Section 340(b)(1) now requires only that a satellite subscriber receive the satellite carrier's local-into-local service as a precondition for the subscriber to receive SV stations.[115] Moreover, the express language of the HD format requirement in Section 340(b)(2) applies only when a satellite carrier transmits an SV station in HD format. Therefore, in order for a satellite

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[105] In the *2006 DIRECTV-EchoStar Joint Petition*, the Satellite Carriers challenged the Commission's interpretation of the "equivalent bandwidth" requirement. Because the STELA eliminates this requirement, this issue is now moot. *See infra* Section III.G. (discussing *Order on Reconsideration*).

[106] 47 U.S.C. § 340(b)(2) (2010), as amended by the STELA § 203(a).

[107] *H.R. 2994 Report* at 16 (noting that the Commission's implementation of Section 340, including its interpretation of the "equivalent bandwidth" requirement, has generally served to discourage satellite carriers from using Section 340 to provide significantly viewed signals to qualified households.). *See also Gabrielli Testimony* at 9 ("Fixing the 'Significantly Viewed Rules' will Rescue Congress's Good Idea from the FCC's Implementation Mistakes").

[108] *See H.R. 3570 Report* at 4-5.

[109] *H.R. 2994 Report* at 16.

[110] *See* Appendix B final rule 47 C.F.R. § 76.54(g)(2). We renumber former Section 76.54(h) as 76.54(g)(2).

[111] *Id.*

[112] NPRM at ¶ 12. We clarify that this requirement is separate from the local service requirement in Section 340(b)(1), which imposes restrictions on the satellite carriage of an SV station, regardless of format.

[113] Broadcaster Associations Comments at 14; DIRECTV Comments at 4 and Reply at 8; Dish Comments at 2.

[114] Broadcaster Associations Comments at 14-15.

[115] *See supra* ¶ 16. *See also* DIRECTV Reply at 8.

carrier to retransmit to a subscriber an SV station in SD format, the statute does not require satellite carriage of the local station affiliated with the same network in SD format.

30. Accordingly, we adopt our tentative conclusion that Section 340(b)(2) only limits satellite carriage of an SV station in HD format and does not apply if the satellite carrier only carries the SV station in SD format, and we adopt this requirement in new Section 76.54(g)(2).[116] We also adopt our proposal that, for purposes of this provision, "HD format" refers to a picture quality resolution of 720p, 1080i, or higher.[117] We received no opposition to this proposal.

### 2. "HD format" requirement applies when a local station makes itself technically and legally "available" to satellite carrier

31. We conclude that, for a local (in-market) station to be "available" for purposes of the "HD format" requirement in Section 340(b)(2), the local station must: (1) timely request carriage (*i.e.*, elect mandatory carriage or grant retransmission consent); (2) provide a good quality HD signal to the satellite carrier's local receive facility (LRF) in accordance with Section 76.66(g) of the Commission's rules; and (3) otherwise comply with Sections 76.65 and 76.66.[118] We believe that the statute's use of the term "available," instead of "broadcast" or "transmitted," signifies that Congress did not intend a narrow technical meaning and affords us discretion to create a workable framework for satellite carriage of SV stations. Our conclusion is supported by Dish and DIRECTV,[119] while the Broadcaster Associations oppose it.[120]

32. The STELA establishes the new "HD format" requirement in Section 340(b)(2) to permit a satellite carrier to retransmit an SV network station in HD "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."[121] In the NPRM, we sought comment on the significance of this language. We also sought comment on whether satellite carriers would face any technical problems in complying with our proposed rules.

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[116] *See* Appendix B final rule 47 C.F.R. § 76.54(g)(2)(i).

[117] *See* Appendix B final rule 47 C.F.R. § 76.54(g)(2)(ii). NPRM at ¶ 12 (citing, *e.g.*, *Carriage of Digital Television Broadcast Signals; Amendments to Part 76 of the Commission's Rules Implementation of the Satellite Home Viewer Improvement Act of 1999*; CS Docket No. 98-120, Local Broadcast Signal Carriage Issues, CS Docket No. 00-96, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 2598, 2628, ¶ 71 and n 204 (2001) (discussing several formats that are considered "high definition"). *See also Carriage of Digital Television Broadcast Signals; Amendments to Part 76 of the Commission's Rules Implementation of the Satellite Home Viewer Improvement Act of 1999*; Local Broadcast Signal Carriage Issues, CS Docket No. 00-96, Second Report and Order, Memorandum Opinion and Order, and Second Further Notice of Proposed Rulemaking, 23 FCC Rcd 5351, 5354, ¶ 5 (2008). *See also*, *e.g.*, Newton's Telecom Dictionary definition of HDTV at 389 (20th ed. 2004) and the Commission's "DTV Shopping Guide" for consumers at http://www.dtv.gov/shopgde.html).

[118] *See* 47 C.F.R. §§ 76.65 and 76.66. These rules govern, *inter alia,* requirements to negotiate in good faith, procedures for requesting carriage, carriage of stations that substantially duplicate, and other matters related to satellite carriage of local stations.

[119] *See* Dish Comments at 7 and DIRECTV and Dish *Sept. 22 SV Talking Points* at 3.

[120] Broadcaster Associations Reply at 14-16.

[121] *See* 47 U.S.C. § 340(b)(2) (2010), as amended by the STELA § 203(a).

33. The STELA does not define the term "available" for purposes of Section 340.[122] The legislative history likewise does not explain the meaning of the term. The Satellite Carriers and Broadcaster Associations offer competing interpretations as to what "available" should mean in this context. Dish argues that we should interpret this language to mean that, "if the local station has not elected must carry and has not signed a retransmission consent agreement, or fails to provide a good quality signal in accordance with [Section] 76.66(g), then the signal should be deemed not available for purposes of the ["HD format" requirement], and the satellite carrier should be able to supply the SV station in HD."[123] Dish argues that this interpretation is necessary to prevent a local station from depriving satellite subscribers of both the local and the SV station in the event of an impasse in retransmission negotiations, which they assert would be "a result directly at odds with Congress' express intent to make SV stations more available to satellite subscribers."[124] The Broadcaster Associations oppose Dish's proposal, asserting that the Satellite Carriers' interpretations of the new "HD format" requirement "are motivated by a desire to affect retransmission consent negotiations."[125]

34. The Broadcaster Associations argue that the term "available" should mean "whenever the television station is *transmitting* or *broadcasting* the relevant channel in HD format."[126] They argue that this interpretation is most consistent with other parts of the statute, such as Sections 339[127] and 342[128] of the Act.[129] We disagree. The Sections cited by the Broadcaster Associations pertain to a different use of the term "available" in different contexts and are expressly limited to those contexts. Moreover, even if we were to rely on the definition of "available" in Section 339 or the reference to "availability" in Section 342, the term "available" in the context of SV carriage would remain ambiguous. Section 339 relates to whether a satellite carrier's local-into-local package is "available" to a subscriber. If so, the subscriber is not eligible for distant signals (*i.e.*, "no distant, where local"). In the context of HD signal availability in Section 340, ascribing this meaning to the term "available" could support either the Satellite Carriers' interpretation that the HD signal is not available if the local station does not grant consent for retransmission or the Broadcaster Associations' interpretation that the HD signal is available if

[122] The STELA amendments to the Communications Act use the word "available" with respect to a signal in three different contexts: 1) in Section 340 with respect to an HD signal; 2) in Section 339 in reference to whether the satellite carrier is retransmitting the local station to a subscriber as part of the local-into-local service package, *see* 47 U.S.C. §§ 339(a)(2)(A)(i)(I), (2)(B)(i)(I) and (II), (2)(C)(i) and (ii), (2)(D)(iii), (2)(E), and (2)(H); and 3) "availability" in Section 342 with respect to a satellite carrier's "good quality signal," *see* 47 U.S.C. § 342(e)(2)(A)(i). As discussed, *infra*, only Section 339 offers a definition of "available" but expressly limits this definition: "for purposes of this paragraph," that is, to Section 339(a).

[123] Dish Comments at 7-8.

[124] *Id.* at 8.

[125] Broadcaster Associations Reply at 12.

[126] *Id.* at 15.

[127] Section 339(a)(2)(H) of the Act defines the term "available" in this limited context (*i.e.*, "no distant where local"):

> (H) Available defined. For purposes of this paragraph, a satellite carrier makes available a local signal to a subscriber or person if the satellite carrier offers that local signal to other subscribers who reside in the same zip code as that subscriber or person.

47 U.S.C. § 339(a)(2)(H). *See also* Broadcaster Associations Reply at 14-15 (citing 47 U.S.C. § 339(a)(2)(C)(i)).

[128] The Broadcaster Associations also argue that, in the qualified satellite carrier certification context in Section 342 of the Act, the "availability level of a satellite signal" "means that the satellite carrier is retransmitting the satellite signal in a manner to satisfy the 'good quality satellite signal' requirements." Broadcaster Associations Reply at 15 (citing 47 U.S.C. § 342(e)(2)(A)(i)).

[129] *Id.*

broadcast.[130] Similarly, Section 342 refers to the "availability level" of a satellite signal as a means of defining "good quality satellite signal" for purposes of a satellite carrier's eligibility for certification as a "qualified carrier."[131] We do not see the relevance of satellite signal coverage in the context of Section 342 to the interpretation of Section 340. Moreover, here again, even by strained analogy, signal availability could mean the physical presence of the signal, as the Broadcaster Associations argue, or the ability to receive and use the signal, as the satellite carriers contend.

35. In contrast to the Broadcaster Associations' attempt to import uses of the word from other contexts, the Satellite Carriers describe the circumstances in which the HD format requirement is intended to apply: when the satellite carrier receives a station's HD signal and the permission to retransmit it but chooses not to retransmit the HD version and instead converts the HD signal to a standard definition ("SD") signal.[132] We believe that this interpretation is most consistent with common usage of the term "available." In contrast, we think it strains the common meaning of the term to consider "available" a signal that the satellite carrier is legally barred from carrying.

36. The Satellite Carriers also address the practical impact of defining the term "available" as suggested by the Broadcaster Associations. They explain that they offer local service in some markets only in HD.[133] Therefore, an SV station originating from such a market would have one HD feed covering both the station's local market and SV area and there would be no technical way for the satellite carrier to down-convert the HD feed signal to SD only in the SV area. Moreover, a satellite carrier would likely not have the capacity on its spot beam to add a duplicative, SD version of the station.[134] Therefore, if a local station withholds retransmission consent, the Satellite Carriers would have to either down-convert the SV station from HD to SD in its own local market or not carry it as an SV station, frustrating the intent of the statute.[135]

37. The question then is whether an HD signal is "available" for purposes of the statute any time a broadcaster is transmitting an HD signal, or whether the term "available" takes into account practical and legal considerations, such as whether the broadcaster is delivering a "good quality signal" to the satellite carrier[136] and the satellite carrier is legally permitted to carry it (*i.e.*, the broadcaster has elected mandatory carriage or granted retransmission consent).[137] We believe the term is ambiguous[138]

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[130] For example, the definition in Section 339 does not shed light on whether the term "available" takes into account practical considerations or whether it is sufficient for a signal simply to be theoretically available.

[131] 47 U.S.C. § 342 (describing the process and grounds for the Commission to issue a "qualified carrier" certification pursuant to 17 U.S.C. § 119(g)).

[132] DIRECTV and Dish *Sept. 22 SV Talking Points* at 1. "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 [SD] service in such situations by taking the HD signal and downrezzing it to [SD]. Thus, the HD signal is 'available to the satellite carrier,' but the satellite carrier does not 'retransmit to a subscriber in [HD] format the signal of [such] station' — exactly the situation in which Congress meant to restrict the format of [SV] importation. So, if a satellite carrier offered an entire market in SD format only, it could not import a [SV] station in HD format because the HD format of the in-market station is 'available to' it." "Downrezzing" refers to reducing the resolution from high definition to standard definition.

[133] *See* DIRECTV and Dish *Sept. 20 SV Talking Points.*

[134] *See id.* at 4.

[135] DIRECTV Comments 4-5; Reply at 12.

[136] *See* 47 U.S.C. § 338(b).

[137] *See* 47 U.S.C. § 325(b).

and thus should be defined in a manner that best effectuates the text, history and purposes of the statute.[139] As discussed above, we believe the overriding goal of the legislative changes made in Section 340 is to facilitate satellite carriage of SV stations and remove the obstacles to carriage created by our interpretation of SHVERA.[140] With this goal in mind, we find that the term "available" within the context of Section 340(b)(2) is best interpreted by taking into account whether the satellite carrier has the legal authority to transmit the local broadcaster's signal and has been provided a "good quality" signal, and we believe that this interpretation is most consistent with common usage of the term.

38. We agree with the Broadcaster Associations that our rules must protect localism,[141] but disagree that we must protect the in-market station at the cost of making satellite carriage of the SV station impractical.[142] The Broadcaster Associations' argument fails to take into account that the SV station is generally not significantly viewed throughout an entire market. Indeed, the Satellite Carriers contend that stations that are significantly viewed outside of their own markets are generally significantly viewed only in small portions of neighboring markets, making it unlikely that satellite carriers could use SV stations to replace local stations in other markets.[143] As noted above, we also find it unlikely that an SV station could permanently substitute for a local in-market station to the satisfaction of subscribers throughout the market.[144]

39. We are persuaded that, if we were to adopt the Broadcaster Associations' interpretation that a station's HD signal is "available" even when it has not granted retransmission consent or is not providing a "good quality" signal, the satellite carrier in many cases will have to downconvert the SV

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[138] *See, e.g., Natural Resources Defense Council v. EPA,* 571 F.3d 1245 (D.C. Cir. 2009) (term "reasonably available" is ambiguous where statute did not specify how to define the term, so agency is permitted to reasonably interpret statute); *State of Hawaii ex rel. Atty. Gen. v. FEMA,* 294 F.3d 1152, 1161-1162 (9th Cir. 2002) (observing that "[a]s the dictionary definitions of the word reveal, the term 'available' is ambiguous in the current context.... Under the first definition, 'available' takes into account practical considerations ...; under the second definition, the term suggests instead a more abstract or theoretical concept without regard for cost, risk or uncertainty"). We note that the court finds ambiguous the definition from the dictionary on which the Broadcaster Associations rely on as being clear. Broadcaster Associations Reply at 15 (citing to American Heritage Dictionary of the English Language at 127 (3d ed. 1996) (defining available as "1. Present and ready for use; at hand; accessible ... 2. Capable of being gotten; obtainable").

[139] *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (where statute's plain terms do not directly address precise question at issue and statute is ambiguous on the point, courts are required to defer to the implementing agency's reasonable construction); *see also National Cable and* Telecommunications *Ass'n v. Brand X Internet Services*, 545 U.S. 967, 980 (2005) (ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in a reasonable fashion); *Verizon Comm'ns Inc. v. FCC*, 535 U.S. 467, 539 (2002) (under Chevron doctrine, courts generally defer to agency's reasonable interpretation of an ambiguous provision in its enabling statute).

[140] *See supra* ¶ 15.

[141] *See, e.g.*, Broadcaster Associations Comments at iv.

[142] *See, e.g.*, NAB *ex parte* (dated Oct. 7, 2010) Significantly Viewed Talking Points Appendix at 3 ("*NAB Oct. 7 SV Talking Points*").

[143] DIRECTV and Dish *Sept. 22 SV Talking Points* at 1. *But see NAB Oct. 22 ex parte* at 1, 3-6 (the Broadcaster Associations disagree, and contend that there are some small markets in which there is substantial "overshadowing" by a SV station from an adjacent, larger market (*e.g.*, Dayton, OH; Hartford-New Haven, CT; Lansing, MI; and Sherman, TX-Ada, OK DMAs)). Neither side quantifies the prevalence of (or potential for) overshadowing. We agree that overshadowing is a concern, but the potential for overshadowing already exists in the cable context, and there is no evidence that overshadowing is currently a problem in the cable context or would be more prevalent in the satellite context.

[144] *See supra* ¶ 23.

station or not carry the SV station at all due to limited satellite capacity,[145] and Congressional intent will, again, be thwarted. If, on the other hand, we were to conclude that a station's HD signal is not "available" unless the carrier has the legal right to carry the station and a "good quality" signal is being provided, the satellite carrier will be able to carry an SV station and, in the overwhelming majority of cases, will continue to have the incentive to reach a retransmission consent agreement with the local station. Thus, this interpretation will likely result in carriage of both the SV and local stations. We acknowledge that this interpretation may affect retransmission consent negotiations in some situations by giving a satellite carrier the opportunity to provide network programming to some subscribers through the SV station. This interpretation may also affect the local station's leverage in negotiations because in certain areas of the DMA it would no longer be the only source of programming from that network to some satellite subscribers. We conclude, however, that this is the best interpretation of the statutory language because it ensures that the overall intent of the statutory provisions to promote SV carriage is carried out.[146]

40. Therefore, we find that Section 340(b)(2) is best interpreted to enable satellite TV consumers to receive both the SV and in-market stations as part of their carrier's local service package.[147] Accordingly, we amend Section 76.54(g)(2).[148] We note, however, that our interpretation here assumes that both parties are negotiating in good faith in compliance with our rules.[149] If the local station is willing to grant consent and make its HD signal available, but the satellite carrier is not negotiating for retransmission consent in good faith, as required by Section 76.65, then the local station's HD signal will be deemed available. The amended Section 76.54(g)(2) includes this condition.[150]

### 3. "HD format" requirement applies to a local station's HD multicast signal

41. We find that the "HD format" requirement is best interpreted to require carriage of any HD signal of a local station affiliated with the same network as the SV station, regardless of whether the local station broadcasts the HD signal as a primary or as a secondary multicast stream.[151] The Broadcaster Associations and Dish debate whether the statute's use of the term "signal" includes a multicast stream, with the Broadcaster Associations arguing it does and Dish arguing it does not.

42. In the NPRM, we sought comment on how the "HD format" requirement in Section 340(b)(2) should apply in the event a satellite carrier wants to retransmit an SV network affiliate in HD and there is an in-market (local) station that is broadcasting multiple streams of programming ("multicasting") and more than one of the streams is in HD format and affiliated with a network. We asked whether the satellite carrier is required to carry the secondary stream in HD in order to be permitted to retransmit an SV station affiliated with the same network in HD, notwithstanding that the in-market station's primary stream is affiliated with a different network. In other words, would a satellite carrier be

[145] DIRECTV and Dish *Sept. 20 SV Talking Points* at 2 ("explaining that under the Broadcaster Associations' interpretation, "in the event of a retrans dispute, the satellite carrier must downrez or black out the SV station").

[146] DIRECTV and Dish *Sept. 22 SV Talking Points* at 1 ("Treating satellite carriers like cable operators with respect to significantly viewed service would not give satellite carriers undue leverage in retransmission consent negotiations").

[147] DIRECTV Reply at 3, 11; DIRECTV Comments at 5. DIRECTV agreed with Dish's proposal in their joint *ex parte* presentations. *See, e.g.*, DIRECTV and Dish *Sept. 20 SV Talking Points*. This interpretation of "available" applies only with respect to the SV provisions in STELA and not to other provisions in STELA, including Section 339 (47 U.S.C. § 339).

[148] *See* Appendix B final rule 47 C.F.R. § 76.54(g)(2).

[149] *See* 47 C.F.R. § 76.65(a).

[150] *See* Appendix B final rule 47 C.F.R. § 76.54(g)(2)(iii).

[151] A station may be affiliated with more than one network.

required to carry more than one HD programming stream of an in-market station if the in-market station is multicasting HD streams that are affiliated with different networks in order for the satellite carrier to carry an SV station affiliated with each network in HD? We also considered whether we could address this situation on a case-by-case basis. In their comments, both the Broadcaster Associations and the Satellite Carriers seek a Commission decision on the multicast question.[152]

43. We conclude that the statute's use of the term "signal" in this context does not differentiate between streams that are primary or secondary.[153] For purposes of carriage of SV signals in HD, the question is whether there is an in-market station affiliated with the same network as the SV station that makes its HD signal available to the satellite carrier. If so, the satellite carrier may not carry the SV station in HD format unless it carries the local station affiliated with the same network in HD format. Dish argues that Section 340(b)(2) does not expressly use the term "multicast stream," but, as noted by the Broadcaster Associations, this section also does not expressly use the term "primary stream."[154] Dish notes that, for purposes of the broadcast carriage requirements, a satellite carrier is generally only required to carry the stream that a station deems its "primary" stream if the station elects mandatory carriage.[155] That carriage requirement, however, is not determinative of which signal a satellite carrier is required to carry in order to carry a particular SV station in HD format under Section 340(b)(2). As stated above, when an SV station is carried in HD, we interpret Section 340(b)(2) as requiring carriage of any available HD signal of a local station affiliated with the same network as the SV station. We amend Section 76.54(g)(2) accordingly.[156]

44. Though appearing to acknowledge that the "HD format" requirement applies to multicast channels, DIRECTV expresses concern that applying the HD format requirement to multicast streams would make carriage of SV stations technically problematic because of what it calls the "mushroom" problem; that is, "if a new, [HD] network affiliate suddenly appeared on the multicast stream of an existing station, [DIRECTV] would have to drop or downrez the [SV] station until [DIRECTV] could negotiate carriage and make room for the 'new' local station."[157] We believe our definition of "available" in the HD format requirement may alleviate this "mushroom" problem in many cases because a new HD multicast stream would not be available to the satellite carrier until the station grants retransmission consent for that stream. Additionally, if the new HD multicast stream is a new station, our existing satellite carriage rules already recognize that satellite carriers may face technical issues associated with

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[152] *See* Broadcaster Associations Comments at 16 and Dish Reply at 11. The Broadcaster Associations contend that case-by-case multicast determinations would be discriminatory and would violate the STELA. Broadcaster Associations Comments at 16.

[153] DIRECTV at 5; Broadcaster Associations Reply at 10. For example, a local station may be affiliated with two different networks and broadcast programming from both networks using its digital signal capacity to air two or more signal streams simultaneously. If the local station makes an HD signal affiliated with a network available to the satellite carrier, and that carrier wishes to carry the HD signal of an SV station affiliated with the same network, Section 340(b)(2) requires carriage of the local station's HD signal, as discussed, *infra*. We conclude that it is irrelevant whether the local affiliate's broadcast of the HD signal is aired on a primary or secondary multicast stream, as long as the HD signal is available to the satellite carrier.

[154] Dish Comments at 6; Broadcaster Associations Comments at 16.

[155] 47 C.F.R. § 76.66(b). Dish Reply at 12-13. Satellite carriers are required to carry multicast streams only in Alaska and Hawaii. *See* 47 C.F.R. § 76.66(b)(2).

[156] *See* Appendix B final rule 47 C.F.R. § 76.54(g)(2).

[157] DIRECTV Comments at 4-5. DIRECTV explains that, from its perspective, "a new multicast network affiliate can appear as quickly as a mushroom on the lawn after a rainy night." DIRECTV Reply at 12 (explaining "the moment a new multicast network affiliate appeared, DIRECTV would either have to carry it in HD or drop an SV station affiliated with the same network that it had been carrying").

commencing carriage of new broadcast signals in a local market.[158] We recognize, however, that a satellite carrier may nonetheless face a "mushroom" problem where a new HD multicast stream is introduced by an existing station in the local market and such station has previously granted carriage consent. Furthermore, the satellite carrier may not be able to accommodate the new HD multicast stream in the market on its spot beam. Therefore, to minimize consumer disruption, we recognize that satellite carriers may need additional time to come into compliance with the HD format rule without having to drop an existing SV station while they make the technical adjustments necessary to carry a new HD format network stream.[159] We will consider special circumstances on a case-by-case basis, considering when the satellite carrier was informed of the introduction of a multicast stream containing HD signals in relation to the existing HD carriage of an SV station affiliated with the same network, as well as the carrier's compliance with its notice requirements with respect to carriage of SV signals.[160]

### D. Statutory Exceptions to the Subscriber Eligibility Limitations

45. While the STELA revises the subscriber eligibility limitations on receipt of SV service in Sections 340(b)(1) and 340(b)(2), it does not amend the statutory exceptions to those limitations in Sections 340(b)(3) and 340(b)(4).[161] As noted above, the Section 340(b)(3) exception permits a satellite carrier to offer an SV network station to a subscriber when there is no local network affiliate present in the local market,[162] and the Section 340(b)(4) exception permits a satellite carrier to privately negotiate with the local network station to obtain a waiver of the eligibility restrictions.[163] The Broadcaster Associations argue that if Section 340(b)(1) were construed simply to require receipt of some local-into-local service, rather than local-into-local carriage of the local affiliate of the same network as the SV station, that reading would render superfluous the exceptions to Section 340(b)(1) contained in Sections 340(b)(3) and (b)(4).[164] To support their argument, the Broadcaster Associations rely on the Commission's 2005 decision that the "best reading" of the SHVERA version of Section 340(b)(1) required receipt of the local affiliate of the same network because, under any other reading, "there would be no need" for the Section 340(b)(3) or (b)(4) exceptions to Section 340(b)(1).[165] We reject the Broadcaster Associations' argument and find that our 2005 interpretation was not necessary to give effect to the Section 340(b)(3) and (b)(4) exceptions.[166] Giving effect to the most natural reading of Section

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[158] *See* 47 C.F.R. § 76.66(d)(3)(iii) (providing 90 days for the satellite carrier to commence carriage of a new station). *See also* 47 C.F.R. § 76.66(d)(2)(iv)(requiring satellite carriage within 90 days of receiving a mandatory carriage request in a new local-into-local market or upon commencing local-into-local service).

[159] We recognize that the HD format rule may require a satellite carrier to drop an existing SV station if it is not able to accommodate the new HD signal in the market on its spot beam. In such cases, the satellite carrier will be afforded a reasonable amount of time to inform its subscribers that it will be dropping the SV station.

[160] *See* 47 C.F.R. § 76.66(d)(3)(iii) and 47 C.F.R. § 76.54(e) (requiring satellite carriers that intend to carry SV stations to provide written 60 days notice to all TV stations assigned to the same local market).

[161] 47 U.S.C. § 340(b)(3) and (4). We note that the STELA § 103 does amend the waiver provision in the corresponding satellite statutory copyright license in 17 U.S.C. § 122(a)(2) to eliminate the now out-dated "sunset" provision and replace the term "superstation" with "non-network station," consistent with other references in the statute (*see supra* note 25).

[162] *Id.* at § 340(b)(3). *See supra* ¶ 10 (for statutory text).

[163] *Id.* at § 340(b)(4). *See supra* ¶ 10 (for statutory text).

[164] *See* NAB *ex parte* (dated Nov. 18, 2010) at 4-5 ("*NAB Nov. 18 ex parte*").

[165] Broadcaster Associations Comments at 10-11; *NAB Nov. 18 ex parte* at 4-5 (*citing SHVERA Significantly Viewed Report and Order,* 20 FCC Rcd at 17305-17306, ¶¶ 70-71).

[166] The Satellite Carriers support changing the interpretation to comport with the literal language of Sections 340(b)(1) and (b)(3). DIRECTV Comments at 4 and Reply at 8; Dish Comments at 2.

340(b)(1) – which lacks the "same network affiliate" language found elsewhere in Section 340 and simply requires receipt of some local-into-local service as a condition of retransmitting SV stations – does not render either Section 340(b)(3) or Section 340(b)(4) superfluous. For example, in a situation where a satellite carrier does not offer a local-into-local package and thus Section 340(b)(1) would otherwise prohibit retransmission of any SV network station, Section 340(b)(3) would allow retransmission of an SV station to subscribers where there is no local station affiliated with the same television network as the SV station in the market (*e.g.*, an SV station that is an ABC affiliate could be retransmitted if there is no local ABC affiliate). Likewise, if a subscriber does not receive the local-into-local package, thereby failing to meet the requirements of Section 340(b)(1), retransmission of an SV station to that subscriber would nonetheless be permissible under Section (b)(4) if the local station affiliated with the same network as the SV station grants a waiver from the requirements of Section 340(b)(1) (*e.g.,* the local ABC affiliate permits the satellite carrier to retransmit an SV station that is an ABC affiliate). These examples show that the exceptions of (b)(3) and (b)(4) have meaning even when we read (b)(1) simply to require receipt of some local-into-local service as a condition of retransmitting SV stations. Further, we reject the Broadcaster Associations' argument that because Congress did not amend Sections 340(b)(3) and (b)(4) when it adopted the STELA in 2010, the Commission may not depart from its 2005 interpretation of Section 340(b)(1).[167] This argument ignores that an agency is free within the limits of reasoned interpretation to change course so long as it adequately justifies the change.[168] In 2005, the Commission construed what it found to be an ambiguous provision in Section 340(b)(1) by adopting a reading that the Commission believed would best harmonize Section 340(b)(1) with Sections 340 (b)(2), (b)(3) and (b)(4).[169] Given the modifications to Sections 340(b)(1) and (b)(2) enacted in STELA and Congress's intent to ease carriage of SV stations, nothing in that legislation suggests that Congress intended to lock in the Commission's 2005 interpretation of Section 340(b)(1) or restrict the Commission's discretion to interpret the revised eligibility requirements. As explained above, we now conclude that our earlier reading was not in fact necessary to harmonize the various provisions of Section 340(b). Moreover, our reading of Section 340(b)(1) here better serves the STELA's goals of improving service options for satellite subscribers by allowing SV carriage in additional situations.

46. In the 2005 *SHVERA Significantly Viewed Report and Order*, the Commission interpreted the Section 340(b)(3) exception to allow a satellite carrier to retransmit an SV station to a subscriber when there is no local affiliate of the same network present in that market, provided that the subscriber subscribes to and receives the carrier's local-into-local service.[170] Under our new interpretation of the subscriber eligibility limitations in Section 340(b)(1) and (2), the Section 340(b)(3) exception permits a subscriber to receive an SV network affiliate, even if he or she does not subscribe to local-into-local service, if there is no affiliate of that network in his or her local market.[171] In other words, Section 340(b)(3) operates as an exception to any limitations on subscriber eligibility to receive a SV station if there is no affiliate of the same network as the SV station in the local market. Because it gives effect to

[167] *NAB Nov. 18 ex parte* at 6.

[168] *See National Cable and Telecommunications Association v. Brand X Internet Services,* 545 U.S. 967, 980-981 (2005).

[169] *Compare SHVERA Significantly Viewed Report and Order,* 20 FCC Rcd at 17305, ¶ 70 ("Subscriber receipt of 'local-into-local' service is unambiguously required by the statute") *with id.* ("Subscriber receipt of a specific local network affiliate ... is the best reading of Section 340(b)(1) in the overall context of Section 340").

[170] *SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd at 17309, ¶ 80.

[171] For example, the statutory exceptions in Sections 340(b)(3) and (4) would still apply where local-into-local service is not available to a subscriber for technical reasons (such as the spot beam does not cover the entire DMA or its reception is blocked for an individual subscriber by terrain or foliage) or if local-into-local service is not yet offered by the satellite carrier to a subscriber's market. *See STELA-Significantly Viewed NPRM, supra* note 3, at ¶ 18.