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

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

COMMENTS OF THE BROADCASTER ASSOCIATIONS

NATIONAL ASSOCIATION OF BROADCASTERS

ABC TELEVISION AFFILIATES ASSOCIATION

CBS TELEVISION NETWORK AFFILIATES ASSOCIATION

FBC TELEVISION AFFILIATES ASSOCIATION

NBC TELEVISION AFFILIATES

August 17, 2010

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Summary

The Commission proposes to modify its satellite television "significantly viewed" ("SV") rules to implement Section 203 of the Satellite Television Extension and Localism Act of 2010 ("STELA"). At issue are certain eligibility restrictions Congress enacted to "prevent satellite carriers from favoring an SV network station over the in-market (local) station affiliated with the same network."[1]

STELA's principal modification to the eligibility restrictions of Section 340's SV provisions is to replace the "equivalent or entire bandwidth" carriage requirement with a high definition ("HD") format carriage requirement. In short, STELA replaced the requirement that a satellite carrier carry the "equivalent or entire bandwidth" of a local station with a requirement that the satellite carrier carry the signal of the local network station in a high definition ("HD") format, if available, as a condition precedent to importation in HD format of a distant SV station affiliated with the same network. The Broadcaster Associations agree with the *Notice*'s construction of STELA in this respect.

The *Notice* also suggests, however, that STELA includes a second major change to existing law by deleting the requirement that a satellite carrier actually retransmit the signal of the local network affiliate as a condition precedent to importation of a distant SV signal affiliated with the same network. The Broadcaster Associations respectfully disagree. To the contrary, the operative "same network affiliate" language of existing law is retained by STELA, and, together with unamended Sections 340(b)(3) and 340(b)(4), the fundamental existing statutory structure in this respect remains the same. The *only* substantive differences in the statute are the

[1] Notice of Proposed Rulemaking (released July 23, 2010) ("*Notice*"), at ¶ 2.

replacement of the "equivalent or entire bandwidth" provision with a simpler-to-implement HD format provision and the use of conforming digital language throughout necessitated by the DTV transition. Nothing in STELA evinces a congressional intent to abandon the Act's basic and fundamental requirement that satellite carriage of a local network station is a pre-condition to importation of a distant SV station affiliated with the same network. Any other reading of STELA would be contrary to the statute's core policy objective of protecting the integrity of "localism" and local broadcast television service.

The same issue arose during implementation of SHVERA, and the Commission correctly concluded in the *SHVERA Significantly Viewed Report and Order* that a carrier may not import the SV signal of a distant network station without retransmitting the local station affiliated with the same network. Basic principles of statutory construction require the Commission to presume not only that Congress was aware of its existing carriage requirement and the interpretation of that requirement by the agency entrusted to implement Section 340 under SHVERA, but also that Congress's failure to expressly amend the statute to alter that interpretation (unlike replacement of the "equivalent or entire bandwidth" requirement) is, in effect, a legislative confirmation of that interpretation.

The *Notice* asks further whether the HD format requirement applies if a local station's network-affiliated channel is a "multicast" channel. Plainly, it does. The word "signal," as used in amended Section 340(b)(2), encompasses both primary and multicast channels or streams within its ambit. Had Congress intended to differentiate in Section 340(b)(2) between multicast and primary channels, it would have done so. In contrast, in other sections of STELA, Congress expressly did make a distinction between primary and multicast channels. To illustrate, Congress expressly distinguished between "primary" and "multicast" streams within a digital

"signal" in the new, amended definition of an "unserved household" in Section 119.

Combined with the HD format carriage requirement for both primary and multicast channels, Sections 340(b)(1) and 340(b)(2), as amended by STELA, require that a satellite carrier delivering a distant SV network station in a particular local market must (1) provide local-into-local service in the local market, (2) retransmit in SD format the local network station's signal, whether a primary or multicast channel, as a condition precedent to importation of an SV duplicating distant network signal, and (3) retransmit in HD format, if available, the local network station's signal, whether a primary or multicast channel, as a condition precedent to importation of an SV duplicating distant network signal in HD format.

The *Notice* correctly observes that STELA retained, without change, the statutory exceptions to subscriber eligibility limitations in Sections 340(b)(3) and 340(b)(4). We agree with the *Notice*'s tentative conclusion that these statutory exceptions should continue to apply as they have before. However, the *Notice* states that the Commission's prior application of the exceptions is consistent with its suggested interpretation of Sections 340(b)(1) and 340(b)(2), and that the exceptions could even be read to allow SV carriage in a local market if local-into-local service is not yet offered by the satellite carrier to a subscriber's market. These expansive re-interpretations of the unamended Sections 340(b)(3) and 340(b)(4) are without support in the statute and are flatly contrary to the Commission's prior determination in the *SHVERA Significantly Viewed Report and Order*.

Significantly, STELA retains the SV compulsory license requirement that subscribers "receive" the local-into-local signals under 17 U.S.C. § 122(a)(1) as a condition precedent to statutory licensing. That requirement means that local-into-local service must be provided in a market as a condition precedent to satellite importation of SV signals into that market.

Therefore, the Commission's rationale in the *SHVERA Significantly Viewed Report and Order* remains correct, and the Section 340(b)(3) exception cannot be read to allow SV signal importation if the satellite carrier does not provide local-into-local service in the local market.

Finally, the *Notice* proposes various "house cleaning rule changes" relating to a definition in the SV rules and the replacement of a reference to analog Grade B contour with a reference to noise limited service contour. We support these proposed changes.

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COMMENTS OF THE BROADCASTER ASSOCIATIONS

The National Association of Broadcasters, the ABC Television Affiliates Association, the CBS Television Network Affiliates Association, the FBC Television Affiliates Association, and the NBC Television Affiliates (collectively, the "Broadcaster Associations")[1] hereby submit these comments in response to the Notice of Proposed Rulemaking ("*Notice*") released on July 23, 2010, in the above-captioned proceeding.

In this proceeding, the Commission proposes to modify its satellite television

[1] The National Association of Broadcasters is a nonprofit trade association that advocates on behalf of free, local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the Courts. The ABC Television Affiliates Association is a nonprofit trade association representing television stations affiliated with the ABC Television Network. The CBS Television Network Affiliates Association is a nonprofit trade association representing television stations affiliated with the CBS Television Network. The FBC Television Affiliates Association is a nonprofit trade association representing television stations affiliated with the FOX Television Network. The NBC Television Affiliates is a nonprofit trade association representing television stations affiliated with the NBC Television network. Collectively, the four network affiliate trade associations represent approximately 750 television stations affiliated with the four major broadcast television networks.

"significantly viewed" ("SV") rules to implement Section 203 of the Satellite Television Extension and Localism Act of 2010 ("STELA").[2] Section 203 of STELA amends certain provisions of Section 340 of the Communications Act of 1934 ("Communications Act" or "Act"), 47 U.S.C. § 340, which governs the ability of satellite carriers to offer out-of-market but significantly viewed broadcast television network stations as part of their satellite service to subscribers.

I. Introduction

At issue are certain eligibility restrictions enacted by Congress in the satellite laws "to prevent satellite carriers from favoring an SV network station over the in-market (local) station affiliated with the same network."[3] The purpose of these restrictions, as with STELA and all of its predecessors,[4] is "to protect the role of local broadcasters in providing over-the-air television by limiting satellite delivery of network broadcasting programming to subscribers who were 'unserved' by over-the-air signals."[5] As Senator Leahy stated: "Broadcast television plays a critical role in cities and towns across the country, and remains the primary way in which consumers are able to access local content such as news, weather, and sports."[6]

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[2] Satellite Television Extension and Localism Act of 2010 ("STELA"), § 203, Pub. L. No. 111-175, 124 Stat. 1218, 1245 (2010).

[3] *Notice* at ¶ 2.

[4] Predecessors include the Satellite Home Viewer Act of 1988 ("SHVA"), the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"), and the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA").

[5] *Notice* at ¶ 5.

[6] 156 CONG. REC. S3435 (May 7, 2010) (statement of Sen. Leahy).

Any discussion of the modifications that are the subject of this rulemaking must be evaluated in light of the core communications policy objectives Congress intended to address in authorizing satellite retransmission of television broadcast signals. The overarching national communications policy endorsed for decades by both Congress and the Commission is that the public interest is served when multichannel video programming distributors ("MVPDs") carry *local* television stations, rather than duplicating out-of-market stations. The 1988 SHVA and its successors implement the longstanding communications policy objective of ensuring that free, *local*, over-the-air stations will continue to provide high-quality programming in more than 200 local markets, large and small, throughout the United States. The eligibility restrictions on receiving out-of-market SV signals included in legislation governing satellite carriage of broadcast signals were designed to protect local network affiliates from harm and discriminatory treatment by satellite carriers that import duplicative network programming from distant SV stations.

From a policy perspective, there are far greater benefits to satellite delivery of local, as opposed to non-local SV, network stations. Unlike local stations, out-of-market SV stations often do not provide viewers in the local market with their *own* uniquely local news, weather, emergency, public safety, political, public affairs, and public service programming. But viewership of distant SV stations diverts viewers from the same national programming offered locally by local stations, which, in turn, adversely affects the ability of local stations to fund their free, over-the-air, *local* service. These are the policy principles on which the statutory framework of STELA is based.

II. STELA Amended Section 340 to Address a Technical Implementation Concern; STELA Otherwise Left Section 340 As the Commission Had Previously Interpreted It

STELA contains one significant substantive amendment and one minor amendment to Section 340 governing satellite retransmission of SV signals. The significant amendment concerns the elimination of the "equivalent or entire bandwidth" requirement and its replacement with a high definition ("HD") format requirement; the minor amendment concerns updating the section to recognize the DTV transition. STELA otherwise leaves Section 340 untouched.

Based on STELA's amendments to Section 340, the *Notice* proposes to eliminate the "equivalent or entire bandwidth" requirement and replace it with an HD format requirement.[7] The Broadcaster Associations agree that is what Congress intended. However, the *Notice* also proposes to limit the reciprocity requirement to an HD format only and not to impose a limitation on satellite retransmission of an SV station in a standard definition ("SD") format.[8] This construction of Section 340 is contrary to and inconsistent with the Commission's earlier interpretation of Section 340 enacted by STELA's predecessor, SHVERA. The *Notice* also seeks comment on, but provides no tentative conclusion with respect to, applicability of the HD format requirement to local network-affiliated multicast channels.[9] When read in context with other sections of the Act, it is clear that Congress intended for the HD format requirement to apply to both primary and multicast channels.

As noted above and in the Commission's *SHVERA Significantly Viewed Report and*

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[7] *See Notice* at ¶ 12.

[8] *See Notice* at ¶ 12.

[9] *See Notice* at ¶ 13.

Order,[10] Section 340 was intended to advance—not undermine—the fundamental principles of "localism." To that end, Section 340, in SHVERA, and, as it was continued by Congress in STELA, does not permit satellite carriers to replace carriage of local network stations with carriage of out-of-market SV stations affiliated with the same network. Thus, in order for a satellite carrier to retransmit a distant duplicating SV network station into a local market, the satellite carrier must (1) provide local-into-local service in the local DMA, (2) retransmit the local station (if one exists) that is affiliated with the same network as the distant duplicating SV station, without regard to whether the local network station broadcasts the network programming on a primary channel or multicast channel, (3) and retransmit the local network station in HD format, if available, as a condition precedent to importation of the distant duplicating SV station in HD format, regardless of whether the local station broadcasts that network programming on its primary channel or on a multicast channel.

A. STELA Replaces the "Equivalent or Entire Bandwidth" Requirement with an HD Format Requirement

STELA's principal change to Section 340 was its replacement of the "equivalent or entire bandwidth" provision with an HD format provision. As the *Notice* observes,[11] this change was made because Congress believed that the Commission's implementation of the "equivalent or entire bandwidth" provision was "impractical for satellite carriers to match the format of the local and significantly viewed signals moment-by-moment" and thus "discourage[d] satellite

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[10] *Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004; Implementation of Section 340 of the Communications Act*, Report and Order, 20 FCC Rcd 17278 (2005) ("*SHVERA Significantly Viewed Report and Order*").

[11] *See Notice* at ¶ 11.

carriers from using section 340."[12] Reps. Boucher and Stearns, the Chairman and Ranking Member, respectively, of the House Subcommittee on Communications, Technology, and the Internet, expressly agreed this was the purpose of the amendment to Section 340. Chairman Boucher stated:

> [The bill] provides needed clarification regarding the provision by satellite carriers of significantly viewed signals by stating that a significantly viewed signal may only be provided in high definition format if the satellite carrier is passing through all of the high definition programming of the corresponding local station in high definition format, as well. [13]

And Congressman Stearns observed:

> Because satellite operators find it infeasible to match the transmission formats of the two stations moment-by-moment, they usually choose not to carry the significantly viewed stations at all. To address that, the bill makes clear that a satellite operator may carry the significantly viewed affiliate in high definition when the local affiliate is not broadcasting in high definition so long as the satellite operator does carry the local affiliate in high definition when it is available in that particular format.[14]

As the legislative history makes clear, it was the intent of Congress to replace the "equivalent or entire bandwidth" provision with a simpler and more straightforward HD format provision. The new HD format provision states:

> A satellite carrier may retransmit to a subscriber in high definition format the signal of a station determined by the Commission to be

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

[13] *Markup on "H.R. 2294, A Bill to Reauthorize the Satellite Home Viewer Extension and Reauthorization Act of 2004"*, Subcommittee on Communications, Technology, and the Internet, Committee on Energy and Commerce (June 25, 2009) (transcript), at 4, ll. 58-64 (statement of Rep. Boucher).

[14] *Id.* at 9-10, ll. 169-77 (statement of Rep. Stearns).

> 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.[15]

A satellite carrier may retransmit an SV signal in HD format only if it retransmits the signal of a local station affiliated with the same network as the SV signal whenever the local station is broadcasting the relevant signal in HD format. Thus, the Broadcaster Associations agree with the Commission's tentative conclusion that it is no longer necessary for a satellite carrier to provide "equivalent bandwidth" or the "entire bandwidth" of the local station in order to import an SV signal; rather, the satellite carrier must simply retransmit the relevant local signal in HD format whenever it is broadcast in HD format if the satellite carrier wants to retransmit the SV signal in HD format.

B. STELA Requires Carriage of Specific Local Affiliates of the Same Network

The *Notice* proposes to remove from the statute the requirement that a satellite carrier retransmit the signal of the local, in-market station affiliated with the same network as the out-of-market duplicating SV network station as a condition precedent to satellite retransmission of the distant SV station's signal. The *Notice* discusses why the Commission imposed this requirement in the *SHVERA Significantly Viewed Report and Order* but tentatively concludes that Congress in STELA removed the operative "same network affiliate" language and thus is presumed to have intentionally altered the Commission's construction under SHVERA.[16] We respectfully

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[15] 47 U.S.C. § 340(b)(2).

[16] *See Notice* at ¶¶ 13-17.

submit that the *Notice*'s tentative conclusion in this respect is incorrect. The *Notice* misconstrues the statute, and its interpretation would violate the most basic tenant underlying the conditions under which satellite carriers are permitted to retransmit broadcast signals.

The *Notice* conflates and confuses the language in Section 340(b)(1) with the language in Section 340(b)(2). The *Notice* asserts that amended Section 340(b)(1) "no longer requires carriage of the local affiliate of the same network."[17] However, prior Section 340(b)(1) never contained the "same network affiliate" requirement. That requirement appeared in prior Section 340(b)(2), and that very same requirement still appears in new Section 340(b)(2). And it was because the requirement was contained in prior Section 340(b)(2) that the Commission in the *SHVERA Significantly Viewed Report and Order* harmonized that language with prior Section 340(b)(1) to require satellite carriage of the specific local station affiliated with the same network as the SV station.[18] The same interpretation and the same result must apply here.

Prior Section 340(b)(1) provided:

> With respect to a signal that originates as an analog signal of a network station, this section shall apply to retransmissions to subscribers of a satellite carrier who receive retransmissions of a signal that originates as an analog signal of a local network station from that satellite carrier pursuant to section 338 of this title.

47 U.S.C. § 340(b)(1) (2004). Amended Section 340(b)(1) provides:

> 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 of this title.

47 U.S.C. § 340(b)(1) (2010). In other words, the *only* substantive change to the provision is the

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[17] *Notice* at ¶ 16.

[18] *See SHVERA Significantly Viewed Report and Order* at ¶¶ 71-73.

removal of references to "analog signal," which the *Notice* correctly observes is necessary "because of the completion of the DTV transition."[19] Both provisions contain the requirement that subscribers actually "receive" local-into-local service pursuant to Section 338, which the *Notice* also correctly notes.[20]

Prior Section 340(b)(2) provided, in relevant part:

> With respect to a signal that originates as a digital signal of a network station, this section shall only apply 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) [satisfies the "equivalent or entire bandwidth" requirement].

47 U.S.C. § 340(b)(2) (2004). Amended Section 340(b)(2) provides:

> 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.

47 U.S.C. § 340(b)(2) (2010). As in the case of Section 340(b)(1), amended Section 340(b)(2) removes references to "digital signal" as part of STELA's recognition of the DTV transition. But the *Notice* suggests that the operative language in prior Section 340(b)(2) that served as the basis for the carriage requirement in the *SHVERA Significantly Viewed Report and Order* is the

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[19] *Notice* at ¶ 16. STELA deletes in Section 340(b)(1) the entire phrase "that originates as an analog signal of a local network station." As explained below, *see infra* at 11 n.25, the deletion is not substantive.

[20] *See Notice* at ¶ 16 (stating that the provision, "as amended, still contains the local-into-local service requirement").

phrase "*that is affiliated with the same television network.*"[21] However, substantively identical language appears in amended Section 340(b)(2): "signal of a station located in the local market of such subscriber and *affiliated with the same network.*"[22] Therefore, the *Notice*'s statement that Congress struck Section 340(b)(2)(A), which governed digital stations and included the "same network affiliate" language,[23] is a misstatement of the statutory text.

STELA did not amend in any way Sections 340(b)(3) and 340(b)(4). Both of those provisions continue to contain the "same network affiliate" language. In the *SHVERA Significantly Viewed Report and Order* the Commission construed those provisions, in conjunction with Section 340(b)(1), to require satellite retransmission of the local station's signal as a condition precedent to satellite retransmission of the SV signal. That reasoning applies here:

> Section 340(b)(3) permits subscribers to receive a significantly viewed signal of an out-of-market network affiliate if there is no local affiliate of that network in the subscriber's local market. It states that the limitation in Section 340(b)(1) "shall not prohibit a retransmission under this section to a subscriber located in a local market in which there are no network stations *affiliated with the same television network* as the station whose signal is being retransmitted pursuant to this section." If Section 340(b)(1) only required receipt of any local-into-local service as a prerequisite to receiving significantly viewed signals, as opposed to receiving the local affiliate of the network with which the significantly viewed station is affiliated, there would be no need for Section 340(b)(3) to apply to Section 340(b)(1). Using similar contextual reasoning, we consider Section 340(b)(4), which provides authority for the network station in the local market in which the subscriber is located, and that is *affiliated with the same television network*, to

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[21] *Notice* at ¶ 16 & n.66 (emphasis in original).

[22] The word "television" modifying "network" is absent in amended Section 340(b)(2), but it is surely implied, and its absence has no material effect on the meaning of the provision.

[23] *See Notice* at ¶ 16.

> grant station-specific waivers. If Section 340(b)(1) only required receipt of any local-into-local service as a prerequisite to receiving significantly viewed signals, there would be no reason for Congress to allow for waivers from specific network stations. Statutory requirements should be read to have meaning and not be superfluous. The best reading of subsection (b)(1), therefore, is to require subscriber receipt of the local station affiliated with the same network as the significantly viewed signal sought to be carried.[24]

Following STELA, the fundamental structure of Section 340 remains just as it did under SHVERA. The only substantive differences in the statute, as noted earlier, are replacement of the "equivalent or entire bandwidth" requirement with a simpler-to-implement HD format requirement and clean-up necessitated by the DTV transition.[25] Nothing in STELA evinces an intent by Congress for the Commission to completely reverse its existing interpretation of the statutory scheme with respect to carriage of the specific local affiliate whose signal would be duplicated by the imported SV network signal.

In fact, STELA approved the Commission's interpretation of Section 340 with respect to

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[24] *SHVERA Significantly Viewed Report and Order* at ¶ 71 (footnotes omitted) (citing *Zimmerman v. Cambridge Credit Counseling Corp*., 409 F.3d 473, 476 (1st Cir. 2005), for the principle of statutory construction that "all words and provisions of statutes are intended to have meaning and are to be given effect, and no construction should be adopted which would render statutory words or phrases meaningless, redundant, or superfluous" and citing *Preston v. State*, 735 N.E.2d 330, 334 (Ind. App. 2000) for the proposition that "there is a strong presumption that the legislature did not enact a useless provision").

[25] In connection with the DTV transition clean-up, STELA deletes in Section 340(b)(1) the entire phrase "that originates as an analog signal of a local network station." The deletion of the words "a local network station" at the end of this phrase has no substantive effect on the meaning of Section 340, nor does the *Notice* suggest otherwise. The Commission's construction of Section 340 in the *SHVERA Significantly Viewed Report and Order* turned on the "same network affiliate" language in subsections (b)(2), (b)(3), and (b)(4), as discussed above, not on the words "a local network station" in subsection (b)(1). The deletion of those words in subsection (b)(1) in STELA as part of the DTV transition clean-up can have no effect on the local carriage requirement when all the provision of Section 340(b) are read *in pari materia*.

the carriage requirement and disapproved the Commission's interpretation only of the "equivalent or entire bandwidth" requirement. There is nothing in STELA's legislative history to suggest that Congress objected to the Commission's carriage requirement interpretation; rather, as shown above, all of STELA's legislative history suggests that Congress intended *only* to remedy the "equivalent or entire bandwidth" requirement and to update the statute for DTV transition purposes.

In amending STELA as Congress did, the Commission should presume not only that Congress was aware of the carriage requirement interpretation the agency had given to Section 340 under SHVERA, *see, e.g., Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (where "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute"); *United States v. Ramirez-Ferrer*, 82 F.3d 1131, 1137 (1st Cir. 1996) ("Courts must presume that Congress knows of prior judicial or executive branch interpretations of a statute when it reenacts or amends a statute."), but also that Congress's failure to expressly amend the statute to alter that interpretation (unlike with respect to the "equivalent or entire bandwidth" requirement) is tantamount to a legislative re-enactment of that interpretation. This principle of statutory construction is well-established. *See, e.g., Isaacs v. Bowen*, 865 F.2d 468, 474 (2d Cir. 1989) ("by not using the opportunity when amending the section to address the agency's interpretation, Congress must be presumed to have considered and approved the implementing regulations"); *Emerson Elec. Supply Co. v. Estes Express Lines Corp.*, 451 F.3d 179, 187 (3d Cir. 2006) (because of the presumption that "Congress will use clear language if it intends to alter an established understanding about what a law means," the lack of legislative history revealing a congressional intent to alter the judicial interpretation

means that the requirements of the judicial interpretation must continue). *See also Casey v. Commissioner of Internal Revenue*, 830 F.2d 1092, 1095 (10th Cir. 1987) ("When Congress is, or should be, aware of an interpretation of a statute by the agency charged with its administration, Congress's amendment or reenactment of the statutory scheme without overruling or clarifying the agency's interpretation is considered as approval of the agency interpretation."); *cf. In re Letters of Rogatory Issued by the Director of Inspection of the Gov't of India*, 385 F.2d 1017, 1020 (2d Cir. 1967) (an "amendment must be interpreted in terms of the mischief it was intended to rectify").

Thus, not only is the *Notice*'s reversal of the Commission's local station carriage requirement inconsistent with the Commission's own interpretation of the Section 340 statutory scheme, but it is now contrary to the implicit approval by Congress of that interpretation. Section 340 continues to require retransmission of the signal of the local station affiliated with the relevant network as a condition precedent to satellite carriage of the SV signal that the satellite carrier wants to carry in the adjacent local market. As the Commission concluded in the *SHVERA Significantly Viewed Report and Order*: "[T]he statute does not allow a satellite carrier to retransmit a significantly viewed signal to a subscriber receiving local-into-local service but which local service does not include an affiliate of the network with which the significantly viewed station is affiliated, unless the exemption in Section 340(b)(3) or the waiver provision in Section 340(b)(4) applies."[26]

Finally, STELA's amendments to Section 340 should be read in the context of the overarching intent of Congress in SHVERA in conditioning the importation of out-of-market

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[26] *SHVERA Significantly Viewed Report and Order* at ¶ 73.

duplicating SV network signals "to prevent satellite carriers from favoring an SV network station over the in-market (local) station affiliated with the same network."[27] As the Commission previously recognized, "the legislative history repeatedly reflects Congressional concern that the amendments permitting carriage of out-of-market significantly viewed signals not detract from localism."[28] The *Notice*'s interpretation of amended Section 340 to read out of the statutory framework the local carriage requirement would also read out both Congress's and the Commission's long-standing policy to foster, encourage, and promote broadcast localism. There is no reasonable basis or plausible evidence to suggest that the attempt by Congress in STELA to fix technical implementation issues with the "equivalent or entire bandwidth" requirement and to update the statute to account for the DTV transition intended to reverse the fundamental policy premises underlying SHVA and each of its successors.

C. STELA Requires Satellite Carriage of Local Stations in SD Format If the Satellite Carrier Retransmits an SV Station Only in SD Format

As discussed above, the Broadcaster Associations agree with the *Notice*'s tentative conclusion that a satellite carrier can import an SV station in HD format only if it retransmits the local station affiliated with the same network in HD format, whenever such format is available. Consequently, to the extent the *Notice*'s proposed rule tracks the statutory language, the Broadcaster Associations agree with this interpretation and with the proposed rule. The *Notice*, however, further tentatively concludes that the amended Section 340(b)(2) "only limits satellite

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[27] *Notice* at ¶ 2.

[28] *SHVERA Significantly Viewed Report and Order* at ¶ 71.

carriage of an SV station with respect to HD format; it does not apply if the satellite carrier only carries the SV station in SD format."[29] The *Notice* then proposes to add a sentence to the proposed rule that *does not* track the statute. The proposed rule states: "This condition does not apply to, nor prohibit, the retransmission to a subscriber of a significantly viewed station in standard definition (SD) format."[30]

To the extent this proposed addition is intended to only mean that a satellite carrier is not required to retransmit the signal of the local station in an HD format if the local station only broadcasts the SV signal in an SD format, then the proposed additional sentence is consistent with STELA and congressional intent. However, the *Notice*'s proposed addition goes further to suggest that a satellite carrier is not required to retransmit the signal of a local station in an SD format if it is only retransmitting the out-of-market duplicating SV signal in an SD format. This proposal is logically inconsistent with the *Notice*'s correctly stated view that a satellite carrier cannot import a distant duplicating SV network signal in HD format if it is not also uplinking the local affiliate in HD format. For the reasons set forth above, a satellite carrier *must* retransmit the signal of the local station if it retransmits the distant duplicating SV signal *in any format*. Therefore, in place of the proposed additional, non-statutory sentence, the Broadcaster Associations recommend the following, which is in keeping both with congressional intent and the statutory language of STELA: "This condition does not require the retransmission of the signal of a station located in the local market of the subscriber in HD format if the satellite carrier is only retransmitting the significantly viewed station in standard definition (SD) format."

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[29] *Notice* at ¶ 12.

[30] *Notice* at Appendix A (proposed § 76.54(g)(2)).

D. STELA's Eligibility Restrictions for Carriage of SV Stations Apply Fully to Multicast Channels

1. The Signal/Stream Distinction

As noted above, the *Notice* seeks comment on the applicability of the HD format requirement to local network-affiliated *multicast* channels.[31] It is clear that the eligibility restrictions on satellite importation of an out-of-market duplicating SV network station apply to multicast channels. STELA goes to great lengths to distinguish expressly the provisions that apply to primary channels and those that apply to multicast channels, and, when not intending to draw the distinction, the Act simply uses the more inclusive term "signal." Had Congress intended to differentiate between multicast and primary channels in Section 340, it would have done so, just as it did in other sections of STELA. Not having done so, it would be unreasonable to graft onto the statute a provision that Congress elected not to include. *See, e.g., Consolidated Bank, N.A., Hialeah, Fla. v. U.S. Dep't of the Treasury*, 118 F.3d 1461, 1465 (11th Cir. 1997) ("Congress' clear ability to modify the term 'examination' to indicate the type thereof in the other instances . . . and the fact that it did not do so in the disputed phrase, indicates that it had no intention to so limit the term.").

Congress, for example, expressly amended the "unserved household" definition in the distant network signal compulsory license in 17 U.S.C. § 119 to distinguish between network-affiliated "multicast streams" and network-affiliated "primary streams." The program exclusivity protections in Section 119 that apply to network-affiliated "multicast" streams are

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[31] *See Notice* at ¶ 13.

expressly different from those that apply to network-affiliated "primary" streams.[32] Then, the provision goes on to use the term "signal" in its broad, encompassing sense in subparagraph (ii), namely, "if the *signal* originates as a digital signal, . . .", 17 U.S.C. § 119(d)(10)(A)(ii) (emphasis added), where the clear meaning of "signal" refers to both primary and multicast streams. STELA also amended the cable compulsory license to apply to multicast channels.[33] And when STELA amended the Section 339 provision governing the rules for eligibility and signal testing for distant signals, it brought the new multicast channel recognition into the Communications Act by cross-referencing the new unserved household definition in the Copyright Act.[34]

In addition, the Commission, in another proceeding, has recognized STELA's applicability to multicast channels. In a Notice of Proposed Rulemaking to establish a predictive model and measurement standards for digital signals, the Commission construed the Copyright Act and Communications Act provisions of STELA together in recognition that both its predictive Individual Location Longley-Rice model and its procedures to measure signal intensity at individual locations would apply to multicast channels, and it tentatively concluded that neither the predictive model nor the measurement standards need to be altered to account for

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[32] *See* 17 U.S.C. § 119(d)(10)(A); *see also id*. § 119(d)(14) (defining "multicast stream"); *id*. § 119(d)(15) (defining "primary stream").

[33] *See* 17 U.S.C. § 111(f)(11) (defining "multicast stream"); *id*. § 111(f)(6) (providing for treatment of multicast streams in definition of "network station"); *id*. § 111(f)(5)(A)(ii) (providing for treatment of multicast streams in definition of "distant signal equivalent").

[34] *See* 47 U.S.C. § 339(a)(2)(D)(i)(III) (providing that a subscriber is eligible to receive a distant network signal if the subscriber is in an unserved household as determined under 17 U.S.C. § 119(d)(10)(A)).

multicast channels.[35]

Moreover, the word "signal" is a broad term encompassing both primary and multicast channels or streams within its ambit. Thus, Congress's use of the word "signal" in Section 340(b)(2) indicates an intent to use a term with broad meaning. Because Congress obviously knew how to differentiate between primary and multicast streams, and did differentiate between the two when it intended to do so, the use of the broad term "signal" in Section 340(b)(2) shows that Congress clearly intended that the HD format requirement for importation of duplicating SV network stations apply to both primary and multicast network affiliated streams.

Basic principles of statutory construction support this view. "A term appearing in several places in a statutory text is generally read the same way each time it appears." *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994); *see also Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) ("identical words used in different parts of the same act are intended to have the same meaning" (internal quotation marks and citation omitted)). "Signal" should be read the same way in Section 340(b)(2) as it is in 17 U.S.C. § 119(d)(10)(A). Moreover, if a particular problem could be resolved by the use of narrow language, but Congress used broad language instead, then Congress's choice of the broad language demonstrates the statute's intended breadth of

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[35] *See Establishment of a Model for Predicting Digital Broadcast Television Field Strength Received at Individual Locations*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, ET Docket Nos. 10-152, 06-94, FCC 10-133 (released July 28, 2010), at ¶¶ 10 (recognizing that multicast channels are to be considered in the determination of terrestrial service), 12 (recognizing definition of unserved households applies to multicast streams), 17 (tentatively concluding that the ILLR model does not need to be changed to reflect the added reference to network affiliated multicast streams), 38 (tentatively concluding that special testing procedures are not necessary for multicast streams since the same procedures for the primary channel will work).

application. *See Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 299 (D.C. Cir. 2003). Had Congress intended to limit the HD format requirement to the primary channel only, it would not have used the broader term "signal" but, instead, would have used the narrower term "primary stream."

In addition, this construction of the term "signal" is also consistent with the Commission's prior construction of the term in implementing SHVERA. In SHVERA, the "equivalent or entire bandwidth" requirement likewise used the broad term "signal," *see* 47 U.S.C. § 339(b)(2) (2004), and in implementing that requirement the Commission recognized that comparison of the SV station's signal "with the local station's multiplexed (multicast) signal" would be necessary.[36] As previously noted, STELA's legislative history evinces an intent to amend Section 340 to replace the "equivalent or entire bandwidth" requirement with the HD format requirement, but there is no evidence, let alone a clear expression, that Congress intended the HD format requirement to apply only to one portion of a station's signal, i.e., the primary channel affiliated with a network. Equally telling, in implementing Section 338(a)(4) following enactment of SHVERA concerning local satellite carriage obligations in Alaska and Hawaii, the Commission required local carriage of all multicast channels because Congress used the broad term "signals" and did not include any limiting language such as "primary video" that expressly limited or described the nature, format, or content of the broadcast signal that satellite carriers were required to carry. Because the Commission had previously interpreted in the cable context the term "primary video" to mean a single programming stream, the Commission concluded that, "[h]ad Congress intended to limit digital carriage to only a single standard

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[36] *SHVERA Significantly Viewed Report and Order*, at ¶ 96.

definition stream, we believe Congress would have included similar limiting language in the satellite context."[37]

In short, the plain language of the statute, principles of statutory construction, and the Commission's own interpretation of the term "signal" in similar contexts construing the satellite carriage laws *all* conclusively establish that the HD format requirement applies to both primary channels and multicast channels.

2. Case-by-Case HD Multicast Determinations Would Be Discriminatory and Would Violate the Act

The *Notice* also seeks comment on the extent to which stations are broadcasting two network affiliates in HD.[38] The Broadcaster Associations are aware of some two dozen stations that broadcast at least two Big 4 network-affiliated channels, and there are dozens more that broadcast one Big 4 network-affiliated channel and a CW network-affiliated channel. However, the Broadcaster Associations are not aware of a tally for the number of stations broadcasting two network-affiliated channels in HD format. The *Notice* suggests that if the number is small, then perhaps the issue of HD multicasts can be addressed on case-by-case basis rather than by rule or order.[39] The Broadcaster Associations respectfully disagree. A case-by-case treatment would be patently discriminatory and inconsistent with the underlying policy objectives of the Act.

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[37] *Implementation of Section 210 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 to Amend Section 338 of the Communications Act*, Report and Order, 20 FCC Rcd 14242 (2005), at ¶ 16.

[38] Of course, this is only possible where the same entity controls both program streams since the statistical multiplexing needed in such a circumstance dynamically shifts bits between the two program streams on a moment-by-moment basis.

[39] *See Notice* at ¶ 13.

As discussed above, the statutory language is quite clear that Section 340 applies to HD network-affiliated multicast channels. STELA requires the Commission to promulgate a rule to implement the amendments to this portion of the statute.[40] Thus, a case-by-case approach is not permitted by STELA.

A selective, case-by-case approach would also be bad public policy. Station KTEN(TV), Ada, Oklahoma, is an example of a station that broadcasts two Big 4 network-affiliated channels in HD, NBC on its primary channel and ABC on a multicast channel. KTEN is located in the Sherman-Ada DMA, which is a very small market (DMA 161) with very heavy satellite penetration (in excess of 50%). That market is heavily over-shadowed by SV stations from the larger Dallas (DMA 5) and Oklahoma City (DMA 45) markets. It would be especially harmful to small market stations, such as KTEN, to have duplicating network programming from out-of-market SV stations carried by satellite in HD format and for the in-market, local station not have its own HD broadcasts carried in HD. Viewers would have every incentive to migrate to the HD programming from the out-of-market station, and the local station would lose those viewers and, in turn, advertising revenue. Moreover, small rural markets typically have high satellite penetration. The Commission's rules and policies, particularly for stations in these markets,[41] have long recognized the importance of network and copyright exclusivity protection. Small-market stations would be particularly hard-pressed to undertake the significant expense of litigating a case-by-case determination.

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[40] *See* STELA, § 203(b), 124 Stat. 1245 (2010).

[41] See 47 C.F.R. § 76.92 Note which provides stations in 100+ markets with an extra 20 mile zone of network non-duplication exclusivity because of smaller operating margins and, typically, more geographically dispersed populations in these small markets.

In short, STELA requires replacement of the "equivalent or entire bandwidth" requirement with an HD format provision and applies that HD format provision to any local network station's programming stream affiliated with a network if the local station broadcasts that programming in an HD format.

III. STELA Does Not Permit Carriage of SV Stations in Markets Where Local-Into-Local Is Not Yet Offered

The *Notice* correctly observes that STELA retained without change the statutory exceptions to subscriber eligibility limitations in Sections 340(b)(3) and 340(b)(4) and correctly tentatively concludes that "these statutory exceptions will continue to apply as they have before."[42] However, the *Notice* then states that the Commission's prior application of the exceptions is consistent with its suggested interpretation of Sections 340(b)(1) and 340(b)(2) and that the exceptions could even be read to allow SV carriage in a local market "if local-into-local service is not yet offered by the satellite carrier to a subscriber's market."[43] This is a profound misinterpretation of the unamended Sections 340(b)(3) and 340(b)(4).

Section 340(b)(3) is unambiguously clear on its face and, as the Commission previously determined, only permits satellite carriage of an SV signal in a local market "when there is no local affiliate of the same network present in that market."[44] The satellite carrier must still provide local-into-local service in the local market; Section 340(b)(3) is an exception to the local carriage requirement of Sections 340(b)(1) and 340(b)(2) when read together (as discussed

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[42] *Notice* at ¶ 18.

[43] *Notice* at ¶ 18.

[44] *SHVERA Significantly Viewed Report and Order* at ¶ 77.

above) that applies to markets that lack the relevant local network affiliate.

The Commission's reasoning in the *SHVERA Significantly Viewed Report and Order* is fully applicable here:

> We find that a satellite carrier may retransmit a significantly viewed 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. Although Section 340(b)(3) does not require local-into-local service, we conclude that we should read this provision together with the compulsory license restriction in Section 119(a)(3)(B) of title 17, which does require the subscriber's receipt of local-into-local service. We agree with NAB that the compulsory license restriction compels this finding.[45]

While STELA moved the SV compulsory license from 17 U.S.C. § 119(a)(3)(B) to 17 U.S.C. § 122(a)(2)(A),[46] STELA retained the SV compulsory license requirement that subscribers "receive" the local-into-local signals under 17 U.S.C. § 122(a)(1) as a condition precedent to statutory licensing.[47] Therefore, the Commission's rationale in the *SHVERA Significantly Viewed Report and Order* remains correct, and the Section 340(b)(3) exception cannot be read to allow SV signal importation if the satellite carrier does not provide local-into-local service in the

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[45] *SHVERA Significantly Viewed Report and Order* at ¶ 80.

[46] *See* STELA, §§ 102(i)(2)(B), 103(b), 124 Stat. 1225, 1227 (2010).

[47] *See* 17 U.S.C. § 122(a)(2)(A) ("A secondary transmission of a performance or display of a work embodied in a primary transmission of a television broadcast station to subscribers who *receive* secondary transmissions of primary transmissions under paragraph (1) shall be subject to statutory licensing under this paragraph if the secondary transmission is of the primary transmission of a network station or non-network station to a subscriber who resides outside the station's local market but within a community in which the signal has been determined by the Federal Communications Commission to be significantly viewed in such community, pursuant to the rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976, applicable to determining with respect to a cable system whether signals are significantly viewed in a community." (emphasis added)).

local market.

Moreover, for the same reasons discussed above with respect to the local carriage requirement, the fact that Congress did not amend Section 340(b)(3) means that the Commission should presume that Congress approved of and intended to legislatively re-enact the Commission's prior interpretation. *See, e.g., Isaacs v. Bowen*, 865 F.2d 468, 474 (2d Cir. 1989); *Emerson Elec. Supply Co. v. Estes Express Lines Corp.*, 451 F.3d 179, 187 (3d Cir. 2006); *Casey v. Commissioner of Internal Revenue*, 830 F.2d 1092, 1095 (10th Cir. 1987).

Section 340(b)(4), which also was not amended, permits a local station to grant a waiver of either the requirements of Section 340(b)(1) or Section 340(b)(2). Waiver of the Section 340(b)(1) requirement works in tandem with the waiver provision in the SV compulsory license, which STELA also moved from Section 119 to Section 122 of the Copyright Act.[48] Consequently, the Commission's previous determination in the *SHVERA Significantly Viewed Report and Order* remains valid when the movement of the compulsory license is accounted for:

> To carry a significantly viewed station via a privately negotiated waiver, a satellite carrier must have both the authority under Section 340(b)(4) and the statutory copyright license under 17 U.S.C. § [122(a)(2)]. Section 340(b)(4) requires that a local station *affirmatively grant* a waiver request to a satellite carrier. We agree with NAB that Section 340(b)(4) is clear on this point.[49]

A local station is free to determine the extent of any waiver of the HD format requirement.

The Commission should continue to interpret the unamended Section 340(b)(3) and Section 340(b)(4) exceptions just has it had before. The *Notice*'s suggestion that the

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[48] *See* 17 U.S.C. § 122(a)(2)(B).

[49] *SHVERA Significantly Viewed Report and Order* at ¶ 85 (footnote omitted).

Commission could read these exceptions to be consistent with its new, but unsupported, interpretation of Sections 340(b)(1) and 340(b)(2) does not make sense for the reasons cited above.

IV. Housecleaning Rule Changes

The *Notice* proposes two housecleaning rule changes: (1) that the definition of "significantly viewed" in the Commission's rules be amended to replace both the phrase "other than cable television" and the term "noncable" with the term "over-the-air"; and (2) that a reference to "Grade B contour" that is now outdated due to the DTV transition be stricken.[50] The Broadcaster Associations agree that both of these rule changes are appropriate.

Conclusion

For the reasons set forth above, STELA requires that a satellite carrier wishing to deliver an SV signal in a particular local market must (1) provide local-into-local service in the local market; (2) retransmit in SD format the signal, whether a primary or multicast channel, of the local station affiliated with the same network as the SV signal if the satellite carrier retransmits the SV signal in SD format only; and (3) retransmit in HD format, whenever it is available, the signal, whether a primary or multicast channel, of the local station affiliated with the same network as the SV signal if the satellite carrier retransmits the SV signal in HD format at any time.

The Broadcaster Associations respectfully request that the Commission implement the amendments to Section 340 as explained herein.

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[50] *See Notice* at ¶¶ 20-21 & Appendix A.

Respectfully submitted,

/s/
Jane E. Mago
Benjamin F.P. Ivins
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036
(202) 429-5430

/s/
Wade H. Hargrove
David Kushner
BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, L.L.P.
150 Fayetteville Street, Suite 1600
Raleigh, North Carolina 27601
(919) 839-0300

Counsel for the ABC Television Affiliates Association and the FBC Television Affiliates Association

/s/
Jonathan Blake
Jennifer Johnson
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 662-6000

Counsel for the CBS Television Network Affiliates Association and the NBC Television Affiliates

August 17, 2010