

ADVISORY | Communications and Media

July 22, 2010

SATELLITE TELEVISION EXTENSION AND LOCALISM ACT OF 2010: A BROADCASTER'S GUIDE

This guide provides a summary of the key changes made by the Satellite Television Extension and Localism Act of 2010 ("STELA"), which was signed into law by the President in May 2010.¹ STELA is the latest in a series of congressional acts, building upon the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA"), governing satellite carriers' retransmission of broadcast television stations. This guide explains how STELA did and did not change the law in four important areas: (1) local-into-local carriage, (2) distant signal carriage, (3) retransmission of significantly viewed signals, and (4) the retransmission consent requirements.

I. Local-into-Local

STELA preserves the policy that satellite companies are not required to retransmit local channels into local markets. Instead, satellite carriers are permitted to offer local-into-local service, but if they so choose, they are then required to carry all local broadcast channels (in that respective DMA) that ask to be carried and are eligible. Under this "carry one, carry all" requirement, a satellite carrier does not have to carry more than one local broadcast station that either substantially duplicates the signal of another local broadcast station which is retransmitted by the satellite carrier within the same local market or is affiliated with the same TV network in the same state.

Notwithstanding the carry one, carry all requirement, as discussed in Section C, STELA creates a strong incentive for the satellite carriers to provide local-into-local service in all 210 DMAs. Indeed, as of the date of this memo, DISH Network has stated that it is providing local-into-local service in all 210 television markets, although this does not mean that it has reached agreement with and is carrying all local stations that elected retransmission consent.

A. Local-into-Local Generally

STELA has made several changes to the statutory provisions for local carriage. For example, the statute clarifies that satellite carriers must provide all local high definition ("HD") signals on a single dish, though that dish may be different from the one on which the satellite carrier provides standard definition ("SD") signals. STELA also directs satellite carriers to submit reports to the FCC detailing in which markets it provides local-into-local service, in which new markets it has commenced such service, and in which markets it has ceased to provide local-into-local service. Satellite carriers also must inform the Commission about the use and potential use of their satellite capacity for local signal transmissions.

STELA also contains several provisions that are specific to noncommercial stations. STELA sets a schedule for DISH Network to carry their programming in HD, when available, in all local markets where DISH Network otherwise provides secondary transmissions of broadcast stations in HD. (DIRECTV is not affected by this provision because DIRECTV separately agreed to carry

¹ Satellite Television Extension and Localism Act of 2010, Pub. L. No. 111-175, 124 Stat. 1218 (2010).

noncommercial stations in HD pursuant to a private agreement with the Association of Public Television Stations.) DISH Network must carry the HD transmissions of noncommercial educational stations in at least 50 percent of the markets receiving other HD secondary transmissions of broadcast stations by December 31, 2010, and in 100 percent of such markets by December 31, 2011. Further, DISH Network must immediately carry the HD transmissions of all noncommercial educational stations for any market it enters after the enactment of STELA, provided that it otherwise offers the HD format for secondary broadcast transmissions in that station's market. DISH Network has brought a lawsuit in federal district court, claiming that the provision is unconstitutional. In addition, where a single state government entity licenses three or more noncommercial educational broadcast stations, STELA provides a license to retransmit those stations to all of the counties in that state.²

Broadcasters succeeded in defeating efforts to add new "market modification" provisions for commercial network-affiliated broadcast television stations, which would have allowed satellite carriers to retransmit these stations in "orphan counties" that are geographically located in the same state as such stations, but in a different DMA that is served by an out-of-state affiliate. (STELA maintains the limited market modification provisions that were previously established by SHVERA and that apply to certain counties in Oregon, Mississippi, New Hampshire, and Vermont.) STELA does direct the FCC, however, to produce a report analyzing the number of households that receive local signals from stations located in a different state; the extent to which local markets have access to in-state broadcast programming; and whether there are alternative ways to define markets so as to provide more in-state broadcast television programming.

B. Low Power Television Stations

STELA provides parity to low power television stations with respect to royalty-free carriage throughout the station's DMA (unlike with cable), but not with respect to carriage rights. STELA amends the geographic limitations on the statutory copyright license for low power television stations. Specifically, STELA replaces a definition that based eligibility on a subscriber's distance from the transmitter site, with a provision that enables satellite carriers to rely on the statutory copyright license for low power television signals where subscribers reside within the same DMA as the station originating the transmission. STELA also eliminates the tiered royalty fee calculations for low power transmissions, so that retransmission of such signals is now entirely royalty free.

However, STELA also specifies that the decision to retransmit a low power television station does not require a satellite carrier to make any other secondary transmissions. This means that the retransmission of a low power television station does not obligate a satellite carrier to retransmit any other low power television stations in that market or to offer local-into-local service with respect to full-power television stations. As under SHVERA, low power television stations are not entitled to carry-one, carry-all rights and must negotiate retransmission consent agreements for carriage.

C. DISH Network Provisions

STELA provides that, in exchange for providing local-into-local service into all 210 television markets, DISH Network can seek a waiver of the permanent injunction that the United States District Court for the Southern District of Florida levied against DISH Network in 2006 for repeated violations of its statutory license for network stations.³ In the interim, DISH Network also can apply for a

² In certain states, government entities have licensed three or more noncommercial educational stations, and this provision is intended to apply only in such scenarios.

³ On May 23, 2006, the Eleventh Circuit ordered the United States District Court for the Southern District of Florida to enter a nationwide permanent injunction against DISH Network's use of the statutory license for

temporary waiver of the injunction to provide distant signal service in short markets. DISH Network states that it began offering nationwide local-into-local service on June 3, 2010. DISH Network's offering of local-into-local service in all markets creates market pressure for DirectTV, which is not subject to an injunction prohibiting it from providing distant signals and therefore is not subject to the waiver provisions, to follow suit.

1. Temporary Waiver

Upon a request by DISH Network, the court that issued the injunction must issue a temporary waiver, lasting 120 days, unless extended for good cause, permitting DISH Network to transmit distant signals into unserved households in "short markets," i.e., markets where one of the four major television networks is not offered on the primary stream of a local broadcast station. For purposes of the temporary waiver section, multicast streams are not considered when determining whether all four major television networks are offered, even though, as discussed in Part II, another section of STELA phases in multicast streams for determining whether a household is unserved. Therefore, there may be a period of overlap when a household that receives multicast streams will be considered part of a "short market" for purposes of DISH Network's temporary waiver, but will not otherwise qualify as an unserved household. DISH Network filed a request for a temporary waiver, which was granted and became effective on June 3, 2010. Should DISH Network lose its temporary waiver, it will not be eligible to reapply.

2. Permanent Waiver

In order to be eligible for a permanent waiver of the injunction, DISH Network must be found by the court that issued the injunction to be a "qualified carrier." The court must recognize DISH Network's status as a qualified carrier once DISH Network has provided local-into-local service in all 210 DMAs and has been issued a certification by the FCC. The Commission must issue a certification once it has confirmed that DISH Network is providing a "good quality satellite signal" with respect to local network-affiliated television broadcast retransmissions to at least 90 percent of households in each DMA. A "good quality satellite signal" must conform to several technical requirements, designed to assure that there is no discrimination between the local-into-local signal quality and that of other transmissions provided by DISH Network. The Commission must grant or deny certification within 90 days after such a request is filed. As noted below, DISH Network can lose its permanent waiver if it fails to comply with all the statutory requirements. DISH filed an application for certification as a qualified carrier on June 30, 2010, and the FCC currently is considering public comments.

3. Safeguards

Congress enacted multiple safeguards to ensure DISH Network's continued compliance with the statutory licensing requirements. A special master must be appointed to examine DISH Network's compliance with the royalty payment and household eligibility requirements from the period DISH Network is recognized as a qualified carrier, until April 30, 2012. If the special master finds that there is substantial evidence that a copyright holder could bring a successful claim of infringement, the special master must commence an additional examination of DISH Network's compliance with the Act. The Comptroller General must monitor DISH Network's compliance with all requests made to the special master.

distant television signals provided for in 17 U.S.C. § 119. *CBS Broad. Inc. v. Echostar Comm. Corp.*, 450 F.3d 505 (11th Cir. 2006).

In addition to providing institutional oversight of DISH Network's compliance, STELA provides relief for those entities who may be aggrieved by DISH Network. A copyright holder can file a motion with the court that recognizes DISH Network's status as a qualified carrier to terminate DISH Network's status for failure to comply with the statutory licensing requirements. An aggrieved broadcast station may request that the court make a determination as to whether DISH Network is properly providing local-into-local service in all DMAs. Upon such a motion, DISH Network will have the burden to prove compliance. If the court finds non-willful noncompliance, it may fashion a financial remedy, taking into account the severity of the conduct; the degree of control DISH Network had over the circumstances; and the quality of its efforts to remedy its failure. For willful noncompliance, the court must terminate DISH Network's qualified carrier status; reinstate the permanent injunction; and, at its discretion, impose a fine between \$250,000 and \$5,000,000. Further, if DISH Network loses recognition as a qualified carrier, STELA prohibits reapplication.

II. Distant Signals

STELA extends the statutory copyright license for satellite carriage of distant signals for five more years. (The statutory copyright licenses for satellite carriage of local signals and for carriage by cable operators do not expire.) However, STELA also requires the Register of Copyrights to submit a report to Congress that provides recommendations on how to implement a phase-out of all of the statutory copyright licenses, i.e., the licenses that enable carriage of local and distant signals by satellite and cable carriers. Specifically, the report must provide proposals for making these licenses inapplicable where the broadcast television station has the rights to provide the satellite or cable carrier with a copyright license directly, in addition to any other recommended alternatives to phase out the statutory copyright licenses. STELA mandates a second report by the Comptroller General that analyzes the changes to the current carriage requirements (e.g., retransmission consent and must-carry requirements) that would be required "or beneficial to consumers" if Congress were to phase out the statutory copyright licenses. This report must consider the impact these changes would have on consumer prices and access to programming.

STELA retains SHVERA's implementation of the "no-distant-where-local" limitation on subscriber eligibility, simplifying some of the provisions governing it by eliminating, except when referring to low power television stations, references to analog signals. Specifically, individuals who were not receiving a distant signal at the time STELA was enacted, will not be eligible to receive such signal, if, at the time they wish to subscribe, the satellite carrier offers the subscriber local-into-local service that includes the signal of a local station affiliated with the same network. Households that legally subscribe to distant signals after the enactment of STELA may retain eligibility for those signals so long as they subscribe to the local signal within 60 days of it becoming available.

STELA retains the four primary ways in which a satellite subscriber may be eligible to receive distant signals. First, the subscriber may qualify to continue to receive distant signals under a grandfathering provision. Second, the subscriber may qualify as an unserved household, subject to the "no-distant-where-local" limitations identified above. Third, a local network-affiliated station may grant a waiver allowing for the retransmission of a distant station affiliated with the same network to the subscriber. Finally, the subscriber may qualify to receive significantly viewed signals (discussed below in Part IV).

A. Grandfathered Subscribers

Subscribers that were grandfathered to receive distant signals under SHVERA will continue to be grandfathered under STELA. STELA also adds additional categories of subscribers who may continue to receive distant signals. For example, STELA permits subscribers who lawfully subscribed

to distant signals at the time of STELA's enactment, to continue being eligible to receive those signals, regardless of whether they receive a local signal affiliated with the same network.

B. Unserved Household Eligibility

STELA continues to allow a satellite carrier to offer distant signals to households that are unserved, subject to the "no-distant-where-local" limitations identified above. However, STELA modifies the definition of an unserved household in three important ways:

- **Phase-in for Multicast Signals**: STELA clarifies that, after a phase-in period, multicast transmissions will be considered when determining whether or not a household is unserved. Specifically, multicast signals that existed on or before March 31, 2010 will be taken into consideration on October 1, 2010. Multicast signals that came into existence after this date will be counted as of January 1, 2011. New multicast signals after January 1, 2011 will be counted immediately. Thus, broadcasters with network-affiliated multicast signals may reduce the number of households that qualify as "unserved" and are therefore eligible for the receipt of distant signals.
- **"Outdoor Rooftop" Antenna Requirement Modified**: Prior to STELA, the unserved household determination was based on use of "an outdoor rooftop receiving antenna." STELA modified this standard, so that now a household is unserved if it cannot receive, "through the use of an antenna," an analog over-the-air network signal of Grade B intensity (as defined by the FCC) or a digital signal conforming to FCC regulations. By dropping the "outdoor rooftop" requirement, the number of unserved households may increase.
- **"Grade B Bleed" Signals No Longer Considered**: STELA eliminates the "Grade B bleed" issue by specifying that only signals from stations located in the household's local market will be considered to determine whether a household is unserved. By not considering Grade B bleed transmissions, i.e., those that originate in adjacent markets, more households in areas previously reached by broadcasters in adjacent DMAs may be eligible to receive distant signals.

Satellite companies typically use a computer model to determine whether a particular household is predicted to be unserved. STELA directs the FCC to develop an improved predictive model for these purposes. This new model, like the new definition for an unserved household, will consider reception by "an antenna" rather than an "outdoor rooftop receiving antenna." Therefore, the FCC will likely interpret and clarify this statutory change (e.g., whether indoor antennas will be considered to determine whether a household is unserved) as part of this proceeding.

As under SHVERA, if the household does qualify as unserved, it is permitted to receive no more than two distant network-affiliated signals per day for each TV network. STELA also retains the requirement that a household may only receive channels located in the household's respective time zone or a later time zone, and not an earlier time zone.

C. Waivers

STELA leaves the waiver provisions virtually unchanged. If a household is not predicted to be unserved, and it requests a waiver through its satellite carrier, the television station from which the waiver is requested has 30 days to respond to the request. If the station does not grant or deny the request within the 30-day window, the waiver is deemed granted and the satellite carrier may begin providing the distant signal.

However, if the television station responds in a timely manner and denies the request then the satellite subscriber may request a signal strength test to determine whether the station's signal reaches the requisite signal strength at that subscriber's home. If the satellite carrier agrees to test the signal strength, the test must be performed by an independent party chosen and agreed upon by both the satellite company and the television station. If the signal is tested and it exceeds the required signal strength, the satellite carrier must pay for the test; if the signal does not exceed the required signal strength, then the television station must pay for the test. The satellite company is not required to agree to the test. If it chooses not to, then the household at issue may arrange the test itself. If the household chooses to proceed with the test on its own, it must pay for the test no matter what the result is and must still use an independent tester agreed upon by the satellite company and the television station.

III. Significantly Viewed Signals

STELA retains many of SHVERA's requirements for carriage of significantly viewed signals. For example, satellite companies still have discretion regarding whether to offer significantly viewed signals (provided they have consent from the significantly viewed station), but the satellite company must already be offering local-into-local service in order to provide significantly viewed channels.

However, STELA makes two significant changes to the provisions governing significantly viewed signals. First, and as described in more detail below, it eliminates references to the equivalent and entire bandwidths standards. Second, STELA moves the provisions governing significantly viewed stations from Section 119 of the Copyright Act (governing distant retransmissions by satellite carriers) to Section 122 (governing local retransmissions by satellite carriers). Since significantly viewed signals have always been subject to a royalty-free license, there is no change in royalty payments. However, this move does have the practical effect of making permanent the statutory copyright license for significantly viewed signals (since only Section 119 is set to expire in five years) and of enabling DISH Network to retransmit these signals should it lose its qualified carrier status (since the injunction is limited to retransmission pursuant to Section 119).

In STELA, Congress effectively overturned the FCC's rules implementing the statutory equivalent bandwidth requirements, imposed by SHVERA, by removing all references to the standard. Under SHVERA, the retransmission of a local network station had to occupy "at least the equivalent bandwidth" of the retransmission of the significantly viewed station, or comprise "the entire bandwidth of the digital signal broadcast by" the local station. The FCC interpretation of this requirement was designed to prohibit satellite carriers from using technological means to discriminate against the digital signals of local stations. STELA replaces the requirement to provide equivalent bandwidth to local signal retransmission with the specification that satellite providers may retransmit a significantly viewed signal in HD only if it also retransmits the local signal in HD "whenever such format is available." The FCC is directed to take all actions necessary to implement this change by February 21, 2011.

IV. Retransmission Consent

STELA retains SHVERA's provisions that affect the manner in which the carriage election process between broadcasters and satellite companies is conducted and that mandate carriage of signals originating in Alaska and Hawaii. STELA also reauthorizes until January 1, 2015 the provisions in SHVERA that impose a good faith negotiation requirement on broadcasters and MVPDs for retransmission consent negotiations.

V. Conclusion

This summary of STELA, the FCC's implementation of SHVERA, and the effect of SHVERA and STELA on the interests of broadcasters is meant to serve as a guide. While it should assist broadcasters in their interactions with satellite carriers operating in the broadcaster's market, it is not meant to be an exhaustive legal resource and is subject to change based on further actions by Congress or the FCC. Broadcasters are advised to consult with counsel before engaging in any strategic action based on the provisions of this guide.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our communications and media practice group:

Jonathan Blake	202.662.5506	jblake@cov.com
Jennifer Johnson	202.662.5552	jjohnson@cov.com
Lindsey Tonsager	202.662.5609	ltonsager@cov.com

This information is not intended as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

Covington & Burling LLP, an international law firm, provides corporate, litigation and regulatory expertise to enable clients to achieve their goals. This communication is intended to bring relevant developments to our clients and other interested colleagues. Please send an email to unsubscribe@cov.com if you do not wish to receive future emails or electronic alerts.

© 2010 Covington & Burling LLP, 1201 Pennsylvania Avenue, NW, Washington, DC 20004-2401. All rights reserved.