

FCC Proposes Simplifying Satellite Carriage of Significantly Viewed Television Signals In Response To STELA

by Lauren Lynch Flick

Revisions implicate stations' retransmission consent strategy. Comments are due August 17, 2010 and Reply Comments are due August 27, 2010.

The Federal Communications Commission has released a Notice of Proposed Rulemaking proposing revisions to its rules making it easier for satellite carriers to transmit the signals of television stations located in one Nielsen Designated Market Area (DMA) to subscribers located in another DMA where the stations are "significantly viewed" (SV). In enacting the Satellite Television Extension and Localism Act of 2010 (STELA), Congress directed the FCC to undertake this rulemaking inquiry and to complete it by November 2010. Accordingly, the comment timeframe is very short. Taken together, the proposed revisions mean that (1) a satellite operator can import the signal of any SV station it wants (in areas where the station has SV status), as long as it gets the SV station's consent and the subscriber subscribes to the local-into-local package for its DMA; and (2) if the operator imports an SV signal in high definition (HD), it must carry the local affiliate's HD signal (where one exists).

Background

Significantly viewed television stations are those television stations that, while assigned to one television market, are viewed over the air by residents of a second television market to such a degree that the FCC has concluded that they should be considered local stations, and that cable and satellite providers should be allowed to deliver them to subscribers in areas where the station enjoys SV status, even if those areas are outside that station's DMA. The concept of SV stations is designed to preserve local over the air viewing patterns by making all signals that are available to over the air households also available to cable and satellite households in that area.

While cable systems have been allowed to carry SV signals since 1972, satellite carriers only received that right through the now-expired Satellite Home Viewer Extension and Reauthorization Act (SHVERA) in 2004. SHVERA imposed two conditions on satellite carriers that did not apply to cable operators. Specifically, satellite carriers could not transmit an SV signal into a neighboring market unless (1) the subscriber receiving the SV station's signal also received the local network affiliate of the same network (known as the "same network affiliate" rule), and (2) the satellite provider did not use technological means

to manipulate the local affiliate's signal and discriminate against it, known as the "equivalent or entire bandwidth" requirement.

Elimination of the Same Network Affiliate Rule

With regard to which local stations a subscriber was required to receive before it could obtain access to SV stations, the now-expired SHVERA set up two standards – one for analog signals and one for digital signals. The two standards used different language, leading to arguments that they required two different things. The FCC originally concluded that they both required the same thing – for both analog and digital signals, the subscriber had to receive the signal of the local station affiliated with the same network as the SV signal before the SV signal could be imported. In reaching this conclusion, the FCC rejected the argument that, for analog signals, Congress only intended to require that the subscriber subscribe to the local into local package, regardless of which affiliates were included in that package, before SV signals could be imported.

In STELA, Congress updated the satellite carriage laws to reflect the completion of the transition to digital television. It eliminated the separate standards for digital and analog SV signal importation, but retained the language of the old analog provision and applied it to digital SV signals. As a result, the FCC now suggests that Congress intended to overrule the FCC's prior interpretation, and therefore allow a satellite subscriber to receive any SV signal as long as it receives some local signals by satellite (whether or not from the same network). As a result, the FCC affirmatively states that a satellite carrier can import an SV signal (with the SV station's consent) whenever a local station affiliate withdraws its signal from the satellite provider in a retransmission consent dispute. This conclusion is obviously worrisome to broadcasters that will be engaged in retransmission consent negotiations, as it lessens the broadcaster's negotiating leverage if the satellite provider is permitted to bring in a substitute affiliate from the same network.

Elimination of the Equivalent or Entire Bandwidth Requirement

Under the Commission's interpretation of the SHVERA "equivalent or entire bandwidth" requirement, the Commission strictly limited the manner in which satellite providers could manipulate the local affiliate's signal, thereby preventing the carrier from discriminating against the local affiliate in favor of the SV signal. Specifically, the carrier had to objectively compare the local affiliate's use of its bandwidth in terms of megabits per second (bit rate) on a minute-by-minute basis to that of the SV signal to be imported. Satellite operators argued that this was an unworkable requirement, and the Commission now suggests that the requirement has prevented satellite carriers from carrying SV signals to a greater extent.

In STELA, Congress replaced the language that gave rise to the Commission's bit rate interpretation. STELA simply requires that where a satellite operator seeks to import an SV signal in high definition, it must carry the local affiliate's signal in HD, where available. The Commission states that this language means that the satellite operator must carry the local affiliate in HD, only if the local affiliate has an HD signal and that this requirement does not limit the satellite carrier if it imports the SV signal in SD format. The Commission also clarifies that it intends to use the ATSC definition of HD – television having a screen resolution of 720p, 1080i, or higher. Thus, so long as the format in which the signals are being carried can fairly be characterized as "HD", the FCC will not, as the bit rate interpretation had, delve into whether the compression rate or other technological aspects of the carrier's handling of the signals is comparable. Again, this is worrisome to broadcasters as it may allow a satellite provider to pressure a broadcaster during retransmission consent negotiations by manipulating the local affiliate's signal so that it looks inferior to the SV affiliate's signal.

While the FCC is seeking comment on all of these proposals, it also asks two specific questions with regard to the HD carriage requirement. First, the FCC asks for comment on the extent to which stations are multicasting in HD and carrying the programming of a network on the secondary stream. Second, to the extent a station is carrying a network in HD on a secondary stream, the FCC asks whether STELA requires that the satellite provider carry that secondary stream in HD before importing the HD signal of an SV affiliate of the same network.

Conclusion

The revisions contained in STELA and the FCC's proposals to implement STELA may increase instances of SV signal importation. While satellite operators have generally had the right to import these signals for some time, there were ample limitations on their exercise of those rights. The FCC states that its bit rate interpretation of the former "equivalent or entire bandwidth" requirement was one such limitation that has now been eliminated. Another practical limitation was that DISH Network was prevented by a court order from taking advantage of the SV provisions. STELA restores DISH's ability to import these signals.

The full impact of these revisions will not likely be felt until the start of the next three-year must carry/retransmission consent election cycle in 2012. The FCC's rules require that satellite carriers provide local stations with notice of the SV signals they intend to import into the market prior to the start of a three-year election cycle or prior to serving a new market for the first time. The FCC's rules also continue to allow the local affiliate to elect must carry status in those portions of the market where an SV signal can be imported, but elect retransmission consent in other portions of the market.

Stations should examine how these upcoming changes would affect them. Stations that are significantly viewed outside of their DMAs may have additional opportunities to be carried in those areas. For that reason, local affiliates should educate themselves as to whether there are SV stations carrying the same programming available to be imported into their markets. Finally, all broadcasters should be alert to any notices they receive from satellite operators in their markets. A notice that advises that the satellite carrier intends to import an SV signal may affect a station's strategy in electing between must carry and retransmission consent for the next three-year cycle.

Stations wishing to comment on the FCC's proposals to implement STELA, or to research the availability of SV signals in their markets, should contact the attorney(s) listed below.

Please contact the attorney below for more information:

Lauren Lynch Flick (bio)
Washington, DC
+1.202.663.8166
lauren.lynch.flick@pillsburylaw.com

This publication is issued periodically to keep Pillsbury Winthrop Shaw Pittman LLP clients and other interested parties informed of current legal developments that may affect or otherwise be of interest to them. The information contained herein do not constitute legal opinion and should not be regarded as a substitute for legal advice.

© 2010 Pillsbury Winthrop Shaw Pittman LLP. All Rights Reserved.