Communications

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FCC Implements Satellite Television Extension and Localism Act

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Yesterday, the Federal Communications Commission issued three Orders and a Public Notice designed to implement the new requirements of the Satellite Television Extension and Localism Act (STELA).

The FCC beat by one day the November 24, 2010 statutory deadline for adopting new rules governing several aspects of satellite operators' carriage of television broadcast signals under STELA. The first of three Orders favors satellite providers by making it easier for them to import the signals of significantly viewed ("SV") stations from neighboring markets into a station's local television market. However, the other two Orders favor broadcasters in updating the procedures for subscribers wishing to qualify to receive distant network television stations from their satellite operator. Lastly, the FCC issued a Public Notice seeking comments and data for a required report to Congress regarding the availability of in-state broadcast stations to cable and satellite subscribers located in markets straddling state borders.

Significantly Viewed Stations Order

In this Order, the FCC concluded that, under STELA, a satellite subscriber must generally subscribe to the local-into-local package before it can receive the signal of an out of market station significantly viewed (over-the-air) in that subscriber's area. Illogically, however, the subscriber does *not* have to receive the signal of the local affiliate of the *same* network as the imported SV network station. The subscriber's receipt by satellite of *any* local station is all that is needed. The FCC stated that its interpretation means that, where a local affiliate is not carried during negotiation of a retransmission consent agreement, the satellite carrier can provide certain subscribers with network programming from an SV network station in a neighboring market.

The broadcasters commenting in the proceeding identified several markets where that SV carriage could serve as a near total replacement for the in-market affiliate and therefore undercut the carrier's need to negotiate with the local affiliate for carriage at all. The FCC candidly acknowledged that a "tension" exists between protecting localism and increasing satellite SV carriage rights to ensure equal treatment of satellite carriers and cable systems. In resolving that tension, however, the FCC decidedly favored the satellite carriers and increased importation of SV signals, essentially brushing off broadcasters' concerns that such an approach would undercut broadcasters in retransmission consent negotiations. The FCC supported its action by stating that SV signals are usually only available in a portion of a station's market,

and that viewers would usually prefer to receive the signal of their in-market station. Based on this, the FCC concluded that SV signals are not a long-term solution for satellite carriers and that such carriers will therefore continue to need to negotiate with local affiliates for retransmission. Finally, the FCC pointed to the good faith negotiation requirement as a safeguard, stating that it expects satellite carriers to "offer SV stations to consumers wherever possible," but that it may revise these rules if carriers use them to supplant rather than supplement carriage of local network affiliates.

The FCC also concluded that in the special circumstance where there is no local affiliate of a particular network in a market, subscribers can receive the imported SV signal of an affiliate of that network, even if they do not subscribe to the local-into-local package at all.

The Significantly Viewed Stations Order also addressed the manner in which SV signals can be carried, requiring that before an SV signal can be carried in "HD format," the signal of the local affiliate of the same network must be carried in HD format, if such a signal is "available." The FCC quickly concluded that "HD format" means nothing more than a picture quality of 720p, 1080i, or higher, and received no comments from the public on that issue. With respect to when a station is actually "available" to a satellite carrier to retransmit, the FCC adopted a narrow construction of the term "available."

Specifically, the FCC concluded that a station is only "available" for this purpose if it (1) provides a good quality signal at the operator's local receive facility, (2) has elected must carry or has granted retransmission consent, and (3) is in compliance with the FCC's good faith negotiation requirements. Broadcasters had argued that the term "available" means that their signal must be carried in HD format by the satellite operator whenever the local station is transmitting in HD format. The FCC rejected this argument, stating that the mere fact a station is broadcasting in HD does not give the satellite carrier the right to actually carry the station. Where the carrier has no legal right to carry the station, the FCC will not consider the station "available." Taken together, these new provisions mean that, in most cases where a local network affiliate is not carried on a satellite system, the carrier can import the HD signal of an SV station to its subscribers located in areas where the SV station is significantly viewed over-the-air.

Where the programming of a network is carried on a multicast stream of the local station rather than on the station's primary program stream, the FCC considered whether the satellite carrier should be required to carry that stream in HD format before being allowed to import an SV station with that same network programming in HD format. The FCC determined that the term "signal" did not differentiate between streams for these purposes, and an in-market station's network multicast stream would have to be carried in HD format before the satellite carrier can import an SV signal in HD format.

Signal Prediction and Signal Measurement Orders

STELA provides that subscribers are eligible to receive the signal of a distant network affiliate if they are unable to receive the in-market affiliate's signal with "an antenna," rather than with a "rooftop antenna" as had previously been the case. The FCC concluded that this change in language was not intended to require the FCC to develop new methods of determining whether a subscriber can receive an adequate quality signal with an indoor antenna, merely that the FCC has flexibility in this area. The FCC has two methods for determining whether subscribers are eligible to receive distant signals. One method is the predictive method using the Individual Location Longley-Rice (ILLR) model and the second is taking actual on-site signal strength measurements. Where the use of either method demonstrates that an individual subscriber cannot receive an adequate signal from its in-market affiliate, the subscriber is eligible to receive the signal of a distant affiliate of the same network from its satellite provider.

The FCC noted that there would be too many variables involved to create a reliable methodology for assessing signal strength via an indoor antenna. As a result, the FCC retained the requirement that an outdoor antenna raised to 30 feet above ground (20 feet for a single story building) be presumed in the ILLR model and used when taking actual on-site measurements. The FCC noted that in the case of on-site measurements, the outdoor antenna standard is less burdensome for the subscriber, as testers would not need to enter and potentially damage the subscriber's home. The FCC indicated its concern that using the outdoor antenna standard means that some subscribers in multiple dwelling units relying on indoor antennae cannot receive their local affiliate, but are still ineligible to receive imported network signals. However, the FCC concluded that the number of subscribers adversely affected is likely to be very small given that most will be able to obtain their local signals from the satellite provider. The few areas where local-into-local is not available are generally rural, where it is more likely that subscribers are using an outdoor antenna than would be the case in a densely populated urban area. Of course, subscribers remain able to request a waiver from their local network affiliate in order to obtain a duplicating distant network signal even where the FCC's methodology indicates the subscriber should be able to receive the local affiliate over-the-air.

The FCC also made some changes to its current measurement methodologies to adapt them to digital transmissions. In addition, it is now permitting on-site testers to use dipole antennae in addition to the calibrated gain antennae previously permitted, while prohibiting measurements made in inclement weather. With respect to the ILLR prediction method, the FCC adopted its original proposals largely unchanged, but received some valuable information in the comments it received on refinements that could be made to the model. The FCC indicates it will study these further, and is holding open this docket to continue collecting additional information that might make the ILLR method more accurate.

Public Notice

Finally, STELA requires the FCC to submit a report on in-state broadcast programming to Congress by **August 27, 2011**. According to the FCC, the report will: (1) analyze the number of households in a state that receive the signals of local broadcast stations assigned to a community of license located in a different state; (2) evaluate the extent to which consumers in each local market have access to in-state broadcast programming over-the-air or from a multichannel video programming distributor; and (3) consider whether there are alternatives to DMAs for defining "local" markets that would provide consumers with more in-state broadcast programming. The purpose of the report is to address a concern of some members of Congress that subscribers located in markets that straddle a state line may be unable to receive broadcast news and information from their own state because the local stations made available by cable and satellite providers are all located in the "other" state.

Comments on this proposed report are due **45 days** after Federal Register publication of the notice, with reply comments due **75 days** after Federal Register publication.

If you have any questions about the content of this Alert, please contact the Pillsbury attorney with whom you regularly work, or the authors of this Alert.

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