

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

In the Matter of)	
)	
Amendment of the Commission's Rules)	
Concerning Market Modification)	MB Docket No. 15-71
)	
Implementation of Section 102 of the STELA)	
Reauthorization Act of 2014)	
)	

To: The Commission

**COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters (NAB)¹ submits these comments on the *Notice of Proposed Rulemaking*² seeking comment on the Commission's implementation of Section 102 of the STELA Reauthorization Act of 2014 (STELAR).³ As discussed below, NAB generally supports the Commission's proposed interpretation of Section 102 and believes that many of the proposals in the *Notice* will effectuate the plain language of the statute and Congressional intent. NAB comments on specific FCC proposals below.

I. BACKGROUND

Section 102 of STELAR amended the Communications Act and the Copyright Act to give the Commission the authority to modify a commercial television broadcast station's

¹ The National Association of Broadcasters is a nonprofit trade association that advocates on behalf of local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

² *Amendment of the Commission's Rules Concerning Market Modification; Implementation of Section 102 of the STELA Reauthorization Act of 2014*, Notice of Proposed Rulemaking, MB Docket No. 15-71, FCC No. 15-34 (rel. Mar. 26, 2015) (*Notice*).

³ The STELA Reauthorization Act of 2014 (STELAR), §§ 102, 204 Pub. L. No. 113-200, 128 Stat. 2059, 2060-62 (2014), *codified at* 47 U.S.C. § 338(l); 47 U.S.C. § 534(h)(1)(C); 17 U.S.C. § 122(j)(2)(E).

market for purposes of satellite carriage. Previously, the Commission had such authority only with regard to cable systems, and was required to consider whether market modifications were appropriate under four statutory criteria.⁴ Section 102 also adds a new in-state signal criterion that the Commission must consider in connection with both satellite and cable market modification requests. Specifically, STELAR requires the Commission to consider “whether modifying the local market of the television station would promote consumers’ access to television broadcast station signals that originate in their State of residence.”⁵

While the statutory language for the cable and satellite market modification regimes is virtually identical, the market modification standard in STELAR contains one provision that is unique to satellite providers. This provision states: “A market determination under this subsection shall not create additional carriage obligations for a satellite carrier if it is not technically and economically feasible for such carrier to accomplish such carriage by means of its satellites in operation at the time of the determination.”

STELAR requires the FCC to adopt rules implementing Section 102 within nine months of its enactment, or September 4, 2015. The *Notice* seeks comment on the Commission’s proposals to modify its existing rules to encompass a satellite market modification process, while adding provisions to the rules to address the unique nature of satellite television service. It also seeks comment on how to implement the new in-state signal criterion and the technical and economic feasibility standard.

⁴ 47 U.S.C. § 534(h)(1)(C). See also 47 C.F.R. §76.59.

⁵ 47 U.S.C. § 338(l); 47 U.S.C. §534(h)(1)(C).

II. THE COMMISSION'S PROPOSAL TO MODIFY SECTIONS 76.59 AND 76.7 OF ITS RULES TO INCLUDE SATELLITE MARKET MODIFICATIONS EFFECTUATES CONGRESS' INTENT

NAB supports the Commission's proposal to modify the rules that currently govern the cable market modification process to provide for satellite market modifications. This proposal is most consistent with Congress' stated intent to "create a television market modification process for satellite carriers similar to the one already used for cable operators."⁶

Initiation of and Participation in Proceedings. The FCC's proposal that only affected broadcasters and cable or satellite carriers be permitted to file market modification requests is particularly important.⁷ As the Commission held in the cable context, stations and satellite carriers have rights and obligations that are directly affected by a market modification – rights and obligations that only these parties can perfect.⁸ The same reasoning applies in the context of satellite market modifications. Accordingly, only affected cable, satellite and broadcast entities parties should be permitted to file modification requests.⁹ NAB supports the FCC's proposal that Section 76.7 of the Commission's rules also govern the satellite market modification filing process and service requirements.¹⁰ The FCC observes that local

⁶ *Notice* at n. 15, *citing* Report from the Senate Committee on Commerce, Science, and Transportation accompanying S. 2799, 113th Cong., S. Rep. No. 113-322 (2014) (*Senate Commerce Committee Report*).

⁷ *Notice* at ¶ 8 and Appendix A.

⁸ *Notice* at ¶¶ 8-9. As the *Notice* observes, the FCC's reasoning was that "[n]o statute or Commission rule requires a broadcaster to allow its signal to be carried on a local cable system because another party wishes to view it." *Id.* at ¶ 8. Rather, a broadcaster must elect either must carry or retransmission consent with regard to a cable system, and, if electing retransmission consent, must successfully negotiate carriage. In other words, "[w]ithout the active participation of an affected broadcaster, modifying a station's market will not affect access to a given station." This reasoning applies equally to satellite market modifications.

⁹ *Notice* at ¶ 10.

¹⁰ *Notice* at ¶ 10.

governments or individuals may wish to take positions on proposed market modifications.¹¹ Views and evidence these parties wish to add to the record in market modification proceedings can certainly be captured through the comment filing process and considered by the FCC.¹²

Evidentiary Standards. NAB generally supports the Commission's proposal to apply the evidentiary requirements for cable market modifications to satellite market modifications.¹³ Several proposals in the *Notice* quite sensibly update FCC rules or modify them to apply relevant standards to the satellite context pursuant to Section 102 of STELAR. In particular, NAB supports the FCC's proposals to update Section 76.59(b)(2) of the FCC's rules to reflect digital broadcast signals;¹⁴ to dismiss without prejudice satellite market modification requests that lack requisite evidence (as is done in the cable context);¹⁵ and to require satellite carriers to maintain the status quo with regard to signal carriage during the pendency of a market modification proceeding (consistent with cable rules).¹⁶

The Commission seeks comment on what evidence it should consider in connection with a request that involves the new statutory factor designed to promote access to in-state signals.¹⁷ NAB agrees that a request that contends it will promote in-state signal access should include evidence that the station at issue is licensed to a community within the state

¹¹ *Notice* at ¶ 9.

¹² *Notice* at ¶ 9.

¹³ *Notice* at ¶¶ 11-12.

¹⁴ *Notice* at ¶ 14 (proposing to add a reference to the digital noise-limited service contour (NLSC)).

¹⁵ *Notice* at ¶ 15. See also 47 C.F.R. §76.59 (c).

¹⁶ *Notice* at ¶ 15. See also 47 C.F.R. §76.59 (d).

¹⁷ *Notice* at ¶ 13.

in which the modification is requested.¹⁸ Consideration of the “in-state signal” statutory factor also could involve an evaluation of programming or advertising on that station.¹⁹ However, a modification request involving an “in-state” showing should not be required to demonstrate that the “DMA at issue lacks any (or an adequate number of) in-state stations.”²⁰ The statute does not suggest that the Commission should take into account only those in-state market modification requests that would help to remedy a complete absence—or some minimum number—of in-state broadcast stations. Rather, the Commission is to weigh whether modifying a station’s market “would *promote* consumers’ access to television broadcast signals that originate in their state of residence.”²¹

Market Determinations. The Commission’s decisions regarding cable market modifications apply on a station-specific, system-specific, and community-specific basis. NAB agrees with the Commission’s proposal to make satellite market modifications similarly specific to the stations, carriers, and communities addressed in a particular request.²² In addition to meeting the Congressional directive to set up a “similar” modification process, this proposal acknowledges the highly fact-specific nature of showings by affected parties and determinations by the FCC in acting on a market modification request. NAB also can see merit in not importing market modification decisions from the cable context into the satellite

¹⁸ *Notice* at ¶ 13.

¹⁹ *Notice* at ¶ 13 (seeking comment on whether programming or advertising information would be relevant to the in-state statutory factor). The Commission currently evaluates programming relevant to the communities that are the subject of a market modification under its existing standardized evidence approach, and permits parties to include advertising data. 47 C.F.R. §§76.59(b)(4);(b)(6). See also *Notice* at Appendix A.

²⁰ *Id.*

²¹ See 47 U.S.C. § 534(h)(1)(C)(ii); 47 U.S.C. §338(l) (emphasis added).

²² *Notice* at ¶ 16.

context.²³ As the *Notice* observes, historic carriage is one of the five statutory factors the Commission must consider in any market modification request.²⁴ NAB anticipates that FCC consideration of this factor is likely to give sufficient weight to prior decisions without the adoption of a particular presumption or an automatic application of cable market modifications to satellite carriage.²⁵

NAB supports the FCC's proposal that stations that become eligible for carriage pursuant to a market modification decision may, within 30 days of the effective date of the decision, elect must carry or retransmission consent with regard to the relevant satellite carrier(s).²⁶ Consistent with the cable market modification rules and existing satellite carriage procedures, satellite carriers should commence carriage within 90 days of this election.²⁷ Both cable and satellite carriers should adhere carefully to this requirement, and the Commission should make clear that the filing of a petition for reconsideration or application for review does not relieve a cable or satellite provider of its obligation to commence carriage pursuant to a broadcaster's must carry election or begin retransmission consent negotiations consistent with good faith requirements. A broadcaster that has undertaken the burden and expense of a successful market modification request (which generally involves FCC filing, legal, engineering and possibly other fees) should not be faced

²³ *Notice* at ¶ 17.

²⁴ *Notice* at ¶ 17, *citing* 47 U.S.C. § 338(l)(2)(B)(i)(I)(whether the station, or other stations located in the same area "have been historically carried on the cable system or systems within such community").

²⁵ *Notice* at ¶ 17.

²⁶ *Notice* at ¶ 18 and Appendix A.

²⁷ *Id.*

with an obligation to file a must carry or good faith negotiation complaint to compel a cable or satellite carrier to comply with a market modification order.

III. THE COMMISSION SHOULD REQUIRE SATELLITE CARRIERS TO SUBSTANTIATE CLAIMS OF TECHNICAL AND ECONOMIC INFEASIBILITY

As stated in the *Notice*, the legislative history of STELAR shows that “claims of the existence of [technical] difficulties should be well substantiated and carefully examined by the [Commission] as part of the petition consideration process.”²⁸ This clear expression of legislative intent should guide the Commission’s implementation of the standard.

NAB agrees with the Commission’s conclusion that satellite carriers have the burden to prove that technical and economic infeasibility preclude carriage of a television broadcast station as a result of a market modification.²⁹ The Commission also has correctly concluded that the statute requires satellite carriers to raise any technical or economic impediments in the context of the market modification proceeding.³⁰ NAB agrees with the Commission’s proposal that a satellite carrier be deemed to have waived technical and economic infeasibility arguments if they are not raised during a market modification proceeding.³¹

NAB also supports the Commission’s proposal to grant a meritorious market modification request, even the grant would not create a new carriage obligation at that time because of a finding of technical or economic infeasibility.³² This approach would be more

²⁸ *Notice* at ¶ 19, citing *Senate Commerce Committee Report* at 11.

²⁹ *Notice* at ¶ 19.

³⁰ *Notice* at ¶ 19 (observing that this conclusion is “consistent with the language of the statute (that [the FCC] consider whether the carrier can accomplish carriage ‘at the time of the determination’)” and “will be most efficient for all parties.”)

³¹ *Notice* at ¶ 19. Such a carrier would be prohibited from raising such a claim after a market determination, such as in response to a station’s request for carriage. *Id.*

³² *Notice* at ¶ 19. The FCC observes that this is consistent with the cable carriage context. *Id.*

efficient for all concerned parties, who might otherwise have to re-litigate all of the matters involved in a market modification petition. Moreover, as the Commission observes, this proposal would ensure that, “if there is a change in circumstances such that it later becomes technically and economically feasible for the satellite carrier to carry the station, then the station could assert its carriage rights pursuant to the earlier market modification.”³³ Relatedly, NAB urges the Commission to require satellite carriers that have been found to face technical and economic barriers in connection with a market modification proceeding to notify the affected station of a change in circumstances that would permit carriage of the station.³⁴ A station is not likely to be able to determine whether there has been a change in the satellite carrier’s technical or economic circumstances, and should not bear the burden of attempting to discover this information through news reports or regulatory filings by satellite carriers. Satellite carriers are in the best position to know whether their circumstances have changed, and, consistent with bearing the burden of proving the technical and economic infeasibility of carriage, satellite carriers should be required to provide notice of changed circumstances.

NAB looks forward to learning what technical and economic feasibility issues may arise for satellite carriers as a result of market modifications. The FCC seeks comment on these issues,³⁵ noting that it has previously recognized that spot beam coverage limitations

³³ *Notice* at ¶ 19.

³⁴ *Notice* at ¶ 20. The Commission asks whether, in the event of a Commission finding of technical or economic infeasibility, it should impose a reporting requirement on satellite carriers to notify the affected broadcaster if circumstances change at a later time making it technically and economically feasible for the carrier to carry the station, and related questions. *Id.* (“Would such changes in circumstances be sufficiently public so as to not necessitate the burden of such a reporting requirement? If not notified by the carrier, how else could a broadcaster find out about such a change in the feasibility of carriage?”).

³⁵ *Notice* at ¶ 20.

may be a legitimate technical impediment in the context of satellite local-into-local service.³⁶ NAB urges the Commission to require satellite carriers claiming infeasibility due to insufficient spot beam coverage to provide spot beam contour diagrams to show whether a particular spot beam can be used to cover a particular community. To the extent that such material may be commercially sensitive or proprietary, the Commission could adopt appropriate protective orders to permit review of this evidence by FCC staff and affected parties.³⁷ Satellite carriers making a claim of technical or economic infeasibility relating to spot beam coverage also should be required to document that reconfiguring a spot beam, or adding a station to another spot beam that *does* cover an affected community would be technically or economically infeasible.

The Commission also seeks comment on whether, if a satellite carrier can provide a station to some, but not all, of the subscribers in a community that is the subject of a market modification, it should require such carriage.³⁸ NAB agrees that if carriage is viable within portions of a community that is the subject of a market modification request, satellite carriers should be required to carry the affected station (pursuant to the station's election of either must carry or retransmission consent).

Citing the potential time and expense involved in filing a market modification petition, the Commission seeks comment on whether it should encourage or require parties to consult in advance to determine whether the carrier has concerns about technical and

³⁶ Notice at ¶ 20, citing *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues, Retransmission Consent Issues*, Report and Order, 16 FCC Rcd 1918, 1937-38, ¶ 42 (2000).

³⁷ At a very minimum, the Commission should review relevant evidence, in which case an affected satellite carrier could simply avail itself of the appropriate protections for confidential information under Sections 0.457 and 0.459 of the Commission's rules. 47 C.F.R. §§ 0.457, 0.459.

³⁸ Notice at ¶ 20.

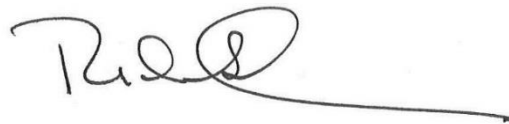
economic feasibility.³⁹ Some stations may wish to avail themselves of this opportunity, but stations should not be required to do so. Additionally, learning that a satellite carrier views a potential market modification as technically and economically infeasible should not preclude the station from filing a petition. Otherwise, a satellite carrier could effectively foreclose the filing of all petitions based on its subjective opinion, which is inconsistent with the statutory requirement that the FCC make market determinations.

IV. CONCLUSION

The Commission has properly concluded that modifying its existing rules and procedures relating to cable market modification petitions is the best means to establish a satellite market modification process. As discussed above, the Commission's proposals to adapt its rules for satellite context also are consistent with the statute and Congress' intent. NAB urges the Commission to ensure that satellite carriers make appropriate evidentiary showings to support any claim that a new carriage obligation arising from a market modification is technically and economically infeasible.

Respectfully submitted,

**NATIONAL ASSOCIATION OF
BROADCASTERS**
1771 N Street, NW
Washington, DC 20036
(202) 429-5430



Rick Kaplan
Erin L. Dozier

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³⁹ Notice at ¶ 21.