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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY
CS Docket No. 97-141

In the Matter of)
)
Annual Assessment of the Status of)
Competition in Markets for the)
Delivery of Video Programming)

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

**NATIONAL ASSOCIATION OF
BROADCASTERS**
1771 N Street, NW
Washington, DC 20036

Henry L. Baumann
Executive Vice President and
General Counsel

Barry D. Umansky
Deputy General Counsel

Benjamin F.P. Ivins
Associate General Counsel

Jack N. Goodman
Vice President/Policy Counsel

August 20, 1997

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EXECUTIVE SUMMARY

The National Association of Broadcasters (“NAB”) submits its views on several of the issues advanced in the Commission’s *Notice of Inquiry* in the above-captioned proceeding. These issues all relate to the ability of free, over-the-air broadcasting to compete in an ever-crowded video marketplace. Herein we address: the effect on competition by satellite delivery of broadcast network programming; the rights of consumers to employ outdoor antennas to receive free, over-the-air terrestrial television and other video signals; and the ability of broadcasters to site, construct and modify transmission facilities.

We first respond to certain satellite carriers who seek wholesale changes to the Satellite Home Viewer Act. They urge that, to help satellite carriers “compete” more successfully with cable television, the Copyright Act should be radically altered. They seek to destroy the protection Congress has given local network-affiliated stations against importation of duplicative network programming by satellite – a suggestion could well lead to the demise of the national affiliate system that both Congress and the Commission have found to be a bedrock of broadcasting.

The Copyright Act gives satellite carriers an extraordinary privilege: to retransmit and sell to dish owners television programming offered by national network-affiliated stations. Congress responsibly limited that privilege, however, to “unserved households,” ensuring that satellite carriers do not jeopardize the network/affiliate system by duplicating in local markets the network programs offered by local, terrestrial stations.

Certain satellite carriers have flagrantly violated the “unserved household” limitation by selling duplicative network programming to hundreds of thousands of ineligible subscribers. But,

instead of coming into compliance with the law, these carriers are now asking that the law they have broken be eviscerated.

The proposed destruction of the program exclusivity rights of local network stations is completely unnecessary to achieve the purposes that the carriers purportedly want to advance. Contrary to what these satellite carriers have told the FCC in their comments, existing law and technology provides them with ample means to enable viewers to combine the availability of local over-the-air stations with nonbroadcast satellite-delivered program services.

The other “reform” proposals offered by the satellite industry -- such as making permanent the compulsory license they have so flagrantly abused -- are equally without merit.

Other equally important issues addressed in these reply comments include the need for federal preemption of: (a) certain state/local government and non-government restrictions on the ability of consumers to receive over-the-air signals; and (b) land use and other restrictions on broadcasters’ ability to site, construct and modify broadcast antennas. Such federal regulations are critically needed if over-the-air broadcasting is to be able to compete effectively among electronic media and in the homes of American consumers.

The rights of consumers to receive over-the-air signals were strengthened in Section 207 of the Telecommunications Act of 1996. This statutory provision is now being implemented in an FCC rulemaking proceeding. However, we are concerned over the failure of the Commission to adopt a preemption policy that is faithful to the will of Congress. Moreover, the FCC must ensure that the regulatory scheme adopted in its “cable inside wiring” proceeding will be congruent with an overall regulatory plan aimed at ensuring all viewers’ access to over-the-air television stations – both in the analog world of today and the digital world of the not-to-distant future.

Concerning broadcasters' efforts to obtain state/local approval for the siting, construction and modification of transmission antennas, NAB and the Association for Maximum Service Television, Inc. ("MSTV") jointly have submitted a Petition for Further Notice of Proposed Rule Making. This petition urges the Commission to adopt rules that effectively will preempt certain state and local government restrictions that impair the ability of broadcasters -- TV and radio -- to site, construct and/or modify broadcast facilities. The Commission has begun such a proceeding and should swiftly adopt an appropriate preemption scheme that will further the federal policy supporting the provision of free, local, terrestrial broadcast services to the viewing and listening audience.

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REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS

I. INTRODUCTION AND SUMMARY

In these reply comments the National Association of Broadcasters¹ submits its views on several of the issues advanced in the Commission's *Notice of Inquiry* in the above-captioned proceeding.² These issues all relate to the ability of free, over-the-air broadcasting to compete in an ever-crowded video marketplace. Herein we address: the effect on competition by satellite delivery of broadcast network programming; the rights of consumers to employ outdoor antennas to receive free, over-the-air terrestrial television and other video signals; and the ability of broadcasters to site, construct and modify transmission facilities.

The issue upon which we focus the first portion of these reply comments is the regulatory system that should attach to satellite carriers providing broadcast network and other video signals

¹ NAB is a nonprofit, incorporated association of television and radio stations and networks which serves and represents the American broadcast industry.

² *Notice of Inquiry* in CS Docket No. 97-141, 12 FCC Rcd 7829 (1997).

to consumers. We respond to certain satellite carriers who seek wholesale changes to the Satellite Home Viewer Act.

In their initial filings, two commenters (PrimeTime 24 and DirecTV) urge that, to help satellite carriers “compete” more successfully with cable, the Copyright Act should be radically altered to destroy the protection Congress has given local network stations against importation of duplicative network programming by satellite. That suggestion could well lead to the demise of the national affiliate system that both Congress and the Commission has found to be a bedrock of broadcasting.

The Copyright Act gives satellite carriers an extraordinary privilege: to retransmit and sell to dish owners television programming offered by ABC, CBS, Fox, and NBC network-affiliated stations -- programming that the satellite companies have no role in creating, and need not purchase in the marketplace. Congress sensibly limited that privilege, however, to “unserved households,” ensuring that satellite carriers do not jeopardize the network/affiliate system by duplicating in local markets the network programs offered by local over-the-air stations.

Both PrimeTime 24 and DirecTV (which distributes PrimeTime 24 to its DBS customers) have flagrantly violated the “unserved household” limitation by selling duplicative network programming to hundreds of thousands of ineligible subscribers. (A federal Magistrate Judge found exactly that in a recommended decision released just a few weeks ago.) Instead of coming into compliance with the law, PrimeTime 24 and DirecTV ask that the law they have broken be eviscerated. To accept that invitation would be a grave and unprecedented mistake.

➤ It would gravely jeopardize the network/affiliate system that has brought free television and local news to nearly all Americans;

- it would be completely inconsistent with the policies that the Commission has applied for more than 30 years in its network nonduplication and other program exclusivity rules;
- it would reward blatant and willful copyright infringers; and
- it would hand satellite carriers two huge, and unfair, competitive advantages over cable systems: satellite companies would (1) have no must-carry obligations, and (2) be entitled to import duplicative network programming into every local community in the country.

The proposed destruction of the program exclusivity rights of local network stations is completely unnecessary to achieve the purposes that PrimeTime 24 and DirecTV purportedly want to advance. Contrary to what these satellite carriers have told the FCC in their comments, existing law and technology provides them with ample means to enable viewers to combine the availability of local over-the-air stations with nonbroadcast satellite-delivered program services. As DirecTV says on its current World Wide Web page (as of August 18, 1997): **“Enjoy local channels and DirecTV too! . . . A new generation of off-air antennas can seamlessly deliver high-quality signals from free local TV broadcasters directly to your DSS system with just a push of your remote.”** (Pages from DirecTV’s Web page are reprinted after page 17 below.)

The other “reform” proposals offered by the satellite industry -- such as making permanent the compulsory license they have so flagrantly abused -- are equally without merit.³

Other equally important issues are addressed in these reply comments – each also related to the competitive potential of over-the-air broadcasting. They include the need for federal preemption of: (a) certain state/local government and non-government restrictions on the ability of consumers to receive over-the-air signals; and (b) land use and other restrictions on

³ The one proposal for alteration of the Copyright Act that might be in the public interest is clarifying the applicability of Section 119 to the local delivery of local stations. See p.29 below. Any such clarification, however, should be accompanied by imposition of a must-carry obligation similar to that now imposed on cable systems.

broadcasters' ability to site, construct and modify broadcast antennas. Such federal regulations are critically needed if over-the-air broadcasting is to be able to compete effectively among electronic media and in the homes of American consumers.

The rights of consumers to receive over-the-air signals were strengthened in Section 207 of the Telecommunications Act of 1996. This statutory provision is now being implemented in an FCC rulemaking proceeding.⁴ However, as noted below and in several pleadings NAB already has submitted to the Commission, we are concerned over the failure of the agency to adopt a preemption policy that is faithful to the will of Congress. Moreover, the FCC must ensure that the regulatory scheme adopted in its "cable inside wiring proceeding"⁵ will be congruent with an overall regulatory plan aimed at ensuring all viewers' access to over-the-air television stations – both in the analog world of today and the digital world of the not-to-distant future.

Concerning broadcasters' efforts to obtain state/local approval for the siting, construction and modification of transmission antennas, NAB and the Association for Maximum Service Television, Inc. ("MSTV") jointly have submitted a Petition for Further Notice of Proposed Rule Making.⁶ This petition urges the Commission to adopt rules that effectively will preempt certain state and local government restrictions that impair the ability of broadcasters -- TV and radio -- to site, construct and/or modify broadcast facilities. Though filed in the initial context of television broadcasters' conversion to digital broadcasting, consistent with the Commission's regulations on the matter,⁷ the NAB/MSTV petition is an "all-industry" one that includes within its scope the

⁴ See *Notice of Proposed Rule Making* in CS Docket No. 96-83, FCC 96-151, 61 FR 16890 (April 18, 1996); see also *Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rule Making* in CS Docket No. 96-83, FCC 96-328, 61 FR 46557

⁵ See, e.g., *First Order on Reconsideration and Further Notice of Proposed Rulemaking*, MM Docket No. 92-260, 61 FR 6210 (February 16, 1996)

⁶ *Petition for Further Notice of Proposed Rule Making*, MM Docket No. 87-268 (May 30, 1997)

⁷ See FCC 97-116, 62 FR 26996 (May 16, 1997)

adoption of preemption benefits for *all* television and *all* radio stations. This week the Commission has initiated such a rulemaking proceeding.

II. PREVENTING DUPLICATION OF NETWORK PROGRAMMING AVAILABLE FROM LOCAL STATIONS SERVES VITAL INTERESTS AND DOES NOT HINDER COMPETITION

The “unserved household” limitation that PrimeTime 24 and DirecTV attack is simply one component of a longstanding and unbroken federal policy: to protect local network stations -- which provide free television and local news to virtually all Americans -- against importation of duplicative network programming. As a matter of sound public policy, it is essential to retain strong and enforceable protections against such duplication, whether by cable systems, open video systems, satellite companies, or any other retransmission system.

A. Congress and the Commission Have Repeatedly Recognized the Vital Interests Served by the Partnership Between Broadcast Networks and Their Affiliates

Over the past 50 years, Congress and the Commission have worked to foster the development of a national system of free over-the-air broadcast stations to serve local communities around the country. In particular, Congress has long directed the Commission to promote “localism” in the broadcast industry “to afford each community of appreciable size an over-the-air source of information and an outlet for exchange on matters of local concern.” Turner Broadcasting Sys. v. FCC, 512 U.S. 622, 663 (1994) (Turner I); see United States v. Southwestern Cable Co., 392 U.S. 157, 174 & n.39 (1968). That policy has provided salutary public interest benefits. Only this year, the Supreme Court declared that

Broadcast television is an important source of information to many Americans. Though it is but one of many means for

communication, by tradition and use for decades now it has been an essential part of the national discourse on subjects across the whole broad spectrum of speech, thought, and expression.

Turner Broadcasting Sys. v. FCC, ___ U.S. ___, ___, 117 S. Ct. 1174, 1188 (1997).

This success is largely the result of the partnership between broadcast networks and affiliated television stations in markets across the country. The programming offered by network-affiliated stations is, of course, available over-the-air for free to local viewers, unlike cable or satellite services, which require substantial payments by the viewer. See Turner Broadcasting Sys. v. FCC, 512 U.S. 622, 663 (1994) (Turner I); Communications Act of 1934 § 307(b), 48 Stat. 1083, 47 U.S.C. § 307(b). Although cable, satellite, and other technologies offer alternative ways to obtain television programming, “nearly 40 percent of American households still rely on broadcast stations as their exclusive source of television programming.” Turner I, 512 U.S. at 663.

The network affiliate system provides a service that is very different from nonbroadcast networks. Each network-affiliated station offers a unique mix of national programming provided by networks, local programming produced by local stations, and syndicated programs acquired by stations from third parties. Unlike nonbroadcast networks, which telecast the same material to all viewers nationally, each network station provides a customized blend of programming suited to its community -- in the Supreme Court's words, a “local voice.” For example, stations in North Carolina provide vitally needed information to viewers about potential hurricanes, while stations in Montana do the same about impending blizzards.

A key source of revenues for local network affiliates is the sale of local advertising time during network programs. Because network programs often command large audiences, the sale of local advertising slots during these programs is one of the most important ways in which

stations earn revenues to stay in business and fund their local news, weather, and public affairs programming.

Networks and their local affiliates also cooperate in a wide variety of other ways to encourage "audience flow" and to promote one another's programming. For example, networks often provide their affiliates with the opportunity, during their 10-11 p.m. programs, to offer a "local news tease" promoting that day's 11 p.m. local news program. These various forms of cooperation can succeed, however, only if viewers are watching their own local stations.

A variety of technologies have been developed or planned -- including cable, satellite, and open video systems ("OVS") -- that, as a technological matter, enable third parties to retransmit distant network stations into the homes of local viewers. Whenever those technologies posed a risk to the network/affiliate system, Congress or the Commission (or both) has acted to ensure that the retransmission system does not import duplicative network programming from distant markets.

In the case of cable television, for example, the Commission has since the mid-1960's imposed "network nonduplication" rules on cable systems. 47 C.F.R. §§ 76.92-76.97 (1996). As the Commission explained when it strengthened the network nonduplication rules in 1988:

"[I]mportation of duplicating network signals can have severe adverse effects on a station's audience. In 1982, network non-duplication protection was temporarily withdrawn from station KMIR-TV, Palm Springs. The local cable system imported another network signal from a larger market, with the result that KMIR-TV lost about one-half of its sign-on to sign-off audience. Loss of audience by affiliates undermines the value of network programming both to the affiliate and to the network. Thus, an effective non-duplication rule continues to be necessary."

Report and Order, In the Matter of Amendment of Parts 73 and 76 of the Commission's Rules

Relating to Program Exclusivity in the Cable and Broadcast Industries, Gen. Docket No. 87-24, ¶

117, 3 FCC Rcd. 5299, 5319 (released July 15, 1988), aff'd, 890 F.2d 1173 (D.C. Cir. 1989); see also Southwestern Cable Co., 392 U.S. at 165; Wheeling Antenna Co. v. WTRF-TV, Inc., 391 F.2d 179, 183 (4th Cir. 1968). Similarly, when considering the possible entry by telephone companies into the multichannel video business through open video systems, Congress in 1996 specifically directed the FCC to apply its program exclusivity rules, including its network nonduplication, syndicated exclusivity, and sports blackout rules, to OVS operators. Telecommunications Act of 1996, Pub. L. 104-104, § 653(b)(1)(D).

B. The Satellite Home Viewer Act

In the 1980s, satellites emerged as a new method of retransmitting broadcast stations to viewers. As the Satellite Broadcasting and Communications Association (“SBCA”) has acknowledged in its comments, however, a satellite’s footprint is ubiquitous and national in nature. SBCA Comments at 4. Because satellite carriers currently lack the technological capacity to provide each of their subscribers with the signals of their local stations, they instead select a handful of local stations for distribution throughout the entire country.

As with cable (and later with OVS), Congress immediately recognized that satellite retransmission, if not narrowly limited, could destroy the network/affiliate system that Congress and the Commission have consistently sought to preserve. Accordingly, in the Satellite Home Viewer Act (“SHVA”) (creating Section 119 of the Copyright Act), Congress crafted a special compulsory license for the satellite carrier industry, but strictly limited the license so that only viewers who could not receive their local stations over the air (so called “unserved households”)-- and no one else -- would be eligible to receive network stations by satellite. See 17 U.S.C. § 119(d)(10); Satellite Home Viewer[] Act of 1988, H.R. Rep. No. 100-887, pt. 2 at 20 (1988) (“The Committee intends [by Section 119] to . . . bring[] network programming to unserved areas

while preserving the exclusivity that is an integral part of today's network-affiliate relationship")
(emphasis added).

NAB has attached to these Comments the Statement of Michael Remington, who served as Chief Counsel to the House Judiciary Subcommittee that drafted the SHVA in 1988. (Mr. Remington's Statement is attached as Exhibit 1.) As Mr. Remington explains, Congress' objective was simply to authorize satellite delivery of network programming to a small number of viewers in rural areas.⁸

To accomplish its purpose, Congress adopted a simple, objective test for determining eligibility under the SHVA. Congress knew that if it established a vague or debatable standard for "unserved households," enforcement of the law would be impossible. Congress therefore chose a strictly objective definition of which households qualify as "unserved." That objective definition has two parts:

(1) Only households that cannot receive a local signal of Grade B intensity. First, a household qualifies as "unserved" with regard to a particular network only if it "cannot receive, through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of grade B intensity (as defined by the Federal Communications Commission) of a primary network station affiliated with that network." 17 U.S.C. § 119(d)(10). As the 1988 House Judiciary Report makes clear, "Grade B intensity" refers to the objective signal strength levels established by the Commission in 47 C.F.R. § 73.683(a). H.R. Rep. No. 100-887, at 26 (1988). In that regulation, the Commission has long defined Grade B intensity as a median signal strength level of

⁸ See 134 Cong. Rec. 28582 (1988) ("The goal of the bill . . . is to place rural households on a more or less equal footing with their urban counterparts.") (remarks of Rep. Kastenmeier) (emphasis added); 134 Cong. Rec. 28585 (1988) ("This legislation will increase television viewing choices for many rural Americans") (remarks of Rep. Slattery) (emphasis added); 134 Cong. Rec. at 28587 (1988) ("television programming in rural areas is often limited") (remarks of Rep. Roth) (emphasis added).

47 dBu for TV channels 2-4, 56 dBu for TV channels 7-13, and 64 dBu for TV channels 14-69.⁹

The recommended decision recently issued by Magistrate Judge Johnson in a copyright infringement case against PrimeTime 24 concurs that “Grade B intensity” is an objective measurement of signal strength.

In its Comments, PrimeTime 24 speciously argues that “signal of Grade B intensity” has never been defined by the Commission, and that Congress could not have meant to use the Grade B signal strengths set forth in 47 C.F.R. § 73.683(a) for setting eligibility because the Commission itself does not use Grade B contours to predict picture quality at a particular household. PT24 Comments at 5-8. But PrimeTime 24 misses the point: the definition of “unserved household” is not based on predicted Grade B contours, but on the actual ability of a household to receive a signal of Grade B intensity. Although Grade B contours do not enable one to predict with certainty whether a particular household receives a signal of Grade B intensity, the Commission has concluded -- based on extensive empirical research -- that a household that does receive a signal of a Grade B intensity is very likely to receive an acceptable picture. Engineering Statement of Jules Cohen ¶ 11. (Mr. Cohen’s Engineering Statement is attached as Exhibit 2 hereto.) Congress thus made a sensible choice in borrowing the “Grade B intensity” standard (set forth in Section 73.683(a) of the Commission’s regulations) as an objective proxy for determining which households can receive an acceptable picture over the air. And as discussed below, recent empirical evidence confirms that Grade B intensity is still an excellent proxy for acceptable picture quality. See below at pp. 27-28.

⁹ In amending Section 119 in 1994, Congress reaffirmed that “Grade B intensity” is an objective standard. H.R. Rep. No. 103-703, at 13 (1994) (“This is an objective test, accomplished by actual measurement.”) (emphasis added); S. Rep. No. 103-407, at 9 n.4 (1994) (Grade B intensity is an “objective test”) (emphasis added).

(2) No cable within previous 90 days. Congress also specified that satellite carriers could serve only households that had not, within the previous 90 days, “subscribed to a cable system that provides the signal of a primary network station affiliated with that network.” 17 U.S.C. § 119(d)(10)(B). Because cable systems (unlike satellite companies) offer local network stations, the 90-day rule promotes localism by discouraging viewers from lightly switching to a service that provides only distant network-affiliated stations. Contrary to the claims made by the SBCA and DirecTV, this requirement is not anticompetitive; it simply promotes localism by encouraging reception of local, rather than distant, network stations.

Congress thus imposed clear, objective standards for which households may -- and which may not -- receive network programming by satellite. Both of these tests could easily be applied by satellite carriers using a properly designed compliance system. First, it has long been possible to produce sophisticated maps, using the Longley-Rice methodology developed by U.S. Government engineers (and often relied on by the Commission), that take into account detailed terrain data to predict where a station’s signal does (and does not) reach.¹⁰ Second, satellite carriers could readily determine whether their customers are cable subscribers by obtaining privacy waivers from the customers and asking their cable systems whether the customers have recently subscribed. As discussed below, the satellite carriers have (until now) done neither of these things, nor taken any other meaningful steps to comply with the Act.

¹⁰ The Longley-Rice methodology is explained in the declaration prepared by broadcast engineer Jules Cohen for use in one of the lawsuits filed against PrimeTime 24. A copy of Mr. Cohen’s declaration is attached as Exhibit 3.

C. PrimeTime 24 and DirecTV Have Grossly Abused the Compulsory License

Although satellite industry commenters assert that the statutory copyright scheme adopted by Congress has proven unworkable, SBCA Comments 21-32; PrimeTime 24 Comments 4-5; DirecTV Comments at 8, the primary factor preventing Congress's scheme from working is the carriers' refusal to comply with it. In practice, the carriers have ignored the restrictions that Section 119 imposes on their retransmission of network programming. In particular, PrimeTime 24, and its largest distributor DirecTV, have flagrantly violated the Copyright Act by selling to massive numbers of ineligible subscribers -- a number that is growing by thousands every day. Indeed, as discussed below, PrimeTime 24's pattern of willful infringement is so extreme that a United States Magistrate Judge in Miami recently recommended entry of a nationwide preliminary injunction against it.

There are two simple ways to demonstrate the breadth of PrimeTime 24's violation of the "unserved household" limitation:

a. Maps showing Grade B propagation and subscriber locations. As discussed above, it is possible to produce maps that use detailed terrain data to predict the actual propagation of a television station's signal. In addition, readily available "geocoding" software makes it possible to pinpoint the locations of subscribers on a map. Combining these technologies provides a graphic way to evaluate whether a satellite carrier is complying with the "Grade B intensity" standard imposed by Congress.

As the map on the next page demonstrates, PrimeTime 24 completely ignores the Grade B intensity requirement in its actual sales practices. The map shows the predicted propagation of

WFOR, the CBS station in Miami, Florida, and the locations of a sample of PrimeTime 24's customers in this area -- those signed up by DirecTV during 1996 and early 1997. The map graphically demonstrates PrimeTime 24's routine, and lawless, sale of distant network stations to households in WFOR's core urban and suburban service area that obviously receive signals of Grade B intensity. This pattern of abuse by PrimeTime 24 is uniformly replicated in television markets, large and small, across the United States. To illustrate the point, we have attached to Mr. Cohen's Declaration (Exhibit 3 hereto) representative maps from three other markets at issue in current litigation against PrimeTime 24. These maps show that, despite the plain requirements of Section 119, PrimeTime 24 has no geographic restriction whatsoever on where it will sell network programming.

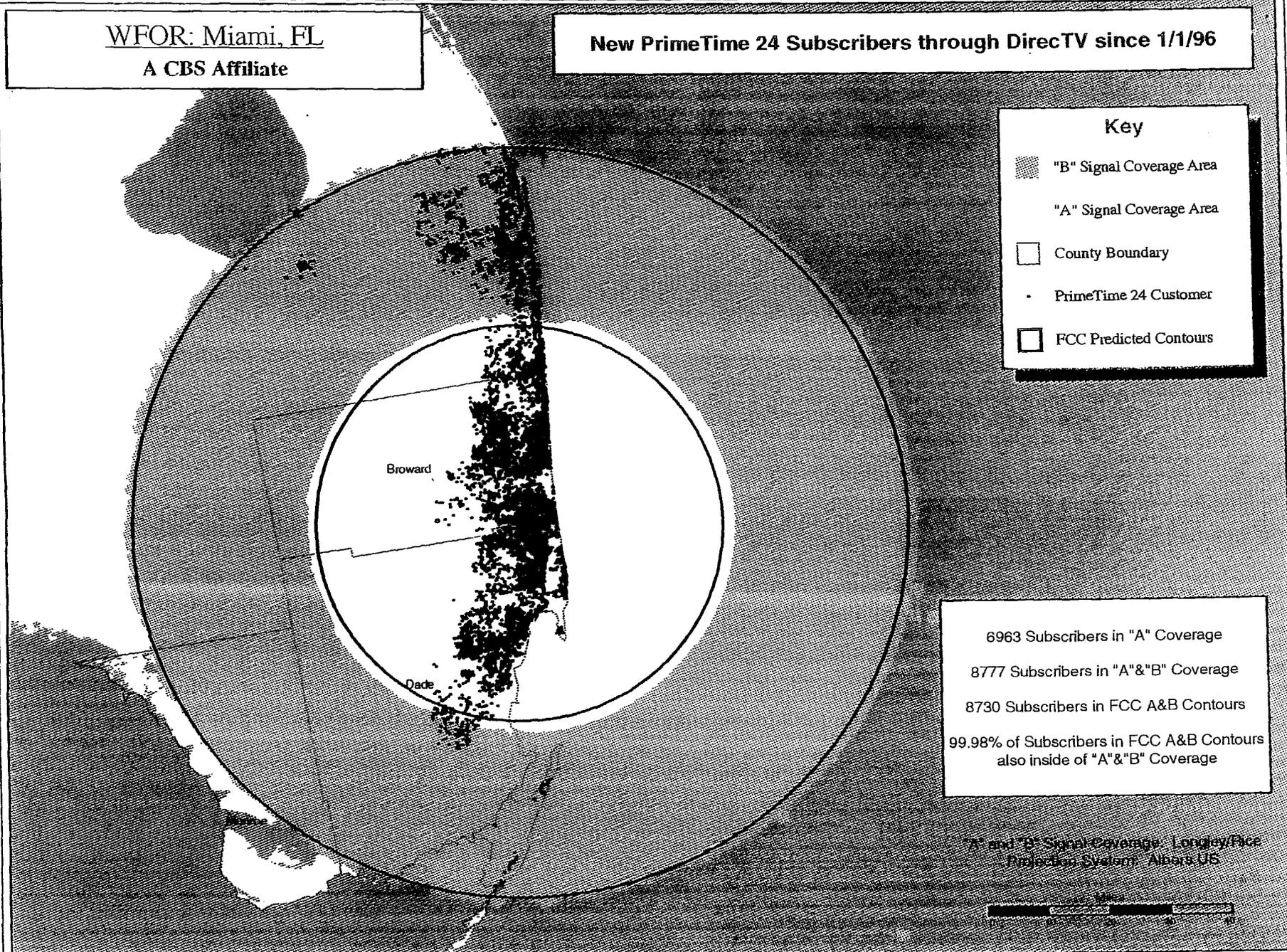
b. Signal intensity testing. Broadcasters have commissioned professional engineers to perform actual signal intensity tests at the homes of hundreds of randomly selected PrimeTime 24 subscribers in two markets in which litigation is pending. The results are overwhelming. First, in the Miami area, broadcasters tested 100 randomly selected PrimeTime 24 subscribers (among those who had signed up in May 1996) for testing. Every one of these 100 locations got at least a Grade B intensity signal of both the CBS and Fox stations in Miami -- in almost all cases, an even stronger, Grade A intensity signal. Cohen Declaration, ¶¶ 14-17 (Exhibit 3 hereto).

WFOR: Miami, FL
A CBS Affiliate

New PrimeTime 24 Subscribers through DirecTV since 1/1/96

Key

-  "B" Signal Coverage Area
-  "A" Signal Coverage Area
-  County Boundary
-  PrimeTime 24 Customer
-  FCC Predicted Contours



6963 Subscribers in "A" Coverage
8777 Subscribers in "A"&"B" Coverage
8730 Subscribers in FCC A&B Contours
99.98% of Subscribers in FCC A&B Contours
also inside of "A"&"B" Coverage

"A" and "B" Signal Coverage: Longley/Rice
Projection System: Albers US



Similarly, in Amarillo, Texas, the local NBC station arranged for two sets of signal intensity tests of randomly selected local PrimeTime 24 subscribers. A professional engineer conducted 273 signal intensity measurements -- of which 262, or 96%, showed that the customer received a signal of at least Grade B intensity. Again, in almost all cases the household actually received a signal not merely of Grade B intensity but of Grade A intensity. See Expert Report and Supplemental Expert Report of Louis Robert du Treil, Jr. (Dec. 26, 1996 and Feb. 27, 1997), Cannan Communications, Inc. v. PrimeTime 24 Joint Venture, Civ. No. 2-96-CV-086 (N.D. Tex.).

How did PrimeTime 24 accumulate so many ineligible customers? The answer is simple: PrimeTime 24 does not, and has never, marketed its network package as an “unserved household” service. To the contrary, PrimeTime buries in fine print the fact that there are any legal restrictions on its service. Nor, as discussed below, has PrimeTime 24 or DirecTV ever implemented any meaningful compliance program.

Because it knows the market for “unserved households” is very small, PrimeTime 24 aggressively promotes other benefits of its service to the public and to satellite retailers. One of PrimeTime 24's current advertisements illustrates its cynical strategy: under the headline “Everyone Watches Television. Some Watch When They Choose,” PrimeTime 24 promotes use of its service to watch network programs earlier or later than they are available locally. That “benefit,” of course, has nothing to do with living in an unserved household.

PrimeTime 24's motivation for selling to “served” households -- maximizing its (unlawful) profits -- is thus easy to see. From the viewers' perspective, there are a number of reasons -- totally unrelated to living in an “unserved household” -- why viewers pay to receive network programs by satellite:

➤ No need for antenna. Many satellite carrier customers (particularly former (or current) cable subscribers) have had their over-the-air antennas removed, or have allowed them to fall into disrepair. By signing up for PrimeTime 24, a viewer can receive network programming without the need to install (or maintain) a rooftop antenna -- or even set-top "rabbit ears."

➤ Seeing programs earlier or later. PrimeTime 24 offers both East Coast and West Coast ABC, CBS, and NBC stations. Viewers can therefore use PrimeTime 24 to "timeshift" to watch programming hours earlier (or later) than its local broadcast.

➤ Access to out-of-town sports events. Network stations often broadcast different sports events in different parts of the country. The National Football League, for example, provides each NFL City with the games in which its own team plays, but does not broadcast many of those games elsewhere. Satellite dish owners can obtain access to many out-of-town NFL games by marketplace means by purchasing the "NFL Sunday Ticket" package. PrimeTime 24 exploits the Section 119 compulsory license to deliver many of these same out-of-market games to its customers without having to negotiate the relevant rights in the marketplace.

➤ Sale of network stations as part of fixed-price package. PrimeTime 24 and several of its distributors offer network stations as an automatic part of a larger package of channels such as CNN, ESPN and USA Network. Strikingly, several distributors do not offer any discount if one does not take the network stations as part of the package. Thus, viewers have no economic incentive not to take the distant network package.

If it intended to comply with the Copyright Act, PrimeTime 24 would have implemented objective standards to ensure that only true "unserved households" -- not served homes seeking to subscribe for other reasons -- could sign up for its service. Instead, PrimeTime 24 markets directly to, and welcomes the business of, hundreds of thousands of plainly ineligible customers. Its "compliance" system, which relies entirely on a patently unreliable system of self-reporting, is a sham. Subscribers are well aware that, in order to receive PrimeTime 24's network package, all they need to do is say "no" to PrimeTime 24's "compliance" questions.¹¹

¹¹ See David Hatch, Coalition Sets Sights on Satellites: Primetime Hit with Suit over Network Signals, Electronic Media, Jan. 2, 1997, at 3 ("Satellite sources point out that some customers who are capable of receiving local signals lie and tell satellite companies they cannot receive them."); Mark Robichaux and Bryan Gruley, Battle in the Air, Wall Street Journal, Jan. 30, 1997 ("At present, DBS customers in the middle of cities and suburbs, who can easily get strong local signals, are fibbing about 'poor' picture quality to satellite-dish services and retailers so they can get out-of-market signals."); Rick Redding, Area TV Stations Challenge Thousands of Satellite Users, Business First Of Louisville, Jan. 27, 1997 ("many viewers apparently can't resist the temptation to tell a white lie

PrimeTime 24 has no objective check whatsoever on the answers it receives from customers (in those cases in which it even asks the questions). Far from representing a genuine effort at compliance, PrimeTime 24's system is simply an attempt to create the appearance of a compliance effort while enrolling as many customers as possible to maximize profits.

PrimeTime 24 reaps enormous revenues by selling network programming on demand to large numbers of new, ineligible subscribers every month. During January 1996 alone, for example, PrimeTime 24 signed up some 120,000 new customers for its network station package. Left no choice by PrimeTime 24's blatant disregard of the law, the broadcasters have filed three lawsuits to enforce their copyrights. In the largest of these actions, currently pending in federal district court in Miami, Magistrate Judge Linnea Johnson conducted a four-day hearing in June; in July, Judge Johnson issued a 56-page Report and Recommendation urging the District Court to enter a nationwide preliminary injunction against PrimeTime 24's illegal conduct. Among other things, Judge Johnson concluded that PrimeTime 24's infringements are "willful," "repeated" and "massive."

D. The Radical Alteration of Existing Law Proposed by DirecTV and PrimeTime 24 Is Unnecessary and Unwise

1. DirecTV's Own Public Statements Flatly Contradict its Comments Here, and Show That There is No Need to Change Existing Law

Amazingly, DirecTV says in its Comments that it "effectively is precluded from offering [local broadcast channels] to a vast majority of its subscribers." DirecTV Comments at 8. This

or two."); *id.* (quoting satellite dealer as saying "It's up to the customer - he can call and lie through his teeth, that's up to the mentality of the customer"); *TV's Changing Picture*, Consumer Reports, Dec. 1996, at 14 ("You can order broadcast network service on your dish, providing you say you can't receive local channels well with an antenna") (emphasis added).

outrageous claim is contradicted by numerous of DirecTV's own public statements on the matter, including its current World Wide Web pages.

The President of DirecTV, for example, publicly stated in January 1997 that "all of our subscribers have figured out' how to get local channels." Satellite Sales Buoy Lagging Consumer Electronics Market, Communications Daily, Jan. 10, 1997. Similarly, a spokesman for United States Satellite Broadcasting, which shares satellite space with DirecTV, recently assured satellite dealers that "[t]oday's antennas (you probably sell them in your store) are capable of bringing in a high quality signal for just about every urban or suburban homeowner. And it will almost always be a clearer, more stable, and more reliable signal than cable TV!" Bob Shaw, Customers Get Local Channels Free With Every DSS, DSS Insider (Winter 1997).¹²

Most strikingly, DirecTV's current statements to its own subscribers show that it is being entirely disingenuous in telling the Commission that current law "preclude[s]" it from offering local signals to its subscribers. Because the contrast between DirecTV's statements to the Commission and its public admissions is so stark, we reprint over the next six pages DirecTV's statements of its actual view -- which is that satellite companies can readily provide local broadcast stations to almost all of their customers.

¹² As DirecTV's President has explained, "We've got to integrate the antenna with the 18-inch satellite dish." Stephen Keating, Antennas the Hot News for Satellite TV Denver Post, March 26, 1997, 1997 WL 6068687. DirecTV's most recent initiative -- the Freedom Antenna system -- is an "aesthetically pleasing" flat over-the-air VHF/UHF antenna that "conforms to the back of an 18" satellite dish." Press Release, Antennas America, Inc. Licensed by DirecTV to Manufacture its New Freedom Antenna System (July 14, 1997).