

DIRECTV

SATELLITE TV AT ITS BEST

August 18, 1997

GENERAL INFORMATION

PROGRAMMING

DIRECTV programming selections

PRICING

DIRECTV selections

MOVIES

DIRECT TICKET movies for the month

SPORTS

Sports packages and season tickets

PRESS

Recent DIRECTV news

Q&A

Everything you want to know about DIRECTV

SALES

Where to buy and dealer information

COMMERCIAL

Apartments, condos, restaurants, offices, etc.

DSS PRODUCTS

Compare the brands

CUSTOMER SERVICE

General information

Enjoy the 1997 NFL season with **NFL SUNDAY TICKET™** on DIRECTV® for only \$79.50. That's a 50% savings off the regular season price! Simply purchase a DSS® system and subscribe to Total Choice® programming between August 6th and September 14th to become eligible for this amazing offer.*



New to DIRECTV? Get an overview of DIRECTV programming and services to find the information you are most likely to be interested in. With quick links and brief descriptions of our most requested information you will see why DIRECTV is "Satellite TV At Its Best."

Were you an Alphastar subscriber, and do you reside in the continental United States? If so check this out.



Visit our Comparison Chart to see how the others stack up to DIRECTV.

Enjoy local channels and DIRECTV too! Off-air antennas can deliver local TV broadcasts with the ease of your remote.

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YES YOU CAN!

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HUMAN RESOURCES

FEEDBACK

HOME

Enjoy Local Channels and DIRECTV® Too!

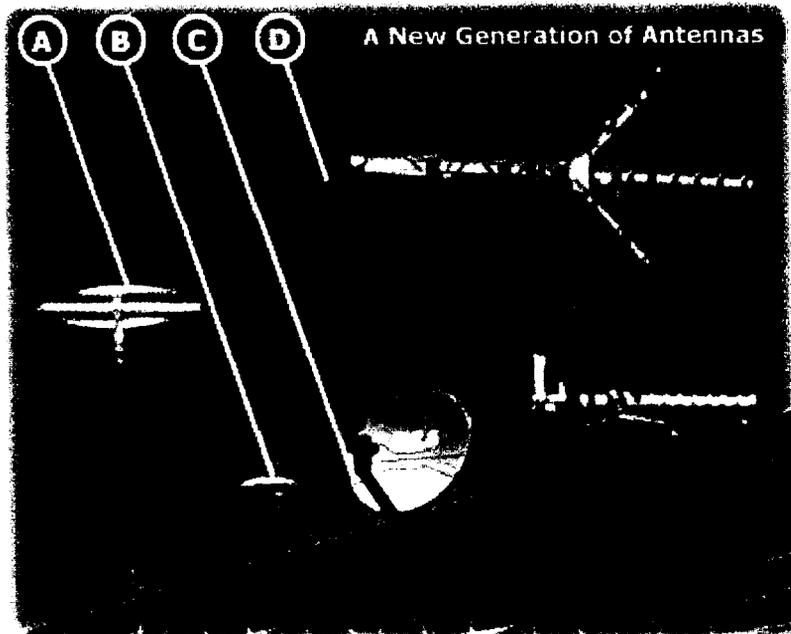
TV ANTENNAS FIND NEW ROLE IN HIGH-TECH WORLD

What do martinis, cigars and TV antennas have in common? They're all throwbacks to the '50's that are cropping up again in the American landscape. The latest among these are TV antennas, which are emerging as the receiver of choice for local TV channels among the millions who are upgrading their home entertainment systems with Digital Satellite Systems and pizza-sized satellite dishes, which receive programming from carriers such as DIRECTV.

Federal law places restrictions on the ability of national direct broadcast satellite companies such as DIRECTV to deliver broadcast network programming. As a result, off-air-antenna manufacturers such as Winegard Company have seen sales skyrocket.

According to Winegard's Hans Rabong, "Off-air antenna sales have increased significantly because consumers are realizing that the combination of a DSS system and an off-air antenna is unbeatable. You get more programming networks than most cable systems with great digital picture and sound from the mini-satellite dish service, as well as free local programming from the TV antenna."

Faced with a choice of using cable for local channel access or a simple TV antenna, many consumers are choosing to rid themselves of cable and its continually rising costs.



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.

For those in the market for a DSS system, industry leader DIRECTV recommends an off-air antenna to pull local broadcasts for free. In addition to the traditional rooftop antennas, the satellite industry has sparked the birth of a new generation of antennas tailored to individual needs. Some types include:

A. Omni/semidirectional, UHF/VHF antenna

This antenna is ideal for consumers who live between two or more television transmitting stations because of its ability to pick up signals from different directions. Its compact size allows the antenna to be conveniently disguised behind a satellite dish.

B. Omnidirectional, UHF/VHF antenna

This saucer-shaped antenna, the latest breed of new generation off-air antennas, mounts easily on the roof and picks up most television signals in a 360-degree radius. The antenna's compact size allows it to be hidden almost out of sight.

C. Imbedded off-air antenna

With this third generation DSS system, RCA has developed an off-air antenna that is imbedded directly into the 18-inch satellite dish and is virtually invisible to the eye. Although this may seem like the ideal solution, consumers should be aware that other factors might affect antenna performance such as broadcast signal proximity and position of the satellite dish to broadcast signal location.

D. Directional UHF/VHF antenna (traditional rooftop antenna)

A UHF/VHF antenna will provide the best performance of all antenna types. Although it is relatively larger than most of the new generation off-air antennas, it will work well at much greater distances from the television station.

CHOOSING AN ANTENNA THAT IS RIGHT FOR YOU

No single off-air antenna is the best solution for every customer. For optimal signal strength, when installing the antenna, consumers should consider the direction/location of the signal from the antenna, distance of the antenna from the signal location, obstructions such as mountains and tall buildings, and the building material of the home.

Additional accessories are also available to strengthen television reception such as external amplifiers, ghost cancelers, or simply replacing the old cable that connects the antenna to your television.

Every DSS system allows consumers a seamless way to see their local TV channels as well as switch to national programming from DIRECTV with the touch of a button on their DSS remote control. For more information regarding any of the antennas or accessories mentioned, inquire at a local electronics retailer such as Radio Shack. For information on DIRECTV programming services call 1-800-DIRECTV.

Restrictions apply. Programming, pricing, terms and conditions subject to change. Hardware and programming sold separately. Equipment specifications may vary in Alaska. © 1997 DIRECTV, Inc. DIRECTV and DSS are registered trademarks of DIRECTV, Inc., a unit of Hughes Electronics Corp.



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Enjoy Local Channels and DIRECTV® Too!

HERE'S HOW YOU CAN GET YOUR LOCAL CHANNELS WHILE SUBSCRIBING TO DIRECTV PROGRAMMING.

1. WHAT OFF-AIR ANTENNA IS RIGHT FOR YOU?

Find out here. An off-air antenna connected to a DSS® receiver enables DIRECTV customers to receive local channels. Some DSS manufacturers

offer DSS-approved off-air antennas under brand names such as RCA, Sony and Toshiba. Off-air antennas can be rooftop, attic-mount or set-top models.



2. "LIFELINE" CABLE SERVICE

In areas that offer cable programming, customers can ask their cable company for "lifeline" cable service. This service carries the most basic cable channels, including local networks. Not all cable companies advertise this service and some do not provide it. So call your local company to find out if "lifeline" cable is available in your area.

And whether you use an off-air antenna or a "lifeline" cable hookup, accessing your local channels with DIRECTV is so easy! You just switch back and forth from DIRECTV programming to your local channels with the touch of a remote control button.

CAN'T GET LOCAL BROADCAST RECEPTION WITH AN ANTENNA? THEN YOU MAY QUALIFY TO GET OUT-OF-MARKET ABC, CBS, NBC, FOX, AND PBS AFFILIATES.

DIRECTV has an a la carte programming package called PrimeTime 24 which offers both East and West Coast affiliate feeds of: ABC (WJLA/Washington, DC and KOMO/ Seattle, WA), CBS (WRAL/Raleigh, NC and KPIX/San Francisco, CA) and NBC (WNBC/New York, NY and KNBC/Los Angeles, CA), and national affiliate feeds of FOX and PBS. To order this great package, you must meet the following two requirements:

1. You must live in an area where you cannot receive the local networks with a conventional rooftop antenna.

- and -

2. You must not have subscribed to a cable service within 90 days before the date you subscribe to the PrimeTime 24 Network Package from DIRECTV. The a la carte price of the PrimeTime 24 Network Package is \$4.99 per month, or 99¢ per month for individual affiliates.

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2. The DirecTV and PrimeTime 24 “Reform” Proposals Would Have a Devastating Impact on the Network/Affiliate System

DirecTV and PrimeTime 24 make slightly different, but equally radical, “reform” proposals.¹³ DirecTV urges that the “unserved household” limitation simply be scrapped, and that satellite companies be permitted to sell network programming to any dish owner who requests it by paying a “surcharge.” DirecTV Comments at 8. That proposal, if adopted, would amount to an unprecedented and ultimately devastating attack on the network/affiliate system. PrimeTime 24 urges that the objective definition of “unserved household” in Section 119 of the Copyright Act be abandoned in favor of a subjective test of “acceptable picture quality.” PT24 Comments at 8. As PrimeTime 24’s own experts have admitted, and as the Copyright Office has already found, however, that test would be completely unworkable. See U.S. Copyright Office, *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals* at 126 (Aug. 1, 1997) (hereinafter “Copyright Office Report”).

a. Abolition of the “Unserved Household” Limitation Would Inflict a Crushing Blow on the Network/Affiliate System

DirecTV recommends that the Section 119 compulsory license for satellite carriers be modified “to eliminate the ‘white area’ restriction, and instead to substitute a surcharge for receipt of network affiliate signals within 35 miles of a local television station’s city of license.” DirecTV Comments at 8. In its recent report, the Copyright Office has (mistakenly) suggested, with virtually no analysis, that an approach similar to this might provide a “temporary” solution to

¹³ This section discusses two of the satellite industry “reform” proposals. The remaining proposals are discussed on pp. 28-29 below.

disputes about satellite delivery of network programming.¹⁴ Copyright Office Report at 128-29.

The adverse consequences of DirecTV's proposal would be breathtaking -- and completely unprecedented. Congress and the FCC have uniformly, and correctly, concluded that it is contrary to the public interest to permit retransmission technologies (whether cable, OVS, or satellite) to import network programming that duplicates the programming available from local stations. Neither Congress nor the FCC has ever offered other retransmission technologies the option to violate that principle by paying a government-set fee. For example, the FCC has never allowed cable systems to import duplicative network stations in violation of the network nonduplication rules -- whether for payment of a "surcharge" or otherwise.¹⁵

Under the DirecTV approach, local stations' role of actually servicing their local communities by providing a unique (to each community) mix of local, syndicated, and network programs would be put at great risk for a rapidly growing segment of the population. Instead, local network stations would be relegated to the role of collecting rents -- set by the government -- from third parties that have taken over the role of delivering network programming to as many viewers as they can enlist as customers. (Those numbers are very large: DBS providers are adding more than 6,000 new subscribers per day. SBCA Comments, Appendix A.) DirecTV's proposal to convert local stations into rent collectors not only would deprive communities of

¹⁴ The Copyright Office's principal recommendation to Congress about the "unserved household" limitation, however, is not to abolish nonduplication protection for satellite delivery of network stations, but simply to have the FCC, rather the Copyright Act, provide that protection: "If the section 119 license is extended, the Copyright Office recommends that Congress amend the Communications Act of 1934 to provide, or direct the FCC to adopt, network exclusivity . . . protection for satellite retransmissions of broadcast signals." Copyright Office Report at xix-xx (summarizing conclusions); see id. at 117 ("The FCC has considerable experience and expertise in creating and applying nonduplication rules to the cable industry, and is capable of extending those rules to satellite."), id. at 131 ("the Office suggests that [network program exclusivity protection] be moved to the communications law and regulation"). The Copyright Office makes clear that its first choice is to have the Commission adopt new regulations of this type, and that the controversial "surcharge" proposal is a distant second best. Id. at 131.

“local voices,” it also would leave local stations unable to fulfill their public interest obligations.

In short, DirecTV would have Congress force the over-the-air broadcast networks -- which today deliver their programming as part of locally-customized packages through local outlets across the country -- to transform themselves into one-size-fits-all, generic national networks on the model of Nickelodeon, the USA Network or the Family Channel. This is obviously not in the public interest.

The payment of some government-set fee to local stations for violation of their rights could not possibly compensate for the destruction of the role of stations as the source of network programming for their viewers. For one thing, it destroys the intricate relationships between networks and their affiliates -- such as carefully scheduled promotional spots designed to encourage viewers of network programs to stay tuned for upcoming local programs. More profoundly, turning local stations into mere passive rent collectors -- rather than actual broadcasters -- would deprive stations of any opportunity to add value to their key customers: advertisers and national networks. A business that does not add value cannot expect to long survive. A shift from delivery of programming by local broadcast stations to one-size-fits-all national programming distributed via satellite would have a devastating effect on the 40% of Americans -- some 40 million television households -- who rely exclusively on free over-the-air broadcast television. Satellite subscribers willing to pay extra to receive distant network signals should not be permitted to be given “choices” that will inevitably harm the millions of Americans who choose not to (or cannot afford to) subscribe to multi-channel video systems.¹⁶

¹⁵ DirecTV also ignores the massive administrative burdens (e.g., proper surcharge calculation and distribution) that its proposal would create.

¹⁶ Similar policy considerations prompted Congress to include local mandatory carriage provisions in the 1992 Cable Act when it perceived that cable operators’ growing market power threatened the network/affiliate system

Nor, contrary to the Copyright Office's well-intentioned suggestion, is it plausible to expect abolition of the "unserved household" limitation to be merely a temporary step: once viewers see bypassing their local stations as an entitlement, it will be extraordinarily difficult to reintroduce the notion that local network stations are the exclusive source of network programming.

Destruction of the "unserved household" limitation would also hand satellite carriers enormous, and completely unjustified, competitive advantages over cable. First, satellite companies, unlike cable systems, would have no "must carry" obligation to deliver local broadcast stations to their customers. Second, satellite companies would have no obligation equivalent to the network nonduplication rules that apply to cable: unlike cable systems, satellite companies could import distant network stations to enable their viewers to time-shift, to watch out-of-town sports events they would otherwise have to purchase in the marketplace, or for any other reason.¹⁷ There is no justification whatsoever for bestowing such undeserved competitive advantages on satellite companies, particularly ones that have flagrantly violated the existing law.

b. The Subjective Picture Quality Standard Proposed by PrimeTime 24 is Unworkable

In its Comments before the Commission (at 8), as in its previous filings with the Copyright Office, PrimeTime 24 advocates a subjective "picture quality" standard -- under which eligibility to receive network programming would turn on subjective views about the acceptability of TV reception, rather than on an objective test of signal strength. This alternative proposal would

(because operators could refuse to carry local stations) and, indeed, the very existence of free over-the-air television. See Pub. L. No. 102-385, 106 Stat. 1460 §§ 4, 5, 47 U.S.C. §§ 534 & 535; see generally Turner II, ___ U.S. ___, 117 S. Ct. 1174.

¹⁷ DirecTV's comments falsely state that cable operators "may distribute both local network affiliate signals and distant network affiliates to their subscribers." DirecTV Comments at 8. DirecTV is apparently unaware of the Commission's network nonduplication rules that apply to cable operators.

require the creation of a bureaucracy of unprecedented proportions and would be completely impractical.

As discussed above, Congress consciously and deliberately chose an objective standard for determining which households are eligible -- and which are ineligible -- to receive network programming by satellite. Congress knew that to choose a vague, subjective standard, such as “acceptable picture quality,” would turn enforcement of the Act into a morass. Instead, Congress chose a two-part standard, both parts of which are strictly objective: a signal of less than Grade B intensity, and no cable subscription in the previous 90 days. The alternative advocated by PrimeTime 24 -- a subjective “picture quality” standard -- would turn enforcement of the Satellite Home Viewer Act into a nightmare: it would transform every household claiming to receive an “unacceptable” picture over the air into its own, complex federal case.

Indeed, PrimeTime 24's own experts agree that a subjective picture quality standard cannot work. Before the Copyright Office, PrimeTime 24 offered written statements and live testimony from two experts: William Hassinger, a former staffer at the Commission, and W. Russell Neuman, a researcher who studies subjective reactions to video and audio. Since then, these experts have provided sworn testimony in the copyright lawsuits currently pending against PrimeTime 24. Their testimony vividly demonstrates that applying a subjective, picture quality standard would be completely unworkable. In particular, PrimeTime 24's experts agree:

- that views about whether a TV picture is “acceptable” are personal and subjective;
- that because “acceptability” is subjective, multiple observers are required to obtain valid data;
- that the stated opinions of people who have a stake in the outcome (in this case, dish owners who would like to get additional channels) are biased and unreliable; and

- that it would be necessary to use standardized, properly functioning equipment to do the tests, rather than the homeowner's own equipment, which may not be properly installed.

Each of these points is described in detail below.

- i. **Opinions About Whether a Particular Television Picture is "Acceptable" Are Highly Subjective**

PrimeTime 24's experts confirm the obvious: that statements about whether a particular television picture is "acceptable" are subjective opinions. Mr. Hassinger, for example, testified that asking an individual "do you find this picture acceptable to you" is "a subjective question."¹⁸ Mr. Neuman confirms that ratings of picture quality are strictly "personal" and that people have "a broad range of tastes for different image characteristics."¹⁹

- ii. **Because "Acceptability" is Subjective, Many Neutral Observers Would be Required to Obtain Valid Data**

If one wished to make a determination about whether the "picture quality" that could be achieved from over-the-air reception at a particular location was "acceptable," it would be necessary to use a substantial number of observers to overcome the subjectivity that is inherent in such an assessment. This important principle is clearly stated in recognized standards for subjective assessments of picture quality, and has been firmly endorsed by PrimeTime 24's lead expert, Mr. Hassinger.

(A) **ITU Standards.** In 1995, the International Telecommunications Union published the most recent version of a "Methodology for the Subjective Assessment of the

¹⁸ Deposition of William Hassinger, May 23, 1997, Tr. 74; see also id. at 111 ("It would be a subjective response if we simply asked them to evaluate the picture using their own judgment").

¹⁹ Testimony of W. Russell Neuman, June 3, 1997, Tr. 457-58.

Quality of Television Pictures.” To overcome the subjectivity inherent in picture quality ratings, the ITU methodology calls for at least fifteen nonexpert observers to be used. These fifteen or more nonexpert observers must be carefully screened to ensure that they have good eyesight and do not suffer from color blindness. Id.

(B) Treatise. The treatise Transmitted Picture Assessment by John Allnatt -- on which PrimeTime 24's expert, Mr. Neumann, has relied²⁰ -- contains a chapter entitled “Method for Full-Quality Grading of Broadcast Television Pictures.” That chapter provides the following guidelines about the number of observers to be used and their qualifications:

"Generally, twenty or more [non-expert] observers are employed, non-expert in the sense that none work in television engineering, or in the photographic or allied fields involving visual arts. Immediately prior to a session, the observers are screened for visual acuity using appropriately scaled Snellen charts, and (except for monochrome tests) for color vision using Ishihara charts."

Allnatt, supra, at 125 (emphasis added).

(C) Views of PrimeTime 24's Lead Expert. Mr. Hassinger concurs with the ITU and the Allnatt treatise that multiple observers are required in light of the subjectivity of picture quality assessments. E.g., Hassinger Tr. 95 (“I don’t think a sample of one is appropriate”); Tr. 82-83 (“[E]ven among experts, you will find some spread of opinion. It's like we see two doctors or three doctors and not just one”). Mr. Hassinger believes that at least five observers would be needed to evaluate whether the picture quality that could be achieved at a particular location is subjectively “acceptable.” Hassinger Tr. 86, 109-110.

²⁰ See W. Russell Neuman & Shawn O'Donnell, Broadcast Television Signal Strength, Grade of Service and Picture Quality at 3 n.2 (Dec. 10, 1996) (citing Allnatt treatise).

iii. A Subscriber's Own Statements about Acceptability are Biased Because the Subscriber Knows He or She Will Get A Benefit By Giving the "Right Answer"

PrimeTime 24's experts agree that, in gathering data about whether a particular television picture is "acceptable," the data would be compromised if observers knew they would get a benefit for giving a particular answer. But that, of course, is precisely what happens when dish owners -- who have decided they would like to receive a distant network station by satellite -- are aware they can do so long as they say their picture quality is "unacceptable."

Mr. Hassinger, for example, admitted what common sense confirms: he said he would "find it unacceptable that a test panel were giving incentives to arrive at one answer rather than another," because that would tend to "skew the results." Hassinger Tr. 88-89. Similarly, he testified that telling people that they will get additional TV stations if they say their picture is "unacceptable" would be an improper attempt "to sway the observers in one direction as opposed to another." *Id.* at 90-91. For his part, Mr. Neumann -- who does research about subjective reactions to television pictures -- testified that he has never done a study in which observers were given a reward for giving one answer as opposed to another. Neuman Test. at 466. That procedure, Mr. Neumann testified, would "bias" the study and "would not be an appropriate methodology for assessing their opinion." *Id.*

iv. It Would Be Necessary to Use Standardized Equipment to Obtain Meaningful Information About Picture Quality

It would be necessary to use standardized equipment if Congress were to adopt a subjective "acceptable picture" standard: otherwise, a household could be considered to be "unserved," not because of any problem with the signal available to that household, but because it

did not have the necessary equipment (such as a rooftop antenna) or its equipment was not functioning properly.

This is not an academic issue. Nearly two-thirds of all American television households subscribe to cable. There is little reason for cable subscribers to acquire (or to maintain) over-the-air antennas. As a result, when a cable subscriber becomes a dish owner, he or she will typically not have a rooftop antenna at all -- or may own one that has been neglected for many years.

The satellite industry freely admits this point. A satellite industry publication says this:

“[U]nderstand that the customer you were talking to probably has been a cable TV subscriber for a long time. And there's a good possibility that the last time they watched TV from an antenna was back when Jimmy Carter was President.”

Bob Shaw, Customers Get Local Channels Free With Every DSS, DSS Insider (Winter 1997).

In his deposition testimony, Mr. Hassinger likewise acknowledged the obvious: that one cannot determine what type of reception a household could get from a rooftop antenna if the household does not have one. Hassinger Tr. 134. He also testified that he would need to be sure that the household had “good, clean connections” on the wires from the antenna down to the television set, because otherwise the TV station's signal might be needlessly degraded. Id. at 134-35. But it would obviously be much easier to use standardized equipment in good working order than to conduct a complex audit of the customer's antenna (if any), wiring, VCR, and television, and of all of the connections between these various components.

v. **Congress Considered, and
Correctly Rejected, A Subjective
Standard for Eligibility in 1988**

As discussed in the Statement of Michael Remington (Exhibit 1 hereto), Congress has already carefully considered -- and rejected -- a subjective test for eligibility to receive network service. In 1988, when Section 119 was originally being drafted, the satellite industry urged Congress to adopt a subjective standard. In response, the House Judiciary Subcommittee with jurisdiction over copyright matters prepared a draft bill that would have made eligibility depend on subscriber affidavits about picture quality. The Subcommittee rejected that proposal, however, because it would undercut copyright protection and provide no meaningful protection for the network/affiliate system. PrimeTime 24's current effort to change the law to retroactively "bless" its massive violations of the Copyright Act should likewise be rejected.

3. **The Objective "Grade B Intensity" Standard is
the Best Available Proxy for Picture Quality**

In 1994, researchers from the Field Testing Task Force of the FCC's Advisory Committee on Advanced Television Service conducted field tests in Charlotte, North Carolina. The purpose of these tests was to compare the performance of conventional (analog) TV signals and digital signals. As part of the field work, neutral researchers collected data, at about 200 different locations about both (a) the signal strength of the analog signals (in dBu units) and (b) subjective ratings (by several expert viewers) of the resulting picture quality. Although collected for a different purpose -- to compare digital and analog broadcasting -- the data show there is in fact a strong relationship between signal strength and picture quality. See Engineering Statement of Jules Cohen ¶ 11 (Exhibit 2 hereto); Declaration of Richard Boyce. (Mr. Boyce's Declaration is

attached as Exhibit 4.)²¹ In short, far from being an outmoded proxy for acceptable picture quality, Grade B intensity is shown by very recent research data to be an excellent proxy.

III. THE SATELLITE INDUSTRY'S OTHER "REFORM" PROPOSALS ARE EQUALLY WITHOUT MERIT

SBCA, DirecTV, and/or PrimeTime 24 make several other proposals to alter the satellite carrier compulsory license in Section 119 of the Copyright Act. With one exception, those proposals are equally lacking in merit.

A. Local-to-Local Retransmissions.

SBCA and DirecTV contend that Section 119 of the Copyright Act should be amended to clarify that retransmission of a local network station into its own market is permissible. NAB takes no position about whether such local retransmission is now permissible or should be made permissible under the Section 119 license. NAB believes, however, that any such compulsory license would be appropriate only to the extent that conditions are imposed that protect localism and exclusivity. In particular, local satellite retransmissions of signals should be subject to an "if any, then all" condition. That is, to qualify for the compulsory license in any particular television market, if the carrier proposes to carry any local station, it must carry all television stations licensed to communities in that market. Such a condition could properly be imposed as part of the compulsory license under the Copyright Act.

²¹ PrimeTime 24 itself has endorsed the validity of these data by presenting them to the Court in the infringement case against it in Miami. PrimeTime 24 was apparently unaware at the time that the data defeat its claims. In other forums, PrimeTime 24 has contended that a study conducted in Pittsburgh for its expert, Russell Neuman, supposedly shows a lack of correlation between signal strength and picture quality. That study is multiply, and fatally, flawed, see Engineering Statement of Jules Cohen ¶¶ 12-13 (Exhibit 2 hereto), as PrimeTime 24 concedes by not calling it to the Commission's attention in its Comments here.

B. The 90-Day Rule.

SBCA and DirecTV contend that it is anticompetitive to bar cable subscribers from receiving distant network stations by satellite. But as with the sunset issue, that contention ignores a crucial distinction: cable systems deliver local network stations; satellite carriers deliver distant stations. Congress correctly, and responsibly, concluded that it did not want to encourage viewers lightly to switch from viewing local stations to viewing distant ones. When and if satellite carriers develop the capacity to offer local stations by satellite -- as discussed below -- it will then be time to revisit this rule.

IV. NO CHANGES SHOULD BE MADE TO THE PROGRAM ACCESS RULES

BellSouth and Bell Atlantic argue that the Commission needs to expand the program access rules created under the Cable Act of 1992 to ensure access by new multi-channel video providers to the most attractive programming. Most of their comments concern programming created for distribution on cable systems, matters on which NAB takes no position. Bell South (Comments at 16), however, goes further and requests the Commission to impose conditions on television stations' exercise of their retransmission consent rights. NAB strongly opposes any such measures.

The amendments to Section 325 of the Act, 47 U.S.C. § 325, enacted in 1992 were intended to establish a free market in the rights to retransmit the signals of broadcast stations in order to redress the economic imbalance that had been created by cable systems and other video distributors' ability to resell broadcast signals without compensating stations. *See* S. REP. NO. 92, 102d Cong., 1st Sess. 34-38 (1991). There was no suggestion during the Congressional debates in 1992, and there is no basis for any conclusion now, that the abuse of vertical integration that lead

to program access rules being placed on cable program providers is likely to occur with respect to the retransmission consent negotiations with individual broadcast stations.

The restrictions on retransmission consent rights that Bell South proposes would unfairly prevent broadcasters from obtaining the benefits of the popularity of their program offerings and would have the effect of reinstating the economic imbalance that the Commission and the Congress concluded existed before 1992. *See Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd. 4962, 5041 (1990). Whatever changes the Commission determines may be needed in the program access rules, they should not be extended to impair individual television stations' right of retransmission consent.²²

V. THE ABILITY OF FREE, OVER-THE-AIR TERRESTRIAL TELEVISION TO COMPETE IN THE VIDEO MARKETPLACE WILL DEPEND UPON CONSUMERS' ABILITY TO ACCESS SUCH PROGRAMMING AND FOR BROADCASTERS TO BE ABLE TO SITE, CONSTRUCT AND MODIFY ANTENNA SITES NEEDED TO TRANSMIT PROGRAMMING

The Congress and the Courts have acknowledged and helped foster the notion that the audience should have access to broadcast programming. But, we are concerned that certain FCC rules do not further that principle well enough.

NAB views the 1992 Cable Act and the recent Supreme Court affirmation of the cable "must carry" rules as key examples of government recognition of this principle of consumer access to broadcast programming. Similarly, the Telecommunications Act of 1996 included a

²² In *Implementation of the Cable Television Act: Signal Carriage Issues*, 8 FCC Rcd. 2965, 3006 (1993), the Commission did bar exclusive retransmission consent agreements between cable systems and television stations. The Commission then committed itself to "revisit this issue in three years." Despite the passage of more than four

provision that gives viewers a new right to construct and employ outdoor antennas to receive, among other things, the signals of over-the-air, terrestrial television stations. We trust the Commission will adopt a “cable pass-through” must carry rule for digital television stations when it begins that promised rule making. However, it also is essential that all viewers -- including current cable subscribers -- have the option of constructing and employing an outdoor reception antenna to receive today’s analog and tomorrow’s digital TV signals.

Particularly in light of the current timetable for television stations’ rapid transition to digital facilities, the Commission must ensure that broadcast programming is made available to the audience. However, there are FCC rules and pending proceedings that threaten this principle and well may deprive the public of broadcast service and important public service programming, now and in the future. Below we address two such regulatory areas:

(A) The need for FCC “reception antenna” preemption rules that implement effectively the will of Congress; and

(B) The preemption, where necessary, of local land use and other non-federal restrictions on the siting of new or modified broadcast facilities -- particularly in the context of TV stations’ DTV transition and the siting of radio facilities displaced from TV towers due to the transition.

Also related directly to these matters is the Commission’s ongoing rule making on cable television inside wiring. Along the lines of the considerations embodied in the Commission’s “over the air reception devices” or “OTARD” proceeding, especially the “multiple dwelling unit” (“MDU”) phase of that proceeding, the cable inside wiring proceeding addresses important issues of access. This is a time when MDU owners are increasingly excluding competitive providers of multichannel video services from their premises (in favor of providers either owned by MDU

years, the Commission has not yet begun to reexamine this rule. NAB urges the Commission to undertake such an inquiry promptly.

owners or those who provide substantial fees to MDU owners).²³ Particularly in light of these activities of MDU owners, it is essential that the Commission, in this proceeding and others, take regulatory steps affording widespread access.

In order to promote competition and to facilitate the goals expressed in the Telecommunications Act of 1996 and the Commission's own *Notice* in this proceeding, broadcasters must be able to reach all of the audience within their service areas, including audience members residing in MDUs. Concerning cable inside wiring, the FCC must adopt a regulatory structure under which broadcasters, cable operators, telephony providers and other multichannel video providers are given substantially equivalent access to inside wiring, including MDU inside wiring. Just as effective must carry rules ensure that cable operators are not able to stifle competition over their systems, MDU owners must not be permitted to stifle competition by maintaining bottleneck control over their controlled premises.

By taking coordinated action in all these proceedings, the Commission may achieve the essential goal of ensuring US citizens' universal access to free, over-the-air broadcast services. This should be the case regardless of where the consumer resides and regardless of whether cable television or other multichannel providers offer service to his or her community or dwelling facility. Such a regime of universal access to over-the-air broadcast stations is all the more important in the near-term era of digital availability of HDTV and multiple standard definition offerings by local stations.

²³ See Comments of the North Carolina Cable Telecommunications Association in CS Docket No. 97-141, filed July 23, 1997, at 1-2.

A. The Commission Must Adopt “OTARD” Rules That Will Afford the Consumer Access to Terrestrial Television That Was Envisioned by the Congress in the Telecommunications Act.

On the matter of “receive antenna” preemption, the Commission has adopted -- in response to Section 207 of the Telecommunications Act of 1996 -- a set of preemption regulations which unfortunately are far less forceful and far more ambiguous than Congress has contemplated in its passage of the underlying statutory provision. Moreover, the FCC has only adopted rules governing preemption where the viewer has an ownership interest in the property upon which the antenna would be employed.

The Commission’s *Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rule Making* is now the subject of several reconsideration petitions, including an NAB-supported petition filed by the Network Affiliated Stations Alliance (“NASA”). In its decision the FCC adopted rules that preempt – to a degree – zoning and homeowners association restrictions on the placement and use of rooftop antennas on a private home (or where the viewer has a direct ownership interest in the property upon which the antenna is located or planned to be located).

We also have participated in the Commission’s “second phase” proceeding, which has sought further comment on preemption of antenna restrictions in the scenario where television viewers are living in apartment houses and the like. Here the viewer does not possess the kind of “ownership interest” to which the FCC’s rules thus far apply. Instead, the antenna would be installed on MDU property owned by a landlord, or on common property controlled by a condominium or homeowners’ association. In each of these filings broadcasters simply have urged the Commission to adopt regulations that implement the will of Congress and preempt

restrictions that impair a viewer's ability to construct and use an outdoor antenna to receive the signals of terrestrial TV stations. We also have opposed the notion of the Commission undertaking *de novo* analyses of these issues and adopting rules that *will not* be effective in preempting such restrictions.

Thus far the FCC only has addressed one class of viewers in adopting "receive antenna" preemption – private homeowners -- and it has failed to adopt effective preemptive regulations even for that class, as explained in filings submitted by NASA and NAB in the reconsideration process. For viewers residing in MDUs, it seems clear from a reading of the Commission's *Further Notice of Proposed Rule Making* that the agency may not fulfill Congress' will. Rather, the FCC's course seems to be that of adopting "politically correct" rules that defer to municipality, homeowners association and building owner interests.

Here the FCC *has* embarked on seemingly *de novo* reviews of these matters, adopting or suggesting a series of "middle grounds" despite the fact that the Congress has made the public policy determinations here and has required unambiguous preemptive action by the Commission. As such, this FCC course amounts to an evasion of the Commission's statutory responsibility.

Clearly, the Commission and its staff must review the record of this proceeding (CS Docket No. 96-83) and question whether the FCC's adopted rules -- as well as its proposed rules -- are responsive to the will of Congress. To be sure, certain representatives of cities and towns have expressed their displeasure with the notion of preemption. However, their argument is with the Congress -- and Congress has acted. Their complaints should have absolutely no bearing on the FCC implementing the statute passed by the Congress. Plainly, *all* viewers now have Congressionally-established rights to employ outside antennas. Reduced to its simplest terms, the Commission is *required* by Congress to promulgate regulations that prohibit *all* restrictions that

impair a viewer's ability to receive terrestrial TV signals through an over-the-air reception antenna. Such action is long overdue.

B. The Siting, Construction and Use of New or Modified Television and Radio Transmission Facilities Deserves Federal Preemption Protection

Also on the matter of federal preemption, it is essential that the Commission confront a fundamental reality involved not only in the DTV "rollout," but also in the effort of *any* broadcaster trying to modify a tower or site a new antenna. The issue is obtaining prompt approval for such new or modified tower sites from local and/or state authorities.

Every month, more and more broadcasters are facing ever-increasing difficulties in siting new or modified facilities. These problems are also being experienced by every other terrestrial, spectrum-using firm. Indeed, these delays are threatening the core of the Commission's allocation and licensing scheme for broadcasting and for other services (*e.g.* PCS, where the Commission has compiled a growing record of "construction moratoria" and other local intransigence).

Without the Commission adopting a preemptive stance on the siting of new and modified towers/antennas, it will be difficult if not impossible for TV stations to inaugurate digital transmission according to the plans and timetables envisioned by those in government as well as in the TV industry. Recent trade press reports have been replete with examples of the difficulty of certain major market stations in finding new antennas sites due to local zoning and local procedural restraints. But, these problems affect every TV station in every size market.

This also is a radio issue. From a review of the FCC's databases, it appears that hundreds of FM stations have placed their antennas on television transmission towers. TV licensee and other tower owners have maximized the occupancy on their towers -- to the very limits of "wind

loading” and other structural safety concerns. As a result, a substantial number of these radio stations may have to find different sites as the TV stations involved add DTV antennas to their tower structures.

At the NAB State Leadership Conference in March of this year, a radio broadcaster experiencing siting problems asked FCC Chairman Hundt what could be done. He replied:

“...we are trying to be diplomatic in our dealings with the cities and the states. But I think that we have a very strong story to tell them from the FCC about the public interest in having tower siting be facilitated in the fastest possible way....I do think that the FCC ought to be there to be an advocate and maybe, to the degree the law gives us powers, to be more than a mere advocate for the most expeditious proceedings at the state and local and municipal level to solve the tower siting problem...”

The answer of course, is prompt Commission adoption of preemption rules applicable to all tower siting controversies. And now the FCC has been presented with recommendations on how this can be achieved.

On May 30, 1997, NAB and MSTV filed a joint Petition for Further Notice of Proposed Rule Making, again requesting this relief. The NAB/MSTV petition observed that, in adopting rules for the provision of DTV, the Commission has acknowledged the critical importance of converting to digital technology to the future of broadcast television. But, the ambitious and mandatory DTV build-out schedule contemplated by the Commission may prove unworkable, given the obstacles posed by state and local governments to the alteration of existing towers and the construction of new ones.

Broadcasters often have faced considerable difficulties in siting, constructing and modifying broadcast towers. Citizens and local governments have increasingly raised concerns over such issues