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

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In the Matter of)
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Definition of an)
Over-the-Air Signal of)
Grade B Intensity for Purposes)
of the Satellite Home Viewer Act)
)
To: The Commission)

RM No 9335

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**FURTHER RESPONSE OF THE NATIONAL ASSOCIATION OF
BROADCASTERS TO EMERGENCY PETITION FOR RULEMAKING FILED
BY THE NATIONAL RURAL TELECOMMUNICATION COOPERATIVE**

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Benjamin F.P. Ivins

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Dated: September 4, 1998

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**FURTHER RESPONSE OF THE NATIONAL ASSOCIATION OF
BROADCASTERS TO EMERGENCY PETITION FOR RULEMAKING FILED
BY THE NATIONAL RURAL TELECOMMUNICATION COOPERATIVE**

The National Association of Broadcasters (“NAB”)¹ hereby submits its further response to the Emergency Petition filed by the National Rural Telecommunications Cooperative (“NRTC”) on July 8, 1998.

On July 17, 1998, NAB filed an extensive preliminary response (“NAB’s Preliminary Response”) to NRTC’s emergency petition, in which it demonstrated that the Commission does not have the authority to grant the relief NRTC seeks namely to change the statutory definition of Grade B intensity. NAB further showed that even if the Commission had the relevant authority, it would be a grave and unprecedented mistake to gut the limitations on the compulsory license created by Congress in the Satellite Home Viewer Act (“SHVA”): it would jeopardize the network/affiliate system that has brought free television and local news to nearly all Americans, and it would be completely inconsistent with policies that the Commission has applied for more than 30 years in its

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

network nonduplication and other program exclusivity rules. Finally, NAB demonstrated that, contrary to NRTC's claims, the enforcement of the SHVA by the courts is in no way jeopardizing lawful competition between the satellite and cable industries. NAB hereby incorporates its July 17, 1998, Preliminary Response by reference.

On August 6, 1998, NRTC filed a reply to NAB's preliminary response. NAB's responses to NRTC's reply are as follows:

1) The impression created in NRTC's Reply that "more than a million satellite consumers" are in danger of "imminent disenfranchisement" as a result of the preliminary injunction granted by the federal district court in Miami is pure bunk. First, nothing is required to happen "imminently," because the broadcast plaintiffs in Miami have voluntarily and unconditionally agreed not to enforce the service termination provisions of that injunction until January 1, 1999.² The reason for doing so was to provide additional time to assist consumers in making an orderly transition to a legal means of receiving network programming. While the Satellite Broadcasting and Communications Association ("SCBA") has announced that, notwithstanding plaintiffs' offer, its industry is hell bent on disconnecting subscribers by October 8, 1998, there is no requirement that they do so. Accordingly, the "imminent" nature of disconnects is solely of NRTC's and other satellite service providers' own doing.

Second, it should be made clear precisely what these million subscribers are being disenfranchised from and, more importantly, what they are not being disenfranchised from. Subscribers will be "disenfranchised" from receiving an illegal service NRTC knowingly and willfully provided. They will not be disenfranchised from receiving CBS

² See Appendix A attached hereto consisting of the filing by plaintiffs in Miami August 27, 1998.

and Fox network programming because the vast majority of them, many of whom reside in the Grade A contour of local affiliates, will be able to obtain those networks' programs from their local affiliates, either with no additional effort, or through the installation of a rooftop antenna, precisely as Congress intended.

2) NRTC inexplicably continues to confuse Grade B contour with Grade B intensity. Its statement (Reply, p. 2) that the Miami Court's preliminary injunction "prohibited the retransmission of network signals by satellite to any subscribers residing within the Grade B contours of local affiliates" is belied by its own footnote to that statement describing the Court's injunction in terms of "signal intensity" and preserving the right of NRTC always to conduct signal intensity tests. (See NAB Preliminary Response at 20-21).

3) While NRTC's concern with the public interest impact on the impending disconnect of its subscribers is laudable, its attempt to shift the blame for these terminations of service and the disruptions they will cause from itself to broadcasters is shameful. On August 13, 1998, the Court in Miami released a redacted version of its July

10, 1998, order granting the preliminary injunction, a copy of which is attached as Appendix B. On page 4 of the August 13 Opinion, the Court properly places the blame on distributors such as NRTC for the disruption that will occur:

“ . . . PrimeTime’s assertion that [the injunction] will ‘wreak havoc with the marketplace’ is an exaggeration and results largely from PrimeTime’s decision to flout the statute and the Magistrate’s ruling, albeit a recommendation, while this motion was pending ”³

Moreover, it is NRTC, for its own selfish political reasons, that is choosing “imminently” to disconnect subscribers by October 8.

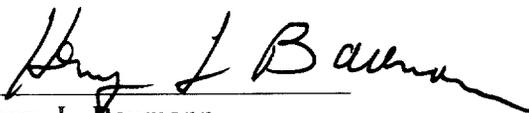
4) NRTC attacks the network-affiliate system, which Congress, the Courts, and the Commission have all found to have provided extraordinary societal benefits (NAB Preliminary Response at 12-15) as being “a blatantly monopolistic attempt by the broadcasting industry to prop-up the local affiliates and artificially support their economic well-being, all at the expense of competition, consumers and consumer choice,” and as a “blatantly socialist approach to media.” NRTC would seem to bite the hand that feeds. It is indeed extraordinary that NRTC, for whom network programming seems so essential, but who pays not one red cent for its creation and production, and who already is permitted by law to take for about \$2.50 per month per subscriber and sell for \$6 to \$7 to a prescribed set of subscribers, feels it should have an additional government-created right to take network programming, at a government prescribed rate, and sell it to almost anyone it wants in competition against the very system that created it. What a perfect description of a “blatantly socialist approach to media.”

5) NRTC says much about what Congress could have said, but didn't, with respect to the Commission's authority to change the definition of Grade B signal strength intensity. In this regard, it must be remembered that what is at issue in this proceeding is a copyright statute, not the Communications Act. NRTC's position apparently is that within the context of a copyright law creating a compulsory license, which is itself a narrowly drawn exception to program owners' exclusive rights to prohibit any retransmission of their works, Congress intended to provide the Commission with unbridled discretion to define the scope of the compulsory license as broadly as it might choose. Had Congress intended that result, it would have clearly said so.

Conclusion

For the foregoing reasons, the Commission should recognize the limitations on its jurisdiction in this area of copyright law and should deny NRTC's petition.

Respectfully submitted,



Henry L. Baumann
Benjamin F.P. Ivins

NATIONAL ASSOCIATION OF
BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036

Dated: September 4, 1998

³ See p. 17 of Slip Opinion: "A majority of the damages PrimeTime will incur results from their persistence in signing up a large number subscribers in violation of the SHVA even after the Magistrate Judge ruled in Plaintiffs' favor."

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Further Response Of The National Association Of Broadcasters To Emergency Petition For Rulemaking Filed By The National Rural Telecommunication Cooperative was mailed this 4th day of September, 1998, via First Class Mail, postage prepaid, to the following:

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Washington, D.C. 20001

Angela L. Barber

Appendix A

UNITED STATES DISTRICT COURT FILED BY _____ D.C.
SOUTHERN DISTRICT OF FLORIDA

98 AUG 27 PM 4: 28

CARLOS JENKE
CLERK U.S. DIST. CT.
S.D. OF FLA.-MIAMI

CBS Broadcasting Inc., et al.,)
)
 Plaintiffs,)
)
 v.)
)
 PrimeTime 24 Joint Venture,)
)
 Defendant.)
 _____)

CIV-Nesbitt No. 96-3650
Magistrate Judge Johnson

**PLAINTIFFS' MOTION FOR IMPOSITION OF CONDITIONS
ON IMPLEMENTATION OF PRELIMINARY INJUNCTION BY PRIMETIME 24**

As the Court is aware, plaintiffs have consistently been concerned about the loss of goodwill that local network stations (as well as the networks themselves) suffer when PrimeTime signs up ineligible customers for its service, and later terminates the service. Experience has shown that viewers whose service is terminated frequently become angry at their local network station and threaten never to watch the station again. See, e.g., Report & Recommendation at 43-45; 6/2/97 Tr. at 71-72 (Farr); 6/2/97 Tr. at 152-53 (Schmidt); Declaration of William Sullivan (Tab 14 to Plfs.' Motion for Preliminary Injunction), at ¶¶ 9-10, Att. A; Declaration of Alrick Thedwell (Tab 16 to Plfs.' Motion for Preliminary Injunction), at ¶ 6 and Att. A; Subscriber Questionnaires (Plaintiffs' Trial Exhibit 508).

In the past, PrimeTime 24 has sought to inflame ineligible subscribers against their local stations when it terminates their network service. See, e.g. Declaration of Jerrell W. Birdwell (Tab 6 to Plfs.' Motion for Preliminary Injunction), at ¶ 8; Declaration of Sherry Burns

(Tab 7 to Plfs.' Motion for Preliminary Injunction), at ¶¶ 9-10, Att. A; Declaration of Ben Tucker (Tab 17 to Plfs.' Motion for Preliminary Injunction), at ¶¶ 10-13 and Att. A. It is likely that (absent restraint) PrimeTime 24 will continue to do so. Because PrimeTime 24 and its distributors lawlessly signed up huge numbers of ineligible subscribers while the preliminary injunction motion was pending, the threat to the goodwill of CBS and Fox and their affiliates as those subscribers are terminated is particularly acute.

To protect plaintiffs (and the public) from still further harm from PrimeTime 24's unlawful conduct, plaintiffs request that the Court impose the following conditions on PrimeTime 24's implementation of its duty under the preliminary injunction to terminate ineligible customers signed up after March 11, 1997:

1. Substantial advance disclosure of termination, with information about options for obtaining local stations. To make the transition from reliance on satellite delivery of network programming to local stations, PrimeTime 24's ineligible customers will need to obtain and install an over-the-air antenna or subscribe to a "lifeline" cable service that offers local broadcast stations. These steps take time. A customer who receives little or no notice that his or her satellite network service is about to be terminated may not be able to take these steps before the unlawful satellite service is ended. Viewers who are given little or no notice of this change in their television service may, as a result, have no access at all to network programming for a period of time. These viewers are likely to be upset and angry -- and to turn their anger on their local network stations and/or the national networks.

This problem is entirely preventable. First, to provide viewers sufficient time to arrange for other options, PrimeTime 24 should give its customers at least 45 days notice that it will be terminating their satellite network service. Second, PrimeTime 24 should give its customers truthful information about the options available to them to obtain network programming from local stations. A form of notice containing these disclosures is attached to the proposed order submitted with this motion.¹

Termination of unlawful service to large numbers of PrimeTime 24 subscribers is likely to place a heavy demand on the limited number of vendors capable of installing rooftop antennas. To alleviate this problem, and to protect their own goodwill in light of the large number of ineligible customers who must be terminated, plaintiffs hereby stipulate that until January 1, 1999, they will not seek contempt sanctions or otherwise seek to enforce the preliminary injunction with respect to delivery of CBS or Fox network programming to customers who received CBS or Fox network programming from PrimeTime 24 as of July 10, 1998.

2. Advance notification to local stations of customers to be terminated. Some stations may be willing (for their own reasons) to waive their rights with respect to certain viewers who are predicted by Longley-Rice to receive a signal of Grade B intensity. If stations know in advance which households are scheduled to have their satellite network service terminated, they will have the opportunity to decide in advance whether to waive their rights with respect to those households. Accordingly, plaintiffs request that PrimeTime 24 be required to

¹Contact with customers about the termination process may be initiated either by PrimeTime 24 or by its distributors. Under Rule 65(d), the order requested by plaintiffs would apply to both PrimeTime 24 and to its distributors who have actual notice of the order.

provide to each CBS and Fox station, at least 45 days before the date of termination, a list of all post-March 11, 1997 subscribers predicted by Longley-Rice to be capable of receiving a Grade B intensity signal from that station, and who have not been tested and found to be incapable of receiving a Grade B intensity signal. These stations may then, if they so choose, notify PrimeTime 24 that they do not object to satellite delivery of network programming to particular households or in particular areas.²

Conclusion

PrimeTime 24 has made much in its court filings of the disruption that will supposedly occur if it is required to comply with the Copyright Act. Plaintiffs submit that the steps described above will go a long ways towards minimizing any such disruption and ameliorating the harmful impact of PrimeTime 24's lawbreaking on its ineligible customers. Accordingly, plaintiffs offer the attached proposed order, which sets forth procedures for the implementation of the Court's preliminary injunction and requires the use of a particular notification letter to subscribers affected by the Court's orders.

²Viewers who are predicted by Longley-Rice to receive a signal of Grade B intensity from more than one CBS station (or more than one Fox station) would need to obtain waivers from each such station.

Respectfully submitted.



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Attorneys for CBS Television
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Newsweek Stations Florida, Inc. KPAX
Communications Inc., LWVI
Broadcasting, Inc., and Retlaw Enterprises, Inc.

August 27, 1998

CERTIFICATE OF SERVICE

I hereby certify that I have, this 27th day of August, 1998, arranged for service of a true and correct copy of the Plaintiffs' Motion for Imposition of Conditions on Implementation of Preliminary Injunction by Primetime 24 Notice of Name Change upon counsel for the defendant as follows:

By Facsimile transmission and
U.S. Mail to:

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U.S. Mail to:

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Fax (617) 832-7000



David M. Rogato

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CBS Broadcasting Inc., et al.,)
)
 Plaintiffs,)
)
 v.)
)
 PrimeTime 24 Joint Venture,)
)
 Defendant.)
 _____)

CIV-Nesbitt No. 96-3650
Magistrate Judge Johnson

ORDER

It is hereby ORDERED that, in complying with the requirements of the July 10 Supplemental Order pertaining to subscribers who signed up for PrimeTime 24 after March 11, 1997. PrimeTime 24 shall take the following steps:

1. At least 45 days before terminating satellite delivery of CBS or Fox network programming to such a subscriber, PrimeTime 24 shall provide the subscriber with a notification in the form of Exhibit A hereto.

2. At least 45 days before terminating a subscriber that is predicted by Longley-Rice (in the manner specified in the Court's July 10 Orders) to receive a signal of Grade B intensity from a particular CBS or Fox network station, PrimeTime 24 shall provide the station with a list of all such subscribers. The CBS or Fox network stations may then, at their option, notify PrimeTime 24, with respect to particular subscribers, that the station does not object to continued satellite delivery of CBS or Fox network programming to those subscribers. This Paragraph 2 shall be applicable only with respect to CBS or Fox network stations for which plaintiffs have provided PrimeTime 24 a mailing address.

3. PrimeTime 24 shall set forth the steps it has taken to comply with the above requirements in the compliance reports required by the July 10 Supplemental Order.

United States District Judge

Exhibit A

(Form of Subscriber Notification)

Dear _____:

As you may know, PrimeTime 24 is permitted to deliver ABC, CBS, Fox, and NBC programming only to a limited number of households, and not to everyone. To qualify to receive network programming by satellite from PrimeTime 24, a household must be unable to receive an over-the-air signal of a certain strength from local network stations through use of a rooftop antenna. PrimeTime 24 does not obtain the copyrights necessary to deliver network programming to any other households.

A federal judge has made a preliminary finding that PrimeTime 24 has not restricted its service in the manner required by federal law. Specifically, the Court has found that PrimeTime 24 has sold network programming to many customers who are likely to be able to receive their local network stations over the air.

Because of these findings, the Court has ordered PrimeTime 24 to change its practices for signing up new customers, and to terminate service to certain customers who appear to be ineligible to receive it. PrimeTime 24 has determined, using the procedures specified by the Court, that your household is likely to be able to receive a signal of Grade B intensity from a local [CBS] [Fox] station. Accordingly, PrimeTime 24 is required to terminate satellite delivery of [CBS] [Fox] programming to your household.

There are two options available to you to continue receiving network programming after PrimeTime 24 terminates distant network service to your home. *First*, many viewers can obtain local network stations through use of an over-the-air antenna. Local electronics dealers in your area can probably help you to choose, purchase, and install an over-the-air antenna, or to check on the functioning of an antenna that you already have. *Second*, you may wish to purchase a basic, or "lifeline" cable service that provides local broadcast stations. Your local cable company (or companies) can provide you with more information about this possibility.

To ensure that you will have sufficient time to make the transition to viewing your local network stations, PrimeTime 24 is providing this notice **45 days in advance** of the day your PrimeTime 24 service will be terminated. (That is, delivery of [CBS] [Fox] programming from PrimeTime 24 service is scheduled to be terminated on [DATE].) You will therefore want to make arrangements quickly to obtain local network stations so that your access to network programming will not be interrupted.

Very truly yours,

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 96-3650-CIV-NESBITT

CBS INC.; FOX BROADCASTING
CO.; GROUP W/CBS TELEVISION
STATIONS PARTNERS, CBS
TELEVISION AFFILIATES
ASSOCIATION; POST-NEWSWEEK
STATIONS FLORIDA, INC.; KPAX
COMMUNICATIONS, INC.; LWVI
BROADCASTING, INC.; AND RETLAW
ENTERPRISES, INC.,

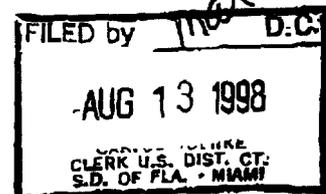
Plaintiffs,

vs.

PRIMETIME 24 JOINT VENTURE,

Defendant.

ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFFS'
MOTION TO UNSEAL

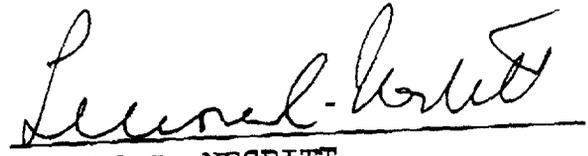


This cause comes before the Court upon Plaintiffs' Motion to Unseal Court's Order of July 10, 1998, filed August 11, 1998 (not docketed yet). After due consideration, it is hereby

ORDERED and **ADJUDGED** that Plaintiffs' Motion is **GRANTED** in part and **DENIED** in part. The Court's Order of July 10, 1998 (D.E. #260) is not to be unsealed. However, attached to this Order is a

redacted version of the Court's Order of July 10, 1998 which will not be sealed.

DONE and ORDERED in Chambers, Miami, Florida, this 13 day of August, 1998.



LENORE C. NESBITT
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 96-3650-CIV-NESBITT

CBS INC.; FOX BROADCASTING
CO.; CBS TELEVISION AFFILIATES
ASSOCIATION; POST-NEWSWEEK
STATIONS FLORIDA, INC.; KPAX
COMMUNICATIONS, INC.; LWI
BROADCASTING, INC.; AND RETLAW
ENTERPRISES, INC.,

SEALED ORDER ON MOTIONS FOR
CLARIFICATION AND
APPLICATION FOR BOND

Plaintiffs,

vs.

PRIMETIME 24 JOINT VENTURE,

Defendant.

FILED by *[Signature]*
JUL 10 1993
CARLOS WENKE
CLERK U.S. DIST. CT.
S.D. OF FLA. - MIAMI

This cause comes before the Court upon Defendant PrimeTime 24 Joint Venture's ("PrimeTime") Motion for Hearing on its Memorandum With Respect to Preliminary Injunction Bond, filed May 28, 1998 (D.E. #196), PrimeTime's Motion for Clarification and for Hearing, filed May 28, 1998 (D.E. #196), PrimeTime's Motion for Hearing on Motion for Clarification, filed May 28, 1998 (D.E. #198), Non-Party DirecTV, Inc.'s ("DirecTV") Motion for Clarification, filed June 1, 1998 (D.E. #204), DirecTV's Request for Hearing on its Motion for Clarification, filed June 1, 1998 (D.E. #206), DirecTV's Application for Bond Pursuant to Fed.R.Civ.P. 65, filed June 18, 1998 (D.E. #), DirecTV's Request for Hearing on its Application for

Bond, filed June 18, 1998 (D.E. #224), and Plaintiffs'¹ Motion for Leave to file Surreply to Correct Factual Inaccuracy in Defendant's Reply, filed June 12, 1998 (D.E. #218).

On May 13, 1998 (D.E. #193) the Court affirmed in part and reversed in part Magistrate Judge Johnson's Order granting Plaintiffs' Motion for Preliminary Injunction. The May 13th Order granted Plaintiffs' Motion for Preliminary Injunction and directed the parties to file a memorandum addressing the issue of a reasonable bond. On June 16, 1998 (D.E. #223) this case was scheduled for a hearing on the issue of a reasonable bond. The hearing was held on June 29, 1998 and oral argument was heard on the abovementioned motions.

I. PrimeTime's Motion for Clarification

PrimeTime seeks clarification of the Court's May 13th Order which substantially affirmed Magistrate Judge Johnson's Report recommending that Plaintiffs' Motion for Preliminary Injunction be granted. PrimeTime contends that the Court should not apply this injunction to subscribers that PrimeTime has signed up since the

¹ CBS Inc., Fox Broadcasting Co., CBS Television Affiliates Association, Post-Newsweek Stations Florida, Inc., KPAX Communications, Inc., LWWI Broadcasting, Inc., and RETLAW Enterprises, Inc. (collectively "Plaintiffs")

date Plaintiffs filed their Motion for Preliminary Injunction - March 11, 1997. PrimeTime also requests clarification of the use of Longley-Rice maps as a guideline in the preliminary injunction. Furthermore, PrimeTime contends that the injunction should not include a provision regarding cable television and that the Court should modify the consent and testing provisions of Plaintiffs' Proposed Order granting the injunction.

A. Scope of the Injunction

PrimeTime argues that the injunction should not apply to those subscribers that signed up for PrimeTime's services after the date Plaintiffs filed their motion for preliminary injunction - March 11, 1997. In fact, PrimeTime contends that such an injunction would be retroactive and would "wreak havoc" in the marketplace. During the hearing, PrimeTime stated that it has signed up nearly subscribers since March 11, 1997. Thus, PrimeTime requests that the injunction apply only as to future PrimeTime subscribers. In the alternative, PrimeTime seeks 180 days to comply with any injunction that applies to subscribers signed on since the date the motion for injunction was filed.

PrimeTime's characterization of the preliminary injunction as retrospective is incorrect. The injunction only applies to persons that PrimeTime signed up after Plaintiffs filed their Motion for

Preliminary Injunction. As PrimeTime itself states, Plaintiffs requested injunctive relief "running from the date they filed the motion." D.E. #196 at 3. Thus, applying the injunction to subscribers that signed up for PrimeTime's services after March 11, 1997, is not retrospective.

In addition, although the injunction will most likely affect numerous subscribers, PrimeTime's assertion that it will "wreck havoc with the marketplace" is an exaggeration and results largely from PrimeTime's decision to flout the statute and the Magistrate's ruling, albeit a recommendation, while this motion was pending. First, as previously noted in the May 13, 1998 Order, the injunction will only affect subscribers that live in "served" areas as defined by Congress. Second, the injunction is limited in that it will only terminate CBS and Fox programming. PrimeTime subscribers will still have countless other channels to view. Therefore, the Court will not alter the scope of the injunction as PrimeTime requests.

As to the number of days within which PrimeTime must comply with the injunction, PrimeTime has requested 180 days. Plaintiffs admit that PrimeTime should be given additional time to comply, but suggest that 45 days is sufficient. After considering oral argument and the pleadings, the Court finds that 90 days is

sufficient time within which PrimeTime must comply with the injunction.

B. Longley-Rice Maps

Next, PrimeTime seeks clarification as to the use of Longley-Rice maps in the Preliminary Injunction. PrimeTime contends that the use of Longley-Rice propagation maps will create several issues. For example, PrimeTime points out that hundreds of Longley-Rice maps will need to be created for nearly every market in the nation and that there are issues as to who should create the Longley-Rice maps and the accuracy of the creator.

Furthermore, PrimeTime questions whether the Longley-Rice maps will help in determining whether a prospective subscriber is eligible for CBS and Fox programming. The maps do not show street addresses or geographical boundaries. PrimeTime does indicate, however, that there is one company which purports to have created software that enables one to correlate street addresses with Longley-Rice maps; but, PrimeTime does not vouch for the software's reliability.

In addition, PrimeTime argues that there are more fundamental problems with the Longley-Rice maps. PrimeTime points out that several variables must be fixed and input into the model before a map can be generated, such as: 1) percentage of households that