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Before The
Federal Communications Commission
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
The Petition of NRTC	)	
Concerning The Definition	)	
of an Over-the-Air Signal	)	RM No. 9335
of Grade B Intensity for	)	
Purposes of the Satellite	)	
Home Viewer Act	)	
	)	
To: The Commission	)	

COMMENTS OF THE NETWORK AFFILIATED STATIONS ALLIANCE

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SUMMARY

The Satellite Home Viewer Copyright Act (the "Act" or the "SHVA") was adopted by Congress in 1988 to facilitate the delivery of broadcast network programming by satellite for private home viewing to subscribers who, because of distance, terrain or other factors, are unable to receive a signal of at least Grade B intensity with an outdoor rooftop antenna from a local station affiliated with that network. The Act created a limited, conditional, compulsory copyright license authorizing satellite carriers to uplink a distant network television station (without securing the station's consent and without having purchased in the open market the underlying copyrights for the station's programming) and retransmit that station by satellite for "private home viewing" to "unserved households," i.e., households that (1) cannot receive with a conventional outdoor rooftop antenna a signal of "Grade B intensity" from a local station affiliated with that network and (2) have not received the same network by cable within the previous 90 days.

The copyright license was narrowly crafted to facilitate satellite delivery of broadcast network stations, while at the same time, protecting the integrity of the copyright license local stations hold for the exhibition of their network's programming within their markets. Shortly after the SHVA was enacted, it became apparent that satellite carriers were exceeding the limits of their compulsory license on a massive scale by uplinking and delivering distant network stations to households that were, plainly, not "unserved." Perhaps the most egregious violator has been NRTC's business associate, PrimeTime 24, which two federal courts have recently found to have violated the Act on a massive scale.

Whether a household can or cannot receive a signal of Grade B intensity from a local affiliate can only be determined by an objective signal measurement test conducted at the household. The test set forth in the SHVA is not whether a household is *predicted* to receive a Grade B signal, but rather whether the household can *actually* receive the signal.

NRTC's Petition asks the Commission to ignore the plain language of the Act which requires an *actual* signal measurement to be taken at the household and to substitute in its place a *predicted* Grade B contour standard in which 100 percent of the population within the specified area is *predicted* to receive "over-the-air coverage" 100 percent of the time. The plain, unambiguous legal standard set out in the Act is an "actual" signal measurement standard--not a "predicted" contour standard.

NRTC appears, also, to be requesting that the Commission redefine the level of signal required to be classified as a signal of "Grade B intensity." The legislative history of the Act confirms that Congress intended to adopt the Grade B signal standard that was in effect when the Act was adopted.

Finally, NRTC requests the Commission to engraft upon the Act an "inside" receiving antenna standard to replace the "outdoor rooftop" antenna standard expressly set out in the statute.

NRTC is asking the Commission not to *interpret*, but rather to *rewrite* the Act. The Commission cannot rewrite the Act. Thus, to the extent NRTC is addressing its proposal to the Commission, rather than Congress, it is addressing the wrong forum.

NRTC goes to great length in discussing the need to make the satellite industry more competitive with cable but ignores the satellite industry's own claims of economic growth and robust competitiveness with cable. Overall, the satellite industry now has some 9.3 million

subscribers and experts predict it will likely hit 10 million before the year is out and 15 million by 2001. By its own admission, the satellite industry is a thriving industry experiencing tremendous growth. Perhaps the best evidence that satellite carriers are having no difficulty competing with cable is the candid acknowledgment by DirecTV that virtually *one-half (43%) of its subscribers are former cable subscribers!* In its recent video competition report, the Commission stated that according to a Nielsen Media Research survey, 80% of DBS subscribers, in contrast with 45% of cable subscribers, give a very high satisfaction rating to their service. Given the unqualified success that the satellite industry is enjoying, its not clear exactly what NRTC is complaining about.

NRTC's argument that it cannot compete with cable without infringing the copyrights of local stations is further belied by statements that satellite carriers are making to their subscribers. The satellite industry on the one hand claims that advances in antenna technology have created a "seamless switch" between over-the-air signals and satellite service while complaining to the Commission that outdoor antennas are not an alternative for consumers.

NRTC's Petition is confusing at best and reflects a fundamental misunderstanding of the Act, its public policy objectives and recent court decisions interpreting the Act. If adopted, its proposal would constrict the geographical area in which broadcast stations receive copyright protection for their network programs. Indiscriminate retransmission by satellite of duplicating network programming from distant network stations, if not checked, will undermine the economic foundation on which the nation's network/local affiliate distribution system is based. Preservation of the free, over-the-air national network/local affiliate distribution system was a core policy objective of the SHVA--a fact which has been obscured by the muddled cacophony of the

satellite industry's current debate. The demise of the free, over-the-air local television service would result in fewer, not more, programming choices--a result particularly harmful for those who cannot afford to pay for television service.

Enforcement of the Act, as written, will not, as NRTC claims, result in the loss of access to broadcast network service by millions of satellite subscribers. In fact, enforcement of the SHVA will only result in the termination of distant network service to those who are *illegally* receiving it. These subscribers will *not* lose network service. By definition, these subscribers are able to receive a Grade B signal, free, from their *local* network affiliate. To that extent, NRTC misrepresents the nature and effect of the recent ruling by the Miami court and the court's use of predicted Longley-Rice contour maps. The Miami court did not substitute, as NRTC contends, a *predicted* signal measurement methodology for the *actual* signal measurement mandated by the Act. The Miami court utilized the Longley-Rice *predicted* signal methodology only as a *tool* to administer the Act's *actual signal measurement* requirement.

NRTC wants the Commission to take a "pro-consumer" action. We agree and urge the Commission to inquire into the misleading, deceptive and unfair trade practices of NRTC and its colleagues in the satellite industry. NRTC and its associates have duped millions of innocent consumers into signing up and paying for satellite program services these satellite carriers knew they did not have a copyright license to provide. It is that deception--that fraud--which has triggered the public's concern and to which the Commission should direct its attention in this proceeding.

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COMMENTS OF
THE NETWORK AFFILIATED STATIONS ALLIANCE

The Network Affiliated Stations Alliance ("NASA"), a coalition of the ABC, CBS and NBC Television Affiliate Associations, hereby submits these Comments in opposition to the Emergency Petition for Rulemaking filed by the National Rural Telecommunications Cooperative ("NRTC") on July 8, 1998 ("Petition").

I. Introduction

The Satellite Home Viewer Copyright Act (the "Act" or the "SHVA") was adopted by Congress in 1988 to facilitate the delivery of broadcast network programming by satellite for private home viewing to subscribers who, because of distance, terrain or other factors, are unable to receive a signal of at least Grade B intensity with an outdoor rooftop antenna from a local station affiliated with that network. The Act created a limited, conditional, compulsory copyright license authorizing satellite carriers to uplink a distant network television station (without securing

the station's consent and without having purchased in the open market the underlying copyrights for the station's programming) and retransmit that station by satellite for "private home viewing" to "unserved households," i.e., households that (1) cannot receive with a conventional outdoor rooftop antenna a signal of "Grade B intensity" from a local station affiliated with that network and (2) have not received the same network by cable within the previous 90 days.[1] The copyright license was narrowly crafted to facilitate satellite delivery of broadcast network programs, while at the same time, protecting the integrity of the copyright license local stations hold for the exhibition of their network's programming within their markets. Shortly after the SHVA was enacted, it became apparent that satellite carriers were exceeding the limits of their compulsory license on a massive scale by uplinking and delivering distant network stations to households that were, plainly, not "unserved." Perhaps the most egregious violator has been NRTC's business associate, PrimeTime 24, which two federal courts have recently found to have abused the Act.

NRTC distributes the satellite service furnished by DirecTV, which, in turn, retransmits various broadcast network program packages provided to it by PrimeTime 24. NRTC, DirecTV and PrimeTime 24 are, therefore, engaged in a joint effort to deliver broadcast network programming by satellite, and their economic interests are aligned.

Whether a household can or cannot receive a signal of Grade B intensity from a local affiliate can only be determined by an objective signal measurement test conducted at the household. The test is not whether a household is *predicted* to receive a Grade B signal, but rather whether the household can *actually* receive the signal.

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[1]*See* 17 U.S.C. §119(a)(2)(A); (a)(2)(B); and (d)(10).

NRTC is requesting the Commission to ignore the plain language of the Act which requires an *actual* signal measurement to be taken at the household and to substitute in its place a *predicted* Grade B contour standard in which 100 percent of the population within the specified area is *predicted* to receive "over-the-air coverage" 100 percent of the time. NRTC is asking the Commission, in short, to rescind the Act's *actual signal measurement* requirement and redefine the term "Grade B intensity" as a predicted

> ". . . contour encompassing a geographical area in which 100 percent of the population, using readily available, affordable equipment, receives over-the-air coverage by network affiliates 100 percent of the time."[2]

In addition, NRTC requests the Commission to engraft upon the statute an "inside" receiving antenna standard to replace the "outdoor rooftop" antenna standard Congress expressly incorporated in the statute.[3]

NRTC is asking the Commission to do that which it is without authority to do: The Commission cannot rewrite the Act. To the extent NRTC is addressing its proposal to the Commission, rather than Congress, it is addressing the wrong forum.

NRTC's Petition is replete with inaccurate and misleading assertions of fact and erroneous statements of law. NRTC's proposal is confusing at best and reflects a fundamental misunderstanding of the Act, the public policy objectives of the Act and recent court decisions interpreting the Act. For example, NRTC goes to great length in discussing the need to make the satellite industry more competitive with cable, but ignores the satellite industry's own claims

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[2]NRTC Petition at 19.

[3]*See* 17 U.S.C. §119(d)(10)(A).

of economic growth and robust competitiveness with cable. Moreover, NRTC's proposal, if adopted, would constrict the geographical area in which broadcast stations receive network program exclusivity protection under the Act, which, in turn, would undermine the economic foundation of the network/affiliate distribution system and ultimately result in fewer, rather than more, viewer choices. And, finally, NRTC misrepresents the nature and effect of the recent ruling by the Miami court and that court's use of Longley-Rice predicted contour maps.

We urge the Commission to dismiss the NRTC Petition. Congress has not authorized the Commission to substitute a "predictive" signal test for the actual site measurement test required by the Act, nor to redefine the term "Grade B intensity" for purposes of the Act, nor to redefine the receiving antenna standard provided for in the Act. Moreover, the Commission does not have the statutory authority to conduct rulemaking proceedings to interpret the *copyright* laws. And even if it were authorized to do so, there is no public policy justification for the Commission to replace an *actual* signal measurement standard with a *predicted* signal measurement standard or to redefine other provisions of the Act that would weaken the Act's network program exclusivity provisions.

NRTC asks the Commission to take a "pro-consumer" action. We agree and urge the Commission to inquire into the misleading, deceptive and unfair trade practices of NRTC and its colleagues in the satellite industry. NRTC and its associates have duped millions of innocent consumers into signing up and paying for satellite program services the satellite carriers knew they did not have a copyright license to provide. It is that deception--that fraud--which has triggered the public's concern and to which the Commission should direct its attention in this proceeding.

A. Purpose Of The Satellite Home Viewer Act

The SHVA was adopted by Congress in 1988 to facilitate the delivery of broadcast network programming by satellite to households that, because of distance, terrain or other factors, are unable to receive with a conventional outdoor rooftop antenna a signal of at least Grade B intensity from a local television station affiliated with that network. The Act had a dual purpose: (1) To enable households located beyond the reach of a local affiliate to obtain access to broadcast network programming by satellite and (2) to preserve the existing free, over-the-air national network/local affiliate distribution system [4]

The Act created a limited statutory copyright--a "compulsory license"--authorizing satellite carriers to uplink a distant network station (without the station's consent and without having purchased the underlying copyrights in the station's programming) and retransmit the station by satellite to households that cannot receive the same network programming from a local network affiliate. Congress contemplated that the delivery of duplicating network programming would be confined to households located primarily in rural areas:

> "The bill will benefit 'rural America, where significant numbers of farm families are inadequately served by broadcast stations licensed by the Federal Communications Commission.'"[5]

* * *

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[4]H. Rept. No. 100-887 (I) at 8 (1988), *reprinted in*, 1988 U.S.C.C.A.N. 5577.

[5]*Id.* at 15.

"In essence, the statutory license for network signals applies in areas where the signals cannot be received via rooftop antenna or cable."[6]

* * *

"The special statutory copyright for satellite service was created 'in recognition of the fact that a *small percentage* of television households cannot now receive a clear signal of the three national television networks.'"[7]

* * *

"The extension of the SHVA 'ensure[s] that rural home satellite dish consumers will be able to continue to receive retransmitted broadcast programming. This is essential because in many rural areas satellite technologies represent the only way that rural families can receive the kind of information and entertainment programming that many urban Americans take for granted.'"[8]

* * *

"The extension of the SHVA is needed 'to ensure that rural consumers will continue to receive television programming.'"[9]

In hearings before Congress, Ralph Oman, the then Register of Copyrights, stated that only a "relatively small number of viewers would qualify under the Act for satellite delivery of broadcast network programming."[10]

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[6] *Id.*

[7] *Id.* (Emphasis added.)

[8] 140 Cong. Rec. E 1770 (daily ed. Aug. 19, 1994) (statement of Rep. Long).

[9] 140 Cong. Rec. H 9268, H 9270 (daily ed. Sept. 20, 1994) (statement of Rep. Hughes).

[10] Statement of Ralph Oman, before the Subcommittee on Courts, Civil Liberties and the Administration of Justice, House Committee on the Judiciary, 100th Cong., Jan. 27, 1988.

The Act represented a careful balance, on the one hand, between the public interest in allowing unserved households to secure access to broadcast network programming and, on the other hand, in preserving the national network/local affiliate television program distribution system by protecting the copyright held by each affiliate for exhibition of its network programming. At the heart of the Act was an acknowledgment by Congress of the national interest in preserving the longstanding, *free*, universally available, over-the-air national network/local affiliate television distribution system:

> "This television network-affiliate distribution system involves a unique combination of national and local elements, which has evolved over a period of decades. The network provides the advantages of program acquisition or production and the sale of advertising on a national scale, as well as the special advantages flowing from the fact that its service covers a wide range of programs throughout the broadcast day, which can be scheduled so as to maximize the attractiveness of the overall product. But while the network is typically the largest single supplier of nationally produced programming for its affiliates, the affiliate also decides which network programs are locally broadcast; produces local news and other programs of special interest to its local audience, and creates an overall program schedule containing network, local and syndicated programming."
>
> * * *
>
> ". . . [T]he network-affiliate partnership serves the broad public interest. It combines the efficiencies of national production, distribution and selling with a significant decentralization of control over the ultimate service to the public. It also provides a highly effective means whereby the special strengths of national and local program service support each other. <u>This method of reconciling the</u>

> values served by both centralization and decentralization in television broadcast service has served the country well."[11]
>
> * * *
>
> ". . . [T]he bill respects the network/affiliate relationship and promotes localism."[12]
>
> * * *
>
> "The Committee believes that this approach will satisfy the public interest in making available network programming in these (typically rural) areas, while also respecting the public interest in protecting the network-affiliate distribution system."[13]

Congress recognized that an important public interest distinction between the services offered by satellite carriers and those offered by local affiliates is that satellite services are available only to those who can afford to *pay* for them while broadcast services provided by local affiliates are *free* for everyone:

> "Free local over-the-air television stations continue to play an important role in providing the American people information and entertainment. The Committee is concerned that changes in technology, and accompanying changes in law and regulation, do not undermine the base of free local television service upon which the American people continue to rely."[14]

Accordingly, the assurance of continued access by the public to the nation's *free, universal, local* broadcast service was a core policy objective of the Act. Regrettably, that critical policy

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[11]H. Rept. No. 100-887 (II) at 20 (1988), *reprinted in*, 1988 U.S.C.C.A.N. 5577. (Emphasis added.)

[12]H. Rept. No. 100-887 (I) at 14.

[13]H. Rept. No. 100-887 (II) at 19-20.

[14]H. Rept. No. 100-887 (I) at 26.

objective has been obscured in the muddled cacophony of the satellite industry's current debate.

To enable local stations to monitor compliance by satellite carriers with the limitation of their copyright, the Act required satellite carriers to furnish broadcast networks, on a monthly basis, a list of the names and addresses, including zip codes, of their new subscribers along with a list of terminated subscribers. The networks aggregate these subscriber lists, along with a list of terminated subscribers, for each local television market and provide them to their local affiliates. Each affiliate reviews the lists, and if it believes a satellite carrier is violating the terms of its statutory copyright, the affiliate may either write a letter to the satellite carrier identifying subscribers the affiliate believes do not qualify for delivery of duplicating network programming and request that the carrier terminate broadcast network service to those subscribers or the affiliate may immediately file a copyright infringement action in federal court.

The Act established a three-part test for determining whether a household qualifies for satellite broadcast service under the statutory license:

* The satellite dish must be used for "private home viewing"--thus, distant network stations may not be delivered to sports bars, lounges and restaurants,

* The receiving site must not be able to receive by the use of a conventional outdoor rooftop antenna a "measured" signal of at least Grade B intensity (as determined under Federal Communications Commission rules) from a local affiliate of the same network or from a translator carrying that affiliate, and

* The home must not have received by means of cable television a station affiliated with the same network within the 90-day period before satellite delivery of network service began.

Believing satellite carriers would follow the law and respect the limits of their statutory copyright, broadcasters did not object to the new favored copyright status for satellite carriers. Broadcasters assumed that satellite carriers would, in good faith, honor their commitment to Congress and comply with the limits of their copyright.

The Act was amended in 1994. Disputes between satellite carriers and local affiliates over the "unserved household" issue had become widespread and in an attempt to discourage satellite carriers from signing up illegal subscribers and local affiliates from making invalid challenges, the 1994 amendment added a "loser pays for the cost of measurement" provision. Under this provision, if a local broadcaster wrongfully challenges a subscriber, the broadcaster must reimburse the satellite carrier for any signal measurement costs the satellite carrier may have incurred. By the same token, if a satellite carrier wrongfully provides service to a home that does not qualify for the service, the satellite carrier must reimburse the local affiliate for any signal measurement costs the broadcaster may have incurred in measuring the signal at the subscriber's household.

The 1994 amendment also clarified that the burden of measurement and of proving whether a household can receive a Grade B signal from a local affiliate is on the satellite carrier--not the affiliate. And, for the first time, the Fox Network was covered by the Act.

B. The Broken Promise

Hardly had the ink dried on the 1988 Act when local broadcasters began to realize that satellite carriers were exceeding the limits of their compulsory license, on a massive scale, and infringing the copyright of local affiliates. Satellite carriers were marketing and selling distant

broadcast network stations indiscriminately to dish owners who could easily receive the same network from a local affiliate. As a result, NASA and the networks initiated discussions with satellite carriers shortly after the Act became law in an effort (as Congress expressly encouraged) to establish a voluntary inter-industry compliance and enforcement program. NASA and the networks continued those negotiations for several years with satellite carriers in the hope that agreement might eventually be reached on a compliance and enforcement program. A settlement and compliance agreement was finally reached with two satellite carriers (PrimeStar and Netlink) earlier this year. Regrettably, NRTC's business associates, PrimeTime 24 and DirecTV, along with EchoStar, refused to enter into the agreement.

During this period, PrimeTime 24 has marketed its broadcast network service--not as a supplemental service to "unserved households" as Congress had envisioned--but rather as a broadcast network "time shifting" and "out-of-market" sports programming service. Advertisements for satellite service by PrimeTime 24 regularly promote "time shifting" of broadcast network programming and the availability of "out-of-market" sports programs--many of which may not legally be televised locally. The deceptive advertising and trade practices of NRTC's partner, PrimeTime 24, have been egregious:[15]

[15]The full text is contained in Exhibit A.

"All the football you need is on PrimeTime 24 . . . over 100 games on PT East, PT West and Fox . . . the only place you can get all 10 playoff games . . . plus your favorite network programs from 7 major cities . . . PrimeTime 24--Your network and football connection."

[PrimeTime 24 ad]

* * *

"Do your customers know they can get the networks on their DBS system?"

[PrimeTime 24 ad]

* * *

"With PrimeTime 24's network affiliates, your DBS customers won't miss one minute of their favorite prime time programs, daytime soaps, evening news and seasonable sports on East and West Coast feeds."

[PrimeTime 24 ad]

It is noteworthy that in all of the ads, disclosure of the statutory "unserved household" restriction is relegated to fine print which is hardly discernable without magnification. Consumers have been misled by countless advertisements like these and by the failure of satellite service providers and their agents and distributors to disclose fully and conspicuously the "unserved household" restrictions. Thus, NRTC's suggestion that it is acting on behalf of consumers is laughable.[16] If NRTC's subscribers are frustrated (and they have reason to be), it is because NRTC failed to disclose truthfully and honestly the limits of its copyright and,

[16]NRTC Petition at ii-iii.

instead, has misled its subscribers into signing up for a service which NRTC knew it did not have a copyright license to provide.

NRTC's assertion that it has acted in "good faith" in providing its broadcast network program service[17] is amusing in light of the gross indifference it and its associate, PrimeTime 24, have shown for the law. A North Carolina federal district court recently found that PrimeTime 24 has been "grossly negligent"[18] in complying with the statute. The court held: "No reasonable fact finder could fail to find that PrimeTime's actions constitute a pattern and practice of statutory violation."[19] Of the more than 35,000 subscribers it has been serving in the Raleigh-Durham market, PrimeTime 24 was able to show that *only 5* of them could not receive a Grade B signal and thus qualified for its service. The court also concluded that PrimeTime 24 had readily "admitted its failure to supply ABC with complete and timely subscriber lists"[20] as the Act requires.

NRTC claims that as evidence of its "good faith" it has voluntarily terminated service to "some 40,000 subscribers."[21] That translates to 40,000 copyright infringements! Put another way, this is an admission by NRTC that it has committed 40,000 acts of larceny of intellectual property. Why did NRTC unlawfully serve these subscribers in the first place? Did NRTC

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[17]NRTC Petition at 11.

[18]*ABC, Inc. v. PrimeTime 24, Joint Venture*, CIV No. 1:97CV00090 (M.D.N.C. Aug. 19, 1998), Order, Judgment, And Permanent Injunction at 26. A copy of the Order is attached as Exhibit B.

[19]*Id.* at 27.

[20]*Id.* at 31.

[21]NRTC Petition at 11.

conduct signal measurements at the homes of these subscribers (as two federal courts have held is required by the Act) to qualify them for the service? Has NRTC refunded the subscription fees it wrongfully took from these subscribers and truthfully explained to them that it violated the copyright law in providing the service? Or did NRTC (as did its associate, PrimeTime 24) pocket the illegal profits and write letters to its subscribers blaming Congress, the Commission and local broadcasters for its unlawful conduct? So much for NRTC's "good faith."

Having tolerated infringement of their copyright licenses for years and having spent years in fruitless and frustrating negotiation, the national broadcast networks and local network affiliates eventually began to file copyright infringement actions against PrimeTime 24. Infringement actions were filed in Miami, Amarillo and Raleigh-Durham. In *CBS, Inc. et al. v. PrimeTime 24, Joint Venture*, Case No. 96-3650-CIV-Nesbitt (S.D. Fla. May 13, 1998), the district court for the Southern District of Florida recently issued a *preliminary* injunction prohibiting PrimeTime 24 from retransmitting CBS and Fox Network programming to any household within areas shown on Longley-Rice propagation maps that are predicted to receive a signal of at least Grade B intensity from a local CBS or Fox affiliate without obtaining the written consent of the affiliate and the network or providing the affiliate with the results of a signal strength test of the subscriber's household that establishes it cannot receive from the affiliate a signal of Grade B intensity.[22] The injunction was issued based on preliminary findings that PrimeTime 24 had

[22]*CBS, Inc. v. PrimeTime 24*, Order Affirming In Part And Reversing In Part Magistrate Judge Johnson's Report And Recommendation, at 35. A copy of the Order is attached as Exhibit C.

"willfully and repeatedly rebroadcast copyrighted network programming to served households in violation of SHVA."[23]

In its Petition, NRTC mischaracterizes the scope and effect of the injunction issued by the Miami court. The Miami court did not substitute, as NRTC implies, a *predicted* signal measurement standard for an *actual* signal measurement at the subscriber's household. The court, in the exercise of its equitable powers, utilized conventional Longley-Rice signal propagation maps to establish "presumptions" about where a Grade B signal may or may not be received. Under the Order, if a household, based on Longley-Rice maps, is *predicted* not to receive at least a Grade B signal, then a presumption exists that satellite service may be provided to that household without conducting a signal measurement. The presumption may be rebutted by a local affiliate if the affiliate conducts a signal measurement which establishes that the household can receive a signal of Grade B intensity from a local affiliate. Conversely, if Longley-Rice maps *predict* that a household can receive a Grade B signal from a local affiliate, network service to that household may not be provided unless the satellite carrier establishes by an actual signal measurement that the household *cannot* receive a Grade B signal from a local affiliate. In short, the Miami court utilizes the Longley-Rice *predicted* signal methodology only as a *tool* to administer the Act's *actual signal measurement* requirement. It is inaccurate to suggest, as NRTC does, that the Miami court has, in any way, departed from the Act. The Miami court could have simply ordered PrimeTime 24 to measure *every* household it serves--not just those *predicted* by Longley-Rice maps to be ineligible for satellite service. The court did not, and it is regrettable that its effort to *minimize* the satellite industry's testing burden has been so grossly distorted and

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[23]*CBS, Inc. v. PrimeTime 24* at 30.

mischaracterized by NRTC and its colleagues. This, again, is an example of the ethic of deception, distortion and half-truth that has become the hallmark of the satellite industry's public/government relations strategy.

In *ABC, Inc. v. PrimeTime 24*, a North Carolina federal district court recently granted summary judgment in favor of ABC's Station WTVD and found from "a mountain of evidence" that PrimeTime 24 had engaged in a "pattern and practice" of copyright infringements and "willful or repeated" violations of the Act.[24] The court, as the Act requires, issued a permanent injunction revoking PrimeTime 24's statutory compulsory license and prohibiting PrimeTime 24 from retransmitting ABC Network programming to *any* household--served or unserved--within Station WTVD's local market.[25] The court concluded that PrimeTime 24 had abused the special statutory copyright license provided to it by Congress on a massive scale and pursuant to the Act's explicit mandate, the court revoked the compulsory license. This Commission would have done no less had it, rather than the court, been authorized by Congress to enforce the Act.

Having failed, after years of trying, to persuade Congress and the courts that the provisions of the Act that provide network program exclusivity for local network stations should be diluted and weakened, NRTC now redirects its efforts to this Commission.

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[24]*See* Exhibit B at 1.

[25]*Id.* at 2.

II. The Commission Does Not Have Authority To Grant The Relief Requested

NRTC claims that the Commission has been empowered by Congress to redefine the "Grade B *concept*" for purposes of the Act.[26] The Petition asserts that by placing in the Act the phrase "a signal of Grade B intensity (as defined by the Federal Communications Commission)" Congress authorized the Commission to redefine the term at will.[27] Congress did not intend to authorize the Commission to rewrite the Act by replacing the Act's *actual* signal measurement standard with a *predicted* signal standard, nor did Congress authorize the Commission to change its then existing definition of a "signal of Grade B intensity" for purposes of the Act.

A. NRTC Proposes Not An Interpretation, But Rather A Revision And Rewrite Of The Act

NRTC claims it is asking the Commission to "interpret" what Congress meant by the "Grade B concept" for purposes of the SHVA. However, it is clear on the face of the Petition that what NRTC really seeks is not an *interpretation*, but rather a *revision* and *rewrite* of the Act's "unserved household" definition. NRTC asks the Commission to redefine "Grade B signal intensity" for purposes of the Act as a

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[26]NRTC Petition at ii. (Emphasis added.) Although the legal standard in the Act is "a signal of grade B intensity," NRTC throughout its Petition persists in referring to the Act's legal standard as the "Grade B concept" or the "Grade B contour." The NRTC's attempt at deception is obvious.

[27]NRTC Reply to Preliminary Response filed by the NAB ("NRTC Reply") at 6.

> "contour encompassing a geographic area in which 100 percent of the population, using readily available, affordable equipment, receives over-the-air coverage by network affiliates 100 percent of the time."[28]

The definition proposed by NRTC would not constitute an "interpretation" of the term "Grade B intensity," but rather the substitution of a *predicted* contour standard for the actual *measured* signal intensity standard expressly provided for in the Act. In addition, NRTC asks the Commission to redefine the type of antenna required to receive broadcast signals.

The Commission, as an administrative agency, cannot, under the guise of "interpretation," revise and rewrite substantive provisions of a federal statute. An "[A]gency has no authority to rewrite the statute."[29] The D.C. Circuit of Appeals has held that: "[r]egardless of how convincing the Commission's policy rationales may be, the Commission is without authority to alter Congressional mandates."[30]

In drafting the Act, Congress "established an objective test to determine to which households a satellite carrier could rebroadcast network programs."[31] Both the plain language of the Act and its legislative history indicate that "the purpose of the SHVA is to provide network programming to those that cannot receive a sufficiently strong signal."[32] The crux of this objective test is the signal strength of the local network affiliate station actually received by

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[28]NRTC Petition at iii. The proposal is confusing because it would replace the Act's *actual* signal measurement standard with a *predicted* contour standard.

[29]*Asarco, Inc. v. EPA*, 578 F.2d 319, 327 (D.C. Cir. 1996).

[30]*Southwestern Bell Corp. v. FCC*, 43 F.3d 1515, 1520 (D.C. Cir. 1995).

[31]*CBS, Inc. v. PrimeTime 24* at 14.

[32]*ABC, Inc. v. PrimeTime 24* at 16.

individual households. Accordingly, the determination of whether a household is "unserved" is an objective test that can only be made on a household-by-household basis.

The House Report accompanying the 1988 Act states that whether a household is "unserved" depends upon the measurement of the local affiliate's signal strength. For example, the Report says "[t]he distribution of network signals is restricted to unserved households; that is, those that are unable to receive an adequate network over-the-air signal . . ."[33] and that a subscriber's household "must be able to receive a signal of a primary network station to fall outside the definition of unserved household."[34]

In 1994 when Congress amended the SHVA, it reiterated its understanding that the determination of whether a household is "unserved" turns on signal strength measurements taken at individual households. The 1994 Senate Report states that an "unserved household" is one that cannot receive with a "conventional outdoor rooftop antenna" an over-the-air signal of Grade B intensity: "**This objective test can be accomplished by actual measurement.**"[35] Similarly, the House Report notes that "the definition of 'unserved household' in Section 119(d)(10) [of the Act] refers to the use of a conventional outdoor rooftop receiving antenna to receive 'an over-the-air signal of Grade B intensity' as defined by the FCC, thereby **requiring that the household actually receive a signal of that intensity**."[36]

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[33]H.R. Rep. No. 100-887 (I) at 15.

[34]H.R. Rep. No. 100-887 (II) at 26.

[35]S. Rep. No. 103-407 at 9 and n. 4. (Emphasis added.)

[36]H.R. Rep. No. 103-703 at 14 n. 6. (Emphasis added.)