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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
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)
SATELLITE DELIVERY OF BROADCAST) CS Docket No. 98-201
NETWORK SIGNALS UNDER THE) FCC 98-302
SATELLITE HOME VIEWER ACT)
)
 To: The Commission

COMMENTS OF KKCO-TV

Television broadcast station KKCO-TV, Grand Junction, Colorado, by its attorneys, hereby submits its comments in response to the Notice of Proposed Rule Making, FCC 98-302, released by the Commission on November 17, 1998 63 FR 234 (Dec. 7, 1998).¹ As shown below, the FCC (1) lacks the authority to modify, solely for purposes of the Satellite Home Viewer Act (the "SHVA"), the definition of "Grade B" contour; and (2) in any event, strong public policy considerations argue against such a course.

The premise of the instant rulemaking proceeding is that certain numbers of people who live within the Grade B contours of network-affiliated television stations are unable to receive the affiliates' signals off air. The FCC therefore proposes to redefine "Grade B"

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Before commenting on the merits of the policies at issue in the instant *NPRM*, KKCO-TV must object to the excessively precipitous nature of this proceeding. Public notice of the *NPRM* occurred only four days before the due date. This is an inadequate period within which to obtain full participation of affected parties. The short time for the preparation of comments has, *inter alia*, hindered at least this commentator's ability to secure more detailed input from engineering experts. In the instant *NPRM* the FCC attributes the proceeding's hasty schedule to the outcome of recent court cases in which the proponents of a revised Grade B standard lost. However, the Commission was not a party to the litigation nor otherwise subject to a legal mandate for immediate action.

contour in a radical fashion, but only for purposes of the SHVA. The principles discussed below do not permit such a change.

I. FACTUAL BACKGROUND

KKCO-TV is the affiliate of the CBS Television Network serving Grand Junction, Colorado and a vast rural area of western Colorado. The station's predicted Grade B signal reaches approximately 135,262 people. In order to meet the demands imposed by the region's rough topography, KKCO has structured a transmission system which includes a low power television station, four translators, fiber optic and microwave hops in order to reach areas shielded from the station's main antenna.

The station receives three to five calls daily for DBS waivers. Well over half those waiver requests are from counties outside the station's DMA. It appears to KKCO-TV that the satellite distributors have created a hoax in order to flood the FCC and Congress with trumped up viewer complaints, such as from Aspen or Vail, Colorado, 2.5 hours away by car. KKCO-TV grants those requests in white space, even though it is outside of its jurisdiction.

Inside the station's DMA, 95% or more of the waiver requests received are not justified. Most requests are from viewers sold a bill of goods by the local dish vendor in an attempt to make a sale. By and large, those requesting waivers have no outdoor antenna or, without exceptions, have no home antenna rotors to turn the device to the different transmission originating points. The three major networks in the Grand Junction-Montrose market all broadcast from different locations. Without an outdoor antenna and rotor, those requesting

waivers have not met the criteria to get DBS.

The Grand Junction TV market is rural and not served off air by another TV station. However, KUSA TV (Denver's NBC affiliate) is up linked on Netlink Satellite and is sold illegally all the time by dish suppliers. One would have to lie to get this service, but it happens too often.

KKCO-TV grants any in-market waiver if the request is a legitimate terrain-shielded problem, but that is about 1 out of every 50 calls.

II. CONTROLLING INTERPRETIVE PRINCIPLES

In assessing the legitimacy of the potential courses of FCC action outlined in the *NPRM*, it is critical to keep in clear focus a pivotal premise of the SHVA. The SHVA's grant of a compulsory copyright license to satellite video viewers is a limited exception to the exclusive programming copyrights enjoyed by television networks and their affiliates. The scope of that exception is narrow because Congress, in the SHVA, explicitly reaffirmed the fundamental importance that copyright protection plays in preserving the twin values of free, over-air broadcasting and localism. Accordingly, Congress defined the scope of the permissible infringement of these two principles in clear and familiar terms: "an over-the-air signal of Grade B intensity." 17 CFR 119(d)(10)(A). This is a technical construct utilized in Federal legislation and regulations for over four decades. *See Sixth Report and Order*, 41 FCC 148 (1952). Its meaning is not ambiguous, vague, confusing or indeterminate. Indeed, it is difficult to conceive of a term of art from the discourse of telecommunications jurisprudence

whose meaning is any more plainly understood. Congress presumably chose that term for just this reason: Employment of the "grade B" construct would avoid confusion and ensure that any creative second-guessing of congressional "intent" would be precluded.

Not surprisingly, therefore, litigation by satellite interests over this proviso in the SHVA has not impressed courts. As the Federal District Court in *ABC, Inc. v PrimeTime 24, Joint Venture* recognized, the SHVA standard for unserved households is strictly objective, and disallows a "subjective inquiry into the quality of the picture on a potential subscriber's television set for any signal strength showing." 1988 WL 544286 (July 16, 1998).

Further limiting the scope of the FCC's contemplated actions in the *NPRM* is *Chevron U.S.S., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984). Typically invoked to support arguments for agency discretion, in the instant context *Chevron* has a different effect. In *Chevron*, the Supreme Court clarified that the presumption otherwise favoring agency constructions of areas within their expertise is not in play where the dispute involves a statute (such as SHVA) in which Congress has spoken plainly. Here, the operative principle of administrative law is designed to forfend an agency's tinkering with federal legislative acts that are explicit and unambiguous on their face.

The Commission's instant rulemaking proceeding is apparently responsive to political pressures from some consumers who have claimed an inability to receive the signal of a local network affiliate, but such claims are contradicted by the experience of stations such as KKCO-TV. The station has challenged numerous illegal distant network signals. In most

instances in which the station has measured its signal strength at an individual home in question, that home has been able to receive the station's signal using a rooftop antenna. Most often where residents claim that they cannot receive the KKCO-TV signal over-the-air, they have attempted to do so without the benefit of an appropriate antenna, correctly installed and positioned.

The proponents of expanded direct-to-home satellite broadcasting (DSB) are not satisfied with the explosive growth they have experienced in recent years. In the pursuit of ever more customers, they seek to supplant local broadcast network affiliates as suppliers of network programming. The current battleground is the area within the Grade B contour of numerous network affiliates where the DSB proponents contend the affiliates do not place an adequate off-air signal. On the questionable theory of inadequate coverage, DSB operators have gone ahead and made innumerable illegal installations, where distant network signals are fed to residents of the natural service area of KKCO-TV.

The experience of KKCO-TV therefore shows that the stated basis for a change in the Grade B coverage standard under the SHVA is bogus. No doubt other stations in other markets will have had the same experience, to the extent that they have gone to the trouble to investigate claims of inadequate coverage. In mountainous areas where terrain obstructions limit reception within a given station's Grade B contour, thousands of translators have been installed to overcome this problem. Consequently, the facts do not support the perception spread by the DSB industry that the current Grade B definition is inadequate. Circumstances

therefore do not warrant the change proposed by the Commission.

KKCO-TV does not argue that, if Congress had been silent, the Commission would not have general authority to change its definition of Grade B intensity when circumstances warranted and with general applicability. However, here not only do the circumstances not warrant such a change, but such a change by the Commission cannot legally alter application of the SHVA. Congressional enactment of that legislation effectively codified the signal strength standard in use by the Commission *at that time*.

The Commission's rules refer to "Grade B" in no fewer than 24 of its current provisions (see Exhibit A). None of these references utilizes a Grade B definition distinct from the traditional one, with the *sui generis* exception of §22.657. No doubt the clear meaning of the term established over decades of use led Congress adopted Grade B as its objective standard in the SHVA. Yet the instant proposal would turn this objective standard into no more than a variable, subject to the Commission's continuous review.

The existence of so many references to the Grade B standard also limits the Commission's ability to re-define Grade B with general applicability, since the standard affects so many different rules. The instant NPRM notes that the current Grade B standard, devised nearly five decades ago, could not have anticipated the issues raised by DSB. However, this argument is like saying that the FCC cannot measure communications towers in meters because the creators of the metric system did not anticipate electronic communications. Moreover, the point would also apply to many of the two dozen rules which make use of the

Grade B standard. In sum, Congress used the established standard with full knowledge of the issues posed by DSB.

FCC intervention in this dispute would clearly contradict the current law as enacted by Congress. Moreover, the change suggested in the Notice would flout continuing Congressional efforts to forge from this policy dispute a democratically legitimate consensus by legislative means. Congress has delegated no authority to the FCC to alter the copyright law in so substantive a fashion. First, the Commission lacks subject-matter jurisdiction to consider altering the definition of Grade B intensity solely to affect application of the copyright law. The SHVA makes no reference to any ongoing discretion wherein the Commission could substantively alter U.S. copyright law. The repeated references to Grade B intensity and the Grade B contour in the Act merely signal Congress' desire to employ an objective standard which would balance the public interest in maintaining the system of locally based advertising-supported, or "free", broadcasting against the interests of residents of truly remote areas in the reception of broadcast signals.

In fact, the only relevant reference to Commission authority within the SHVA is contained in a parenthetical explaining the derivation of the term "Grade B." The courts could hardly conclude that such a passing reference somehow gave the Commission authority to rewrite the SHVA in a substantive fashion. Such a conclusion by the Commission would clearly be erroneous. Rather, the context of the references to the Grade B standard in the legislation is a persuasive indication that Congress intended to use the FCC's current Grade B standard

for purposes of the SHVA. After all, Congress did not refer to a Grade B standard “*to be defined*” by the FCC, but to one that was already in existence.

Congress’ efforts to forge a new consensus in this policy area demonstrate that the legislature has *not* delegated its authority in this regard to the FCC. The Commission notes in its instant NPRM that several members of Congress have expressed concern related to the outcome of recent litigation and have implied that the FCC has authority to rectify those decisions, yet the number of Congressional contacts cited by the FCC does not approach the number of votes needed to pass legislation. Any attempt by the Commission to circumvent the legislature would, against this background, amount to usurpation of the constitutional prerogative of Congress.

In the SHVA, Congress adopted a standard broadly employed by the Commission for many decades. Congress could not have anticipated or have approved at that time every potential re-definition that the Commission might later promulgate. The Commission implicitly admits as much in the instant NPRM by conceding that it does not have unbridled discretion to define Grade B signal intensity as greater than what has traditionally been defined as Grade A service. Note, however, that if the Commission accepts the premise that it does have the authority to re-write the SHVA, in effect, by re-defining the term Grade B for the purpose of applying that Act, then there are no theoretical limits to such discretion.

The adoption of either of the DSB industry proposals would define Grade B as better than Grade A. Obviously, the term Grade B would lose all meaning were it to be defined as

a better signal than Grade A. The Commission should retain the present 90-50 standard for Grade B, wherein the best 50 percent of locations should receive an acceptable video transmission 90 percent of the time. The two DSB industry proposals, wherein the Grade B coverage would decrease to include only the best 95 or 99 percent of locations receiving an acceptable signal, respectively, 95 or 99 percent of the time, would dramatically clearly undermine Congress' effort to balance the interests of the DSB industry and free, local television by adopting the 90-50 Grade B standard, which had been in effect since 1952.

III. POLICY CONSIDERATIONS

Aside from the profound legal questions limiting FCC authority in this matter, legitimate policy reasons provide further support for a cautious approach by the Commission. A local broadcast station is best positioned to serve the population in the public interest. Local news, weather and announcements relating to events of local importance are available through local broadcast television. In fact, most Americans receive the majority of their information related to politics, policy, and current events from television. The high cost of the alternatives to free broadcast television makes the services provided by KKCO-TV and other broadcasters essential to the civic participation of most average Americans. In addition, the emergency alert system is able to target the counties served by a broadcast station. Where a local station is carried on a cable system, these advantages of local service are also afforded to cable customers. The same is not true with those who receive DSB transmissions until DSB operators carry local stations.

The Commission's proposal, if adopted, could in many markets destroy the access to local news and programming that the FCC consistently claims to promote. A relaxed Grade B standard would remove all incentive for the DSB industry to deliver local signals to their subscribers. The DSB industry essentially seeks greater authority to re-transmit distant signals, as opposed to the distribution of any local programming. This creates a "free-rider" problem for terrestrial broadcasters in that the creation of local programming will cease to yield adequate returns, due to audience shares lost to distant signals imported via satellite.

Multichannel video competition will arrive only when DSB operators provide local signals under the same rules that govern the cable television industry. Thus, FCC intervention in this area -- already illegitimate under the law -- is also ill-advised from a policy perspective, since it threatens to reduce the production of local television content.

The action contemplated by the Commission would erode the "mass" nature of free broadcasting as a mass communications medium. Although the desire of advertisers for genuine mass media outlets has allowed local service to flourish, this system must not be taken for granted. So long as DSB operators have not created their own systems to cover local news and local problems, expanding the customer base of DSB does not equate to the public interest.

Moreover, in an age of increased cultural Balkanization, free broadcast television serves the public interest by providing common cultural experiences within local communities and for the nation. For those reasons, the Commission should resolve to do no harm to free

broadcast television in its effort to promote competition to cable television.

The proponents of a re-defined Grade B contour routinely ignore the potential of DTV (and MMDS) by insisting that a re-defined Grade B contour is the best means by which to achieve competition in the multichannel video service industry. Essentially, the DSB industry presents itself as America's only hope of rescue from supposedly high cable rates at the hands of cable television franchise monopolies. In order to accomplish their objective, the DSB industry demands that policy makers threaten the economic viability of free local broadcasting, even though it also competes with cable in many ways. In an age of digital television, free broadcasting will present new opportunities for narrowcast competitors to cable television without abandoning the mass market that network television and local news broadcasts provide. People with low and moderate incomes will have full access to this type of multichannel competition. Due to the high initial cost of reception equipment, however, the DSB industry cannot serve the poor on a par with terrestrial broadcasters.

Unfortunately, many in the DSB industry have sold their products to consumers illegally. The courts have uniformly ruled against the DSB industry when it has been challenged by networks and broadcasters for copyright violations. Now they seek, in effect, to alter the copyright laws through this rulemaking. The Commission should not, through this means, rescue the DSB industry from the consequences of its illegal activities.

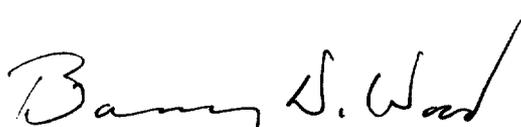
Conclusion

Because the commission lacks authority to re-define the Grade B standard with any

applicability to the SHVA, the Commission should terminate this proceeding without trammeling on the prerogatives of Congress. Even if the Commission had authority in this area, because relaxing the Grade B contour in the manner advocated by the DSB industry will undermine the economic viability of free broadcasting, the FCC should refrain from re-defining Grade B intensity.²

Respectfully submitted,

KKCO-TV

By: 
Barry D. Wood
Paul H. Brown

WOOD, MAINES & BROWN,
CHARTERED
1827 Jefferson Place, N.W.
Washington, DC 20036
(202) 293-5333

Its Attorneys

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² Should the FCC decide that it does hold the authority to proceed in this instant rulemaking, KKCO-TV urges the Commission to limit its action to an update of predictive methods consistent with the Longley-Rice method used in recent Digital Television (DTV) proceedings before the Commission.

EXHIBIT A

“Grade B” references in FCC Rules

- 0.283(a)(1)(iii) Authority not delegated to Chief, Mass Media Bureau to decide duopoly ownership issues for TV stations w/ Grade B contour overlap
- 0.283(a)(11) Authority not delegated to consider VHF station expanding B into UHF station's B, where area served by fewer than 4 VHF stations.
- 1.420(h) Additional procedures required when FM stations propose amendment to table of allotments when station will overlap w/ Grade B contour of TV station operating on Channel 6.
- 15.242(d) Biomedical telemetry devices must be Grade B contours of TV stations by specified distances.
- 22.625 Point to multipoint transmitters must protect specified TV stations by being located outside Grade B contour.
- 22.657(d)(e) Distance to Grade B contour for UHF station assumed to be 55 miles.
- 73.525(e) Method of calculating interference to TV Ch 6 from noncommercial educational FM stations uses Grade B as data.
- 73.622(e) During transition to DTV, the assumed service area for the a DTV station is the analog station's Grade B contour, rather than the noise-limited contour calculated by Longley-Rice methods.
- 73.622(f) DTV maximum power and antenna heights were chose to replicate analog station's Grade B contour.
- 73.3555(b) TV duopoly rule forbids Grade B overlap of commonly-owned stations.
- 74.705(a) The protected contour of a TV broadcast station is its Grade B contour.
- 74.731(j) TV booster stations must be located within, and signals must not exceed, the Grade B contour of the primary station.
- 74.1205(c) Noncommercial educational FM station not approved if its interfering contour overlaps with Grade B contour of TV station operating on of Ch 6 .

- 76.54(c) Notice of “significantly viewed” surveys for cable carriage must be served on all TV broadcast stations whose Grade B contours overlap the surveyed community.
- 76.55(b) NCE station qualified for cable carriage if the cable headend is within the Grade B contour of such station.
- 76.70 Exemption of cable system from input selector switch requirement uses Grade B contour.
- 76.92(d) Community television systems must, upon request translator permittee, cease carriage of network signals from distant stations.
- 76.501 Cable system may not carry signal of commonly-owned TV station within the Grade B contour.
- 80.215(h) Grade B contour for Channel 13 TV stations used to predict interference by AMTS coast stations.
- 80.559(c) Operational fixed stations secondary w/in Grade B contours of TV stations operating on Ch 4 or 5.
- 87.451(c) ditto
- 90.307(b) UHF-TV station sharing frequencies w/ land mobile base station is protected in its Grade B contour.
- 95.855(b) CTS & RTU ERP limited within Grade B contour of Channel 13 TV station.
- 95.1011 Protection of television Ch 13 from LPRS interference.
-