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Lisa M. Chandler

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December 11, 1998

VIA COURIER

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W., Room TW-A325
Washington, D.C. 20554

Re: Comments of the Small Cable Business Association
CS Docket No. 98-201, RM Nos. 9335 and 9345

Dear Ms. Salas:

On behalf of the Small Cable Business Association ("SCBA"), we enclose fourteen (14) copies of the above-referenced Comments. We request that each Commissioner receive a copy of SCBA's Comments.

In addition, we provide a "FILE COPY." We ask that you date-stamp and return it to the courier.

If you have any questions, please call us.

Very truly yours,

Lisa M Chandler

Lisa M. Chandler

Enclosures

cc: Small Cable Business Association

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act	)	**CS Docket No. 98-201**
	)	**RM No. 9335**
	)	**RM No. 9345**
	)	
Part 73 Definition and Measurement of Signals of Grade B Intensity	)	

COMMENTS OF THE SMALL CABLE BUSINESS ASSOCIATION

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December 11, 1998

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SUMMARY

The Commission proposes taking action that threatens to undermine the congressionally mandated public policy of localism. The determination of critical public policy remains solely within the realm of Congress.

Congress established a narrowly tailored satellite compulsory license that balanced the needs of the satellite industry and the need to protect the network-affiliate relationship and localism. The following considerations all demonstrate that the Commission lacks the authority to modify the Grade B standard for measuring "unserved households:"

- **Broadening the license will hurt localism.** Congress expressly designed the satellite compulsory license in a manner to protect localism.
- **No express right to modify.** In other parts of the Satellite Home Viewer Act of 1994, Congress expressly granted the right for the Commission to make future changes. Congress granted no similar right to the Commission regarding the definition of "unserved households."
- **Congress used a local broadcast signal measure purposely to protect localism.** Congress used the Grade B contour (the area of predicted Grade B signals) as an enforcement measure because it matched the area of protection with the local service area of a local broadcast station. To change one of the two measures would eliminate the overlap and undermine the protection sought by Congress.
- **Recent legislation would have given the Commission authority.** The existence of recent proposed legislation that would have expressly granted the Commission authority to revise the definition of "unserved" households underscores the Commission's current lack of authority.

If the Commission does modify the "unserved" household definition to principally rely on signal intensity measurements inside customer homes, it will create a system that will largely rest on voluntary compliance. Neither small cable (if they had standing) nor small broadcasters have the financial resources to measure signal strength on a home-by-home

basis. Consequently, satellite providers will face little verification in rural areas. Given the vast non-compliance noted by the courts and the Commission, the satellite providers simply should not be entrusted with a system principally reliant on voluntary compliance.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act	)	**CS Docket No. 98-201** **RM No. 9335** **RM No. 9345**
	)	
Part 73 Definition and Measurement of Signals of Grade B Intensity	)	

COMMENTS OF THE
SMALL CABLE BUSINESS ASSOCIATION

I. INTRODUCTION

The limited satellite carrier compulsory license established by the Satellite Home Viewer Act ("SHVA") represents a carefully-crafted balance by Congress between: (1) the interests of the satellite industry, its users, and promoting distribution of national network programming; and, (2) the well-established interests of sustaining the network-local affiliate relationship to promote localism. The Commission should not fall prey to yet another attempt by satellite distributors, under the guise of promoting competition, to essentially rewrite SHVA to legitimize their illegal acts of providing distant broadcast network signals to locally served households. Satellite distributors claim that without changes to the Grade B intensity standard and its measurement mechanism, potentially millions of satellite subscribers will lose invaluable network programming. These claims, however, ignore the simple fact that, with the exception of a small percentage, most of these subscribers

receive distant broadcast network programming illegally.[1]

SCBA does not object to satellite delivery of broadcast network signals, so long as satellite providers are required to provide carriage of all broadcast signals within a single community. The actions sought by this rulemaking, however, will not accomplish that goal. Instead, they will reward illegal and anticompetitive behavior, *i.e.*, satellite carriers' appropriation of valuable programming for their own commercial gain without regard for the restrictions under current law designed to protect localism. The actions requested in this matter go well beyond the alteration of a long-standing Commission definition. They will immutably alter the multichannel video programming distribution market and threaten to destroy the financial viability of local programming. Such critical changes to public policy can and should only result from Congressional action.

The preservation and promotion of localism remains critically important to SCBA. With approximately 300 members serving more than two million subscribers nationwide, SCBA remains the only voice solely dedicated to representing the interests of smaller, independently owned cable businesses that distribute local programming to much of rural America. Because of the far-reaching impact of the changes proposed in this rulemaking

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[1] *In the Matter of Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act*, Notice of Proposed Rule Making in CS Docket No. 98-201, RM Nos. 9335 and 9345, FCC 98-302, at ¶ 15 (released November 17, 1998) ("NPRM"). The Commission acknowledges that the evidence in a couple of recent court cases "strongly suggests that many, if not most, of those subscribers do not live in 'unserved households' under any interpretation of that term." *Id.* (referring to *CBS, Inc. et al. v. PrimeTime 24, Joint Venture*, Order Affirming in Part and Reversing in Part Magistrate Judge Johnson's Report and Recommendations, 9 F. Supp.2d 1333 (S.D. Fla. May 13, 1998); *ABC, Inc. v. PrimeTime 24, Joint Venture*, __ F.Supp.2d __, 1998 WL 544286 (M.D. N.C. July 16, 1998) (Case No. Civ. A. 1:97CV00090)).

proceeding, SCBA takes this opportunity to file its comments.

II. THE COMMISSION LACKS AUTHORITY TO REDEFINE "UNSERVED HOUSEHOLD" AS THAT TERM IS USED IN 17 U.S.C. § 119.

Despite its tentative conclusions to the contrary, the Commission lacks authority to take the actions requested here. The satellite carrier compulsory license represents a carefully-crafted, narrowly tailored measure, created to strike a balance between the needs of the satellite industry and the need to protect the network-affiliate relationship and localism.[2] The "unserved household" definition remains inalterably part of the statutory satellite carrier compulsory license under 17 U.S.C. § 119, and changes to it require congressional, not Commission, action.

A. The Legislative History of SHVA Shows Congress' Intent to Give Satellite Carriers Only a Limited Ability to Import Signals.

Congress designed the satellite carrier compulsory license as a limited license.[3] The Commission cannot expand the satellite carrier compulsory license to go beyond that which Congress intended.

SHVA represents a balanced measure. SHVA arose from Congress' "recognition of the fact that a *small percentage* of television households [could not] receive clear signals

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[2] NPRM at ¶ 3.

[3] *See* H.R. Rep. No. 100-887(II), 100th Cong., 2nd Sess. (1988), 1988 U.S.C.C.A.N. 5577, 5648 ("*House Report II*") ("Under the bill, satellite carriers are provided a limited interim compulsory license for the sole purpose of facilitating the transmission of each network's programming to "white areas" which are unserved by that network.")

embodying programming of the three national television networks."[4] It "clarif[ies] the legislative status under the Copyright Act of satellite carriers that retransmit television broadcast signals to [home satellite dish] owners."[5] SHVA strikes an important balance of interests: it addresses the needs of the home satellite dish industry and users, without jeopardizing the network-affiliate relationship or localism.[6]

B. Congress Intended That the Commission's Definition of "Grade B Intensity" Used for Local Broadcast Signal Measurement Also Determine "Unserved Households."

Congress did not delegate to the Commission authority to define "Grade B intensity" for purposes of SHVA's satellite carrier compulsory license. Instead, Congress looked to the Commission's existing definition of "Grade B intensity" as the criterion for determining whether a household is an unserved household. The legislative history of SHVA offers strong support for this conclusion. SCBA provides several examples below.

1. Congress "froze" the definition of "Grade B intensity."

Despite the Commission's contrary exclamations,[7] Congress intended to establish by statute the definition of "Grade B intensity" rather than authorize the Commission to

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[4] H.R. Rep. No. 100-887 (i), 100th Cong., 2nd Sess. (1988), 1988 U.S.C.C.A.N. 5577, 5621 *("House Report I")* (emphasis added).

[5] S. Rep. No. 103-407, 103rd Cong., 2nd Sess. (1994), 1994 WL 577581 at Part II.A ("*Senate Report*").

[6] *House Report I* at 5617; *see also House Report II* at 5648 (expressing the belief of the House of Representatives Committee on Energy and Commerce that the "limited interim compulsory license . . . 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.")

[7] *See* NPRM at ¶ 20.

modify or create its own definition. Congress' actions in the Satellite Compulsory License Act of 1994 ("1994 SHVA") support this conclusion. With the 1994 SHVA, Congress made changes to certain definitions. For example, it expanded the definition of "local service area of a primary transmitter" under 17 U.S.C. § 111(f).

With the revised definition of "local service area of a primary transmitter," Congress sought to account for a number of contingencies -- including potential Commission elimination of 47 C.F.R. § 76.55(e) upon which the definition relied and subsequent changes with respect to a television market as the then-current rules contemplated.[8] In addition, Congress realized that "the FCC may, in the future, and consistent with accepted audience measurement and market analysis, rely on a different definition of a television station's local market when implementing sections 76.55(e) and 76.59."[9] Anticipating such change, the Senate Committee on the Judiciary ("Senate Committee") specifically stated that "[s]uch modifications will be incorporated into the additional definition of a 'local' signal provided by this legislation."[10]

Interestingly, the Commission looks to the same definition to reach its tentative conclusion that Congress intended a fluid definition of "Grade B intensity." The Commission looks to the definition of "local service area of a primary transmitter to suggest that "where Congress intended to incorporate regulations as they existed on a certain date,

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[8] *Senate Report*, 1994 WL 577581 at Part V.3.

[9] *Id.*

[10] *Id.*

it has expressly done so."[11] The Commission relies on Congress' reference in the definition of "local service area of a primary transmitter" under Section 111(f) to "Commission regulations 'in effect on April 15, 1976, or such station's television market as defined in section 76.55(e) of title 47, Code of Federal Regulations (as in effect on September 18, 1993) . . .' "[12] The Commission, however, omits that part of the definition that anticipates a fluid definition of "local service area of a primary transmitter" — "or any modifications to such television market made, on or after September 18, 1993, pursuant to section 76.55(e) or 76.59 of title 47 of the Code of Federal Regulations."[13] Congress included this latter phrase to account for future changes.

In contrast, Congress did not revise the definition of "unserved household," nor did it specify that the definition will incorporate Commission changes to the definition of "Grade B intensity." Congress therefore must have intended for the existing definition of "Grade B intensity" to apply. "[W]here . . . Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as if affects the new statute."[14] By preserving the definition of "unserved household" in the 1994 SHVA without alteration, Congress intended that definition to retain the meaning it had as originally enacted -- the

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[11] NPRM at ¶ 20.

[12] *Id.*

[13] *See* 17 U.S.C. §117(f).

[14] *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 n. 66 (1982) (citing *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978)).

Commission's existing definition of Grade B intensity. That Congress did not explicitly state that the Commission may make changes to the unserved household definition, as it had for purposes of other definitions, supports this conclusion.

2. Congress' intentional use of the Grade B contour to determine violations demonstrates Congress' intent to rely on existing definitions.

Congress uses the Grade B contour as a principal measure of a television station's "local market" or to approximate its coverage area. The Grade B contour represents that area predicted to receive a viewable signal, *i.e.*, a signal strength of Grade B intensity.[15] Congress largely intended that the "unserved household" restriction serve to protect the network-affiliate relationship and localism. Congress' intentional use of the Grade B contour to both define local broadcast market coverage areas and served areas under SHVA precludes the Commission from establishing a different standard for SHVA.

Congress' incorporation of the Grade B contour as part of its transitory enforcement mechanism to arbitrate disputes involving the status of households as unserved evidences Congress' intent to use existing Commission definitions, not to create new measures. In the 1994 SHVA, Congress created the now-defunct mechanism to enforce rights affected by the satellite carrier compulsory license.[16] The enforcement mechanism called for actual

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[15] The Grade B contour represents the area, subject to certain variables, for which predicted reception will meet the specified Grade B signal strength. *See* NPRM at ¶ 32-34. Different methods for determining the Grade B contour exist. *See id.*

[16] *See* 17 U.S.C. § 119(a)(8) (Although the enforcement mechanism contained in Section 119(a)(8) was transitory in nature and has expired, Congress believed that use of the Grade B contour is the appropriate criteria to determine which households fall within the definition of "unserved households.").

measurements where a broadcast television station challenged a particular household's status as unserved. The mechanism, however, specifically adopted the use of the Grade B contour in making such determinations, establishing different procedures depending on whether a household was within or beyond the Grade B contour.[17] Congress' specific reliance on the Grade B contour reinforces that Congress intended to use the Commission's established definition of Grade B intensity.

Congress' additional reliance on the Grade B contour — the measure of a local station's coverage area — for purposes of establishing patterns of violations further shows its intention to use existing Commission definitions. The *House Report* to the 1994 SHVA discusses the appropriateness of its use of the Grade B contour as the means to measure a local network station's market for purposes of determining a pattern or practice of violations under 17 U.S.C. § 119(a)(5)(B).[18] After giving consideration to other possible ways to define a station's local market,[19] the House Judiciary Committee concluded that, for purposes of determining the existence of a pattern of violations on a local basis, the predicted Grade B contour of the network station at issue represented the only appropriate

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[17] *See* 17 U.S.C. § 119(a)(8). For purposes of the enforcement mechanism, the Grade B contour served as a demarcation point — within the Grade B contour, the satellite carrier had to test the signal strength to determine if a household qualified as unserved; beyond the Grade B contour, the station had to prove that a household did not. The enforcement mechanism suggests the following rebuttable presumption: households within the Grade B contour are served households; those beyond the contour are not.

[18] *See* H.R. Rep. No. 103-703, 103rd Cong., 2nd Sess. (1994), 1994 WL 454551 ("*1994 House Report*") (Section 2(5) of the section-by-section analysis).

[19] Congress considered using alternative means to define a station's local market, *e.g.*, the Area of Dominant Influence and the Designated Market Area. *Id.*

measure.[20] This definition matched the zone of protection under SHVA with a broadcaster's local market area. Consequently, the Commission cannot change one of those areas without changing the other. This establishes that the Commission lacks authority to establish a Grade B definition unique to SHVA.

C. Where Congress Desires That the Commission Take Some Particular Action, It Has So Directed.

1. Compare other Congressional directives to the Commission.

Where Congress wants the Commission to exercise its jurisdiction as an expert regulatory agency, it has expressly directed. In its *House Report II*, Congress ordered the FCC to consider the feasibility of applying the syndicated exclusivity rules to satellite carriers.[21] Had Congress also wanted the Commission to consider other issues related to the satellite carrier compulsory license, specifically, defining signal strength to identify unserved households, it would have. It did not. The Commission must accept Congress' silence on the matter as evidence of its intent that the FCC not make changes to the definition of "Grade B intensity."

That Congress made no changes to the definition of "unserved household" in the 1994 SHVA strengthens the conclusion that it did not intend for the Commission to exercise any authority. Hailing the satellite compulsory license a success, the Senate Committee found that:

The satellite carrier compulsory license has fulfilled its stated purpose of

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[20] *Id.*

[21] *House Report II* at 5656.

> providing a clear cut statutory framework for the delivery of broadcast households to HSD owners, and by expanding the access of rural and other households to broadcast programming. The license balances the rights of copyright owners, by ensuring payment for the use of their property rights, with the rights of satellite dish owners, by assuring availability at reasonable rates of retransmitted television signals.[22]

Had Congress believed it necessary for the Commission to exercise its authority as the expert regulatory agency with respect to the issue of defining "Grade B intensity," Congress would have directed the Commission to so act. It did not.

2. A recent legislative proposal signals the need for Congress to explicitly direct Commission action.

The recent introduction of legislation specifically addressing matters raised in this rulemaking demonstrates the need for Congress to direct the Commission to take action with respect to the issues raised in this proceeding. Rising congressional concern about the potential loss to direct broadcast satellite ("DBS") subscribers of network programming caused Senator John McCain and others to introduce in 1998 Senate Bill 2494, the "Multichannel Video Competition Act of 1998."[23] Although not passed into law, this bill specifically addressed the concerns that led to the instant proceeding — the ability of satellite carriers to offer distant network signals to consumers that receive inadequate off-air reception of local television signals.[24] Section 5(c) of Senate Bill 2494 specifically directed the Commission to conduct a rulemaking to "rule on any petitions or similar

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[22] *Senate Report*, 1994 WL 577581 at Part III (emphasis added).

[23] *See* S. 2494, 105th Cong. 2d Sess. (1998).

[24] *See* S. 2494, § 5.

matters regarding the definition of unserved areas or households."[25] The grant of authority in that bill suggests that absent such a directive the Commission lacks authority to consider the proposed changes.

D. The Copyright Office's Findings Reaffirm That the Commission Lacks Authority.

Previous Copyright Office findings confirm that the Commission lacks authority to consider the matters presented by the NPRM. The satellite carrier compulsory license is a copyright law, and the Commission should give appropriate deference to the Copyright Office's findings relating to it.

A Copyright Office report prepared at the request of Congress suggests that only Congress presently has the authority to make the proposed changes or direct the Commission to take action. In 1997, the Copyright Office, the government agency charged with overseeing the satellite carrier compulsory license, conducted a comprehensive review of the satellite carrier compulsory license. In its report to Congress, the Copyright Office stated that "[t]he [unserved household] restriction is a copyright substitute for a communications regulation (the network nonduplication rules) and, as such, is arguably better located in communications law. The fact that the unserved household restriction ended up in the copyright law is nothing more than happenstance."[26]

The Copyright Office's conclusion is critical to understanding the scope of

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[25] *Id.*

[26] Report of the Register of Copyrights, "*A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals*" at 128 (August 1, 1997).

Commission authority. The Copyright Office determined that the unserved household restriction better fits within the scope of communications law. That restriction, however, absent an act of Congress, remains a copyright law. The Grade B intensity standard, for SHVA purposes, is an integral and inseparable component of the unserved household restriction — a copyright matter. Consequently, the Commission lacks authority regarding changes to the Grade B intensity standard as it relates to the satellite carrier compulsory license.

III. THE COMMISSION'S METHODOLOGIES TO DETERMINE "UNSERVED" HOUSEHOLDS MUST PROVE ADMINISTRATIVELY AND FINANCIALLY VERIFIABLE.

If the Commission alters the "Grade B intensity" standard and its measurement mechanisms, it must act with extreme caution so as to not create a measurement mechanism not easily subject to independent verification. Any methodology ultimately used to determine "unserved" household status must be capable of enforcement.

The measurement of signal intensity (however defined) cannot rest solely in the hands of the satellite carriers. The satellite carriers' continued blatant disregard for the current restrictions on importation of distant network signals shows that they cannot be trusted when it comes to determining "unserved" household status.[27] To ensure against continued abuse of the satellite carrier compulsory license, any method for determining "unserved" status must permit independent, objective and affordable verification.

Many of the methods, especially those requiring home-by-home measurements

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[27] The Commission has recognized the existence of significant noncompliance. *See NPRM* at ¶ 15.

create an expensive framework for enforcement. Small cable and small broadcasters lack the financial resources to go out and retest each home. Consequently, the system will rely on voluntary compliance, an attribute conspicuously absent from the current business practices of many satellite providers.

IV. CONCLUSION

Commission action in this matter is wholly inappropriate. The Commission lacks the authority to make the proposed changes. The proposed changes would have broad public policy implications, consequences that require Congressional attention. SCBA therefore strongly recommends that the Commission abstain from taking the proposed actions.

Respectfully submitted,

SMALL CABLE BUSINESS ASSOCIATION

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