

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

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Satellite Delivery of Network Signals  
to Unserved Households for  
Purposes of the Satellite Home  
Viewer Act

Part 73 Definition and Measurement  
of Signals of Grade B Intensity

CS Docket No. 98-201  
RM No. 9335  
RM No. 9345

To: The Commission

**REPLY COMMENTS OF ECHOSTAR COMMUNICATIONS CORPORATION**

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Dated: December 21, 1998

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## SUMMARY

EchoStar Communications Corporation (“EchoStar”) hereby files its reply comments in the above-captioned proceeding.<sup>1</sup> EchoStar supports and incorporates by reference many of the reply comments filed today by the Satellite Broadcasting and Communications Association (“SBCA”). It wishes, however, to expand on those views concerning several aspects of the comments filed on December 11, 1998 by parties representing the broadcast industry, in particular the National Association of Broadcasters (“NAB”) and a coalition of broadcast affiliate associations (the “Joint Affiliate Associations”). These comments show a profound disrespect for American consumers, many of whom are unable to receive acceptable over-the-air local network signals yet would be prohibited from receiving distant network signals under the current antiquated and confused regulatory regime. Worse, by artificially counting as “viewers” those customers who now cannot receive adequate signals anyway, the broadcasters present the Commission with conclusory “sky-is-falling” arguments concerning the consequences of EchoStar’s proposals. The Commission should not be misled by these fictions, however. It has ample authority to adopt, and a compelling public interest justification for adopting: new values for Grade B intensity corresponding to modern notions of acceptable service; a more accurate model for predicting the incidence of Grade B intensity; and a more accurate and cheaper methodology for measuring signal intensity at individual households.

The broadcasters persist in denying the Commission’s clear authority in this area, but do not advance any persuasive arguments to question the NPRM’s tentative conclusions on

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<sup>1</sup> *Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act; Part 73 Definition and Measurement of Signals of Grade B Intensity*, Notice of Proposed Rule Making, FCC 98-302 (rel. Nov. 17, 1998) (“NPRM”).

this matter. To the controlling precedent of *Lukhard v. Reed*, which states that “[it] is of course not true that whenever Congress enacts legislation using a word that has a given administrative interpretation it means to freeze that administrative interpretation in place,”<sup>2</sup> the broadcasters juxtapose two arguments. They first claim that *Lukhard* is inapposite because it referred to a delegation from an agency’s organic statute. Whatever the distinction between “organic” and “inorganic” statutes means, it can neither be found in *Lukhard* itself, nor in its predecessor *Helvering v. Wiltshire*,<sup>3</sup> and the broadcasters do not cite any precedent distinguishing these decisions on such a basis. The broadcasters also unearth an inapposite 1974 district court case having to do with statutory references *to another statute*, quoting *another inapposite* 1950s case from the Oregon Supreme Court.<sup>4</sup> Of course, the 1987 Supreme Court precedent of *Lukhard* cannot seriously be questioned by unsuccessful attempts at drawing inferences from a 1959 state court case, and the broadcasters appear to recognize this as they do not even cite *Seale* directly.<sup>5</sup> The broadcasters also claim that, because Congress did not direct the Commission to conduct a rulemaking with respect to Grade B intensity within a certain time period, as it did with respect to several other issues in the SHVA, it could not have meant to delegate any authority to the Commission whatsoever. Yet just because the Commission is under no obligation to promulgate a rule within 180 days, it does not follow that the Commission may not promulgate such a rule at all.

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<sup>2</sup> 481 U.S. 368, 379 (1987).

<sup>3</sup> 308 U.S. 90, 100-101 (1939).

<sup>4</sup> *United States v. An Article of Cosmetic Consisting of 1,227 Packages*, 372 F.Supp. 302, 303 (D. Or. 1974), *quoting Seale v. McKennon*, 336 P.2d 340, 345-46 (1959).

<sup>5</sup> *Seale v. McKennon*, 336 P.2d 340, 345-46 (1959).

The broadcasters next attempt to forestall Commission action by raising the false specter that this action would interfere with federal court litigation: “it will be up to the courts – not to the Commission – to decide whether a satellite carrier has met its statutorily imposed burden of proof.”<sup>6</sup> Yet this is the very reason why the Commission *should* rather than should not redefine Grade B intensity and establish a model for predicting its incidence. The Commission’s work on defining Grade B intensity, consistent with the provisions of the SHVA, will not circumvent the copyright courts, but will instead assist those courts. Indeed, it will provide indispensable guidance: federal courts are now struggling with the “unserved household” question without any guidance from the agency whose expertise Congress chose to marshal. When the Commission does supply the necessary tools for implementing the unserved household provision, its work will be complete regardless of the precise extent and manner in which the courts will apply that guidance. It will be the concern of the courts of appeals reviewing district court rulings, and not of the Commission, to determine whether the courts have applied the “unserved household” provision well or committed error in the process. In other words, while the Commission can and should provide courts with the benefit of its regulatory expertise, it cannot interfere – and therefore need not fear interfering – with the federal courts’ authority to enforce the SHVA.

Neither the promulgation of an accurate model for predicting the incidence of Grade B intensity nor the new values that desperately need to be set for Grade B intensity would cause any harm to localism as alleged by the broadcasters. First, with respect to the question of a predictive model, the broadcasters continue to make the remarkable argument that such a model

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<sup>6</sup> NAB Comments at 38.

has no place in the implementation of the SHVA,<sup>7</sup> even though they have prosecuted the Miami copyright litigation based on the use of their own pet predictive model as a presumptive tool. Having avidly requested use of a predictive model in court, they cannot now erect a legal barrier to the development of a more accurate one by the Commission. Indeed, all parties in this proceeding should in theory support the same thing – a model that most accurately predicts which households are truly “unserved.” Moreover, the numbers cited by the broadcasters as “lost viewers” are a red herring.<sup>8</sup> First, they are unreliable. For example, the “national” numbers cited by the NAB are the result of taking numbers derived from a Commissioner’s extemporaneous remarks and increasing them manifold to take account of “the nation’s 100 million television homes.”<sup>9</sup> But most important, the premise is wrong: what the broadcasters refer to as “lost viewers” means in most cases viewers *that cannot receive acceptable local signals in the first place*. The broadcasters cannot lose audiences that they mostly do not have anyway. For the same reason, localism is in no danger from the setting of Grade B values reflecting modern consumer acceptance standards. If a household cannot receive a signal corresponding to these standards, it likely does not watch the relevant station anyway and should not count as a “lost” household.

Finally, the broadcasters continue their attacks on EchoStar’s measurement proposals based on an inaccurate *legal* proposition: that because the SHVA contemplates use of

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<sup>7</sup> E.g., Joint Affiliate Association Comments at 58.

<sup>8</sup> NAB Comments at 5 (the broadcasters fear losing “all protection with respect to 15% or 20% of all American TV households . . . [consisting of] 15 to 20 million households, with 40 to 53 million viewers”).

<sup>9</sup> *Id.*

a conventional rooftop antenna, measurements must take place at the rooftop itself. But, as EchoStar has already stated, the only place where the strength of a television signal is relevant to the statutory purposes is at the television itself. The statutory specification of an “outdoor rooftop” antenna does not change this.

The broadcasters also continue to argue that, even if a household *does not* receive a Grade B signal, the broadcasters would deny that household distant network retransmissions on the grounds that, theoretically, the household *could* receive such a signal if measurements were taken at the roof using perfect equipment.<sup>10</sup> Indeed, the broadcasters argue that Congress’ intent in promulgating the SHVA was to determine “unserved households” as those who could – *in other circumstances* – hypothetically receive Grade B signals.<sup>11</sup> EchoStar believes that it is little comfort for a consumer who cannot receive a Grade B signal using her equipment that she *could conceivably* obtain such signals by selling all but one television and using the money to upgrade and perfectly calibrate her rooftop antenna. Indeed, in a case cited by the broadcasters themselves, the Commission recently ruled against a homeowners’ association in another context for “[failing] to even take measurements from inside of Petitioner’s attic – the very location from

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<sup>10</sup> E.g., NAB Comments at 49 (“[EchoStar’s] proposal flies in the face of the Act, which makes a household ‘unserved’ only if it ‘*cannot receive*’ a signal of Grade B intensity . . . with a conventional rooftop antenna.

<sup>11</sup> Joint Affiliate Association Comments at 72-73 (“When Congress granted the satellite carriers the extraordinary privilege of a compulsory copyright license, it intended for the license to be used only to provide network signals to households that *truly cannot receive* a signal of Grade B intensity of over the air with an outdoor, rooftop antenna. Congress did not intend to permit service to households that are not receiving an acceptable picture simply because they are using faulty, defunct, or miscalibrated equipment or because they refuse to use an outdoor antenna or orient their antenna toward the local network station’s transmitter.”).

which it claims that Petitioners can receive acceptable quality signals.”<sup>12</sup> The broadcasters acknowledge this attic measurement holding, but make the astounding claim that their *engineer* believes this holding to be inapposite in the SHVA context because of the SHVA’s specific legal requirements of a rooftop measurement.<sup>13</sup>

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<sup>12</sup> *In re Lubliner and Galvin*, 13 FCC Rcd. 16107 (1998); *In re Lubliner and Galvin*, 13 FCC Rcd. 4834, 4841 (Cab. Serv. Bur. 1997).

<sup>13</sup> NAB Comments at 48 n.29.

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local network signals yet would be prohibited from receiving distant network signals under the current antiquated and confused regulatory regime. Worse, by artificially counting as “viewers” those customers who now cannot receive adequate signals anyway, the broadcasters present the Commission with conclusory “sky-is-falling” arguments concerning the consequences of EchoStar’s proposals. The Commission should not be misled by these fictions, however. It has ample authority to adopt, and a compelling public interest justification for adopting: new values for Grade B intensity corresponding to modern notions of acceptable service; a more accurate model for predicting the incidence of Grade B intensity; and a more accurate and cheaper methodology for measuring signal intensity at individual households.

## I. ARGUMENT

### A. The Commission Has Authority to Define – and Redefine – the Term Grade B Intensity Specifically for SHVA Purposes

The Commission has tentatively agreed with EchoStar that the Commission has authority to define – and redefine – the term “Grade B intensity.”<sup>2</sup> Under the controlling precedent of *Lukhard v. Reed*,<sup>3</sup> a statutory reference to an agency definition is meant precisely to tap the expertise of an agency best equipped to deal with a technical term for redefining the term as appropriate. Had Congress intended a term frozen in time, it would have picked a dBu number from the then-Commission’s rules and frozen it by inclusion in the statutory text. Indeed, the legislative history repeatedly refers to Grade B intensity “as defined by the FCC,

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<sup>2</sup> NPRM at 20.

<sup>3</sup> 481 U.S. 368, 379 (1987).

*currently in* 47 C.F.R. section 73.783(a).”<sup>4</sup> This reference indicates that the statutory words “defined by” the Commission allow for the possibility that the Commission may redefine the term in question.

The broadcasters’ attempts to distinguish *Lukhard* and *Helvering* are not serious. For example, they claim that the cases do not apply here because they concern an agency’s authority to conduct a rulemaking proceeding pursuant to that agency’s organic statute.<sup>5</sup> Whatever that means, however, the “organic” status of a statute is completely irrelevant. First, nothing in the *Lukhard* and *Helvering* line of cases suggests that their holdings are based on the nature of a law as “organic”; the notion of an “organic” statute and even the term “organic” does not come up in either Supreme Court case, and the broadcasters cite to no precedent distinguishing these decision on such a basis. Indeed, it is not even clear that the statute governing the Aid to Families with Dependent Children program at issue in *Lukhard* can be accurately considered the “organic” statute with respect to the Department of Health and Human Services (much less the Virginia Department of Social Services).

To the authority presented by EchoStar and the satellite industry, the broadcasters juxtapose their own misguided application of an interpretive rule that applies only to statutory references to other statutes (as opposed to administrative regulations).<sup>6</sup> The broadcasters’ only

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<sup>4</sup> H. Rep. No. 100-887 Part 1, at 26 (1988) (emphasis added); *see also* H. Rep. No. 100-887 Part 2, at 24 (1988); *see also* H. Rep. No. 98-134, at 45 (1988); *reprinted in* 1984 U.S.C.A.N. 4655, 4682. (“[T]he *current formula* for computing the grade B contour is found at 47 CFR 73-684.”) (emphasis added).

<sup>5</sup> Joint Affiliate Associations Comments at 35.

<sup>6</sup> *Hassett v. Welch*, 303 U.S. 303, 314 (1938) (refusing to “update” one provision of estate tax law to reflect changes in another provision of estate tax law); *Southwestarn Bell Corporation v. FCC*, 43 F.3d 1515 (D.C. Cir. 1995) (interpreting Communications Act in

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addition to these inapplicable cases, a 1974 district court decision from Oregon, is inapplicable for the same reason: it too concerns a statutory reference to another statute.<sup>7</sup> In *dictum*, that decision quotes from a quaint state court decision of the Oregon Supreme Court, which is itself inapposite: it concerned the constitutionality of a state law and the adoption of a federal agency's rules by a state agency – a circumstance where the lawmakers were obviously not tapping the expertise of the state agency, as they were merely instructing it to adopt the rules of another agency. The 1987 Supreme Court precedent of *Lukhard* cannot seriously be questioned by unsuccessful attempts at drawing inferences from a 1959 state court case, and the broadcasters appear to recognize this as they do not even cite *Seale* directly.<sup>8</sup>

The broadcasters try to make something of the fact that the SHVA directed the Commission to conduct certain rulemakings within specific time frames in connection with syndicated exclusivity, discrimination, and encryption standards. According to the broadcasters, because SHVA mandated no such time-limited rulemaking activity here, Congress intended *no* delegation to the Commission in connection with Grade B intensity.<sup>9</sup> This argument, however, is nothing but a straw man. EchoStar has never claimed that Congress directed the Commission to change the definition of Grade B intensity within a specific time frame, as it did in these other

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parallel with Interstate Commerce Act); *Curtis Ambulance of Florida v. Board of County Commissioners*, 811 F.2d 1371 (10<sup>th</sup> Cir. 1987) (refusing to “update” local government resolution to reflect changes in state law).

<sup>7</sup> *United States v. An Article of Cosmetic Consisting of 1,227 Packages*, 372 F.Supp. 302, 303 (D. Or. 1974) (“When a statute adopts by specific reference the provisions of another statute, regulation, or ordinance, such provisions are incorporated in the form in which they exist at the time of the reference. . . .”).

<sup>8</sup> *Seale v. McKennon*, 336 P.2d 340, 345-46 (1959).

<sup>9</sup> See NAB Comments at 31-32.

cases.<sup>10</sup> Just because the Commission is under no obligation to promulgate a rule within 180 days, it does not follow that the Commission may not promulgate such a rule. Otherwise the Commission's rulemaking authority would be nearly exhausted with the time-limited rulemaking activity directed by the 1996 Telecommunications Act. Instead, the Commission's reference to Grade B intensity "as defined by the Federal Communications Commission" indicates the authority to adjust the definition of Grade B intensity as circumstances require. NAB's "Congress-knew-how-to-delegate-authority-expressly" arguments are thus inapposite to the particular delegation in question.

Nor do the broadcasters provide any satisfactory answer to the NPRM's questions as to whether the Commission may define "Grade B intensity" specifically for the purposes of the SHVA. Remarkably, the NAB argues that the Commission lacks such SHVA-specific authority because "the FCC is a creature of the Communications Act. . . . [while the] SHVA, on the other hand, is emphatically part of the *Copyright Act*."<sup>11</sup> It seems to EchoStar that this argues *for* the Commission's ability to act specifically for the purposes of the SHVA pursuant to SHVA's limited delegation in the copyright area. In any event, as EchoStar has pointed out, the Commission's broad discretion to set policy either by rulemaking or by case-specific

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<sup>10</sup> Satellite Home Viewers Act of 1998, Pub. L. 100-667, title II, § 712(1) ("The bill directs the Federal Communications Commission within 120 days after the date of enactment, to under take a combined inquiry and rulemaking proceeding regarding the feasibility of imposing syndicated exclusivity rules for private home viewing. . . ."); *id.* at § 713 ("This bill directs the FCC within a year of the enactment to prepare and submit a report [concerning discrimination against distributors of secondary transmissions]); *id.* at Section 4 ("This section . . . require[s] the FCC, within six months after enactment of this legislation, to initiate an inquiry concerning the need for a universal encryption standard . . .").

<sup>11</sup> NAB Petition at 29.

adjudication<sup>12</sup> means *a fortiori* that the Commission has authority to set policy by a SHVA-specific rulemaking.

**B. EchoStar Supports SBCA's Proposals to Modify dBu Levels for SHVA Purposes**

Recognizing the obsolescence of the Television Allocation Study Organization (“TASO”)<sup>13</sup> standards, developed during the Truman administration, on what constitutes an acceptable signal, the NPRM asks several sophisticated questions with respect to setting new values for Grade B intensity.<sup>14</sup> The broadcasters try to delay the Commission’s work in this area by using EchoStar’s prior recognition that “the redefinition of ‘Grade B intensity’ for SHVA or any other purposes may require careful, fully informed and elaborate analysis.”<sup>15</sup> On the basis of that recognition, EchoStar continued: “While the Commission should undertake that analysis, EchoStar requests that the Commission proceed expeditiously with the other issues covered by

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<sup>12</sup> E.g., *NLRB v. Bell Aerospace Co*, 416 U.S. 267, 291-94 (1974); *Shalala v. Guernsey Memorial Hospital*, 115 S.Ct. 1232, 1233 (1995).

<sup>13</sup> See O’Connor, “Understanding Television’s Grade A and Grade B Service Contours,” *Transactions on Broadcasting*, Vol. BC-14, No. 4 at 139 (1968).

<sup>14</sup> See NPRM at ¶ 27 (Has what constitutes a “conventional outdoor rooftop receiving antenna” and the concept of the quality of service that viewers consider acceptable changed since the Commission adopted the Grade B signal strength levels in the 1950s?); *id.* (Would these standards need modification so that the median observer would continue to find the service acceptable?).

<sup>15</sup> EchoStar Petition at 4 n.3.

this Petition – the development of a predictive method and establishment of measurement rules.”<sup>16</sup>

When EchoStar made that statement, the preliminary injunction issued by the federal district court in Miami was to become effective on October 8, 1998. EchoStar and many others felt that Commission action was necessary by that date to provide needed guidance to the court. In that extremely tight time frame, EchoStar expected there would simply be no time to undertake the work necessary to set new, more appropriate Grade B intensity values. Under an agreement between the parties to the litigation, the effectiveness of that injunction has now been stayed to February 28, 1999. In that extended time period, the work has now been undertaken: SBCA’s expert engineer Mr. Benjamin Dawson has presented solid evidence supporting new values for an acceptable standard of Grade B intensity.

Notably, Mr. Dawson has also been able to “short-circuit” the task by relying on analyses already conducted by the Commission in the area of cable television. As noted in EchoStar’s Comments, the Commission has established *43 dB – fully 13 dB greater than that computed in the Grade B standard* – as the minimum acceptable signal-to-noise ratio that cable operators must provide to subscribers.<sup>17</sup> Moreover, the Commission’s must-carry rules require a television station to deliver to a cable operator’s principal headend a signal of –49 dBu for VHF and –45 dBu for UHF, which “will generally result in a good quality television signal

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<sup>16</sup> EchoStar Petition at 4 n.3.

<sup>17</sup> *Compare Cable Television Technical and Operational Standards*, 7 FCC Rcd. 2021, 2027-28 (1992) *with* O’Connor at 140.

being received.”<sup>18</sup> However, the Commission has repeatedly held that even these signal levels – markedly higher than the Commission’s current Grade B rules – do not always result in acceptable picture quality.<sup>19</sup> In promulgating these rules for the cable industry, the Commission determined what set of dBu levels would constitute “acceptable service.” On the basis of the evidence submitted by Mr. Dawson and the relevant work already undertaken by the Commission, there is no need to wait before adopting new Grade B values that reflect more modern consumer standards.

**C. The Commission Can Promulgate a Model for Predicting Grade B Intensity Without Interfering With the Courts or Jeopardizing Localism or the Network-Affiliate Relationship**

EchoStar observes with some dismay that several broadcast interests – after devoting many pages to the proposition that the Commission has no authority in the area of copyright law – persist in using this rulemaking as a forum to rehash accusations from their court cases. Indeed, at points, several pleadings degenerate into little more than name-calling.<sup>20</sup> As in

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<sup>18</sup> See *Implementation of the Cable Television Consumer Protection and Competition Act of 1991*, 8 FCC Rcd. 2965, 2990 (1993).

<sup>19</sup> See *WRNN-TV Associates Ltd.*, 13 FCC Rcd. 12654, 12657 (1998) (denying must-carry complaint where station signal failed to meet minimum signal-to-noise ratio of 53 dB set by NCTA); *Northwest Indiana Public Broadcasting, Inc.*, 12 FCC Rcd. 4709, 4711 (1997) (denying must carry complaint because station failed to deliver a signal with acceptable picture quality).

<sup>20</sup> *E.g.*, Joint Affiliate Association Comments at vii (“The history of the marketing and reselling of broadcast signals by the satellite industry is a history of fraud and deception. Satellite carriers have been engaged in the larceny of intellectual property on a scale unprecedented in the history of the television industry. The satellite industry’s record of copyright infringement is, as confirmed by recent federal court decisions, a record of arrogant indifference to the law.”); *id.* at 13 (“From the very beginning, the broadcasters urged and

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its prior comments, EchoStar will not dignify these accusations with a response, except to say that (as the broadcasters urge when it suits them) federal court – not the Commission – is the forum to determine the legality of EchoStar’s actions. EchoStar believes that its actions have been legal and in good faith, and has taken steps to confirm this legality in federal court.<sup>21</sup>

At the same time, the broadcasters’ apparent willingness to be at the same time both for and against interjecting the Commission into the business of the courts highlights an important point. The broadcasters seem to forestall Commission action by raising the false specter that this action would interfere with federal court litigation: “it will be up to the courts – not to the Commission – to decide whether a satellite carrier has met its statutorily imposed

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pleaded with the satellite carriers not to misrepresent to innocent consumers the nature and scope of the copyright license the satellite carriers hold for delivery of broadcast network programming. These requests were ignored.”); *id.* at 14 (“the deceptive advertising and marketing practices of satellite carriers PrimeTime 24 and EchoStar have been particularly egregious.”); *id.* at 15 (“[P]rint ads that EchoStar is currently publishing in major newspapers across the country bury the “unserved household” restriction at the bottom of the page in minuscule print that is unreadable for most without a magnifying glass.”); NAB Comments, Summary at 1 (“Until recently, [the principles of localism] were most seriously widespread and flagrant infringement of affiliates’ rights under the Copyright Act by satellite carriers such as PrimeTime 24 and EchoStar. . . . The proposals advanced by the lawbreakers in the satellite industry utterly contradict [localism and the network affiliate relationship].”); *id.* at 1 (“[S]atellite companies . . . have had a simple, and utterly cynical, strategy: (1) sign up as many illegal subscribers for distant network stations as possible, (2) when the courts inevitably order the satellite companies to stop breaking the law, enlist terminated subscribers as a lobbying army to try to ratify the satellite companies’ lawbreaking.”); *id.* at 34 (“The Commission plainly lacks the authority to transform a narrow compulsory license enacted by Congress into a massive transfer of property rights – in this case to scofflaws – that Congress could not conceivably have contemplated.”); *id.* at 56 (“For ten years, the satellite industry has consciously and lawlessly abused the narrow compulsory license granted by the SHVA.”); *id.* at 60 (“Satellite companies have marketed network signals illegally not as a charitable enterprise – as their comments imply – but as a highly profitable, unlawful business.”).

<sup>21</sup> *EchoStar Communications Corp. v. CBS Broadcasting, Inc.*, Plaintiff’s Original Complaint and Request for Declaratory Judgment, Civil Action No. 98-B-2285 (D. Colo., Oct. 19, 1998).

burden of proof.”<sup>22</sup> Yet this is the very reason why the Commission *should* rather than should not redefine Grade B intensity and establish a model for predicting its incidence. The Commission’s work on defining Grade B intensity, consistent with the provisions of the SHVA, will not circumvent the copyright courts, but will instead assist those courts. Indeed, it will provide indispensable guidance: federal courts are now struggling with the “unserved household” question without any guidance from the agency whose expertise Congress chose to marshal. When the Commission supplies the necessary tools, the precise extent and manner in which the courts would use them will, of course, be up to these courts. If the courts err in their effort or failure to do so their decisions can be reviewed by the appropriate federal courts of appeals. In any event, however, the Commission’s work will be complete. Contrary to the broadcasters’ misleading intimations, the Commission would not need to be involved in the enforcement of the SHVA or encroach on the jurisdiction of any copyright court. In other words, while the Commission can and should provide courts with the benefit of its regulatory expertise, it cannot interfere – and therefore need not fear interfering – with the federal courts’ authority to enforce the SHVA.<sup>23</sup>

With respect to the question of a predictive model, the broadcasters continue to make the remarkable argument that such a model has no place in the implementation of the SHVA,<sup>24</sup> even though they have prosecuted the Miami copyright litigation based on the use of

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<sup>22</sup> NAB Comments at 38.

<sup>23</sup> Of course, upon a court’s grant of a motion to refer a particular “Grade B” matter to the Commission’s primary jurisdiction, the Commission may need to pass on this matter.

<sup>24</sup> *E.g.*, Joint Affiliate Association Comments at 58.

their own pet predictive model as a presumptive tool. Having avidly requested use of a predictive model in court, they cannot now erect a legal barrier to the development of a more accurate one by the Commission. Nor can such inconsistency be justified by the fact that courts have the authority to fashion equitable remedies.<sup>25</sup> Here, there is no need to resort to any equitable authority as the Commission has clear statutory authority under the SHVA.

Nor would localism be endangered by the use of a model for more accurately predicting which households cannot receive an adequate signal. The *underprediction* of such households that bedevils the Longley-Rice 50,50,50 model is not necessary to protect localism. With a more accurate predictive model such as the point-to-point Terrain Integrated Rough Earth Model (“TIREM”), network affiliates lose few if any viewers who can now receive an acceptable local signal, yet all consumers are ensured access to one source of network programming. Thus, all parties in this proceeding should in theory support the same thing – a model which most accurately predicts which households are truly “unserved.”

In any event, the numbers cited by the broadcasters as “lost viewers” are a red herring.<sup>26</sup> First, they are unreliable. For example, the “national” numbers cited by the NAB are the result of increasing numbers derived from a Commissioner’s extemporaneous remarks to take account of “the nation’s 100 million television homes.”<sup>27</sup> But most important, the premise is wrong: what the broadcasters refer to as “lost viewers” means in most cases viewers *that cannot*

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<sup>25</sup> *Id.* at 58-60.

<sup>26</sup> NAB Comments at 5 (the broadcasters fear losing “all protection with respect to 15% or 20% of all American TV households . . . [consisting of] 15 to 20 million households, with 40 to 53 million viewers”).

<sup>27</sup> *Id.*

*receive acceptable local signals in the first place.* The broadcasters cannot lose audiences that they mostly do not have anyway. For the same reason, nor should localism be at risk with the setting of new Grade B values. If a household cannot receive a signal corresponding to these standards, it likely does not watch the relevant station anyway and should not count as a “lost” household.

Indeed, other than these misleading estimates of “lost” viewers and conclusory “the sky-is-falling” statements,<sup>28</sup> no broadcaster submits tangible or quantitative evidence of financial harm from the rules requested by EchoStar.<sup>29</sup> Notably, no broadcaster even tries to quantify any loss of advertising revenues if the Commission sets new Grade B values and develops a model for predicting their incidence. In that respect, EchoStar also notes that advertising rates are not tied to Grade B contours. Rather, broadcasters use Designated Market Areas (“DMAs”) – not Grade B contours – to “represent the actual market areas in which broadcasters acquire programming and sell advertising.”<sup>30</sup> The use of DMAs for advertising sales is particularly significant: since the “unserved household” restriction is all about avoiding cannibalization of each network affiliate’s advertising revenue, it is reasonable to wonder, for

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<sup>28</sup> *E.g.*, Comments of the Association of Local Television Stations at 10 n.20 (“No rational doubt may exist that a local station denied access to a portion of its in-market audience is injured.”). Again, EchoStar disputes the proposition that households who cannot receive a truly acceptable signal can accurately be considered to be part of a station’s “in-market audience.”

<sup>29</sup> See NPRM at ¶¶ 27-28 (Would changes in the definition of Grade B intensity have detrimental effects on viability of local television stations, and, potentially, on the goal of localism?).

<sup>30</sup> *Definition of Markets for Purposes of the Cable Television Mandatory Television Broadcast Signal Carriage Rules, Implementation of Section 301(d) of the Telecommunication Act of 1996 Market Determinations*, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 6201, 6219 (1996) (“*Market Determination Order*”).

example, how “loss” of viewers outside an affiliate’s DMA but within a Grade B contour or Longley Rice map could cause the sort of harm postulated by the broadcasters, especially since, as explained above, most of these viewers could not watch the signal anyway.

**D. The Broadcasters’ Statements Regarding Signal Measurement Are Incorrect**

All of the broadcasters’ arguments regarding measurement are based on an erroneous legal premise: that signals must be measured *in the air at the rooftop*. The broadcasters apparently rely on the SHVA’s identification of an unserved household as one that “cannot receive *through the use of a conventional outdoor rooftop receiving antenna*, an over the air signal of Grade B intensity. . .” as requiring rooftop measurements. Based on this belief, they argue, for example, that, “the crucial issue is the *ambient field strength in dBu’s* in the vicinity above the rooftop.”<sup>31</sup> But, as EchoStar has already stated, “outdoor rooftop” in the SHVA simply describes where the *antenna* must be, not where the signal must be measured, and certainly not where the poor consumer can be expected to install his or her television set to receive an acceptable signal.<sup>32</sup> The only place where the strength of a television signal is relevant to the statutory purposes is at the television itself. The statutory specification of an “outdoor rooftop” antenna does not change this.

The broadcasters continue to argue that measurements must be taken at the roof with perfectly calibrated and aligned antennas using preamplifiers and rotors connected to a

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<sup>31</sup> NAB Comments at 49.

<sup>32</sup> See 17 U.S.C. § 119(d)(10).

single television in order to show which households “can” or “cannot” receive a Grade B signal.<sup>33</sup> In other words, even if a household *does not* receive a Grade B signal, the broadcasters would deny that household distant network retransmissions on the grounds that, theoretically, the household *could* receive such a signal if measurements were taken at the roof using perfect equipment. Indeed, the broadcasters argue that Congress’ intent in promulgating the SHVA was to determine “unserved households” as those who could – *in other circumstances* – hypothetically receive Grade B signals.<sup>34</sup> Respectfully, EchoStar submits that this is absurd. It is little comfort for a consumer who cannot receive a Grade B signal using her equipment that she *could conceivably* obtain such signals by selling all but one television and using the money to upgrade and perfectly calibrate her rooftop antenna.

Indeed, in a case cited by the broadcasters themselves, the Commission recently upheld a Cable Services Bureau ruling concerning a dispute between a homeowners’ association and several residents of Potomac, Maryland over whether that resident could receive an acceptable over-the-air broadcast signal at their home.<sup>35</sup> The Bureau ruled against a

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<sup>33</sup> E.g., NAB Comments at 49 (“[EchoStar’s] proposal flies in the face of the Act, which makes a household ‘unserved’ only if it ‘cannot receive’ a signal of Grade B intensity . . . with a conventional rooftop antenna.

<sup>34</sup> Joint Affiliate Association Comments at 72-73 (“When Congress granted the satellite carriers the extraordinary privilege of a compulsory copyright license, it intended for the license to be used only to provide network signals to households that *truly cannot receive* a signal of Grade B intensity of over the air with an outdoor, rooftop antenna. Congress did not intend to permit service to households that are not receiving an acceptable picture simply because they are using faulty, defunct, or miscalibrated equipment or because they refuse to use an outdoor antenna or orient their antenna toward the local network station’s transmitter.”).

<sup>35</sup> *In re Lubliner and Galvin*, 13 FCC Rcd. 16107 (1998); *In re Lubliner and Galvin*, 13 FCC Rcd. 4834 (Cab. Serv. Bur. 1997).

homeowners' association for "[failing] to even take measurements from inside of Petitioner's attic – the very location from which it claims that Petitioners can receive acceptable quality signals."<sup>36</sup> The broadcasters acknowledge this attic measurement holding, but make the astounding claim that their *engineer* believes this holding to be inapposite in the SHVA context because of the SHVA's specific legal requirements of a rooftop measurement.<sup>37</sup>

The broadcasters also make much of the fact that EchoStar's measurement proposals in this proceeding differ from those presented in the Colorado litigation.<sup>38</sup> This is a non-issue. EchoStar has presented two measurement proposals that accomplish the same thing: measure actual (as opposed to non-existent ideal) conditions. One is the proposal presented to the Colorado court, which involves subtracting from the measurement the results of antenna misorientation and signal loss associated with actual splitters and length of consumer cable. As an alternative, the Commission could simply measure the signal strength (in volts terminated in the characteristic impedance of the coaxial or twin-lead transmission line) at the television sets themselves.<sup>39</sup> Both proposals satisfy the requirement of measuring actual signal strength, and EchoStar endorses use of either methodology.

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<sup>36</sup> *Lubliner*, 13 FCC Rcd. at 4841.

<sup>37</sup> NAB Comments at 48 n.29.

<sup>38</sup> NAB Comments at 46; Joint Affiliate Associations Comments at 68-69.

<sup>39</sup> Indeed, measurement at the television set was endorsed by Hammett & Edison, Inc., an independent firm of consulting engineers. *See* Hammett & Edison Comments at 3-4 ("Inasmuch as it is relatively cumbersome to measure independently the field strength at a household's outdoor receiving antenna, measurement of the signal as gathered by that antenna and carried by the antenna transmission line to the household receiver antenna terminals may be of interest. . . . We recommend that the Commission accept RCL measurements for SHVA purposes.).

## II. CONCLUSION

For the foregoing reasons, and those set forth in EchoStar's and SBCA's comments, the Commission should adopt new values for Grade B intensity for the purposes of SHVA, promulgate an accurate model for predicting its incidence, and establish rules for measuring it.

Respectfully submitted,



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