

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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, 9345
)	
Part 73 Definition and Measurement of Signals of Grade B Intensity)	

REPLY COMMENTS OF DIRECTV, INC.

DIRECTV hereby offers the following reply comments in the above-captioned proceeding.

In this proceeding, the Commission has properly identified a number of serious problems attending the determination of whether a household is “unserved” for purposes of applying the satellite carrier compulsory copyright license created by Congress in the Satellite Home Viewer Act (“SHVA”).¹ Instead of proffering any serious efforts to resolve these problems, the National Association of Broadcasters (“NAB”) and the network affiliates, among others, have responded with comments that are long on rhetoric but short on substance. Indeed, while the NAB urges the Commission to “shed no tears for the satellite industry,”² makes dire reference to threats posed by “satellite industry lawlessness,”³ and uses the term “scofflaw” repeatedly throughout its filing, the association never comes to grips with the simple,

¹ 17 U.S.C. § 119(d)(10).

² Comments of the National Association of Broadcasters (“NAB Comments”) at 3.

³ *Id.*

fundamental principle that underlies the SHVA, which has been distilled to its essence by Senator Patrick Leahy: *“No customer’s distant satellite TV signals should be cut off if the customer is unable to receive local TV broadcasts over the air.”*⁴

Neither the subscriber who is precluded from receiving an acceptable broadcast network television signal due to the configuration of “Southern Indiana hills in [his] neighborhood,”⁵ nor the customer whose “house lies in a low area” such that he “cannot receive a viewable signal for any of the major networks,”⁶ nor the resident living in the mountain community northwest of Las Vegas whose household is located in several network stations’ Grade B contours, but whose path to these stations is blocked by a ridge of mountains 10,000 feet above sea level,⁷ is a “scofflaw.” It is not “radical and illogical”⁸ for the Commission to try to come up with a method of ensuring that if these consumers cannot receive viewable over-the-air pictures from their local network affiliates, they are able to receive distant network signals from satellite providers. Indeed, it is hard to understand what the vaunted principle of “localism” means to a consumer who cannot receive an acceptable over-the-air picture from his or her local network affiliate.

The simple fact motivating this proceeding is that many consumers are being unfairly denied access to network programming via satellite because of an arbitrary and inequitable application of the term “signal of Grade B intensity” that the Commission presently

⁴ Comments of Senator Patrick Leahy at 1 (emphasis added).

⁵ Comments of John V. Wiegand, Spencer, Indiana.

⁶ Comments of Michael Bailey, Waxhaw, North Carolina.

⁷ Comments of Ralph Hamilton, Mt. Charleston, Nevada.

⁸ NAB Comments at 20.

stands in a unique position to address. In fact, the text of the SHVA charges the Commission to do so. The Commission should not abdicate this responsibility.

I. THE COMMISSION HAS THE CLEAR LEGAL AUTHORITY TO TAKE THE ACTIONS REQUESTED BY THE SATELLITE INDUSTRY

As a threshold matter, it is plain that the Commission has the legal authority to define the term “signal of Grade B intensity” for SHVA purposes, as well as to adopt a predictive model that will serve as a workable proxy for compliance purposes. The broadcasters’ efforts to argue otherwise are unpersuasive and inconsistent with the text and intent of the statute.

In particular, the NAB attempts to characterize Section 119 as reflecting a “specific adopt[ion]” of “the FCC’s then-existing recitation of Grade B signal strengths -- *e.g.*, 47 dBu as the minimum ‘Grade B’ signal strength for Channels 2-6.”⁹ The network affiliates similarly argue that Congress adopted with “mathematical precision” the definition contained “in Section 73.683” of the Commission’s rules.¹⁰ Unfortunately, these readings are simply not in accord with what the statute says. The plain language of the “unserved household” definition specifically references an “over-the-air signal of grade B intensity (*as defined by the FCC*).”¹¹ It does *not* say that a signal of Grade B intensity has the meaning expressly set forth in title 47 of the Code of Federal Regulations “as in effect” on a certain date -- the approach that Congress took, for example, in defining “local service area of a primary transmitter” in the cable compulsory licensing provisions.¹² It does *not* say that Grade B signal intensity shall be that set

⁹ NAB Comments at 27.

¹⁰ Joint Comments of the ABC, CBS, Fox and NBC Television Network Affiliate Stations (“Affiliate Comments”), at 34.

¹¹ 17 U.S.C. § 119(d)(10)(A) (emphasis added).

¹² 17 U.S.C. § 111(f).

forth in Section 78.683 or any other Commission rule. And it does *not* say that a signal of Grade B intensity shall mean “47 dBu for Channels 2-6,” as the broadcasters contend, or any other dBu. Congress has expressly delegated to the FCC the authority to “define[]” what constitutes an “over-the-air signal of Grade B intensity” for purposes of determining whether a household is “unserved.” That is what the Commission now should do.

The network affiliates attempt to distance themselves from the uncontroversial principle, recognized in *Helvering v. Wiltshire*, 308 U.S. 90 (1939) and *Lukhard v. Reed*, 481 U.S. 368 (1987), that where Congress means to freeze an agency’s administrative interpretation in time, it must do so expressly and unambiguously. Their attempt is wholly unpersuasive.

First, the affiliates maintain that the Commission is without authority to interpret terms contained in the Copyright Act.¹³ The fundamental flaw in this position, of course, is that the statute on its face *expressly delegates* responsibility to the FCC to determine the content of the term “signal of Grade B intensity.” This term does not appear in any Copyright Office regulation, or in any FCC rule for that matter. It is a term that Congress expected the FCC to “define[],” considering whether individual “household[s]” can “receive” such signals using a “conventional rooftop receiving antenna.”¹⁴ As further evidence of the FCC’s intended role, the Copyright Office has recognized that the issues attending the definition, prediction and measurement of Grade B signals are technical matters that are uniquely within the FCC’s expertise to address, since the unserved area restriction is essentially a “communications

¹³ Affiliate Comments at 33, 36.

¹⁴ 17 U.S.C. § 119(d)(10)(A).

regulation” that “appropriately belongs” in the province of the FCC.¹⁵ Unlike the Copyright Office, the FCC has the “considerable experience and expertise,” and the “continuing jurisdiction and regulatory mechanisms to make adjustments to its regulations on a case by case basis should any difficulties arise.”¹⁶ The FCC also has the “engineering expertise” to explore what standards should be utilized to ascertain whether a subscriber is “unserved.”¹⁷ These facts were evident to Congress in delegating definitional authority to the FCC.

Second, the affiliates argue that Congress in fact referred to a “fixed administrative interpretation” of Grade B signal intensity that the Commission now is precluded from revisiting or revising.¹⁸ That argument has been addressed above, and in DIRECTV’s initial comments, and is simply not supported by the text of the statute. If the broadcasting industry desires a “frozen” definition of Grade B signal intensity, it must approach Congress for this relief. Until then, the delegation to the Commission to define the term for SHVA purposes is clear and explicit.

Third, with little support on the law, the affiliates proceed to argue policy, claiming that “[a]ny increase in the Commission’s longstanding Grade B signal intensity values would be inconsistent with the principles of localism -- the touchstone for any action in this proceeding -- and they are, therefore, inconsistent with the plain, unequivocal legislative goals,

¹⁵ U.S. Copyright Office, *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals* (August 1, 1997), at 125-26.

¹⁶ *Id.*

¹⁷ *Id.* at 126.

¹⁸ Affiliate Comments at 34.

objectives, and intent of Congress in enacting the Act.”¹⁹ But this noble-sounding conclusion says nothing helpful about the Commission’s task here. As a legal matter, while the broadcasters’ repeated references to “localism” presumably are intended to remind the Commission that it is a policy factor²⁰ that the Commission can weigh in defining “Grade B” as Congress authorized and expected it to do, it is not a reason to refrain from action, which would be directly contrary to the statutory text. Moreover, the purpose of the SHVA, by the broadcasters’ own admission, was and remains “to authorize satellite delivery of network programming” to “households that are genuinely ‘unserved’ by local network affiliates.”²¹ Fighting tooth and nail the Commission’s promulgation of an accurate definition and predictive methodology for determining whether consumers are “genuinely” unserved is a curious way to effect this undisputed legislative purpose.

¹⁹ *Id.* at 35.

²⁰ Interestingly, for all their collective emphasis on the fact that the term “signal of Grade B intensity” is not part of the statute (the Communications Act) that the FCC ordinarily administers, it is worth noting that the policy of localism itself is not grounded in the text of the Communications Act, either. When the Commission first proposed to create the DBS service in the early 1980’s (over the objections of the NAB and the broadcasting industry, who argued that the Commission had no authority to create a national video service), the Commission noted that the “words ‘local’ or ‘localism’ [do not] appear in the statute,” and while localism certainly has been a “fundamental underpinning of Commission television regulation,” this underpinning “was established by Commission choice, not by statutory command.” Inquiry into the development of regulatory policy in regard to Direct Broadcast Satellites for the period following the 1983 Regional Administrative Conference, *Notice of Proposed Policy Station and Rulemaking*, 86 FCC 2d 719, 737, ¶¶ 46-47 (1981). Although the principle of localism is not expressly grounded in the statute that the FCC is “entrusted to administer,” Affiliate Comments at 27, the broadcasters do not question the FCC’s authority to take regulatory action based on that policy. It is therefore ironic, to say the least, that they here challenge the Commission’s authority to define “signal of Grade B intensity” for SHVA purposes when Congress explicitly charges the agency in the statutory text to do just that.

²¹ NAB Comments at 12.

In sum, the profound desire of the broadcasting industry for “the signal strength standards in Section 73.683(a) of the Commission’s rules” to be “codified for purposes of the Act” thankfully cannot alone change the actual text of the statute. The express language required to impose a static definition of a “signal of Grade B intensity” does not exist, and for good reason: Congress intended the Commission to define that term, and to update it as necessary in view of particular market and regulatory conditions that are uniquely within the province of the Commission to assess. Unless the broadcasters have a hidden agenda -- such as inflating for advertising purposes the number of consumers that they claim can receive viewable signals even when this in fact is not the case -- there simply can be no reasonable objection to the Commission’s promulgation for SHVA purposes of a definition of Grade B signal intensity, as well as precise predictive and measurement methodologies, which are intended to accurately identify which consumers indeed are “unserved.”

II. FCC ACTION HERE WILL NOT UNDERMINE “LOCALISM” OR THREATEN THE NETWORK-AFFILIATE RELATIONSHIP

A. The Broadcasters Have Grossly Exaggerated Any Threat To “Localism”

The network affiliates argue in dramatic fashion that the issue here is the “economic impact that a loss of program exclusivity . . . will have on *local television service*.”²² The Commission has heard this argument before. In fact, it heard it more than fifteen years ago when the DBS service was first created. Although they now laud the industry’s “unprecedented competitive and consumer success,”²³ broadcasters used the *very same* rallying cry of “localism”

²² Affiliate Comments at ix (emphasis in original).

²³ Affiliate Comments at xi.

to try to prevent the introduction of DBS to consumers in the first instance, filing dire predictive studies and reams of charts and paper intended to show the harm that introduction of the new satellite-delivered video service allegedly would wreak on the principle of localism.²⁴ The Commission recognized that broadcaster claims concerning the probable effects of DBS on the revenues and audiences of local broadcast stations were speculative, and did not justify refraining from taking action that would benefit consumers.²⁵ That is precisely the scenario here, and the Commission similarly should not hold back from once again taking pro-consumer and pro-competitive regulatory measures.

In particular, the Commission should view with skepticism the proffered “Chicken Little” arguments regarding the erosion of “localism” when DIRECTV, the largest DBS provider in the country, has, by the broadcasters’ own admission,²⁶ actively encouraged the integration of DBS service with over-the-air signals as the best way to provide local signals to subscribers. DIRECTV agrees that consumers prefer local news, weather and sports. That is why DIRECTV encourages and markets off-air antenna usage wherever possible so that its subscribers can receive that local programming.

²⁴ Inquiry into the development of regulatory policy in regard to Direct Broadcast Satellites for the period following the 1983 Regional Administrative Conference, *Notice of Proposed Policy Station and Rulemaking*, 86 FCC 2d 719, 737, ¶ 49 (1981) (“As usually stated, the economic argument against permitting DBS or other competitors to enter a market in competition with local television broadcasters is that competition from DBS would reduce the audiences of advertiser-supported over-the-air television stations, which would reduce the stations’ profits and their ability to provide public-service programming or locally-originated programming.”).

²⁵ Inquiry into the development of regulatory policy in regard to Direct Broadcast Satellites for the period following the 1983 Regional Administrative Conference, *Report and Order*, 90 FCC 2d 676, 691 (1982).

²⁶ NAB Comments at 70-73.

The issue at hand, however, is to make sure that consumers who are unable to receive free, over-the-air signals will still be able to receive network programming by subscribing to distant network signals retransmitted via satellite. DIRECTV believes that this is a policy objective with which it is difficult to take issue, notwithstanding the broadcasters' rhetoric to the contrary.

B. The Broadcasters' Emphasis On Contour-Based Service Areas Is Irrelevant To The Revised Signal Strength Values That The FCC Should Adopt For SHVA Purposes

As the Satellite Broadcasting and Communications Association ("SBCA") has shown, the Commission's current Grade B signal strength values are based upon planning standards and signal propagation assumptions that are clearly outdated; the validity of the assumptions that underlie them have been questioned for decades.²⁷ Thus, DIRECTV has recommended that the Commission adopt Grade B signal strength values of **70.75** dBu for low-band VHF stations, **76.5** dBu for high-band VHF stations and **92.75** dBu for UHF stations. These values are set forth and justified in the Hatfield and Dawson statement submitted by the SBCA, based upon an effort to adapt the Commission's original planning factors to achieve a meaningful measure of Grade B signal strength for SHVA purposes.²⁸ They more accurately reflect the current signal propagation environment and consumer expectations, and although

²⁷ Hatfield and Dawson, Engineering Statement, "Technical Issues and Definitions Relative to the Satellite Home Viewer Act" (Dec. 1998) ("Hatfield and Dawson"), at 4 (attached to the Comments of the Satellite Broadcasting and Communications Association ("SBCA Comments")) ("The values selected for the planning factors have been carried through to the present time from the early 1950's, the days of black and white television and limited national service, despite substantial evidence that these values are outmoded and in need of modification.").

²⁸ *Id.* at Appendix 2, "Recommended Planning Factors."

conservative, will provide meaningful relief for DTH subscribers that cannot receive acceptable over-the-air signals.

Contrary to the claims of broadcasters, implementing these revised values will not threaten the sanctity of the network/affiliate relationship. The claim that a revised Grade B “signal intensity” definition will lead to reduced protected service areas of local television stations,²⁹ for example, simply exploits confusion between Grade B signal *contours* -- predictors of a station’s coverage area for channel allotment and interference protection purposes -- and the determination of an individual consumer’s receipt at his or her home of a “signal of Grade B intensity.” The latter is relevant to the SHVA “unserved household” inquiry; the former is not.³⁰ Specifically, no satellite carrier in this proceeding is urging the Commission to “raise ‘Grade B’ signal intensity to ‘Grade A’ levels . . . as a way to shrink stations’ protected service areas.”³¹ The many pages of coverage maps submitted by the broadcasters to make this point³² thus are irrelevant.

The contour-based Grade B signal strength values contained in Section 73.683 of the Commission’s rules may well be appropriate for the specific channel assignment and interference protection purposes enumerated therein; no satellite commenter has proposed to change their use for those purposes. The SHVA eligibility inquiry, on the other hand, is not

²⁹ NAB Comments at 22-25.

³⁰ See Hatfield and Dawson at 2 (“Simply stated, the Grade B contour of television station service is an area where there may be, but there also may not be, an available signal strength of the level defined as a Grade B signal by the applicable Rules of the Federal Communications Commission.”).

³¹ NAB Comments at 22.

³² *Id.* at 19-27; see Affiliate Comments at 47-57.

about whether a television station signal falls within or outside of a wide, predetermined geographic coverage area. It looks to whether an *individual household*, using a conventional outdoor receiving antenna, can adequately receive a particular station's signal and a viewable picture.

In this regard, signal strength values that are intended to be utilized for that particularized determination, as the satellite industry has proposed, will aid in identifying individual households that are unable to receive over-the-air network signals so as to permit those households to receive distant network signals via satellite. To say that this development will lead to a "loss" of local affiliate viewers is patently false. Often, those consumers were not viewers in the first instance.

III. THE COMMISSION SHOULD ADOPT THE POINT-TO-POINT TIREM PREDICTIVE METHODOLOGY PROPOSED BY THE SBCA AND FIND THAT IT PRESUMPTIVELY MEETS THE SHVA'S DEFINITION OF GRADE B SIGNAL INTENSITY

In terms of a predictive model, DIRECTV believes that the broadcasting industry is on the right track in urging the Commission generally to adopt a point-to-point approach,³³ which better comports with the focus of the SHVA and accommodates a more precise analysis of signal reception at individual households.³⁴ However, the parameters of the Longley-Rice methodology supported by the broadcasters and its assumptions, while possibly appropriate for wide area Grade B predictions (such as those used in the recent digital television proceedings)

³³ Affiliate Comments at 60; NAB Comments at 38; Comments of the Association for Maximum Service Television ("MSTV Comments") at 25.

³⁴ DIRECTV agrees that "Congress chose to make each household's eligibility to receive network signals by satellite depend on whether that particular household can receive a signal of Grade B intensity from a local station." NAB Comments at 40.

are not useful for the more particularized SHVA inquiry into service at individual households.³⁵

For this reason, DIRECTV again urges the Commission to adopt the TIREM methodology proposed by the SBCA.³⁶ As explained, TIREM's "conservative assumptions . . . make it . . . a very useful program for testing specific paths, especially those with complex geometry,"³⁷ is commercially available, and has significant advantages over Longley-Rice. Used in conjunction with the United States Geological Survey's Land Use and Land Clutter ("LULC") database to determine additional losses in signal strength due to foliage and other land use conditions that exist in the vicinity of the receiving location,³⁸ adoption of the TIREM approach as the FCC-endorsed method of determining whether subscribers are "unserved" for section 119 purposes would be an immensely useful step in helping to increase the likelihood that subscribers that cannot receive a quality Grade B over-the-air broadcast signal are afforded a satellite-delivered distant network signal alternative.³⁹

³⁵ See Hatfield and Dawson at 11; see Hammett & Edison Comments at 6.

³⁶ SBCA Comments at 15-19.

³⁷ Hatfield and Dawson at 8; see Hammett & Edison Comments at 6 & n.5 (treatment of error codes is one example of the deficiencies of Longley-Rice, and "one of the reasons that H&E uses TIREM. . . a more sophisticated propagation loss algorithm of which the Longley-Rice routine is only a part").

³⁸ Hatfield and Dawson at 11-12.

³⁹ A TIREM point-to-point approach can be easily implemented, as Hatfield and Dawson explain, through the use of software implementation that can screen consumers' SHVA eligibility. Thus, the "street address of any household in the U.S. can be used to determine a set of geographic coordinates to the nearest second, using ubiquitous and inexpensive commercially available software," and "[s]oftware can be developed by users from Federal government sources for several versions of TIREM." Hatfield and Dawson at 10-11. Indeed, various vendors, such as Decisionmark, offer such software already. See Comments of Decisionmark at 2. The market undoubtedly will produce a multiplicity of vendors that will offer easy-to-use TIREM-based software. DIRECTV sees no reason, however, for the Commission to adopt any commercial vendor's

For the TIREM-based methodology to have its most meaningful effect, however, the Commission must explicitly find that its definition of Grade B signal intensity presumptively is met by the methodology's predictions. Although the broadcasters challenge the Commission's authority to "substitute a predictive model for" an alleged "site measurement requirement" in the SHVA, this is a mischaracterization of the statute. Nothing in the text of the SHVA requires that an actual measurement be taken at each household before a consumer is determined to be "unserved," and the FCC's clear authority to "define[]" Grade B signal intensity contains no explicit or implicit command to the agency to avoid incorporating the use of a predictive model as a means of defining such a signal or determining whether such signals are being received at individual households.

As even MSTV recognizes, the SHVA "unserved household" inquiry can be satisfied by either predictive or measurement options.⁴⁰ As a practical matter, however, the FCC is absolutely correct that "predictive models can be effective proxies for individual household measurements,"⁴¹ and that establishing "an initial presumption" of SHVA compliance if a subscriber is predicted to be unserved using an FCC-approved methodology will "create certainty" and help manage SHVA compliance on a broad scale.⁴²

DIRECTV accordingly once again urges the Commission to adopt a rule that if a subscriber is predicted not to receive Grade B signals using the model proposed, parties

proprietary software or technology as a standard or even as a preferred choice in determining whether households are "unserved."

⁴⁰ MSTV Comments at 25-26.

⁴¹ *Notice* at ¶ 30.

⁴² *Id.* at ¶ 42.

challenging that determination should bear the entire cost and burden of the challenge. Although some parties have advocated retention of a “loser pays” approach in the event of a challenge,⁴³ DIRECTV does not believe that this approach adequately reflects the increased accuracy of the point-to-point, TIREM-based methodology proposed. It also does not adequately decrease the motivation for broadcast network affiliates to bring numerous costly challenges against satellite service providers. DIRECTV strongly believes that challengers should bear the full cost and burden of proceeding when they are presented with suitable evidence that a subscriber has been determined to be “unserved” using an FCC-endorsed predictive model.

IV. SHVA MEASUREMENT TECHNIQUES MUST REFLECT REALISTIC CONDITIONS AT THE HOME

No party to this proceeding has proffered a “low cost, accurate, and reproducible methodology for measuring the presence of a Grade B signal intensity signal in a household.”⁴⁴ Likely, that is because the parties recognize that no such methodology exists, and even if it did, its use on a nationwide basis as a primary method of qualifying millions of subscribers to receive satellite-delivered distant network signals would be wholly impractical. This highlights again that the only practical solution is to accord presumptive weight to the predictive model the Commission endorses for SHVA Grade B determination purposes.

Nevertheless, to the extent that measurement at the household remains as a secondary method for showing SHVA compliance, DIRECTV reiterates the importance of incorporating real-life factors into an approved measurement methodology. The 100-foot mobile

⁴³ See, e.g., Affiliate Comments at 75.

⁴⁴ Notice at ¶ 37.

run proposed by the broadcasters,⁴⁵ for example, is simply no substitute for measurement at an individual “household” -- which is the precise focus of the SHVA.

Similarly, orienting the test antenna toward “maximum signal strength”⁴⁶ again does not provide results relevant to the SHVA inquiry into whether a particular household receives a viewable picture. A “conventional outdoor receiving antenna” does not rotate to point in the direction of a network station’s tower, and the SHVA certainly does not require consumers to purchase expensive rotating antennas. Moreover, in considering whether consumers can receive a viewable picture (which is the bottom-line result that receipt of a signal of Grade B intensity is intended to approximate), the strongest signal is not necessarily the best signal. Indeed, peaking an antenna on the strongest signal often produces a *worse* picture due to ghosting (the main signal and the reflected signals adding and subtracting). Looking at the picture and adjusting the antenna to receive the best picture (minimum ghosting) is what homeowners and installers do. It also is common sense -- a desirable feature of any measurement methodology that the Commission adopts.

In line with the other changes that DIRECTV and others in the DTH industry have advocated, DIRECTV again urges the Commission to adopt a method of actually measuring signal strength whereby (1) measurements are taken in an accessible location, as close as possible to the residence, at actual roof height; (2) signal strength readings are taken approximately every thirty seconds for a period of five minutes; and (3) each of these readings is subsequently be adjusted for signal strength loss due to the actual length of the antenna line and the actual number

⁴⁵ NAB Comments, Attachment C, Engineering Statement of Jules Cohen (“Cohen Statement”), at 7, ¶ 16.

⁴⁶ *Id.* at 8-9, ¶¶ 18-20.

of splitters per household.⁴⁷ If more than one of the ten signal strength values computed under this method (*i.e.*, greater than 10%) is less than the Grade B signal strength values proposed by DIRECTV and the SBCA, then that subscriber should be deemed an “unserved household” under the SHVA and eligible to receive satellite-delivered distant network signals.

V. THE SUCCESS OF THE DTH INDUSTRY TO DATE IS A COMPELLING REASON TO GRANT RELIEF TO CONSUMERS, NOT TO DENY IT

One of the more puzzling approaches that the broadcasters have taken in this proceeding is to laud the success that the satellite industry has had to date in spite of the formidable obstacles it has faced and continues to face. The network affiliates, for example, quote DIRECTV’s president repeatedly in an effort to show that the “satellite industry is enjoying unprecedented consumer acceptance and success,”⁴⁸ and the NAB characterizes the industry as “thriving.”⁴⁹ The argument, it seems, is that the Commission should not afford satellite subscribers relief in this proceeding, no matter how intolerable the current situation, because DBS providers have shown some promise in competing against cable operators, who nevertheless continue to dominate the MVPD market with an 85% share.⁵⁰

The argument is peculiar at best. DIRECTV of course is proud of the inroads that a young DBS industry has made in attempting to offer a real cable alternative to consumers.⁵¹ But those inroads have come *in spite of and notwithstanding* a variety of regulatory obstacles and

⁴⁷ SBCA Comments at 22.

⁴⁸ Affiliate Comments at v, x.

⁴⁹ NAB Comments at 70.

⁵⁰ *News Release*, “Commission Adopts Fifth Annual Report on Competition in Video Markets” (rel. Dec. 17, 1998) (“Competition Report News Release”), at 1.

⁵¹ *Id.* (noting that DBS subscribership between June 1997 and June 1998 grew from approximately 5 million to 7.2 million subscribers).

barriers to entry that still hamper its progress. The Commission recognized some of these obstacles just days ago in releasing its Fifth Annual Report on Competition in Video Markets:

Noncable MVPDs that provide competitive pressure on incumbent cable operators and provide consumers with real choice still find regulatory and other barriers to entry in to markets for the delivery of video programming. MVPDs with the potential to compete with incumbent cable operators continue to experience some difficulties in obtaining programming, both from vertically integrated satellite cable programmers and from unaffiliated program vendors who continue to make exclusive agreements with cable operators. In multiple dwelling unit markets, while landlords may have a choice of more than one distributor, potential entry may be discouraged or limited by incumbent video programming distributors that have negotiated long-term exclusive contracts.⁵²

There is no telling where the satellite industry would be or could be if providers such as DIRECTV were not hindered by the controversy and uncertainty surrounding the satellite delivery of distant network signals. Indeed, DIRECTV faces the prospect of hundreds of thousands of subscribers being arbitrarily cut off from receiving those signals precisely because of the vagaries of a statutory term that the Commission has never stepped in to define. Asking the Commission to do so now for the sake of millions of current and future DBS subscribers is hardly a plea for the Commission to “bend the copyright laws” in the satellite industry’s favor.⁵³ To the contrary, it is a plea for the Commission to address a problem that poses a serious potential constraint on satellite industry growth relative to incumbent cable monopolists, who are

⁵² *Id.* at 4 (emphasis added); *see also* Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, *Report and Order* (rel. Nov. 25, 1998) at ¶ 60 (noting that DBS industry “is a relatively new entrant attempting to compete with an established, financially stable cable industry” and that DBS providers “currently have far less market power than cable operators”).

⁵³ Affiliate Comments at x.

not so constrained.⁵⁴ And it is disingenuous to tout the success of DBS (which has been achieved against tremendous odds) as a reason for the Commission not to address a regulatory barrier that clearly impedes the satellite industry's ability to compete fully against dominant cable operators in the MVPD market.

VI. "LOCAL-INTO-LOCAL" IS NOT A PANACEA

Finally, DIRECTV wishes to point out that, whatever the merits of permitting satellite providers to retransmit local affiliates into local markets via satellite, it is not a panacea for the problem that the satellite industry currently faces. There simply is not enough satellite capacity available for any satellite carrier to carry the nation's more than 1,584 local broadcast television stations.⁵⁵ Most likely, a DTH provider could carry a handful of local stations in a handful of markets. Thus, there will always be a need for distant network signals, even if the copyright law is changed to permit local-into-local service.⁵⁶ Moreover, to the extent that such service is not compatible with a subscriber's DBS receiving equipment, or the subscriber does not wish to purchase additional receiving equipment, including a second dish, it should not be looked upon as the optimal method for providing "unserved" subscribers with continued access to network programming.

⁵⁴ The cable television compulsory copyright license contains no "unserved household" restriction, *see* 17 U.S.C. § 111, which the broadcasters themselves acknowledge. See NAB Comments at 64.

⁵⁵ *News Release*, "Broadcast Station Totals as [of] October 30, 1998" (rel. Nov. 18, 1998), at 1.

⁵⁶ Indeed, Echostar, the only DBS provider that has announced plans to offer local-into-local service, agrees that the service will be offered only in a limited number of markets and that there will continue to be a need for distant network signals for many of its subscribers, evidenced in part by its petition for the Commission to initiate this rulemaking. *See Notice* at ¶ 9.

DIRECTV believes that, ultimately, the best way to bring local signals to subscribers is by providing terrestrial over-the-air signals as a complement to DBS service. While local-into-local service may provide an additional option for providing a limited number of local signals, it will by no means eliminate the critical need for a consumer-friendly approach to distant network signal eligibility.

More fundamentally, there should be no illusions about the magnitude of the current Grade B definitional problem, or of the need for the Commission to address it. DIRECTV accordingly urges the Commission to do so.

VII. CONCLUSION

Satellite providers and their subscribers need the FCC's help, and soon. The Commission has the legal and policy mandate to provide a definitive statement on the Grade B signal intensity standard for SHVA purposes, as Congress intended. As DIRECTV and the satellite industry have urged, the Commission's rules should be modified to include: (i) Grade B signal strength values specifically crafted for use in determining which households are "unserved" under the SHVA; (ii) endorsement of a TIREM-based methodology, in conjunction with additional adjustments for losses due to foliage and other land use conditions (among other factors), that can be used to predict such whether households are "unserved," and the results of which will be given a presumptive legal effect in disputes regarding SHVA compliance; and (iii) a more practical and accurate method of measuring signal strength actually received at the home.

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