

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

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

To: The Commission

OPPOSITION TO PETITION FOR RECONSIDERATION AND/OR CLARIFICATION

Entravision Holdings, LLC (“Entravision”), by and through its counsel, and pursuant to Section 1.429(f) of the Commission’s Rules, hereby files its Opposition (“Opposition”) to the Petition for Reconsideration and/or Clarification (“Petition”) filed by EchoStar Communications Corporation (“EchoStar”) in the above-captioned proceeding.¹ The Petition concerns the Commission’s efforts regarding the methods for determining whether a household is “unserved” by local network-affiliated television broadcast stations for the purposes of the Satellite Home Viewer Act (“SHVA”). 17 U.S.C. § 119. The Petition requests, among other things, that the Commission adopt a SHVA-specific definition of Grade B intensity for the purposes of determining whether a household is “unserved.”

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¹ 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, Report and Order, FCC 99-14 (rel. Feb. 2, 1999) (“Order”).

I. Introduction

The Commission has clearly stated that the main purpose of the Order is to “identify those households that are *truly unserved* within the meaning of the SHVA.” Order at ¶ 8 (emphasis added). The present definition of Grade B intensity serves this purpose as it has been found, time and time again, to provide a “realistic picture of station coverage.” Order at ¶ 42. EchoStar’s request that the Commission adopt a SHVA-specific definition of Grade B intensity is clearly made in order to expand of the number of households that are defined as “unserved” so as to take advantage of SHVA’s compulsory license provisions. This change will not fulfill the Commission’s stated goal of identifying households that are “truly unserved.” EchoStar’s request directly contradicts Congressional intent, is beyond the Commission’s authority, is unnecessary, and will only serve to create confusion regarding other Commission standards which depend on the definition of Grade B intensity. Consequently, the relief must be denied.

II. Argument

Entravision is the licensee of full-power and low-power Spanish language television stations, primarily in the Southwest and West Coast areas, all affiliated with the Univision Network. Entravision has determined from experience that the existing definition of “unserved household,” founded as it is upon the Commission’s definition of Grade B intensity, is crucial to maintaining the balance necessary to meet the broadcasting needs of its minority-group audience. Entravision disseminates Spanish-language programming to and serves the needs of Hispanic individuals who rely on Entravision’s stations not only for entertainment, but also for news and public affairs programming of importance to them. This specialized programming will suffer greatly from an expansion of the definition of “unserved households” that would occur with the

creation of a SHVA-specific definition of Grade B intensity. The duplication of programming that would result from such an expansion would diminish the viewing audience of Entravision's stations. Such a result will inevitably produce a drop in advertising revenue, endangering the financial health of the stations and the ability of Entravision to provide quality Spanish-language broadcasts to its viewers. This result would ill serve the public interest.

Broadcast copyright owners enjoy the exclusive right to exploit their works and to authorize others to do so. 17 U.S.C. § 106 (1998). However, Congress, in SHVA, carved out a narrow exception from the Copyright Act for the satellite carrier industry, allowing satellite carriers to deliver network broadcasts to a limited category of dish owners, truly unserved by local network affiliate broadcasters. This compulsory license in SHVA was enacted solely in order to make network programming available to the small percentage of viewing households unable to receive local stations while, at the same time, protecting local network affiliates from duplication of their programming in homes able to receive local stations.

In enacting these provisions, Congress strictly limited the compulsory license so that in order to qualify for network programming, unserved customers had to establish their inability to receive local network affiliates through over-the-air reception. 17 U.S.C. § 199(d)(10) (1998); Satellite Home Viewer Act of 1988, H.R. Rep. No. 100-887, pt. 2, at 20 (1988) (“[Section 119 is intended] to . . . bring network programming to unserved areas while preserving the exclusivity that is an integral part of today’s network-affiliate relationship”). Only if there is a substantial basis that a household can’t receive local programming is that household deemed an “*unserved household*,” entitled to receive network programming directly from a satellite service.

In SHVA, Congress explicitly defined an “unserved household” as a household that is unable to receive “through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of grade B intensity (as defined by the Federal Communications Commission) of a primary network station affiliated with that network.” 17 U.S.C. § 119(d)(10) (1998).² In defining Grade B intensity, Congress explicitly identified 47 C.F.R. § 73.683 of the Commission’s Rules as the existing regulation it was relying and adopting by reference. H.R. REP. 100-887, at 26 (1988). That standard, long used by the Commission to define “adequate” or “acceptable” reception, consists of a median signal strength of 47 dBu for Channels 2-6, 56 dBu for Channels 7-13, and 64 dBu for Channels 14-69. 47 C.F.R. § 73.683.³

EchoStar’s request to create a SHVA-specific definition of Grade B intensity is made only in order to sidestep Congressional intent. Creation of SHVA-specific Grade B would allow EchoStar to adhere to the *letter* of the law (“unserved household” as one that is unable to receive “through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of

² It is well established that once a statute “adopts the particular provisions of another by a specific and descriptive reference to the statute or provisions adopted . . . [s]uch adoption *takes the statute as it exists at the time of adoption* and does not include subsequent additions or modifications by the statute so taken unless it does so by express intent.” Hassett v. Welch, 303 U.S. 303, 314 (1938), quoting SUTHERLAND STATUTORY CONSTRUCTION (2nd ed.) 787-88 (emphasis added). See also SUTHERLAND STATUTORY CONSTRUCTION § 51.08 (5th ed.) (remarking that “[a] statute of specific reference incorporates the provisions referred to from the statute as of the time of adoption without subsequent amendments, unless the legislature has expressly or by strong implication shown its intention to incorporate subsequent amendments within the statute”).

³ Congress reaffirmed use of the Grade B contour for establishing an “unserved household” in amending and extending Section 119 of the Copyright Act in 1994. H.R. Rep. No. 103-703, at 13 (1994) (reaffirming “Grade B intensity” as an objective test). It has not been altered since.

grade B intensity”) so as to take advantage of SHVA’s compulsory licence provisions. But when Congress adopted Grade B intensity as the standard for the definition of “unserved household” under the SHVA, it adopted it as an accurate predictor of signal strength due, in part, to its use as a signal strength standard in many of the Commission’s rules. Congress adopted a well known and oft used standard Grade B standard that was fair to unserved households and network television affiliates. It is a standard that should not be altered so as to satisfy the needs of satellite providers. EchoStar’s Petition essentially requests that the name of the standard be stamped on a new SHVA-specific definition in order to afford EchoStar the benefits of SHVA’s compulsory license provisions. This represents a dishonest attempt to sidestep Congressional intent, is beyond the Commission’s authority, and as such, should not be allowed.

Creating a SHVA-specific definition of Grade B intensity is also unnecessary. The present definition of Grade B intensity serves the Commission’s stated goal of identifying “truly unserved” households. As cited by the Commission in the Order, the present definition of Grade B intensity has been confirmed as an accurate predictor of signal strength by multiple studies. Order at ¶ 42, citing 1975 Field Strength Order, 53 FCC 855 (1975); DTV Sixth Report and Order, 12 FCC Rcd. 14588, 14607 and 14676 (1997). As the present definition of Grade B intensity well serves the Commission’s goal of identifying “truly unserved” households for the purposes of SHVA, the creation of a SHVA-specific definition is both unnecessary and improper.

Any change to the Grade B standard specified in the Commission’s Rules would also be inadvisable as it would have a profound effect on the FCC’s regulatory system. The Commission itself stated in the Order that a multitude of Commission rules are tied to the present

definition of Grade B intensity, and that “establishing another set of values . . . is likely to create confusion in the broadcast industry.” Order at ¶ 43. As a number of the Commission’s rules are tied to the definition of Grade B intensity, the creation of multiple standards denominated “Grade B” would only serve to make the Commission’s rules nearly indecipherable. See, e.g. Section 76.54(c) (“significantly viewed signals”); Section 76.92(d) (network non-duplication rules); Section 76.156(a) (exceptions to syndicated exclusivity); Section 76.501(a) (cable TV cross-ownership). This confusion speaks against the creation of a SHVA-specific definition of Grade B intensity.

Additionally, a flurry of recent Congressional activity may address many of the concerns that prompted EchoStar’s Petition. The Senate Commerce Committee recently voted out a bill that would establish local-to-local satellite broadcasting via a statutory and regulatory scheme where satellite carriers deliver local broadcast signals directly to corresponding local viewers. S. 303, 106th Cong. § 4 (1999). The Courts and Intellectual Property Subcommittee of the House Judiciary Committee also recently voted out its version of such “local-to-local” legislation. H.R. 1027, 106th Cong. (1999). Such an arrangement was considered and nearly enacted in the past. Hopefully, this Congress will enact it into law and resolve the issue of satellite delivery of local programming in the proper, legislative forum. Clearly, the legislative solution is the correct one.

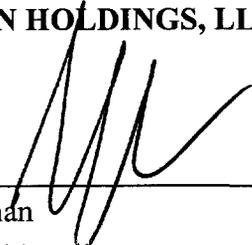
III. Conclusion

EchoStar’s request for a SHVA-specific definition of Grade B intensity for the purposes of the definition of “unserved household” will not serve the Commission’s goal of identifying the “truly unserved.” Rather this unnecessary and dual standard is requested so that EchoStar may sidestep Congressional intent and create a false definition of Grade B intensity in order to take

advantage of the compulsory license provisions of SHVA. As such a result contradicts Congressional intent and is beyond Commission's authority to adopt. Entravision opposes EchoStar's Petition and urges the Commission to deny it.

Respectfully submitted,

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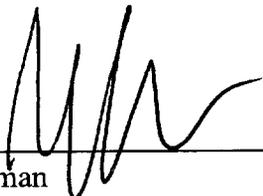
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition to Petition for Reconsideration and/or Clarification was served this 5th day of April, 1999, via hand delivery upon the following:

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