

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. 98-200
RM No. 9335
RM No. 9345

DOCKET FILE COPY ORIGINAL

To: The Commission

REPLY OF ECHOSTAR COMMUNICATIONS CORPORATION

EchoStar Communications Corporation ("EchoStar") hereby files its Reply to the oppositions filed in connection with its petition for reconsideration and/or clarification in the above-captioned proceeding.¹ EchoStar notes that the National Rural Telecommunications Cooperative filed comments in support of its petition and that submitted by DirecTV.²

¹ Petition for Reconsideration and/or Clarification of EchoStar Communications Corporation (filed March 15, 1999) ("Petition"). DirecTV, Inc. also filed a Petition for Reconsideration on March 15, 1999 ("DirecTV Petition"). Several parties filed pleadings and comments with respect to these two petitions, including: Opposition to Petition for Reconsideration and/or Clarification of Entravision Holdings, LLC (filed Apr. 5, 1999) ("Entravision Opposition"); Opposition to EchoStar and DirecTV Petitions for Reconsideration of the National Association of Broadcasters (filed Apr. 16, 1999) ("NAB Opposition"); Opposition to Petitions for Reconsideration and/or Clarification of the ABC Television Affiliates Association *et al.* (filed Apr. 16, 1999) ("Network Affiliates Opposition"). The two petitions and the various pleadings concern *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").

² Comments of the National Rural Telecommunications Cooperative in Support of Petitions for Reconsideration of DirecTV, Inc. and EchoStar Communications Corporation (filed Apr. 16, 1999) ("NRTC Comments").

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In sum, the broadcast interests do not persuasively rebut the four core points of

EchoStar's petition:

- that the Commission has the power to change the definition of "Grade B intensity" for SHVA purposes, to which NAB responds with the fiction that the term "Grade B intensity" is unambiguous, *see* NAB Opposition at 6-7;
- that the Commission's measurement and predictive methodologies should be adjusted to take into account the serious problem of ghosting, which the broadcasters try to brush off, insultingly for consumers, as a question of subjective fancy, *see* NAB Opposition at 7, Affiliates Opposition at 2;
- that the Commission should simplify its measurement methodology – here, the broadcasters respond with the conclusory allegation that, essentially, EchoStar's estimate of a cost of \$100 per household is cheap enough, *see* Affiliates Opposition at 4; and
- that consumers who receive local network service with only 50% confidence should not reasonably be predicted as ineligible for distant network signals; the broadcasters' retort here is that EchoStar does not understand the confidence factor, *see* Affiliates Opposition at 4. The primary dispute with respect to that factor, however, is not over its meaning, but over the policies that should inform the choice of factor.

ARGUMENT

A. The Commission Has Inherent Authority to Set SHVA-Specific Values for Grade B Intensity.

In its petition, EchoStar argued that the Commission erred by failing to recognize its authority to change Grade B intensity values specifically for SHVA purposes.³ To the merits

³ Petition at 2-6. NAB's claim that EchoStar's petition should be rejected because it urges the Commission to reconsider issues already decided is incorrect. NAB Opposition at 5. NAB cites to a single case, *Amendment of Part 97 of the Commission's Rules Concerning the Establishment of a Codeless Class of Amateur Operator License*, 7 FCC Rcd. 1753 (1992), for the proposition that petitions for reconsideration of *rulemakings* must be rejected where they fail to present new facts. However, that case merely stands for the proposition, as stated in section

(Continued ...)

of EchoStar's showing, NAB concedes that agencies interpret the same terms differently, but argues that they only do so when those terms are "ambiguous." Opposition at 6-7. In NAB's view, where, for example, the term "domestic sewage" in the Resource Conservation and Recovery Act is "ambiguous" and thus permits multiple interpretations, the term "Grade B intensity" is "specific" and permits but one interpretation. While some of the authority cited by EchoStar discusses the interpretation of "imprecise"⁴ or "broad"⁵ terms, there is *no* authority for the sort of specificity test cited by NAB to determine whether agencies have the power to define a term differently in different circumstances. In any event, EchoStar cannot discern any "specificity" in the use of the term "Grade B intensity," a term as esoteric and dependent on an agency's technical expertise as can be. Nor can EchoStar understand how "Grade B intensity" can be said to be any more specific than "domestic sewage." Indeed, Congress clearly intended the Commission to "specify" the meaning of the term. Had Congress wanted to be "specific," it could have copied verbatim the Commission's then-current signal measurements in dBu. By choosing not to do so, and by referring to the term "as defined by the FCC, *currently in 47* C.F.R. section 73.783(a),"⁶ Congress signaled that the term "Grade B intensity" was to be made "specific" by the Commission. In other words, "Grade B intensity" is *exactly* the sort of term

1.429(b) of the Commission's Rules, that *if a petition relies on facts which have not previously been presented to the Commission*, those facts must be new or not known to the petitioner at the time of the original proceeding. See 47 C.F.R § 1.429(b). Here, EchoStar does not rely on new facts.

⁴ *Abbott Labs v. Young*, 920 F.2d 984, 987 (D.C. Cir. 1990).

⁵ *Comite Pro Rescate de la Salud v. Puerto Rico Aqueduct and Sewer Auth.*, 888 F.2d 180, 186 (1st Cir. 1989).

⁶ H. Rep. No. 100-887 Part 1, at 26 (1988) (emphasis added); *see also* H. Rep. No. 100-887 Part 2, at 24 (1988).

that lends itself to different interpretations in different situations even if specificity were a relevant factor.

B. The Problem of “Ghosting” Can Be Addressed Within the Framework of the SHVA

In its petition, EchoStar argued that measurements of signal intensity cannot capture the effect of “ghosting” on consumer reception, and requested that the Commission institute further proceedings with the goal of determining how to best account for the effects of ghosting in the context of SHVA’s “unserved household” restriction. EchoStar pointed out that a consumer viewing a “ghosted” picture does not receive an “acceptable” picture regardless of the nominal value in dBu of the signal.

To this, the NAB argues that ghosting is irrelevant in determining which households can receive distant signals, because “ghosting” does not fall within its interpretation of the term “Grade B intensity.” NAB Opposition at 7; Affiliates Opposition at 2. But the Commission has already decided this precise issue to the contrary, and the broadcasters did not request reconsideration of that decision:

As a matter of general policy we agree that the Grade B standard incorporated by Congress into the SHVA implicitly includes within the definition a signal that is, in fact, viewable and not one so impaired by interference as to be degraded below the ‘acceptable to the median’ observer level.

Order at 44. The Commission was correct: the word “intensity” should not be construed as having only an incidental relationship to the concept of an “acceptable picture,” much less as excluding all considerations of signal viewability. For one thing, Congress used the word “intensity” rather than “signal strength,” the proper technical term that should have been used if

Congress intended to denote exclusively signal strength measurements in volts/meter or amps/meter.⁷ This suggests that Congress was not being overly technical in crafting the SVHA – that it did not mean to exclude non-strength viewability considerations, and the Commission correctly recognized this.

The Network Affiliates go even further than the NAB. They argue that “[t]here is no way ghosting can be evaluated other than by use of a ‘subjective’ picture quality test – a test which, by its very nature, would render the Act unenforceable.” Affiliates Opposition at 2. Ghosting is not – as the broadcasters suggest – a concept like “beauty” that can only be judged in the eye of the beholder. Ghosting either exists or it does not, it is objectively ascertainable, and it is insulting to consumers to try to dismiss the very real problem of a ghosted picture as a figment of the consumer’s imagination. Apparently, under the broadcasters’ perverse theory, *because* a ghosted picture hampers consumer satisfaction, it becomes a subjective concept and should therefore be ignored by the Commission. Essentially, the Affiliates are almost trying to advance the interpretive canon: “if it’s good for the consumer, it cannot be possibly allowed by the SHVA.” The Commission should refuse to construe the law in the basis of such a canon, and has correctly interpreted the term “Grade B intensity” as encompassing viewability considerations, which include the absence of a ghosted picture.

⁷ See, e.g., Engineering Statement of Hatfield & Dawson, Consulting Electrical Engineers at 1, attached to Comments of the Satellite Broadcasting and Communications Association at Appendix 1 (filed Dec. 11, 1998).

C. The Commission Should Reduce the Complexity and Cost of its Signal Measurement Procedures

In its petition, EchoStar pointed out that the Commission's signal measurement procedures will likely prove to be burdensome and expensive, hampering the broad use of tests. EchoStar suggested a number of methods to reduce the cost and complexity of this methodology, including measuring signal strength at the television set; eliminating the requirement that the testing antenna be oriented separately for each station being measured (since reorienting essentially implies an unconventional and expensive rotor-equipped antenna); reducing the number of locations and the number of measurements required; and allowing parties flexibility concerning the type of testing antenna to be used. Petition at 11-14. The broadcast industry does not engage the merits of most of those suggestions. It responds, first, that the test would not be burdensome; second, that a simplified method would permit "gaming"; and third, that some of EchoStar's proposals would not work.

The broadcast industry first argues that the \$100 per-test cost estimated by EchoStar is not really all that high. Affiliates Opposition at 4. In fact, however, the aggregate cost of the method adopted by the Commission (\$100 multiplied by millions of households) dooms the method to fail to perform the function intended by the Commission – that of a widely used tool for determining whether a household is unserved. No satellite company can afford to spend hundreds of millions of dollars to perform tests at the millions of households of all would-be subscribers that are predicted to be served.

Next, the broadcasters insinuate that EchoStar has proposed reducing the number of measurements for less-than-legitimate reasons. NAB asserts that EchoStar hopes to "game" the process, NAB Opposition at 10, while the Network Affiliates believe that "EchoStar's real

interest appears to be in continuing to violate the law and infringe the copyrights and copyright licenses held by the broadcast networks and their copyright licensees.” Affiliates Opposition at 4. The broadcasters, however, do not even attempt to show *how* EchoStar’s proposals would “vitiating the accuracy and reliability of the test,” Affiliates Opposition at 4, much less how they would do so to the detriment of the broadcasters. As EchoStar has explained, any marginal sacrifice of accuracy will likely be in both directions, so that in the end the practicality of the test should be the prevalent consideration. Petition at 13, 13 n.39.

Moreover, with respect to the “gaming” potential alleged by the broadcast interests, EchoStar notes that its recommended method errs against EchoStar’s own interest in the interest of simplicity. EchoStar has specifically recommended that, in households predicted as served, additional measurements be conducted if any one of the first three measurements shows insufficient Grade B intensity, while, if the first three measurements show sufficient intensity, the household is – without more – disqualified. Petition at 13-14. EchoStar fails to see how such a simplified method, *skewed in favor of the broadcasters for households predicted as served*, can be cast as the sinister proposition described by the broadcasters.

The broadcast industry also takes issue with EchoStar’s proposal to allow parties flexibility concerning the type of testing antenna to be used. At the outset, EchoStar notes that NAB’s expert engineer *agrees* that “use of a properly calibrated gain antenna” should be allowed in addition to the half-wave dipole contemplated by the rules,⁸ and does not appear to dispute the fact that the gain would have to be subtracted from a gain antenna measurement in order to make

⁸ Engineering Statement of Jules Cohen, P.E. at 3, attached to NAB Opposition (“Cohen Declaration”).

the results correlate with those from a half-wave dipole measurement. Petition at 14. With respect to use of a fixed-length wave dipole, NAB expresses concern that such a dipole is less accurate than a variable-length dipole because calibration tables are unreliable, and an empirical calibration process would be necessary. Cohen Declaration at 2-3. This concern, however, ignores that use of a variable-length dipole is vulnerable to inaccuracies as well. The use of a variable-length half wave dipole requires at least as much if not more delicacy and care in the test set-up. The dipole is easy to damage, and inaccurate measurements can also result from improper settings of the telescoping arms. Any loss of accuracy from use of a calibration table is probably offset by the risks of inaccurate measurement with a variable-length dipole. In the end, therefore, some marginal loss of accuracy is inevitable with either antenna, and the prevalent consideration should be flexibility and simplicity. EchoStar believes that many critical electromagnetic compatibility measurements are made every year with use of fixed antennas and calibration tables, and there is no reason why the Commission should not permit this additional alternative here.

D. The Commission Should Adjust the “Confidence Factor” Associated With Its Predictive Model

EchoStar believes that consumers who receive local network service with only 50% confidence should not reasonably be predicted as ineligible for distant network signals. Petition at 14-17. To this, the broadcasters retort that EchoStar does not understand the confidence factor. Affiliates Opposition at 4. Yet it is the broadcasters who fail to acknowledge that the choice of confidence factor is largely a *policy* choice – one that should be made with the consumer in mind.

The primary dispute with respect to that factor is not over its meaning, but over the policies that should inform that choice of factor. EchoStar believes that, in deciding how confident we must be in predicting that a consumer should be barred from receiving distant network signals, the Commission must take the side of the consumer. As between avoiding the disenfranchising of consumers who cannot be predicted with great confidence as receiving an adequate signal and granting broadcasters a cushion of overprotection, the Commission should be guided by the pro-consumer goals of the SHVA and its own precedent. In EchoStar's view, a household predicted as receiving an adequate off-air signal with only 50% confidence should not be deemed "served" and therefore ineligible for distant network service.

Even on the facts, the broadcasters do not dispute that a 90% factor would carry a very insubstantial risk of over-prediction of unserved households: very few of the households predicted as receiving, say, a 45 dB "or more" signal with 90% confidence would in fact receive a signal well above the predicted value of 45 dB. Therefore, most households that cannot be predicted with 90% confidence as receiving a signal of 47 dBu or higher would in fact receive a signal of less than 47 dBu.⁹ Nor do the broadcasters address the compromise proposal put forward by EchoStar, which would cut off any risk of outlying, aberrant results. EchoStar and the Satellite Broadcasting and Communications Association have specifically proposed a "cap" that would cut off from eligibility for distant satellite service a household if it cannot be confidently predicted (with, again, 90% confidence) as receiving 70.75 dBu *or less*. Petition at 18. EchoStar believes that this cap will eliminate those few, aberrant cases in which use of the

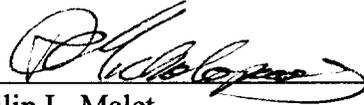
⁹ Petition at 17, *citing* "Appropriate Statistical Factors for Using in Predicting Signal Strength For Purposes of the Satellite Home Viewer Act," attached to January 26, 1999 letter from Margaret Tobey, counsel for SBCA, to Mr. Donnie Fowler and Ms. Eloise Gore of the Cable Services Bureau.

90% confidence factor could lead to erroneous results. The Commission should give careful consideration to this proposal.

CONCLUSION

For the foregoing reasons, EchoStar respectfully requests that the Commission clarify and/or reconsider its *Order* consistent with its petition.

Respectfully submitted,



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Dated: April 26, 1999

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CERTIFICATE OF SERVICE

I, Michael D. Nilsson, do hereby certify that the foregoing pleading was sent this 26th day of April, 1999 by hand delivery and first-class mail (indicated with an asterisk), postage prepaid, to the following:

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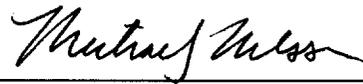
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