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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**Hand Delivery**

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

*Re: Ex Parte Presentation in WT Docket No. 96-198*

Dear Ms. Salas:

On Wednesday, 30 June 1999, Marc Berejka of Microsoft Corporation, and undersigned counsel for Microsoft, met with Dan Connors in the office of Commissioner Susan Ness in connection with the above-captioned proceeding.

Microsoft suggested that the Commission's Order adopting regulations to implement Section 255 of the Telecommunications Act of 1996 should explicitly exclude equipment, such as computers, that are used primarily to provide information services. Moreover, Microsoft suggested that this Order should explicitly exclude software that is offered from sale separately from, and is not integral to the operation of, telecommunications equipment and customer premises equipment.

Microsoft specifically encouraged the Commission to adopt that portion of Paragraph 56 of the NPRM in this matter, where it stated that, "where software to be used with CPE is marketed separately from the CPE, we believe that the software itself would not be subject to Section 255 and that it could not even be considered to fall within the statutory definition of CPE." Finally, Microsoft encouraged the Commission explicitly to limit its regulations to devices that primarily provide telecommunications services, and any service provided *by those devices* that are integral to the provision of telecommunications services.

Respectfully submitted,

Scott Blake Harris

cc: Dan Connors

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Rick Chessen, Esq.  
Senior Legal Advisor to Commissioner Gloria Tristani  
Federal Communications Commission  
The Portals  
445 Twelfth Street, S.W., Room 8-C302E  
Washington, D.C. 20554

**Re: CS Docket No. 98-120  
Carriage of the Transmission of Digital Broadcast Stations**

Dear Rick:

Jonathan Blake's letter of May 27, 1999 utterly fails to reconcile the inconsistent positions adopted by the broadcast industry in the Satellite Home Viewer Act (SHVA) and digital must-carry contexts regarding the ability of television viewers to receive local off-air broadcast signals through outdoor antennas.

In the SHVA context, broadcasters have trumpeted the fact that any viewers, even those in remote rural areas, who are deprived of DBS-delivered television signals, can obtain local television signals by simply installing an outdoor antenna.<sup>1</sup> Indeed, as referenced in my ex parte letter of April 28, 1999 (copy enclosed), NAB has proposed that, for those DBS consumers cut off from receipt of distant network television stations, the DBS industry should be required to buy and install outdoor antennas enabling those DBS subscribers to receive both off-air television

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<sup>1</sup>By NAB's own estimate, "ninety percent of rural satellite TV viewers that are in the 'Grade B' signal range should be able to receive local network signals with a rooftop antenna." Prime Time 24 Asks For Extension of Miami Court Order, Satellite Business News, February 22, 1999 (quoting John Earnhardt, NAB Director of Media Relations).

Rick Chessen, Esq.

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July 1, 1999

signals and DBS programming.<sup>2</sup> In the must-carry context, however, NAB and other broadcast interests have rejected over-the-air reception as a viable mechanism for introducing digital television signals during the potentially infinite transition period from analog to digital broadcasting.

Rather than attempt to explain this irreconcilable inconsistency, Mr. Blake embarks on a revisionist (and largely inaccurate)<sup>3</sup> recitation of historical matters no longer relevant in today's competitive environment, apparently attempting to rationalize these contradictory positions on the basis that SHVA and cable must-carry legislation were designed to address differing policy goals.

Mr. Blake's proffered rationale is non-responsive. Even if SHVA and cable must-carry laws were enacted for different purposes, this does not justify an effort to ignore the laws of physics. If the installation of an outdoor antenna is good enough for a DBS subscriber (even in remote, rural areas) to receive local television stations not rebroadcast by the DBS operator, then that same outdoor antenna is obviously good enough for a cable subscriber to receive local broadcasters' secondary digital broadcasts, particularly given that all primary analog broadcasts will retain must-carry rights throughout the analog/digital transition.

Mr. Blake resorts to tired rhetoric that must-carry rules are required because cable operators have "bottleneck control" and are somehow able to "exclude local broadcast service from subscriber households." By the broadcasting industry's own admission, however, viewers can receive digital television signals - - for free - - by simply erecting the same antennas and installing the same A/B switches that NAB has shown to be effective even for rural consumers.<sup>4</sup>

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<sup>2</sup>NAB Calls on Satellite Industry To Supply Antennas, February 22, 1999, available at [www.nab.org/PressRel/Releases/0899.html](http://www.nab.org/PressRel/Releases/0899.html).

<sup>3</sup>For example, contrary to Mr. Blake's suggestion that "must-carry rules were laid atop of the compulsory license," the FCC first adopted cable must-carry rules in 1972, whereas Congress enacted the cable compulsory license in 1976. Moreover, the cable compulsory license was not adopted at the behest of the cable industry, but rather was vigorously advocated by the broadcast industry in response to a ruling by the U.S. Supreme Court that cable operators had no legal obligation to pay copyright royalties for the retransmission of local television stations, which broadcasters boast are available for "free."

<sup>4</sup>As Time Warner illustrated in its comments in this proceeding, supported by detailed affidavits from engineering experts, digital TV sets will have a built-in, electronic input selector switch. Thus, a flick of a button on the remote control will allow the viewer to seamlessly move from off-air reception of digital broadcasts to cable delivery of analog broadcasts and cable services, just as DBS subscribers can switch from satellite to local broadcast signals. The latest

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Even if cable were the only other distribution facility for digital broadcast signals,<sup>5</sup> the efficacy and ease of installation of outdoor antennas, coupled with electronic A/B switches built into digital TV sets, completely undermine any attempt to justify digital must-carry rules on the basis of a phantom "bottleneck" or cable's alleged "anti-competitive" proclivities. Cable is further incapable of acting on any such incentives because, as noted, broadcasters' analog signals will continue to enjoy must-carry status during the potentially infinite DTV transition period.

In sum, Mr. Blake's letter only serves to further undermine the broadcasting industry's feeble claim to duplicative digital and analog must-carry rights during the transition. By confirming the efficacy of off-air antennas and A/B switches, already amply demonstrated by broadcasters' angry recriminations over SHVA, Mr. Blake merely highlights the existence of a viable alternative delivery system for broadcasters' digital signals.<sup>6</sup> These technological advances further demonstrate that antenna reception represents a means of bringing digital broadcast television to consumers that is preferable to, and far less intrusive on the core free speech rights of cable operators than, a constitutionally infirm governmental mandate.

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evidence of this support was indicated by a broadcast industry representative who described switching from his satellite service to off-air broadcasting as "painless." See *Communications Daily*, June 14, 1999 at 3. The fact that the Commission years ago rejected primitive outdoor antennas and mechanical A/B switches as a surrogate for analog must-carry simply has no bearing on the question of whether cable operators should *also* have to carry broadcasters' digital signals.

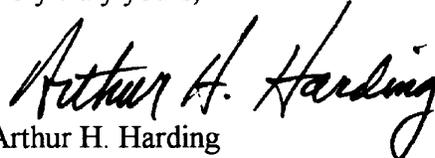
<sup>5</sup>Time Warner emphasizes that the current competitive environment renders this assumption -- even for the purposes of argument -- increasingly untenable, as Congress prepares to pass legislation allowing DBS operators to offer local broadcast signals and as alternative MVPDs gain record numbers of subscribers.

<sup>6</sup>AT&T's recent agreement to carry NBC's programming through 2008, along with CBS's similar agreement with Time Warner, illustrate just two prominent examples of private sector negotiations ensuring that cable subscribers will have access to desirable HDTV programming without the need for constitutionally suspect and statutorily impermissible transitional digital must-carry requirements. See AT&T Agrees to Carry NBC's HDTV Through 2008, *Communications Daily*, July 11, 1999, at 5-6.

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July 1, 1999

I am sending a copy of this letter to the Commission's Secretary for inclusion in the record in CS Docket No. 98-120.

Very truly yours,



Arthur H. Harding  
Counsel to Time Warner Cable

Enclosures

cc: Magalie Roman Salas (CS Docket No. 98-120)  
Kathryn Brown  
Tom Power  
Marsha MacBride  
Kim Matthews  
Paul Misener  
Helgi Walker  
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April 28, 1999

VIA HAND DELIVERY

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street S.W. -- Room TW-B204  
Washington, D.C. 20554

RECEIVED  
APR 28 1999  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**Re: CS Docket No. 98-120  
Carriage of the Transmissions of Digital Television Broadcast Stations**

Dear Ms. Salas:

Time Warner Cable ("Time Warner"), a division of Time Warner Entertainment Company, L.P., by its attorneys, and pursuant to Section 1.1206 of the Commission's rules, hereby submits two copies of this permitted written *ex parte* presentation to the Commission regarding CS Docket No. 98-120. Time Warner submits this presentation in the interests of a complete record to highlight the inconsistent positions taken by the broadcasting industry toward the critical issue of the feasibility of over-the-air reception of television signals in the above referenced proceeding, compared with the positions taken in Definition of an Over-the-Air Signal of Grade B Intensity for Purposes of the Satellite Home Viewer Act, RM-9335 ("SHVA proceeding") and related legislative initiatives.

In its comments urging mandatory digital broadcast signal carriage requirements for cable operators, the broadcasting industry's principal trade association, the National Association of Broadcasters ("NAB"), expressed severe pessimism that over-the-air reception represented a viable mechanism for introducing digital television signals to consumers during the potentially infinite transition period when broadcasters' analog signals will continue to enjoy mandatory

carriage rights.<sup>1</sup> Other broadcasting groups echoed this sentiment in their digital must-carry comments that off-air reception of DTV signals did not present a workable solution for consumers.<sup>2</sup>

However, in the SHVA context, NAB adopted a contradictory position on the efficacy and practicability of over-the-air antenna reception. With the economic interests of its members threatened by satellite-delivered network affiliate programming, NAB has accused the satellite industry of illegally providing distant network affiliate signals to consumers who have perfectly viable mechanisms for receiving local broadcast signals -- simple rooftop antennas.<sup>3</sup> Quite apart from the merits of the parties' dispute in the SHVA proceeding, it is clear that NAB has demonstrated its faith in the ability of consumers within a station's Grade B contour to erect an antenna and receive that station's signal via a rooftop antenna.<sup>4</sup> More striking is that NAB's position focuses on rural consumers, who often do not even receive a signal of the same intensity as the vast majority of the population concentrated in and around metropolitan areas. In

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<sup>1</sup>Comments of the National Association of Broadcasters in CS Docket 98-120, October 13, 1998, at 11 (“[A]ntenna-based over-the-air DTV service . . . will not be sufficient to complete a shortened transition. . . . [T]he DTV transition will be stillborn if DTV signals are not available to viewers over their cable systems.”)

<sup>2</sup>See, e.g., Reply Comments of the Association of America's Public Television Stations in CS Docket 98-120, December 22, 1998, at 14-19 (“[T]here continue to significant drawbacks to the use by cable subscribers of antennas and A/B switches.”); Reply Comments of Association of Local Television Stations in CS Docket 98-120, December 22, 1998, at 60-61 (“A-B switches are a very distant second-best to cable carriage . . . .”); and Reply Comments of Association for Maximum Service Television in CS Docket 98-120, December 22, 1998, at 34-36 (“[I]t is unclear that the technical improvements in A/B switches predicted by the commenters have or will take place.”).

<sup>3</sup>See, e.g., Satellite Companies May Operate Above the Earth But They're Not Above The Law!, NAB's TV Today, March 1, 1999, attached as Exhibit A.

<sup>4</sup>Preliminary Response of National Association of Broadcasters in RM-9335, July 17, 1998, at 32 (“The correctness of the Commission's judgments on [Grade B signal quality] are confirmed by much more recent data, which show that, with a properly functioning rooftop antenna, a signal of at least Grade B intensity is very likely to produce a television picture that median, neutral observers will judge to be acceptable.”). See also Communications Daily, March 22, 1999, at 8 (citing NAB transmission to members describing a Grade B signal as “a good picture”).

fact, by NAB's own estimate, "*ninety percent of rural satellite TV viewers that are in the 'Grade B' signal range should be able to receive local network signals with a rooftop antenna.*"<sup>5</sup> NAB has suggested that the satellite industry be required to buy and install rooftop antennas as a solution for those viewers subject to the court-ordered termination of satellite-delivered distant network programming.<sup>6</sup>

It is impossible to reconcile NAB's belief that rooftop antennas will work for nearly all the households at issue in the SHVA proceeding with its claim that the Commission should categorically reject over-the-air reception as a means for cable subscribers to receive any local digital broadcast signals which the cable operator elects not to carry. NAB never claimed in its digital must-carry pleadings, nor is there any such evidence, that digital broadcast transmissions pose any greater technical barriers to reception than analog broadcasts.<sup>7</sup> Recent reports also indicate that broadcasters are working with other industry participants to improve antenna reception of DTV signals.<sup>8</sup> Therefore, one can only conclude that self-interest, and not objective analysis of technical and policy considerations, has guided NAB's contradictory positions on antenna reception of broadcast signals in the SHVA and digital must-carry contexts.

In fact, as Time Warner and numerous other commenters demonstrated, advances in antenna technology and the ready availability of A/B switches built into digital television sets will

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<sup>5</sup>PrimeTime 24 Asks For Extension of Miami Court Order, Satellite News, February 22, 1999 (quoting John Earnhardt, NAB Director of Media Relations) (emphasis added).

<sup>6</sup>NAB Calls on Satellite Industry To Supply Antennas, February 22, 1999, available at [www.nab.org/PressRel/Releases/0899.html](http://www.nab.org/PressRel/Releases/0899.html), and attached as Exhibit B. Of course, implicit in NAB's position that antenna reception will work for most satellite customers is the ease of A/B switches enabling those customers seamlessly to change from broadcast to satellite delivered programming. These are the very same types of switching devices that allow cable subscribers to select between cable programming and digital broadcast programming delivered to off-air antennas.

<sup>7</sup>See, e.g., Communications Daily, April 20, 1999, at 3 (according to NBC Vp-Technology Charles Jablonski, NBC's tests showed "virtually no difference" in indoor reception of DTV and analog signals); see also Communications Daily, April 22, 1999 (reporting Advanced TV Systems Committee's finding that acceptable reception of DTV signals via indoor antennas "has been backed by 'scientifically sound data from more than 200 indoor locations in several cities.'").

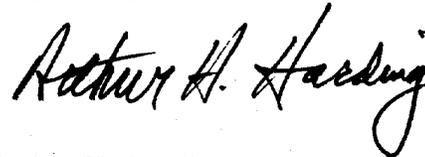
<sup>8</sup>See, e.g., Communications Daily, April 20, 1999, at 3 (reporting collaboration between Sarnoff and Motorola to develop chips to improve indoor reception of DTV signals).

Ex Parte Letter in CS Docket No. 98-120  
April 28, 1999  
Page 4

enable consumers to receive more than adequate digital broadcast signal reception over-the-air.<sup>9</sup> Antenna reception, which NAB claims is effective for ninety percent even of rural households, surely represents a means of bringing digital broadcast television to consumers that is preferable to, and far less intrusive on the core free speech rights of cable operators than, a constitutionally infirm governmental mandate.<sup>10</sup> Indeed, any DTV must-carry requirement would undoubtedly cause the deletion of popular cable programming and advanced communications services to make room for digital simulcasts of analog programming viewable only by a handful of affluent viewers able to afford high-end digital television sets.

Time Warner respectfully requests that this letter and the accompanying materials indicating NAB's endorsement of the efficacy of off-air antennas be entered into the record in CS Docket No. 98-120. If there are any questions regarding this matter, please communicate directly with the undersigned.

Respectfully submitted,



Arthur H. Harding  
*Counsel to Time Warner Cable*

Enclosures

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<sup>9</sup>See Time Warner Comments at 7-8; Time Warner Reply Comments at 7-9.

<sup>10</sup>See Time Warner Comments at 13 (discussing the Supreme Court's standard for the constitutionality of must-carry obligations).

**EXHIBIT A**

# TV today

3/1/99

Route to:  GM  GSM  ND  PD



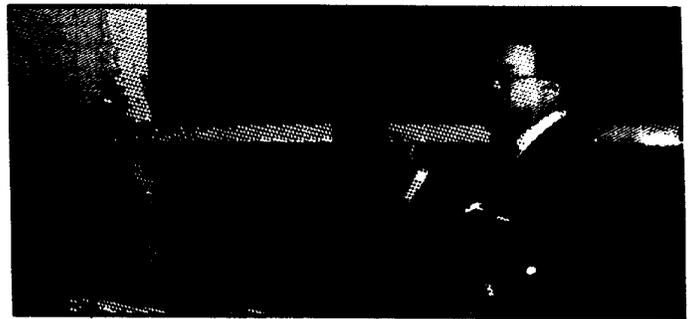
## 'Satellite Companies May Operate Above the Earth, But They're Not Above the Law!'

Last week in Washington the legal and legislative battles escalated on DBS satellite issues, with four congressional hearings, promises of quick legislative action and press bombardments from all directions. DirecTV dropped PrimeTime 24 as its wholesaler of distant network program packages and made a last-ditch effort to instead offer its own service directly to DBS homes — brazenly ignoring the court-ordered termination of illegal service scheduled for Sunday. ABC, CBS, NBC and FOX and their affiliates responded with another court action, and late Thursday U.S. District Judge Lenore Nesbitt granted a temporary 10-day restraining order prohibiting DirecTV from transmitting illegal signals on its own. The ruling means beginning Sunday, DirecTV is barred from illegally delivering CBS and FOX programming to about 400,000 homes that are served by local stations. More cutoffs are expected later.

Prior to the judge's ruling, at a news conference last week, NAB had exposed the hard facts about satellite signal piracy:

- Satellite carriers have generated at least \$557 million in illegal revenues for distant network programming.
- Most illegal subscribers are within the Grade A signal coverage area. (See Chart)
- Many rural homes will be unaffected because they will receive waivers, being granted in unprecedented numbers to viewers unable to receive a decent picture.

NAB President/CEO Edward Fritts told reporters there is one solution: "Satellite providers should use some of that \$557 million in ill-gotten revenue to buy and install TV antennas for customers duped into buying illegal ser-



vice. Holding up an example of a simple, effective over-the-air antenna (above), Fritts said, "What's at stake here is localism and the preservation of free, over-the-air television. Satellite companies should shoulder the responsibility for a problem they created and from which they profited." We urge you to continue your efforts to educate your viewers on this situation, and continue to grant waivers to viewers who cannot receive an acceptable signal." Look for NAB's educational letter to consumers explaining the satellite situation in today's *USA Today*.

### How Good is Your Signal?

Where are illegal satellite subscribers located?

#### Percentage of Illegal Grade A Subscribers:

|               |      |     |
|---------------|------|-----|
| Houston       | 100% | FOX |
| Dallas/Ft. W. | 95%  | CBS |
| Seattle/Tac.  | 94%  | CBS |
| Miami         | 92%  | FOX |
| Atlanta       | 90%  | CBS |
| Salt Lake     | 89%  | CBS |
| Los Angeles   | 74%  | FOX |
| New York      | 66%  | CBS |
| Washington    | 63%  | FOX |
| San Francisco | 60%  | FOX |

### Now is the Time to Act...

On Capitol Hill, House Commerce committee members are pushing a 90-day moratorium on illegal satellite signal cut-offs, pending a rulemaking by the FCC (HR 851). Act now to persuade your members of Congress that extension of illegal satellite service is a bad

idea. This bill could come to the House floor next week. NAB has sent out a special update kit via Priority Mail that should arrive at most stations today. Watch for it!

To Note: Congressman William Delahunt (D-MA) said last week he might ask Attorney General Janet Reno to look into copyright violations by satellite companies.

**EXHIBIT B**

IMMEDIATE RELEASE

## **NAB CALLS ON SATELLITE INDUSTRY TO SUPPLY ANTENNAS**

### **Consumers Duped Out of \$550 Million by Satcasters Should Be Compensated**

WASHINGTON, DC, February 22, 1999 -- The National Association of Broadcasters (NAB) today called on the satellite television industry to supply and install TV antennas free of charge to homes that are being cut off from broadcast network satellite programming.

On February 28<sup>th</sup>, as a result of a federal court order, satellite providers must terminate distant CBS and FOX programming to direct broadcast satellite (DBS) customers unwittingly sold the illegal out-of-market network programming.

Speaking at a press briefing here, NAB President/CEO Edward O. Fritts said satellite carriers have been found by two federal courts to have willfully violated a law barring network broadcast programming from being sold to DBS households capable of receiving the same programming for free from local TV stations.

Fritts said NAB estimates that satellite providers earned revenues of over \$550 million through the illegal distribution of distant network signals. He called on the satellite industry to use part of that illegal revenue to buy antennas enabling viewers to be reconnected to local stations.

"What's at stake here is localism and the preservation of free, over-the-air television," said Fritts. "Satellite companies should shoulder the responsibility for a problem they created and profited from."

Judge Lenore Nesbitt of the U.S. District Court, Southern District of Florida wrote in her May 13, 1998 injunction against PrimeTime 24's illegal satellite service that "PrimeTime made a conscious decision to flout the law (and) places no geographical limits on its sale of CBS or FOX programming. ... A company cannot build a business on infringements and then argue that enforcing the law will cripple that business."

Joining Fritts at today's press briefing was Garry Ritchie, V.P. and acting general manager of WOWK-TV Huntington, W. V. Ritchie stated, "When you have nearly half of the people subscribed to this service turn out to be illegal, you quickly begin to see this is not an accident. These illegal sales have a negative impact on our ability to serve the public interest."

Fritts also pointed out that two satellite operators already have co-marketing deals with local phone companies under which they provide discounted TV antenna to new consumers. "If this type of arrangement is good enough for their new customers," said Fritts, "then a modified version of it is certainly appropriate for existing customers who have been misled by satellite operators."

James C. May, Executive Vice President of NAB's Government Relations, explained that along with roof-top antennas there is legislation on Capitol Hill that will readily resolve the issue. "Providing *local* stations via satellite is something that we support. The so-called 'local-to-local' solution will ensure that consumers receive network programming and that the copyright interests of local stations are not infringed upon."

Fritts stressed that local broadcasters are continuing to grant waivers for the small percentage of DBS households truly unable to receive an acceptable network television picture from local stations via rooftop antenna. Such waivers permit the continued importation of network programming from a distant source.

Ritchie stated that his station has issued 853 waivers out of 1,627 requests. He held up a letter he received from one consumer who wrote, "After receiving your letter on February 13, 1999, I invested in a roof top antenna and signal booster. This enabled me to receive an acceptable signal from your station. Please cancel my request for a waiver..."

The National Association of Broadcasters serves and represents radio and television stations and all the major broadcast networks.

###

Contact: Dennis Wharton

John Earnhardt

202-429-5350