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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

August 15, 2000

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Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 12th Street, S.W., TW-A325  
Washington, D.C. 20554

**Re: Joint Opposition of the ABC, CBS, Fox, and NBC Television Network  
Affiliate Associations to EchoStar Satellite Corporation's Petition for  
Reconsideration, ET Docket No. 00-11**

Dear Ms. Salas:

Enclosed please find the original and eleven copies of the Joint Opposition of the ABC, CBS, Fox, and NBC Television Network Affiliate Associations to EchoStar Satellite Corporation's Petition for Reconsideration in the above-referenced docket.

If any questions should arise during the course of your consideration of this matter, it is respectfully requested that you communicate with the undersigned.

Sincerely,

David Kushner

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Before the  
Federal Communications Commission  
Washington, D.C. 20554

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OFFICE OF THE SECRETARY

In the Matter of )  
)  
Establishment of an Improved Model for )  
Predicting the Broadcast Television Field )  
Strength Received at Individual Locations )

ET Docket No. 00-11

To: The Commission

**JOINT OPPOSITION OF THE  
ABC, CBS, FOX, AND NBC  
TELEVISION NETWORK AFFILIATE ASSOCIATIONS  
TO ECHOSTAR SATELLITE CORPORATION'S  
PETITION FOR RECONSIDERATION**

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August 15, 2000

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## Summary

EchoStar's Petition for Reconsideration contains nothing warranting any change to the Commission's *First Report and Order* in this docket. The Commission followed Congress's directions to prescribe a point-to-point predictive model that accounts for terrain, building structures, and other land cover variations. Based on actual field test data, the Commission properly determined that the ILLR model, without any clutter loss corrections, was the most accurate predictive model in terms of correctly predicting "unserved" status and that only modest corrections to the UHF band were needed to balance under-predictions and over-predictions. The Commission's actions are fully consonant with the Communications Act, the Copyright Act, and the legislative history of SHVIA.

Moreover, from a technical perspective, the ILLR model, without additional clutter loss corrections, already takes into account building structures and other land cover variations. The fact that Longley-Rice is semi-empirical and incorporates some clutter in the model is well-recognized in the scientific and technical community, and the Commission acknowledged this established fact in the *ILLR Order*. The case law cited by EchoStar for the proposition that the Commission had no discretion but to include positive clutter loss values for VHF channels is totally irrelevant. Setting certain clutter loss values to zero does not mean that the model thereby takes no account of these factors; it only means that the model does not take *additional* account of clutter losses that make the model *less*, not more, accurate. As a matter of law and of science, the Commission did what it was directed to do by SHVIA in the *ILLR Order*.

As for EchoStar's fallacious assertion that the Commission has violated the Administrative

Procedure Act by utilizing certain results provided in public comments, there is simply no requirement that the data underlying studies produced by private parties in response to an agency's Notice of Proposed Rule Making be made a part of the public record. None of the cases EchoStar relies upon hold any such thing. In fact, one of the cases EchoStar cites explicitly states that all data used to support an agency's position need *not* have been made public and exposed to refutation, including even data that was neither shown to nor known by private parties in a proceeding. In any event, even if the rule were as EchoStar incorrectly believes, EchoStar has not shown—and cannot show—that it has been materially prejudiced by the Commission's use of the NAB/MSTV study results. Furthermore, given that the underlying data are now a part of the public record, the issue is moot, and the Commission need not concern itself with EchoStar's argument on this point.

Finally, EchoStar's outlandish proposal to unilaterally determine whether a particular household is eligible for distant network service warranted no consideration in the initial rulemaking proceeding and should be rejected outright upon reconsideration. EchoStar's proposal would turn a statutorily-mandated process on its head by denying network affiliates the right to consider waiver requests on their own terms and by denying network affiliates the right to have a say on who may be qualified as an appropriate tester. EchoStar's proposal should be recognized as the end-run that it is. Congress quite plainly fashioned a "loser pays" rule for the cost of conducting site measurements. Congress did not contemplate that EchoStar could buy the results that its wants merely by paying for the cost of testing up front. EchoStar's proposal must be rejected outright.

*EchoStar's Petition for Reconsideration is meritless and should be denied in its entirety.*

\* \* \*

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of )  
 )  
Establishment of an Improved Model for ) ET Docket No. 00-11  
Predicting the Broadcast Television Field )  
Strength Received at Individual Locations )

To: The Commission

**JOINT OPPOSITION OF THE  
ABC, CBS, FOX, AND NBC  
TELEVISION NETWORK AFFILIATE ASSOCIATIONS  
TO ECHOSTAR SATELLITE CORPORATION'S  
PETITION FOR RECONSIDERATION**

The ABC Television Affiliates Association, the CBS Television Network Affiliates Association, the Fox Television Affiliates Association, and the NBC Television Affiliates Association (collectively, the "Network Affiliates"), by their attorneys, hereby oppose the Petition for Reconsideration ("Petition") filed by EchoStar Satellite Corporation ("EchoStar") on July 10, 2000, in the above-captioned proceeding. Network Affiliates represent more than 800 local television broadcast stations throughout the nation that are affiliated with one of the four major television broadcast networks. EchoStar's Petition contains nothing warranting any change to the Commission's *First Report and Order* in this docket.<sup>1</sup>

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<sup>1</sup> See Establishment of an Improved Model for Predicting the Broadcast Television Field Strength Received at Individual Locations, *First Report and Order*, FCC 00-185 (May 26, 2000) (hereinafter "*ILLR Order*").

**I. The Commission Fully Complied with the Statutory Requirement to Prescribe a Point-to-Point Predictive Model That Accounts for Terrain, Building Structures, and Other Land Cover Variations**

In the *ILLR Order*, the Commission adopted a method to assign clutter losses to specific land use and land cover (“LULC”) environments. The Commission further set the specific clutter loss values to zero for VHF channels and specified clutter loss values at one-third of the values originally proposed in the *Notice of Proposed Rule Making* for UHF channels.<sup>2</sup> EchoStar claims that the Commission abdicated its responsibility under the Satellite Home Viewer Improvement Act (“SHVIA”) by failing to specify positive clutter loss values for all broadcast channels. EchoStar further asserts that, under certain case law, the Commission has no discretion in the matter.<sup>3</sup> EchoStar is wrong both as a matter of science and as a matter of law.

In the first place, it must be clear precisely what was required of the Commission. SHVIA states, in pertinent part:

Within 180 days after the date of the enactment of the Satellite Home Viewer Improvement Act of 1999, the Commission shall take all actions necessary, including any reconsideration, to develop and prescribe by rule a point-to-point predictive model for reliably and presumptively determining the ability of individual locations to receive signals in accordance with the signal intensity standard in effect under section 119(d)(10)(A) of title 17, United States Code. In prescribing such model, the Commission shall rely on the Individual Location Longley-Rice model set forth by the Federal Communications Commission in Docket No. 98-201 and ensure that such model takes into account terrain, building structures, and other

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<sup>2</sup> See *ILLR Order* at ¶ 15; see also Establishment of an Improved Model for Predicting the Broadcast Television Field Strength Received at Individual Locations, *Notice of Proposed Rule Making*, FCC 00-17 (Jan. 20, 2000) (hereinafter “*ILLR Notice*”), Appendix A, Table 3.

<sup>3</sup> See EchoStar Petition at 5-8.

land cover variations. The Commission shall establish procedures for the continued refinement in the application of the model by the use of additional data as it becomes available.<sup>4</sup>

The accompanying Conference Report, which is entitled to “great deference,”<sup>5</sup> provides important guidance with regard to modifying the ILLR model. The Conference Committee recognized that the Commission’s goal should be only *to attempt* to increase the ILLR model’s accuracy and that the measure of success in any such revision is whether the model’s predictions—with the modifications vis-à-vis without the modifications—are closer to the results of actual field testing:

Section 339(c)(4) [sic; *read* Section 339(c)(3)] addresses the ILLR predictive model developed by the Commission in Docket No. 98-201. The provision requires the Commission *to attempt to increase its accuracy* further by taking into account not only terrain, as the ILLR model does now, but also land cover variations such as buildings and vegetation. If the Commission discovers other practical ways to improve the accuracy of the ILLR model still further, it shall implement those methods as well. *The linchpin of whether particular proposed refinements to the ILLR model result in greater accuracy is whether the revised model’s predictions are closer to the results of actual field testing in terms of predicting whether households are served by a local affiliate of the relevant network.*<sup>6</sup>

Additional guidance on the meaning of Section 339(c)(3) is provided by the floor statement of Senator Leahy, which further explicates Congress’s intent for the Commission to attempt to increase the ILLR model’s overall accuracy as measured by actual field test data:

Whether a proposed modification to the ILLR model makes it *more accurate* is an *empirical* question that the Commission should

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<sup>4</sup> 47 U.S.C. § 339(c)(3).

<sup>5</sup> *RJR Nabisco, Inc. v. United States*, 955 F.2d 1457, 1462 (11th Cir. 1992).

<sup>6</sup> Conference Report on H.R. 1554, 145 CONG. REC. H11796 (daily ed. Nov. 9, 1999) (hereinafter “Conference Report”) (emphasis added).

address by comparing the predictions made by any proposed model *against actual measurements* of signal intensity. The Commission's analysis should reflect our policy objective: to determine whether a household is—or is not—capable of receiving a signal of Grade B intensity from at least one station affiliated with the relevant network.

The FCC has properly recognized that *reducing one type of errors, underprediction, while increasing another type of errors, overprediction, does not increase accuracy*, but simply puts a thumb on the scale in favor of one side or the other. *The issue under Section 119(a)(2)(B)(ii) is the overall accuracy of the model, as tested against available measurement data*, with regard to whether a household is, or is not, capable of receiving a Grade B intensity signal from at least one affiliate of the network in question.<sup>7</sup>

Considering both the Conference Report and Senator Leahy's statement, then, it is clear that Congress intended for the ILLR model to be modified only if the modifications increase the accuracy of the predictions, as measured against actual field test data, and that the results must be appropriately balanced for overall accuracy.

The Commission could hardly have been clearer that what it did followed Congress's directions precisely:

For VHF channels, . . . a prescription of additional losses would make the ILLR model *less accurate* because it already produces more under-predictions than over-predictions (a condition that favors the interests of satellite service providers). . . . For both VHF and UHF, the ILLR model without clutter corrections proves superior to other models by making the correct prediction more often. For UHF, however, even though more correct than the competing models, the ILLR model tends to over-predict the field intensity substantially more often than it under-predicts. This is a condition that could be restored to approximate balance by assigning clutter losses.

Therefore, based on the *available measured data* of television signals, we are reducing the clutter loss values from those proposed

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<sup>7</sup> 145 CONG. REC. S15022-23 (daily ed. Nov. 19, 1999) (statement of Sen. Leahy) (emphases added).

in the *Notice in order to make the ILLR model more accurate*. We are setting the clutter loss values for VHF channels to zero *because the measurement data of Table 1 indicate that larger values produce fewer correct predictions*. Thus the ILLR model is not being changed for VHF. For UHF channels, we are setting small clutter loss values in order to obtain a better balance between under-predictions and over-predictions. Specifically, we are reducing the clutter loss values to one-third of those proposed in the Notice *because our assessment of the data indicates that this will produce a better balance between under-predictions and over-predictions without adversely affecting the overall percentage of correct predictions*.<sup>8</sup>

Therefore, the Commission only made modifications to the ILLR model that increased its *overall* accuracy, by maintaining the existing ILLR model's superiority in correctly predicting "unserved" status while assuring that under-predictions and over-predictions would be fairly balanced. Moreover, these modifications were tested against field data obtained from approximately one thousand actual signal strength tests.<sup>9</sup> The *ILLR Order* was, accordingly, directly on target in satisfying congressional intent.

That the Commission acted properly is further bolstered by the amendment made to Section 119 of the Copyright Act by SHVIA. Amended Section 119 states in pertinent part:

In determining presumptively whether a person resides in an unserved household under subsection (d)(10)(A), a court shall rely on the Individual Location Longley-Rice model set forth by the Federal Communications Commission in Docket No. 98-201, as that model *may be amended by the Commission over time under section 339(c)(3) of the Communications Act of 1934 to increase the accuracy of that model*.<sup>10</sup>

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<sup>8</sup> *ILLR Order* at ¶¶ 14-15 (emphases added).

<sup>9</sup> *See id.* at ¶ 13.

<sup>10</sup> 17 U.S.C. § 119(a)(2)(B)(ii)(I) (emphases added).

Therefore, the Copyright Act itself incorporates Congress’s notion that the ILLR model should only be modified if the modifications, in fact, increase the model’s accuracy.<sup>11</sup> Because Section 119 of the Copyright Act and Section 339 of the Communications Act must be read *in pari materia*,<sup>12</sup> the ILLR model could only have been modified if the Commission were satisfied that any modifications actually increased the predictive accuracy of the model, as confirmed by empirical field data. Again, this is what the Commission did in the *ILLR Order*.

Moreover, the statute’s language that the Commission “ensure that such model takes into account terrain, building structures, and other land cover variations” is not rendered nugatory by the legislative history which requires only that the Commission *attempt* to increase the model’s accuracy by taking into account land cover variations. Indeed, the legislative history is fully consistent with and explains that statutory language. Congress’s overarching goal was the prescription of an accurate model, and its directive to ensure that various factors are taken into account is necessarily subsidiary to that overarching goal. Therefore, read as a whole, the Act means that the Commission is to engage in all reasonable efforts, *consistent with sound scientific principles*, to take into account terrain, building structures, and other land cover variations in order to make the ILLR model as accurate as possible. Congress clearly did not direct the Commission to modify its model merely for the sake of modification, without any regard for a modification’s effect on the model’s accuracy. Such a course would be bad scientific practice, and it is absurd to think that Congress intended the

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<sup>11</sup> See Conference Report, 145 CONG. REC. H11794 (qualifying modifications to the ILLR model to occur only “when the FCC amends the ILLR model to make it more accurate”).

<sup>12</sup> See, e.g., *Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972) (stating that the rule of *in pari materia* “makes the most sense when the statutes were enacted by the same legislative body at the same time”).

Commission to engage in bad science.

In addition, the consistency between the legislative history and the statute is further explained by the fact that, as Network Affiliates previously showed, Longley-Rice is a semi-empirical model whose empirical foundations, based on data collected from mobile runs, necessarily incorporate whatever vegetation and buildings existed at the time of the mobile runs.<sup>13</sup> Therefore, from a technical perspective, the ILLR model already takes into account “building structures[] and other land cover variations,” and the statute’s requirement to do so is already fulfilled.<sup>14</sup> The fact that Longley-Rice is semi-empirical and incorporates the then-existing clutter in the model is well-recognized in the scientific and technical community.<sup>15</sup> The Commission acknowledged this

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<sup>13</sup> See *SHVA Order* at ¶ 82 & n.209; Supplemental Information of the ABC, CBS, Fox, and NBC Television Network Affiliate Associations, CS Docket No. 98-201 (filed Jan. 15, 1999), at 2-3; Joint Comments of the ABC, CBS, Fox, and NBC Television Network Affiliate Associations, ET Docket No. 00-11 (filed Feb. 22, 2000), at 5 & n.11, 22 & n.48. See also G.A. Hufford *et al.*, *A Guide to the Use of the ITS Irregular Terrain Model in the Area Prediction Mode*, NTIA Report 82-100 (U.S. Dep’t of Commerce Apr. 1982) [“Longley-Rice Manual”], at 12 (“The data used in developing the empirical relations have clearly influenced the model itself. It should then be noted that these data were obtained from measurements made with fairly clear foregrounds at both terminals. In general, ground cover was sparse, but some of the measurements were made in areas with moderate forestation. The model, therefore, includes effects of foliage, but only to the fixed degree that they were present in the data used.”)

<sup>14</sup> This interpretation of SHVIA does not render the statutory language superfluous as SHVIA expressly directed the Commission to prescribe a predictive model with the characteristics of the ILLR model. Prior to SHVIA, the Commission in CS Docket No. 98-201 had only *recommended* the acceptance of the ILLR model for SHVA purposes. Now, in the instant docket, the Commission formally adopted such a model. The language in Section 339(c)(3) served as a check on the Commission’s discretion to prescribe a predictive model that does not take account of terrain and clutter factors to any extent.

<sup>15</sup> See, e.g., R. Grosskopf, *Comparison of Different Methods for the Prediction of the Field Strength in the VHF Range*, 35 IEEE TRANS. ON ANTENNAS AND PROPAGATION 852 (July 1987), 852 (stating that in the Longley-Rice model “empirically gained quantities influence the field strength  
(continued...)

established fact in the *ILLR Order*:

[L]and use and land cover (e.g., vegetation and buildings) considerations are included through a look-up table of clutter losses *additional to those inherent in the basic Longley-Rice 1.2.2 model . . .*<sup>16</sup>

Thus, the case cited by EchoStar, *Colorado v. United States Department of Interior*, 880 F.2d 481 (D.C. Cir. 1989), for the proposition that the Commission had no discretion but to include positive clutter loss values for VHF channels is totally irrelevant.<sup>17</sup> In *Colorado*, the statute at issue there required the Department of Interior (“DOI”) to promulgate certain Superfund regulations that “shall take into consideration” three specific factors.<sup>18</sup> There DOI had to create a computer model from scratch, and the resulting model the agency created included only one of the three factors. The *Colorado* court ruled that the model had to include each of the congressionally specified factors.<sup>19</sup> Here, by contrast, it is an undisputed scientific fact that the ILLR model does account, due to its

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<sup>15</sup>(...continued)

prediction”); M.L. Meeks, *VHF Propagation over Hilly, Forested Terrain*, 31 IEEE TRANS. ON ANTENNAS AND PROPAGATION 483 (May 1983), 488 (recognizing the semi-empirical nature of the Longley-Rice model and the fact that it affects the model’s prediction of propagation loss); M.M. Weiner, *Use of the Longley-Rice and Johnson-Gierhart Tropospheric Radio Propagation Programs: 0.02-20 GHz*, 4 IEEE J. ON SELECTED AREAS IN COMMUNICATIONS 297 (Mar. 1986), 297 (stating that Longley-Rice is a “statistical/semi-empirical model[] of tropospheric radio propagation”); *id.* at 299 (stating that it is necessary to take account of vegetation only in the immediate vicinity of the receiving antenna because “knife-edge diffraction by vegetation distant from the antennas is usually included in the semi-empirical methods used for estimating the excess propagation loss”).

<sup>16</sup> *ILLR Order*, Appendix A at A-1 (to be republished as OET Bulletin No. 72) (emphasis added).

<sup>17</sup> See EchoStar Petition at 7-8.

<sup>18</sup> *Colorado*, 880 F.2d at 490 (quoting 42 U.S.C. § 9651(c)(2)(B)).

<sup>19</sup> See *id.* at 491.

semi-empirical foundations, for “terrain, building structures, and other land cover variations,”<sup>20</sup> which is all SHVIA requires. Setting certain clutter loss values to zero does not mean that the model thereby takes no account of these factors, it only means that the model does not take *additional* account of clutter losses that make the model *less*, not more, accurate.<sup>21</sup> Moreover, unlike DOI in *Colorado*, the Commission here was not creating a point-to-point predictive model from scratch but rather was attempting to refine the ILLR model which was pre-existing and whose core goes back more than 30 years. Obviously, Congress knew that the Commission would utilize the semi-empirical ILLR model, since it expressly specified the model in SHVIA.<sup>22</sup>

Therefore, as a matter of law and of science, the Commission did what it was directed to do by SHVIA. It is well-established that an “agency’s choice of model and its application must be respected when the record discloses that the agency examined the relevant data and articulated a reasoned basis for its decision.”<sup>23</sup> There is no question here that the record discloses that the Commission examined the relevant data.<sup>24</sup> Even EchoStar does not complain that the Commission failed to examine the data, only that the data that the Commission did examine was not part of the

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<sup>20</sup> 47 U.S.C. § 339(c)(3).

<sup>21</sup> *Cf. Solite Corp. v. EPA*, 952 F.2d 473, 486 (D.C. Cir. 1991) (holding that, where there was no specific congressional intent to set a specific volumetric threshold or to set a specific generation rate of any particular Bevill waste to serve as the cutoff for mineral processing wastes to qualify for a certain exemption, Congress left the task of setting the criteria for determining which mineral processing wastes are special wastes to the agency).

<sup>22</sup> *See* 47 U.S.C. § 339(c)(3).

<sup>23</sup> *National Ass’n of Mfrs. v. United States Dep’t of Interior*, 134 F.3d 1095, 1102 (D.C. Cir. 1998).

<sup>24</sup> *See ILLR Order* at ¶¶ 13-15.

public record.<sup>25</sup> Furthermore, there is also no question that the record establishes that the Commission articulated a reasoned basis for its decision to set clutter loss values for VHF channels at zero and to reduce the clutter loss values for UHF channels. Tables 1 and 2 of the *ILLR Order* provide a comparison of the effect of clutter modifications on the accuracy of the ILLR model, and the text of the *Order* itself states (1) that if clutter loss values for VHF channels were set to some positive number, those “larger values produce fewer correct predictions”; and (2) that the UHF values were reduced “because our assessment of the data indicates that this will produce a better balance between under-predictions and over-predictions without adversely affecting the overall percentage of correct predictions.”<sup>26</sup>

As explained above, the Commission’s decision to modify the ILLR model only to the extent that such modifications enhance the accuracy of the model and appropriately balance under-predictions and over-predictions is fully consonant with Congress’s intent in SHVIA. Therefore, the Commission’s actions also satisfy a *Chevron* analysis.<sup>27</sup> Certainly no reviewing court would second-guess the Commission’s actual scientific judgment as the expert on radiowave propagation models.<sup>28</sup>

The Commission complied with SHVIA’s requirements in modifying the ILLR model as it

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<sup>25</sup> See, e.g., EchoStar Petition at 9 (complaining of the Commission’s “use of extra-record data”); *id.* at 11 (complaining of the Commission’s “reliance on extra-record materials”).

<sup>26</sup> *ILLR Order* at ¶ 15.

<sup>27</sup> See, e.g., *National Ass’n of Mfrs.*, 134 F.3d at 1103.

<sup>28</sup> See *id.* (stating that the court does not “review scientific judgments of the agency . . . as the chemist, biologist, or statistician that we are neither qualified by training nor experience to be, but as a reviewing court exercising our narrowly defined duty to holding agencies to certain minimal standards of rationality” (internal quotation marks and citation omitted)).

did in the *ILLR Order*. EchoStar's argument to the contrary is warrantless, and there is no need for the Commission to reconsider its decision in this regard.

**II. There Is No Legal Requirement That the Data Underlying Studies Produced by Private Parties Be Made a Part of the Public Record, and the Commission Properly Based Its Decision on the Totality of the Evidence Before It**

EchoStar fallaciously asserts that the Commission violated the Administrative Procedure Act ("APA") by utilizing the results of a study contained in the joint comments and reply comments of the National Association of Broadcasters ("NAB") and the Association for Maximum Service Television, Inc. ("MSTV").<sup>29</sup> More specifically, EchoStar complains that NAB/MSTV's underlying data were never made part of the public record, and EchoStar argues that the Commission was therefore somehow prohibited from using the results of the NAB/MSTV study since EchoStar was not afforded the opportunity to critique the underlying data. EchoStar misapprehends the nature of the informal rulemaking process.

There is, *ab initio*, simply no requirement that the data underlying studies produced by private parties in response to an agency's Notice of Proposed Rule Making be made a part of the public record. The administrative rulemaking process would grind to a halt if private parties were required to disclose data obtained only through the private expenditure of considerable time and expense. Indeed, the entire rulemaking process is predicated upon the expectation and desire that private parties will engage in studies so that they may present meaningful comments to the agency for considered decision-making. The public comment process permits all interested parties to

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<sup>29</sup> See EchoStar Petition at 9-11.

conduct such studies, submit them for consideration, and critique the studies of other parties. But administrative rulemaking does not contemplate that the comment process be a backhanded means to open private wallets for the production of public data.

Certainly none of the cases EchoStar relies upon holds any such thing. Neither *Portland Cement Association v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973), nor *U.S. Lines, Inc. v. Federal Maritime Commission*, 584 F.2d 519 (D.C. Cir. 1978), concerns agency reliance on privately-funded studies whose data was not made part of the public record. Indeed, both cases involve only questions of whether *agency*-produced data need to be exposed to public scrutiny, an entirely different factual predicate.<sup>30</sup> In fact, one of the cases EchoStar cites, *Data Processing*, explicitly states that all data used to support an agency's position need *not* have been made public and exposed to refutation, including even data that was neither shown to nor known by private parties in a proceeding.<sup>31</sup> More broadly, and quite to the contrary of EchoStar's assertions, it is well-established that an agency engaged in informal rulemaking is not obliged to consider only record evidence.<sup>32</sup>

Even if the rule were as EchoStar incorrectly believes, EchoStar has not shown—and cannot

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<sup>30</sup> Neither *Association of Data Processing Service Organizations v. Board of Governors of the Federal Reserve System*, 745 F.2d 677 (D.C. Cir. 1984), nor *Home Box Office v. FCC*, 567 F.2d 9 (D.C. Cir. 1976), which EchoStar also relies upon, involve study data at all.

<sup>31</sup> See *Data Processing*, 745 F.2d at 684. See also *Personal Watercraft Industry Ass'n v. Department of Commerce*, 48 F.3d 540, 543-44 (D.C. Cir. 1995) (holding that where agency commissioned study after the comment period closed and parties did not have the opportunity to comment upon it and where study was not critical to agency's decision to regulate an activity but instead supported decision that flowed from comments, agency could rely on the new information without starting anew unless material evidence of prejudice is shown).

<sup>32</sup> See *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 547-48 (1978); *Air Transport Ass'n of America v. FAA*, 169 F.3d 1, 7 (D.C. Cir. 1999).

show that it has been materially prejudiced by the Commission's use of the NAB/MSTV study results. EchoStar bears the burden of indicating with "reasonable specificity" what portions of the NAB/MSTV study it objects to and how it might have responded if it had been given the opportunity that it claims it was denied.<sup>33</sup> Yet EchoStar has made no attempt in its Petition to shoulder that burden. It does not point to anything in the NAB/MSTV study results that might be considered erroneous. It does not suggest that either the methodology used to take the field test measurements of signal strength or the methodology used to determine whether a given model correctly predicts, over-predicts, or under-predicts "unserved" status is in any way defective. And it does not indicate what it would have said to the Commission if the data underlying the study had been provided to it before the comment period closed.<sup>34</sup>

In any event, EchoStar's complaint is now moot. On July 24, 2000, NAB and MSTV filed the underlying data in their study in this docket.<sup>35</sup> EchoStar now has every opportunity to comment upon the underlying data. Thus, because the Commission can consider EchoStar's adversarial position in full view for reconsideration, even if there were error in the Commission's process in this proceeding—which Network Affiliates strongly disclaim—it is harmless and fully cured.<sup>36</sup>

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<sup>33</sup> See *Personal Watercraft*, 48 F.3d at 544 (quoting *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 540-41 (D.C. Cir. 1983)).

<sup>34</sup> See *id.*

In addition, it is telling that EchoStar makes no claim that it ever simply asked NAB/MSTV for, and was denied, access to the underlying data, data that it claims it made "exceptional efforts," EchoStar Petition at 9 n.33, to obtain.

<sup>35</sup> See NAB and MSTV, Notice of Filing Supplemental Material, ET Docket No. 00-11 (filed July 24, 2000).

<sup>36</sup> See *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1121-22 (D.C. (continued...))

In short, there is nothing defective about the Commission's use of the NAB/MSTV study results, and, because the underlying data is now available for public refutation upon reconsideration, the Commission need not concern itself with EchoStar's argument on this point at all. Indeed, just as the Commission already did once, it should again conclude, based on the totality of the evidence before it, that "the ILLR model without clutter corrections proves superior to other models by making the correct prediction more often"<sup>37</sup> and that, only in the case of UHF channels, should clutter values one-third of those proposed in the *ILLR Notice* be used to "produce a better balance between under-predictions and over-predictions without adversely affecting the overall percentage of correct predictions."<sup>38</sup>

### **III. Satellite Carriers Can Never Unilaterally Determine That a Particular Household Is Eligible for Distant Network Service**

Just as it did in its comments in this proceeding, EchoStar is again attempting to preempt and subvert the entire waiver and testing processes set forth in SHVIA by arguing that it should be allowed to conduct tests, on its own initiative, to pre-qualify individual households for distant network service.<sup>39</sup> EchoStar's proposal did not warrant consideration in the initial rulemaking

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<sup>36</sup>(...continued)

Cir. 1984) (holding that error in failing to release FCC staff study in initial comment period was harmless where parties had opportunity to comment for reconsideration).

<sup>37</sup> *ILLR Order* at ¶ 14.

<sup>38</sup> *Id.* at ¶ 15. Network Affiliates hereby incorporate by reference their earlier comments on the superiority of the ILLR model without additional clutter loss corrections. *See Joint Reply Comments of the ABC, CBS, Fox, and NBC Television Network Affiliate Associations*, ET Docket No. 00-11 (filed Mar. 14, 2000), at 15-26.

<sup>39</sup> *See EchoStar Petition* at 11-13; *EchoStar Comments* at 8-9.

proceeding,<sup>40</sup> and it should again be rejected outright upon reconsideration. EchoStar is free to conduct all the tests it wants, at its own expense,<sup>41</sup> but no such test results can preclude a local network affiliate from rejecting a waiver request submitted by a potential subscriber to distant network service nor insulate EchoStar from copyright liability if its testing is flawed. In other words, EchoStar can test to its heart's content to determine that certain locations are *not* eligible for distant network service, but it can never unilaterally determine that a particular location *is* legally eligible for distant network service.

SHVIA envisions that the initial determination of eligibility for distant network service will be predicted by the ILLR model. If the ILLR model predicts that a particular household is “served” by one or more television stations affiliated with the relevant network, then the customer may submit to those stations, through his or her satellite carrier, a written request for a waiver.<sup>42</sup> If a network affiliate denies a waiver request, then the customer may request that an actual site test be

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<sup>40</sup> It is well-established that an agency need only address comments that are relevant and significant, and EchoStar’s proposal is neither. *See MCI Worldcom, Inc. v. FCC*, 209 F.3d 760, 765 (D.C. Cir. 2000) (“An agency is not obliged to respond to every comment, only those that can be thought to challenge a fundamental premise.”); *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 468 (D.C. Cir. 1998) (“An agency must . . . respond[] to those comments that are relevant and significant.”); *Home Box Office Inc. v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1977). The statute required the Commission to designate an independent and neutral entity to select testers where the network affiliate and the satellite carrier could not agree, *see* 47 U.S.C. § 339(c)(4)(B), and that is what the Commission proposed to do, *see ILLR Notice* at ¶ 15, and did, *see ILLR Order* at ¶ 23. It is insignificant and irrelevant that EchoStar wants the Commission to rewrite the statute on an unrelated matter.

<sup>41</sup> It is interesting that EchoStar concedes for the first time in its Petition that “satellite carrier[s] should pay for the tests irrespective of outcome.” EchoStar Petition at 13 n.42.

<sup>42</sup> *See* Conference Report, 145 CONG. REC. H11796; 47 U.S.C. § 339(c)(2).

conducted.<sup>43</sup> The network affiliate and satellite carrier must agree on the individual to conduct the test, and, if they cannot agree on such an individual, an independent and qualified individual designated by the American Radio Relay League can conduct the test.<sup>44</sup>

EchoStar's proposal would turn this statutorily-mandated process on its head by denying network affiliates the right to consider waiver requests on their own terms and by denying network affiliates the right to have a say on who may be qualified as an appropriate tester. EchoStar's proposal should be recognized as the end-run that it is. Congress quite plainly fashioned a "loser pays" rule for the cost of conducting site measurements. Congress did not contemplate that EchoStar could buy the results that it wants merely by paying for the cost of testing up front. EchoStar's proposal must be rejected outright.

### **Conclusion**

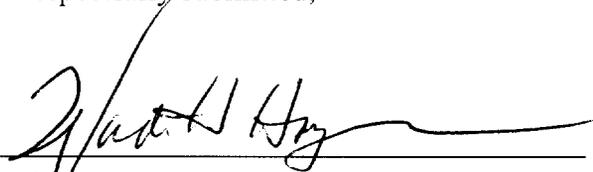
For the foregoing reasons, EchoStar's Petition is meritless and should be denied in its entirety.

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<sup>43</sup> See 47 U.S.C. § 339(c)(4)(A).

<sup>44</sup> See *ILLR Order* at ¶ 23.

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August 15, 2000

**Certificate of Service**

The undersigned, of the law firm Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., hereby certifies that s/he has caused a copy of the foregoing **Joint Opposition to Echostar Satellite Corporation's Petition for Reconsideration** to be served by U.S. mail, first class postage prepaid, addressed as follows:

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This the 15th day of August, 2000.

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