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Reply
COMMENT NO. 4

Satellite Home Viewer Extension and Reauthorization Act of 2004	))	**Docket No. RM 2005-7**

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS AND THE BROADCASTER CLAIMANTS GROUP

September 22, 2005

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REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS AND THE BROADCASTER CLAIMANTS GROUP

The National Association of Broadcasters ("NAB")[1/] and the Broadcaster Claimants Group[2/] hereby file their joint Reply Comments in response to the initial Comments filed by certain other parties in response to the Notice of Inquiry ("Notice") issued by the Office in this proceeding, 70 Fed.Reg. 39343 (July 7, 2005). In addition, the Broadcaster Claimants Group has joined in the Joint Reply Comments of Copyright Owners, being filed separately.

I. EchoStar's Characterization of Copyright Infringement Litigation Under SHVA is Inaccurate.

EchoStar contends in its initial Comments (at 15) that broadcasters are "misguided" in complaining about the abysmal record of certain satellite carriers in complying with the Act's unserved-household limitation. But EchoStar does not and could not dispute the Copyright Office's accurate observation that "satellite carriers largely ignored the proscription of the unserved household limitation in the years after 1988," Notice of Inquiry, 70 Fed. Reg. at 39344,

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1/ NAB is a nonprofit incorporated association of radio and television stations and broadcast networks. NAB serves and represents the American broadcasting industry. It has represented all U.S. commercial television stations in cable royalty distribution proceedings and cable rate adjustment proceedings since 1978.

2/ The Broadcaster Claimants Group is an ad hoc group that has represented U.S. commercial television stations in satellite royalty distribution proceedings and satellite rate adjustment proceedings since 1988.

and that only costly litigation forced (most of) the satellite industry to mend its ways. As to the lawsuit against EchoStar itself, EchoStar did not and could not seriously challenge on appeal the District Court's findings that EchoStar used a series of unlawful methods to sign up subscribers, and that EchoStar deliberately broke a sworn promise to the Court to turn off hundreds of thousands of subscribers that it knew to be ineligible. *CBS Broadcasting, Inc. v. EchoStar Communications Corp.*, 276 F. Supp. 2d 1237 (S.D. Fla. 2003), *appeal pending* (11th Cir.).

The key point is this: given this history of lawbreaking, especially by EchoStar, the Office should be reluctant to recommend any new "unserved household" standard that is likely to lead to renewed abuse by certain satellite carriers. Reluctance to expand the distant-signal compulsory license is particularly appropriate when local-to-local service is now almost universally available and only a tiny percentage of households are today in true "white areas."

EchoStar also argues (at 15) that because it paid the statutory royalty fee for its illegal subscribers, it in effect did not really violate the Act, and broadcasters were supposedly unharmed. But its argument reflects a basic misreading of Section 119. In the first place, the minimal royalty fee that DBS companies pay for distant signals is designed to compensate for the delivery of distant network stations to *unserved* households, not to households that can receive their own local network stations. EchoStar's argument assumes that Congress -- in effect -- *did* permit delivery of distant signals to any household so long as the statutory royalty was paid. But Congress has considered -- and flatly rejected -- proposals to abolish the unserved household limitation and allow unlimited delivery of distant signals in return for a royalty payment.

More fundamentally, however, the royalties paid by EchoStar and other carriers pursuant to the compulsory license have been distributed only to copyright owners of the programs that

appear on the distant signals (including the distant stations' own programs), and have not been distributed to local broadcasters to compensate for the devastating harm caused by EchoStar's providing duplicative network programming to households in their local markets. EchoStar's argument illustrates the cavalier attitude towards compliance with the Copyright Act that makes it vital to retain a narrow, objective standard for eligibility to receive distant signals.

II. EchoStar's Criticisms of the Grade B Intensity Standard and ILLR Are Without Foundation.

In its Comments, EchoStar briefly summarizes (at 16-18) a few of the many criticisms it has filed with the Federal Communications Commission about the Grade B intensity standard and the ILLR model.[3/] As the Office has acknowledged, the FCC is the expert agency on these issues, such as those EchoStar raises about whether or not the Act should -- as it has since 1988 -- assume the use of correctly-oriented rooftop antennas. Accordingly, it would be entirely appropriate for the Office to defer to the FCC on these issues.

In any event, EchoStar's criticisms of the Grade B intensity standard and the ILLR model are without merit. For example, even if EchoStar's survey is correct that only a minority of customers in rural counties who rely on over-the-air reception have rotatable outdoor antennas (EchoStar Comments at 17), that fact is irrelevant. *First*, because towers in many cities are located close to one another, many rural households can rely on a non-rotating antenna to receive all of the stations broadcasting from that city. Indeed, as the engineering firm of Meintel,

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3/ Notably, DIRECTV tells the Office in its Comments that it has no objection to the current Grade B intensity standard.

Sgrignoli & Wallace has explained in recent FCC filings, about 83% of the TV markets with four network affiliates (112 of 135 markets) have essentially co-located transmitter sites.[4/]

Second, EchoStar's survey, although purportedly aimed at "rural" households, did not determine the distance of the surveyed households from TV transmitters. There is therefore no way to determine how many of these ostensibly "rural" households are in areas relatively close to the main transmitters of TV stations in the nearest adjacent city. *Third*, stations and community groups have built translators or similar "ancillary" towers in many rural areas. In Utah and New Mexico, to name two notable examples, there are dozens of translator towers that deliver TV stations to rural viewers. These households, though "rural," may therefore not need an outdoor antenna to receive over-the-air signals, because they are close to the transmitting tower.

The purported fact that 43% of households that rely on over-the-air reception use indoor antennas also proves nothing. In areas close to TV towers, households may find it unnecessary to use an outdoor antenna, because signal strengths even indoors are so strong. But if a household *needs* to use a correctly oriented rooftop antenna to receive an over-the-air signal, it is certainly reasonable to expect the household to do so -- particularly since a household must *always* have a precisely-oriented outdoor antenna to receive *satellite* signals. It ill behooves EchoStar to insist that broadcast stations be judged by an indoor antenna standard when EchoStar would have no business if its customers used indoor antennas.

4/ *See Technical Standards for Determining Eligibility for Satellite-Delivered Network Signals Pursuant to the Satellite Home Viewer Extension and Reauthorization Act,* ET Docket No 05-182, Comments of the National Association of Broadcasters, filed June 17, 2005, at Att. 1, pp 13-15; Reply Engineering Statement of Meintel, Sgrignoli & Wallace Concerning Measurement and Prediction of Digital Television Reception, filed July 5, 2005, at 4-5.

EchoStar also complains (at 18) about how the ILLR model handles buildings, foliage, and other forms of "clutter." (EchoStar does not dispute that the ILLR model takes into account mountains, hills, valleys, and every other form of terrain.) But EchoStar conveniently fails to advise the Office about the entirely rational approach the FCC has taken to the issue of clutter. *First*, contrary to EchoStar's suggestion, the Commission *has* added a clutter factor to the ILLR model for UHF stations (those on Channels 14-69) -- because adding a clutter factor to those channels makes the ILLR model *more* accurate. *Second*, the Commission sensibly declined to add a clutter factor for VHF channels, because it determined, based on extensive empirical data, that doing so would make the ILLR model *less* accurate. That is, the Commission compared ILLR *predictions* to actual *site measurements*, and found that, even without the clutter factor, the ILLR model is already "tilted" in favor of underpredictions (*i.e.*, in favor of satellite carriers). Adding a clutter factor for VHF stations would make this problem worse, by causing still more underpredictions. The Commission therefore elected to set the clutter factor at zero for VHF channels. *See Establishment of an Improved Model for Predicting the Broadcast Television Field Strength Received at Individual Locations*, 15 FCC Rcd. 12118, ¶ 15 (2000), on reconsideration, 19 FCC Rcd. 9964 (2004).

EchoStar has challenged this decision in a petition for review now pending in the U.S. Court of Appeals for the D.C. Circuit, which is set to be argued in December 2005. We respectfully suggest that this matter would best be addressed by the Commission and the Court of Appeals.

III. While Predictive Models are Desirable if Possible, a "Digital ILLR" Model is Not Practical for the Foreseeable Future.

DIRECTV observes, correctly, that in an ideal world, a predictive model is an easier and more efficient way than individual site testing to assess whether particular households can receive broadcast TV signals over the air. NAB has supported the use of the ILLR model to determine whether households are "unserved" over-the-air by the analog signals of network affiliates.

From this general principle, DIRECTV concludes that a "digital ILLR" model should be put into effect immediately, and that satellite carriers should be permitted to deliver distant digital signals based on the results of digital ILLR predictions. While appealing in theory, the practical reality is that a digital ILLR model would be a nightmare in the near term, for the reasons set forth in our initial Comments at pp. 28-30 (and discussed in much greater detail in NAB's filings with the FCC, cited in our initial Comments).

For example, the FCC has not even given *channel assignments* to translator stations, which extend the reach of many stations by "pushing" their signal into areas not reached by the station's main transmitter. (Once these stations are given channel assignments, of course, they will need time to build their digital facilities.) If a digital ILLR model were applied immediately, the results would be disastrously unfair: every household that will ultimately receive a digital signal from a translator would be considered "digitally unserved," and hence eligible to receive a distant digital signal, even if the household can already receive a high-quality, digitized retransmission of the analog signals of its local stations from its satellite carrier. Much of the states of Utah and New Mexico, for example -- where translators play a crucial role -- would immediately be eligible for distant digital signals, even though the local stations have done everything that the Commission has asked them to do, and even though (for example) *every*

household in the state of Utah can today receive local-to-local analog service from EchoStar. And the translator issue is only one of the many problems that would arise from the immediate use of a digital ILLR model.

Although implementation of a digital ILLR model for SHVA purposes is not yet practical, DIRECTV and EchoStar nevertheless can rely on the existing analog ILLR predictive model to determine which households may receive distant digital signals. In SHVERA, Congress codified the Office's 2003 conclusion that an "analog-unserved" household (with respect to a particular network) is eligible to receive a distant *digital* signal of a station affiliated with the same network. Thus, DIRECTV and EchoStar are already enjoying the convenience and efficiency of a predictive model to determine which households can receive distant digital signals.

As discussed in our initial Comments, there may be very little need for a distant-signal compulsory license at all for the signals of the four major networks within a few years, as analog (and eventually digital) local-to-local service expands. At present, however, Congress was wise to conclude that only a digital site test will permit delivery of a distant digital signal based on a claim that the household is unable to receive a digital signal over the air, and there is no basis for the Office to recommend otherwise.

IV. The Compulsory License Harms Rather Than Benefits Copyright Owners

DIRECTV and EchoStar are fundamentally in error in their assertion that the compulsory license results in a net benefit to copyright owners. Because the statutory royalty payments received under the license fall short of marketplace value, the net effect of the operation of the compulsory license is harm to the copyright owners of the programs on the retransmitted signals.

On the central issue of whether the statutory rate is lower than market-level rates, the carriers' comments only rehash arguments they made in losing the satellite rate adjustment case before the CARP, the Librarian, and the Court. The EchoStar study purporting to demonstrate that the statutory rates actually exceed the market value of distant signal programming is addressed separately in the Joint Comments of Copyright Owners.[5/] In sum, none of the arguments made in that study or in DIRECTV's or EchoStar's Comments provide any new or persuasive basis for questioning the conclusion that the statutory rates, as well as the rates adopted as a result of the recent rate adjustment settlement, are below the fair market value of the distant signals.[6/]

V. Program Suppliers' Proposal that Congress Should Adopt a New Compensation Requirement for Local Carriage Under Section 122 is Misplaced.

In their initial Comments, Program Suppliers propose (at 12) that "Congress should devise a way" to require new compensation for the copyright owners of programs retransmitted within a station's local market pursuant to the Section 122 license.[7/] The question of whether

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5/ As those separate Joint Comments show, EchoStar's principal arguments for a lower "fair market value" rate were previously presented to, and rejected by, the CARP and the Librarian. Similarly, EchoStar's argument (at 4-5, 9) that copyright owners receive offsetting advertising revenues when stations are retransmitted as distant signals was raised in that proceeding as a "variation" on its advertising insert argument, and was rejected as well. *See Rate Adjustment for the Satellite Carrier Compulsory License,* 62 Fed. Reg. 55742, 55750 (1997).

6/ In any event, EchoStar and the other satellite carriers have apparently found the rates sufficiently low that they continue to choose to resell an array of distant signals to their subscribers, presumably at a profit. As noted in our initial Comments, overall distant carriage remained at roughly the same level from 1998 through 2004. *See* Comments of the National Association of Broadcasters and the Broadcaster Claimants Group at 44 n.58.

7/ *See also* Comments of Joint Sports Claimants at 13 (discussing lack of compensation but not proposing legislative action).

royalties should be paid for local carriage under Section 122 was not raised in the Office's Notice, and in any event has been expressly resolved by Congress in Section 122(c). Moreover, as we explained in our initial Comments (at 45-46), the Section 122 license, coupled with appropriate program exclusivity rules, provides a benefit to program suppliers by assuring that the programs they have licensed into a broadcast market will actually be available to the potential viewers in that market. The Office should not propose a new royalty under Section 122 in its Report to Congress.

Conclusion

The Office should report its recommendations to Congress concerning the Section 119 license in accordance with the proposals set forth in our initial Comments in this proceeding.

Respectfully submitted,

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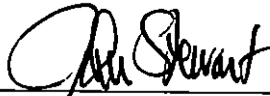

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September 22, 2005

Certificate of Service

I, Karen Rogers, hereby certify that I have sent a copy of the foregoing document, "Reply Comments of the National Association of Broadcasters and The Broadcaster Claimants Group," to be sent via U.S. first class mail, postage prepaid, this 22nd day of September, 2005, to all parties listed on the attached service list for Docket No. RM 2005-7.

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