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OF COPYRIGHT

Before the  
U.S. Copyright Office  
Library of Congress  
Washington, D.C. 20559-6000

DOCKET NO.
RM 2005 7
Reply COMMENT NO. 4

Satellite Home Viewer Extension  
and Reauthorization Act of 2004

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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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The National Association of Broadcasters (“NAB”)<sup>1/</sup> and the Broadcaster Claimants Group<sup>2/</sup> 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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<sup>1/</sup> 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.

<sup>2/</sup> 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.<sup>3/</sup> 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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<sup>3/</sup> 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.<sup>4/</sup>

*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.

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<sup>4/</sup> 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.