



FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

November 5, 1998

OFFICE OF
THE CHAIRMAN

The Honorable Rick Boucher
United States House of Representatives
2329 Rayburn House Office Building
Washington, D.C. 20515

Dear Congressman Boucher:

Thank you for your letter about the preliminary injunction issued by the United States District Court for the Southern District of Florida on July 10, 1998, relating to the Satellite Home Viewer Act ("SHVA"). I want to update you on what is happening in the court and at the Commission regarding this matter.

Like you, I am concerned that the court's action may disrupt satellite service to subscribers who cannot receive an acceptable, local network television signal over-the-air. I am also concerned that this type of disruption may impede the continued development of competition in the multichannel video programming distribution market.

The Florida federal court litigation highlights one of the difficulties with the SHVA, which, as you may know, expires on December 31, 1999. The SHVA provides that satellite carriers may retransmit network stations only to "unserved households." (For purposes of the Act, ABC, CBS, FOX, NBC, and PBS currently qualify as networks.) An unserved household is one that cannot receive, using a conventional rooftop antenna, an over-the-air signal of Grade B intensity from a network station and has not subscribed within the past 90 days to a cable system that carries an affiliate of the network. FCC rules define Grade B intensity. FCC rules also define how to predict a Grade B contour for each television station. The FCC's rules define this contour, often a circle drawn around the transmitter site of a television station, in such a way that 50 percent of the locations on that circle are statistically predicted to receive a signal of Grade B intensity at least 90 per cent of the time. Moreover, although a station's predicted signal strength increases as one gets closer to the transmitter, there will still be some locations within the predicted Grade B contour that do not receive a signal of Grade B intensity.

The Florida federal court's preliminary injunction, however, establishes a presumption that *all* households residing within the predicted Grade B contour can receive a signal of Grade B intensity and therefore are not "unserved households." Yet, under the FCC's current rules and predictive methodology, some subscribers inside the predicted Grade B contour do not receive a signal of Grade B intensity because of, for example, topographic conditions. Additionally, other subscribers receive a signal of Grade B intensity, but their reception is impaired by interference conditions. Many of these subscribers, in fact, choose satellite-delivered services precisely because this is the only way for them to receive network stations.

There are currently two petitions pending before the Commission that urge the Commission to adopt rules that would clarify, among other matters, which consumers are eligible to receive satellite-delivered network broadcast signals. One petition was filed by the National Rural Telecommunications Cooperative ("NRTC"). In it, the NRTC requests the Commission to redefine a "signal of Grade B intensity." In effect, the NRTC has asked the Commission to change the definition of "unserved households." The NRTC's proposal, which is based on its belief that the current standard fails to identify all households that are actually unserved, would almost certainly result in an increase in the number of households deemed eligible to receive satellite-delivered network stations.

The other petition was filed by EchoStar Communications Corporation. EchoStar suggests that neither the Commission's definition of Grade B intensity, nor its model for predicting Grade B contours, nor its methodology for measuring the strength of a television broadcast signal are appropriate for SHVA purposes. In EchoStar's view, application of these procedures does not identify all truly unserved households. EchoStar's petition requests that the FCC: (1) adopt a new signal intensity standard that identifies unserved households; (2) revise its signal strength prediction model; and (3) specify a signal strength measurement procedure that is less expensive and cumbersome than the present one.

The FCC placed both of these petitions on Public Notice and received numerous comments. In response, the Commission will soon commence an expedited rulemaking proceeding on ways to improve the implementation of the SHVA, consistent with our statutory authority. The Commission intends to conclude this expedited rulemaking proceeding in February 1999.

To prevent consumers who cannot receive an adequate local network signal from losing service while the Commission conducts its rulemaking, it was important that the U.S. District Court for the Southern District of Florida postpone the effective date of its injunction. This was done on September 30, 1998, when the presiding judge in the SHVA litigation in Miami, Florida, signed an Order filed by the broadcast and satellite parties to the litigation. (I am enclosing a copy of the signed Order for your information.)

The Order extends from October 8, 1998, to February 28, 1999, the date by which the satellite carrier, PrimeTime 24, must terminate delivery of distant CBS and Fox Broadcasting network signals to households "served" by their local CBS and Fox network affiliate stations. This extension will protect many consumers over the next four months from having their satellite network programming services terminated. The extension will also allow consumers more time to evaluate their options to receive local network signals. The court's Order, for example, requires PrimeTime 24 and its distributors to give subscribers "ample advance written notice" of their termination of satellite network service as well as a letter explaining their options for receiving local network signals. The letter must also explain that the court's

Order "permits continued satellite delivery of network signals to subscribers who have obtained consent from the relevant station(s) or who have been tested and found not to receive a Grade B intensity signal from a network station of the relevant network." Finally, the court's Order specifies procedures to identify and notify subscribers of broadcaster waivers and consent to continued satellite service.

I support this Order and the underlying agreement by the parties to the Florida litigation to delay enforcement of the court's injunction until February 28, 1999. However, I continue to believe that ultimately, important aspects of this dispute, such as how to determine who resides in an "unserved household," would best be resolved through private negotiations. I believe such a voluntary agreement negotiated by the principal private parties in the multichannel video programming distribution market can be as effective and durable as any governmentally mandated solution.


Assuming, however, the parties cannot reach such a voluntary agreement, I support Congressional action with respect to satellite retransmission of local broadcast signals. More specifically, the SHVA currently does not permit satellite carriers to provide network stations, even local ones, to households that are not "unserved." The cable compulsory license imposes no such limitation. If Congress amended the SHVA to permit "local-into-local" retransmission of network signals, satellite carriers would be able to offer the same network programming that cable companies currently provide, thus making satellite carriers more effective competitors to cable. Moreover, such "local-into-local" legislation would not compromise the intent of SHVA to protect the current exclusivity provisions of the broadcast network television distribution system, as well as the viability of local affiliates and network-affiliate relationships.

Congress could also amend the definition of unserved household to reduce the disparity of treatment between cable and satellite services. The current definition prohibits a subscriber from receiving satellite-retransmitted network signals if he or she has subscribed within the past 90 days to a cable service carrying an affiliate of the network in question. Imposing a 90-day waiting period for network station access on those who wish to switch from cable to satellite service places an unwarranted handicap on the satellite carriers in their competition with cable.

Finally, legislation would be helpful to address other barriers to increased competition between the satellite and cable television industries. These measures would include efforts to harmonize the compulsory license regimes among the various multichannel video programming distributors by, for example, applying the same methodology to determine the copyright fees paid by satellite and cable companies for broadcast superstation and network programming.

I do not condone the conduct of any satellite provider that is not in compliance with SHVA. But I believe that those consumers who are unable to receive an acceptable, over-the-air signal should have a lawful, alternative means to receive network programming via satellite. I therefore look forward to working with you and your colleagues in the next Congress to assist consumers without an acceptable, over-the-air signal, and to promote competition in the multichannel video programming distribution market.

Sincerely,

A handwritten signature in black ink, appearing to read "Will Kennard". The signature is fluid and cursive, with a prominent loop at the end of the last name.

William E. Kennard
Chairman

Enclosure

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

FILED by M.A. D.C.
SEP 30 1998
CLERK U.S. DIST. CT.
S.D. OF FLA. - MIAMI

CBS Broadcasting Inc., et al.,)
)
Plaintiffs,)
)
v.)
)
PrimeTime 24 Joint Venture,)
)
Defendant.)
_____)

CIV-Nesbitt No. 96-3650
Magistrate Judge Johnson

ORDER CONCERNING IMPLEMENTATION OF PRELIMINARY INJUNCTION

Pursuant to the stipulation of all parties, it is hereby ORDERED that the July 10, 1998 Supplemental Order Granting Plaintiffs' Motion for Preliminary Injunction is modified in the following respects:

1. Effective date for termination of existing subscribers: Paragraph 5 of the July 10, 1998 Supplemental Order is hereby modified to read as follows:

With respect to subscribers signed up by PrimeTime from March 11, 1997 to the date of this Order, PrimeTime shall come into compliance with ¶¶ 2-3 above (as now in force or later modified) no later than February 28, 1999.

5. Notifying subscribers about waivers. For any subscriber as to which the relevant station(s) have provided written consents to PrimeTime 24 by December 8, 1998, PrimeTime 24 shall provide (or shall direct the relevant distributor to provide) by January 8, 1999 a letter to the pertinent subscriber, in a form to be agreed on between plaintiffs and defendant, stating that his or her satellite network service is to be continued because the pertinent station(s) have consented to that service. If such written consents are provided by January 8, 1999, PrimeTime 24 shall provide (or direct the relevant distributor to provide) the subscriber with such a letter by February 8, 1999. Any consent granted by a station shall be subject to any conditions contained in the consent letter from the station.

6. Reservations of rights. Plaintiffs reserve all of their rights to seek to enforce all aspects of the July 10, 1998 Supplemental Order except as specifically modified herein. Except as part of an effort to enforce this Order, no party shall use any other party's stipulation to this Order against that party in this or any other litigation or proceeding. PrimeTime 24 and its distributors reserve all of their rights to contend that the Court's July 10, 1998 Supplemental Order and/or this Order is subject to and/or superseded by future actions relating to SHVA by the FCC or Congress, and otherwise to seek modification of the July 10, 1998 Supplemental Order. Plaintiffs reserve their rights to oppose any such argument or request. The provision of lists pursuant to ¶ 4 above, and any information obtained from those lists, shall not be used against PrimeTime 24 or its distributors in this or any other litigation or proceeding. Without limiting the generality of the preceding sentence, the provision of lists pursuant to ¶ 4 above shall be without prejudice to the right of PrimeTime 24 and its distributors to maintain that subscribers on such lists need not be terminated due to intervening circumstances, and to the right of plaintiffs to oppose that position.

Nothing in this Order shall constitute any admission by PrimeTime 24 that any of its customers are able to receive local network signals. PrimeTime 24 reserves all of its appellate rights with respect to the Court's May 13, 1998 Order and July 10, 1998 Supplemental Order, including as modified by ¶ 1 hereof. PrimeTime 24 further reserves its position that it is entitled to serve the affected subscribers and its right to seek to have the preliminary injunction vacated in whole or in part. Plaintiffs reserve their rights to oppose any such request.

It is so ordered this September 30, 1998.


United States District Judge

cc: David M. Rogero, Esq.
Thomas Olson, Esq.
Natacha Steimer, Esq.
Andrew Schwartz, Esq.
Stephen Deutsch, Esq.
Brian Spector, Esq.

2. Ample notice of termination. PrimeTime 24 shall provide (or shall direct its distributors to provide) ample advance written notice of termination to each subscriber whose CBS or Fox service from PrimeTime 24 the distributor or PrimeTime 24 expect to terminate under the July 10, 1998 Supplemental Order.

3. Letter concerning options in light of termination. In giving such advance notice of termination, PrimeTime 24 shall provide (or shall direct that its distributors provide) each affected subscriber with a letter, in a form to be agreed on between plaintiffs and defendant, concerning options for receiving local network signals. The letter shall also explain that the July 10, 1998 Supplemental Order permits continued satellite delivery of network signals to subscribers who have obtained consent from the relevant station(s) or who have been tested and found not to receive a Grade B intensity signal from a network station of the relevant network.

4. Provision of lists for consideration of possible consent to continued service. No later than November 15, 1998, PrimeTime 24 shall provide plaintiffs with a list of all existing subscribers that PrimeTime 24 or its distributors expect to terminate under the Court's July 10, 1998 Supplemental Order as now in force. The plaintiffs, and any other CBS or Fox station receiving these lists, shall use the lists only for purposes of determinations by stations about whether, in the sole judgment of the station(s), to advise PrimeTime 24 that the station(s) consent(s) to satellite delivery of network programming to particular subscribers. The networks and stations shall not use the lists to communicate directly with subscribers, and shall not provide the lists to third parties except to obtain assistance in carrying out the purposes described above.