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## A Satellite Dish or a Birdbath: The Efforts of the 106th Congress to Revise the Satellite Home Viewer Act

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# A SATELLITE DISH OR A BIRDBATH: THE EFFORTS OF THE 106TH CONGRESS TO REVISE THE SATELLITE HOME VIEWER ACT<sup>1</sup>

## I. INTRODUCTION

After months of bickering over the details, almost to the point of destroying the bill, in November Congress finally passed a bill amending the Satellite Home Viewer Act (SHVA).<sup>2</sup> With the stroke of President Clinton's pen on November 29, 1999, the direct broadcast satellite (DBS) industry gained the ability to deliver local television station programming into respective local markets nationwide.<sup>3</sup> Many questions remain, however, as to the efficacy of this legislation to put DBS in a position to compete with the cable industry in an effective manner. Technological, economic, political, and legal restraints still remain to be overcome. The purpose of this Note is to examine the process that has brought the issue this far and then to examine the remaining barriers and steps to be taken, offering insight as to the ramifications this process has had and will continue to have on the consumer and the industries involved.

## II. HISTORY

Arthur C. Clarke, in 1945, first envisioned satellites orbiting the earth and transmitting television signals down to earth stations or receivers. Over two decades later, that vision became reality with the launch of the Westar I satellite in 1974.<sup>4</sup> With this new technology in place, the cable industry began to transmit programming received via satellite to consumers. In order to allow them to do so within the bounds of copyright law, Congress created, in the Copyright Act of 1976, a compulsory statutory license for the

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<sup>1</sup> The reference to the satellite dish as a birdbath is taken from a quote by Senator Leahy, as quoted in *SHVA Caught in Gridlock At Capitol*, TELEVISION DIGEST (Nov. 15, 1999).

<sup>2</sup> Trademark Law Revision Act of 1988, Pub. L. No. 100-667, 102 Stat. 3935 (codified in scattered sections of 15 U.S.C., 17 U.S.C. and 47 U.S.C.); See Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501 (containing the full text of the bill amending the SHVA).

<sup>3</sup> Charles Haddad, *Access to Local Programs Boosts Satellite TV*, THE ATLANTA J. CONST., Dec. 3, 1999, at B1.

<sup>4</sup> H.R. REP. NO. 100-887(I), pt. 1, at 10 (1988), reprinted in 1988 U.S.C.C.A.N. 5577, 5614.

cable industry to re-transmit these signals.<sup>5</sup> All was fine until the advent of the home satellite receiver, which allowed individual consumers to receive those signals originally intended for the cable industry. Cable systems were paying satellite carriers for the signals while individuals were not. In order to impede the unauthorized reception of programming signals, the satellite carriers began encoding or scrambling their signals and providing descrambling devices to paying subscribers of their service.<sup>6</sup> Thus, the issue of copyright infringement on the carrier's behalf arose and was debated by Congress. Prior to scrambling the signals and providing these services to consumers, satellite carriers were protected as passive carriers under the Copyright Act. Since they had no control over the content of the transmissions, their activities consisted "solely of providing wires, cables, or other communications channels" to users.<sup>7</sup> Congress was forced to address the new active role being played by satellite carriers in providing satellite-to-home distribution of broadcast signals. As a result, legislators passed the SHVA in 1988.<sup>8</sup>

In passing the SHVA, Congress created a statutory license for satellite carriers to re-transmit network television broadcast signals to consumer households. At the same time, the SHVA protected the "network/affiliate distribution system to the extent that it is successful in providing programming by other technologies" since it prevented satellite carriers from delivering duplicate network programming to households served by those technologies.<sup>9</sup> The Act authorized satellite carriers to retransmit to "unserved"<sup>10</sup> households the signal of a distant network station without the consent of that station, and it created a system of copyright royalties to be paid on a per subscriber basis by the satellite carriers to the stations.<sup>11</sup> The Act was scheduled to sunset six years after enactment, in the hopes that the cable and satellite broadcast industries would come to an agreement by which such broadcasts could continue without government interference.<sup>12</sup>

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<sup>5</sup> See 17 U.S.C. § 111(c-e) (1994) (describing the statutory license for cable operators). Note that this license is permanent in that it provides for no sunset provision.

<sup>6</sup> H.R. REP. NO. 100-887, pt. 2, at 11-12 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5577, 5615.

<sup>7</sup> 17 U.S.C. § 111(a)(3) (1994).

<sup>8</sup> H.R. REP. NO. 100-887, pt. 1-2, at 11-15 (1988) *reprinted in* 1988 U.S.C.C.A.N. 5577, 5618.

<sup>9</sup> H.R. REP. NO. 100-887, pt. 1, at 8 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5577, 5617.

<sup>10</sup> 17 U.S.C. § 119(a)(2)(B) (1994).

<sup>11</sup> H.R. REP. NO. 100-887, pt. 1, at 15 (1988) *reprinted in* 1988 U.S.C.C.A.N. 5577, 5618; H.R. REP. NO. 100-887 pt. 2, at 7 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5577, 5626.

<sup>12</sup> *Id.*; See 17 U.S.C. § 119 (regarding sunset provision).

The “unserved” household restriction, also known as the “white area” restriction,<sup>13</sup> permitted satellite carriers to transmit a network station’s signal only to households that (1) “cannot receive, through the use of a conventional, outdoor rooftop receiving antenna, an over-the-air signal [from that network] of grade B intensity (as defined by the Federal Communications Commission) . . .” and (2) have not received that network’s signal through the cable system within the last 90 days.<sup>14</sup> This restriction was modeled after the network duplication rules applicable to the cable industry, which prevent a cable operator from transmitting a duplicate network signal within a local network station’s market area, which cannot exceed 35-50 miles from the broadcast station, depending on the market. However, satellite carriers, unlike cable operators, were not providing their subscribers with network signals from local affiliates. Instead, satellite subscribers within certain geographic regions were receiving the same network station’s signal. For example, the New York affiliate serviced most east coast subscribers. Network broadcasters feared local affiliates would lose viewers (and ultimately advertising revenue) to these distant network signals being piped in by the satellite carriers. To protect the local affiliates from duplicate network signal competition, the “white area” restriction was created.<sup>15</sup>

As noted *supra*, the SHVA was scheduled to sunset six years after enactment, on December 31, 1994.<sup>16</sup> Congress expected the cable and satellite industries to reach contractual agreements on their own which would compensate copyright owners of broadcast material, thereby ending the need for a statutory compulsory license. Unfortunately, that did not occur, and as the deadline approached in 1994, the nation’s satellite subscribers were facing a possible loss of network programming. In August of 1994, though, Congress stepped in and extended the sunset date to December 31, 1999.<sup>17</sup> Also, in response to alleged noncompliance with the “unserved” household restriction, Congress included in the 1994 amendment a clause putting the burden on the satellite carrier to prove that a challenged

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<sup>13</sup> U.S. COPYRIGHT OFFICE, A REVIEW OF THE COPYRIGHT LICENSING REGIMES COVERING RETRANSMISSION OF BROADCAST SIGNALS 100 (Aug. 1, 1997) [hereinafter CRO Review].

<sup>14</sup> 17 U.S.C. § 119(d)(10) (1994).

<sup>15</sup> CRO Review 102-03.

<sup>16</sup> 17 U.S.C. § 119 (1994).

<sup>17</sup> Satellite Home Viewer Act of 1994, Pub. L. No. 103-369, 108 Stat. 3477 (codified in scattered sections of 17 U.S.C.).

subscriber is indeed “unserved.”<sup>18</sup> Furthermore, Congress also added a “loser pays for the cost of measurement” provision, which means that when a challenge is made regarding the legality of a subscriber’s receipt of network programming via satellite, the losing party must pay for the measurement required to determine legality.<sup>19</sup> Therefore, if the subscriber is legal, the challenging network station would be held responsible for the cost of testing the subscriber household, and if the subscriber is illegal, the satellite carrier will be held responsible for the cost of testing.<sup>20</sup> However, Congress did not completely side with the cable and network broadcasting industries. They also added a provision to the 1994 amendments which limits the number of challenges a station can make in a year. Each station is limited to challenging a satellite carrier’s service to no more than five percent of subscribers to that carrier’s service within the network station’s local market within a calendar year in order to take advantage of certain statutory protections.<sup>21</sup>

That same year, a new technology, Direct Broadcast Satellite (DBS), was about to rock the industry even more. In 1988, when Congress first passed the SHVA, only about two million households had satellite dishes, and most of those households were in rural areas with their only source of video programming being the satellite carriers.<sup>22</sup> Such households easily qualified as being “unserved,” so little attention was paid to the situation by network stations. However, when DBS was introduced in mid-1994, subscribership to satellite service increased tremendously. In the first thirty-two months, 6.5 million subscribers were added.<sup>23</sup> DBS is very attractive to consumers because it requires a smaller dish than the older C-band technology, yet offers a much higher channel capacity without the hassle of changing satellite positions as was required with C-band.<sup>24</sup> The FCC reports that as of June

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<sup>18</sup> *Id.*

<sup>19</sup> Wade H. Hargrove, *Copyright Star Wars: Testimony on the Satellite Home Viewer Act, Before the Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary*, 33 WAKE FOREST L. REV. 147, 152 (1998); see 17 U.S.C. § 119 (a)(8-9) (1994) (describing cost of measurement responsibilities and “loser pays” aspect of law).

<sup>20</sup> Hargrove, *supra* note 19, at 152.

<sup>21</sup> 17 U.S.C. § 119 (a)(8)(C) (1994).

<sup>22</sup> H.R. Rep. No. 100-887(I) at 11, 15 (1988), reprinted in 1988 U.S.C.C.A.N. 5614, 5618; H.R. Rep. No. 100-887(II) at 15 (1988), reprinted in 1988 U.S.C.C.A.N. 5642.

<sup>23</sup> In re Satellite Delivery of Broadcast Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act, Part 73 Definition and Measurement of Signals of Grade B Intensity, 14 F.C.C.R. 2654, 2657, para. 9 (1999) [hereinafter Grade B Order].

<sup>24</sup> In Re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 12 F.C.C.R. 4357, 4385, para. 49 (1997).

1999 DBS providers had 10.1 million subscribers, and their numbers continue to grow.<sup>25</sup> In fact, DBS is quickly dominating the home satellite industry, with most of the old C-band customers now switching over to the new technology.<sup>26</sup> Cable, on the other hand, had 66.7 million subscribers as of June of 1999 and is also continuing to grow.<sup>27</sup> However, the cable industry is growing at a slower rate and is beginning to lose its huge market share. Cable's overall share of the video programming market declined from 85% in 1998 to 82% in 1999.<sup>28</sup> Most of that market loss is attributed to the gains made by the DBS industry.<sup>29</sup> What was once a rural phenomenon is now turning into a fierce competitor of the cable industry.

Congress created the compulsory license for satellite carriers in the hope that the industries would eventually make their own contractual agreements over the copyrighted broadcast material. By putting sunset provisions in both the 1988 Act and the 1994 amendments, Congress urged them to reach a mutual agreement.<sup>30</sup> Though talks between the satellite and broadcast industries did occur, they fell apart at the end of 1995.<sup>31</sup> Negotiations were reconvened in the summer of 1996, and a tentative agreement was reached with two minor satellite carriers in 1998.<sup>32</sup> That agreement, though, would not be enough to satisfy the industries or the lawmakers.

The compulsory license Congress had created and extended quickly showed its inadequacies under the pressure of the new DBS competition. At the center of the debate was the "unserved household" restriction.<sup>33</sup> Prior to the 1994 amendments of the SHVA, a network affiliate accusing a satellite carrier of violating the restriction was forced to take the carrier to court by way of a copyright infringement suit. No such suits were filed prior to the amendments.<sup>34</sup> With the 1994 amendments, Congress added to the statutory scheme provisions, which allowed affiliates to challenge satellite carriers on

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<sup>25</sup> *In re Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 15 F.C.C.R. para. 8 978, 981 (2000) [hereinafter *Sixth Video Competition Report*].

<sup>26</sup> *Id.* at para. 84.

<sup>27</sup> *Id.* at para. 7.

<sup>28</sup> *Id.* at para. 5.

<sup>29</sup> *Id.* at para. 8.

<sup>30</sup> See Trademark Law Revision Act, 17 U.S.C. § 119 (1994 & Supp. 1998) (amending the Trademark Law Revision Act).

<sup>31</sup> Hargrove, *supra* note 19, at 152.

<sup>32</sup> *Id.* at 153.

<sup>33</sup> CRO Review, *supra* note 13, at 101-02.

<sup>34</sup> *Id.* at 104.

this issue as to specific individual households. For households within the predicted Grade B contour, the satellite carrier was then forced to either discontinue service to that household or conduct a signal intensity measurement to see if it fell below the Grade B standard, with the “loser pays” provision also in effect.<sup>35</sup> For households outside the predicted Grade B contour, the affiliate had the responsibility of testing the signal intensity, with the “loser pays” provision still in effect.<sup>36</sup>

These testing provisions had a huge negative impact on the satellite industry. Due to the cost ineffectiveness of conducting the tests, “virtually no measurements of any sort were conducted” during the effective period of the provisions.<sup>37</sup> In most instances, satellite carriers simply discontinued providing the challenging affiliate’s programming to the households challenged by that affiliate.<sup>38</sup> However, this testing scheme was only adopted as a transitional tool, expiring on December 31, 1996. Upon its expiration, the affiliates were once again forced to sue the satellite carriers on copyright infringement grounds in order to enforce the “unserved” household requirement.<sup>39</sup> With the increased subscribership to DBS services and the expiration of the testing regime of the 1994 amendments, lawsuits were sure to follow, and they did.

### III. PRIMETIME 24 LAWSUITS

PrimeTime 24 became the target of several lawsuits filed by network broadcasters, thus heightening the awareness of the problem. Suits were filed in Florida, North Carolina, and Texas alleging that PrimeTime 24 was providing network programming to households that did not meet the “unserved” requirement of the SHVA.<sup>40</sup> The satellite industry had very little legal ground upon which to stand in situations where they indeed were providing network programming to served households. They were in clear violation of the law, and the resulting rulings from the lawsuits reflected the penalties of those violations. The case with the most far-reaching

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<sup>35</sup> *Id.* at 104-05.

<sup>36</sup> *Id.* at 105.

<sup>37</sup> CRO Review, *supra* note 13, at 121.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 105.

<sup>40</sup> *Grade B Order*, *supra* note 23, at paras. 16, 20-21.

significance was the Florida case,<sup>41</sup> in which CBS and Fox, along with their affiliates, brought suit against PrimeTime 24.<sup>42</sup> The court ruled that PrimeTime 24 had willfully violated the SHVA, and it issued an injunction forcing them to terminate service to all households nationwide which were not "unserved" according to the SHVA and FCC issued standards.<sup>43</sup> The court outlined methods for identifying such households and required PrimeTime 24 to follow those methods. Specifically, PrimeTime 24 was enjoined from providing CBS or Fox network programming:

to any customer within an area shown on Longley-Rice propagation maps, created using Longley-Rice Version 1.2.2 in the manner specified by the Federal Communications Commission ("FCC") in OET Bulletin No. 69, as receiving a signal of at least grade B intensity of a CBS or Fox primary network station, without first either (i) obtaining the written consent of the affected station(s) . . . or (ii) providing the affected station(s) with copies of signal intensity tests showing that the household cannot receive an over-the-air signal of grade B intensity as defined by the FCC from any station of the relevant network.<sup>44</sup>

With respect to PrimeTime 24 customers added after March 11, 1997, the date of the filing of the lawsuit, the injunction was to take effect on February 28, 1999, and for those who were customers before March 11, 1997, the injunction was to take effect on April 30, 1999.<sup>45</sup> The total number of customers expected to lose network programming as a result of this ruling was 2.2-2.5 million households.<sup>46</sup>

A similar lawsuit filed against PrimeTime 24 in Raleigh, North Carolina also resulted in an unfavorable ruling towards PrimeTime 24.<sup>47</sup> The court's

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<sup>41</sup> CBS, Inc. v. Primetime 24 Joint Venture, 9 F. Supp. 2d 1333 (S.D. Fla. 1998).

<sup>42</sup> *Grade B Order*, *supra* note 23, at para. 16.

<sup>43</sup> *Id.* at para. 17.

<sup>44</sup> *Id.* at para. 18.

<sup>45</sup> *Id.* at para. 19.

<sup>46</sup> Letter from William E. Kennard, Chairman, Federal Communications Commission to United States Senator John McCain, Chairman, Senate Committee on Commerce, Science and Transportation, and United States Representative Tom Bliley, Chairman, House Committee on Commerce (Sept. 4, 1998) available at <<http://www.fcc.gov/speeches/kennard/statements/stwek866.txt>>.

<sup>47</sup> See ABC, Inc. v. PrimeTime 24, Joint Venture, 17 F. Supp. 2d 467 (M.D.N.C. 1998) (discussing the



injunction and finding that PrimeTime 24 had repeatedly violated SHVA requirements by recruiting subscribers based solely on the subscribers' subjective observations about picture quality was upheld by the federal appellate court, forcing PrimeTime 24 to cut off transmissions to households within the ABC affiliate's Grade B contour.<sup>48</sup> Several other lawsuits were filed around the country on both sides of the dispute. Most of these were left undecided.<sup>49</sup>

#### IV. FCC INVOLVEMENT

The onslaught of lawsuits and subsequent filings with the FCC led to an inquiry by the FCC on the issue. The ruling itself was a direct response to petitions filed by the National Rural Telecommunications Cooperative (NRTC) and EchoStar, both of whom are satellite carriers, requesting the FCC prevent the expected termination of satellite service that was at that time imminent under what would become the aforementioned court rulings.<sup>50</sup> These petitions sought FCC rulemaking regarding Grade B intensity under the SHVA in order to bring the definition of Grade B intensity more in line with the actual picture quality received by viewers, with the desired result of allowing many of the households expected to be impacted by the court rulings to maintain their service from DBS.<sup>51</sup> Once these petitions were placed on public notice, various parties filed comments with the FCC regarding the issue.<sup>52</sup> "Those opposing the petition

court's ruling); *id.* at 478 (issuing a permanent injunction against PrimeTime 24).

<sup>48</sup> ABC, Inc. v. PrimeTime 24, 184 F.3d 348, 51 U.S.P.Q.2d 1451 (4th Cir. 1999).

<sup>49</sup> *Grade B Order*, *supra* note 23, at para. 21.

<sup>50</sup> *Id.* at para. 2 and n.5.

<sup>51</sup> *Id.*

<sup>52</sup> *In re Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act, Part 73 Definition and Measurement of Signals of Grade B Intensity*, NOTICE OF PROPOSED RULE MAKING, CS DKT. NO. 98-201, FCC 98-302 para. 10 (1998) [hereinafter *Grade B Notice*]. The various comments included: National Association of Broadcasters (NAB) Preliminary Response to NRTC Petition, July 17, 1998; Satellite Broadcasting & Communications Assn (SBCA) Comments to NRTC Petition, July 22, 1998; NRTC Reply to NAB Preliminary Response to NRTC Petition, August 6, 1998; NAB Further Response to NRTC Petition, September 4, 1998; Network Affiliated Stations Alliance (NASA) Comments to NRTC Petition, September 4, 1998; DirecTV Comments to NRTC Petition, September 4, 1998 (joint for NRTC & EchoStar); DSI / National Programming Service (NPS) Comments to NRTC Petition, September 4, 1998; National Telecommunications Information Administration (NTIA) Comments to NRTC Petition, September 4, 1998; PrimeTime 24 Comments to NRTC Petition, September 4, 1998; SCBA Comments to NRTC Petition, September 4, 1998; Small Cable Business Assn (SCBA) Reply Comments to NRTC Petition, September 21, 1998 (joint for NRTC & EchoStar); NRTC

generally represented broadcast interests, while those supporting the petition generally included D-T-H [direct-to-home] satellite interests.”<sup>53</sup> The supporters of the petition generally urged the FCC to update the definition of the Grade B standard so that it “reflects actual reception of an adequate television signal at a household’s television set.”<sup>54</sup> They also sought the adoption of predictive models in order to make compliance with the standard easier to ensure.<sup>55</sup> The broadcasters, on the other hand, opposed any changes to the standard and opposed the predictive model approach, arguing that the FCC lacked authority to make such changes to the SHVA, as enacted by Congress.<sup>56</sup>

Concern over the impending loss of service to so many households was expressed by many outside the industry as well, including several members of Congress. For example, Senator John McCain and Representative Tom Bliley coauthored a letter to the FCC.<sup>57</sup> Twenty-two members of Congress have written the FCC, including Representative Rick Boucher, Senator Tim Huthchinson, Representative Pat Danner, Representative Bill Redmond, Representative Virgil Goode, and Representative James H. Maloney.<sup>58</sup>

The FCC’s first response was a Notice of Proposed Rulemaking in November of 1998.<sup>59</sup> Four issues regarding the Petitions for Rulemaking were explored, and comments were sought on each in the Notice.<sup>60</sup> First, the FCC sought comment on the Commission’s authority to proceed regarding the issues raised by the petitions. Second, comment was sought on changing the definition of Grade B intensity. Third, comment was sought on prediction models and methodologies of predicting the signal strength

Reply Comments to NRTC Petition, September 21, 1998; EchoStar Petition: DirecTV Comments to EchoStar Petition, September 4, 1998 (joint for NRTC & EchoStar); SCBA Reply Comments to EchoStar Petition, September 21, 1998 (joint for NRTC & EchoStar); SBCA Comments to EchoStar Petition, September 25, 1998; A.H. Belo Corp. Opposition to EchoStar Petition, September 25, 1998; Network Affiliated Stations Alliance (NASA) Comments to EchoStar Petition, September 25, 1998; Superstar/Netlink Group Comments to EchoStar Petition, September 25, 1998; Cosmos/Cox Broadcasting Comments to EchoStar Petition, September 25, 1998; NAB Comments to EchoStar Petition, September 25, 1998; PrimeTime 24 Comments to EchoStar Petition, September 25, 1998; EchoStar Reply Comments to EchoStar Petition, October 13, 1998. *Id.* at n.28.

<sup>53</sup> Grade B Notice, *supra* note 52, at para. 10.

<sup>54</sup> *Id.* at para. 12.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at para. 10-11.

<sup>57</sup> *Id.* at para. 13.

<sup>58</sup> Grade B Notice, *supra* note 52, at note 32.

<sup>59</sup> Grade B Notice, *supra* note 52.

<sup>60</sup> *Id.* at para. 17.

received by individual households. Fourth, the FCC sought comment on testing methods used to determine actual signal strength at individual households.<sup>61</sup>

As to its authority to proceed, the FCC noted that the broadcasters held the position that the FCC could not change the Grade B definitions and measurement procedures because Congress drafted the SHVA in 1988 based upon the regulations existing at that time, “effectively freezing them in place.”<sup>62</sup> Changing the rules as to Grade B definitions and measurements, they argued, would go beyond the FCC’s authority by effectively changing the law Congress had passed. The satellite industry and its supporters responded by pointing out that Congress did not specifically incorporate the FCC rulings on these issues into the SHVA, leaving the FCC the authority to modify its rulings as it sees fit to do so.<sup>63</sup> The FCC tentatively agreed with the satellite industry in that the Commission did not believe that Congress intended to “freeze” the definition of Grade B intensity.<sup>64</sup> Left without conclusion, though, was whether the FCC could “revise its Grade B rules specifically for the purposes of SHVA”<sup>65</sup> or develop a predictive model as to signal strength for purposes of SHVA.<sup>66</sup> As to the predictive model, though, the FCC responded positively by noting that the use of a predictive model over actual measurements could make administration of the “unserved” household rule easier and more cost-effective for consumers and the industry.<sup>67</sup> Finally, the FCC concluded that its authority to define Grade B intensity includes the authority to define measurement methods for use at individual households for purposes of the SHVA, something it had not specifically done in the past.<sup>68</sup>

As to the Grade B intensity definitions, the FCC sought comment on the prudence of changing the specified values in order to determine more adequately what constitutes “unserved” households, making the definitions more in tune with quality of reception expected by consumers.<sup>69</sup> While

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<sup>61</sup> *Id.* at para. 17.

<sup>62</sup> *Id.* at para. 18.

<sup>63</sup> *Id.* at para. 19.

<sup>64</sup> Grade B Notice, *supra* note 52, at para. 20.

<sup>65</sup> *Id.* at para. 22.

<sup>66</sup> *Id.* at para. 23.

<sup>67</sup> *Id.* at para. 24.

<sup>68</sup> *Id.* at para. 25.

<sup>69</sup> Grade B Notice, *supra* note 52, at para. 27.

Congress sought an objective measure for SHVA purposes, the FCC recognized that consumers deserve to have that standard brought as close as possible to subjective expectations.<sup>70</sup> While recognizing that any changes would be limited by what is accepted as the Grade A standard because Grade B cannot equal or exceed the Grade A standard,<sup>71</sup> the FCC states, “we welcome comments, supported by evidence, regarding any claimed changes to the assumptions made in deriving the Grade B signal intensity.”<sup>72</sup>

As to prediction models, the FCC stated that it did believe prediction models could be “effective proxies for individual household measurements” under the SHVA.<sup>73</sup> Actual measurements often require time and resources such that taking them outweighs the benefits. As a result, the industry has commonly used predictive models, and the industry’s decisions of whether to provide service are based on these models, many of which are erroneous.<sup>74</sup> The FCC tentatively concluded that its traditional predictive models for determining a Grade B contour are inadequate to predict Grade B signal intensity at an individual household.<sup>75</sup> In light of that, the FCC proposed that the Longley-Rice propagation model be used to predict signal strength for SHVA purposes and sought comment on how the method could be improved to suit this use.<sup>76</sup> The FCC also sought comment on any other predictive methodologies thought to be adequate in predicting the status of individual households.<sup>77</sup>

As to testing methods to determine actual signal strengths at individual households, the FCC proposed exploring a method that is “accurate, easier, and less expensive than the current method.”<sup>78</sup> The Commission recognized that the current method of measuring field strength, a “so-called 100-foot mobile run,”<sup>79</sup> can cost several hundred dollars and includes many assumptions, which do not apply to many individual households.<sup>80</sup>

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<sup>70</sup> *Id.* at para. 16.

<sup>71</sup> *Id.* at para. 28.

<sup>72</sup> *Id.* at para. 27.

<sup>73</sup> *Id.* at para. 30.

<sup>74</sup> Grade B Notice, *supra* note 52, at para. 31.

<sup>75</sup> *Id.* at para. 33.

<sup>76</sup> *Id.* at para. 34.

<sup>77</sup> *Id.* at para. 35.

<sup>78</sup> *Id.* at para. 37.

<sup>79</sup> Grade B Notice, *supra* note 52, at para. 38 (citing 47 C.F.R. § 73.686(b)).

<sup>80</sup> Grade B Notice, *supra* note 52, at paras. 38-39.

Comments were sought as to the creation of a new testing methodology that would address these concerns.<sup>81</sup>

After reviewing comments received from the satellite and broadcast industries, as well as many Congressmen, the FCC issued its report and order in response to the petitions on February 2, 1999.<sup>82</sup> The Commission took a rather conservative stance in that it declined to take any substantial action. It characterized the SHVA as a “copyright law designed to balance owners’ and users’ rights[,] . . . not a communications law with an express purpose of increasing competition among MVPDs [multichannel video programming distributors].”<sup>83</sup> The report goes on to say that “[t]he SHVA is primarily administered by the Copyright Office and enforced by the federal courts. . . .”<sup>84</sup> As the FCC sees it, the SHVA only regulates the availability of broadcast signals, primarily from a copyright standpoint. As to defining “unserved households,” the Commission felt it was constrained by the law, as passed by Congress, in that it contained two specific terms: 1) the Grade B standard is incorporated into the definition; and, 2) the inability to receive a signal by “using a conventional outdoor rooftop antenna” . . . is required.<sup>85</sup>

The FCC did conclude, however, that Congress did not intend to “freeze” the definition of Grade B intensity as it existed at the time the SHVA was passed. The Commission found that Congress gave it a “continuing role” under the SHVA in defining Grade B intensity.<sup>86</sup> The Commission further concluded, though, that it did have the authority to modify the definition of Grade B intensity solely for purposes of the SHVA, given that Congress adopted that standard as one used for many purposes in the broadcasting industry.<sup>87</sup>

The Grade B standard was actually created as part of a regulatory scheme by the FCC for the purposes of defining service areas or contours of television stations, not to determine picture quality in individual households.<sup>88</sup> Congress, however, chose to incorporate that standard into

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<sup>81</sup> *Id.* at para. 40.

<sup>82</sup> *Grade B Order, supra* note 22.

<sup>83</sup> *Id.* at para. 28.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at para. 30.

<sup>87</sup> *Grade B Order, supra* note 22, at para. 31.

<sup>88</sup> *Id.* at para. 33.

the SHVA to define “unserved” households.<sup>89</sup> Though the FCC found that incorporation gave it latitude in defining Grade B intensity for all of the many purposes for which it is used, the FCC declined to modify that definition in its Report and Order, stating that “some of the environmental and technical changes [cited by the various commentators] that have taken place trend in opposite directions and tend to cancel each other out.”<sup>90</sup> The Commission further stated that it did not have the authority to change Grade B intensity values solely for purposes of the SHVA and that doing so would not be advisable anyway given the huge ripple effect it could have on the broadcast industry, resulting only in confusion and implications of further changes which the FCC is not prepared to address.<sup>91</sup>

As to signal intensity measurements at individual households, the FCC made its only actual amendment to the rules and regulations affecting the SHVA.<sup>92</sup> The Commission found that the “100-foot mobile run,” the methodology in place at that time, was inadequate for purposes of the SHVA in that it did not accurately measure what signal households could receive using a “conventional outdoor rooftop receiving antenna,” as defined in the Act.<sup>93</sup> To replace this methodology, the FCC ruled that “a tester [is] to make at least five measurements in a cluster as close as possible to the location being tested. The median value of the measurements will be the signal intensity at the location.”<sup>94</sup> The new methodology defined many variables for use in the measurement process including antenna types and height, numbers of tests required, the location and proximity to the household for testing, and other procedural requirements which make the new testing methodology “accurate, practical, and relatively inexpensive.”<sup>95</sup>

Finally, the FCC also adopted a predictive model for use in conjunction with the SHVA. The Commission “conclude[d] that predictive models can be effective and helpful proxies for individual household measurements and that [the FCC has] the authority to develop and endorse a model for making predictions of signal strength at individual locations”;<sup>96</sup> however, the

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<sup>89</sup> *Id.* at para. 32.

<sup>90</sup> *Id.* at para. 42.

<sup>91</sup> *Id.* at para. 43.

<sup>92</sup> *Grade B Order*, *supra* note 22, at para. 45.

<sup>93</sup> *Id.* at paras. 48-9 (citing 17 U.S.C. § 119(d)(10)(A) (1994)).

<sup>94</sup> *Id.* at para. 50.

<sup>95</sup> *Id.* at paras. 51-60.

<sup>96</sup> *Id.* at para. 64.

Commission also decided that it is not the “primary enforcer of the SHVA” and that its endorsement of a predictive model does not change the burden on satellite carriers to prove that a household is “unserved” under the SHVA.<sup>97</sup> The FCC also declined to follow the satellite industry’s recommendation that a challenger to any household’s status pay for actual signal intensity testing regardless of the outcome. Instead, the use of the predictive model only serves to meet the initial burden of a rebuttable presumption that a household is “unserved,” with the “loser pays” testing costs provision of the SHVA still applying to all challenges made.<sup>98</sup>

The model chosen by the Commission is the “Individual Location Longley-Rice” (ILLR), a predictive model better suited for SHVA purposes than the traditional Grade B contour model.<sup>99</sup> ILLR takes into account many factors not considered by the traditional methodology, including terrain elevation, antenna height, land cover, and individual location.<sup>100</sup> The use of this model, though, is discretionary with the parties. The satellite and broadcast industries still may use other models to conduct their business, but the FCC endorsed ILLR as the best approach and one that will hopefully bring some harmony to the industry.<sup>101</sup>

In concluding its Report and Order, the FCC also made several legislative recommendations. The Commission suggested that the Grade B signal intensity standard is inadequate for SHVA purposes and that exploration into a better objective standard should be explored.<sup>102</sup> The FCC also stated its belief that the cable industry-protective 90-day waiting period provision of the SHVA should be eliminated.<sup>103</sup> Finally, the Commission urged Congress to expand the “loser pays” provision of the SHVA to cover challenges and testing done before the commencement of litigation and in conjunction with the ILLR predictive model endorsed in this Order.<sup>104</sup> These recommendations, along with the following comment from the joint statement of Chairman William E. Kennard and Commissioner Susan Ness, aptly sum up the rather restrained position in which the FCC found itself:

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<sup>97</sup> *Grade B Order*, *supra* note 22, at para. 66.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at paras. 68, 71.

<sup>100</sup> *Id.* at para. 71.

<sup>101</sup> *Id.* at para. 66.

<sup>102</sup> *Grade B Order*, *supra* note 22, at para. 95.

<sup>103</sup> *Id.* at para. 96.

<sup>104</sup> *Id.* at para. 97.

“We have gone as far as we can under the SHVA to enable consumers to receive network programming via satellite. A more comprehensive solution to this problem—including, for example, allowing delivery of local broadcast signals into local markets—would require Congressional action.”<sup>105</sup>

## V. CONGRESS RESPONDS

The FCC’s order brought little help to consumers. However, it provided a framework for settlement of the PrimeTime 24 lawsuits. Under an agreement that mirrored the standards of the FCC order, DirecTV was allowed to temporarily restore distant network signals to its estimated 700,000 customers who lost service in February as a result of court injunctions.<sup>106</sup> Subscribers predicted (via the ILLR model) to receive a Grade A signal were to be disconnected by June 30, 1999, and those predicted to receive a Grade B signal were to be disconnected by December 31, 1999.<sup>107</sup> This agreement, as pointed out in the Senate Report, did not change the fact that millions of subscribers would eventually lose their network programming without a change in the law.<sup>108</sup>

With the prospect of so many subscribers losing their network programming as a result of the PrimeTime 24 lawsuits and given the lack of help from the FCC’s decision, the public outcry for relief from Congress intensified. Even before the FCC released its decision, members of Congress began to take notice. On January 19, 1999, Senator Orrin G. Hatch introduced the Satellite Home Viewers Improvements Act of 1999, S. 247, 106th Cong. (1999).<sup>109</sup> On January 25, Senator John McCain introduced the Satellite Television Act of 1999, S. 303.<sup>110</sup> The House of Representatives, not to be outdone, also got busy on its own legislation. Representatives W.J. Billy Tauzin, Howard Coble, and Rick Boucher combined their efforts to create H.R. 1554.<sup>111</sup>

<sup>105</sup> *Id.* at App. C.

<sup>106</sup> S. REP. NO. 106-51, at 5 (1999).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Background* (visited Aug. 14, 2000) <<http://www.tvaccessnow.com/background.htm>>; see also 145 CONG. REC. S5775 (daily ed. May 20, 1999) (showing full text of bill along with statements by various Senate members).

<sup>110</sup> *Background*, *supra* note 109; see S. REP. NO. 106-51, at 9 (1999) (analyzing the bill).

<sup>111</sup> *Background*, *supra* note 109; see 145 CONG. REC. H2312 (daily ed. April 27, 1999) (showing full text of bill as adopted along with statements by various House members).



The story of this legislation's trek through Congress is a wild and varied one that involves many obstacles and impediments that had to be overcome. In fact, the mere presentation of the bill in the House stirred up jurisdictional rivalries that had to be settled by the respective members of the Judiciary and Commerce Committees.<sup>112</sup> The Commerce Committee was being protective of its authority over telecommunications issues, and the Judiciary Committee was being protective of its authority over copyright issues, but the two worked together to promote legislation to help satellite broadcast consumers.<sup>113</sup>

Noticeable in all the statements and reports regarding the various bills in Congress is the prevailing motive of promoting competition in the broadcast industry. Congressmen had no qualms about specifically stating that this bill is being passed to "provide the American consumer with a stronger, more viable competitor to their incumbent cable operator."<sup>114</sup> This concern was heightened by the fact that the cable industry was deregulated in March of 1999.<sup>115</sup> Even with regulations, cable rates increased more than 20% since the enactment of the 1996 Telecommunications Act.<sup>116</sup> Regulation of cable ceased as of April 1, 1999, under the premise that the cable industry would face competition from a number of other multichannel video services by that time.<sup>117</sup> Wireless cable faced financial difficulties that impeded its growth, and the DBS industry struggled to compete but was impeded by "a series of statutorily-imposed limitations on the nature and terms of the service it could offer."<sup>118</sup> This effectively created a monopoly for the cable industry, one free of regulation and competition.<sup>119</sup> Seeing that regulation had been ineffective and knowing that competition could be very effective, Congress quickly decided to act in favor of consumers by opening the door to the DBS industry and removing some of the statutory limitations on its service.<sup>120</sup> Further fueling the flames in Congress was the fact that the two industries

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<sup>112</sup> 145 CONG. REC. H2317 (daily ed. April 27, 1999) (statement of Rep. Coble).

<sup>113</sup> *Id.* at H2319 (statement of Rep. Bliley) ("This bill, as others have said, represents the hard work and collaboration of the two committees, the Committee on Commerce and the Committee on the Judiciary . . .").

<sup>114</sup> *Id.* at H2318 (statement of Rep. Tauzin).

<sup>115</sup> *Id.*

<sup>116</sup> S. REP. NO. 106-51, at 1 (1999).

<sup>117</sup> *Id.* at 2.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 6.

had been squabbling over the issues surrounding this legislation for several years without any movement toward copyright license agreements that would solve most of the problems.<sup>121</sup>

Moreover, consumers already viewed DBS as a suitable substitute for cable. The only ingredient lacking for the consumers was access to network programming.<sup>122</sup> This impediment to competition was made all too clear in cable advertisements which pointed out the fact that customers with even the finest of satellite systems were still “encumbered by old-fashioned ‘rabbit ear’ antennas if they wanted to receive their regular local programming.”<sup>123</sup> Senate Committee research even revealed that “86 percent of those consumers who consider subscribing to satellite but ultimately do not do so, decide against satellite service because the local television signals are not available.”<sup>124</sup> Senator Leahy aptly recommended that Congress alleviate these problems by passing legislation which fosters local-into-local service instead of continuing the current policy that only “fosters confusion-into-more-confusion service and lots of litigation.”<sup>125</sup>

Legislation was finally passed by the House of Representatives on April 27, 1999 by an overwhelming vote of 422 to 1.<sup>126</sup> The Senate followed suit by passing its version on May 20, 1999 by unanimous consent.<sup>127</sup> This would be far from the end of the road for this bill, though. Each chamber passed different versions of the legislation, sparking an inter-chamber debate that would threaten to destroy the entire bill. It all started with the Senate’s passage in May of what in name was H.R. 1554. The bill actually was composed fully of S. 247. The Senate simply deleted the full text of H.R. 1554 and inserted their version of the legislation.<sup>128</sup> Though the two bills were very similar, some significant differences did exist which would set up a conference showdown between House and Senate members.<sup>129</sup>

<sup>121</sup> 145 CONG. REC. H2323 (daily ed. April 27, 1999) (statement of Rep. Ewing) (“[I]t amazes me that the two industries involved could not resolve this issue between themselves.”).

<sup>122</sup> *Id.* at 2319 (statement of Rep. Bliley).

<sup>123</sup> *Id.* at 2324 (statement of Rep. Jackson-Lee).

<sup>124</sup> 145 CONG. REC. S5775, 5777 (daily ed. May 20, 1999) (statement of Sen. Hatcher) (citing *Research Summary for Thomson Electronics*, U.S. SATELLITE BROADCASTING, Aug. 1997, at 6).

<sup>125</sup> *Id.* at 5778 (statement of Sen. Leahy).

<sup>126</sup> *The Sausage Factory*, NAT’L J., October 2, 1999, at 2810, 2810.

<sup>127</sup> *Id.*

<sup>128</sup> *Legislation: Senate Passes Bill on Satellite-TV Licensing*, BNA PATENT, TRADEMARK & COPYRIGHT LAW DAILY NEWS, June 2, 1999 (WL cite 6/2/1999 PTD d 3).

<sup>129</sup> *Id.* For instance, the House version included exemptions for certain broadcasters while the Senate

To iron out the differences in the two bills, a House-Senate panel was formed, as is the normal procedure in such instances. When the conferees to the panel had not met even once by their August deadline, tempers started flaring, and many began to wonder if a law would be passed at all by this Congress.<sup>130</sup> Senator John McCain, Senate Commerce Committee Chairman and one of the conferees, was particularly upset. He sent a letter to Senate Judiciary Committee Chairman Orrin Hatch, House Judiciary Committee Chairman Henry Hyde, and House Commerce Committee Chairman Tom Bliley, all conferees and key players in the legislation, requesting their support and displaying his frustration over the lack of action.<sup>131</sup> The cause for the inaction was not very clear, but House and Senate staff members did put forth one possible reason. While Senate staff members from the Commerce and Judiciary Committees had met to work out a proposal for the panel, no such meeting had occurred between House Committee staff members. Some attributed this to the jurisdictional rivalry between Representatives Bliley and Hyde; something they had overcome in April to pass the initial bill but were having trouble doing at this point.<sup>132</sup> Though the friction among the two committees is nothing new on Capitol Hill, its impact on this legislation was threatening to be quite severe.<sup>133</sup> In fact, as September neared its end, the panel had gone four months without its first meeting.<sup>134</sup> This left about 450,000 C-band customers without network programming as their service was terminated on July 31, 1999, under an agreement stemming from the Primetime 24 lawsuits, and it left many more DirecTV customers residing within the Grade A contour without network programming as their service was terminated under similar agreements.<sup>135</sup> Without resolution, thousands more DirecTV subscribers in the Grade B contour were set to lose service on January 1, 2000, both as a result of litigation settlement agreements and the sunset of the statutory compulsory license to DBS provided by the Satellite Home Viewers Act.<sup>136</sup> Progress

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version contained a moratorium on certain court ordered terminations.

<sup>130</sup> Ted Hearn & Monica Hogan, *McCain Wants Congress to Pass DBS Bill*, MULTICHANNEL NEWS, Aug. 9, 1999, at 2.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 58.

<sup>133</sup> Ted Hearn, *Tauzin Seeks Movement on DBS Bill*, MULTICHANNEL NEWS, Sept. 20, 1999, at 12.

<sup>134</sup> *Id.*

<sup>135</sup> Hearn & Hogan, *supra* note 130, at 58.

<sup>136</sup> Hearn, *supra* note 133, at 12; *see also* 17 U.S.C. § 119(c)(2)(D) (1994) (regarding sunset provision).

finally loomed on the horizon in late September as a meeting between the eighteen conferees was scheduled.<sup>137</sup> The myriad of issues to be faced included whether to include a full must-carry provision in the legislation which would force DBS providers to provide all local networks in a market, if any at all, by January 1, 2002; the rights of broadcasters to sign "exclusive and discriminatory retransmission-consent deals"; and whether to allow continued transmission of distant network signals.<sup>138</sup>

The must-carry provision, placed in the act to "ensure that satellite companies that choose local-to-local service will give their customers all and not just some of the local channels, thereby broadening the choice consumers have in programming,"<sup>139</sup> struck a sensitive nerve within the broadcast industry. As industry heads learned of the provision's being at issue in the conference, they began writing letters to lawmakers involved in the process, advocating their respective positions.<sup>140</sup> An October 1 letter from Robert Sachs of the National Cable Television Association (NCTA) urged Congress to keep the must-carry provision in the legislation and to not push back the date any further, arguing that an unfair competitive imbalance otherwise would result, giving the DBS industry the advantage over cable.<sup>141</sup> Executives from EchoStar and the NRTC responded with a letter of their own urging Congress to reconsider the must-carry provision because it would create a "digital divide" between urban and rural markets by sapping all the capacity of the DBS satellites.<sup>142</sup> DirecTV's president also made a similar response, attacking the NCTA for attempting to limit local-into-local service in order to preserve its monopoly status.<sup>143</sup> The DBS industry urged Congress to at least push back the date or only permit a must-carry provision once a DBS provider has a fifteen percent market share, both of which are strongly argued against by the cable industry.<sup>144</sup>

The DBS industry's concern over the must-carry issue and other similar facets of the legislation even led to the coauthoring of a letter by the heads

<sup>137</sup> Ted Hearn, *Dish Bill Movement Seen*, MULTICHANNEL NEWS, Sept. 27, 1999, at 58.

<sup>138</sup> *Id.*

<sup>139</sup> 145 CONG. REC. H2312, 2321 (daily ed. Apr. 27, 1999) (statement of Rep. Conyers).

<sup>140</sup> Ted Hearn, *Cable, DBS Fan Must-Carry Flames*, MULTICHANNEL NEWS, Oct. 11, 1999, at 64.

<sup>141</sup> *House Conferees Prepare to Receive New DBS Proposal From Senate Counterparts*, SATELLITE NEWS, Oct. 11, 1999.

<sup>142</sup> Hearn, *supra* note 140, at 64.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

of industry rivals EchoStar and DirecTV.<sup>145</sup> The letter outlined what the two industry leaders considered to be essential elements that would allow them to compete with cable by offering local-into-local service:

1. The FCC taking into account the fundamental capacity and other differences between cable and satellite in crafting must carry rules. . . .
2. Letting satellite providers become immediately competitive with cable by phasing in retransmission consent. . . .
3. Prohibiting broadcasters from discriminating among multichannel video programming distributors in giving retransmission consent. . . .
4. Not applying network non-duplication, syndicated exclusivity and sports blackout rules to DBS services. . . .
5. Granting eligible households access to distant signals, even if DBS providers offer local signals.<sup>146</sup>

With the jurisdictional rivalry set aside at least long enough to work on the bill and the end of October drawing near, the conferees to the joint panel put the finishing touches on the bill that would be presented to both Houses for final approval. One particular amendment, though, would threaten to once again derail the legislation. The amendment was actually a provision added during the final drafting sessions by Representative Rick Boucher that would subsidize the deployment of satellites by nonprofit entities to serve rural areas not receiving local network broadcasts from DirecTV and EchoStar.<sup>147</sup> With DirecTV and EchoStar planning to provide local-into-local service in only the top sixty-seven markets over the next few years, this provision would open the door for markets sixty-eight through two hundred-eleven.<sup>148</sup> Such a plan would essentially subsidize competition against small cable operators that are scattered throughout rural America, but many lawmakers are convinced it is the only way to ensure satellite broadcasts of local

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<sup>145</sup> *Rivals DirecTV, EchoStar Urge House-Senate Conferees To Grant Right to Local Signals*, SATELLITE NEWS, Oct. 18, 1999.

<sup>146</sup> *Id.*

<sup>147</sup> Ted Hearn, *Boucher Plan Could Hurt Small Ops*, MULTICHANNEL NEWS, October 4, 1999, at 44. See 145 CONG. REC. H11769,11776 §§ 2002-03 (showing actual text of loan guarantee provision).

<sup>148</sup> Hearn, *supra* note 147.

networks to that sector of people.<sup>149</sup> The proposal gained wide support from many key lawmakers, the DBS industry, and the National Association of Broadcasters, but it garnered huge opposition from the American Cable Association, which represents the nation's small rural cable systems.<sup>150</sup>

The bill emerged from the joint conference with the loan provision intact; on November 9, 1999, the House of Representatives passed the bill by a vote of 411 to 8.<sup>151</sup> The road through the Senate, though, promised to be much less pleasant as Senator Phil Gramm began mounting his attack on the bill because Representative Boucher's loan provision had not been authorized by the Senate Banking Committee, of which Gramm is the Chairman.<sup>152</sup> Threatening a filibuster, Gramm vowed that with the loan provision in place the bill "[would] not become law in this millennium."<sup>153</sup> A fight over the provision seemed to be brewing as senators vowed to stand by it and not allow the Senate to adjourn without passing the law with the provision intact.<sup>154</sup> Ironically, it seems that the provision even had enough support to pass in the Senate if it could have simply reached the floor, but Gramm continued using procedural mechanisms to block the bill's passage, in what some saw as a move which ignored the interests of his own rural Texas constituents.<sup>155</sup> As fears of the bill's demise increased, word soon began to spread that Senator Gramm had struck a deal that would allow the bill to pass, albeit without the loan provision, but he promised a bill with a similar provision would be presented in the year 2000.<sup>156</sup> With the deal in place and the loan provision gone, the bill returned to the House for a vote as part of the catchall fiscal year 2000 appropriations package, and passed by a vote of 296 to 135.<sup>157</sup> The bill also quickly passed in the Senate by a vote

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<sup>149</sup> *Id.*

<sup>150</sup> *Rural Satellite TV Viewers Gain Attention from Lawmakers as DBS Bill is Fine Tuned*, *SATELLITE NEWS*, Oct. 25, 1999.

<sup>151</sup> Lizette Alvarez, *House Votes to Let Satellite TV Carry Local Station Programs*, *N.Y. TIMES*, Nov. 10, 1999, at C2.

<sup>152</sup> *SHVA Caught in Gridlock at Capitol*, *TELEVISION DIGEST*, Nov. 15, 1999.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Senate Must End Stonewalling of Satellite Legislation and Support Rural America, NRTC Says . . .*, *PR NEWSWIRE*, Nov. 16, 1999.

<sup>156</sup> Lizette Alvarez, *Satellite TV Compromise Passes House*, *N.Y. TIMES*, Nov. 19, 1999, at C1.

<sup>157</sup> *Skyreport* (visited Nov. 20, 1999) <<http://www.skyreport.com/skyreport/nov99/112099.htm>>.

of 74 to 24,<sup>158</sup> and President Clinton signed the measure on November 29, 1999.<sup>159</sup>

## VI. ACCOMPLISHMENTS OF REVISED LAW AND REACTIONS

The new law, among other things, creates a compulsory statutory license that allows satellite carriers to retransmit network station signals into each station's respective local market, the so-called local-into-local provision;<sup>160</sup> adds five more years to the statutory license that allows the retransmission of distant network signals into "unserved" households;<sup>161</sup> adopts the ILLR predictive model as a presumptive determination of a household's status;<sup>162</sup> allows satellite subscribers within the Grade B contour who were scheduled to lose service at the end of 1999 to maintain service until December 31, 2004;<sup>163</sup> exempts recreational vehicles from the limits on retransmitted signals;<sup>164</sup> removes the ninety-day waiting period before cable subscribers can switch to satellite service;<sup>165</sup> enacts a must-carry provision for satellite carriers that goes into effect on January 1, 2002;<sup>166</sup> gives satellite carriers six months to negotiate retransmission consent deals with local stations in order to continue transmitting local signals;<sup>167</sup> demands that the FCC review and recommend policies relating to network nonduplication, syndicated exclusivity, sports blackouts, modifications to the Grade B standard for determining "unserved" households, creation of a new predictive model or modifications to ILLR, and the promulgation of regulations governing the creation of retransmission consent agreements between satellite carriers and local stations to ensure "good faith" on the part of the local station.<sup>168</sup>

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<sup>158</sup> *McCain Blasts SHVA Legislation as Lacking Safeguards*, SATELLITE WEEK, Nov. 29, 1999. The text of the final measure, as adopted by both Houses, may be found at Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, App. S. 1948, 113 Stat. 1501, 1537-515 (1999).

<sup>159</sup> *Clinton Signs Local-Carriage Bill; DirecTV Already Sending Local Channels*, COMMUNICATIONS TODAY, Nov. 30, 1999.

<sup>160</sup> Satellite Home Viewer Improvement Act, *supra* note 158, § 1002.

<sup>161</sup> *Id.* § 1003.

<sup>162</sup> *Id.* § 1005(a)(2).

<sup>163</sup> *Id.* § 1005(c).

<sup>164</sup> *Id.* § 1005(d).

<sup>165</sup> Satellite Home Viewer Improvements Act, *supra* note 158, § 1005(a).

<sup>166</sup> *Id.* § 1008(a).

<sup>167</sup> *Id.* § 1009(a)(1).

<sup>168</sup> *Id.* §§ 1008(a) and 1009(a)(2).

One provision that worries those in the satellite carrier industry is the six month negotiation phase.<sup>169</sup> After six months have passed from the date of the bill's passage, satellite carriers must have in hand a retransmission consent agreement allowing them to retransmit a local station's signal into its respective local market.<sup>170</sup> Given that no limits are placed on what the local stations can charge the satellite carriers to carry their signal, industry analysts predict that the stations will attempt to charge the satellite carriers more than they charge cable companies, given the lower market share of satellite carriers.<sup>171</sup> Other analysts predict that the local stations will not overcharge because they seek to reach the young wealthy viewers that are attracted to satellite and are attractive to advertisers.<sup>172</sup> Only time will tell how fair the agreements will be to satellite carriers, but many are urging Congress to keep an eye on the issue in order to ensure that DBS becomes a competitor to cable.<sup>173</sup>

The version of the law that passed drew harsh criticism and a vote of nay from at least one Senator who had helped create the initial Senate bill, Senator John McCain.<sup>174</sup> In a "scathing 5-page statement," McCain said special interests got the upper hand in the bill, leaving the satellite industry without any safeguards to ensure their ability to compete with cable.<sup>175</sup> Specifically, McCain is upset that the determination of "good faith" negotiations on the part of local stations is punted to the FCC.<sup>176</sup> Furthermore, the six-month negotiation phase leaves the satellite carriers stranded if no deal is reached and yet gives the network station the upper hand in cutting the deal.<sup>177</sup> Also, Congress failed to act on revising the Grade B standard and instead punted it to the FCC for review, and the bill lacks provisions that help rural America receive network programming.<sup>178</sup>

There was a mixed reaction for the bill among satellite industry leaders. DirecTV president Eddy Hartenstein supported the bill as a "breakthrough agreement" while EchoStar's Charlie Ergen labeled the bill "anticompetitive

<sup>169</sup> See *id.* § 1009(a)(1) (describing the negotiation phase).

<sup>170</sup> Satellite Home Viewer Improvement Act, *supra* note 158, § 1009(a)(1).

<sup>171</sup> Lizette Alvarez, *Satellite TV Compromise Passes House*, N.Y. TIMES, Nov. 19, 1999, at C1.

<sup>172</sup> *Id.*

<sup>173</sup> *Satellite TV*, SATELLITE WEEK, Dec. 6, 1999.

<sup>174</sup> *McCain Blasts SHVA Legislation as Lacking Safeguards*, SATELLITE WEEK, Nov. 29, 1999.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*



and anticonsumer.’”<sup>179</sup> The lack of a guarantee of fair pricing on the local-to-local retransmission agreements worried many in the industry, as did the implication of a full must-carry provision on January 1, 2002.<sup>180</sup> While the rural satellite industry advocates, namely the NRTC, were unhappy that the rural loan guarantee program was slashed from the bill, they did at least gain assurances that it would be revived on the Senate floor by April 1, 2000.<sup>181</sup>

The other industry players, the cable industry and the network affiliates, were at odds over the bill from the outset. Ironically, the cable industry supported the bill’s efforts to increase competition against that industry. However, it did so for its own political reasons, knowing that without competition, Congress was likely to reinstate strict regulation of cable which had just ended on April 1, 1999.<sup>182</sup> Local network affiliates, represented by the National Association of Broadcasters (NAB), on the other hand, battled the legislation from start to finish. In doing so, they gained many provisions in their favor, including a nonduplication provision that prohibits satellite carriers from delivering a duplicate network signal within about a seventy-five mile radius of a local affiliate, twice the radius to which cable companies must adhere.<sup>183</sup> The NAB was also instrumental in excluding from the bill provisions which would guarantee fair pricing of the retransmission consent agreements and any true action toward redefining standards for determining “unserved” households.<sup>184</sup> However, one provision that the NAB was not able to have removed from the bill was a grandfather clause that allows customers within the Grade B contour already receiving a distant network signal to continue doing so while the FCC reviews the standard used to determine “unserved” households, a welcomed provision by consumers in areas like West Virginia where topography often creates obstacles to receiving a signal in areas where models predict that they should be able to do so.<sup>185</sup>

<sup>179</sup> *SHVA Caught in Gridlock at Capitol*, TELEVISION DIGEST WITH CONSUMER ELECTRONICS, Nov. 15, 1999, at 1.

<sup>180</sup> Ted Hearn, *SHVA Heading to the White House*, MULTICHANNEL NEWS, Nov. 22, 1999, at 1.

<sup>181</sup> *Id.*

<sup>182</sup> Jeri Clausing, *Satellite TV is Poised for New Growth*, N.Y. TIMES, Nov. 26, 1999, at C9.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> 145 CONG. REC. S8201 (daily ed. July 1, 1999) (statement of Sen. Byrd). See SATELLITE HOME VIEWER IMPROVEMENT ACT, *supra* note 158, § 1005(c) (describing grandfather clause).

One major concern that most feel was left unmet by the legislation is that for rural markets. Many obstacles exist, both legislative and technological, that need to be overcome in order to ensure service to rural markets of network programming. According to Bob Phillips of the NRTC, "local-into-local service remains a pipe dream for any consumers outside the major metropolitan areas."<sup>186</sup> Due to technological restraints on satellite capacity, only 67 of America's 210 broadcast markets will be served by local-into-local service over the next two to three years under the plan, leaving four out of the top five states by percentage of satellite households without even one city receiving service.<sup>187</sup>

The technological problems concern the ability of satellites to broadcast signals at certain frequencies. DBS satellites are able to transmit to the forty-eight contiguous states from three orbital slots around the earth: 101 degrees, 110 degrees, and 119 degrees west longitude.<sup>188</sup> There are thirty-two available frequencies at each orbital slot, with current technology allowing a satellite to transmit up to ten standard channels on each frequency.<sup>189</sup> Most satellite dish receivers can only receive signals from one orbital slot at a time, limiting a dish's receiving capacity to a theoretical maximum of 320 channels.<sup>190</sup> Control over the frequencies, though, is spread out among DBS providers. As a result, DirecTV can offer up to 320 channels, but EchoStar can only offer 210 channels to customers with their standard dish and can offer up to 500 channels to customers who purchase their new dish, which is capable of receiving signals from two orbital slots.<sup>191</sup> With this technology, the signals of all the local affiliates picked up by each provider will be broadcast to all dish subscribers across the country, an inefficient process in which the carrier will be forced to scramble the signal in all markets except the local affiliate's market.<sup>192</sup> Given that the must-carry provision will take

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<sup>186</sup> *NRTC Says Passage of S. 247 Fails to Solve Local TV Crisis in Rural America*, U.S. NEWSWIRE, May 21, 1999.

<sup>187</sup> *Rural Leaders Say Satellite Legislation Ignores the Needs of 50 Million Americans*, P.R. NEWSWIRE, June 18, 1999.

<sup>188</sup> Seth Schiesel, *Local Signals May Be Costly for Satellite TV Providers*, N.Y. TIMES, Dec. 13, 1999, at C1.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

effect in January of 2002, forcing carriage of all networks in a market if any at all, the satellite carriers will be limited to providing local-into-local service for only about 20-25 markets, thereby sapping all their satellite capacity on the most lucrative markets while leaving the rural markets out in the cold.<sup>193</sup>

A new technology, though, does exist that hopefully will allow satellite carriers to overcome this barrier to rural service. Spot-beam satellites, which allow a much more efficient use of frequencies by breaking up the beams and aiming them at specific metropolitan areas, thereby increasing channel capacity on each frequency, are being investigated by the industry.<sup>194</sup> DirecTV has even announced plans to order a spot-beam satellite for a launch in the fourth quarter of 2001, but plans have not yet been finalized.<sup>195</sup> Although this sounds promising, the satellite still will not allow service to all rural markets, and the cost to DirecTV of \$200 million may be an obstacle to its launch.<sup>196</sup>

Another problem cited by industry insiders is that of supplying retransmissions of the smaller networks like WB and UPN. These smaller networks will eat away even more of the satellite capacity once the must-carry provision takes effect.<sup>197</sup> Moreover, some parts of rural America could not be helped by the bill even if satellite technology was not limited. For example, in Bangor, Maine, the local network affiliates simply do not have the technology to allow satellite carriers to uplink their signals.<sup>198</sup> That leaves viewers in that area with only the possibility of seeking a waiver from the local affiliates, something quite unlikely to happen for most customers unless they can show that they truly cannot receive an acceptable signal.<sup>199</sup>

Not to erode all hopes among rural viewers, the bill did offer some help. The bill does order the FCC to investigate the provision of DBS and wireless cable to rural America and to report within a year on its findings.<sup>200</sup> Also, as mentioned above, the rural loan guarantee program that was slashed from

<sup>193</sup> Schiesel, *supra* note 188.

<sup>194</sup> *DirecTV Ready to Roll On Local Service*, (visited Aug. 15, 2000) <<http://www.skyreport.com/skyreport/nov99/111199.htm>>; Schiesel, *supra* note 188.

<sup>195</sup> *DirecTV Plans New Satellite to Offer Important Local-Into-Local Services*, SATELLITE NEWS, Dec. 13, 1999.

<sup>196</sup> Schiesel, *supra* note 188.

<sup>197</sup> Mike Musgrove, *Local TV - Live Via Satellite*, WASHINGTON POST, Dec. 17, 1999, at E13.

<sup>198</sup> Andrew Neff, *Satellite Act of Little Benefit to Maine Viewers*, BANGOR DAILY NEWS, Dec. 2, 1999.

<sup>199</sup> *Id.*

<sup>200</sup> *Rural Loan Program Eliminated from SHVIA*, COMMUNICATIONS DAILY, Nov. 19, 1999; see SHVIA, *supra* note 2, § 2002 (showing text of bill relating to FCC directive).

the bill was promised to be brought to the Senate floor by April 1, 2000. In fact, as of the completion of this Note, hearings are currently being held to discuss the loan guarantee provision, with testimony being offered by many representatives from the industries involved.<sup>201</sup>

Further clarification of the bill is also forthcoming as the FCC has begun to seek comments on issues relating to the Act. For example, the Commission issued a Notice of Proposed Rulemaking (NPRM) in late January as to modifications of the ILLR predictive model used in the revised Act.<sup>202</sup> As of the time of completion of this Note, other NPRMs are expected to be released shortly, addressing issues such as the “good faith” negotiation of retransmission consent agreements.<sup>203</sup> According to an FCC representative, more than 600 calls have come into the FCC seeking clarification on issues relating to the Act.<sup>204</sup>

## VII. CONCLUSION

Though not a complete victory for consumers, the Satellite Home Viewer Improvement Act does at least open the door to competition. A lot of work remains to be done which Congress is well aware of as evidenced by its ongoing efforts at the time of this note’s completion. Immediately after the bill’s passage, DBS providers were sending local signals into major metropolitan areas, including Boston, New York, Los Angeles, Chicago, Atlanta, Miami, Denver, and San Francisco.<sup>205</sup> Subscribership to DBS service is increasing and expected to continue to grow over the coming months as more and more markets are served by local-into-local broadcasts.<sup>206</sup> The

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<sup>201</sup> *Satellite Returns to the Hill* (visited Jan. 29, 2000) <<http://www.skyreport.com/skyreport/jan2000/012800.htm>>.

<sup>202</sup> *FCC Seeks Comment on Predictive Model* (visited Jan. 29, 2000) <<http://www.skyreport.com/skyreport/jan2000/012100.htm>>.

<sup>203</sup> *SHVIA Implementation Needs Clear Terms* (visited Jan. 29, 2000) <<http://www.skyreport.com/skyreport/jan2000/011400.htm>>.

<sup>204</sup> *Id.*

<sup>205</sup> Joe Bartolotta, *Satellite TV Pact is Signed*, BOSTON HERALD, Nov. 30, 1999, at 25; *Local TV Offerings Debut Today* (visited Jan. 6, 2000) <<http://www.skyreport.com/skyreport/nov99/112999.htm>>.

<sup>206</sup> *November DBS Subscriber Numbers: A Ninth Consecutive Record Month*, SATELLITE NEWS, Jan. 3, 2000; MARTHA MCKAY, *Satellite TV Ready to Compete; Now Able to Supply Some Local Channels*, THE RECORD (Bergen County, N.J.), Dec. 2, 1999, at B1.

birds, to their misfortune, maybe, will have to continue using traditional bird baths at least for a little while longer.

CHAD HUNT