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Backgrounder
Executive Summary

No. 1254 February 19, 1999

WHY CONGRESS MUST FIX THE SATELLITE HOME VIEWER ACT

ADAM D. THIERER AND BRYAN T. JOHNSON

The satellite industry is one of the fastest growing and most important high-technology sectors of today's U.S. economy. It provides, among other things, communications, television, cable, and sophisticated imagery and sensory satellites for U.S. intelligence-gathering operations. Over the past decade, home satellite subscriptions for television service have grown dramatically. Five years ago, for example, there were barely 1 million home satellite subscribers; today, there are over 8 million. For many of these subscribers, satellite transmission is the only way they can receive broadcast television programs from such networks as ABC, CBS, NBC, and Fox Television.

Soon, however, millions of Americans may lose these network broadcasts. A U.S. District Court judge in Florida has ruled that satellite providers must begin terminating the retransmission of network broadcasts to customers by February 28, 1999. If this ruling stands, 2.2 million subscribers could lose their service by late spring, and millions of new satellite consumers would be unable to receive such broadcasts in the future. As Federal Communications Commission Chairman William B. Kennard recently warned, "an impending train wreck" will occur if reform is not undertaken.

Senators John McCain (R–AZ) and Conrad Burns (R–MT) have introduced the Satellite Television Act of 1999 (S. 303) to address this issue by correcting some of the problems in an obscure statute known as the Satellite Home Viewer Act of 1988 (SHVA). The SHVA allows satellite providers to retransmit broadcast station signals to "unserved households," subscribers who otherwise could not receive network broadcast signals satisfactorily.

But S. 303, as written, cannot prevent the "impending train wreck." Legislators are becoming mired in a debate over the legalities and technicalities associated with SHVA reform. For example, under S. 303, by 2002 satellite carriers would be required to carry every local broadcast signal upon request by a local station. It is uncertain whether the technology will be available to accomplish this goal. Even if it is, such "must-carry" mandates

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interfere with the workings of the free market in satellite service.

In addition, the new standards that S. 303 would establish are just as subjective as the current standards in the SHVA. S. 303 merely alters the status quo to appease the interests of local broadcast affiliates. Policymakers appear to be putting the interests of consumers behind those of industry. If S. 303 passes as currently written, millions of Americans will lose their current satellite TV service, and many more will be unable to obtain high-quality television programming signals from the providers of their choice.

Congress would do well to adopt a bold new paradigm for the industry which embraces the principles of deregulation, competition, and consumer choice. Specifically, all television consumers should be able to purchase service from whomever they prefer and on whatever terms they can negotiate, and neither legislation nor regulation should stand in the way of such voluntary market transactions. These "consumers first" principles would help guarantee that competition is preserved in this vital sector of the economy.

In the short term, to fix the SHVA, Congress should:

- **Extend** the court-imposed deadline to cut off satellite transmission of network broadcasting until this problem is resolved;
- **Allow** households that already subscribe to broadcast affiliates through a satellite provider to be grandfathered into any new arrangement;
- **Allow** existing subscribers to carry over grandfathered services when they change residences;
- **Eliminate** the 90-day waiting period for canceling cable service for new satellite subscribers;
- **Allow** a grace period after a reform bill is passed during which additional consumers may sign up for distant network signals; and
- **Broadly define** "unserved households" so that consumers are seen by the government as the best judges of whether the quality of their local broadcast signals is satisfactory.

Over the longer term, Congress should create a deregulatory framework to sunset all regulations governing satellite signal delivery and competition. Such a framework should:

- **Articulate** a clear and unfettered "consumer choice" standard;
- **Sunset** the SHVA's compulsory licensing requirements and allow voluntary negotiation and freedom of contract between buyers and sellers of television programming;
- **Reject** the new "must-carry" mandates; and
- **Clarify** that state and local regulation of the delivery of global satellite programming interferes with interstate commerce, and therefore would be unconstitutional.

Such reforms would help bring about a more competitive and innovative satellite industry that guarantees consumers greater choice in programming and service. It also would ensure continued vitality and growth in an industry with important ramifications for U.S. global competitiveness, as well as U.S. national security.

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Congress is scheduled to consider the Satellite Television Act of 1999 (S. 303), legislation that will help decide the future of one of America's most competitive and technologically important industries: satellite television broadcasting.

The satellite industry includes many services, from delivering cellular phone service and television broadcasting to sophisticated imagery and sensory satellites for U.S. intelligence-gathering operations. Policymakers and regulators, however, are making decisions that could stifle market innovation and competition within this important industry, limiting consumer choice at home and threatening the competitive advantage now enjoyed by many U.S. satellite and broadcasting companies.

The Satellite Television Act of 1999 is an attempt to correct some problems with an obscure statute known as the Satellite Home Viewer Act of 1988 (SHVA). The SHVA allows satellite providers to retransmit broadcast station signals to "unserved households," subscribers who otherwise could not receive network broadcast signals satisfactorily using a rooftop antenna.

But S. 303, introduced by Senators John McCain (R–AZ) and Conrad Burns (R–MT), will not prevent what Federal Communications Commissions (FCC) Chairman William B. Kennard calls an "impending train wreck."[1] Under pressure from network broadcast stations and satellite providers, legislators are becoming mired in a heated debate over the legalities and technicalities associated with SHVA reform. Under S. 303, for example, by 2002 satellite carriers would be required to carry every local broadcast signal upon request by a local station. It is uncertain whether the technology will be available to accomplish this goal. Even if it is, such "must-carry" mandates interfere with the workings of the free market in satellite service.

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1. Letter from Federal Communications Commission Chairman William B. Kennard to Senator John McCain and Representative Thomas Bliley, September 4, 1998.

Over the past decade, home satellite subscriptions have grown dramatically. Five years ago, there were barely 1 million home satellite subscribers; today, there are over 8 million. Many of these subscribers receive television network broadcasts (such as those of ABC, CBS, NBC, and Fox Television) thanks to the SHVA. But Congress is being forced to reexamine this little-known law on an expedited basis because the current compulsory licensing arrangement is set to expire on December 31, 1999, and millions of Americans may soon lose their access to network broadcasts.

A U.S. District Court in Florida has ruled[2] that satellite providers must begin to terminate the retransmission of network broadcasts to consumers by February 28, 1999. FCC officials estimate that approximately 2.2 million satellite consumers could lose the "out-of-market" network television signals they receive through a satellite provider if the Florida District Court ruling stands.[3] Millions of other video consumers would be unable receive such broadcasts in the future.

If Congress fails to correct this problem, the likelihood is that competition within the U.S. satellite video programming industry will decrease, severely harming the entire satellite industry.

For decades, television broadcasters and cable television providers in the United States sought to shield their industries from competitive market forces by protecting their geographic service monopolies. Using the regulatory system to their advantage, they succeeded in stifling innovation and competition from such vital competing industries as satellite production and services. Now, after decades of stagnancy, broadcast and cable monopolies find themselves threatened by genuine competition from these industries.

Instead of welcoming this competition, however, they are pressuring Congress to protect their monopolies and deny customers true choice of service. Members of Congress are being sidetracked by technical and legal concerns put forth primarily by broadcast industry lobbyists who claim that increased consumer choice and competition from the satellite industry threatens their business. Senators McCain and Burns have introduced the Satellite Television Act of 1999 to resolve this conflict, but S. 303, as written, cannot prevent millions of satellite TV consumers from losing their broadcast network programming.

Congress should act immediately to head off the "impending train wreck" in the television programming industry. It should fix the SHVA and implement sound measures that will guarantee consumer choice and competition in this important industry.

THE BROADCAST NETWORK INDUSTRY VS. THE SATELLITE COMMUNICATIONS INDUSTRY

In the ongoing legislative debate over SHVA reform, Congress will hear from three vocal constituencies: the broadcast affiliates of television networks; the satellite communications industry; and household consumers of television (or video) programming. Each group wants the law to accommodate its needs and interests, but these interests vary and are quite complex. For example:

- **Broadcasters** want to preserve the government-sanctioned monopoly they have enjoyed since the early days of TV broadcasting by ensuring that no company (other than the current local broadcast affiliates of ABC, CBS, NBC, and Fox TV located in each community) is permitted to transmit or retransmit network television signals in the local market. They are concerned that increased competition from "out-of-market" competitors like satellite broadcast providers puts their local advertising base at risk. If their advertising base shrinks, broadcasters argue, their economic livelihood will be threat-

2. *CBS Inc., et al.* v. *PrimeTime 24 Joint Venture*, Final Judgement and Permanent Injunction, Case No. 76–3650–CIV–NESBITT, U.S. District Court, Southern District of Florida, December 24, 1998.

3. *Ibid.*

ened and "localism" in broadcasting endangered.

- **Satellite providers** want to continue to deliver "distant network affiliate signals" to anyone who wants them, especially those who have poor signal reception from local network affiliates using roof-top antennas, set-top "rabbit ear" antennas, or cable television. Satellite providers believe "unserved households" should be defined as broadly as possible so that customers who do not receive adequate broadcast signals at any time during the day can do so via satellite transmission.
- **Consumers** for the most part want to make sure they do not lose their current service, whether it is traditional broadcast programming from local affiliates or retransmission of distant network signals via satellite providers. Most important, however, they want to receive the highest quality signal possible from a provider of their choice.

Although most consumers have little interest in, or understanding of, the complex and contentious regulatory battle taking place between broadcasters and satellite providers, they want to be able to choose from as many high-quality programming options as possible. As FCC Chairman Kennard puts it, a "train wreck" is about to occur between competing interests in the television market. Before passing any new legislation, policymakers should be certain they understand the issue and the technology involved.

THE HISTORY OF SATELLITE TELEVISION TRANSMISSION

In the Satellite Home Viewer Act of 1988, Congress established a compulsory licensing system so that satellite carriers could retransmit out-of-market programming by major broadcast networks to subscribers who had problems receiving those signals ("unserved households") from local station affiliates using standard receiving equipment. This compulsory licensing system mimics a similar procedure between broadcasters and the cable industry established as part of the Copyright Revision Act of 1976.

The SHVA compulsory licensing system requires that broadcasters provide their programming services to cable and satellite companies for a royalty fee established by the federal government. Essentially, under both systems of compulsory licensing, broadcasters surrendered the right to negotiate freely with cable and satellite providers to arrive at mutually agreeable terms for retransmitting their signals.

Such compulsory licensing schemes interfere with free-market negotiations and constitute a form of copyright infringement. Yet Congress felt it was necessary to institute these measures for both the cable and satellite industries. Among the excuses commonly heard for such market and copyright interference are:

- Broadcasters use a **publicly owned resource** (the electromagnetic spectrum) to deliver their signals; therefore, they should be required to compensate the public for the use of this valuable good.
- Broadcasters are granted the equivalent of a **geographic monopoly** in each community they serve. Therefore, unique demands may be made on them to control their market power.
- In their early years, the cable and satellite industries were entitled to **special protection or favoritism** to enable them to become credible competitors of the broadcast networks.
- Broadcast television supposedly is a **"public good"** to which every American is entitled. Therefore, market interference and copyright infringement are an acceptable means to a higher end: guaranteeing consumers the maximum amount of choice, absent greater market competition.

WHY THE SHVA MUST BE FIXED

The current compulsory licensing arrangement under the SHVA has long been regarded as a "second best" solution for ensuring adequate access to television programming. The first is the free and voluntary negotiation of copyright contracts in the

communications marketplace. As the U.S. Copyright Office noted in its 1997 *Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals*:

> [F]or licensing copyrighted works retransmitted by cable systems and satellite carriers, the better solution is through negotiation between collectives representing the owner and user industries, rather than by a government administered compulsory license.[4]

Just as it would be unthinkable for the government to demand that newspaper companies or book publishers surrender their copyrights and freedom to negotiate with buyers, so too is it unjustifiable to demand that broadcasters surrender their copyright protections and freedom to contract voluntarily in the free market. Technological developments and growth in the television market have made the need for such regulatory involvement unnecessary. Consequently, the SHVA is now badly outdated and extremely ineffective.

For example, the SHVA's system of compulsory licensing worked well when coverage in the satellite marketplace was quite limited. For many years, few Americans subscribed to satellite television services provided via the large "C-Band" satellite dishes that could be placed only in large open spaces. This was the leading technology of the time, but the large receiving dishes were eyesores, and most consumers did not have adequate open space on their property for them.

As a result, the number of satellite dish owners who signed up to receive distant network signals under the SHVA was relatively small, and satellite subscriptions did not raise concerns about competition among local broadcast affiliates. In addition, during the late 1980s and early 1990s, most households receiving distant network signals under the SHVA generally were situated far enough away from broadcast towers to be considered genuinely "unserved households."

But with the rise of the direct broadcast satellite (DBS) television industry in the mid-1990s, this changed. Unrestrained by burdensome regulations, and able to provide a much smaller dish that was easier for customers to situate on their property, DBS market subscription rates began to explode around 1994. As indicated in Table 1, the number of DBS subscribers skyrocketed from roughly 1.8 million in October 1995 to over 8.9 million in February 1999.

As DBS subscription rates have multiplied, so has the number of consumers seeking to receive

Table 1 B1254

DBS Subscriptions

October 16, 1995	1,760,848
October 10, 1996	3,769,917
October 16, 1997	5,671,698
October 23, 1998	7,984,277
February 10, 1999	8,931,207

Note: These numbers do not include older C-band satellite subscribers.
Source: *DBS Digest*, as found on DBSDish.com website, *http://www.dbsdish.com/dbsdata.html*.

distant network signals through their satellite providers because:

- **Their reception** from traditional roof-top or set-top antennas was poor;
- **They wanted** the highest quality sound and the sharpest reception of network signals possible, which digital retransmission through a DBS company provided;

4. U.S. Copyright Office, *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals*, A Report of the Register of Copyrights, August 1, 1997, p. iv.

- **They were dissatisfied** with their current cable provider's prices, service standards, or picture quality; or

- **They wanted** to receive out-of-market stations instead of traditional local affiliates' programming.

Many DBS subscribers began to request distant network signals from satellite providers during the mid-1990s. When they did, they typically were asked whether they felt qualified as "unserved households" to receive such signals. (See sidebar, "Defining 'Unserved Households.'") Essentially, to qualify as an "unserved household" under the SHVA, consumers had to respond that (a) they could not receive high-quality reception by using a rooftop antenna, and (b) they had not subscribed to a cable provider within the past three months. Transactions between consumers and satellite providers were undertaken in good faith.

Testing every home to see whether it was "unserved" was an expensive and impractical consideration for most satellite companies. It was easier simply to trust the judgment of consumers who called the provider to request distant network broadcast stations. If a consumer requested a distant network signal, the satellite provider had to assume that the consumer felt the reception quality of the local broadcast affiliate was poor.

As the ranks of satellite-owning Americans grew and subscriptions to distant network signals multiplied, local broadcasters grew increasingly concerned that "localism" in broadcasting was threatened by direct competition from out-of-market providers. They argued that what was needed was a very strict interpretation of the term "unserved household," so that only consumers who fit certain regulator-defined "contours" would be eligible for retransmission of distant network signals.

Problems with the SHVA Definition of "Unserved Households"

The SHVA's definition of "unserved households" is rife with controversy because of its inherent subjectivity. For example, reception is graded "B" after measuring a signal 30 feet above the ground. But why is "30 feet above the ground" the standard for Grade B reception when not every household has an antenna that reaches 30 feet off the ground? The determination is made for a "median observer," but it is unclear whether such an entity is a regulator, a consumer, or a broadcast or satellite company. In addition, it is unclear just what constitutes an "acceptable" picture.

Instead of providing answers to such questions, the FCC attempts to define the Grade B standard technically to clarify which households fit within its "contours." The agency notes that "The Grade B contour is defined as the set of points along which the best 50% of the locations should get an acceptable picture at least 90% of the time."[5] But this definition clarifies little; it does not answer, for example, the question of how these percentages are determined accurately. Measuring difficulties also make such precise determinations very difficult.

Worse, under FCC logic, households that receive the equivalent of a grade B signal may be able to receive a respectable signal only for a certain portion of their viewing day, yet they are not eligible to purchase distant network signals under the law. This makes very little sense. It is analogous to Congress's mandating that a hypothetical Federal Automobile Commission establish a "Grade B" standard for automobiles and then telling consumers that 50 percent of automobile owners will have to be satisfied to own a Grade B car that runs properly only 90 percent of the time.

In addition, although Grade A consumers are considered those who receive good quality signals everywhere in their Grade A contour, this is not always the case. In fact, consumers within the

5. Federal Communications Commission, *In the Matter of Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act*, Notice of Proposed Rule Making, FCC 98–302, CS Docket No. 98–201, November 17, 1998, p. 4.

DEFINING "UNSERVED HOUSEHOLDS"

In order to earn the "right" to subscribe to distant network signals via satellite systems under the SHVA, consumers must be able to prove that they are "unserved households."

"Unserved Households." Section 119(D)(10) of Title 17 of the U.S. Code defines "unserved households" as households that: "(1) cannot receive, through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of grade B intensity (as defined by the Federal Communications Commission) of a primary network station affiliated with that network, and, (2) has not, within 90 days before the date on which that household subscribes, either initially or on renewal, to receive secondary transmissions by a satellite carrier of a network stations affiliated with that network, subscribed to a cable system that provides the signal of a primary network station affiliated with that network."

"Grade A/Grade B." Grades are technical measurements of the strength of a radio or television broadcast signal, and are defined by engineers using various testing technologies and modeling tools. Households are grouped into specific grade "contours." "Grade A contour" households are thought to have premium reception; "Grade B contours" typically receive less clear reception. In other words, the "grade" of a particular television signal that a consumer receives through an antenna is not based on that consumer's personal subjective valuations; it is determined by engineers as the quality of broadcast signals in any given service area.

The FCC uses archaic guidelines from the 1950s to define which households qualify as Grade A or Grade B. A recent FCC Notice of Proposed Rule Making noted: "Grade B represents the field strength of a signal 30 feet above ground that is strong enough, in the absence of man-made noise or interference from other stations, to provide a television picture that the median observer would classify as 'acceptable' using a receiving installation (antenna, transmission line, and receiver) typical of outlying or near-fringe areas."[1]

Under SHVA, households that fall under the FCC's definition of "Grade A" households are not eligible to receive distant network services since they are considered to have good reception quality everywhere within the confines of their Grade A contour.

Merely because a household has been assigned arbitrarily to the Grade A contour through the use of modeling techniques does not mean that it will be able to receive a broadcast television signal of the highest quality. Likewise, households assigned to the Grade B contour by an FCC-employed model either may not be able to receive any signal whatever on certain days or, if they do receive a signal, may receive one that is riddled with interference, ghosting, and shadows.

Prohibition of 90 Days After Canceling Cable Subscriptions. Under the definition of "unserved household" in the SVHA, new satellite consumers may not purchase secondary broadcast transmissions if they have canceled their cable subscriptions in the past 90 days. Cable companies wanted this requirement included in the SVHA to discourage consumers from switching to satellite companies. The end result is less competition.

1. Federal Communications Commission, *In the Matter of Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act*, Notice of Proposed Rule Making, FCC 98–302, CS Docket No. 98–201, November 17, 1998, p. 4.

boundaries of a Grade A contour (typically residing in metropolitan areas or the surrounding suburbs) often confront serious obstacles to receiving high-quality broadcast signals because skyscrapers, high-rise buildings, power lines, heavily forested areas, interference from other broadcast stations and wireless communications systems, or other environmental or atmospheric factors may prevent the reception of a clear signal. And not every household, especially one in a heavily congested urban area, is able to install the type of rooftop antenna needed to pick up clear signals.

These factors cannot always be predicted by the engineering models that the FCC and the broadcasting industry use to define Grade A and Grade B contours and to determine who will be categorized as an unserved household. Just because customers are assigned a Grade A contour does not mean they will be able to receive a broadcast signal of the highest quality at all times.

Between using predictive models (which are not always accurate) and testing every home (which is too expensive and intrusive), few serious options exist by which to determine accurately which households do and do not receive high-quality television reception. The FCC's *Notice of Proposed Rule Making* on this matter described the problems with one such *ad hoc* method as follows:

> The Commission's current method of measuring the field strength of over-the-air signals in a station service area requires a so-called 100-foot mobile run. The run typically involves a truck with a 30-foot antenna that takes continuous measurements while being driven a distance of 100 feet. The antenna must be rotated to the best receiving position, and engineers record factors that might affect signals, such as topography, height and type of vegetation, buildings, obstacles, and weather. If overhead obstacles get in the way, a cluster of measurements must be taken at locations within 200 feet of each other. This elaborate procedure can cost several hundred dollars each time it is performed. This is an expensive proposition for a satellite company or a consumer who wants to prove that a household is unserved by over-the-air signals. When multiplied over hundreds of households at the outer edges of a station's service area, the cost may become prohibitive and may prevent many truly unserved consumers from receiving broadcast network services.[6]

The FCC is forced to conclude that "requiring clusters of tests and a 100-foot mobile run ignores the fact that homes are stationary and that reception may vary considerably over a mobile run on a nearby street."[7] In other words, if consumers cannot receive a satisfactory picture from their specific location, they cannot simply pick up their house and move it 100 feet down the road until they find a spot that has good reception.

Ultimately, the individual must be given the benefit of the doubt. No legislator or bureaucrat should be in a position to dictate what qualifies as "reasonable reception." Consumers should be allowed to decide *for themselves* whether the reception they receive is satisfactory.

LITIGATION CLOUDS THE PICTURE

Several local broadcast affiliates in Florida filed a lawsuit against PrimeTime 24 Joint Venture, the leading U.S. provider of retransmitted network television signals. Specifically, affiliates of the Fox Broadcasting Co. and CBS, Inc., convinced a judge in the U.S. District Court for the Southern District of Florida that certain satellite consumers were receiving distant network-affiliated television broadcast signals illegally through PrimeTime 24. The Fox and CBS affiliates argued that under the SHVA, only truly unserved households were eligible to receive distant network signals via their satellite providers.[8]

6. *Ibid.*, p. 19.

7. *Ibid.*

The judge in this case ruled in favor of the broadcast affiliates and imposed two deadlines by which distant broadcast services to satellite consumers will be terminated. On February 28, 1999, between 700,000 and 1 million consumers who signed up for distant network feeds after March 11, 1997, will lose their network affiliate services. On April 30, 1999, an estimated 1 million more individuals who subscribed to distant network service before March 11, 1997, will lose their signals.

The resolution of this debate has far-reaching implications for millions of Americans. Congress should realize that there is a technological, market-driven solution to this problem that would appeal to all sides. As the U.S. Copyright Office has noted:

> [A] technological solution would be the best solution in the unserved households debate. The problem can be eliminated entirely if technology and business practices advance to enable satellite carriers to retransmit local network affiliates to their subscribers. If the subscribers can purchase the signals of their local network affiliates, they have no need to import distant network signals, and there will be no "unserved households."[9]

Such a technological solution is known in the industry as "spot beaming." It should be available soon nationwide. Although satellite broadcasting technology is evolving to provide such a "local-to-local" option, in the short-term, the retransmission of every local affiliate signal in America is impossible because of the capacity limitations of current satellites. Industry interests are asking Congress and the FCC to resolve the sticky legal and technical debate over what constitutes an "unserved household." The problem, however, cannot be resolved within the pre-existing regulatory confines of the SHVA and its accompanying FCC regulatory paradigm.

WHY S. 303 WILL NOT SOLVE THE PROBLEMS

Although no action has been taken on this issue in the House, there have been signs that the House might simply adopt S. 303, the Satellite Television Act of 1999,[10] with only slight modifications. S. 303 would not promote successful reform of the industry, however. It would only allow satellite subscribers to have access to the stations to which they currently subscribe if (a) there is no local affiliate, (b) the local network cannot adequately be received off-air, or (c) continued carriage would not be likely to materially harm local television service.

This definition presents at least three major problems:

Problem #1. The new standard for service created in S. 303 is just as subjective as the old standard in the SHVA, and in many ways is worse. Interpretation of S. 303's terms is left entirely to the FCC, not to consumers. This means that bureaucrats, not citizens, will still decide what is the appropriate reception quality standard for households. Worse yet, the third criterion in S. 303 for determining whether households can continue to receive distant stations is so subjective that almost any local broadcaster will be able to argue that it is likely to suffer "material harm" if carriage of distant signals continues.

Problem #2. Instead of eliminating the overall regulatory burden, S. 303 contains new regulations in the form of "must-carry" mandates on the satellite industry. Under S. 303, by no later than January 1, 2002, any satellite carrier that wants to carry a television signal to consumers in any given community will have to carry the signal of every local broadcast television affiliate back into its local community via their satellites. The FCC would

8. *CBS Inc., et al.* v. *PrimeTime 24 Joint Venture, op. cit.*
9. U.S. Copyright Office, *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals*," pp. xiv–xv.
10. Companion legislation, S. 247, The Satellite Home Viewers Improvements Act, has been introduced in the Senate by Judiciary Committee Chairman Orrin Hatch (R–UT) to deal with copyright issues.

then be required to promulgate regulations to achieve the "local-to-local" retransmission of television signals in much the same way cable companies are required to retransmit local broadcast television signals over their networks to the communities they serve.

The creation of such a "local-to-local must-carry" regime is troublesome for many reasons. Although it appears highly likely that most satellite providers will have the capability to provide local-to-local signal retransmission by 2002, it is not a certainty that the industry will be able to meet this timetable. It also remains unclear why any satellite provider should be required by force of law to retransmit any broadcast station. Legislative efforts to mandate such a conversion and a regulatory timetable should be regarded as high-tech industrial policy.

Problem #3. Under S. 303, millions of satellite subscribers will be unable to purchase distant broadcast signals. Essentially, legislators are accepting the warped logic of broadcast industry interests who claim Americans are entitled to one, and only one, broadcast television affiliate per community. Furthermore, the outdated Grade A and Grade B "contours" apparently will continue to be used to determine who should qualify for service.

These problems stem from the fact that S. 303 accepts the confines of the debate as determined by only one side—the broadcast affiliates. Legislators seem to think that the only solution is to tweak current rules, regulations, guidelines, and definitions to achieve a slightly better balance in the industry. For the most part, the current regulatory guidelines, such as compulsory licensing requirements, "unserved household" guidelines, and Grade A or Grade B standards, remain intact. Many consumers will still lose service, and many others will never be able to purchase distant network signals in the future.

Finally, S. 303 embodies no substantive deregulation. By attempting to balance industry interests within the confines of current regulatory definitions and constraints, policymakers will fall short of the important reforms that are needed.

PRINCIPLES FOR EFFECTIVE INDUSTRY DEREGULATION

As the discussion of unserved households shows, policymakers can get lost in the many legalities and technicalities associated with this issue. Instead of engaging in a futile debate on what constitutes "unserved households" or "Grade B contours," Congress needs to articulate a simple set of principles to guide the reform process and communications policy in general:

- **Deregulation,** not new forms of regulation;
- **Competition,** not the protection of monopolies; and
- **Consumer choice,** not bureaucratic empowerment.

Television viewers should be given the right to purchase service from whomever they prefer and on whatever terms they can negotiate with various providers of television signals and service. By following these "consumers first" principles, policymakers can bring about sensible and genuine deregulatory reforms that:

- **Guarantee freedom of choice in television service.** The most important reason to reform the SHVA is that it will allow consumers to make their own television (video) programming decisions. Just as consumers have the right to shop for a new television set free of regulatory interference and meddling, so should they have the unfettered right to shop for the best programming options available.
- **Improve the quality of video programming available to consumers.** Discriminating shoppers will force programmers to improve the quality of programming and the range of service options available.
- **Help bring competition to stagnant local television and cable markets.** For decades, Ameri-

cans have been forced to settle for the limited video programming choices available in their local markets. This is because government regulators long ago granted broadcast affiliates geographic franchise service monopolies that still exist. The rise of cable TV added a certain amount of competition, but cable companies were granted exclusive franchise monopolies by local governments as well. The recent explosion of satellite-based service is due in part to the fact that such service offers a competitive alternative to video programming without new government rules or regulations. Since the Telecommunications Act of 1996 requires that all cable rate regulations sunset in late March, government officials will be concerned that cable rates in these monopolies will rise. SHVA reform would help encourage more satellite industry competition, thus putting pressure on the cable industry to keep rates low as they are deregulated.

- **Help ensure America's continued global competitiveness.** The United States is unrivaled in satellite technology and, for the most part, leads in such areas as satellite imagery, high-end telecommunications, and cellular communications. The industry also contributes heavily to growth in the important commercial space industry and off-shooting technologies. Innovation in the satellite industry will progress from intense competition, and deregulation would allow satellite companies to compete directly with TV and cable broadcasters. Such competition would spur exports and likely spur demand for spacelift technologies, which also would ensure a plentiful supply of companies that are able to produce satellites for America's military and intelligence needs.

WHAT POLICYMAKERS SHOULD DO

Policymakers need to think "outside the box" of the current regulatory state of affairs and consider a bold new paradigm to resolve the conflict between broadcast network affiliates and satellite providers that has been created by the SHVA. If congressional policymakers want to stop the impending SHVA debacle and achieve true deregulation, they will need to implement a principled set of short-term and long-term reforms.

Short-term reforms should be focused on ensuring that no one loses television services they currently possess or would want in the near future. Longer-term reforms should focus on sunsetting all regulations governing satellite signal delivery and competition so that consumers, not regulators, can determine what type of service they receive.

Short-Term Reforms

To ensure that no one loses service in the short term, Congress should:

- **Extend the court-imposed deadline indefinitely until a firm resolution of this problem can be achieved.** It would be unwise for Congress to allow millions of Americans to lose the service they currently receive based on a ruling by one judge. Congress should make it clear that the court-ordered service termination deadlines will not go into effect until SHVA reform is completed.

- **"Grandfather in" households already subscribing to broadcast affiliates through a satellite provider.** These consumers contracted with their satellite providers in good faith because they believed they were "unserved households." Having contracted in good faith, they should not lose these services, regardless of their service contour.

- **Allow existing subscribers to "carry over" grandfathered services when they change residence.** They should not lose the distant broadcast television services they previously received. They should be able to re-subscribe to those same services after they change addresses.

- **Eliminate the 90-day waiting period after canceling cable service for new satellite subscribers.** Consumers should be able to request distant network feeds via their satellite systems whenever they want to do so.

- **Allow a "grace period" after passage of the bill during which additional consumers can sign up for distant network signals under the current regime.** Prospective consumers should also be able to purchase distant network signals if they so desire, even before full deregulation has been achieved. A grace period should be instituted after passage of SHVA reform that allows new satellite television customers to purchase out-of-market signals on terms similar to those that grandfathered customers would receive. This grace period would end at roughly the time Congress sunsets the compulsory licensing requirements.

- **Broadly define "unserved households" so that consumers decide whether the quality of their local broadcast signals is satisfactory.** If Congress refuses to go this far in the short term, the burden of proof in showing that a household is not "unserved" should rest squarely on the shoulders of broadcasters who hope to limit consumer choice and competition.

Longer-Term Reforms

To sunset all regulations governing satellite signal delivery and competition, Congress should:

- **Articulate a clear and unfettered "consumer choice" standard for all television (video) program purchasing decisions in the future.** Congress should reject efforts by broadcasters to use the regulatory process to destroy competition and lessen customer choice. The use of Grade A and Grade B distinctions and the rigid and unrealistic "unserved household" definition as the standard by which consumers are considered entitled to purchase out-of-market signals should cease.

- **Sunset compulsory licensing requirements and allow voluntary negotiation and freedom of contract between buyers and sellers of video programming.** The "grace period" during which new subscribers can sign up for distant network signals should last until Congress believes all compulsory licensing requirements are no longer needed. Optimally, the requirement for broadcasters to surrender their right to negotiate the copyright retransmission rights for their programming should be abandoned as soon as possible, since it constitutes an unjustifiable interference with their copyrights and general freedom to contract. However, it might be more practical to wait until "spot beaming" technology is widely available to satellite companies so that they could negotiate "local-to-local" retransmission contracts with local broadcast affiliates. Finally, legislators simultaneously should sunset cable compulsory licensing and "must-carry" requirements to guarantee a level playing field between cable and satellite television providers.

- **Reject new "must-carry" mandates that replace one set of problems with another.** The creation of a customer choice paradigm involves the complete rejection of any effort to impose burdensome new "must-carry" mandates on satellite providers. Congress should not be creating *de facto* industrial policy within this important industry sector. Furthermore, once spot beaming technology is widespread, such mandates will be unnecessary, since satellite providers will be able to provide "local-to-local" retransmission of local broadcast signals. Attempting to mandate such a result prematurely would interfere with the natural progression of technology and competition in this market segment.

- **Clarify that state and local regulation of the delivery of global satellite programming would be inefficient as well as unconstitutional, since it interferes with interstate commerce.** Federal policymakers must make clear that state and local regulators should not interfere with the provision of satellite-based services. Such interference would constitute interference with the free flow of interstate commerce and would be unconstitutional under Article I, Section 8, Clause 3 of the U.S. Constitution (the Commerce Clause).

CONCLUSION

America's satellite industry is at a crossroads. It could go the way of the Internet, which has been allowed to develop under intense competitive forces and has given rise to entirely new industries. Or it could go the way of telephone communications: burdened by endless government regulation, characterized by limited innovation, and lacking in true competition and customer choice. Its fate is in the hands of a few select government bureaucrats within the Federal Communications Commission, a handful of policymakers in Congress, and the television and cable industries intent on protecting their monopolies.

Although much of this debate may seem technical, and the outcome may seem limited, few of those involved understand the impact each decision will have. Even fewer understand that technological innovation is occurring so rapidly that much of the debate will be obsolete in the near future. For example, every satellite carrier may soon have the ability to retransmit millions of broadcast feeds from any community in America back into that community or countless other communities across the country. This would be the result of innovation, the spontaneous evolution of a free market in satellite services, and competition.

Congress would do well to abandon current attempts to "tinker around the margins" in this sector of the economy. Policymakers should reform the SHVA's current regulatory framework and allow full competition and innovation to occur without meddling and excessive regulation from Washington. Such an approach will ensure consumer choice, result in a more vibrant and competitive U.S. satellite industry, and benefit other industries like the global telecommunications industry and the commercial space sector. It will also help America achieve its national security goals by ensuring a healthy source of technologically advanced satellites and services for the U.S. military.

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