

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-1304

ECHOSTAR SATELLITE, L.L.C

Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA

Respondents

ON PETITION FOR REVIEW OF ORDERS OF THE FEDERAL
COMMUNICATIONS COMMISISON

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GLOSSARY

ILLR	Individual Location Longley-Rice. The engineering model used by the Commission to determine the strength of a television signal at a given point.
LULC	Land Use and Land Cover
SHVA	Satellite Home Viewer Act of 1988 Pub. L. No.100-667, 102 Stat. 3935 (1988)
SHVERA	Satellite Home Viewer Extension and Reauthorization Act Pub. L. No. 108-447, 118 Stat. 2809 (2004)
SHVIA	Satellite Home Viewer Improvement Act of 1999 Pub. L. No. 106-113, 113 Stat. 1501A (1999)

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QUESTIONS PRESENTED

Congress has granted satellite television providers a statutory license to deliver certain network television signals to unserved households in some circumstances; satellite providers may not provide network signals to other households without first obtaining a waiver from affected television stations. In the orders on review, the FCC addressed revisions to its engineering model for predicting when a given household can receive a television signal of a strength adequate to assure over-the-air viewing and thus is not unserved. The agency undertook the rulemaking proceeding pursuant to a directive of Congress that the agency “prescribe by rule a ... predictive model for reliably and presumptively determining the ability of locations to receive signals” of the requisite strength. Congress directed that in prescribing such a “reliabl[e]” model, the Commission “ensure that such model takes into account terrain, building structures, and other land cover variations.” 47 U.S.C. § 339(c)(3). The questions presented are:

1. Whether the Federal Communications Commission complied with the statute when it found, on the basis of uncontroverted empirical evidence in the record, that, with respect to VHF stations, the existing model already effectively accounted for signal loss due to land cover and that revising the model to decrease the predicted signal strength due to land cover would make the model a less reliable predictor of coverage.

2. Whether the FCC violated the Administrative Procedure Act, 5 U.S.C. § 553, when, in making its findings, it relied on a study that had been placed in the record and was subject to

comment, but as to which the raw data underlying the study were placed in the record only in the reconsideration round.

3. Whether the FCC properly interpreted § 339 to require that satellite companies and their customers follow a waiver process specified in the statute.

JURISDICTION

The Court has jurisdiction over petitions for review of rulemaking orders pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

STATUTES AND REGULATIONS

Pertinent materials are contained in EchoStar's statutory appendix.

COUNTERSTATEMENT OF THE FACTS

This case involves the Commission's engineering model for predicting when a household is "unserved" by a local television station because it does not receive a signal of "Grade B" strength, as defined by the FCC. Congress has granted satellite television providers a statutory license to deliver certain network television signals to unserved households in some circumstances; satellite providers may not provide network signals to other households without obtaining a waiver from any affected television station or stations. A household's status as served or unserved is presumptively determined by the application of an engineering model specified by the Commission that predicts the signal strength at a given location. Congress has directed the Commission to "ensure" that the FCC's model for predicting signal coverage "takes into account" the effect of buildings, trees, etc. on the signal. 47 U.S.C. § 339(c)(3). A weakening of the signal due to such obstructions is referred to as "clutter loss." In the orders on review, the Commission altered the predictive model for UHF stations by establishing specific

reductions in the predicted signal strength based on the type of land use in the area of the location at issue. With respect to VHF stations, the Commission determined that the existing model already effectively took clutter loss into account and did not need to be altered. Any subtraction from the predicted signal strength of VHF stations, the Commission found, would make the model a *worse* predictor of signal availability, not a better one, as Congress had intended when it directed the agency to revise the model.

1. Programming Copyrights and the SHVA Legislation.

Congress has accorded the owners of copyrights in television shows “the exclusive rights to do and to authorize ... [the] display [of] the copyrighted work publicly.” 17 U.S.C. § 106(5). Exercising that right, television networks typically enter into programming contracts with their affiliated stations granting the affiliates the exclusive right to broadcast network-supplied programming in their markets. *See* 47 C.F.R. § 76.101 *et seq.* Copyright protection in the network broadcast area serves an important public purpose because “without copyright protection, the economic viability of local stations, specifically those affiliated with national broadcast networks, might be jeopardized.” *Satellite Delivery of Network Signals to Unserved Households*, Notice of Proposed Rulemaking, 13 FCC Rcd 22977, 22979 (1998) (*SHVA NRPM*). That is because an out-of-market programming distributor carrying the same network material and competing for the same customers as the local network station could undermine the local station’s market share, weakening its financial condition and reducing its ability to serve the community. Exclusive copyrights thus “make possible the existing free, over-the-air national network/local affiliate broadcast distribution system.” *Satellite Delivery of Network Signals to Unserved Households*, Report and Order, 14 FCC Rcd 2654, 2659 (1999) (*SHVA Order*). The

copyright system plays a vital role in fostering the public interest in local television stations that can make available information of interest to local communities. *Ibid.*

At the same time, Congress balanced its concern for protecting through copyright law the public interest in free, over-the-air local television against the public interest in ensuring that all citizens enjoy the benefit of network television broadcasts. In the Satellite Home Viewer Act of 1988 (SHVA), Pub. L. No. 100-667, 102 Stat. 3935, Congress accommodated those conflicting policies by crafting a carefully limited exception to the networks' exclusive copyright in their broadcasts. Under SHVA, Congress granted a "statutory license" that entitled providers of satellite television service to re-transmit without permission from or agreement of the copyright holder (but for a royalty fee) the signals of television network stations, but only "to person[s] who reside in unserved households." 17 U.S.C. § 119(a)(2) (1988).¹ The statute originally defined an "unserved household" in relevant part as one that "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." 17 U.S.C. § 119(d)(10)(A) (1988).²

¹ Congress has afforded cable television systems a similar statutory license to transmit copyrighted material. 17 U.S.C. § 111(c).

² The statute was later amended by Pub. L. No. 106-113 to (among other things) incorporate the results of the *SHVA Order*, as described at pages 7-8 below. A Grade B signal is defined in 47 C.F.R. § 73.683 to mean a signal of a specified strength (measured in decibels above 1 microvolt per meter or dBu) for specific television channels. A household that receives a Grade B signal should receive an acceptable television picture at least 90% of the time. *See SHVA Order*, 14 FCC Rcd at 2659-2660.

2. The FCC's SHVA Implementation Proceedings.

SHVA granted broadcast networks a private right of action against satellite carriers for violation of the terms of the limited statutory license. 17 U.S.C. §§ 119(a)(3)–(5). In such a case, SHVA – as subsequently amended – placed on the satellite carrier the burden to show that a household that receives network programming via satellite is unserved. 17 U.S.C.

§ 119(a)(5)(D) (1995). The statute did not, however, define a method for demonstrating whether a given household received a Grade B signal. The FCC's rules set forth a procedure for conducting signal strength field tests, *see* 47 C.F.R. § 73.686, but performing such tests is costly and often economically inefficient. *SHVA Order*, 14 FCC Rcd at 2677. A number of satellite providers accordingly asked the FCC to create an engineering model that would reliably predict for SHVA purposes when an individual household is unserved by a Grade B signal. In 1998, the Commission began such a rulemaking proceeding. *SHVA NPRM*, 13 FCC Rcd 22977.

In the ensuing *SHVA Order*, the Commission recognized that its traditional method of estimating the scope of a station's Grade B signal coverage was neither intended for nor adequate to estimate signal strength at individual locations. The Grade B standard and the means for estimating a station's Grade B signal contour – the roughly circular imaginary line that defines the area within which viewers are predicted to receive a signal of Grade B or higher strength – were originally created in order to estimate a station's coverage area for the purpose of allocating stations among various communities throughout the country, not to make accurate coverage predictions for particular households. *SHVA Order*, 14 FCC Rcd at 2660-2661, 2676-2677. After surveying a number of available models for predicting signal intensity at a given location (known as a “point-to-point” prediction), the Commission adopted a version of the “Longley-Rice” model, modified for use in point-to-point predictions. The “Individual Location

Longley-Rice,” or “ILLR” model (also called “Longley-Rice 1.2.2”) “is an accurate, practical and readily available model for determining signal intensity at individual locations.” *SHVA Order*, 14 FCC Rcd at 2687-2688.

The ILLR model was developed from empirical observations of signal strengths in various areas and was designed principally to reflect the effects on a radio signal of distance and terrain. Although the empirical observations underlying the model necessarily reflected the effects on the measured signals of land use obstructions such as buildings and trees, the Commission recognized that the ILLR model did not include any express terms to reduce the predicted signal strength due to such “clutter loss.” The agency recognized that in theory “land use and land cover affect signal intensity at individual locations and should be used in the ILLR when an appropriate application develops. ... While we expect the model to include land use and land cover, we are not aware of a standard means of including such information in the ILLR that has been accepted by the technical and scientific community. When an appropriate application has been developed and accepted, this information will be included in the ILLR.” *SHVA Order*, 14 FCC Rcd at 2693.

Congress subsequently amended the Copyright Act to incorporate the results of the *SHVA Order*. See note 3, *infra*. Specifically, in the Satellite Home Viewer Improvement Act (SHVIA), Congress added 17 U.S.C. § 119(a)(2)(B)(ii)(I), which provides that “[i]n determining presumptively whether a person resides in an unserved household ... a court shall rely on the Individual Location Longley-Rice model set forth by the Federal Communication Commission in [the *SHVA Order*], as that model may be amended by the Commission ... to increase the accuracy of that model.”

3. The Proceeding On Review.

In SHVIA, Congress also directed the FCC, within 180 days of enactment of the Act, to “take all actions necessary ... to develop and prescribe by rule a point-to-point predictive model for reliably and presumptively determining the ability of individual locations to receive signals ... In prescribing such model, the Commission shall rely on the Individual Location Longley-Rice model set forth by the [*SHVA Order*] and ensure that such model takes into account terrain, building structures, and other land cover variations.” 47 U.S.C. § 339(c)(3).³

In the rulemaking proceeding under review, the FCC undertook an examination of the ILLR model as Congress directed. The Commission “propose[d] to improve the ILLR model by adding clutter loss parameters, including “the effects of both vegetation and buildings.”

Establishment of an Improved Model for Predicting the Broadcast Television Field Strength

Received at Individual Locations, Notice of Proposed Rulemaking, 15 FCC Rcd 1843, 1847

(2000) (*ILLR Notice*) (JA). Specifically, the Commission proposed to adjust the model to

³ SHVIA also changed the copyright and satellite regulatory regime in substantial ways that do not directly bear on this case. In SHVIA, Congress granted a statutory license to satellite operators to provide their customers with the signals of all local stations and imposed a requirement to carry all stations in the market if the satellite operator carries any station in that market. 17 U.S.C. § 122 (1999); 47 U.S.C. § 338 (1999). Whereas under SHVA copyright law restricted satellite carriage of any network signals, under SHVIA copyright law restricts only the carriage of “distant” network stations, *i.e.*, those broadcasting from outside of the market of the household at issue; satellite operators may carry distant stations only to unserved households. 47 U.S.C. § 339 (1999). *See generally Satellite Broadcasting and Communications Ass’n v. FCC*, 275 F.3d 337 (4th Cir. 2001), *cert. denied*, 536 U.S. 922 (2002). Under SHVIA, the ILLR model determined presumptively whether a household was eligible to receive distant stations. In 2004, Congress again substantially revised the satellite regulatory regime in the Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA), Pub. L. No. 108-447, 118 Stat. 2809. Under SHVERA, the ILLR model presumptively establishes a satellite subscriber’s eligibility to receive the analog signal of distant stations in markets where the satellite provider does not carry any local stations, and it is the principal means of determining a household’s eligibility to receive a distant digital network station. 47 U.S.C. §§ 339(a)(2)(B)(i) & (a)(2)(D)(i)(I) (2005); 17 U.S.C. §§ 119(a)(2)(B), (a)(4)(D), & (a)(4)(B) (2005).

subtract a fixed clutter loss factor, measured in dBu, depending on the channel at issue and the particular type of land usage in the area between the television station and the household at issue. For example, if the original version of the model would predict that a given location would receive a signal of 50 dBu, and the clutter loss factor for the channel and land use type was 6 dBu, the final prediction of signal strength would be 44 dBu. To reflect the type of land usage, the Commission proposed to use the Land Use and Land Cover (LULC) database published by the U.S. Geological Survey. That database lists 37 different types of land uses (such as residential, shrub and brush land, forested wetland, beaches, etc.); because many of the LULC categories were not relevant for TV signal propagation purposes (for example, there is no difference for signal prediction purposes between deciduous forest land and evergreen forest land), the Commission proposed to condense the categories into 10 types that could have an effect on television signal propagation. *ILLR Notice* Tables 2 & 3 (JA -).

The agency recognized that “the available data for assigning values to these [land use] parameters is limited, and we believe it is reasonable to assign values only in situations for which measurement data have been analyzed and published, or for which we have some confidence in deriving such values.” *ILLR Notice* ¶11 (JA). The Commission identified one such source of data: a paper published in an engineering journal by Thomas N. Rubinstein giving specific clutter loss factors for various land use types. The Rubinstein figures were imperfect because they did not apply to VHF television channels 2 through 5, but the agency believed that data pertaining to other channels could be successfully extrapolated. *Id.* ¶12 (JA). The Commission also “request[ed] comment on whether other data are available that would allow us to expand the application of clutter loss considerations, and whether there are other approaches that are scientifically supported and could be integrated into the ILLR model.” *Id.* ¶11 (JA -).

A variety of industry groups, including satellite carriers, broadcasters and engineering firms, submitted comments espousing a range of viewpoints. Broadcasters generally did not support the addition of a clutter loss factor – any such factor, by reducing the predicted signal strength, would tend to increase the number of unserved households. For the same reason, satellite companies strongly supported the proposed amendments to the ILLR model. In the resulting order, the Commission carefully assessed the comments and data provided by the parties, and promulgated a “new ILLR model to be used in determining whether a household is eligible to receive distant network signals transmitted by satellite.” *Establishment of an Improved Model for Predicting the Broadcast Television Field Strength Received at Individual Locations*, First Report and Order, 15 FCC Rcd 12118, 12128 ¶20 (2000) (*ILLR Order*) (JA).

With respect to the specific clutter loss factors, the parties took sharply diverging positions. Satellite companies, including petitioner EchoStar, urged the Commission to adopt the Rubinstein figures. Engineering firms criticized the Rubinstein methodology and largely argued that the matter needed to be studied further before reliable clutter loss adjustment factors could be adopted. One engineer, Richard L. Biby, submitted his own set of clutter loss figures “based on a combination of theory, the measurements made by Okumura [another engineer who has published papers on signal propagation] and Biby’s own experience in estimating clutter loss.” *ILLR Order* ¶12 (JA). Thus, the Commission was presented with two sets of adjustment figures: the Rubinstein figures and the Biby figures.

The NAB and the Association for Maximum Service Television (hereafter, collectively, NAB) jointly presented data criticizing both sets of adjustment factors. NAB submitted the results of a study that empirically tested the Rubinstein and Biby figures and found both of them to render the ILLR model less accurate in predicting whether a given location would receive a

Grade B signal. Specifically, the NAB study “compared approximately 1,000 field intensity measurements ... with the corresponding ILLR prediction results for those locations” under the original model, the Rubinstein adjustment figures, and the Biby figures. *ILLR Order* Table 1 & n.13 (JA , -). For each individual measurement, the study reported whether the ILLR model correctly predicted the presence of a Grade B signal, made an “underprediction” (*i.e.*, a prediction that a location would not receive a Grade B signal when in fact it did), or made an “overprediction” (*i.e.*, a prediction that a location would receive a signal when it fact it did not). *Id.* ¶13 (JA). Underpredictions favor satellite providers, such as petitioner, over broadcasters; overpredictions have the opposite effect. The NAB study – the only empirical data submitted by any commenter, and which no other commenter criticized – showed that, for VHF stations, the ILLR model with no adjustment factor yielded few overpredictions and a small number of underpredictions. With either the Rubinstein or Biby adjustment factors, the model made about the same number of overpredictions, but many more underpredictions. *Id.* Table 1 (JA). For UHF stations, the data showed that the Rubinstein and Biby factors tended to yield fewer overpredictions than the original model, but more underpredictions as well. *Id.* Table 2 (JA).

After analysis of the NAB study, the Commission found that “the values assigned as clutter losses should be determined by statistical study of actual measurements in the specific LULC environments to which they are to be applied.” *ILLR Order* ¶13 (JA). With respect to UHF channels, the Commission reduced the clutter loss value to one-third of the values proposed in the *ILLR Notice*. “[O]ur assessment of the data indicates that this will produce a better balance between under-predictions and over-predictions without adversely affecting the overall percentage of correct predictions.” *Id.* ¶15 (JA). EchoStar does not challenge that finding here.

With respect to VHF channels, the NAB study, which presented the only available empirical test of the ILLR model, demonstrated that inclusion of either the Rubinstein or the Biby factors made the ILLR model a *worse* predictor of Grade B coverage than the ILLR model without those factors. In particular, compared with the original model, the Rubinstein and Biby factors increased the number of underpredictions without reducing the number of overpredictions. In that circumstance, the Commission found that “a prescription of additional [signal] losses [in the ILLR model] would make the ILLR model less accurate because it already produced more under-predictions than over-predictions. ... [T]he ILLR model without clutter corrections proves superior to other models by making the correct prediction more often.” *Id.* ¶14 (JA). In other words, contrary to the agency’s earlier expectations, the existing ILLR model in fact would not be improved by the addition of a clutter loss factor for VHF; it already effectively accommodated clutter losses, and no additional factor was necessary. The Commission thus set the clutter loss adjustment factor for all VHF channels to zero.

EchoStar petitioned the Commission to reconsider its decision, arguing that the Commission “abdicated” its responsibility under § 339(c)(3) and violated “the specific instructions of Congress ... to include terrain, building structures and other land cover variations in the predictive model.” EchoStar Petition for Reconsideration at 5 (JA). That statutory instruction, EchoStar claimed, required the agency to use the Rubinstein values for clutter loss. *Id.* at 8 (JA).

The Commission denied EchoStar’s petition. “The specific values we assigned as [clutter] loss quantities provide ILLR predictions accurately reflecting the results of actual field testing. We did not ignore these losses, but rather made a considered determination that the most accurate ILLR predictions for VHF stations ... are made by setting the corresponding loss values

to zero. Thus, we have taken the factors directed by Congress into consideration, and we have followed its direction in the SHVIA by assigning values based on thorough analysis that make the ILLR model as accurate as possible.” *Establishment of an Improved Model for Predicting the Broadcast Television Field Strength Received at Individual Locations*, Order, Memorandum Opinion and Order, 19 FCC Rcd 9964, 9968 ¶13 (2004) (*ILLR Reconsideration Order*) (JA -). The Commission also rejected EchoStar’s claim that the agency violated the Administrative Procedure Act by using the NAB study without affording the parties prior notice and opportunity to comment on the raw observation data on which the study was based. *ILLR Reconsideration Order* ¶8-11 (JA -); see pp. 24-33, *infra*. Finally, the Commission rejected EchoStar’s request that satellite carriers be permitted to bypass a process established by Congress for cases in which satellite subscribers who are predicted by the model to receive an adequate signal but believe that they do not in fact receive a Grade B signal and want to receive distant network signals. *ILLR Reconsideration Order* ¶¶21-24 (JA -).

EchoStar now seeks review of the *ILLR Order* (JA -) and the *ILLR Reconsideration Order* (JA -).

SUMMARY OF ARGUMENT

1. The Commission complied with SHVIA’s dual requirements to create a reliable model for predicting whether a given location would receive a Grade B signal and to ensure that the model takes into account land use effects. With respect to UHF stations, the Commission expressly included a clutter loss term in the model, thus expressly taking land use into account. With respect to VHF stations, the Commission ensured that the model took land use effects into account in a different manner. First, the Commission recognized that some degree of clutter loss is already reflected in the empirical observations from which the original model was derived.

Moreover, the record showed – and EchoStar does not dispute – that the existing ILLR model without any additional factor for land use, is prone to predict that a given location cannot receive a Grade B VHF signal when it actually can receive such a signal. In that situation, subtracting a clutter loss factor would make the model even more prone toward overprediction and render the model less reliable. The Commission accordingly determined that, for VHF stations, the bias present in the existing model has the effect of accounting for land use by compensating for any actual loss of signal strength caused by land cover.

EchoStar is wrong that the plain language of the statute requires that the model produce predictions that vary with the type of land cover. The statute says nothing at all about variations in predictions or dissimilar outcomes, but instead requires only that the Commission “ensure” that the model “takes into account” variations in land cover – and to do so in the context of an accurate predictive model. The Commission satisfied those requirements. Echostar’s argument is premised on the incorrect assumption that “take into account” has a single, fixed meaning; in fact, there is more than one way for a model to “take into account” land cover.

EchoStar’s argument also would read out of the statute the reliability requirement. EchoStar does not contest the Commission’s finding that adjusting the VHF predictions downward to account for a theoretical clutter loss would make the model a less accurate predictor of Grade B coverage. Yet its argument amounts to the contention that Congress unambiguously compelled an express adjustment for land use, even at the cost of the model’s reliability, an approach that would run directly counter to Congress’s statutorily expressed intentions.

2. EchoStar’s contention that it was deprived of a meaningful opportunity to submit comments on the NAB study is unavailing. NAB’s comments described the study and its

methodology and presented the study's essential conclusion that the existing ILLR model contained a bias toward underprediction. Yet, neither EchoStar nor any other satellite party submitted any comment on the NAB study.

EchoStar has not cited any case that would require an administrative record to contain raw observation data underlying an empirical study. The cases it cites involve materials on which the agency relied that were never in the record to any degree – a situation with no bearing here. As long as the parties are informed of a study's methodology, they may meaningfully comment on it. In any event, the Commission found that the raw data were publicly available outside the record. Moreover, the cases establish that the agency's decision must actually rely upon extra-record data before such data may form the basis of an APA violation. Here, the FCC did not rely on the underlying raw data (which, at the initial rulemaking stage, it did not have). Instead, it relied on the aggregate figures and the description of methodology presented by NAB, which were sufficient to enable the Commission “to assess the significance of the tabulated results without repeating the calculations.” *ILLR Reconsideration Order* ¶9 (JA).

Nevertheless, if the Court believes that the raw data should have been on the record in the initial comment period, any error was harmless. EchoStar did not complain of the lack of raw data or criticize any aspect of the study in the initial comment round. Given that failure, EchoStar cannot now maintain that it was prejudiced by the absence of the underlying data. In addition, when NAB ultimately filed the raw data during the reconsideration round, EchoStar reviewed and commented on it.

3. The Commission reasonably declined to allow satellite providers to be excused from the waiver process prescribed by the statute. “The statute delineates a specific sequence of events preceding testing: waiver request, waiver denial, the subscriber's request for an on-site

test, selection of a qualified tester by the satellite carrier and the network station, and then the on-site test.” *ILLR Reconsideration Order* ¶23 (JA). There could hardly be a more straightforward reading of the statutory text. EchoStar’s claim that the statute’s silence on the permissibility of alternatives to the specified waiver process constitutes an unambiguous statutory intent to allow such alternatives is baseless. That argument does not rest on language that appears in the statute, and there cannot be a plain meaning of words that do not exist. At most, Congress’s silence would create an ambiguity, and the Commission reasonably declined to allow satellite carriers to deviate from the specific course of action set forth by Congress.

ARGUMENT

I. STANDARD OF REVIEW.

The Administrative Procedure Act provides that a court may reverse the agency’s determinations only if they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). That standard is highly deferential toward the agency; the Commission need only articulate a “rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 43 (1983). The Court “presume[s] the validity of the Commission’s action and will not intervene unless the Commission failed to consider relevant factors or made a manifest error in judgment.” *Consumer Electronics Ass’n v. FCC*, 347 F.3d 291, 300 (D.C. Cir. 2003).

The agency’s interpretation of its statute is governed by *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-843 (1984). Under *Chevron*, if “the intent of Congress is clear” from the language of the statute, “that is the end of the matter.” *Id.*, 467 U.S. at 842. But if the statutory language does not reveal the “unambiguously expressed intent of Congress” on the “precise question” at issue, the Court must accept the agency’s interpretation as

long as it is reasonable and “is not in conflict with the plain language of the statute.” *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992).

The deference accorded to the agency is particularly broad in this case, which involves the Commission’s scientific and technical expertise. *MCI Cellular Telephone Co. v. FCC*, 738 F.2d 1322, 1333 (D.C. Cir. 1984). In such matters, the Court will uphold the FCC’s ruling as long as the agency has supported its technical judgment “with even a modicum of reasoned analysis.” *Hispanic Information & Telecommunications Network v. FCC*, 865 F.2d 1289, 1297-1298 (D.C. Cir. 1989).

II. THE FCC COMPLIED WITH SHVIA’S REQUIREMENT TO ENSURE THAT THE PREDICTIVE MODEL TAKES ACCOUNT OF LAND USE.

SHVIA requires the Commission “to develop and prescribe ... a point-to-point predictive model for reliably ... determining the ability of individual locations to receive [Grade B] signals In prescribing such model, the Commission shall rely on the Individual Location Longley-Rice model ... and ensure that such model takes into account terrain, building structures and other land cover variations.” 47 U.S.C. § 339(c)(3). The gist of the statutory language is twofold: first, the Commission must produce a model that yields accurate predictions of Grade B signal coverage; and second, in producing a reliable model, the Commission must ensure that the ILLR model accounts for ground cover effects.

Contrary to EchoStar’s contention, the Commission in fact did ensure that the model takes account of land use. With respect to UHF stations, which account for almost half of the

network affiliates in the country,⁴ the Commission found that the basic model “tends to over-predict the field intensity substantially more often than it under-predicts. This is a condition that could be restored to approximate balance by assigning clutter losses;” *i.e.*, by subtracting some amount from the predicted UHF signal. *ILLR Order* ¶14 (JA). The Commission accordingly added a term to the ILLR model that expressly accounts for clutter loss to UHF stations. There cannot be any question that in doing so the Commission satisfied its obligation to ensure both that the model reliably predicts signal intensity and that it takes account of land use (and EchoStar does not challenge the Commission’s treatment of UHF).

With respect to VHF stations, the Commission also ensured that the model “takes into account” signal loss due to land use in two ways. First, the Commission recognized that the Longley-Rice model was itself derived from empirical observations of signal intensity, and those observations would themselves have reflected some degree of clutter loss. *See* NAB Comments at 11 (JA). The Commission accordingly recognized that some amount of clutter loss is “already implicit in the model.” *ILLR Reconsideration* ¶4 (JA). Second, the Commission examined the results of the NAB study and determined – in findings that EchoStar does not challenge – that the existing model “already produces more under-predictions than over-predictions.” *ILLR Order* ¶14 (JA). That is, the original model, without any additional

⁴ There are 1005 full-power UHF stations in the country, of which 613 are “network stations” as defined in 47 U.S.C. § 339(d), affiliated with 5 networks: ABC, NBC, CBS, Fox, WB. “Network stations” also include noncommercial educational stations. There are 711 VHF stations in the country, of which 664 meet the statutory definition. Thus, the Commission’s adjustment of the ILLR model with respect to UHF stations covers about half of all network station in the country. EchoStar is wrong in suggesting to the contrary. Br. at 19 n.7. The data come from a database query submitted by Commission staff at the request of undersigned counsel to BIA Financial Network, Inc. Media Access Pro Television Database as of June 6, 2005. The BIA database is a commonly used, publicly available, fee-based television data resource.

specific factor for ground cover or buildings, is prone to predict that a given location cannot receive a Grade B VHF signal when it actually can receive a Grade B signal.⁵ In directing the FCC to ensure that the model takes account of variations in land usage Congress wanted to make sure that the model did not systematically *overpredict* Grade B coverage because buildings, trees, or other land cover blocked the signal. Having found that the model systematically *underpredicts* Grade B coverage, and that any subtraction from the predicted signal would make the model less accurate, the Commission determined that, for VHF stations, the bias present in the existing ILLR model has the effect of accounting for land use because the bias compensates for any actual loss of signal.

EchoStar nevertheless argues that the Commission “simply failed to carry out the statutory mandate,” because, it argues, the plain language of the statute requires that the model produce predictions that vary with the type of land cover. Br. 32; *see* Br. 29 (“The plain meaning of §339(c) is that Congress intended the ILLR predictive model to give dissimilar predictions based on dissimilarities in land cover.”). But the statute says nothing at all about variations in predictions or dissimilar outcomes. Rather, it requires the Commission to “ensure” that the model “takes into account” variations in land cover; and to do so in the context of an accurate predictive model. As explained above, the Commission did just that – not by incorporating a different factor for each land use type, for the statute imposes no such requirement – but by recognizing that the record showed – without serious dispute – that the

⁵ That outcome is likely because lower frequency radio waves, such as VHF television signals, which have a longer wavelength, are subject to less disruption from structures and ground cover than higher frequency ones with shorter wavelengths, such as UHF signals. *See, e.g.,* Theodore S. Rappaport, *Wireless Communications Principles and Practice* at 135-136 (2d ed. 2002) (giving equations to predict signal scattering due to physical obstructions showing that the size of the scattering effect is inversely proportional to the size of the signal’s wavelength, and thus directly proportional to the frequency).

ILLR model’s inherent bias toward underprediction for VHF had the effect of accounting for variations in land use. EchoStar’s argument is premised on the incorrect assumption that “take into account” has a single, fixed meaning; in fact, there is more than one way for a model to “take into account” land cover. *See Texas Coalition of Cities for Utility Issues v. FCC*, 324 F.3d 802, 808-809 (5th Cir. 2003) (finding the phrase “take into account” ambiguous); *Time Warner Entertainment Co. v. FCC*, 56 F.3d 151, 175 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1112 (1996) (statutory directive to “consider” a list of factors “means only that the [the agency] must ‘reach an express and considered conclusion’ about the weight of a given factor”).

More fundamentally, EchoStar’s argument fails to address the statute’s command that the Commission craft a *reliable* predictive model. EchoStar does not contest the Commission’s finding that adjusting the VHF predictions downward to account for a theoretical clutter loss would make the model a less accurate predictor of Grade B coverage. Yet its argument amounts to the contention that Congress unambiguously compelled an express adjustment for land use, even if doing so would make the model less reliable. That approach reads reliability out of the statute entirely, in violation of the rule that a court should attempt to give meaning to every part of a statute. *United States v. Philip Morris USA, Inc.*, 396 F.3d 1190, 1198-1199 (D.C. Cir. 2005).

Congress intended the model’s reliability to be of at least equal, if not greater, weight than its taking into account land use. The statute directs the Commission to develop a model for “reliably... determining the ability of individual locations to receive” a Grade B signal. 47 U.S.C. § 339(c)(3). It goes on to say that “in prescribing such model” the Commission shall ensure that land use is “take[n] into account.” That statutory structure indicates that Congress

wanted the ILLR model to take into account land usage to further the fundamental purpose of making the model a more reliable predictor of Grade B service.

That reading is reinforced by another part of SHVIA, the Act that contained § 339. A companion provision in SHVIA that amended the Copyright Act is entitled “Accurate Predictive Model” and provides that in copyright litigation under the statute, a court may presumptively rely on the ILLR model “as that model may be amended by the Commission over time ... *to increase the accuracy of that model.*” 17 U.S.C. § 119(a)(2)(B)(ii)(I) (emphasis added). The two statutes, which were part of the same act and work together toward a common purpose, must be read together. *Motion Picture Ass'n of America, Inc. v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002) (“Statutory provisions *in pari materia* normally are construed together to discern their meaning”); *Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972) (“individual sections of a single statute should be construed together”).

The legislative history of SHVIA further demonstrates that Congress gave considerable importance to the accuracy of the predictive model. The SHVIA Conference Report states that § 339(c)(3) “requires the Commission to attempt *to increase [the ILLR model’s] accuracy further* by taking into account not only terrain ... but also land cover variations.” H.R. Rep. 106-464, 145 Cong. Rcd H11769, 11796 (Nov. 9, 1999) (emphasis added).⁶ The Conference Report also states that “[t]he linchpin of whether particular proposed refinements to the ILLR model result in greater accuracy is whether the revised model’s predictions are closer to the results of

⁶ The Conference Report’s reference to the section as 339(c)(4) appears to be a drafting error.

actual field testing.” *Ibid.*⁷ Congress’s emphasis on reliability and accuracy was based on concerns about achieving the appropriate balance between copyright protection and ensuring television service; underprediction disrupts Congress’s carefully chosen balance (against the copyright holders’ interests).⁸ *See* pages 3-4, *supra*.⁹

The cases cited by EchoStar do not salvage its argument. *State of Colorado v. Department of the Interior*, 880 F.2d 481 (D.C. Cir. 1989), involved a government computer model in which, due to a lack of data, the agency had omitted a term expressly required by the relevant statute. *Id.* at 490, 491. Here, by contrast, the statute does not require any particular term to be included in the ILLR model. The agency has fulfilled the statutory requirements by ensuring that the model takes into account the relevant factors and by crafting a reliable model. Nor was the Commission faced with a lack of data; to the contrary, the data were clear and their

⁷ *See also* 145 Cong. Rec. S15022-15023 (daily ed. Nov. 19, 1999) (statement of Sen. Leahy) (“Whether a proposed modification to the ILLR model makes it more accurate is an empirical question that the Commission should address by comparing the predictions made by any proposed model against actual measurements of signal intensity. The Commission’s analysis should reflect our policy objective: to determine whether a household is – or is not – capable of receiving a signal of Grade B intensity ...”).

⁸ *See also* Conference Report at H11792-11793 (“Allowing the importation of distant or out-of-market network stations in derogation of the local stations’ exclusive right ... to show the works in question undermines those market arrangements. Therefore, the specific goal of the 119 license, which is to allow for a life-line network television service to those homes beyond the reach of their local television stations, must be met by only allowing distant network service to those homes which cannot receive the local network television stations.”).

⁹ Congress’s focus on reliability may well explain why Congress did not alter the Commission’s application of the statute even though it substantially revised § 339 in last year’s SHVERA legislation. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985) (“refusal by Congress to overrule an agency’s construction of legislation is at least some evidence of the reasonableness of that construction”); *cf. Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488 (1940) (the “failure of Congress to alter the Act after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one”).

effect is undisputed: they show that the inclusion of a VHF adjustment factor will make the model less accurate. The *Colorado* decision thus has no bearing here. EchoStar's reliance on *United States Telecom Ass'n v. FBI*, 276 F.3d 620 (D.C. Cir. 2002), and *Nuclear Energy Inst. v. EPA*, 373 F.3d 1251 (D.C. Cir. 2004), is misplaced for similar reasons. *United States Telecom* involved an agency that "complete[ly] thr[ew] up its hands" due to a lack of data. 276 F.3d at 627. No such circumstance is present here. In *Nuclear Energy Inst.*, the agency established a compliance period for the storage of nuclear waste that rejected an expert body's guidelines in direct contravention of Congress's unequivocal direction to base the compliance rules on those guidelines. 373 F.3d at 1272-1273. That situation has no bearing here.

At worst, the statute contains two directives of equal weight – that the model be reliable and that predictions vary according to land use – that on the record presented here come into direct conflict. If the ILLR model subtracts signal strength from VHF predictions in order to achieve variability, it necessarily becomes less accurate; both statutory goals cannot be satisfied simultaneously. If the Court reads the statute in that manner (which for the reasons above it should not), the statute contains a legislative gap that Congress has left for the agency to fill. "By declining itself to strike an exact balance between the commands of [the two competing sections of the statute], Congress implicitly delegated to the Commission the authority to accommodate the interests at stake through its own interpretation of the statute." *Bell Atlantic Telephone Companies v. FCC*, 131 F.3d 1044, 1049 (D.C. Cir. 1997); *see also ValueVision Int'l Inc. v. FCC*, 149 F.3d 1204, 1209 (D.C. Cir. 1998) ("The Commission was faced with reconciling the statute's [competing] purposes," and thus has discretion to resolve the matter).

The Commission reasonably resolved any such statutory conflict (although we do not believe that such a conflict exists because the statute does not require variable predictions). The

language, structure and legislative history of § 339 demonstrate that Congress intended to give at least equal weight to the creation of an accurate predictive model. In that case, the Commission’s engineering judgment that it is better to have a more accurate model and that non-zero clutter loss values “produce fewer correct predictions,” *ILLR Order* ¶15 (JA), is entirely sound. Indeed, any other reading would violate basic principles of model building and lead to an absurd result. *Teva Pharmaceuticals, Inc. v. FDA*, 182 F.3d 1003, 1011 (D.C. Cir. 1999) (an agency “must interpret the statute to avoid absurd results and further congressional intent”).

EchoStar's claim (Br. 36-44) that the Commission’s exercise of discretion was unreasonable amounts to little more than a rehash of its argument that the statute unambiguously requires a clutter loss factor without regard to the accuracy of the model, and it fails for the same reasons. EchoStar does not challenge the Commission’s reasoning, allege that the Commission has misread the record, or dispute the agency’s interpretation of the NAB study. Rather, it argues again that the Commission failed to carry out the statutory directive. We have refuted that claim above. EchoStar is also wrong that the Commission “reassessed the policy question” of whether to account for land use, Br. 43; quite to the contrary, it reasonably carried out Congress’s directives to ensure that the model accounted for land use while crafting an accurate predictive model.

III. THE COMMISSION COMPLIED WITH SECTION 553 OF THE ADMINISTRATIVE PROCEDURE ACT.

Section 553 of the Administrative Procedure Act requires agencies conducting notice-and-comment rulemaking proceedings to set forth in the NPRM “either the terms or substance or a description of the subjects and issues involved” in the proceeding, and to “give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments.” 5 U.S.C. § 553(b), (c). The Court has interpreted those statutory

provisions as requiring an agency generally to “identify and make available [for public comment] technical studies and data that it has employed in reaching the decisions to propose particular rules.” *Connecticut Light and Power Co. v. NRC*, 673 F.2d 525, 530-531 (D.C. Cir.), *cert. denied*, 459 U.S. 835 (1982). EchoStar charges the Commission with having violated that requirement because the rulemaking record in this case did not contain the raw observation data on which the NAB study was based. As a result, EchoStar claims, “there has never been any meaningful way for interested parties to test the data and point out errors so as to prevent the Commission from using unreliable information as the basis for its final rule.” Br. 46.

a. Factual Background.

In the *SHVIA Notice*, the Commission proposed using the Rubinstein clutter loss figures, but noted that “we believe it is reasonable to assign [clutter loss] values [in the ILLR model] only in situations for which measurements have been analyzed and published, or for which we have some confidence in deriving such values.” 15 FCC Rcd at 1847 ¶11 (JA). In response to the Notice, NAB submitted comments in which it introduced the NAB study on which the Commission later came to rely. As NAB described it in the comments, the study consisted of 1000 empirical observations of signal intensity in five different geographic regions. About 600 measurements had been taken at 500 randomly selected households in Miami; Raleigh/Durham, North Carolina; Baltimore; Pittsburgh; and Charlotte, North Carolina in connection with litigation between broadcasters and satellite operators under SHVA. The other 400 observations were “taken at neutrally selected radial and grid points in the Charlotte [North Carolina] area” as part of testing that had been conducted in connection with the development of digital television in the early 1990’s. NAB Comments at 12 (JA). NAB attached to its comments an

“Engineering Statement” authored by its engineering consultant Jules Cohen describing the methodology in greater detail. Cohen Statement at 7-10 (JA -).

The Cohen Statement notes that the “[r]esults of the [digital TV] measurements can be found in Document SS/WEP2-1354 submitted to the SS/WP2 Field Testing Task Force of the Advisory Committee on Advanced Television Service of the ... FCC ... September 16, 1994.” *Id.* at 9 n.7 (JA). Cohen also notes that the other measurements were “placed in evidence” in the litigation for which they were developed, and he provides the case caption and docket number. *Id.* at 7 and n.6. In sum, the empirical observations relied on were “available in the public record.” *Id.* at 7.

NAB’s comments summarized the findings of its study in tabular form. NAB Comments at 14. In general, NAB concluded, the ILLR model was an accurate one, but when it did err, “it erred in favor of the satellite industry by tending to underpredict the existence of a Grade B signal.” *Id.* at 15 (JA). Although the data suggested “a modest problem of overprediction” with respect to the UHF observations, a general downward adjustment “is likely to further increase the number of underpredictions” and make the model less accurate. *Ibid.* No satellite provider made any mention of the NAB study in its reply comments.

In its reply comments, NAB amplified its previous comments in the course of its response to other parties’ comments. For example, satellite companies in their comments had strongly endorsed the use of the Rubinstein data, and Mr. Biby’s comments set forth his proposal. *See* pp. 9-11, *supra*. NAB accordingly presented comparative results comparing – based on the same 1000 empirical observations described in the comments – the accuracy of the unadorned ILLR model, the model adjusted with the Rubinstein figures, and the model adjusted with the Biby figures. NAB Reply Comments at 8-14 (JA -). NAB also provided some

additional information on the methodology it used in selecting the locations for its field tests. *Id.* at 6-8 (JA -). The thrust of NAB’s Reply Comments was the same as its opening Comments: that the ILLR model appears to have an “existing bias” to make underpredictions, and that the addition of a separate clutter loss term would “exacerbate the existing problem of underprediction.” *Id.* at 6 (JA).

EchoStar’s petition for reconsideration argued that the agency violated the APA when it relied on the NAB study in the absence of an opportunity by commenting parties to examine the underlying data. In response, NAB filed the underlying raw data in the record. The Commission rejected EchoStar’s claim in the *ILLR Reconsideration Order* (JA). The NAB study “was described and its results analyzed in the joint comments and reply comments” filed by NAB, the Commission found. *Id.* ¶9 (JA). “The methodologies used in the NAB/MSTV and the Rubinstein studies are similar, and in both cases were clearly described so that we were able to determine their applicability and the validity of their results. We were thus able to assess the significance of the tabulated results without repeating the calculations.” *Ibid.* In other words, the raw data were not necessary for the Commission to assess and rely on the NAB Study. In addition, the Commission pointed out, “the underlying raw data for the NAB/MSTV study ... have been publicly available since well before” the *ILLR NPRM*. Moreover, “the data ha[ve] now been filed in the record in this proceeding, and EchoStar has, in fact, reviewed and utilized the raw data in its arguments.” *ILLR Reconsideration* ¶10 (JA).

b. EchoStar Had Adequate Opportunity To Comment.

EchoStar claims that the agency could not properly rely on the NAB study unless all of the raw data underlying the study had been placed on the record. In support of that claim, EchoStar relies on cases that stand for the general proposition that “the most crucial factual

material that is used to support the agency's position on review must have been made public in the proceeding and exposed to refutation." *Air Transport Ass'n v. FAA*, 169 F.3d 1, 7 (D.C. Cir. 1999). That line of cases does not apply here for a number of reasons.

EchoStar's cases do not support the proposition that the record must contain the raw data underlying a study that itself had been placed in the record. Rather, the cases involve materials on which the agency relied that were never in the record at all. For example, *Air Transport Ass'n* involved supplementary information on which the agency based its decision, but that was provided to the agency after the record had closed. No other party saw the information in any form. 169 F.3d at 37. *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974), one of the cases on which EchoStar principally relies, involved a similar situation, where the agency based its decision largely on a staff study that had not been made part of the record in any way and on which no comment had been possible. EchoStar's other principal case, *Connecticut Light & Power Co.*, 673 F.2d 525, likewise concerned studies on which the agency relied, but which it declined to identify (and even so, the Court held that the agency had not violated the APA). *Id.* at 532. Not one of EchoStar's cases holds that an agency is required to put on the record raw data underlying a study, the results and methodology of which were in the record.

Moreover, EchoStar had an adequate opportunity to comment on the NAB study. NAB's comments presented the results of the study and described in some detail the methodology used to gather the data. That approach is typical in FCC proceedings; parties rarely present raw data. That is likely because, in large empirical studies the raw data do not lend themselves to comment; rather, as long as other parties understand the methodology, they may meaningfully comment on the usefulness of the study. For example, in *American Public Communications*

Council v. FCC, 215 F.3d 51, 58 (D.C. Cir. 2000), a coalition of telephone companies presented summary data, along with an explanation of the methodology for deriving the summary numbers. The Court rejected the claim that the Commission could not properly rely on the coalition’s figures, holding instead that it could not “say that it was unreasonable or arbitrary for the FCC in the exercise of its expertise to rely upon [them]” as long as the methodology was explained. Indeed, the record does not contain the data underlying the Rubinstein figures that EchoStar claims the Commission was required to implement, *ILLR Reconsideration Order* n.14 (JA), nor did the record of the SHVA implementation proceeding contain the raw data on which the ILLR model itself is based. Yet no one questions the propriety of the Commission’s reliance on those studies, and the Commission found that the NAB methodology was similar to Rubinstein’s. *ILLR Reconsideration Order* ¶9 (JA).

In any event, as the Commission found, “the underlying raw data for the NAB/MSTV study ... have been publicly available since well before the initial *Notice of Proposed Rulemaking* in this proceeding.” *ILLR Reconsideration Order* ¶10 (JA). Indeed, the Cohen Engineering Statement filed along with NAB’s comments directed interested parties to the particular document filed in another FCC proceeding that contained the raw data for some of the observations as well as the court docket that contained the remainder of the data. Moreover, “in addition to their availability from public sources, [the Commission was] advised that EchoStar obtained these measurements in 1998 through discovery in a separate civil action.” *Id.* n.18 (JA).

The cases also establish that the agency must have actually relied upon extra-record data before it can run afoul of the APA in this manner. *E.g.*, *Community Nutrition Inst. v. Block*, 749 F.2d 50, 57 (D.C. Cir. 1984) (error to “promulgate rules *on the basis of ... data that ... is known*

only to the agency”). Here, the FCC did not rely on the underlying raw data (which, at the initial rulemaking stage, it did not have); rather, it relied on the aggregate figures and the description of methodology presented by NAB. The Commission found that the NAB study “was described and its results analyzed in the joint comments and reply comments of NAB/MSTV Our decision in the [*ILLR Order*] found that the technical assumptions and analytical methods accurately describe how the underlying data had been examined. The methodologies used in the NAB/MSTV and Rubinstein studies are similar, and in both cases were clearly described so that we were able to determine their applicability and the validity of their results. We were thus able to assess the significance of the tabulated results without repeating the calculations.” *ILLR Reconsideration Order* ¶9 (JA). EchoStar does not claim that the Commission’s reliance on the summary data was itself unreasonable (a claim that would fail under *American Public Communications Council*), and as such, all of the data that the Commission actually relied upon were in the record and subject to comment and criticism.

Finally, even if the Court believes that the raw data should have been on the record in the initial comment period, the APA requires that in reviewing agency decisions, “due account shall be taken of the rule of prejudicial error.” 5 U.S.C. § 706. Here, there has been no prejudice. EchoStar did not even *mention* the NAB study in its response to NAB’s initial comments, let alone complain of the lack of raw data or criticize any aspect of the study. *See* Reply Comments of Echostar (JA -). Given its failure to comment at all, EchoStar cannot plausibly maintain that it was prejudiced by the absence from the record of the raw underlying data. In any event, NAB ultimately filed the raw data during the reconsideration round, and EchoStar reviewed and commented on it at that point. The Commission rejected those comments on their merits, *ILLR Reconsideration Order* ¶11 (JA), and EchoStar does not challenge that ruling. Moreover, at

any point during the nearly four-year-long reconsideration process, EchoStar could have supplemented its study of the NAB data and presented its conclusions to the Commission under the Commission’s liberal ex parte rules.¹⁰ Yet, although EchoStar made at least one ex parte presentation, *see* Certified List of Items in the Record at 1, it did not mention the NAB data or supplement EchoStar’s earlier comments on the NAB data. EchoStar thus “had ample opportunity to address” the NAB study; its failure to do so rendered any error on the Commission’s part harmless. *National Ass’n of Regulatory Utility Commissioners v. FCC*, 737 F.2d 1095, 1121 (D.C. Cir. 1984).

There is no basis for EchoStar’s argument that its opportunity to address the NAB raw data on reconsideration was inadequate, Br. 51-52, and the cases it relies on to support that argument are inapposite. *American Iron & Steel Inst. v. OSHA*, 939 F.2d 975, 1010, (D.C. Cir. 1991), involved a study on which the agency relied that had never been subjected to any form of public comment. The case has no bearing here, where EchoStar was able to comment on the NAB summary data and methodology in the original comment round (an opportunity it chose not to take) and on the raw data – on which the Commission did not rely anyway – in the reconsideration round. *Texas Food Industry Ass’n v. Department of Agriculture*, 842 F. Supp. 254, 258 (W.D. Tex. 1993), involved a rule that was promulgated without any notice and comment at all, fundamental procedural violations that the Court has suggested can be deemed harmless error only in unusual circumstances. *See Sprint Corp. v. FCC*, 315 F.3d 369, 376-377

¹⁰ EchoStar incorrectly claims that the raw data were filed “late in the reconsideration stage.” Br. 52. In fact, the data were filed on July 24 and 25, 2000, two weeks after EchoStar filed its petition for reconsideration. *See* Certified List of Items in the Record at 2.

(D.C. Cir. 2003).¹¹ Likewise irrelevant here is *Independent U.S. Tanker Owners Committee v. Lewis*, 690 F.2d 908, 923-926 (D.C. Cir. 1982), which involved a “very strange procedure” in which the agency “adopt[ed] a document as the foundation for its decision and then reveal[ed] only the last seven pages of it until forced to fuller disclosure by litigation.” *Id.* at 925. None of those cases diminish the applicability of the harmless error rule the Court established in *NARUC*, 737 F.2d at 1121. Indeed, the argument that the Commission has committed an error that cannot be remedied by reconsideration is particularly unconvincing when made by a litigant that had an opportunity to raise a timely objection but did not do so until the reconsideration round.

EchoStar suggests that the Commission based its decision on some secret, undisclosed staff study that itself violated the APA’s comment provisions. For example, EchoStar refers to a “further analysis” conducted by the FCC in which it allegedly “independently ‘veri[fied]’ certain critical aspects of the [NAB] study.” Br. 45. “The data and analysis that the Commission produced and the methodology it used to ‘verify’ the [NAB’s] description of the study” were not in the record, EchoStar claims. Br. 46 & n.15. That argument is based on a misreading of the Commission’s orders; in fact, the FCC did not conduct any such secret studies.

The Commission explained that “[t]he signal loss values we established for use in the ILLR model were derived by our own further analysis of both the NAB/MSTV study and another study by Rubinstein that similarly involved a large number of actual measurements of radio field intensity.” *ILLR Reconsideration Order* ¶9 (JA). It is apparent that the “further analysis” consisted not of the Commission’s own empirical study or other sort of data gathering, but rather the agency staff’s routine examination of the record. It was obvious from the face of

¹¹ The same reasoning applies to *State of New Jersey v. EPA*, 626 F.2d 1038, 1050 (D.C. Cir. 1980) and *Advocates for Highway & Auto Safety v. FHA*, 28 F.3d 1288, 1292 (D.C. Cir. 1994), both of which involved the promulgation of rules with no opportunity at all for comment.

the NAB study that the ILLR model “already produces more under-predictions than over-predictions,” and that “the ILLR model without clutter corrections proves superior to other models by making the correct prediction more often.” *ILLR Order* ¶14 (JA). That sort of exercise of an agency’s expert judgment is not a matter, such as a data-gathering study, to be placed on a record; it is the essence of agency decisionmaking. Similar reasoning applies to the Commission’s statement that it “in fact verif[ied] that no apparent bias was introduced from the individual measurement locations selected” in the NAB study. *ILLR Reconsideration Order* ¶9 (JA). That statement plainly refers to the Commission’s examination of NAB’s comments and the Jules Cohen Engineering statement to satisfy itself, in the exercise of its expert engineering judgment, that there was no systematic methodological flaw in the NAB study.¹² “Rulemaking proceedings would never end if an agency’s response to comments must always be made the subject of additional comments.” *Community Nutrition Inst.*, 749 F.2d at 58.

IV. THE COMMISSION PROPERLY DECLINED TO ALLOW SATELLITE PROVIDERS TO BE EXCUSED FROM THE STATUTORY WAIVER PROCESS.

As discussed above, under the copyright laws, only unserved households may receive distant network signals via satellite. 17 U.S.C. § 119(a)(2)(B). A prediction of Grade B service made by the ILLR model serves as a presumption as to whether a given household is served or unserved. 47 U.S.C. § 339(c)(3) (model used for “presumptively determining the ability of individual locations to receive signals”); 17 U.S.C. § 119(a)(2)(B)(ii)(I). Congress created a

¹² The Commission also took notice of publicly available materials from the copyright litigation and the SHVA implementation proceeding. *ILLR Reconsideration Order* n.15 (JA). The law is clear that in informal rulemaking proceedings, the agency is not limited to consideration of items in the administrative record. *Air Transport Ass’n v. FAA*, 169 F.3d at 7. There is no error where the data consulted were publicly available and in any event accounted at most for a minor portion of the Commission’s decision.

particular and detailed method to overcome the presumption for a household predicted by the model to receive a Grade B signal but that nonetheless believes it is entitled to receive distant network stations from its satellite provider. Specifically,

A subscriber who is denied the retransmission of a signal of a network station ... may request a waiver from such denial by submitting a request, through such subscriber's satellite carrier, to the network station asserting that the retransmission is prohibited. The network station shall accept or reject a subscriber's request for a waiver within 30 days after receipt of the request. The subscriber shall be permitted to receive such transmission ... if such station agrees to the waiver request and files with the satellite carrier a written waiver with respect to that subscriber allowing the subscriber to receive such retransmission. If a television network station fails to accept or reject a subscriber's request for a waiver within the 30-day period after receipt of the request, that station shall be deemed to agree to the waiver request and have filed such written waiver.

47 U.S.C. § 339(c)(2). Congress further specified a detailed process of "objective verification" of the model's prediction:

If a subscriber's request for a waiver ... is rejected and the subscriber submits to the subscriber's satellite carrier a request for a test verifying the subscriber's inability to receive a [Grade B] signal ..., the satellite carrier and the network station or stations asserting that the retransmission is prohibited with respect to that subscriber shall select a qualified and independent person to conduct a test Such a test shall be conducted within 30 days after the date the subscriber submits a request for the test. If the written findings and conclusions of a test ... demonstrate that the subscriber does not receive a [Grade B] signal ... the subscriber shall not be denied the retransmission of a network signal.

47 U.S.C. § 339(c)(4)(A). Congress also specified how to select the person to perform the signal test and how the costs of testing would be allocated:

If the satellite carrier and the network station or stations asserting that the retransmission is prohibited are unable agree on such a person to conduct the test, the person shall be designated by an independent and neutral entity designated by the Commission by rule. Unless the satellite carrier and the network station or stations otherwise agree, the costs of conducting the test under this paragraph shall be borne by the satellite carrier, if the stations' signal meets or exceeds [Grade B] intensity standard ..., or by the network station, if its signal fails to meet or exceed such standard.

47 U.S.C. § 339(c)(4)(B).

In its opening comments and its petition for reconsideration, EchoStar asked the Commission to declare that under the statute it would be permissible for a satellite carrier to take actual measurements at the time a subscriber signs up for service, rather than going through the statutorily prescribed request-waiver-measurement process. Comments of EchoStar at 8 (JA); EchoStar’s Petition for Reconsideration at 11-13 (JA). The Commission declined to allow EchoStar’s proposed manner of proceeding, holding that “it is not the procedure contemplated by the statute.” *ILLR Reconsideration Order* ¶23 (JA). EchoStar claims that the Commission’s interpretation of the statute was wrong; in EchoStar’s view, the statute “unambiguously *allows* prior testing.” Br. at 57 (emphasis in original).

The Commission reasonably interpreted the statute. “The statute delineates a specific sequence of events preceding testing: waiver request, waiver denial, the subscriber’s request for an on-site test, selection of a qualified tester by the satellite carrier and the network station, and then the on-site test.” *ILLR Reconsideration Order* ¶23 (JA). There could hardly be a more straightforward reading of the statutory text. The Commission reasonably declined to deviate from the regime established by Congress.¹³

EchoStar believes that the statute unambiguously allows up-front testing in lieu of the waiver process because the statute does not expressly forbid such a process. Br. at 57. That argument does not rest on language that appears in the statute, and there cannot be a plain

¹³ EchoStar claims that if the statute is ambiguous, the Commission was required to “exercise[e] its interpretive discretion,” which, the argument goes, the agency unlawfully failed to do. Br. at 57. But nowhere in the *ILLR Reconsideration Order* did the Commission conclude that the statute is unambiguous, and the Commission did not decline to exercise interpretive discretion. Rather, the order merely says that the statute “contemplate[s]” a specific procedure, and that following that procedure is the best reading of the statute. *Id.* ¶22.

meaning of words that do not exist. At most, Congress's silence would create an ambiguity. But Congress crafted the elaborate waiver/testing process with great care and attention to detail, complete with safeguards that protect the interests of all parties involved in the process, and it left little room for deviation from the exacting procedures specified in the statute. It was therefore reasonable for the Commission to find that EchoStar's preferred approach "is not the procedure contemplated by the statute." *ILLR Reconsideration Order* ¶23 (JA). Although the Commission agreed generally with some of EchoStar's policy arguments about the most efficient

manner of testing, the agency reasonably adhered to the congressionally prescribed process. Indeed, the Commission suggested that Congress consider changing its approach in the then-pending legislation that became SHVERA, *ILLR Reconsideration Order* ¶24 (JA), yet Congress did not do so, thus ratifying the Commission's interpretation of the statute. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. at 137; *Apex Hosiery Co. v. Leader*, 310 U.S. at 488.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for review.

Respectfully submitted,

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July 25, 2005

GLOSSARY

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ECHOSTAR SATELLITE, L.L.C)	
)	
PETITIONER)	
)	
V.)	
)	
FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA)	No. 04-1304
)	
RESPONDENTS)	
)	
)	
)	

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying “Brief for Respondents” in the captioned case contains 11431 words.

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