

**Comments Concerning Applicability of
Section 312(a)(7) Programming
Requirements to DBS Licensees**

54. In its Notice, the Commission requested comment concerning the requirements of Section 25(a) of the 1992 Cable Act as applied to DBS licensees (Notice, Page 5, Paragraph 21). Specifically, the Commission intends to require DBS licensees to ensure that legally qualified candidates for Federal elective office may purchase reasonable amounts of time for commercial or informational programming. Continental finds the proposal prudent and does not protest it. Furthermore, Continental finds the implementation suggestions contained in the Commission's Footnote 21 (Notice, Page 5) practical and efficient. We recommend that the provisions outlined in Footnote 21 of the Notice be implemented.

55. The Commission also notes that application of reasonable access requirements of Section 312(a)(7) constitute a potentially thorny problem with respect to video delivery systems consisting of multiple channels of programming service: "Should a DBS provider that controls multiple channels be required to make all video channels available to federal candidates?" (Notice, Page 5, Paragraph 23).

56. We think the answer to this question is "No". DBS licensees should not be required to make all video channels available to federal candidates on such an "across the board basis". What if a DBS operator airs a channel that only carries cartoon programming for children? It might be extremely difficult, and probably would be downright impossible, for children or

Comments of Continental Satellite Corporation
Regarding Notice of Proposed Rule Making (MM Docket No.: 93-25)

for their viewing parents to tell the difference between the intellectual content of a "Road Runner" cartoon and the basic message of a political candidate whose message must be broadcast because the DBS licensee has to adhere to Section 312(a)(7) obligations. Why confuse the children? Besides, the parents would probably rather vote for the Road Runner. Similar arguments in favor of not requiring "across the board" availability to all video channels for commercials and "infomercials" on behalf of candidates for Federal political office might be made for DBS licensees who broadcast channels that air only horror movies or comedies.

57. Continental recognizes, however, the value of airing political commercials on international all-news video channels: in our opinion, political commercials and reports on international all-news channels both possess similar levels of ethics, honesty, believability, truth content, and all-around veracity. Political commercials would fit well on an international all-news video channel.

58. Channels that are provided without advertisements and which are funded on a subscription basis should be exempt from Section 312(a)(7) requirements to carry political advertisements. These channels are paid for by subscribers who are paying not to have to view commercials. We think it likely that viewers of these channels who find their subscription television channels invaded by political advertisements might be inclined to vote against, and not for the candidate who presumed to invade private-pay broadcast channels with a political message. Also, DBS operators might naturally be tempted to lawfully precede and

**Comments of Continental Satellite Corporation
Regarding Notice of Proposed Rule Making (MM Docket No.: 93-25)**

follow these political advertisements by a disclaimer indicating that the ad in question was only being broadcast so that the DBS operator could keep its license, and that the viewer of the ad being broadcast might want to keep that in mind come election day.

59. In the absence of other suggestions for applying the access to broadcast time requirement of Section 312(a)(7) to DBS operators, Continental suggests that taking into account demographic considerations of various channels with comparable audience size is the most practical way to implement Section 312(a)(7) "equal access" requirements.

**Comments Concerning Utilization of DBS
for Candidates for Federal Office and
Potential Burdens to DBS Licensees**

60. Continental believes that the provisions of the Codification Report and Order (7 FCC Rcd at 681-682) cited in Footnote 28 of Page 6 of the Commission's Notice should also be applied to DBS operators. We suggest, however, that in light of the Half-CONUS and/or Full-CONUS signal coverage planned by Part 100 licensees, enforcement of Section 312(a)(7) to DBS operators should be limited to candidates for the office of President and Vice-President during the months preceding the first state primaries and continuing until election day. It will not be practical to air political advertisements on behalf of individual Senate or House races. The technology simply does not yet exist to do so.

61. With respect to issues raised by Sections 73.1940, 73.1941, and 73.1212(a)(2)(ii) (Notice, Page 6, Paragraph 26), we suggest that these issues be resolved on a case-by-case basis as

**Comments of Continental Satellite Corporation
Regarding Notice of Proposed Rule Making (MM Docket No.: 93-25)**

they arise, perhaps by taking into consideration the demographics of channels with comparable audience size. With respect to LUC policies codified in MM Docket 91-168 and Section 71.1942 of the Commission's Rules, Continental sees no objection to the Commission's stated intention to apply them to DBS operators (Notice, Page 6, Paragraph 27). With respect to political file storage and availability requirements set forth in Section 73.1943 of the Commission's Rules, we have no objection to keeping a public inspection log at our corporate headquarters. Its contents will be kept available for inspection during normal business hours.

**Comments Concerning Other Public Interest
Requirements Applied to DBS Licensees**

62. We agree with the Commission's conclusion in its Notice that "given the flexible regulatory approach taken for DBS and its early stage of development, no other regulations should be considered at this time" (Notice, Page 7, Paragraph 29).

**Comments Concerning Localism and
Restriction of Programming by ZIP Code
on Transponders Operated by DBS Licensees**

63. Continental knows of no feasible technology to provide spot beams capable of adding or deleting satellite delivered programming to accommodate local concerns. At one time, we examined a private study undertaken by Space Systems/Loral regarding this technology, but we ultimately concluded that application of an unproven technology to DBS is impractical and cost-prohibitive for utilization by Continental at this time.

64. With respect to the Commission's request for comments concerning program deletion based on receiver ZIP codes (Notice,

Comments of Continental Satellite Corporation
Regarding **Notice of Proposed Rule Making** (MM Docket No.: 93-25)

Page 7, Paragraph 35), we concur with the Commission's assessment
that deletion of specific programs based on receiver ZIP codes is

**Comments of Continental Satellite Corporation
Regarding Notice of Proposed Rule Making (MM Docket No.: 93-25)**

**Comments Concerning Carriage Obligations
for Noncommercial, Educational,
and Informational Programming by DBS Licensees**

66. As we stated earlier in these Comments, we believe that enforcement of carriage obligations for noncommercial, educational, and informational programming with respect to Part 100 licensees should not begin until the conclusion of the seven-year "shake out period" because we do not know whether debt service

Comments of Continental Satellite Corporation
Regarding **Notice of Proposed Rule Making** (MM Docket No.: 93-25)

Section 25(b) carriage obligations instead of being required to reserve program time spread across all available channels. This is because some DBS channels (children's programming, for example) might by their nature be non-conducive to the broadcast

~~Section 25(b) carriage obligations. By giving Section~~

**Comments of Continental Satellite Corporation
Regarding Notice of Proposed Rule Making (MM Docket No.: 93-25)**

by programming over which it has no control (Notice, Page 9, Paragraph 41). As long as more than fifty percent of the overall programming time of the Section 25(b) channel remains with the DBS operator, we believe that the noncommercial program provider should not necessarily have to comply with the political broadcasting requirements imposed by Section 25. Continental suggests that if a noncommercial program provider takes responsibility for programming more than fifty percent of the air time of a given DBS channel, it should become responsible for complying with the political broadcasting requirements of Section 25. The DBS licensee should be allowed to retain self-enforcement authority to require this adherence, including pre-emptive programming rights to enforce compliance, should such drastic measures become necessary.

**Comments Concerning Restrictions or
Instances of Refusal of Carriage
by DBS Permittees and Application With Respect
to The Miller Standard of Broadcast Decency**

71. One of the most sensitive issues that must be settled for the benefit of the American viewing public concerns the question of how to allow or even whether to allow a DBS licensee to restrict or refuse DBS carriage of certain types of programs or programming channels (Notice, Page 9, Paragraph 42). What this question really is asking is "Should a DBS permittee be allowed to refuse or restrict carriage of programming that is obscene, pornographic, or otherwise objectionable?" Even though Section 12 of the Cable Act permits cable operators to restrict indecent programming to a single access channel and to prohibit broadcast of obscene material on public, educational, or governmental

Comments of Continental Satellite Corporation
Regarding Notice of Proposed Rule Making (MM Docket No.: 93-25)

access channels, no such provision exists for DBS permittees.

72. Cases already have been tried in which satellite programming companies have been prosecuted for violation of state criminal statutes because the content of specific channels carried on the spacecraft from which they were transmitting violated the broadcast decency standards of one state even though they did not necessary violate the decency standards of another state. Continental believes that the only effective and practical solution to the thorny problem of how or whether to restrict carriage of obscene, pornographic, or otherwise objectionable material is to implement a methodology to apply the principles of The Miller

Comments of Continental Satellite Corporation
Regarding Notice of Proposed Rule Making (MM Docket No.: 93-25)

- C. Matter which, to the average person, applying contemporary community standards, lacks serious literary, artistic, political, or scientific value.

The operative words in the Miller Standard are the words "contemporary community standards".

74. Before the Miller Standard was adopted, application of a "statewide standard" of broadcast obscenity instead of a "community standard" of broadcast obscenity meant that motion picture producers and others could safely distribute on a statewide basis matter that might affront the citizens of one small town because it could be argued that the matter was acceptable to the majority of the citizenry of the state in which that distribution was made. As a result, many local communities felt that their rights to set and enforce their own local community standards of decency were being undermined.

75. In contrast to this, the Miller Standard allows local communities to forbid distribution within their own communities matter which might be acceptable to the majority of citizens in one state but which might be objectionable to a specific community. The Miller Standard for obscenity has been approved by the US Supreme Court and confirmed in four subsequent cases over a dozen years. It is also the accepted standard in more than forty states. The standard does not censor all sex portrayed or described, only the most offensive. It does, however, leave to the individual community the responsibility. the constitutionally

Comments of Continental Satellite Corporation
Regarding Notice of Proposed Rule Making (MM Docket No.: 93-25)

DBS licensees and the programming carried on their spacecraft to adhere to the Miller Standard. We also recommend that, in the event of conflicts of opinion between the licensee and its lessee or between the licensee and the derivative user of a licensee's lessee as to whether or not a specific program on a specific channel does or does not violate the provisions of the Miller Standard, the determination of violation and the resultant decision of enforcement of the Miller Standard should rest with the DBS licensee. In the event that the DBS licensee and its lessee or a lessee's derivative user cannot agree regarding whether or not the broader programming intentions, services, or general contents of a specific channel or program operated by a lessee adhere to the Miller Standard, Continental suggests that the Commission require submission of the matter to a one-subscriber/one-vote poll, on a 5-digit ZIP code basis, of all subscriber end users served by the channel or program in dispute.

77. We recommend that these polls be taken on a yearly basis and that they be valid for one year's duration only. Cost of these tabulations should be borne by the disputing lessee or by the disputing lessee's derivative user and not by the DBS licensee. We further recommend that these polls be taken on the first Tuesday of each November of the year. Under our proposal, communities whose subscribers vote by a simple majority (50% of the subscribers plus one vote) that a given service channel or program violates an application of the Miller Standard for that 5-digit ZIP code will have all receivers for that 5-digit ZIP code blocked by the DBS licensee from receiving the transmission of that channel for the calendar year following the vote.

Comments of Continental Satellite Corporation
Regarding Notice of Proposed Rule Making (MM Docket No.: 93-25)

78. A sample draft of how the provisions of the Miller Standard might be incorporated into a DBS SATELLITE TRANSPONDER CAPACITY SERVICE AGREEMENT, along with a photocopy of the text of Sections 311 and 313 of the California Penal Code (as amended by the Miller Standard), is attached to these Comments as Exhibit One. This Exhibits demonstrates that construction of a solution to the problem of how to restrict broadcast of obscene, pornographic, or objectionable material can be accomplished in a practical and cost-effective manner. Continental recommends that the Commission make adherence to the Miller Standard mandatory by all DBS licensees. However, in order to carry out the recommendations set forth in these Comments, the Commission will have to require that all DBS receivers sold in the United States be equipped with an exclusion capability based on a ZIP code format in anticipation of community-wide Miller Standard votes.

79. As we noted earlier, the technology already exists to encrypt and compress the entire nine-digit ZIP code database published by the United States Postal Service in a single EPROM. By broadcasting an EXCLUSIONARY TABLE containing ZIP codes to be locked out by individual receivers as part of its DBS signal, a DBS operator could easily lock out specific channels that are offensive to certain local communities. We repeat our previous endorsement of exclusionary DBS broadcasting based on ZIP code locations, and reiterate our belief that exclusionary broadcasting is technologically possible, economically feasible, and morally indispensable to the construction of a DBS system sensitive to the needs of viewers.

**Comments of Continental Satellite Corporation
Regarding Notice of Proposed Rule Making (MM Docket No.: 93-25)**

**Comments Concerning Definition of Section 25(b)(3) and
Section 25(b)(5)(B): National Educational Programming Supplier
and Noncommercial Educational and Informational Programming**

80. The Commission has requested comment concerning the scope of the term "national educational programming supplier" (Notice, Page 9, Paragraph 43) and of the term "noncommercial educational and informational programming" (Notice, Page 10, Paragraph 44). We have no objection to viewing the former term as encompassing not only public television licensees but also entities such as the Public Broadcasting Service which disseminates programming on a national basis to public television stations.

81. However, we also believe that expanding the definition of "national educational programming supplier" to include smaller, more localized programming entities will give a substantial boost to the Commission's stated goal of bringing greater local-

**Comments of Continental Satellite Corporation
Regarding Notice of Proposed Rule Making (MM Docket No.: 93-25)**

service provider's authorization to utilize a channel that has previously been reserved pursuant to Section 25(b)(2) (Notice, Page 10, Paragraph 45). We recommend that a DBS provider be able to use reserved channel capacity until the noncommercial program provider is ready to commence broadcasting its programming.

**Comments Concerning Rates
for Section 25 "Must Carry" Obligations**

83. Requiring DBS licensees to charge noncommercial entities a rate comparable to only half of the costs -- or less -- could easily be fatal to the infant DBS industry. This is one reason why we suggested earlier in these Comments that the Commission adopt a policy of regulatory minimization until the seven year "initial shake out" period that we've proposed is over. The enormous costs inherent in designing, constructing, launching, operation, and marketing of DBS make it uncertain that any DBS licensees will be able to afford to give discounts on the lease price of any broadcast spectrum until all capitalization costs are fully amortized. We do not believe debt service can be adequately maintained on the financial obligations necessary to construct a DBS system if the Commission requires us to give, on a pre-tax and non-tax-deductible basis, what amounts more than a fifty percent tax right off the top of the gross lease revenues of certain of our broadcast frequencies. Continental recommends that the Commission delay construction of an administrative ruling with respect to rate issues until the seven-year "initial shake out" period we've recommended is over.

Summary and Concluding Comments

84. The Commission noted in Section VII of the Initial Regulatory Flexibility Analysis (IRFA) that accompanied its Notice that the Commission is empowered to pursue an option "not to adopt regulations at this time but reserve the right to do so in the future if circumstances so warrant" (Notice, Page 12, Section VII). Pursuit of this option is not inconsistent with our recommendations set forth in these Comments. Enforcement of Section 25 obligations with respect to Part 100 DBS licensees is impractical at this time because the Part 100 DBS industry has not yet sufficiently matured. The Commission should delay enforcement of Section 25 obligations with respect to Part 100 DBS licensees until all nine permittees have been fully operational for seven years.

85. To sum up our recommendations, Continental believes the Commission should adopt the following public posture with respect to enforcing Section 25 toward Part 100 operators:

Comments of Continental Satellite Corporation
Regarding Notice of Proposed Rule Making (MM Docket No.: 93-25)

tional and informational programming until the end of the seven "shake out period" for Part 100 DBS operators in order to allow them to amortize the high capitalization costs of constructing their transmission systems before imposing carriage obligations

- o Third, because the very nature of DBS services excludes services tailored to local communities, we suggest that implementation of the Commission's long standing goal of service to local communities will continue to best be met by the terrestrially based cable and television systems.
- o Lastly, Continental recommends that specialized tax incentivization, including Investment Tax Credits, be adopted in order to provide financial inducements for investment in the DBS industry because this would significantly assist creation of a favorable economic climate needed to sustain long term growth in the DBS industry.

Continental envisions that the Part 100 operators will mainly serve national markets for DBS telecommunication services. Local service needs should and must remain with local cable and television broadcast licensees.

//
//
//
//
//
//

Comments of Continental Satellite Corporation
Regarding Notice of Proposed Rule Making (MM Docket No.: 93-25)

Exhibit One:

**Portion of
DBS SATELLITE TRANSPONDER CAPACITY SERVICE AGREEMENT**

**And Accompanying Text of
The Miller Standard
Adopted Pursuant to
Miller v. California (1983) 413 US 15**

Senate Bill No. 5

CHAPTER 1378

An act to amend Sections 311 and 313 of the Penal Code, relating to obscene matter.

[Approved by Governor September 25, 1988. Filed with Secretary of State September 26, 1988.]

LEGISLATIVE COUNSEL'S DIGEST

SB 5, Deddeh. Obscene and harmful matter.

(1) Existing law defines "obscene matter" to mean matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary statewide standards, is to prurient interest, as prescribed, and is matter which, taken as a whole, goes substantially beyond the customary limits of candor in description or representation of those matters, and is matter, which, taken as a whole, lacks significant literary, artistic, political, educational, or scientific value. Existing law also prescribes a similar definition for "obscene live conduct," and for "harmful matter" with respect to minors.

This bill would revise those definitions to conform to the federal standard for obscenity established by the United States Supreme Court decision in *Miller v. California*, 37 L. Ed. 2d 419. The bill would also incorporate additional changes to Sections 311 and 313 of the Penal Code proposed by AB 3568, contingent upon that bill's prior enactment.

The bill would mandate a new program or higher level of services on local government by expanding the scope of an existing crime.

(2) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

The people of the State of California do enact as follows:

SECTION 1. Section 311 of the Penal Code is amended to read:
311. As used in this chapter:

(a) "Obscene matter" means matter, taken as a whole, which to the average person, applying contemporary statewide standards, appeals to the prurient interest, and is matter which, taken as a whole, depicts or describes in a patently offensive way sexual conduct; and which, taken as a whole, lacks serious literary, artistic, political, or scientific value.

(1) When it appears from the nature of the matter or the

circumstances of its dissemination, distribution or exhibition that it is designed for clearly defined deviant sexual groups, the appeal of the matter shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or

to the nature of the conduct and can justify the conclusion that the conduct lacks serious literary, artistic, political, or scientific value.

(3) In determining whether the live conduct taken as a whole lack serious literary, artistic, political, or scientific value in description or representation of such matters, the fact that the defendant knew that the live conduct depicts persons under the age of 16 years engaged in sexual conduct, as defined in subdivision (c) of Section 311.4, is a factor which can be considered in making that determination.

SEC. 1.5. Section 311 of the Penal Code is amended to read:

311. As used in this chapter, the following definitions shall control the meaning of the respective terms:

(a) "Obscene matter" means matter taken as a whole, which to the average person, applying contemporary statewide standards, appeals to the prurient interest, and is matter which, taken as a whole, depicts or describes in a patently offensive way sexual conduct; and which, taken as a whole, lacks serious literary, artistic, political, or scientific value.

(1) When it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition that it is designed for clearly defined deviant sexual groups, the appeal of the matter shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter lacks serious literary, artistic, political, or scientific value.

(3) In determining whether the matter taken as a whole lacks serious literary, artistic, political, or scientific value in description or representation of such matters, the fact that the defendant knew that the matter depicts persons under the age of 16 years engaged in sexual conduct, as defined in subdivision (c) of Section 311.4, is a factor which can be considered in making that determination.

(b) "Matter" means any book, magazine, newspaper or other printed or written material or any picture, drawing, photograph, motion picture or other pictorial representation or any statue or

matter or live conduct.

(f) "Exhibit" means to show.

(g) "Obscene live conduct" means any physical human body activity, whether performed or engaged in alone or with other persons, including but not limited to singing, speaking, dancing.

scientific value for minors.

(b) "Matter" means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription, or mechanical, chemical, or electrical reproduction or any other articles, equipment, machines, or materials.

(c) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(d) "Distribute" means to transfer possession of, whether with or without consideration.

(e) "Knowingly" means being aware of the character of the matter.

(f) "Exhibit" means to show.

(g) "Minor" means any natural person under 18 years of age.

SEC. 2.5. Section 313 of the Penal Code is amended to read:

313. As used in this chapter, the following definitions shall control the meaning of the respective terms:

(a) "Harmful matter" means matter, taken as a whole, which to the average person, applying contemporary statewide standards, appeals to the prurient interest, and is matter which, taken as a whole, depicts or describes in a patently offensive way sexual conduct and which, taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

(1) When it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition that it is designed for clearly defined deviant sexual groups, the appeal of the matter shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, that evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter lacks serious literary, artistic, political, or scientific value for minors.

(b) "Matter" means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription, or mechanical, chemical, or electrical reproduction or any other articles, equipment, machines, or materials. "Matter" also includes live or recorded telephone messages when transmitted, disseminated, or distributed as part of a commercial transaction.

(c) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(d) "Distribute" means to transfer possession of, whether with or without consideration.

(e) "Knowingly" means being aware of the character of the matter.

(f) "Exhibit" means to show.

(g) "Minor" means any natural person under 18 years of age.

SEC. 2.6. This act shall be known, and may be cited, as the Deddeh-Polanco Anti-Obscenity Act of 1988.

SEC. 3. Section 1.5 of this bill incorporates amendments to Section 311 of the Penal Code proposed by both this bill and AB 3568. It shall only become operative if (1) both bills are enacted and become effective on January 1, 1989, (2) each bill amends Section 311 of the Penal Code, and (3) this bill is enacted after AB 3568, in which case Section 1 of this bill shall not become operative.

SEC. 4. Section 2.5 of this bill incorporates amendments to Section 313 of the Penal Code proposed by both this bill and AB 3568. It shall only become operative if (1) both bills are enacted and become effective on January 1, 1989, (2) each bill amends Section 313 of the Penal Code, and (3) this bill is enacted after AB 3568, in which case Section 2 of this bill shall not become operative.

SEC. 5. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs which may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, changes the definition of a crime or infraction, changes the penalty for a crime or infraction, or eliminates a crime or infraction.