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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Implementation of Section 4(g) of the Cable Television Consumer Protection Act of 1992)	MM Docket No. 93-8
)	
Home Shopping Station Issues)	

To: The Commission

REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION

The Center for the Study of Commercialism ("CSC") hereby submits this Reply to the various Oppositions to its Petition for Reconsideration ("Petition") in the above docket.

INTRODUCTION

None of the opposition pleadings address CSC's core arguments. They merely mirror the FCC's rationales for its findings, and grossly mischaracterize CSC's position in the process. To the extent that the Oppositions do address CSC's arguments at all, they essentially reaffirm the wisdom of CSC's position and provide inadequate rationales for denying the Petition.

I. SECTION 4(g) OF THE CABLE TELEVISION CONSUMER PROTECTION AND COMPETITION ACT OF 1992 REQUIRES THE COMMISSION TO ADDRESS WHETHER OVERCOMMERCIALIZATION ON HOME SHOPPING STATIONS IS IN THE PUBLIC INTEREST.

The Commission determined that home shopping stations satisfy the public interest standard because their non-commercial material, standing alone, purportedly meets and exceeds FCC standards for license renewal. CSC argues, however, that the Commission failed to consider "the issue of overcommercialization, i.e., whether [fifty-five and a half] minutes of commercial sales presentations per hour is excessive." Petition at ii. In failing to consider

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how much commercialization is too much, CSC posits that the Commission asked and answered the wrong question. CSC agrees with the dissent of Commissioner Duggan when he phrases the appropriate question as

Do television stations that fill 23 hours a day with satellite delivered, non-stop sales pitches serve the public interest by salting each hour of commercials with four minutes an hour of public service announcements?

Petition at 1-2 (citing Duggan dissent at 2).

None of the oppositions effectively address CSC's argument that excessive commercialization, i.e., fifty-five and a half minutes of commercial matter per hour, twenty-four hours a day, can never be compatible with the public interest. In identically worded Oppositions, Silver King Communications, Inc. ("SKC"), Jovon Broadcasting Corporation ("JBC"), Roberts Broadcasting Corporation ("RBC"), and Home Shopping Network, Inc. ("HSN")(collectively "SKC, et al."), effectively concede the point by limiting their discussion to an issue not raised in this proceeding- whether home shopping formats, in general, serve the public interest. See SKC at 7, JBC at 7, RBC at 7, HSN at 7. Like the National Association of Broadcasters ("NAB"), they mischaracterize CSC's argument as being against any commercialization. On the contrary, that is not CSC's position; CSC simply maintains that the Commission's mandate is to decide how much is too much. Petition at 2-6. CSC is concerned that broadcasters using their licenses to present predominantly commercial matter are operating in contravention of the public interest. See Petition at 2-8.

SKC, et al. misunderstand or mischaracterize CSC's argument as to the amount of home shopping programming which is compatible with the public interest. They seem to think that the only reason for the Commission to address the issue is because of concerns about the

revenues of minority and other small broadcasters. SKC at 10-11, JBC at 10-12, RBC at 10-12, HSN at 10-11. They argue that the FCC was under no obligation to find whether a lower level of home shopping programming could vindicate the public interest standard since it based its decision on the three factors enumerated in the statute. Id. However, they do not even attempt to address CSC's contention that the Commission ducked its affirmative duty under the statute to define the meaning of "predominantly utilized for the transmission of sales presentations or program length commercials." See Petition at 6-8.

SKC, et al. also show a fundamental lack of understanding of CSC's position when they state that "CSC's principal substantive objection rests on its claim that the [four and a half] minute format of much of home shopping stations' public service programming does not serve the public interest." SKC at 9, JBC at 9, RBC at 9, HSN at 8-9. This is just not so. CSC's position is that it does not matter how good the four and half minutes of public affairs programming may be. Petition at 3 ("CSC has maintained throughout this proceeding the [four and a half] minutes of non-sales programming broadcast by typical home shopping stations was irrelevant to the question of whether stations predominantly utilized for home shopping serve the public interest." [emphasis added][citations omitted]). Fifty-five and a half minutes of commercial matter per hour, all day long, does not serve the public interest regardless of what accompanies it.

In addition, SKC, et al. state that it is impermissible for the Commission to engage in a rulemaking as to what format should be utilized for public affairs programming. That, too, has nothing to do with CSC's position in this matter. Rather, CSC is here concerned with the duration of commercial matter and not the length or format of the public affairs programming

or other commercial matter. It is well within the Commission's authority to regulate the amount of programming time devoted to commercials, as it has done in the past.¹

Finally, NAB argues that many, or at least some, home shopping stations provide much more than four and a half minutes per hour of public service announcements, and that even those stations also have non-commercial programming for a few hours each Sunday. All of this may be true, but it does not change the mandate to explore whether such stations are operating in the public interest because of their commercial practices.

As Commissioner Duggan noted, the Report and Order at issue here signals the Commission's "comfort" with a broadcast world devoted entirely to full time home shopping. Duggan dissent at 2. The public interest standard, with its First Amendment implications, requires that we seek to promote an informed electorate that knows more than just how to shop.

II. THE COMMISSION CANNOT SHIRK ITS DUTY IN THIS PROCEEDING TO EXAMINE IF OVERCOMMERCIALIZATION SERVES THE PUBLIC INTEREST.

NAB and SKC, et al. argue that this is not the proper forum to discuss overcommercialization because the FCC has already decided to address that matter in another proceeding. NAB at 5, SKC at 6 n.9, JBC at 6 n.9, RBC at 6 n.9, HSN at 6 n.10. However, that proceeding is directed to commercial practices and policies of all stations. By specific statutory command, this proceeding is expressly limited to full time home shopping stations, i.e., "stations predominantly utilized for sales presentations...." By its terms, Section 4(g) speaks

¹See, e.g., 47 U.S.C. §303a(b) [The Children's Television Act of 1990]; See also United States v. Edge, 61 U.S.L.W. 4759 (June 25, 1993) [upholding prohibition of lottery commercials in non-lottery states].

only to overcommercialization as it relates to stations predominantly devoted to "sales presentations and program length commercials." Thus, the Commission cannot use its separate, broader inquiry to substitute for directly answering the narrow question that Congress mandated it to consider here.

Furthermore, to the extent the record in this case compelled the Commission to decide that it was necessary to take a larger look at commercialization, it suggests that there are unarticulated doubts that these stations are operating in the public interest. It seems arbitrary and capricious for the FCC to decide that there is a problem in general and also claim that there is no problem among the chief practitioners.

III. THE COMMISSION IS NOT LIMITED TO CONSIDERING THE THREE FACTORS ENUMERATED BY CONGRESS IN SECTION 4(g) IN MAKING ITS PUBLIC INTEREST DETERMINATION.

Section 4(g) requires the Commission to make one inquiry: "to determine whether broadcast television stations that are predominantly utilized for the transmission of sales presentations or program length commercials are serving the public interest, convenience, and necessity." Section 4(g) further provides that in making this determination

[t]he Commission shall consider the viewing of such stations, the level of competing demands for the spectrum allocated to such stations, and the role of such stations in providing competition to nonbroadcast services offering similar programming.

All of the Oppositions to the Petition place great weight on the fact that the Commission found that these three factors were satisfied. However, leaving aside the soundness of those findings, the plain language of the Act clearly shows that Congress did not intend that the public interest be vindicated solely through these three factors.

With respect to these three factors, Section 4(g) states that "[t]he Commission shall

consider..." them, but not that these are the only factors to be considered. Indeed, the public interest standard is broad, and comprehends all factors which relate to the needs of the public. If Congress wanted the three enumerated factors to serve as the only criteria for the FCC's determination, it would not have made reference to the public interest standard as the guidepost. In the absence of such limiting language, or any language that could be reasonably interpreted as such, the Commission's findings as to those three enumerated factors could not diminish its broader focus in determining that home shopping stations operate in the public interest.²

IV. SECTION 4(g) DOES NOT PRECLUDE THE COMMISSION FROM CONSIDERING PRE-1984 INTERPRETATIONS OF THE PUBLIC INTEREST STANDARD.

In the Petition, CSC showed that the Commission has previously considered excessive commercialization to be contrary to the public interest, and that the Commission's decision for the first time abandoned the notion that excessive commercialization is not something to be discouraged. CSC argued that even in repealing commercial limits, the FCC had promised to revisit the matter if marketplace forces proved inadequate to protect against excessive commercialization. See TV Deregulation, 98 FCC 2d 1076 (1984).

²SKC, et al. also claim that "there should be even greater hesitation [to restrict commercial programming] -- in fact, complete forbearance -- in the case of regulation of legitimate commercial material where there is absolutely no concrete evidence of adverse societal impact associated with its broadcast." SKC at 8, JBC at 8-9, RBC at 8-9, HSN at 8. This argument shows a complete misunderstanding of the public interest standard.

The standard does not provide that a licensee's service have an "adverse societal impact" to be contrary to the public interest, but that there be a positive societal impact for it to qualify for the benefit of a free license giving monopoly access to public airwaves. What SKC, et al. seem to forget is that broadcasters are fiduciaries of the public interest, and that they face replacement by others who show that they can better serve the public interest. Thus, it is wholly appropriate for the FCC to determine what is good, not just what is not bad.

Following the Commission's erroneous approach, the NAB maintains that Section 4(g) requires the FCC to ignore all prior case law on commercialization, including relevant interpretations of the public interest standard which preceded the 1984 TV Deregulation decision. NAB claims that in directing that the FCC consider the home shopping question, Congress wanted the decision to be made without regard to any prior actions concerning commercialization because it told the Commission to make its decision "notwithstanding prior proceedings...." NAB at 3-4.

But the NAB does not quote the entire statutory phrase on which its overly broad argument is based. As a complete reading of that sentence shows, Congress wanted the FCC to disregard only those prior proceedings which condoned home shopping. Specifically, Congress directed the FCC to re-examine the issue

notwithstanding prior proceedings to determine whether broadcast television stations that are predominantly utilized for the transmission of sales presentations or program length commercials are serving the public interest....

[Emphasis added]

There is, and can be, no dispute that any licensee could, or ever did, attempt a full-time home shopping format until commercialization guidelines were repealed in the 1984 TV Deregulation decision. Nor is there any doubt that the issue of whether full-time home shopping formats could be permitted under the public interest standard was not presented to the FCC until late 1986. See, e.g., Family Media, Inc., 2 FCC Rcd 2540 (1987), aff'd sub. nom., Office of Communication of the United Church of Christ v. FCC, 911 F.2d 803 (D.C. Cir. 1990) ("UCC"); Silver King Broadcasting of Vineland, Inc., 2 FCC Rcd 324 (1986), recon. denied, Press Broadcasting Co., 3 FCC Rcd 6640 (1988), aff'd, UCC, 911 F.2d at 812.

Thus, it is clear that the statutory reference to "prior proceedings to determine whether...[full-time home shopping] stations...are serving the public interest..." is a specific reference to the 1984 decision, and those which followed.

The legislative history bears out that this is the true intent of the quoted language. In the definitive Eckart-Dingell colloquy on Section 4(g), Rep. Eckart received affirmative confirmation that this inquiry was to be carried out "notwithstanding prior proceedings the FCC has conducted which may have permitted or had the effect of encouraging such practices." 102 Cong. Rec. E2908 (remarks of Rep. Eckart)[emphasis added].

Rep. Eckart's reference clearly shows that Congress wished a review of decisions per-
mitting or condoning home shopping, but it also makes plain that Congress did not intend the FCC to abandon all prior interpretations of the public interest standard. These are important and valid guideposts, which the Commission has failed to consider and follow in its finding that home shopping is in the public interest.

V. THE COMMISSION IMPROPERLY CONSIDERED EX PARTE COMMUNICATIONS IN MAKING ITS DECISION

SKC, et al. implicitly concede that the Commission's action was taken in reliance on ex parte presentations not properly part of the record. SKC at 11-13, JBC at 12-13, RBC at 12-13, HSN at 11-12. Thus, their primary emphasis is on a futile attempt to show that use of this matter was harmless error, and only served to amplify the arguments already in the record.

Id.

The facts are otherwise. No party cites to a single specific comment in the record that duplicates the content of the ex parte letters upon which reliance was placed, and CSC

respectfully submits that there are none.³ And even if this was not so, it does not change the fact that the Commission used these ex parte comments, and not those in the record, for decisionmaking.

Nor was this harmless error. Chairman Quello's was the deciding vote in this matter, and he clearly states that his decision was substantially based upon the impact that these ex parte materials had on him. In fact, an entire section of his separate statement is devoted to them. Quello Statement at 3. Thus, the taint of the ex parte letters is very real.

Furthermore, the parties were not given adequate notice to address them in contravention of the Commission's own rules. 47 CFR §1.1206(1)(1992). Whether they were eventually placed in the record is irrelevant; the fact remains that CSC and others did not get a chance to address the specific concerns raised in these communications.

VI. THE COMMISSION FAILED TO CONSIDER THE "DINGELL LETTER."

In response to CSC's argument that the FCC failed to consider the views of House Energy and Commerce Committee Chairman Dingell, SKC, et al. argue that Mr. Dingell's June 22, 1993 letter is not controlling. SKC at 13-14, JBC at 13-15, RBC at 13-15, HSN at 12-13.

Again, this is a mischaracterization of CSC's argument. CSC does not claim that the Commission must place decisional weight on the Dingell Letter, but that the Commission did not consider the letter at all. In light of its authoritative origin, the Commission's failure even to consider the letter is arbitrary and capricious, and the Commission should reconsider the

³The only citation offered to support the claim that they include is a general one to their own Comments. A reading of those Comments readily shows that the citation is not on point.

matter in light of the Dingell Letter.

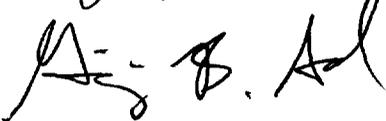
CONCLUSION

For the foregoing reasons, CSC submits that there are strong reasons for the Commission to grant its Petition for Reconsideration.

Respectfully submitted,



Andrew Jay Schwartzman



Gigi B. Sohn

Legal Intern:
Jason G. Wilson
UCLA School of Law

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MEDIA ACCESS PROJECT
2000 M Street, NW
Washington, DC 20036
(202) 232-4300

Attorneys for the Center for the Study of
Commercialism

CERTIFICATE OF SERVICE

I, Jason G. Wilson, hereby certify that copies of the foregoing "Reply to Oppositions to Petition for Reconsideration" were sent, on this 14th day of October, 1993, by mail, first class postage prepaid, to the following:

Henry Baumann
Jack N. Goodman
National Association of Broadcasters
1771 N Street, NW
Washington, DC 20036

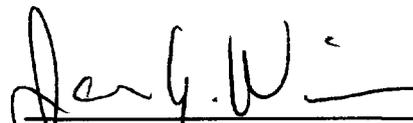
Steven Roberts
Roberts Broadcasting Corporation
1408 North Kings Highway
St. Louis, MO 63113

Joseph Stroud
Jovon Broadcasting Corporation
18600 S. Oak Park Avenue
Tinley Park, IL 60477

Alan Gerson, Esq.
Home Shopping Network, Inc.
2501 118th Avenue, North
St. Petersburg, FL 33716

Michael Drayer
Silver King Communications, Inc.
12425 28th Street North
St. Petersburg, FL 33716

John R. Feore, Jr.
Suzanne M. Perry
Dow, Lohnes and Albertson
1255 23rd Street, NW
Washington, D.C. 20036



Jason G. Wilson