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December 7, 1995

William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

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DEC - 7 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

**RE: Notification of Permitted Written Ex Parte Presentation
in IB Docket No. 95-168 and PP Docket No. 93-253**

Dear Mr. Caton:

American Satellite Network, pursuant to Section 1.1206(a)(1)-(a)(2) of the Commission's rules, hereby submits an original and one copy of this memorandum regarding a permitted ex parte presentation to Commission officials regarding IB Docket No. 95-168 and PP Docket No. 93-253.

On Monday, December 4, 1995, Leonard Schneidman, Michael Tannen and I met with Jane Mago, Senior Legal Advisor to Commissioner Rachelle Chong. The attached written material was delivered to Ms. Mago on December 7, 1995 as a follow-up to issues raised during that discussion.

Kindly direct any questions regarding this matter to the undersigned.

Sincerely,



Dennis R. Kanin

Attachments

cc: Jane Mago

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Ms. Jane Mago
Senior Legal Advisor to Commissioner Rachelle Chong
Federal Communications Commission
1919 M Street, N.W.
Room 844
Washington, D.c. 20554

**RE: Revision of Rules and Policies for the Direct Broadcast
Satellite Service (IB Docket No. 95-168, PP Docket No. 93-253)**

Dear Ms. Mago:

It was a pleasure meeting with you Monday to discuss American Satellite Network's ("ASN") concerns about fair access for independent programmers to cable-owned DBS systems.

During the course of our meeting, you asked us to consider whether applying common carrier rules to DBS services would be an appropriate remedy for ASN's concerns. Upon reflection, we have concluded that application of the Commission's common carrier rules to DBS would not resolve the channel capacity concerns of independent programmers.^{1/}

For the foreseeable future, the DBS industry faces transponder capacity constraints that will limit the number of programming services any DBS operator can carry. Given this fact, it is quite possible that any DBS operator, even as a common carrier, could allocate all of its transponder capacity to programming services in which it has an ownership interest or affiliation, thus freezing out independent program services from carriage. That is why ASN is seeking fair access rules for all DBS operators **and** extension of the

^{1/} We also question whether classification of DBS as a common carrier service is permissible within this proceeding under the Administrative Procedures Act without extensive additional Notice and Comment periods.

Ms. Jane Mago
December 7, 1995
Page 2

Commission's previously adopted cable channel capacity limits^{2/} to cable-owned DBS providers -- who, as cable operators have a history of favoring those program services in which they own an interest.

Given the timetable the Commission has set for itself in this proceeding, we believe extension of existing cable channel capacity limits to cable-owned DBS operators is the best, and most timely, approach for the Commission to adopt prior to its planned January 18, 1996 auction of the two remaining DBS orbital slots.

If it is not possible in this proceeding to extend existing cable channel capacity limits to cable-owned DBS operators we suggest that, at the very least, the Commission put potential cable industry DBS operators on notice that it will be monitoring their conduct as DBS providers. To that end, we recommend that the Commission adopt annual reporting requirements for all cable-owned or affiliated DBS operators^{3/} requiring annual disclosure of:

^{2/} 47 C.F.R. § 76.504. Those rules preclude vertically integrated cable operators from allocating more than 40% of their channel capacity to program services in which they own an attributable interest.

^{3/} Precedence for this exists in the soon-to-expire Primestar Consent Decrees. See United States v. PRIMESTAR Partners L.P. 1994-1 Trade Cas. (CCH) ¶ 70,562 (S.D.N.Y. 1994); State of New York ex. rcl. Abrams v. PRIMESTAR Partners L.P., 1993-2 Trade Cas. (CCH) ¶70,403 (S.D.N.Y. 1993). Those Decrees were entered in 1993 by Primestar Partners, L.P. and numerous other cable entities with the U.S. Department of Justice and the Attorneys General of forty states with the cable operators agreeing, *inter alia*, to submit annual reports to the Liaison States with respect to the cable entities' program ownership interests and distribution agreements; not to retaliate against or threaten retaliation against any programmer that provides or contemplates providing its programming to competing providers (e.g., DBS); not to withhold programming services controlled individually or collectively by the named cable operators from competing distributors; and not to engage in discriminatory practices against competing distributors (e.g., DBS program packagers and distributors). These Consent Decrees are scheduled to expire over the next two years. After that, unless the FCC

(continued...)

Ms. Jane Mago
December 7, 1995
Page 3

- all programming services in which the DBS operator has an interest;
- all national programming services with which the DBS operator has entered a company-wide distribution agreement during the past year;
- all programming services for which the DBS operator has any exclusive distribution rights;
- all programming, cable, and DBS assets that have been sold or transferred during the past year (including identification of the purchaser and the percent of cable or DBS system or programming assets transferred); and
- the percent of independent programming services carried by the DBS operator.

We believe these simple steps will go a long way towards ensuring a competitive and diverse DBS service. Thank you for your thoughtful consideration of these matters.

Sincerely,



Dennis R. Kanin



^{3/}(...continued)

acts now to preclude cable-owned DBS operators' abuse of their significant MVPD market power, those cable entities will once again be free to impose coercive terms and conditions on independent programmers' access to DBS carriage.