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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Direct Broadcast Satellite Public Service Obligations
MM Docket No. 93-25

Dear Mr. Caton:

The National Cable Television Association hereby submits corrected copies of its comments in the above-captioned proceeding. Page 7 was inadvertently omitted from our filing on April 28, 1997.

We request that the enclosed documents be substituted (containing page 7) for the original copies. No other changes have been made to the document.

Thank you for your attention to this matter and we regret any inconvenience.

Sincerely,

Loretta Polk

Loretta P. Polk

LPP:tkb

Enclosures

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Corrected Copy May 1, 1997

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 25	)	
of the Cable Television Consumer	)	MM Docket No. 93-25
Protection and Competition Act	)	
of 1992	)	
	)	
Direct Broadcast Satellite	)	
Public Service Obligations	)	

COMMENTS OF
NATIONAL CABLE TELEVISION ASSOCIATION, INC.

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April 28, 1997

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Television Association

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Public Service Obligations	)	

COMMENTS OF
NATIONAL CABLE TELEVISION ASSOCIATION, INC.

The National Cable Television Association, Inc. ("NCTA") hereby submits its comments in the above-captioned proceeding. NCTA is the principal trade association of the cable television industry in the United States. Its members include cable television operators serving over 80 percent of the nation's cable television households, over 100 national and regional program networks and other entities affiliated with the cable industry.

INTRODUCTION AND SUMMARY

In its public notice, the Commission seeks to update the record in its proceeding on Direct Broadcast Satellite ("DBS") public service obligations.[1] It recognizes that over the last four years since its Notice of Proposed Rulemaking ("Notice") was released, the then-

1 Public Notice on MM Docket No. 93-25, January 31, 1997.

fledgling DBS industry has soared. DBS is now a formidable competitor to cable television, doubling its subscribership from 2.2 million to nearly 4.4 million in 1996.[2] Industry estimates project DBS growth to exceed 20 million homes by 2001 -- or 23 percent of the multichannel video marketplace.[3] Clearly, DBS companies have the financial muscle and business acumen to continue to gain a substantial share of the video programming market in the near future.

In the face of increasing competition from DBS and other video providers, cable companies are investing hundreds of millions of dollars to rebuild their broadband networks for advanced applications and to convert their subscribers from analog to digital technology. Cable investment in programming and customer service too is at an all-time high. The industry is prepared to compete for market share on equal footing with its competitors. But it should not be weighed down with regulatory constraints that inhibit growth, while its competitors, offering comparable service, move about the multichannel video market unencumbered.

In particular, the recently-announced plans of a major DBS player to retransmit local broadcast stations as part of its programming packages poses a major regulatory

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2 Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, Third Annual Report, CS Docket No. 96-496 (1997) (figure excludes Primestar and C-Band satellite subscribership); Paul Kagan Associates, Cable TV Programming, July 31, 1996 at 1.

3 See Remarks of Preston Padden, President, Worldwide Satellite Operations, The News Corporation, February 24, 1997, at 10 (announcing SKY venture) ("Padden Remarks").

disparity.[4] This "local DBS provider" would look and act just like a local cable system and its product would be sold head-to-head with the incumbent cable product. But unlike cable systems, it would shoulder almost none of the regulatory burden under current law. Indeed, early signs show that this "local DBS provider" intends to take advantage of certain laws -- e.g. copyright rules applied to cable -- without incurring many of cable's numerous regulatory obligations.

In particular, cable operators must comply with a complex array of federal, state and local public interest obligations and other requirements that reach into every aspect of their business. Allowing a local DBS provider to avoid the kinds of public interest obligations imposed on cable -- e.g. must carry, program access, cross-ownership restrictions, local fees and taxes -- would create a competitive imbalance between cable and its competitors. This disparity would be inconsistent with the principle of regulatory parity and the procompetitive ends of the 1996 Telecommunications Act.

The Commission need not apply its regulatory hand in a statutory void. Here Congress has spoken -- §25 of the 1992 Cable Act sets up a dual scheme for DBS service obligations. Under §25(a), DBS providers must comply with "public interest or other requirements for providing video programming" imposed by the Commission. The provision also directs the Commission to examine opportunities for the "principle of

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4 "The Whole World in His Hands?", Washington Post, March 16, 1997; Testimony of Rupert Murdoch, Chairman and CEO, The News Corporation Ltd. before Committee on Commerce, Science and Transportation, U.S. Senate, April 10, 1997 ("Murdoch Testimony").

<u>localism</u>" and to regulate DBS providers to serve that goal.[5] Section 25(b) sets forth a requirement that DBS providers reserve 4 to 7 percent of their channel capacity for noncommercial, educational and informational uses. Thus, Congress not only directed the FCC to implement DBS's responsibility to set aside channels for noncommercial, educational programming, but it also gave the agency broad authority to regulate DBS providers delivering <u>local</u> service.

<u>We do not advocate unnecessary regulation -- indeed, promoting competition, not foisting regulation on others, is the better policy course. But in the interests of fair play, competing players, offering comparable service whether by wire or radio, should be subject to similar rules</u>.[6] Many of the obligations imposed on cable television -- <u>e.g.</u>, broadcast signal carriage rules, access channels -- have their genesis in localism concerns. Others, such as program access and cross-ownership restrictions address the public interest in forestalling potential anticompetitive behavior in the provision of video programming. The Commission should either eliminate the public interest obligations imposed exclusively on cable television or extend similar public interest obligations to "local DBS," <u>i.e</u>., DBS providers offering local broadcast signals, under §25(a).

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5 <u>See</u> <u>also</u> Senate Committee on Commerce, Science and Transportation, S. Rep. No. 102-92, 102d Cong. 1st Sess. (1991) at 92.

6 We note that Comments in Part I of this pleading are only addressed to local DBS, that is DBS service equivalent to cable service through the retransmission of local broadcast signals.

In this regard, it should not grant local DBS providers wide latitude in meeting the 4-7 percent noncommercial, educational channel set aside in §25(b), while cable operators must devote equally valuable channel space for public, educational, governmental access, and leased access programming comprising a larger portion of their systems. Rather, local DBS providers should be required to dedicate specific channels, as cable does, to noncommercial educational use and should be subject to leased access requirements -- or these requirements should be substantially lifted from cable.

In short, we urge the Commission to exercise its authority under §25 in a competitively neutral manner by ensuring that its rules result in regulatory parity for similarly-situated multi-channel video providers.

DISCUSSION

I. THE COMMISSION SHOULD IMPOSE PUBLIC INTEREST AND OTHER OBLIGATIONS ON LOCAL DBS PROVIDERS THAT ARE COMPARABLE TO CABLE TELEVISION'S OBLIGATIONS

Congress enacted a two-pronged scheme for DBS public interest and other obligations in §25 of the 1992 Cable Act.

First, §25(a) directs the Commission to impose on DBS providers *public interest or other requirements* for providing video programming that must include, at a minimum, the political broadcasting requirements in §312 and §315 of the Communications Act.[7] The provision further instructs the Commission to "examine the opportunities that the establishment of direct broadcast satellite service provides for the principle of *localism*

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[7] 47 U.S.C. §335(a)(emphasis added).

under this Act", and how this principle may be served by technological developments and regulation of such service.[8]

Second, §25(b) imposes carriage obligations on DBS for noncommercial, educational or informational programming. DBS providers are required to reserve between 4 to 7 percent of their channel capacity exclusively for national suppliers of noncommercial educational programming. The provider must make capacity available on reasonable terms and conditions and exercise no editorial control over the content. As discussed in part II, this channel reservation requirement -- which is reminiscent to cable's public, educational and governmental access (PEG) channel requirements -- should not be loosely enforced while cable operators must comply with more rigid PEG and leased access set aside requirements.

With respect to 25(a), the Commission tentatively concluded four years ago that, given DBS's early stage of development and the discretion accorded the agency in implementing DBS's public interest obligations (only compliance with political broadcasting rules was specified), it would not consider any other regulation at that time.[9] It believed that the noncommercial, educational channel set aside in §25(b) satisfied the public interest obligations of nationwide DBS providers. It also found that its mandate to consider opportunities for localism was limited by DBS' national coverage area and

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8 Id.

9 Notice at ¶29.

national mode of programming. But the Commission noted that *"any regulations regarding DBS and localism would necessarily depend upon whether it is technically possible and economically feasible to provide local DBS service."*[10] Accordingly, the Commission reserved the right under the Act "to impose additional obligations in the future should they be warranted."[11] That time may now have arrived.

It appears that DBS is no longer "inherently unsuitable for the provision of traditional local broadcast service."[12] According to a planned new DBS venture, it is not only technologically and economically feasible for nationwide DBS providers to deliver local broadcast stations to individual communities, but a major media company is seeking federal regulatory approval of this proposal.[13] Beginning this fall and then launching a spot beam satellite next year, one DBS provider -- an owner of local broadcast outlets -- intends to provide U.S. households with local broadcast service.[14]

It is just this kind of local DBS service -- the retransmission of local broadcast stations -- that has been the cornerstone of many localism obligations imposed on cable, including must carry[15], syndicated exclusivity and network nonduplication[16] rules. And

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10 Notice at ¶36 (emphasis added).

11 Notice at ¶29 and ¶36; see Public Notice at 2.

12 NAB v. FCC, 740 F.2d 1190, 1197 (D. C. Cir. 1984).

13 Library of Congress, Copyright Arbitration Royalty Panel, Satellite Rate Adjustment, Docket No. 96-3-CARP, Transcript of Preston Padden testimony April 15, 1997. ("Padden testimony").

14 Murdoch testimony at 2-3; Padden testimony at 3579-82.

15 1992 Cable Act, §2, Congressional Findings 7-19; Turner Broadcasting System, Inc. v. FCC, 65 U.S.L.W. 4208 (U.S. March 31, 1997) (No. 95-992); Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434

it is just the kind of "opportunity for localism" that Congress had in mind in directing the Commission to adopt such obligations for local DBS under §25(a).

But if the Commission determines that local DBS systems are excused from significant public interest obligations, then cable should receive similar regulatory relief. In no event should the Commission accept vague pronouncements about local DBS self-regulation of its public interest obligations (or requests for unfettered flexibility in complying with the noncommercial educational channel reservation), while cable operators must comply with stringent FCC rules.[17] Regulatory parity demands an even-handed approach to this issue.

A local DBS provider is already seeking to gain an unfair advantage over cable operators by urging Congress to amend the 1976 Copyright Act in the absence of the regulatory predicates that accompanied cable's compulsory license. Its goal is to obtain a royalty-free compulsory copyright license to retransmit local network stations comparable to the compulsory license that governs the retransmission of local stations by cable systems. We believe that given the historical antecedents of the cable compulsory license, any change in the Copyright Act to grant DBS a compulsory license should be

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(1985) (discussing pursuit of "localism" as preserving free, locally-oriented broadcasting in a national broadcasting system)

16 See e.g. Syndicated Program Exclusivity, Report and Order, Docket No. 20988, 79 FCC 2d 663, 672-73 (1980).

17 See e.g. Transcript of U.S. Senate Committee Hearing, Competition in the Cable Television Industry, April 10, 1997 at 22, 69, 103 ("Transcript").

accompanied by a balanced application of other regulations that currently apply only to cable operators.[18] As described below, these regulations represent a significant restriction on cable operators' ability to control their channel capacity, develop differentiated product, and own co-located media.[19] They also exact substantial costs on cable operations, resulting in unwarranted competitive inequities.

A. Broadcast Signal Carriage Rules

From the early stages of cable's development in the 1960s, the Commission imposed a complex scheme of regulations to protect broadcasting service from competition from cable television, on the theory that such regulation was necessary to ensure a diverse and community-oriented broadcast service.[20] This "localism" concern is the driving force behind many of cable's regulatory obligations -- even in today's diverse and robust video marketplace.

1. Must Carry

Under the recently-upheld must carry rules, cable operators are required to set aside *up to one-third of their capacity* in each market for commercial broadcast stations

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18 See Written Statement of NCTA, U.S. Copyright Office, Revision of the Cable and Satellite Compulsory Licenses, Docket No. 97-1, April 28, 1997.

19 Cable systems also must comply with FCC rules on EEO, closed captioning, emergency alert systems, commercial limits for children's programming, lottery restrictions, signal quality requirements, and customer service requirements.

20 See Cable Television Report and Order, 36 F.C.C.2d 143, *recon.*, 36 F.C.C.2d 326 (1972), *aff'd sub nom.* American Civil Liberties Union v. FCC, 523 F.2d 1344 (9th Cir. 1975).

and, in addition, must carry *all* qualified noncommercial broadcast stations.[21] In the top 20 markets, for example, this means that cable systems must occupy up to 22 channels with commercial and noncommercial stations, including little-watched independents.[22] Local multichannel DBS competitors, on the other hand, want to be able, in the absence of must carry, to select only the most-desired stations for their alternative local program package. Forcing cable operators to compete with such pick-and-choose providers would be grossly unfair. Indeed, a recent proposal by a DBS company to skim the "best originated PBS material" for one national channel -- while cable operators must devote capacity for all qualified noncommercial broadcasting stations in a market -- demonstrates the potential impact of disparate regulatory treatment.[23]

The Commission imposed must carry requirements on cable early in its history as a means to "channel the growth of cable in a manner consistent with the public's interest in the preservation of local broadcasting."[24] And in 1992, Congress codified mandatory carriage rules for cable systems, finding that absent must carry, "the economic viability of free local broadcast television and its ability to originate quality local programming will

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21 Turner Broadcasting System v. FCC, 65 U.S.L.W. 4208 (U.S. March 31, 1997) (No. 95-992) ("Turner").

22 Warren Publishing, Television and Cable Factbook, Stations Volume No. 65, 1997 Edition.

23 Transcript at 43-44.

24 Quincy Cable TV v. F.C.C., 768 F.2d 1434,1442 (1985); see also 768 F.2d at 1454 (noting the Commission's view that must carry rules serve the interest of preserving free, locally-oriented television and goal of "localism"). As we have noted, must carry was imposed on cable despite its nascent development, while DBS penetration (especially given the advantage of a national footprint) is expected to be much faster than cable's penetration.

be seriously jeopardized."[25] In the 1997 Turner decision, the U.S. Supreme Court concluded that the record supported Congress' predictive judgment that the must carry provisions are necessary to further the important governmental interest in localism.[26] If must carry is to preserve local broadcasting and protect local, non-multichannel video viewers' interests, then local DBS carriage of must carry signals is just as important as cable carriage. The must carry rules should, therefore, be applied to local DBS providers in furtherance of Congress's localism directive in §25(a).

As the Commission is well aware, the cable industry fought long and hard against the must carry regime as an impermissible intrusion on cable operator and cable programmer First Amendment rights. We are still opposed to mandatory carriage rules. But now that the Supreme Court has determined that the current must carry scheme withstands constitutional scrutiny, it is only fair that it be applied to functionally equivalent local DBS providers. If cable systems must bolster marginal broadcast stations with carriage -- irrespective of viewer preferences and the reduced availability of channel capacity for nonbroadcast programming services -- then, in the public interest, local DBS providers entering local markets should be required to do the same.

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25 1992 Cable Act, §2, Congressional Findings at 16.

26 See also Turner Broadcasting System v. F.C.C., 512 U.S. 622, 114 S.Ct. 2445, 2469 (1994).

Must carry and the other signal carriage rules were part of a regulatory compromise that led to the adoption of the cable compulsory license.[27] This linkage is not severed, as suggested by some, because wireless cable or MMDS is not subject to must carry even though it has a statutorily approved compulsory license to retransmit local broadcast stations.[28] While the cable industry has voiced concerns about regulatory parity vis-a-vis MMDS, we generally did not object to wireless cable's exclusion from must carry requirements because the constitutionality of the rules was in doubt over the course of the ten-year court battle. Moreover, it is only recently that digital MMDS has become viable. It is far from clear that Congress would reach the same result regarding MMDS' entitlement to the compulsory license without broadcast signal carriage obligations in today's environment.

In sum, the Commission has broad authority under §25(a) to, and should, impose must carry requirements on local DBS providers consistent with the statutory goal to serve localism.

2. Syndicated Exclusivity, Network Nonduplication, Sports Blackout Requirements

The syndicated exclusivity, network nonduplication, and sports blackout rules restrict cable's provision of certain broadcast programming. Under the rules, a local

27 "The Cable and Satellite Carrier Compulsory License: An Overview and Analysis," A Report of the Register of Copyrights (March 1992); H.R. Rep. No. 94-1476, 94th Cong. 2d Sess. 89 (accompanying 1976 Copyright Act).

28 Padden testimony at 3740-58.

broadcast station with exclusive rights to a program may require a cable system in its area to delete the same program on a distant signal carried on the system. Again, these rules go to Congress' localism concerns -- expressly focused upon in the Commission's 1993 Notice. There is no difference to the owner of syndicated programming, a local network affiliate, or a local sports team -- the beneficiaries of these rules -- whether a customer is lost because the distant signal which causes the loss comes from a cable system or an overhead transponder. As with must carry rules, either a DBS service which retransmits local broadcast signals should be subject to syndex/network nonduplication and sports blackout requirements or these requirements should be lifted from cable.

B. Program Access

Among other obligations imposed on cable are the program access rules. Under the 1992 Cable Act, vertically-integrated satellite cable programmers are required to offer their services to other distributors on non-discriminatory terms and conditions.[29] DBS providers benefit from these rules; cable operators do not have similar access to DBS programming. The cable industry must make its programming available to its competitors; DBS companies are free to create *exclusive* programming networks. In the highly competitive video marketplace, this is an enormous edge.

The same public interest policy rationale that led Congress to enact the program access provisions -- to prevent vertically-integrated cable companies from engaging in

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29 47 U.S.C. §548.

unfair acts or practices regarding the availability of their programming to competitors -- applies with equal force to "local DBS" companies that own local television stations and programming networks.

Indeed, Congress recognized the dichotomy of the program access scheme as applied to multichannel video providers when it extended program access requirements to telephone companies and open video systems in the 1996 Telecommunications Act.[30] The Commission should not give local DBS a windfall of this magnitude at the expense of cable and other video providers. Program access rules should be adopted for "local DBS providers". Alternatively, the whole program access scheme should be repealed.

C. Cross-Ownership Restrictions

In the 1996 Telecommunications Act, Congress eliminated the statutory ban on cable/broadcast station ownership in co-located areas, enabling the Commission to modify or repeal its cross-ownership restriction.[31] The Commission is reexamining its cross-ownership and attribution rules to encourage investment in the affected media where such investment does not present a significant threat to the policy interests that underlie the various cross-ownership restrictions.[32]

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30 1996 Telecommunications Act,§301(h), adding §628(j).

31 47 C.F.R. §76.501.

32 Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, et. al., MM Docket Nos. 94-150, 92-51, 87-154.

The issue of the continuing need for the cable/broadcast station cross-ownership ban may be ripe for review. But for now cable operators are prohibited from owning a broadcast station in their service area. Local DBS providers that hold an attributable interest in broadcast outlets serving the same geographical area as their local DBS service would not be subject to the restriction. As we pointed out in our recent comments in the attribution and cross-interests rulemaking, there is no rational policy basis for banning cable-broadcast cross-ownership while allowing functionally identical DBS-broadcast cross-ownership arrangements to go forward.[33] The Commission should either remove the ban on cable/broadcast station cross-ownership or adopt a local DBS/broadcast station cross-ownership ban.

That DBS and cable cross-ownership is not prohibited has nothing to do with restrictions on cross-ownership of local broadcast stations.[34] The cable/broadcast station cross-ownership ban concerns perceived incentives by a company owning both a cable system and a broadcast station in the same area to discriminate against unaffiliated stations in favor of the co-owned station. Why would a local DBS provider -- which

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33 Id., NCTA Reply Comments, March 21, 1997 at 7.

34 The Commission has already considered and rejected proposals to adopt a cable/DBS cross-ownership restriction. It found that its structural rule restricting ownership of orbital locations was satisfactory to spur adequate competition within the DBS marketplace and among multichannel video providers overall. The Commission reasoned "competition involving full-CONUS DBS operators should . . . constrain a cable-affiliated DBS operator from positioning its services in a manner that avoids competition with cable systems." Revision of Rules and Policies for the Direct Broadcast Satellite Service, Report and Order, IB Docket No. 95-168, PP Docket No. 93-253. Moreover, in the 1992 Cable Act, Congress rejected a DBS/cable cross-ownership ban.

owns local broadcast outlets -- have any different incentive to discriminate than a local cable operator? The obvious answer is that the Commission has no reason to differentiate between the two relationships.

D. Local Taxation and Other Fees

Taxation is another area where the cable industry may be at a competitive disadvantage to local DBS. Many cable systems are required to pay local taxes in their service areas *in addition* to franchise fees. These sales, gross receipts, use and other local taxes generally range from 1 to 5 %. For example, in Kansas, cable systems on average pay a 1.5-2.5% local sales tax on their service. Other local jurisdictions that levy similar taxes include Florida (up to 1.5 % sales tax); Colorado (1-4%); South Carolina (up to 1% sales tax) and Texas (up to 2 % and a higher rate in some special districts). In the District of Columbia, District Cablevision pays a *10%* gross receipts tax *on top of* its 5% franchise fee.

Although the 1996 Act exempts DBS providers from local taxation, the provision did not contemplate a *local* DBS service and was evidently drawn to cover only nationally distributed satellite services.[35] Once a DBS company provides local service in individual communities, there is simply no reason it should be immune from non-

35 1996 Telecommunications Act, §62(a). Under this provision, DBS providers are exempt from the collection or remittance of any tax or fee imposed by a local taxing jurisdiction, including any local sales tax, use tax, local intangible tax, local income tax, business license tax, utility tax, privilege tax, gross receipts tax, excise tax, franchise fee, local telecommunications tax or any other tax imposed for the privilege of doing business, regulating or raising revenue for a local taxing jurisdiction. Id. at §602(b)(5).

discriminatory local fees and taxes. Exempting such providers from local taxation would only enhance their artificial advantage over incumbent cable operators.

Even state legislators are concerned about the potential loss of revenue and competitive implications of DBS's exclusion from local taxation, acknowledging that cable companies "could be placed at a significant disadvantage if their new competitors are able to escape taxation while they continue to pay."[36]

In addition to the potential tax inequities, local DBS providers could enjoy a 5% revenue advantage over cable in light of cable's franchise fee obligations (up to 5% of gross revenues). In 1996 alone, cable companies paid franchise fees of $1.4 billion to state and local governments.[37] Local governments also require cable systems to meet a host of other requirements as a condition of the franchise, including funding cable access corporations, providing access facilities and equipment, and serving public buildings and other institutions with free cable service. Open video systems too are subject to fees on their gross revenues from the provision of cable service, as well as other cable obligations

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36 "Taxing the Superhighway", State Legislatures, publication of National Conference of State Legislatures, February 1997. See e.g. "Sales Taxation of Telecommunications Service in the State of Utah", The Policy Research Center, Georgia State University, May 10, 1996 at 40-42, 70 (describing potential discriminatory taxation of cable programming services versus other providers of similar services, such as DBS, and arguing that similar services should be taxed similarly under the general sales tax); Florida Telecommunications Taxation Task Force, Report to the Governor and the Legislature, February 1997 at 11(discussing equal taxation of providers of similar services).

37 Based on revenues compiled in Paul Kagan Associates, The Cable TV Financial Databook, 1996 at 11.

(e.g., must carry, PEG and leased access, cross-ownership, program access and carriage agreements).

While cable franchise costs may be passed through to consumers as external costs in a non-competitive market, it has little effect on price-conscious consumers able to purchase service from a competitor whose rates do not include such costs.

It may be argued that cable pays franchise fees exclusively for the use of rights of way. But, in fact, the fee was originally intended to recompense franchisers for the cost of administering the franchise, not solely to pay for rights of way. With the 1984 Act's 5 percent cap, the fee is no longer even tied to administrative fees.[38] It is in many respects simply a cost of doing local business.

Further, the argument that fees paid at spectrum auction cover the same ground as franchise fees is unavailing. Cable systems incur numerous costs acquiring franchises in expensive competitive battles. Cable does not use spectrum, but it must pay for every mile of its distribution system. DBS auction winners have spectrum acquisition costs, launch costs and uplink and space segment costs. These costs are comparable to cable's acquisition and construction costs, not to cable's ongoing sales tax and franchise fee requirements.

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38 Indeed, Chairman Hundt has observed that "[T]here is no question 'that cable franchise fees exceed the costs of regulating cable at the local level "by a large amount."' See Responses of the Federal Communications Commission to Post-Hearing Questions of the Senate Committee on Science, Commerce and Transportation, June 18th Hearing on FCC Oversight, September 30, 1996.

E. Leased and Public, Educational and Governmental (PEG) Access

Since 1984, cable operators have been required to set aside 10 to 15 percent of their capacity for unaffiliated leased access programmers. The commercial leased access requirement arose out of concern that cable operators might deny access to programming sources that competed with or otherwise differed in viewpoint from their affiliated program offerings. [39]

We believe that leased access has outlived its usefulness in today's diverse, programming-rich environment -- 165 national program networks (compared to 48 in 1984), approximately 66 of which have no cable ownership interest -- and given the variety of alternative distribution media.[40] But to the extent commercial leased access requirements are retained for cable, they should be imposed on multichannel local DBS providers. With no similar leased access requirement, local DBS providers are able to fill that space with additional program services of their, and their customers', choosing. Cable would be denied that opportunity, creating yet another competitive inequality as well as resulting in a product that is less valued by the cable customer.

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39 P.L. 98-549, §612(a), 47 U.S.C. §532.

40 To the extent concerns remain about unaffiliated entities' access to cable, the 1992 Cable Act addresses this issue by imposing rules that, among other things, limit the number of channels that can be occupied by programmers affiliated with the cable operator, ensure that operators can not demand a financial interest in return for carriage and can not unfairly discriminate against unaffiliated programmers, and require the carriage of broadcast stations.

In addition to reserving leased access capacity, cable operators are obligated to designate channel capacity for public, educational, or governmental use as part of their franchise.[41] PEG channels are designed to provide local outlets for groups and individuals who generally have not had access to the electronic media[42] and to that extent are somewhat analogous to the noncommercial, educational set aside requirement for DBS in §25(b). DBS providers are authorized, however, to charge for use of the channels within certain limits. As discussed in Part II, the Commission should interpret the 4-7 percent set aside in a manner that, at a minimum, is comparable to cable's PEG requirements.

II. THE COMMISSION SHOULD NOT GRANT LOCAL DBS PROVIDERS BROAD FLEXIBILITY IN MEETING THEIR CHANNEL RESERVATION REQUIREMENT UNLESS CABLE'S STRINGENT SET ASIDE REQUIREMENTS ARE LIBERALIZED OR LIFTED

Apart from its rulemaking authority over local DBS providers in §25(a), the Commission is authorized to implement a 4 to 7 percent channel reservation requirement for noncommercial, educational and informational programming in §25(b). As noted above, this provision is somewhat analogous to cable's obligation to provide PEG channels. But PEG channels are provided free, are not subject to any statutory limits on the number of channels that a franchisor may require, and are frequently accompanied by

41 47 U.S.C. §531.

42 H.R. Rep. No. 934, 98th Cong., 2d Sess. (1984). See also Time Warner Entertainment Company, L.P. v. FCC, 93 F.2d 957 (D.C. Cir. 1996).

requirements to provide facilities and equipment. Most importantly, the *combined* PEG and leased access requirements put significant burdens on a cable operator's ability to program its channels and provide new services.

In its 1993 Notice, the Commission tentatively concluded that given the nascent DBS industry, the 4-7 percent channel set aside was sufficient to satisfy the entire public interest obligations of DBS providers. In light of the planned local DBS service, the Commission is rightly taking a second look. Plainly, under the statute, Congress did not intend for the noncommercial set aside to encompass all of DBS's public interest obligations when this service, like cable, could technologically and economically serve the long-standing principle of localism. And, in the interests of regulatory parity, the 4-7 percent channel reservation requirement alone is not enough for local DBS providers when cable systems are held to a much higher public interest standard.

The Commission seeks comment on how to determine the percentage or number of channels that should be reserved for noncommercial use and how to calculate the requirement, i.e., discrete channels or percentage of cumulative time reserved for noncommercial use. In setting the percentage requirement, we urge the Commission to be mindful of cable's PEG channel responsibilities, which range from 6 percent to as high as 16 percent of channel capacity in some communities. In Fairfax, Virginia, for example, Media General's franchise requires 19 of its 120 channels to be set aside for PEG access or approximately 16 percent of its capacity (12 are now currently used with 1 to be added in May). The Time Warner system in Manhatten has 10 PEG channels in its 77-channel system (13%) and its Philadelphia system has 12 of its 82 channels reserved for PEG (15%), eight of which are currently used. The TCI system in San Francisco has three PEG channels in a 54-channel system (6%).

We urge the Commission to interpret the 4-7 percent set aside in a manner at least comparable to cable's PEG obligations. Specifically, the Commission should not grant DBS broad flexibility where cable must comply with specific PEG and leased access requirements. For example, in meeting its set aside requirement, a DBS provider should not be permitted to count established national noncommercial services that a customer would expect to receive as part of a multichannel package. Thus, DBS providers should not get credit toward the 4-7 percent channel set aside by creating a national PBS service (and discriminating against the local public television stations and their local programming) while cable operators must carry virtually all PBS stations in the relevant market.

DBS providers also should not have the flexibility to bury their noncommercial educational and informational programming in dayparts with little audience reach, while cable operators must dedicate *discrete* channels for PEG on a full-time basis. Similarly, permitting DBS providers to phase-in their channel reservation requirement would be unfair to cable operators.

As with the public interest obligations for local DBS providers described in Part I, noncommercial educational channel set asides should be applied evenly for DBS and cable multi-channel providers.