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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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APR 28 1997

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
)  
Implementation of Section 25 )  
of the Cable Television Consumer )  
Protection and Competition Act )  
of 1992 )  
)  
Direct Broadcast Satellite )  
Public Service Obligations )

MM Docket No. 93-25

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FEDERAL COMMUNICATIONS COMMISSION  
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COMMENTS OF DAETC, et al.

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## SUMMARY

Congress imposed public service obligations on DBS operators in 1992. Although the FCC has not yet implemented those requirements, DBS providers have used their exclusive access to publicly owned spectrum to deploy an increasingly competitive video service. The time has come for the public to realize the public service dividend to which it is entitled by law.

DBS has unlimited potential to educate and inform Americans of all ages and socioeconomic background, wherever they may live and work. However, this will happen only if the FCC follows the unusually specific mandates contained in Section 25 of the 1992 Cable Act. Thus, the Commission should now recognize the interests of citizens, including the needs of non-profit programmers, parents, viewers and candidates in the following ways:

- DBS providers, at a minimum, must provide "reasonable access" and equal opportunities for *all* eligible candidates for public office.
- DBS providers must reserve between 4-7% of their capacity for "*noncommercial*" educational and informational programming.
- Only public or nonprofit entities should occupy "*noncommercial*" capacity.
- DBS providers must be prohibited from exercising "*any* editorial control" over this capacity.
- The "direct costs" that determine how much a DBS provider may charge a programmer to use Section 25(b) must be based only on the costs of transmitting the signal to the uplink facility and the direct costs of uplinking the signal to the satellite.
- Sections 25(a) and 25(b) are to be treated as *separate* requirements.

With respect to the overall public interest obligation established in Section 25(a), the Commission should include a requirement that DBS providers reserve 3% of their capacity for public interest programming of their choice, provided that no less than 1% of that capacity is used for children's educational and informational programming. Moreover, DBS providers should be required to comply with the EEO provisions of 47 USC §634.

Section 25(a) also mandates equal opportunities for *all* political candidates, and "reason-

able access" for *all* federal candidates. This means DBS providers may not segregate candidates on a single channel or unreasonably refuse to provide candidates access to a requested time and channel. The FCC should preempt any contractual agreements with programmers which are inconsistent with these preexisting statutory duties,

Section 25(b), the second part of the statute, requires DBS providers to reserve capacity for "noncommercial programming of an educational and informational nature." The best guidelines to define "noncommercial" are those already set out in Sections 399A and 399B of the Communications Act, and in the FCC's various policy statements interpreting them. These guidelines permit underwriting, pledge drives and program related sales, but prohibit paid advertising.

Since Congress adopted language from terrestrial broadcasting for determining which entities should be permitted to use Section 25(b) capacity, the Commission should use its established guidelines for this purpose as well. These definitions would permit use of Section 25(b) capacity by many different entities to providing various kinds of services, but they have one important common denominator - the entity must be public, and/or nonprofit.

In determining the amount of capacity a DBS provider must set aside, the Commission must look to the size of the system. Larger systems must be required to set aside the full 7% of capacity contemplated by Congress. The first 4% of any system's capacity must be reserved exclusively for noncommercial programming. If, after a good faith effort, the capacity above 4% cannot be filled with noncommercial programming, it may be made available for educational and informational programming provided by a nonprofit that is no more than 80% commercial in nature. Moreover, programmers should be limited to one full-time channel on the collective 25(b) capacity, or, in the case of part-time programmers, to 5% of the total program time.

Section 25(b) unambiguously prohibits DBS providers from exercising editorial control

over programming carried on the reserved capacity. To meet this stricture, the Commission should require DBS providers to create and fund an independent non-profit Programming Consortium to select this programming. To help finance this organization, the Commission should allow DBS operators' channel capacity obligation to be reduced by one channel for every 0.5% of gross revenues provided to the consortia. Because DBS providers will have no editorial control, they should be immune from any liability caused by this programming, much as broadcasters are immune from liability for candidate advertisements.

In setting rates for using Section 25(b) capacity, the Commission must keep in mind Congress' intent to make Section 25(b) affordable for nonprofit and public programmers. While the Commission is permitted to set rates at a maximum of "direct costs," it should set them so that the cost of access is at, or near, zero. Congress specified that these costs may include "*only*" the costs of transmitting the signal to the uplink facility and the direct costs of uplinking the signal to the satellite.

Finally, since DBS providers have been on notice for over four years, there can be no grandfathering of contracts inconsistent with Section 25(b). Instead, the Commission should require DBS providers to implement Section 25(b) obligations within 45 days after it adopts final rules.

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COMMENTS OF DAETC, *et al.*

The Denver Area Educational Telecommunications Consortium, Inc., A\*DEC, American Psychological Association, Association of Independent Video and Filmmakers, the Benton Foundation, Center for Media Education, Peggy Charren, Community Technology Centers' Network, Consumer Federation of America, Media Access Project, Minority Media and Telecommunications Council, National Association of Elementary School Principals, National Association of School Psychologists, National Federation of Community Broadcasters, National Writers Union, Office of Communication of the United Church of Christ, Public Access Corporation of the District of Columbia and Self Help for Hard of Hearing People (DAETC, *et al.*) respectfully submit these comments to the *Public Notice*, FCC No. 97-24 (released January 31, 1997) in this docket. The Public Notice seeks to "refresh the record" of the Commission's rulemaking to impose public interest and capacity set-aside obligations pursuant to Section 25 of the 1992 Cable Act, 47 USC §335. *Notice of Proposed Rulemaking*, 8 FCC Rcd 1589 (1993) (1993 NOPR).

INTRODUCTION

DBS has unlimited potential as a vehicle to educate and inform Americans of all ages and socioeconomic backgrounds, wherever they may live and work. However, the extraordinary

possibilities of DBS can be fully realized only if the Commission follows the unequivocal dictates of Congress in Section 25 of the 1992 Cable Act. Section 25 requires the Commission to make DBS an *affordable* and *accessible* multichannel medium, free from the DBS provider's editorial control, for *noncommercial* educational and informational telecommunications services provided by public and nonprofit institutions. For the past five years, the DBS industry has been encouraged to grow its business, using publicly-owned airwaves, without having to provide any service dividend as recompense to the public. The time has now come for the public to start to realize a return on its investment.

The Commission first began its inquiry into the public interest and capacity set-aside obligations of broadcasters over 4 years ago, on March 2, 1993. At that time, only one Ku Band satellite service (Primestar) had commenced operations, providing just "seven superstations, three pay per view channels and one foreign language channel to viewers in a limited geographic area." *1993 NOPR* at 1589. The status of DBS was further complicated by a legal challenge to various sections of the 1992 Cable Act, including Section 25, which resulted in a four year delay in the Commission's consideration of these obligations. *Time Warner Entertainment Co. v. FCC*, 93 F.2d 957 (DC Cir. 1996), *reh'g denied*, No. 93-5349 (D.C. Cir., February 7, 1997). Today, there are 5 operational Ku Band systems. A sixth, ASkyB, is soon to launch. Most of the operational systems offer 100 channels or more of video and audio programming.

Thus, uncertainties about DBS underlying the Commission's proposals in the *1993 NOPR* have now abated. For example, Commission now has a much clearer picture of how DBS technology really works, how much it costs, who exercises control over programming, and how capacity is measured. More importantly, the Commission now knows that DBS can survive, and

perhaps even thrive, as a multichannel mass medium. DBS now has over 4 million subscribers, a number that could increase significantly with the advent of "spot beam" technology that permits carriage of over-the-air broadcast stations and new antenna technology that greatly improves over-the-air reception for users.

Therefore, there is no longer any reason for the Commission to delay adopting regulations to define the public service obligations of DBS providers.<sup>1</sup> Despite an eleventh hour legal challenge by the industry's trade association, the DBS industry is well aware of Congress' mandate in this area, and has had ample time to prepare for it.

Indeed, some DBS providers see Section 25 as an opportunity, rather than a burden, because it will distinguish DBS as a multichannel medium that seeks to educate and inform. DAETC, *et al.* couldn't agree more. Properly implemented, the capacity set-aside requirements of Section 25(b) will provide national access, for the first time, to educational institutions, educational programmers and local public television stations, and will extend the reach of national educational entities such as the Public Broadcasting Service. Many of these institutions could use this capacity for distance learning,<sup>2</sup> low cost internet access, community radio,<sup>3</sup> and video

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<sup>1</sup>Under Section 25, public service and capacity set-aside obligations are imposed on a "provider of DBS service." Section 25(b)(5)(A) defines that term as a "licensee for a Ku-band satellite system under part 100" of the FCC's regulation, or "any distributor who controls a minimum number of channels...for the provision of video programming directly to the home and licensed under part 25" of the Commission's regulations. 47 USC §335(b)(5)(A).

<sup>2</sup>Commenter A\*DEC is a nonprofit consortium of 50 Land Grant Colleges and Universities that provides traditional distance learning in areas such as food and agriculture; and natural resources and environment. A\*DEC's members also provide programming on such topics as nutrition and health; parenting and child development; personal finance; youth development; horticulture and gardening; and community/civic development.

programming that otherwise would only be viewed on PEG access channels in a handful of communities.<sup>4</sup> Importantly, this digital capacity need not be used for one-way video. It is also possible to use it for interactive video and data and digital radio. These wide-ranging opportunities far exceed the reach and scope of cable access channels hobbled by cable operators' reluctance to fulfill their contractual and legal obligations, and their unwillingness to embrace any broader sense of mission to assist the communities in which had welcomed them as public service partners.<sup>5</sup>

Similarly, Section 25(a) provides opportunities for public service not seen on any other multichannel medium. Under the public interest obligations of Section 25(a), a DBS operator can choose to meet this requirement in a number of ways, including, perhaps, providing a secure home for C-SPAN, which has become the mistreated stepchild of the cable industry, or by providing several channels of children's educational and informational programming. Candidates for President could receive cross country access for their messages in one shot.

Now that it has become a serious player in the market for multichannel entertainment, news, information and civic discourse, DBS is ready to assume its public responsibilities. The

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<sup>3</sup>Commenter NFCB's members, for example, could use DBS capacity to broadcast "Linea Abierta," a daily Spanish language talk/call-in program; "Native America Calling," a talk/call-in show dedicated to issues affecting Native Americans; "High Plains News," a weekly news magazine; as well as award-winning entertainment programs, radio dramas and documentaries produced at stations around the country.

<sup>4</sup>Commenter DAETC operates, *inter alia*, "Free Speech TV," a progressive television program service that is carried mostly on public and educational access channels.

<sup>5</sup>Indeed, only 16.5% of cable franchises have public, educational and governmental (PEG) channels. Pat Aufderheide, "Cable Television and the Public Interest," 42 *Journal of Communication* 52 (1992). Moreover, some cable operators are now insisting that they want to take over those channels for their own use in the future. Jim McConville, "Access channels a hot commodity," *Electronic Media*, March 3, 1997 at 1.

Commission must ensure that they are meaningful. Congress demanded no less.

**I. THE PLAIN LANGUAGE OF SECTION 25 SETS STRICT PARAMETERS FOR DBS PUBLIC INTEREST AND CAPACITY SET-ASIDE OBLIGATIONS.**

For much of the past year, counsel for DAETC, *et al.* has been engaged in discussions with the DBS industry and Commission staff over the possible scope of public interest and capacity set-aside obligations for Direct Broadcast Satellite. Many of these interactions have been fruitful - a number of the major industry players appear willing to think creatively about how the Commission should fulfill the mandate of Section 25.

At times, however, there appears to be a collective blindness about the clear parameters set by Congress in the plain language of the DBS public interest and capacity set-aside requirements. These are the express Congressional dictates:

- DBS providers, at a minimum, must provide for "reasonable" access for federal candidates and equal opportunities when necessary. 47 USC §335(a). Thus, a DBS provider cannot deny access and equal opportunities to some qualified federal candidates and not to others. Nor can it segregate candidate access to one channel.
- DBS providers must reserve between 4-7% of their capacity for "*noncommercial*" educational and informational programming. 47 USC §335(b). "Noncommercial" does not mean "very few" commercials. It does not mean "several" commercials. It means *no* commercials.
- Only public or nonprofit entities are eligible to use this capacity. 47 USC §335(b)(5)(B). Thus, a for-profit programmer with a noncommercial feed may not have access to this capacity.
- DBS providers are prohibited from exercising "*any* editorial control" over this educational and informational programming. 47 USC §335(b)(3). Therefore, a DBS provider may not pick and choose among Section 25(b) programmers even if it does not censor the actual program content. As it has done for 60 years in the case of candidate advertising, the Commission can hold DBS providers harmless in the unlikely event that the capacity is used for illegal purposes.
- The "reasonable prices" that DBS providers may charge to use Section 25(b)

capacity cannot be based on marketing, administrative or similar overhead costs, or the revenue that might have been made if the channel was being used by commercial provider. 47 USC §335(b)(4)(C). If the DBS provider charges anything, that charge must be based only on the costs of transmitting the signal to the uplink facility and the direct costs of uplinking the signal to the satellite.

The most startling confusion is the occasional tendency to regard Section 25 as an undifferentiated whole. Section 25(a) and 25(b) contain two *completely separate* provisions that serve entirely different purposes. The Commission must reject any argument that they are one in the same. Section 25(a) programming is akin to that which a terrestrial broadcaster must provide, using its editorial discretion, in its role as a public trustee. Significantly, Section 25(a) programming can be *commercial*. Section 25(b) programming, on the other hand, *must* be "exclusively noncommercial," and must also be educational or informational. This programming is also distinguished from Section 25(a) programming in that the DBS provider is barred from exercising "*any* editorial control" over that programming. If Congress had intended the two obligations established in Sections 25(a) and (b) to one, it would have not adopted two such obviously distinct provisions.

## II. THE PUBLIC INTEREST OBLIGATIONS UNDER SECTION 25(a) SHOULD INCLUDE A RESERVATION OF CAPACITY FOR CIVIC, CHILDREN'S EDUCATIONAL AND/OR FINE ARTS PROGRAMMING.

In its 1993 *NOPR*, the Commission proposed not to require additional public interest obligations beyond the bare minimum required under Section 25(a) because DBS was "in its early stage of development." 1993 *NOPR* at 1595. As the Commission itself notes in the *Public Notice*, that is no longer the case. *Public Notice* at 2. The performance characteristics of the increasingly mature DBS technology are established. Moreover, the Commission can now assess the value received by DBS operators by means of their exclusive licenses. Thus, the Commission

can and should move ahead to establish specific additional requirements defining the public interest mandate of licensees under Section 25(a) commensurate with the capabilities of operators to serve the public and the benefits they have received. In addition to the programming obligations described below, the Commission, should, at a minimum, require DBS providers to meet the equal employment opportunity requirements provided in 47 USC §634.

As Section 25(a) contemplates, DBS providers should have editorial flexibility to fulfill this obligation. However, the Commission should set some guidelines outlining some of the types and amount of programming that would satisfy Section 25(a). This programming could include national and regional civic programming (*e.g.*, C-SPAN or national or regional "civic channels," featuring, important conferences, press conferences, state and local legislative or other policy deliberations); programming featuring the fine arts (*e.g.*, Horizon Cable); local programming of interest to minority and underserved communities; or children's educational and informational programming as defined by the Commission pursuant to 47 USC §303(a).

The Commission should require that DBS providers reserve no less than 3% of its channel capacity for this public interest programming, provided that no less than 1/3 of that capacity (1%) is used exclusively for children's educational and informational programming. This requirement would further the goals of Congress in enacting the Children's Television Act of 1991. 47 USC 303a. *See, generally*, April 28, 1997 Comments of the Center for Media Education, *et al.*

It is also true, as the Commission notes, that technological advances, such as spot beams, may permit DBS providers to offer local over-the-air broadcast signals. However, only one DBS provider, ASkyB, has thus far even proposed to carry local signals. Others are not likely to do so because of technological difficulties, capacity limitations and differing visions of the best use

of the medium. But carriage of these stations alone should not be enough for a DBS provider to fulfill its Section 25(a) obligations. Section 25(a) contemplates that a DBS provider would have a separate, affirmative obligation to serve the public beyond the mere passive carriage of local over-the-air stations.<sup>6</sup> To the extent any DBS provider would carry local signals, they would do so to gain a competitive parity with cable, not to provide a public benefit. Thus, such carriage should not be counted as such.

**III. UNDER SECTION 25(a), DBS PROVIDERS HAVE A DISTINCT DUTY TO PROVIDE REASONABLE ACCESS TO FEDERAL CANDIDATES, AND TO PROVIDE EQUAL OPPORTUNITIES TO OPPOSING CANDIDATES.**

The Commission seeks updated information about how the requirements of Sections 312(a)(7) and 315 of the Communications Act should be applied to DBS providers, as mandated by Section 25(a). In the first round of comments, much of the debate centered around whether all qualified federal candidates should get access to DBS, and if they do, whether those candidates can all be placed on one or several channels.

The plain language of Section 25(a) leaves no wiggle room for the Commission - it is bound to apply the requirements of Section 312(a)(7) and 315 to DBS providers. Nor should the Commission seek to minimize this important mechanism for enabling citizens to seek the votes of other citizens. Section 312(a)(7) requires "reasonable" access for *all* federal candidates, not just some. Moreover, Section 312(a)(7) access places the focus on an candidate's individual needs, and requires a broadcaster to balance those needs, on a case by case basis, with other factors, such as the availability of certain classes of time and the number of candidates. *CBS*,

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<sup>6</sup>In any event, the Commission should require any DBS system that chooses to carry some local over-the-air stations to carry the non-network programming of *all* local stations, except those that are predominantly used for home shopping programming.

*Inc. v. FCC*, 453 U.S. 367, 390 (1981). This means that although a DBS provider need not give a candidate access to a particular time or program, *Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 FCC2d 1079, 1091 (1978), it cannot adopt a rigid policy relegating candidates to a separate channel or channels for candidate speech. *Id.* at 1090. Instead, the DBS provider must make its best effort to ensure candidate access to the channel he or she requested at a time that would garner an audience of the same approximate size the candidate would have gotten by his or her original request. *See Becker v. FCC*, 95 F.3d 75, 80 (D.C. Cir. 1996) ("Congress' primary purpose in enacting Section 312(a)(7);...[is to] ensure 'candidates access to the time periods with the greatest audience potential.'") Those seeking equal opportunities under Section 315 should be similarly accommodated.

However, even with full knowledge of these legal obligations, DBS providers have chosen to accept contractual limitations that prevent them from inserting their own advertising into the feeds of certain program networks, even if those program networks usually reserve some time for local cable operators to insert local advertising. Where such contractual agreements prevent a DBS provider from giving a candidate reasonable access or equal opportunities, the Commission should preempt the contract to permit access.

Any future contracts with programmers should permit DBS providers to insert candidate advertisements, however. While DBS providers have in the past had little leverage in contract negotiations with programmers, that leverage will grow as they become more competitive with cable. Moreover, DBS providers have the protection of the "program access" provisions of 47 USC §628, and the antitrust laws, if programmers do not bargain in good faith.

To the extent that the Commission believes that these protections are not enough to ensure

reasonable access and equal time under Section 25(a), it should forbid future contracts between programmers and DBS providers that prohibit the latter from inserting advertisements in time slots normally reserved for cable operators to insert local advertising.

**IV. CONGRESS EXPRESSLY INTENDED THAT THE SECTION 25(b) CAPACITY BE USED FOR "NONCOMMERCIAL" PROGRAMMING PROVIDED BY "PUBLIC" ENTITIES.**

The Commission seeks further comment on how to define the type of educational and informational programming and the type of entities that would be eligible to use the 4-7% channel reservation required by Section 25(b). *Public Notice* at 2. As discussed below, the Commission has at its disposal time-tested definitions for these terms. Sections 399A and 399B of the Communications Act, and the Commission's own policies on advertising over noncommercial broadcast stations provide guidelines for determining what makes programming "noncommercial." And Congress has provided guidance in Section 25 itself and Section 397 of the Communications Act for determining what entities should be eligible to provide such programming. The Commission need only extend these well known mechanisms to a different mass medium.

**A. Sections 399A and 399B Provide Excellent Guidelines For What Constitutes "Noncommercial" Programming**

Section 25(b)(1) of the Act requires that a DBS provider reserve its channel capacity "*exclusively* for noncommercial programming of an educational and informational nature." [Emphasis added]. The Commission seeks comment on how to define the term "noncommercial" *Public Notice* at 2.

It is not necessary for the Commission to "reinvent the wheel" here. The best guidelines for defining what is "noncommercial" programming are already contained in Sections 399A and 399B of the Communications Act, and in the FCC's various policy statements outlining the

permissible scope of advertising over noncommercial, educational broadcast stations. *E.g.*, *Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations*, 90 FCC2d 895 (1982); *Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations*, 86 FCC 2d 141 (1981) (*Second Report and Order*).

Those guidelines permit acknowledgments of contributions (*i.e.*, underwriting), membership pledge drives and sales related either to classroom type learning (*e.g.*, textbook sales), or programming (*e.g.*, video or companion book sales). What is *not* permitted is programming, provided for consideration, intended to "promote any service, facility or product offered by any person who is engaged in such offering for profit," 399B(a)(1). Paid advocacy and candidate ads are also prohibited, *id.*, as are fundraising activities for entities other than the programmer. *Second Report and Order*, 86 FCC 2d at 158.

It makes perfect sense for the Commission to apply these same strictures to Section 25(b) programming, especially in light of the fact that a number of the permitted entities, *i.e.*, public broadcast stations and the Public Broadcasting Service, already abide by these rules. Adopting these guidelines also ensures that programming that has traditionally been considered to be commercial, but which also may be educational and informational (*e.g.* The Learning Channel), will not have access to this capacity.

**B. Eligibility For Section 25(b) is Limited to "Public" and "NonProfit" Entities.**

The Commission also seeks further comment on how it should define the entities eligible for access under Section 25(b). Section 25(b)(3) states that a DBS provider shall make "channel capacity available to national educational programming suppliers..." Section 25(b)(4)(B) defines "national educational programming suppliers" to include "any qualified noncommercial education-

al television station, other public telecommunications entities and public or private educational institutions."

As the Commission noted in its *1993 NOPR*, the terms "qualified noncommercial educational television station[s]" and "public telecommunications entities" are taken directly from Section 397 of the Communications Act. *1993 NOPR* at 1597. In the absence of any legislative history to the contrary, the only possible conclusion is that Congress intended these terms to be defined no differently than they are in Section 397. The first, a "noncommercial, educational television station," is defined as one "licensed by the Commission as such and which are owned and operated by a public agency or nonprofit private foundation, corporation, or association" or "owned and operated by a municipality that transmits only noncommercial programs for education purposes." 47 USC §397(6)(A&B). The second, "public telecommunications entities," are defined as "a public broadcast station or noncommercial telecommunications entity that disseminates public telecommunications services to the public." 47 USC §397(12). "Noncommercial telecommunications entity" is defined as any enterprise which is

owned and operated by a state, a political or special purpose subdivision of a State, a public agency or association; and...has been organized primarily for the purpose of disseminating audio or video noncommercial educational and cultural programs to the public by means other than a primary television or radio broadcast stations, including, but not limited to, coaxial cable, optical fiber, broadcast translators, cassettes, discs, microwave, or laser transmission through the atmosphere.

47 USC §397(7).

By adopting the definitions contained in Section 397, Congress directed that many different entities providing various services (not just video programming) would qualify to use Section 25(b) capacity, including, but not limited to, elementary and secondary schools, universities and colleges, the Public Broadcasting Service, PEG programmers, and state owned or community

owned telecommunications services. However, it did insist on one important common denominator: that the entity be either public and/or nonprofit. Congress' mandate would therefore prohibit a for-profit entity (*e.g.*, Discovery Channel, The Learning Channel or Animal Planet) from using Section 25(b) capacity even if the program feed it provides were noncommercial.

**V. ALL DBS PROVIDERS MUST RESERVE NO LESS THAN 4% OF CAPACITY FOR NONCOMMERCIAL PROGRAMMING OF AN EDUCATIONAL AND INFORMATIONAL NATURE.**

Section 25(b)(1) requires a DBS licensee to

reserve a portion of its channel capacity," equal to not less than 4 percent nor more than 7 percent exclusively for noncommercial programming of an educational or informational nature.

This language makes two things very clear. First, no less than 4% of capacity must be dedicated *exclusively* for noncommercial educational or informational programming. Second, the 4-7% reservation must be applied to a DBS provider's entire capacity, including both basic and premium channels. The discussion below proposes an equitable application of the 4-7% set aside to DBS systems.

**A. The Commission Should Impose a Sliding Scale Requirement Depending on the Capacity of the DBS System.**

By setting a flexible 4-7% set-aside requirement, Congress recognized that it might be inequitable to treat large DBS systems the same as smaller ones. As the Conference Report states:

The conferees intend that the FCC consider the total channel capacity of DBS system operators in establishing reservation requirements. Accordingly, the FCC may determine to subject DBS systems with relatively large total channel capacity to a greater reservation requirement than systems with relatively less total capacity.

H.R. Rep. 102-862, 102nd Cong., 2d. Sess at 100 (1992).

Thus, the Commission should adopt a sliding scale requirement for Section 25(b) capacity depending on the size of a DBS System. As discussed above, a system's capacity should be determined by its entire channel capacity, including both basic and premium channels. Video, audio and data streams should all have separate set-aside requirements based on the following scale:

# of Channels Offered	# of Channels Required
20-25	1
26-44	2
45-59	3
60-74	4
75-89	5
90-99	6
100-109	7
110 +	7 plus 1 additional channel for every 15 extra channels

Thus, if a DBS system provides 52 video channels, 30 audio channels and 20 data channels, the provider must reserve 3 channels of bandwidth equal to that of a video channel, 2 channels of bandwidth equal to that of an audio channel, and 1 channel of bandwidth equal to that of a data channel. There should be no requirement, however, that any particular channel reserved under Section 25(b) be used for any particular technology.<sup>7</sup>

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<sup>7</sup>To ensure that a DBS provider does not purposely downsize to avoid a greater reservation obligation, the Commission should apply whatever scale it adopts to a licensee's channel capacity as of the date it adopts the rules, or its capacity as of January 31, 1997 (the date of the *Public Notice*), whichever is greater. Any future increase in channel capacity would require a commen-

**B. Section 25(b) Capacity Exceeding the 4% Requirement May be Used For Commercial Educational and Informational Programming in Limited Circumstances.**

DAETC, *et al.* are acutely aware of the lack of available of funding for noncommercial programming. Thus, they encourage DBS providers to assist these programmers either by providing funding for this programming or by providing promotional assistance. *See* discussion at pp. 23-24, *infra*.

However, to the extent that there is a dearth of noncommercial educational and informational programming, *DAETC, et al.* propose a solution that will not only ensure full use of the Section 25(b) capacity, but will also provide badly-needed funding for noncommercial educational and informational programming. If a DBS provider has an obligation to set aside more than 4% of its capacity and cannot, after good faith efforts, fill the capacity above 4% with noncommercial educational and informational programming, the Commission should exercise its authority under Section 25(a) to permit the extra capacity to be filled with educational and informational programming, programmed by nonprofit or public entities, that is 80% noncommercial. These "quasi-commercial" programmers would then donate 5% of their gross annual revenues to the "Programming Consortium" described at pp. 18-20, *infra*, for the sole purpose of providing funding to the noncommercial programmers that are using the first 4% of capacity.

Under this scheme, using the chart at pp. 14, *supra*, a DBS provider with 100 channels must fill at least 4 channels with noncommercial, educational programming, and must attempt to fill the remaining three required channels with the same. If, after making a good faith effort,

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surate increase in the Section 25(b) obligation.

it is not possible to fill any or all of those remaining channels with that programming, those channels could be used for educational and informational programming that is 80% commercial free, *e.g.*, no more than an average of 12 minutes of commercials or promotions per hour. Alternatively, the DBS provider could "pay down" its Section 25(b) capacity obligation by several channels by utilizing the mechanism provided at pp. 24-25, *infra*.

DAETC, *et al.* notes however, that there exist as yet unfunded mechanisms for supporting, among other things, noncommercial children's programming. *E.g.* 47 USC §394 (creating "National Endowment for Children's Educational Television"). Thus, they urge the Commission to commit to revisit the issue of permitting the capacity above 4% to be used for commercial nonprofit programming if, at some point in the future, there is a significant increase in the amount of available noncommercial educational and informational programming.

**C. Use of Section 25(b) Capacity Should Be Limited to One Channel Per Programmer, or in the Case of Part-Time Programmers, to 5 percent of Total Program Time.**

To ensure diversity of noncommercial programmers on capacity reserved under Section 25(b), the Commission should prohibit the Programming Consortium from giving any one programmer access to more than one channel on the collective Section 25(b) capacity in any one program service.<sup>8</sup> Thus, if a programmer eligible under Section 25(b) provides both a video and an audio service, it could provide one channel of the program time for one or the other, but not

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<sup>8</sup>The 5% figure assumes that with the launch of ASkyB, there will be approximately 1032 available program hours (43 channels X 24 hours) each day for 25(b) programming. The channels were calculated by multiplying six DBS providers with 100+ channels by seven and adding one channel for USSB. Should the number of available channels be significantly reduced because of the buyback provision discussed at pp. 23-24, the Commission may wish to lower the ceiling.

both. A programmer can request placement on a particular DBS provider, but must abide by the Consortium's ultimate decision.

The Programming Consortium should also reserve one to two channels of each provider's Section 25(b) capacity for those programmers that cannot fill a full-time channel, or for those who do not want to have their programming relegated to one DBS provider. These programmers would have access to no more than 5% of the total program time on the Section 25(b) capacity. Channels of this type would permit programming to be grouped by content or purpose, *e.g.*, adult education, children's programming.

Other than the limits described above, DAETC, *et al.* do not support any other ceiling on program time. Breaking program time down in smaller increments will make coherent programming more difficult, and therefore may well sacrifice viewership.

#### **VI. DBS PROVIDERS ARE PROHIBITED FROM EXERCISING ANY EDITORIAL CONTROL OVER SECTION 25(b) PROGRAMMING.**

Section 25(b)(3) states that

The provider of direct broadcast satellite service shall not exercise *any* editorial control over any video programming provided pursuant to this subsection.

47 USC §335(b)(3)[Emphasis added].

Despite this unambiguous language, several DBS licensees have thus far attempted to obtain authority to control programming provided pursuant to Section 25(b). *E.g.* May 24, 1993 Comments of Primestar Partners at 5; May 24, 1993 Comments of DirectTV at 5. *Compare*, July 14, 1993 Comments of Consumer Federation of America at 8-10. These DBS providers have also argued that so long as they do not exercise editorial control over the content of a particular program, they may pick and choose among programmers seeking access to the reservation of

capacity.

But it is impossible to read Section 25(b)(3) in any way that permits a DBS provider to exercise any choice in programming or content. Editorial control necessarily includes selecting from among programmers. The Commission recognized this prohibition in its *1993 NOPR*, and requested comment as to whether a DBS provider should be held harmless for "violations caused by programming over which it has no control," *1993 NOPR* at 1597.<sup>9</sup>

Given this clear Congressional mandate, there are already-proven methods by which qualified programming can be selected outside the control of the DBS provider. *See* discussion at Section A, below. While some DBS providers treat Section 25(b) as if it were a novelty, its capacity reservation requirement closely tracks the PEG and leased access cable models, where cable operators are similarly barred from having editorial control. Moreover, to the extent that DBS providers have any concerns about liability stemming from programming over which they have no control, there is precedent permitting the Commission to immunize DBS providers from such liability. *See* discussion at Section B, *infra*.

**A. All DBS Providers Should Collectively Create and Fund a Non-profit Corporation Outside of Their Control to Select Qualified Section 25(b) Programming.**

DAETC, *et al.* believe that the best mechanism to select programming for the 25(b) capacity is through an independent, non-profit "Programming Consortium" formed and funded

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<sup>9</sup>The Commission also sought comment on the significance of the fact that although the 1992 Cable Act set up a mechanism for channeling indecent cable leased access programming and for prohibiting use of PEG access channels for similar material, Congress did not adopt a similar mechanism for DBS. *1993 NOPR* at 1597. The fact that both of the cable access channel restrictions were unconstitutional in *Denver Area Educational Telecommunications Consortium v. FCC*, 116 S.Ct. 2374 (1996) eliminates any rationale the Commission might have had at the time for making any exceptions to Section 25(b)'s prohibition on a DBS provider having editorial control.

by all DBS providers collectively. This corporation could operate much like cable access corporations, which are created pursuant to cable franchise agreements. A sample of an agreement creating one such access corporation is attached as Exhibit A. Access corporations are funded by the local cable operator<sup>10</sup> and typically select and schedule public access programming based on various criteria agreed upon in advance, including production quality and content.

*Id.* As a nonprofit corporation exempt from taxation under Section 501(c)(3) of the Internal Revenue Code, they would also have the ability to accept donations from individuals and corporations for the purpose of funding programming.

The Programming Consortium would function similarly. At a minimum, all administrative overhead and technical costs would be provided by the DBS providers collectively. The Consortium would seek applicants for channels and choose programming by the Commission's guidelines for what qualifies as noncommercial, educational or informational. Any other guidelines would be content-neutral, *e.g.*, technical quality. Programming meeting the Consortium's guidelines would be eligible for capacity on a first come, first served basis. The Consortium would be responsible for scheduling, editing and other technical expertise as may be needed to fill the Section 25(b) capacity.

Importantly, the Programming Consortium must be structured as to prohibit undue influence by DBS providers. The Board of Directors of the Consortium should number no less than 10 persons, no more than one of whom may have *any* relationship or association with *any* DBS provider. Possible Consortium board members could include, *inter alia*, community leaders,

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<sup>10</sup>That funding includes all administrative and overhead costs. Cable operators often provide funding for programming as well. See Attachment 1 at ¶2.4.