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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF U S WEST, INC.

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COMMENTS OF U S WEST, INC.

I. INTRODUCTION AND SUMMARY

U S WEST, Inc. ("U S WEST") herein provides comments to the Federal Communications Commission's ("Commission") Notice of Proposed Rule Making and subsequent Public Notice in the above-captioned matter.[1] U S WEST is the third largest multiple system operator ("MSO") in the United States. In addition to its wholly-owned systems, U S WEST holds a substantial partnership interest (25.5%) in Time Warner Entertainment, Inc. which controls additional cable systems and other production interests, e.g., Home Box Office ("HBO"), Showtime, Warner Bros., etc. Through its ownership of Continental Cablevision, Inc., U S WEST also holds a

[1] 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, Notice of Proposed Rule Making, 8 FCC Rcd. 1589 (1993) ("NPRM") and Public Notice, Comments Sought in DBS Public Interest Rulemaking, 12 FCC Rcd. 2251 (1997) ("Public Notice"), Order extending filing date for comments, DA 97-602, rel. Mar. 21, 1997.

ten percent interest in Primestar Partners ("Primestar"), a direct broadcast satellite ("DBS") distributor. These varied interests place U S WEST in a unique position to comment in this proceeding.

Over the past two years, DBS providers including DirecTV, Primestar, and U.S. Satellite Broadcasting ("USSB") have experienced substantial subscriber growth. DirecTV now boasts over 2.4 million subscribers, Primestar has over 1.7 million subscribers, and USSB has approximately 1.2 million subscribers.[2] DBS is currently adding 125,000 new customers every month. Moreover, DBS is projected to grow from 7 million subscribers today to 14.26 million by the year 2000.[3] Clearly, DBS is no longer a fledgling industry requiring special treatment.

The recent announcement of the merger of ASkyB, controlled by Rupert Murdoch's Australia-based News Corp., and Echostar, the nation's third largest DBS provider, is but another strong indicator of the increasingly competitive multi-channel video environment. "Sky TV," the name chosen to represent the merger of these two large DBS interests, will eventually control 50 out of 96 (52%) of the full continental U.S. ("CONUS") orbital slots with a capacity to deliver over 500 channels using today's compression standards, including the potential for "spot beaming" local broadcast signals.[4]

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[2] DTH Subscribers, SkyREPORT, March 1997, at 8 (table).

[3] Direct Broadcast Satellite, Probe Research, Inc., April 1997 (from Internet homepage).

[4] This includes 28 transponder licenses contributed by MCI to the Sky TV venture in exchange for a 10% ownership interest.

The substantial growth of DBS clearly indicates that it is now fully capable of competing in the marketplace and thus, should have the same public interest and regulatory obligations as other multichannel video programming distributors ("MVPD"). Or, in the alternative, it may be preferable to remove burdensome regulatory obligations from other MVPDs. Senator Wyden, in recent hearings before the Senate Commerce Committee, echoed this sentiment where he asserted in an exchange with Mr. Murdoch that there were really only two choices, "Either you've got to say public interest obligations apply to direct broadcast [satellite] or, in some way you've got to reduce things as it relates to cable operators." Mr. Murdoch concurred, later saying that he believed that the public interest obligations "should certainly be equalized."[5]

Regulatory parity, including an equality of public interest obligations, allows competition to be based on price, product, and customer service factors, rather than economic leverage provided by disparate regulatory treatment. The Commission must take this opportunity to ensure the continued viability of the multichannel video programming marketplace for all competitors by either imposing similar public interest burdens on DBS providers or by removing those obligations from cable operators and other MVPDs.

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[5] Hearing of the Senate Commerce, Science and Transportation Committee, Apr. 10, 1997

II. THE COMMISSION SHOULD EITHER REMOVE THE PUBLIC INTEREST OBLIGATIONS FROM CABLE OPERATORS OR, IN THE ALTERNATIVE, REQUIRE THOSE SAME OBLIGATIONS OF DBS PROVIDERS.

As the Commission notes in its Public Notice, Section 25(a) of the 1992 Cable Act (47 U.S.C. § 335(a)) requires the Commission to initiate a rulemaking to impose on DBS service providers " . . . public interest or other requirements for providing video programming."[6] While the statute at a minimum requires application of the political broadcasting rules, specifically Sections 312(a)(7) and 315,[7] the Commission must also use this opportunity to consider the imposition of other public interest requirements on this rapidly expanding industry.

At the time of the original NPRM, the DBS industry was truly in its early stages of development. Today, however, as shown by the tremendous growth of the industry over the last two years, DBS is no longer a small player. Bolstered by the investment of News Corp. and other major corporations, including General Motors, AT&T and MCI/British Telecom, the DBS industry has become a formidable competitor. The outlook for the industry shows the potential for continued growth. The video distribution marketplace which existed four years ago has changed dramatically. The Commission must seek to establish regulatory parity so that all players in this market have an equal opportunity to provide video programming services to consumers. No one provider should be burdened with public interest obligations not faced by the others. This would only serve to distort the true marketplace econom-

[6] Public Notice, 12 FCC Rcd. at 2252.

ics and provide an improper competitive advantage -- created by governmental preference for one set of providers over others.

Broadcasters and cable operators are currently required to provide reasonable access to their facilities for federal candidates under Sections 312 and 315 of the Communications Act. In line with U S WEST's belief in regulatory parity, it is logical to apply to the DBS industry existing political broadcasting rules and interpretations that have guided broadcasters and cable operators over the years. For example, comparable audience size has been the standard for offering opposing political advertisements, rather than the potentially more difficult standard of comparable demographics. That should apply to DBS as well.

Additionally, DBS should be accessible to all federal candidates to the extent that it is technically feasible and requested by the candidate. If, for example, a candidate for the Senate in California or Texas wants to utilize DBS advertising rather than purchase advertising in a number of broadcast markets, that opportunity should be available. Any potential inefficiencies which are created by this approach should be left for the marketplace to sort out. Furthermore, the lowest unit charge approach should apply equally to DBS as it does currently to broadcasters and cable operators. There is no basis for distinction or lesser obligation for DBS.

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[7] 47 U.S.C. §§ 312(a)(7) & 315.

III. DBS PROVIDERS SHOULD BE REQUIRED TO RESERVE 7% OF THEIR CHANNEL CAPACITY FOR NONCOMMERCIAL EDUCATIONAL, AND INFORMATIONAL PROGRAMMING.

Section 25(b) of the 1992 Cable Act requires that DBS providers set aside not less than 4% or more than 7% of channel capacity for non-commercial educational and informational programming.[8] The Commission has requested comments on several issues: 1) Should the reservation of channels increase over time within the 4%-7% specified range? 2) Does Section 25(b) require that discrete channels be reserved for non-commercial use or is a percentage of cumulative time on the DBS system enough? 3) How should the Commission calculate total channel capacity for a DBS system?

The Commission premises its first inquiry regarding a potential, gradual ramp up of allocated channels on the fact that the industry was in a "nascent stage" of development in 1993 when the initial NPRM was issued. The same concern about saddling a developing industry with too many regulatory burdens was also cited by the Commission in its inquiries regarding public interest obligations under Section 25(a). However, as noted earlier, DBS has experienced rapid growth and has quickly gained market share. Given the success of DBS, both in terms of numbers of subscribers and number of available channels, it is reasonable to require that 7% of channels be reserved for noncommercial educational or informational programming.

[8] 47 U.S.C. § 335(b)(1).

Again, a useful comparison can be made with the cable industry's obligations. Cable operators are required to provide carriage: 1) to all broadcasters who request it, including public broadcasters, utilizing up to one-third of their channel capacity; 2) to leased access programmers, requiring up to 15% of channel capacity; and 3) to make available separate public, educational, and government ("PEG") access channels. Although 3 channels often satisfies the Federal PEG requirement, local franchises sometimes require half a dozen or more PEG channels.

On a 78 channel, 550 Mhz cable system, leased and PEG access requirements together account for almost 20% of system channel capacity. This does not include the set aside of up to one-third of channel capacity for "must carry," which the U S Supreme Court recently upheld on various public interest grounds.[9] The unequal regulatory burden means that DBS is in a more advantaged position to respond to consumer and marketplace demands. It is not infrequent for consumers to demand the carriage of new services which a 450 Mhz or even 550 Mhz system cannot accommodate because so much of its capacity has been allocated for various government mandated purposes. The disparity of treatment certainly justifies mandating the use of 7% of DBS' channels for educational and public interest programming.

Obviously any changes in the cable industry's obligations is a matter for Congress to decide and largely outside the boundaries of the Commission's control. However, U S WEST believes that in view of expanding channel capacities it would

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[9] Turner Broadcasting System, Inc., et al. v. F.C.C., No. 95-992, U.S. Supreme Court, 1997 U.S. LEXIS 2078, Decided Mar. 31, 1997.

be reasonable to cap the various public interest and leased access obligations for cable and DBS, and other MVPDs, at no more than 7% of channels.

A. Discrete Channels Should Be Reserved For Non-Commercial Use And Channel Capacity Should Be Calculated Based On The Number Of Channels Supplied To Customers.

Total channel capacity for the 7% reservation should be calculated based on the number of channels available and used for distributing service to subscribers rather than the number of channels licensed or allotted to a DBS distributor. This approach takes into account changes in technology allowing for advances in compression techniques. It will not, however, artificially force a larger set aside, unfairly encompassing channels that are technically available but reserved for future use.

As for calculating the specific number of channels based on a 7% obligation, the Commission should look to its leased access methodology for guidance. In its leased access rules, the Commission requires that cable operators round-up any fractional channels which result from calculations producing non-whole numbers, e.g., 150 channels x 7% = 10.5; the number of channels required for leased access use would thus be 11. This methodology is fairly simple to apply and is less confusing than a sliding scale approach. As the technology for channel delivery changes (from improved digital compression, etc.), a percentage-based "round-up" methodology easily adapts to increased channel counts.

Additionally, DBS providers should not be allowed to use existing cable network programming to satisfy their 7% public interest obligations. The use of cable-created channels, such as C-SPAN, the Learning Channel, or Discovery, should not

be counted towards a DBS provider's public interest obligations any more than a cable operator can count them against its PEG obligations. For these obligations to be truly impactful, the universe of good, creative public interest programming should be expanded, not simply duplicated. The Commission can ensure the continued expansion of this type of programming by requiring DBS providers to fulfill their public interest obligations with new offerings.

IV. ADDITIONAL PUBLIC INTEREST REQUIREMENTS SHOULD BE REQUIRED OF DBS UNDER SECTION 25(a).

Given the change in the size of the DBS industry and the fact that at least one DBS provider plans to retransmit local broadcast signals, additional public interest requirements which are currently imposed on cable operators should be removed or, in the alternative, be equally applied to DBS providers. At a minimum, there should be regulatory parity with respect to must carry, distant signal quotas, exclusivity, and program access:[10]

1. **Must carry**. Any cable system which carries local broadcast signals must carry them all. Cable operators are required to carry all commercial broadcasters licensed to each ADI, up to 1/3 channel capacity. They must also carry all nearby public broadcasting stations. Cable operators are required to import a distant PBS if one is not available locally. Each broadcaster is given several options of channel position, which most exercise in order to

[10] The Commission has previously recognized that it has the authority to impose such obligations on DBS stating, "We note that the Cable Act provides the basis to impose additional obligations in the future should they be warranted." NPRM, 8 FCC Rcd. at 1595 ¶ 29.

maintain their off-air channel position or to be placed in the lowest-numbered channels, where remote controls begin their surfing. No cable operator may provide any video programming without first selling all of the must carry signals to customers. In addition, those must carries must be delivered unscrambled, to promote compatibility with customers' television receivers. Any DBS provider wishing to carry local signals must step up to these same obligations. The notion that a DBS provider could carry only selected local signals turns the concept of must carry on its head. U S WEST provides broadband video service to more than 1,000 communities, and provides each with all required must carry broadcast signals within its market. If DBS providers face capacity limits which constrain such carriage, then they should provide local signals only to those markets in which they can carry all must carry signals. Alternatively, the must carry rules could be amended for all MVPDs, to extend carriage requirements only to broadcasters who are significantly viewed within a market, as was the case under the Commission's 1987 must carry rules. Permitting DBS providers to cherry pick local stations or to deny them their preferred channel assignments will defeat the very interests identified as constitutionally compelling by the Supreme Court in Turner v. FCC, and would create needless competitive disparities among multichannel providers.

2. **Distant signal quotas**. Cable systems may import only a limited number of signals into local markets (depending on market size, proximity of TV stations, and history of signal carriage on the cable system). When the Commis-

sion deregulated these distant signal quotas in 1981, the copyright rules were immediately adjusted by the Copyright Royalty Tribunal ("CRT") to remise the quotas.[11] DBS providers would be subject to equivalent quotas limiting the number of imported distant independent stations.

3. **Exclusivity**. Through syndicated exclusivity, broadcasters with exclusive exhibition rights to movies and series in their markets have the right to require the "black out" of those same programs from imported signals carried on cable. Parallel "network nonduplication" rules require blackouts of imported network programming when it is available from a local broadcast affiliate. "Sports blackout" rules provide similar protection for the live gate receipts of local teams by requiring black out of home games for local broadcast. Every satellite signal comes with a data stream in which individual receivers are addressed. We suggest that these data streams be addressed by zip code so that the syndex obligation imposed on cable will also be honored by DBS providers. The same addressability might be employed to comply

[11] The standard royalty for distant signals is a graduated scale of royalties which changes with the number of distant signals carried. The first "distant signal equivalent" (independent station) is valued at a royalty of about 0.9% of basic service receipts. (Basic service is the level of service on which all broadcast signals may be received.) The second, third, and fourth "DSEs" are valued at a royalty of about 0.6%. The remaining DSEs are valued at about 0.3%. The CRT was an agency created by the 1976 Act to adjust rates under certain circumstances, such as when communications law changed. In 1982, the CRT imposed a dramatically higher royalty on any signal which would not have been allowed under the old Commission quotas. The rate, 3.75% of gross receipts, has served to re-impose the old signal quotas, and reassert the primacy of the Consensus Agreement. Fewer than 15% of subscribers receive any 3.75% signal today and the number of 3.75% signals continues to decline each year. The CRT has since been abolished and its duties have devolved to the Copyright Office.

with sports blackout. "White area" limitations applied to DBS are the counterpart of network nonduplication. They are designed to give primacy to the local network affiliate if it is available over the air. The mechanics of these restrictions might well be improved, but they must remain in place for DBS.

4. **Program Access**. The 1992 Cable Act imposed additional obligations on vertically integrated programmers and distributors. Under these "program access" rules, programming which is affiliated with cable operators must be made available to cable's competitors. There are also severe constraints on exclusive programming contracts. If DBS is to operate as a cable system, then programming which is affiliated with DBS providers must be made available to other MVPD's under comparable program access rules. There should also be the same constraints on exclusive satellite programming contracts as there are on cable programming contracts.

V. THE PUBLIC INTEREST OBLIGATIONS IMPOSED BY THE COMMISSION IN THIS PROCEEDING SHOULD TAKE EFFECT IMMEDIATELY FOLLOWING ADOPTION OF NEW RULES PROMULGATED HEREUNDER.

U S WEST believes that it is important that any public interest obligations required of DBS providers resulting from this proceeding take effect immediately. The rapid pace of competition in the video distribution marketplace dictates swift implementation once public interest requirements have been instituted by the Commission (or removed as the case may be). Any competitive advantage, no matter how long, can artificially skew the marketplace with the potential for significant harm to competitors.

The Commission may, under its general powers to regulate the licensing of DBS providers, impose obligations which take effect upon publication in the Federal Register. The statutory language in Section 25(b)(1) allows the Commission "[to] require, as a condition of any *provision, initial authorization or authorization renewal . . .*" (emphasis added) that a DBS provider reserve 4% to 7% of channel capacity for non-commercial educational or informational programming.[12] Since DBS operators provision service to subscribers continually at this point, the Commission need not wait until license renewal (or initial licensing) for the imposition of any public interest requirements. Additionally, in the interest of fair and equal competition in the video distribution marketplace, the Commission must not wait.

VI. CONCLUSION

Based on the foregoing, U S WEST urges that the Commission move quickly

[12] 47 U.S.C. § 335(b)(1).

to establish competitive parity in the video distribution marketplace by imposing equal public interest obligations on DBS providers.

Respectfully submitted,

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April 28, 1997

CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 28th day of April, 1997, I have caused a copy of the foregoing **COMMENTS OF U S WEST, INC.** to be served via first-class U.S. Mail, postage-prepaid, upon the persons listed on the attached service list.

Kelseau Powe, Jr.

***Via Hand-Delivery**

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