

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

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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

**REPLY COMMENTS OF THE  
NATIONAL CABLE TELEVISION ASSOCIATION, INC.**

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**REPLY COMMENTS OF THE  
NATIONAL CABLE TELEVISION ASSOCIATION, INC.**

The National Cable Television Association, Inc. ("NCTA") hereby submits its reply comments in the above-captioned proceeding.

**INTRODUCTION AND SUMMARY**

This proceeding fulfills the Congressional objective to integrate public interest obligations into the regulatory framework applied to the Direct Broadcast Satellite ("DBS") service. Just as the broadcast and cable industries have been subject to public interest duties from their early beginnings, Congress intended that DBS too should have meaningful public service obligations. Under Section 25(b) of the 1992 Cable Act, DBS providers are to reserve channels comprising 4-7% of their capacity for noncommercial programming of an educational or informational nature. And under Section 25(a) of the Act, DBS providers must comply with "public interest or other requirements" imposed by

the Commission. Section 25(a) also directs the Commission to examine opportunities for the “principle of localism” and to regulate DBS providers to serve that goal.

NCTA urges the Commission to interpret the noncommercial set aside requirement in Section 25(b) in a fair, straightforward and competitively neutral manner. Proposals in the DBS providers’ comments to spread out eligible programming across the entire line-up of 100 or more channels, to exclude certain channels from the calculation, to simply duplicate existing satellite-delivered cable services in meeting the set aside, and to phase-in the requirement should be rejected. Allowing such discretion would be contrary to Congressional intent, would greatly diminish long-standing Commission policy and would result in unwarranted regulatory disparities between cable and DBS.

Even without a specific statutory directive like Section 25, the Commission imposed public interest obligations on cable, including set asides for broadcast signals and noncommercial public access channels, and restrictions on carriage of distant signals, since cable’s infancy in the 1960s. The DBS industry’s plea for “flexibility” in fulfilling its Congressionally-mandated noncommercial set aside on the ground of nascency is belied by cable’s own history and DBS’ market prowess. DBS today reaches almost 5 million homes as compared to cable television’s 1.27 million subscribers in 1965, when the FCC first imposed public interest obligations on cable in the must carry and distant signal rules.

The Commission also should reject the efforts of those DBS providers that had proposed to deliver local broadcast stations, ASkyB and Echostar, to be free of any public

interest obligations beyond the Section 25(b) noncommercial set aside and the political broadcasting rules. As we and other commenters demonstrated, Congress granted the Commission broad authority to regulate DBS providers delivering local service under Section 25(a). Although it appears that one “local DBS” venture is not going forward at this time, Echostar still plans to offer local broadcast signals in its program package, and other “local DBS” ventures may develop. Therefore, the rules implementing Section 25(a) should make clear that DBS companies offering local service will be subject to parallel localism requirements imposed on cable systems -- e.g., must carry, signal carriage rules, cross-ownership restrictions. By doing so, the Commission will ensure regulatory parity exists between comparable multichannel providers.

## **DISCUSSION**

### **I. THE COMMISSION SHOULD NOT GRANT DBS PROVIDERS BROAD DISCRETION IN FULFILLING SECTION 25(B) SET ASIDE REQUIREMENTS**

#### **A. The Commission Should Reject DBS’ Proposals for “Flexibility”**

The DBS industry advocates limiting the Section 25(b) requirement to reserve channels for noncommercial educational programming to the minimum amount of capacity -- 4 % -- allowed under the statute.<sup>1</sup> DBS providers also seek “flexible” implementing rules that would not only reduce the impact of this set aside on their channel capacity but

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<sup>1</sup>

Comments of DirecTV, USSB, Primestar Partners, Tempo Satellite, Satellite Broadcasting Communications Association (“SBCA”), American Sky Broadcasting (“ASkyB”), Echostar Communications Corp.

provide a more favorable regulatory environment than exists for their cable competitors. As described below, if the Commission were to adopt the loose interpretation of the statute advocated by DBS providers, it would dilute the historic and well-ingrained public interest mandate embodied in Section 25(b) and promulgated by the Commission for cable and other media since their infancy.

First, DBS providers want the flexibility to use a cumulative hour measurement instead of dedicating discrete channels to noncommercial educational use in order, they contend, to facilitate “innovative programming arrangements and creative packaging” from a wide variety of program suppliers.<sup>2</sup> They generally assert that having complete discretion to place Section 25(b) programming in any daypart on any channel will maximize its appeal for target audiences.<sup>3</sup> But the statute obligates a DBS provider to “reserve a portion of its channel capacity, equal to not less than 4 percent nor more than 7 percent” exclusively for noncommercial programming (emphasis supplied). This is commonly and repeatedly understood as a percentage of full-time channels.

Moreover, under the proposed scenario, it would be difficult for consumers to identify and make a point of watching the qualifying programming in a multichannel environment, which defeats the purpose of the set aside. This helter-skelter approach to providing qualifying programs is all the more problematical because digital compression

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<sup>2</sup> Comments of DirecTV at 2; see also Comments of Tempo Satellite Inc., ASkyB, SBCA.

<sup>3</sup> See Comments of DirecTV, Tempo Satellite, Primestar.

technology increases the number of channels. The logic of the DBS commenters' argument fails since full-time dedicated channels, not diffuse programming hours, would ensure that target audiences find the relevant programming.

Although DBS providers claim that they intend to create consumer-responsive noncommercial program packages, they are just as likely to use the lack of specific rules to minimize such programming efforts as part of their overall program offerings. There are market incentives to minimize these program efforts. By way of example, some cable operators have found it difficult to add new programming services because a large number of their channels are taken up with PEG and, in some cases, leased access programmers.<sup>4</sup> While cable operators must provide discrete channels for PEG and leased access, were DBS to "flexibly" spread noncommercial programming throughout channel line-ups, it would essentially avoid the accountability intended by Section 25.

And such a regime would be hard to enforce. The Commission could not be expected to monitor thousands of hours of programming to determine whether or not a DBS provider had violated its public service obligations.

Therefore, the Commission should require DBS providers to dedicate discrete channels to meet their 4-7% public interest set aside.

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<sup>4</sup> Indeed, DirecTV unabashedly acknowledged the distinct marketing advantage it would have in this regard over cable, urging the Commission not to relegate DBS noncommercial educational programming to "a *de facto* 'graveyard' of unwatched PEG or leased access-type channels." Comments of DirecTV at 2. We note that DBS providers will have no editorial control over channels reserved for noncommercial educational programming, just as cable operators have no control over PEG and leased access channel programming.

Second, in calculating their channel reservation requirement, DBS providers push for rules that only count unduplicated full-motion video programming channels and exclude other channels, including audio and data channels, barker channels, program guide and billboard channels, and other non-video channels.<sup>5</sup> And several providers seek authority to calculate the channel set aside in a way that takes into account the still-evolving technical characteristics of digital compression, i.e., by utilizing a methodology based on “bandwidth” or “transponder circuits.”<sup>6</sup>

As to whether certain channels should be excluded, we note that cable operators must include audio, data, barker, program guide and other non-video channels in determining their activated channel capacity for purposes of the Commission’s must carry rules.<sup>7</sup> As long as cable’s public interest set asides include these channels in the calculation, it would be unfair to exclude them in calculating DBS’ noncommercial set aside requirement. Similarly, any changes in the definition of “channel” to accommodate the deployment of digital compression technology, assuming such changes are warranted, should be applied across the board to all media in other contexts. Otherwise, a cable operator would be locked into a conventional channel concept in meeting its public inter-

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<sup>5</sup> See Comments of ASkyB, DirecTV, USSB, Primestar and SBCA.

<sup>6</sup> Comments of ASkyB (proposes bandwidth as a measure of DBS capacity); Comments of Primestar (proposes to count full motion video transponder circuits as opposed to channels.)

<sup>7</sup> See 47 C.F.R. 76.5(nn); 47 C.F.R. 76.5(oo).

est set asides that would inhibit its ability to add new services, while its DBS competitors would be free to use technological developments to meet their obligations.

The Commission should, therefore, require DBS providers to include all activated channels in calculating their 4-7% channel reservation requirement.

Third, DBS providers wish to get credit against the 4-7% set aside by counting established noncommercial satellite-delivered cable services.<sup>8</sup> The DBS noncommercial set aside should facilitate new educational and informational programming, not just duplicate cable programming networks that subscribers expect as part of today's multi-channel package.<sup>9</sup> Congress could not have intended that carrying programming that would ordinarily be carried anyway would satisfy the public interest set aside obligations in a 100-channel DBS system. And while PBS may qualify as a supplier of noncommercial educational programming, DBS providers should not be able to simply cherry-pick the national PBS feed to satisfy their public interest obligation -- especially where cable

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<sup>8</sup> See e.g. Comments of Tempo Satellite, DirecTV, SBCA, USSB.

<sup>9</sup> See Comments of U.S. West at 9. In arguing that DBS should be required to set aside channels for public interest programming, such as C-SPAN, under both section 25(a) and section 25(b), Media Access Project makes an entirely unwarranted and inaccurate statement that C-SPAN has been the "mistreated stepchild" of the cable industry. Comments of DAETC, et. al. at 4 (joint filing of public interest, educational and consumer groups). First of all, C-SPAN was created by and is funded by cable companies on an entirely non-profit basis with an annual budget of \$29.8 million. These companies exercise no editorial control over its content. Second, C-SPAN is ranked number 5 among the top 20 cable networks, and reaches over 69 million television subscribers. Recently, the largest multiple system operator, TCI, signed a 15-year carriage agreement with C-SPAN, ensuring that the service will be carried by TCI systems across the country. "TCI deal puts C-SPAN on Firm Footing," Multichannel News, April 28, 1997 at 1.

systems must carry all local public television stations (and their local programming) and occupy a much greater proportion of their channel capacity.

To the extent existing satellite networks are counted, their inclusion should lead the FCC to adopt the 7% figure, not the 4% minimum. We note that this inclusion would contrast with cable's PEG duties, where a system will not ordinarily get PEG credit for satellite networks that provide noncommercial educational or governmental program services.

Lastly, several DBS providers wish to "phase-in" the channel reservation requirement over a two-year period.<sup>10</sup> There is absolutely no reason to provide a phase-in -- DBS providers have known about the requirement since 1992, over four years, and have had more than ample time to prepare for it. Even ASkyB acknowledges that "all DBS providers have been on notice of the set aside requirement since adoption of the 1992 Cable Act", further reinforced by the D. C. Circuit's 1996 ruling upholding the constitutionality of the statute.<sup>11</sup>

Accordingly, the Commission should not grandfather existing programming contracts, as it refused to do in the context of leased access cable channels.

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<sup>10</sup> Comments of DirecTV, Primestar, SBCA.

<sup>11</sup> Comments of ASkyB at 23.

In sum, the DBS industry's argument that it is an emerging industry that would be harmed without "flexibility" in meeting its 25(b) obligations is unfounded by the facts.

This is not a medium attempting to take its first baby steps in the video world.

- DBS almost doubled its subscribership in 1996 -- from 2.6 million to 5 million homes.<sup>12</sup>
- DBS is projected to serve over 20% of all multichannel subscribers by 2000.<sup>13</sup>
- Some analysts predict DBS service will reach 13 to 15 million subscribers by the end of the decade.<sup>14</sup>
- DBS has the fastest rate of adoption of any consumer electronic service, including VCRs.

The Commission should require DBS providers to step up to their public interest responsibilities under the Act, as has been required of other regulated media from the earliest stage of their development.

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<sup>12</sup> Media Business Corp., Sky Report, May 1997.

<sup>13</sup> Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 96-133, Third Annual Report, rel. January 2, 1997 at ¶38 (citing Dennis Liebowitz at Donaldson, Lufkin & Jenrette in "Multichannel Futures", Sky Report, October 1996 at 3).

<sup>14</sup> Media Business Corp., Sky Report, April 3, 1997 (citing speech by Eddy Hartenstein, President, DirecTV, to Variety/Schroder Wertheim Big Picture Media Conference); see also Paul Kagan Associates, Cable TV Programming, April 30, 1997 at 6 (projects DBS growth to exceed 14.6 million homes by 2002 -- or roughly 18 percent of the multichannel video marketplace).

**B. The DBS Industry Should Not Be Granted “Flexibility” Based On Claims of Its Nascent Stage of Development**

As NCTA and other commenters pointed out, cable television from its infancy has been subject to complex public interest obligations that dictated what operators could and could not carry.<sup>15</sup> In the 1960s, the Commission, among other things, strictly limited cable’s importation of distant signals to protect local broadcasters, a policy that continued throughout the seventies.<sup>16</sup> The cable industry also was required as far back as 1972 to set aside capacity for free, noncommercial access channels on a nondiscriminatory basis.<sup>17</sup> And the must carry channel reservation requirement was put in place when cable barely served 1.27 million subscribers as compared to DBS’ 4.9 million subscriber base today.<sup>18</sup>

The FCC’s 1972 Cable Television Report and Order and its predecessor orders are particularly instructive as the FCC considers appropriate public interest and other obligations for the DBS industry. In that proceeding, the FCC strictly limited cable’s importation of distant signals in an effort, among other things, to cause the nascent cable industry to develop “cable-original” public interest programming, not piggyback on distant sig-

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<sup>15</sup> First Report and Order, Docket Nos. 14895 and 15233, 38 F.C.C. 683 (1965); Second Report and Order, Docket Nos. 14895, 15233 and 15971, 2 F.C.C.2d 725 (1966). See Comments of Time Warner and U.S. West.

<sup>16</sup> Cable Television Report and Order, 36 F.C.C.2d 143, 170 (1972).

<sup>17</sup> Id.; see also Cable Television Proposal, 31 F.C.C.2d 115 (1971).

<sup>18</sup> Warren Publishing, TV & Cable Factbook, Services Volume No. 65; Media Business Corp., Sky Report, May 1997.

nals. To further cable's role in the "national communications structure", the Commission required cable systems to dedicate access channels for noncommercial programming in order to open new outlets for local expression, promote diversity in television programming, advance educational and instructional television and increase informational services of local governments.<sup>19</sup> As the FCC concluded, "[w]e envision a future for cable in which the principal services, channel uses, and potential sources of income will be from other than over-the-air signals."<sup>20</sup> (This conclusion was drawn years before satellite delivery of program networks was a reality.)

Three years earlier, the FCC had adopted a different public interest requirement. The FCC imposed program origination requirements, again intended to differentiate cable from the existing service provided by established providers.<sup>21</sup>

The 1992 Act's mandate for DBS has the same earmarkings as the FCC's efforts in 1969 and 1972 for fostering DBS's own public interest programming by mandating a new block constituting 4-7% of channel capacity. A Commission decision that embraces the DBS provider pleas for special treatment under the guise of "flexibility" and that lets this

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<sup>19</sup> 36 F.C.C.2d 141, 190.

<sup>20</sup> Id.

<sup>21</sup> First Report and Order, 20 F.C.C.2d 201 (1969), aff'd, United States v. Midwest Video Corp., 406 U.S. 658 (1972).

requirement simply piggyback on carriage of existing cable-originated satellite programs undermines Congress' objectives for DBS.

As we and others have noted, the new programming block created by the 4-7% channel reservation requirement is somewhat analogous to cable's set aside of public, educational and governmental access channels. But it stops far short of cable's long-standing obligations to provide capacity for not only PEG, but leased access and must carry channels. Indeed, Time Warner and U.S. West argue that given cable's various set aside obligations, the DBS noncommercial educational set aside percentage should be set at 7%. In setting the percentage requirement for DBS, the Commission should consider that most cable operators are required to devote anywhere from 6 to 16 % of their channel capacity to PEG alone.<sup>22</sup>

Cable's PEG access obligations do not end with making channel space available; they usually involve a host of other PEG-related costs imposed by local franchising authorities. These requirements include providing studio facilities, equipment, training,

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<sup>22</sup>

The Media Access Project disparages cable's commitment to providing PEG channels. Based on current statistics, over 80% of all cable customers are served by 11% of all systems. While there is admittedly no uniformity on the number of PEG channels on local systems (as this is a matter of local franchise negotiation), the large cable systems which serve the overwhelming majority of cable customers in urban/suburban localities are normally required and do offer public access channels in the range of 6 to 16% of their capacity. See NCTA Comments at 21-22. Recent press reports indicate that some cable systems are in an era of expanded PEG access responsibilities. "Access channels a hot commodity", Electronic Media, March 3, 1997 at 1.

and access corporation support.<sup>23</sup> In light of these additional costs and the availability of free PEG channel space, USSB's complaint<sup>24</sup> that DBS providers, unlike cable systems, must provide a 50% cost subsidy to public interest programmers under Section 25(b) is particularly peevisish.

Furthermore, the public interest obligations imposed on the cable industry extend to a range of other areas not required of DBS providers. These responsibilities include compliance with channel occupancy limits, program access and program carriage agreement rules, EEO requirements, commercial limits on children's programming, emergency alert system, signal quality requirements and customer service standards.<sup>25</sup>

We do not suggest "piling on" regulatory requirements on competitors. But in assessing the requirements of Section 25(b), it is important to understand the regulatory environment DBS's competitors operate in. Given cable's history and ongoing regulation, the Commission has a blueprint, and context, for implementing DBS' minimal public interest responsibilities under Section 25(b).

The public interest organizations commenting in this proceeding believe that DBS providers should be required not only to set aside 4-7% of their channel capacity for non-

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<sup>23</sup> See Comments of Time Warner at 41-42 (In New York City, for example, Time Warner spends millions of dollars and employee resources fulfilling PEG access support requirements).

<sup>24</sup> Comments of USSB at 11.

<sup>25</sup> See Comments of NCTA, Time Warner, Small Cable Business Association.

commercial educational programming. They contend that DBS should be obligated to provide additional channel outlets that serve children and under-served communities, or address civic, educational, or fine arts interests under Section 25(a).<sup>26</sup> Whether the FCC takes this next recommended step, we believe that the noncommercial channel reservation requirement is clear. The Commission must enforce straightforwardly the plain intent of the 4-7% minimal set aside under Section 25(b).

## **II. THE COMMISSION SHOULD IMPOSE PUBLIC INTEREST OBLIGATIONS ON “LOCAL DBS PROVIDERS” UNDER SECTION 25(A) THAT ARE COMPARABLE TO CABLE TELEVISION’S OBLIGATIONS**

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As noted earlier, it appears that one DBS proposal to retransmit local broadcast stations is not going forward at this time. Nevertheless, the Commission should recognize, in implementing Section 25(a) of the Act, that DBS companies that engage in the local television business should be subject to public interest obligations comparable to those applied to cable systems.<sup>27</sup> To do less would deny the statute’s express directive to regulate DBS where it is feasible to serve the “principle of localism”.

As we noted in our initial comments, apart from mandating the 4-7 % non-commercial educational programming set aside, Congress drew upon the long history of preserving localism when it granted the Commission broad authority under Section 25(a)

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<sup>26</sup> See Comments of DAETC, *et al.*, including Media Access Project; Comments of Children’s Television Workshop.

<sup>27</sup> With respect to section 25(a), our comments are only directed to “local DBS providers”, that is, DBS service equivalent to cable service through retransmission of local broadcast signals.

to regulate DBS providers offering local service. This localism policy extends beyond the political broadcasting rules specified in the statute for all DBS providers. It encompasses regulatory requirements tied to the retransmission of local broadcast stations, notably mandatory broadcast carriage rules and cross-ownership restrictions. As discussed in Part I, these obligations have been imposed on cable operators since their early days in the video programming business. If a local DBS provider is functionally equivalent to a cable operator, it should assume similar regulatory requirements.

In its comments, ASkyB concedes dramatic change in DBS since Section 25 was enacted in 1992, including advances in spot beam technology for the retransmission of local signals. But ASkyB sees its public service obligations as going no further than the 4-7% noncommercial set aside.<sup>28</sup> Echostar, another potential entrant in the local DBS business, urges the Commission to ‘embrace rather than penalize’ its broadcast retransmission plan by refraining from imposing any additional regulations.<sup>29</sup> Echostar asserts that by withholding regulation, the Commission will enhance Echostar’s ability and economic incentive to compete head-to-head against cable operators and further the principle of localism. But the economic leverage that would be fostered by such a hands-off policy will not enhance competition or localism. Rather it will ensure that one competitor, local DBS, gains a regulatory advantage over local cable.

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<sup>28</sup> Comments of ASkyB at 3,9.

<sup>29</sup> Comments of Echostar at 5-6.

As NCTA and other parties argued in their comments, this proceeding calls for a balanced application of the public interest obligations and other restrictions currently imposed only on cable television systems.<sup>30</sup> In the interests of regulatory parity and fair play, the Commission should impose comparable public interest duties, such as must carry, on all local DBS providers or undertake to remove these obligations from cable television.

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See Comments of Time Warner, U.S. West. Time Warner urges a comprehensive review of the public interest obligations imposed on cable television operators to determine if any obligations continue to serve a vital public interest, and if so, urges that parallel obligations be imposed on DBS providers or lifted from cable operators. U.S. West similarly urges “equality of public interest obligations” for DBS and cable in order to allow competition based on price, product and customer service factors.

**CONCLUSION**

The competitive marketplace may ultimately ensure, more effectively than government regulation, that the communications media will provide programming that best meets the needs and interests of the public. But where regulation is mandated, the Commission must implement Congressional intent. Therefore, for the foregoing reasons, the Commission should implement Section 25 in a manner that is fair and consistent with Commission public interest precedent.

Respectfully submitted,



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