

October 28, 1998

Magalie Roman Salas  
Secretary  
Federal Communications Commission  
1919 M St., NW  
Washington, DC 20554

RECEIVED  
OCT 28 1998  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

MEDIA  
ACCESS  
PROJECT

Re: Notice of *Ex parte* Presentation in MM Docket 93-25

Dear Ms. Salas:

On October 27 & 28, 1998, I sent two electronic mails, the texts of which are attached, to various Commissioners and their staff members. The first e-mail was sent to Chairman Kennard, Commissioners Furchtgott-Roth, Ness, Powell and Tristani and the following Commissioners' advisors: Ari Fitzgerald, Legal Advisor to the Chairman, Rick Chessen, Legal Advisor to Commissioner Tristani, Jane Mago, Legal Advisor to Commissioner Powell, and Helgard Walker, Legal Advisor to Commissioner Furchtgott-Roth. The second e-mail was sent to Anita Wallgren, Legal Advisor to Commissioner Ness.

The e-mails address the issue of whether the prohibition on editorial control contained in Section 25(b) of the 1992 Cable Act is narrower than that contained in Section 612(c).

Pursuant to section 1.1206(b)(1) of the Commission's rules, two copies of this letter are being filed with your office today.

Sincerely,



Gigi B. Sohn  
Executive Director

Attachments

No. of Copies rec'd 0+1  
List ABCDE



To: Anita Wallgren  
From: "Gigi B. Sohn" <gsohnnnn@counsel.com>  
Subject: DBS Set-Aside/Editorial Control  
Cc:  
Bcc:

For some odd reason, my email system deleted your address. As discussed below, permitting the DBS providers to determine only whether the set-aside programming is noncommercial, educational and informational is consistent with the statute, and would also permit the Commission to hold the DBS providers accountable if the programming did not meet those requirements.

>Date: Tue, 27 Oct 1998 15:51:38 -0500

>To: Anita Wallgren, Ari Fitzgerald, Chairman Kennard, Cmr. Furchtgott-Roth, Cmr. Ness, Cmr. Powell, Cmr. Tristani, Helgi Walker, Jane Mago, Rick Chessen

>From: "Gigi B. Sohn" <gsohnnnn@counsel.com>

>Subject: DBS Set-Aside/Editorial Control

>

>I understand that there is an argument that the prohibition on editorial control contained in Section 25(b) of the 1992 Cable Act is narrower than that contained in Section 612(c)(2). Because the latter Section includes the phrase "or in any other way consider the content of such programming," and the former does not, some have asserted that DBS providers should be permitted to choose the programmers for the set-aside.

>

>There is a simple explanation for the difference in the two Sections. Section 25(b)'s requirement that the set-aside programming be "noncommercial, educational or informational," by necessity requires a preliminary content determination. Section 612, by contrast, has no such limitation on the content that can be carried over cable leased access channels. Thus, the additional prohibition on content-based decisionmaking is appropriate only in the leased access context.

>

>For the same reason, Section 611(e) of the Act, which prohibits cable operators from exercising editorial control over public, educational and governmental channels, uses language identical to Section 25(b) and does not contain the extra clause contained in Section 612. This is because, unlike leased access, some content determination must be made as to whether the programming meets one of the three specified categories.

>

>The very limited content control that over-the-air broadcasters have in the context of candidate ads is instructive here. Broadcasters are prohibited by law from choosing among candidates for the same office in the sale of time, and from censoring or channeling candidate ads. However, they are permitted to make a preliminary content determination as to whether the ads meet the Commission's sponsorship identification requirements. Similarly, under Section 25(b), a DBS provider may determine whether a particular program is noncommercial educational or informational, but can make no further content-based determinations.

>

>I would be glad to discuss this further if anyone should so desire. I am filing this as an ex parte.

>

>Thank you.

>

>Gigi

>

>

To: Anita Wallgren, Ari Fitzgerald, Chairman Kennard, Cmr. Furchtgott-Roth, Cmr. Ness, Cmr. Powell, Cmr. Tristani, Helgi Walker, Jane Mago, Rick Chessen  
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