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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	MM Docket 93-25
Direct Broadcast Satellite Public Interest Obligations	

REPORT AND ORDER

Adopted: November 19, 1998 **Released: November 25, 1998**

By the Commission: Chairman Kennard issuing a statement; Commissioners Furchtgott-Roth; Powell and Tristani dissenting in part and issuing seperate statements.

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I. INTRODUCTION

1. This *Report and Order* implements Section 25 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") as codified at Section 335 of the Communications Act of 1934, as amended (the "Act").[1] Section 335 directs the Commission to impose certain public interest obligations on direct broadcast satellite ("DBS") providers.[2]

2. The public interest obligations we adopt today further a Congressional mandate and are designed to expand programming choices for consumers in all areas of the United States. DBS has the potential to provide significant competition in the market for multichannel video programming

[1] 47 U.S.C. § 335.

[2] As discussed more fully below, for purposes of this *Report and Order*, "DBS licensee or provider" means entities that: 1) are licensed to operate a DBS service pursuant to Part 100 of the Commission's rules; 2) operate satellites in the Ku-band Fixed Satellite Service (12/14.6 Mhz) pursuant to a Part 25 license and sell or lease transponder capacity to a video program distributor offering service directly to consumers (DTH-FSS); or 3) are non-U.S. licensed satellites providing DBS or DTH-FSS services in the U.S. pursuant to a Part 25 earth station license. This definition does not include C-band (4/6 GHz) distributors.

distribution ("MVPD") services. Our goal is to create flexible, practical rules that will achieve statutory objectives without stifling growth in the DBS industry so that it can realize its competitive potential.

3. The record in this proceeding reveals the wide variety of programming that could be available on DBS systems as a result of our implementation of these provisions. Distance learning programs on all grade levels could greatly expand educational opportunities for many segments of society.[3] In addition, some commenters have proposed offerings that would allow major universities to share research projects with consumers across the country.[4] Rural libraries could benefit from expanded resources. Other possible programming could include children's educational programming, as well as a wide array of medical, historical, and scientific programming. We expect that the decisions we make here will contribute to enhanced viewing opportunities for consumers throughout the United States.

II. BACKGROUND

4. DBS and the direct-to-home fixed-satellite service ("DTH-FSS") are MVPD services, offering an alternative to cable television service, which is the dominant MVPD provider in the United States. DBS and DTH-FSS both provide video services directly to the home via satellite, together serving as of September 1998 approximately 7.9 million households not including C-band.[5] DBS and DTH-FSS licensees operate the space station and offer programming provided by other entities, such as CNN, Home Box Office and others. They serve more subscribers than any type of MVPD other than cable. Domestic and international demand for DBS and DTH-FSS are predicted to grow, giving rise to increased competition to the cable industry and within the MVPD market generally.[6]

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[3] *See, e.g.*, Knowledge TV Comments at 2-6.

[4] *See, e.g.*, Research TV Comments at 4-6.

[5] *Sky Report*, May 1998 at http://www.dbsdish.com/dbsdata.html (*Sky Report*). For comparison, according to the Commission's 1997 Cable Competition Report, in June 1997, there were a total of 73.6 million MVPD households of which there were 64.2 million basic cable subscribers; 7.2 million DBS, DTH-FSS, and C-band subscribers; 1.1 million MMDS subscribers; 1.2 million SMATV subscribers; and 3,000 OVS subscribers. *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd 1034 (1998) (*1997 Cable Competition Report*) at Appendix E, Table E-1.

[6] *See, e.g.*, Satellite News, February 2, 1998 at 6, *citing* Report by the Consumer Electronics Manufacturing Association.

5. In 1982, the Commission established what it described as "interim" DBS service rules in a new Part 100 of its rules and began accepting applications for service.[7] DBS service has experienced significant growth since it was first introduced and now reaches nearly five million subscribers not including DTH-FSS.[8] Currently, DirecTV, USSB, and EchoStar have licenses for satellites that are being used to provide DBS service to the public. In 1997, Tempo Satellite, Inc. (an affiliate of TCI Satellite Entertainment, Inc.), launched a satellite but has not commenced service as of this date.[9]

6. DTH-FSS service has its origins in the large direct-to-home satellite antennas which were introduced in the 1970s for the reception of video programming transmitted via satellite.[10] These first-generation direct-to-home satellites operated in the C-band frequencies at low power.[11] Today there are approximately two million C-band subscribers. More recently, DTH-FSS licensees have been using the Ku-band to provide direct-to-home services.[12] Specifically, in 1994, a group of several cable companies (including TCI Satellite, Inc., Time Warner/Newhouse, Cox, MediaOne/US West,[13] Comcast, and GE American Communications) formed Primestar Partners, L.P. ("Primestar") to provide DTH-FSS in the Ku-band. Primestar now provides DTH-FSS services to 2.2 million subscribers.[14]

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[7] *See Inquiry into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites for the Period Following the 1983 Regional Administrative Radio Conference*, Report and Order, 90 FCC 2d 676 (1982), *recon. denied*, 53 RR 2d 1637 (1983) (*DBS Order*).

[8] *Sky Report* (May 1998).

[9] *See Tempo Satellite, Inc.*, 13 FCC Rcd. 11068 (1998) (granting extension of due diligence deadline for commencing service).

[10] *See Implementation of Section 19 of the 1992 Cable Act (Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming)* (First Report), CS Dkt. No. 94-48, 9 FCC Rcd 7442 (1994) at ¶ 71.

[11] C-band refers to frequencies in the 3700-4200 MHz and 5425-6426 MHz frequency bands. The Commission did not require FSS licensees to obtain special licenses to provide video service. Instead, licensees were and continue to be subject to the existing FSS rules contained in Part 25, which apply whether the satellite is providing video, voice or data services. DTH-FSS licensees providing service in the C-band are not subject to the rules we adopt today. *See* Section IV.A.2.

[12] The Ku-band frequencies are 11.7 GHz - 12.2 GHz and 14.0 GHz - 14.5 GHz.

[13] On June 12, 1998, Media One and US West split into two companies, with Media One retaining all cable and video services and US West retaining the telecommunications services.

[14] *Sky Report* (May 1998). To provide its DTH-FSS service, Primestar leases transponder capacity on an FSS satellite licensed to GE Americom. Primestar is not itself a Commission licensee.

7. The Commission traditionally treated DBS differently from other fixed-satellite services, reflecting the Commission's original conception of DBS as a broadcast-type service.[15] When the Commission began to regulate DBS in 1982, it envisioned that DBS would be a broadcast service but left open the possibility that licensees could provide service on a non-broadcast, non-common carrier or a common carrier basis.[16] Since the inception of DBS service, DBS providers have had the choice of being regulated as broadcast, common carrier, or non-broadcast, non-common carrier. To date, all DBS and DTH-FSS licensees have chosen to be regulated as non-broadcast, non-common carriers. The Commission's regulatory treatment of DBS has been affirmed by the courts.[17]

8. In 1992, Congress passed legislation establishing public interest obligations for DBS. Section 335[18] directs the Commission to adopt rules to impose public interest or other requirements on DBS providers. At a minimum, DBS providers must comply with the political broadcast requirements of Sections 312(a)(7) and 315 of the Act. The statute also directs the Commission to examine the opportunities that DBS provides for the principle of localism. In addition, DBS providers are required to set aside between four to seven percent of their channel capacity for "noncommercial programming of an educational or informational nature." The statute provides that DBS providers shall meet this requirement by making capacity available to national educational programming suppliers upon reasonable prices, terms, and conditions but shall not exercise editorial control over the noncommercial programming provided pursuant to the rules adopted.

9. In response to Congress' directive, on March 2, 1993, the Commission released a Notice of Proposed Rule Making ("NPRM") seeking comment on proposals to implement the provisions of Section 335.[19] After the *1993 NPRM* was released and comments were received, the United States District Court for the District of Columbia held, *inter alia*, that Section 335 violated the First Amendment of the U.S. Constitution.[20] This ruling effectively stayed the proceeding pending the Commission's appeal of the decision. On August 30, 1996, the United States Court of Appeals for the

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[15] The other distinguishing feature of DBS service is its unique treatment by the International Telecommunication Union (ITU). Under the ITU's rules, spectrum and orbital locations for the DBS service (known internationally as the Broadcast Satellite Service or BSS) are apportioned on a global basis among all nations through ITU agreements reached at ITU World Radio Conferences. By contrast, orbital locations in the fixed-satellite service are generally selected and notified by national administrations, and interference issues are resolved through satellite coordinations.

[16] *DBS Order* at ¶ 84.

[17] *Subscription Video Services*, Report and Order, 2 FCC 2d 1001 (1987), *aff'd, sub nom., National Assoc. for Better Broadcasting v. FCC*, 849 F.2d 665 (D.C. Cir. 1988).

[18] 47 U.S.C. § 335.

[19] *Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992*, Notice of Proposed Rulemaking, 8 FCC Rcd 1589 (1993) (1993 NPRM).

[20] *Daniels Cablevision, Inc. v. U.S.*, 835 F. Supp. 1 (D.D.C. 1993).

District of Columbia Circuit reversed the District Court and held that Section 335 was constitutional.[21] In light of the interval between release of the *1993 NPRM* and the Court's decision upholding this Section, the Commission issued a Public Notice on January 31, 1997, to update and refresh the record. The Public Notice requested additional comments on each of the issues raised in the *1993 NPRM* and on any other issues relevant to the implementation of Section 335.[22]

III. SUMMARY

10. As required by the statute, the rules that we adopt here will apply to entities that are licensed to operate a DBS service pursuant to Part 100 of the Commission's rules, as well as to entities operating satellites in the Ku-band pursuant to a Part 25 license and selling or leasing transponder capacity to a video program distributor offering service directly to consumers. In addition, these obligations will apply to non-U.S. licensed satellites providing DBS or DTH-FSS services in the United States.

11. As specifically required by statute, DBS licensees must comply with the political broadcasting rules of Sections 312(a)(7) (granting candidates for federal office reasonable access to broadcast stations) and 315 of the Act (granting equal opportunities to candidates at the lowest unit charge). This means that DBS licensees must grant legally qualified candidates for federal office reasonable access to their facilities, and must grant equal opportunities to all other legally qualified candidates. DBS licensees must, if they charge for political advertising time, sell time to candidates at the lowest rate available.

12. As noted above, Section 335 requires the Commission to require DBS licensees to set aside for "noncommercial programming of an educational or informational nature" an amount of channel capacity not less than four percent nor greater than seven percent. Pursuant to that authority we will require DBS licensees to reserve four percent of their channel capacity exclusively for such programming. We will, however, limit the number of set aside channels a single national educational and informational programmer can use to one channel per programmer, until all qualified entities that have sought access have been offered access on at least one channel. We also limit access to the reserved capacity to noncommercial national educational programming suppliers. Finally, we adopt a narrow definition of direct costs in order to ensure that noncommercial programming suppliers are able to access affordable DBS channel capacity.

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[21] *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996) (*Time Warner*).

[22] We received 25 comments and 20 replies in response to the *1993 NPRM* and 43 comments and 28 replies to the Public Notice. In addition, we have received a number of ex parte filings addressing various specific issues. A list of commenters, as well as a description of the abbreviations used in this *Report and Order*, is attached as Appendix A. References in this *Report and Order* to comments filed in response to the *1993 NPRM* are referred to as "1993 Comments" or "1993 Reply Comments." If no designation is made, the comments were filed in response to the Public Notice issued in 1997.

IV. DISCUSSION

A. Definition of Provider of DBS Service

13. As a threshold matter, we must identify the entities that will be subject to the public service obligations established by Section 335. Section 335(a) refers to "providers of DBS services" but does not define the term.[23] Section 335(b)(5)(A) defines a "provider of DBS services" as follows:

> (i) a licensee for a Ku-band satellite system under part 100 of title 47 of the Code of Federal Regulations; or
>
> (ii) any distributor who controls a minimum number of channels (as specified by Commission regulation) using a Ku-band fixed service satellite system for the provision of video programming directly to the home and licensed under part 25 of title 47 of the Code of Federal Regulations.[24]

14. The *1993 NPRM* noted that deciding which DBS entities should be covered by Sections 335(a) and (b) is complicated by the Commission's DBS regulatory regime and the complexities of the satellite programming distribution business.[25] The Commission has defined DBS service as a "radio communication service in which signals from earth are retransmitted by high power, geostationary satellites for direct reception by inexpensive earth terminals" as regulated by Part 100 of the Commission's rules.[26] The Part 100 service was established in 1982 to use specific frequencies in the Ku-band that would provide service on a regional and/or national basis.[27] Direct-to-home programming is also provided by fixed satellite service ("FSS") operators using low-power and medium-power satellites in the C-band (4/6 GHz) and in portions of the Ku-band. FSS satellites are licensed under Part 25 of the Commission's rules and do not use the same frequencies as satellites licensed under Part 100.[28] The *1993 NPRM* solicited comment on the meaning of the definition of

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[23] *See* 47 U.S.C. §335(a).

[24] 47 U.S.C. §§ 335(b)(5)(A)(i) and (ii).

[25] *1993 NPRM*, 8 FCC Rcd at 1589.

[26] *Inquiry into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites for the Period Following the 1983 Regional Administrative Radio Conference*, 90 FCC 2d 676, 677, n.1 (1982).

[27] The Ku-band generally refers to a band of frequencies at approximately 12 GHz. DBS licensees under Part 100 of the Commission's Rules operate in the frequency band 12.2-12.7 GHz for the distribution of programming from satellites to subscribers' homes. *See* 47 C.F.R. § 100.1(b).

[28] DTH-FSS satellites are generally spaced two degrees apart while DBS satellites are typically spaced nine degrees from each other. The smaller spacing between satellites for DTH-FSS service typically results in larger receive dishes than those used for DBS service.

"DBS providers" under both Parts 100 and 25 of the Commission's rules and on whether the same definition should apply to both Sections 335(a) and 335(b). Finally, we note that the Commission has proposed to streamline and consolidate its service rules governing DBS services and DTH-FSS. Specifically, the Commission has proposed to consolidate the DBS service rules, currently located in Part 100, with the rules for DTH-FSS in Part 25.[29]

1. Part 100 Licensees

15. With respect to Part 100 licensees, the *1993 NPRM* specifically proposed that, in view of the explicit language of the statute, entities licensed under Part 100 should be held responsible for ensuring that the obligations adopted pursuant to the statute are met.[30] The Commission, however, also recognized that a Part 100 licensee might delegate the day-to-day functions of implementing these requirements to an entity that is actually controlling the distribution of programming by satellite to home viewers. Accordingly, the *1993 NPRM* requested information on how these delegations of authority will occur and, on how this should affect our treatment of the responsibilities imposed by the statute.

16. Many commenters addressing this issue express the view that Part 100 DBS licensees are bound by the requirements set forth in the statute because of its explicit wording.[31] For example, APTS/PBS asserts that licensees under Part 100 should be ultimately responsible for assuring that DBS capacity is made available to noncommercial programming suppliers.[32] SBCA argues that, whether or not a Part 100 DBS licensee delegates its programming obligations under Section 335 to another entity, the Part 100 licensee should be ultimately responsible for meeting these statutory obligations.[33] CFA contends that making the Part 100 licensee ultimately responsible will facilitate enforcement of these obligations and resolution of disputes between Part 100 licensees and their delegates regarding responsibility for violations of Section 335 requirements.[34]

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[29] Policies and Rules for Direct Broadcast Satellite Service, *Notice of Proposed Rulemaking*, FCC 98-26, IB Docket 98-21, 13 FCC Rcd. 6907, 6910 (rel. Feb. 26, 1998) *(DBS Consolidation NPRM)*. Consolidating the regulation of all satellite services is intended to eliminate inconsistencies in the rules, reduce confusion and uncertainty for users, lessen regulatory burdens for licensees, and simplify the development of advanced services. *DBS Consolidation NPRM* at ¶ 13.

[30] *1993 NPRM*, 8 FCC Rcd at 1590.

[31] *See* SBCA 1993 Comments at 5; DirecTV 1993 Comments at 7; APTS/CPB 1993 Comments at 6; CFA 1993 Comments at 2.

[32] *See* APTS/PBS Comments at 30-31.

[33] *See* SBCA 1993 Comments at 5-6.

[34] *See* CFA 1993 Comments at 2-3.

17. In light of the fact that the explicit language of Section 335(b)(5)(A)(i) of the Act references "a licensee for a Ku-band satellite system under Part 100 of Title 47 of the Code of Federal Regulations" within the definition of "provider of DBS service," we conclude Part 100 licensees are required to comply with the obligations of Sections 335(a) and (b).[35] DBS licensees may delegate responsibility to programmers to comply with the licensees' obligations under Section 335, but we will consider the licensees ultimately responsible for complying with the rules we adopt today.

2. Entities Under Part 25 of the Commission's Rules

18. Section 335(b)(5)(A)(ii) of the Act is less clear about what entity bears the public interest responsibilities. This section defines a "provider of direct broadcast satellite service" as "any distributor who controls a minimum number of channels (as specified by Commission regulation) using a Ku-band fixed service satellite system for the provision of video programming directly to the home and licensed under Part 25 of Title 47 of the Code of Federal Regulations."[36] As the Commission observed in the *1993 NPRM*, this definition could apply to a number of different entities, including the satellite licensee, the video programmer, other program suppliers and distributors, or other third parties, such as entities that lease capacity on a wholesale basis and resell it to individual programmers.[37] In the *1993 NPRM*, the Commission tentatively concluded that the most natural reading of the statutory language is that the phrase "licensed under Part 25" refers to the satellite used to distribute programming, not to the "distributor" of the programming. The Commission sought comment on this conclusion, as well as on whether it could impose carriage obligations on entities other than the satellite licensees.

19. Commenters split between those placing ultimate responsibility for complying with the statutory public service obligations of Section 335 on the satellite licensee and those arguing that responsibility should fall on the entity responsible for selecting, packaging, and marketing multiple channels of video service over satellite facilities. APTS/PBS, for example, argues that the licensee of the Part 25 satellite should bear ultimate responsibility, even though that licensee is likely to lease channel capacity to a direct-to-home distributor.[38] APTS/PBS and Primestar argue that the statutory language requires this conclusion.[39]

20. Other commenters contend that the statute only requires that the satellite system used by a direct-to-home distributor be licensed under Part 25 and that the ultimate responsibility for complying with the obligations of Section 335 should rest with the DBS distributor, not with the

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[35] Current licensees are: DirecTV, USSB, EchoStar, MCI, R/L DBS, TEMPO and Dominion Video.

[36] 47 U.S.C. § 335(b)(5)(A)(ii).

[37] *1993 NPRM*, 8 FCC Rcd at 1591.

[38] *See* APTS/PBS Comments at 30-34; *see also* CME comments at 16-17.

[39] *See* APTS/PBS Comments at 31-34; Primestar 1993 Comments at 6-7.

satellite licensee.[40] In support of this position, they interpret the phrase "and licensed under Part 25 of Title 47 of the Code of Federal Regulations" as modifying a "Ku-band fixed service satellite system" and not as applying to "any distributor who controls a minimum number of channels."[41] SBCA argues that "[t]here can be no other interpretation because the lone DBS service falling under this definition conducts business as a program distributor and is not itself a licensee."[42] DirecTV also notes that Congress expressly used the term "licensee" as the operative mechanism for identifying Part 100 DBS providers but did not use this approach for addressing Part 25 providers.[43] Instead, DirecTV asserts that Congress referred to "distributors" who control a threshold number of channels on a Part 25 satellite. As a result, DirecTV argues, Congress is conferring jurisdiction on the Commission to impose public service obligations on direct-to-home distributors, not the satellite licensees.

21. We affirm our tentative conclusion that the statute should be interpreted as imposing on the satellite licensee the ultimate responsibility for complying with the statutory public service obligations of Section 335. We reach this conclusion for a number of reasons. First, the better interpretation of the statutory language supports this conclusion. In the statute, Congress used the conjunction "and", implying that distributor means an entity that controls channels and is licensed by the Commission. If Congress had meant to focus on the programmer, it could have said a "Ku-band satellite . . . that is licensed . . . ." Thus, we do not agree with SBCA that "licensed under Part 25" modifies the satellite system, but rather modifies the word "distributor."[44]

22. Second, we find that the Commission is required to impose the public interest obligations "as a condition of any provision, initial authorization, or authorization renewal."[45] This shows Congress' intent to have the Commission regulate entities it can control through the licensing process. The Commission only authorizes licensees, not lessors of satellite capacity or programming distributors. To read Section 335(b) as applying to program distributors would mean that the Commission could not effectively carry out the law, since under Part 25, the Commission licenses, and thus can impose conditions on, the satellite system, not a particular programmer. Although the statutory language is ambiguous, we conclude that read as a whole, Section 335(b) imposes obligations on the satellite licensee.

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[40] *See* SBCA 1993 Comments at 9-10; GTE Spacenet 1993 Comments at 5; DirecTV 1993 Comments at 11.

[41] SBCA 1993 Comments at 10.

[42] *Id.* at 10.

[43] *See* DirecTV 1993 Comments at 11-12.

[44] CME Comments at 16-17.

[45] Section 335 (b)(1).

23. Third, as noted by APTS/PBS and CME, imposing the obligations on the Part 25 licensee facilitates enforcement.[46] It is unlikely that Congress would have intended that the statute be interpreted in a way that compromises enforcement. That would be the result, however, if we accepted GE Americom's argument that the reference to "provision" refers only to those providing programming, which Part 25 satellite licensees do not do at present.[47] The Commission has greater enforcement powers under the Act over licensees than non-licensees and it also has greater ownership information about satellite licensees than it has over unlicensed direct-to-home distributors.[48] The Commission's enforcement powers with respect to non-licensees are limited to forfeitures and cease and desist orders, which require court action. Neither of these remedies is as effective as the Commission's direct powers over licensees, which includes license revocation. Indeed, efforts to assert jurisdiction over programming suppliers and other non-licensees could involve the Commission in litigation over its regulatory authority. The better interpretation of an ambiguous statute is one that facilitates enforcement, rather than one that makes enforcement difficult.

24. Finally, we agree with APTS/PBS that by holding the satellite licensee responsible, the Commission would be in a position to apply the same regulatory regime to both Part 100 and Part 25 DBS satellites.[49] Equal treatment is particularly important in light of the Commission's proposal to consolidate the Part 100 rules with those in Part 25. Should this occur, all DBS services will be licensed under Part 25. Licensees operating in C-band will not be subject to the rules we adopt today because the statute specifically applies only to satellites operating in the "Ku-band."

25. We acknowledge that Part 25 satellite licensees do not themselves provide programming, but simply lease bulk satellite transponder capacity.[50] We do not agree with commenters who contend that Part 25 licensees should be treated differently than Part 100 licensees because Part 25 licensees have less control over programming.[51] As we noted with respect to Part 100 licensees, the Part 25 licensee can delegate responsibility for Section 335 requirements, but we will hold the Part 25 licensee ultimately responsible for compliance.

26. We will allow satellite licensees to demonstrate compliance with these public service obligations by relying on certifications from distributors that expressly state that they have complied with the obligations of Section 335. Of course, such reliance must be reasonable and cannot be an absolute shield against liability for violations of these rules. The Commission took a similar approach

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[46] *See* CME Comments at 16-17; APT/PBS Comments at 32-33.

[47] GE Americom Further Reply Comments at 4-5.

[48] *See* APTS/PBS Comments at 33; CME Comments at 16-17.

[49] *See* APTS/PBS Comments at 33.

[50] *See* GE Americom Further Reply Comments at 6, n. 6; *see also* Time Warner Comments at 45-48.

[51] *See, e.g.*, DirecTV 1993 Comments at 11-12; USSB 1993 Comments at 2-3; GTE Spacenet 1993 Comments at 3-4; GTE Spacenet 1993 Comments at 6-7.

in its review of closed captioning requirements for "providers and owners of video programming."[52] In that proceeding, the Commission defined the term provider, as we use it here, to include the specific television station, cable operator, cable network or other service that provides programming to the public.[53] Although the Commission held video programming distributors ultimately responsible for compliance with the closed captioning rules, it allowed distributors to demonstrate compliance by relying on certifications from producers, networks or syndicators, that expressly state that the programming is either captioned or exempt from the closed captioning rules. We conclude that a similar approach is appropriate here.

27. We received no comments on whether, for the purposes of applying Section 335(a), "DBS providers" should be defined the same as they are in Section 335(b). In the absence of any statutory source for a different definition, we determine that the same definition should be applied to both sections of the statute.

28. Section 335(b) provides that the Commission shall determine the minimum number of Ku-band FSS channels that must be controlled in order for the public interest obligations to be applied.[54] HBO suggested that the Commission exclude entities controlling six or fewer transponders; DirecTV stated that an entity with a minimum of 11 channels should be subject to the statutory obligations.[55] SBCA noted that the Commission should make its determination based on its assessment of an equitable working of the DBS marketplace.[56] We conclude that the most equitable approach is to impose the public interest obligations on all DBS licensees, with the following exception. On balance, it would not serve the public interest to impose the obligation on an entity that controls so few channels of programming that application of the four percent rule would not yield even one set-aside channel of programming, and, we therefore adopt a de minimis standard to avoid

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[52] *See Closed Captioning and Video Description of Video Programming*, Report and Order, 13 FCC Rcd 3272 (1997) (Closed Captioning Proceeding) (implementing Section 305 of the Telecommunications Act of 1996); 47 U.S.C. § 713.

[53] Video programming distributors are defined as all entities who provide video programming directly to customers' homes, regardless of the distribution technologies employed by such entities. *See Closed Captioning Proceeding*, 13 FCC Rcd at 3276.

[54] For DBS, the United States is assigned 32 channels at eight orbital locations. Each of these 32 channels has a certain center frequency and a bandwidth of 24 MHz. Generally, a DBS satellite has one transponder for each "frequency channel" and, using current compression technology, each frequency channel has sufficient bandwidth to accommodate 6-8 channels of video programming. This is similar for DTH-FSS however, as noted above, DTH-FSS operates on different frequencies.

[55] *See* Home Box Office Comments at 3; DirecTV Comments at 9. *See also* CFA Comments at 6 (12 channel minimum); Continental Satellite (do not apply obligations at all for seven years).

[56] SBCA Comments at 6.

the unintended result of subjecting very small and specialized services to public interest obligations.[57] Accordingly, any DBS licensee controlling sufficient channels of programming to require set aside of at least one channel of video programming under our four percent reservation will be subject to the rules we adopt today.[58]

3. Applicability To Non-U.S. Licensed Satellites

29. Changes in the nature of the satellite industry have made the provision of DBS-type service more global. Last year, the Commission adopted a *Report and Order* that established a framework under which foreign satellites could serve the U.S. market.[59] This framework included all types of direct-to-home video services. Indeed, we have begun to receive requests involving foreign-licensed DBS-type systems that seek to provide service in the United States.[60] Consequently, we must consider whether the rules we adopt today should apply to satellites licensed by administrations other than the United States that provide DBS-type service in this country. ASkyB asserts that exempting operators using non-U.S. licensed satellites from the public service requirements applicable to U.S. licensed systems would have the perverse effect of giving a competitive advantage to those who are doing the least to serve the American public.[61]

30. We conclude that we should impose the same public service obligations we impose on U.S. licensed operators on operators of non-U.S. licensed satellites that provide DBS service to customers in the United States. This conclusion follows the policy applied in our recently adopted *Disco II* Order where we stated:

> We will require non-U.S. satellite operators to comply with all Commission rules applicable to U.S. satellite operators. To do otherwise would place U.S. and foreign operators on an uneven competitive footing when providing identical satellite services

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[57] *See* August 18, 1998 Ex Parte Letter of Philadelphia Park, indicating plans to offer eight end-user channels of horse racing news, features and events. Philadelphia Park urges the Commission to adopt a channel minimum that would exempt such small programmers in order to avoid the inequities of requiring them to hire staff just for the purpose of overseeing noncommercial programming and to avoid the consequent substantial impact on the viability of its business plan.

[58] For example, a DBS provider must offer at least 25 channels of video programming to be subject to these rules (4% of 25 programming channels equals one set-aside channel); *see* IV(C)(1) below for discussion regarding channel capacity.

[59] *Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States*, Report and Order, 12 FCC Rcd 24094 (1997) (Disco II Order).

[60] *See e.g. Televisa* 13 FCC Rcd. 10074 (1997).

[61] *See* ASkyB Comments at 24; *see also* Morality in Media Comments at 4-5.

in the United States and would defeat our public policy objectives in adopting these service rules in the first place.[62]

For example, in *Disco II* we stated that we would require foreign-licensed "Big Leo" satellites to comply with the Commission's rules regarding coverage requirements if they wished to provide service in the United States.[63] In addition, foreign-licensed satellites serving the United States must comply with the prohibition on U.S. licensees entering into an exclusive service agreement with other countries.[64]

31. Although Congress did not address the issue of Section 335's applicability to non-U.S. licensed satellites, we note that there were no non-U.S. licensed satellites proposing to provide DBS service in the United States at the time the statute was enacted. Today, the DBS market is much more global in scope and it is possible that a number of non-U.S. licensed satellites will provide service in the United States. Indeed, in negotiating international agreements allowing for the provision of DBS service into the United States by non-U.S. licensed satellites, we have explicitly provided that the DBS providers may be subject to public interest programming requirements.[65]

32. An argument could be made that Section 335(b) may not on its face apply to non-U.S. licensed satellites, since such satellites are not licensed under Part 100 or Part 25 of the Commission's rules. Although we are not licensing the satellite under Part 25, the earth stations necessary to receive service from a non-U.S. licensed satellite require Commission authorization under Part 25 and we will hold the earth station licensee responsible for compliance with the rules we adopt today.[66] The receiving antennas are an integral part of any satellite system providing video programming directly to the home. Specifically, Section 25.137 of the Commission's rules requires that earth stations operating with a non-U.S. licensed satellite be licensed by the Commission. This provides a vehicle by which the Commission can examine non-U.S. licensed satellites' compliance with our rules and provides a

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[62] *Disco II Order* at ¶ 173.

[63] *Id.*

[64] Disco II Order at ¶ 166.

[65] *See* Protocol Concerning the Transmission and Reception of Signals from Satellites for the Provision of Direct-to-Home Satellite Services in the United States of America and the United Mexican States. (November 8, 1996), Article VI; Agreement Between the Government of the United States of America and the Government of the Argentine Republic Concerning the Provision of Satellite Facilities and the Transmission and Reception of Signals to and from Satellites for the Provision of Satellite Services to Users in the United States of America and the Republic of Argentina (June 5, 1998), Article VI.

[66] 47 C.F.R. §25.131(j) (receive-only earth stations operating with non-U.S. licensed space stations must request a license to operate such earth stations). *See also* sections IV(a)(2) of this Report and Order (holding entities licensed under part 25 of the Commission rule but leasing satellite capacity to video programming resellers responsible for complying with the public interest rules).

regulatory control point to ensure continued compliance.[67] Therefore, as a condition of its license, we will require the earth station licensee communicating with a non-U.S. licensed satellite that is providing the minimum number of video channels as defined in these rules[68] to comply with these public interest obligations.

B. Public Interest Requirements

33. As added by the 1992 Cable Act, section 335(a) of the Act states:

> The Commission shall, within 180 days after the date of enactment of this section, initiate a rulemaking proceeding to impose, on providers of direct broadcast satellite service, public interest or other requirements for providing video programming. Any regulations prescribed pursuant to such rulemaking shall, at a minimum, apply the access to broadcast time requirement of section 312(a)(7) and the use of facilities requirements of section 315 to providers of direct broadcast satellite service providing video programming. Such proceeding also shall examine the opportunities that the establishment of direct broadcast satellite service provides for the principle of localism under this Act, and the methods by which such principle may be served through technological and other developments in, or regulation of, such service.[69]

1. Political Broadcasting Requirements

34. The *1993 NPRM* proposed applying existing rules implementing the access to broadcast time requirements of Section 312(a)(7) and the use of facilities requirements of Section 315 of the Act to DBS providers and to tailor these rules to account for differences between multichannel DBS systems and traditional broadcast stations.[70] While we impose the existing political broadcasting rules, as discussed below, we recognize that applying these rules to the DBS service may present difficulties not encountered in the broadcast environment. Unlike network broadcasters, DBS licensees currently do not originate programming, sell advertising time or provide local network signals throughout the country.[71]

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[67] *Disco II Order* at ¶¶ 188, 201.

[68] *See* para 28 *supra*.

[69] 47 U.S.C. § 335(a).

[70] *1993 NPRM*, 8 FCC Rcd at 1593.

[71] DirecTV explains that DBS licensees use the same program feeds as cable distributors, although cable distributors are able to insert local advertising into the programming stream after it reaches the cable headend. DBS licensees do not insert advertising for technical, economic and legal reasons. Programmers would have to create a "DBS feed" separate from that provided to cable, to insert advertisements. DirecTV June 29 Letter at 4. EchoStar states that it would have to abrogate its existing contracts with cable programmers and require these programmers to insert additional material in order to

a. Reasonable Access

35. Section 312(a)(7) of the Act requires broadcasters to allow legally qualified candidates for federal office reasonable access to their facilities.[72] Access can be provided on a free or paid basis. Since the passage of Section 312(a)(7), the Commission's policy has generally been to defer to the reasonable, good faith judgment of licensees as to what constitutes "reasonable access" under all the circumstances present in a particular case.[73] The Commission tentatively concluded in the *1993 NPRM* that DBS providers should, like broadcasters, have discretion to determine what is reasonable and may take into account a variety of factors in acting upon requests by federal candidates for access.[74] It requested comments on whether any modifications to the political programming rules would be necessary because DBS is a multichannel service, unlike traditional broadcasting. Specifically, the Commission asked whether a DBS provider that controls multiple channels should be required to make all video channels available to federal candidates, including advertisement-free channels, or only certain channels.[75] Finally, the Commission requested comment on whether all federal candidates would be eligible to utilize DBS political advertising. If so, the Commission tentatively concluded that, in determining reasonable access, DBS providers could take into account the burdens of providing access to all federal candidates.

36. We affirm our tentative conclusion that the access to broadcast time requirement of Section 312(a)(7) applies to DBS providers. The statute could not be more explicit. Congress, however, did not indicate how the statutory requirements, which were designed for the traditional local broadcast medium, should be applied to a national, multichannel medium supplied by licensees who contract with third party programmers to provide programming directly to DBS subscribers.

37. Access for Federal Candidates We first address the question of which candidates are entitled to take advantage of the political broadcasting rules. DAETC argues that Section 312(a)(7), by referring to "federal" candidates, does not permit DBS providers to restrict availability to only

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comply with the broadcasting requirements. EchoStar June 30 letter at 1-2.

[72] Specifically, Section 312(a)(7) provides that the Commission may revoke any station license or construction permit for willful or repeated failure to allow reasonable access to or permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy. See 47 U.S.C. §312(a)(7); 47 C.F.R. §73.1944. Consequently, as noted below, this right of access does not apply to candidates for non-federal state or local offices.

[73] *See, e.g.*, Codification of the Commission's Political Programming Policies, *Memorandum Report and Order*, 7 FCC Rcd 678, 680-83 (1991), on recon., *Memorandum Opinion and Order*, 7 FCC Rcd 4611 (1992) (*Codification of the Commission's Political Programming Policies*).

[74] *See id.* at 4612.

[75] *1993 NPRM*, 8 FCC Rcd at 1594.

candidates for President and Vice President.[76] In contrast, DBS providers argue that they should not be required to provide access to House and Senate candidates, but only to candidates for President and Vice President because DBS is not suited to localized or regionalized programming.[77] DirecTV contends that House and Senate candidates may not benefit from DBS, since DBS targets the nation as a whole, and not an individual candidate's district. SBCA is concerned that providing such access would be an inefficient use of limited spectrum.[78] Primestar argues that to require a DBS provider to grant access to every federal candidate could potentially overburden a DBS provider's capacity. It also states that it is highly unlikely that federal candidates other than Presidential and Vice Presidential would have a serious interest in obtaining nationwide access to voters on such a dispersed basis. EchoStar calculates that providing access for all Congressional candidates would require 2500 minutes of advertising.[80]

38. We recognize that DBS is a national service and that Presidential and Vice Presidential candidates are the candidates who are most likely to want to exploit its national coverage. Conversely, it seems highly unlikely that federal candidates running in state or local campaigns would seek a national advertising outlet. We also recognize the technical and financial burdens that providing localized programming to cover other than national races would place on DBS providers and that it may be impossible or impractical for those existing DBS providers to alter their service to allow for localized programming in all jurisdictions, at least in the near future. The Commission has not addressed the issue of whether and under what circumstances a candidate for the U.S. House of Representatives or Senate is entitled to access to a nationally distributed service under Section 312(a)(7). If this issue is brought to our attention in the context of a specific case, we will address it at that time. Factors we would consider in such a case include the number of candidates requesting time, the technical difficulties in satisfying the request, and the availability of reasonable alternatives.

39. Access to Channels. Next we address the issue of what constitutes reasonable access in the context of a varied multi-channel environment. SBCA argues that the Commission should take into account the differences between terrestrial broadcasters licensed to serve particular communities and national, multichannel subscription services, as well as the fact that DBS licensees offer channel space to third party programmers and exercise no control over programming on these channels. Thus, SBCA and ASkyB urge the Commission to give DBS providers discretion to designate a discrete number of the channels over which they retain control for political broadcasting purposes, such as channels on which the DBS provider sells advertising time, controls a block of programming time or

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[76] *See* DAETC Comments at 8-9.

[77] *See* Primestar Further Comments at 8; Tempo Comments at 17; ASkyB Comments at 6; DirecTV Comments at 13-14; Continental Satellite 1993 Comments at 27.

[78] *See* SBCA Comments at 12-15; SBCA June 30, 1998 letter at 1.

[79] *See* Primestar Comments at 8.

[80] EchoStar June 30 letter at 1.

reserves for public access.[81] Similarly, DirecTV argues that given the general inability of DBS providers to alter daily programming schedules to accommodate political broadcasting time, DBS providers should be given the flexibility to place all political advertisements on a single channel or on a limited number of specific channels if the provider determines that such is an optimal strategy to meet its public service obligations.[82]

40. DAETC argues that DBS providers cannot adopt a rigid policy relegating candidates to a separate channel or channels for candidate speech. DAETC also suggests that if contractual agreements prevent a DBS provider from giving a candidate reasonable access, the Commission should preempt a contract to permit access. It states that any future contracts with programmers should permit DBS providers to insert candidate advertisements into programming.[83]

41. While we agree with DAETC that placing political advertisements on channels separate from other programming may be problematic, we also acknowledge the difficulties presented by a requirement that DBS providers alter program feeds supplied by independent programmers. DBS providers will be allowed to make reasonable, good faith determinations in providing access to federal candidates. The determination of whether access is reasonable under Section 312(a)(7) is a highly fact-specific determination that must take into account a number of factors. Relevant factors we would consider include the amount of time requested, the number of candidates in the race, possible program disruption, technical difficulties of providing the access requested, and the availability of reasonable alternatives.[84] Whether the access provided by a DBS provider in a particular case is reasonable will be decided on a case-by-case basis. We will monitor DBS providers' performance in this area so that we can modify our rules if necessary and as experience dictates. We will, of course, evaluate any complaints filed against DBS providers with respect to their obligations under Section 312(a)(7), to determine whether they are acting within the spirit of the statute and Commission rules and policies. We will require DBS providers to maintain a file available to the public at the providers' headquarters containing requests for political advertising time and disposition of those requests.

42. We confirm our tentative conclusion that where DBS providers carry the programming of a terrestrial broadcast television station, it is the responsibility of the terrestrial broadcaster and not the DBS provider to satisfy the political broadcasting requirements of Sections 312(a)(7). We reach this conclusion because terrestrial broadcast television stations are already under an obligation to abide by Sections 312(a)(7). This is consistent with our policy of requiring terrestrial broadcasters to comply with these statutory obligations when their signal is carried by cable television systems.[85]

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[81] *See* SBCA Comments at 17-18; ASkyB Comments at 5.

[82] *See* DirecTV Comments at 14.

[83] *See* DAETC Comments at 8-9.

[84] *See Codification of the Commission's Political Programming Policies*, 7 FCC Rcd. 678, 681 (1991) (providing general guidelines for reasonable access).

[85] We note that Section 315, but not Section 312(a)(7), applies to cable operators.

b. Equal Opportunities

43. Section 315(a) of the Act provides that "if any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station."[86] Section 315(a) also provides that "such licensee shall have no power of censorship over the material broadcast under the provision of this section." Both the statute and the rules narrowly define the term "use," and exclude from the definition candidates' appearances in *bona fide* newscasts, interviews, documentaries and the on-the-spot coverage of news events. In addition, Section 73.1940 of the Commission's rules defines "legally qualified candidate" as any person who has publicly announced his or her intention to run for nomination or office, is qualified under the applicable local, state or federal law to hold the office for which he or she is a candidate, and has qualified for ballot placement or has otherwise met all the qualifications set forth in the Commission's rules.[87] In the *1993 NPRM*, the Commission proposed applying these rules, as well as policies set forth in prior Commission orders to DBS providers, and invited comments as to how to adjust the existing rules to better suit DBS technology.[88] The Commission invited comment on whether to apply to DBS providers the comparable audience size guidelines applied to cable TV, whether other factors should be considered, or whether to make determinations on a case-by-case basis.

44. Commenters generally supported the Commission's decision to apply existing cable rules to DBS services.[89] Tempo and SBCA point out that the Commission has never required cable systems to air opposing candidates' advertisements on the same channels or to take into consideration the demographics of channels.[90] They argue that there is no reason to impose a different or more burdensome policy on DBS services. Primestar urges the Commission to leave the precise channel selection to the discretion of the DBS provider, provided that audience size and day-part can reasonably be maintained among opposing candidates.[91] In contrast, DAETC argues that the DBS provider must make its best effort to ensure access to the channel the candidate requested at the time that would garner an audience of the same approximate size the candidate would have received by his or her request. It further argues that Congress' primary purpose in enacting Section 315 is to ensure candidates' access to the time periods with the greatest audience potential.[92] Some commenters express

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[86] 47 U.S.C. §315(a); 47 C.F.R. §73.1941.

[87] 47 C.F.R. § 73.1940.

[88] *1993 NPRM*, 8 FCC Rcd 1589, 1594.

[89] *See* Tempo Comments at 18-19; Primestar Comments at 10; *but, cf.* Home Box Office 1993 Comments at 6-7.

[90] Tempo Comments at 18-19; Primestar Comments at 11-12.

[91] *See* Primestar Comments at 11.

[92] *See* DAETC Comments at 9, citing *Becker v. FCC*, 95 F.3d 75, 80 (D.C. Cir. 1996).

their concern for advertisement-free channels, urging that these channels be exempt from equal opportunities provisions.[93]

45. In conformance with the statutory mandate, we apply the equal opportunities provisions of the statute and the Commission's rules, as well as the policies delineated in prior Commission orders, to DBS providers. DBS providers will be required to ensure, by contractual means or otherwise, that these rules are followed. If one legally qualified candidate is afforded access to a DBS system, all other candidates for the same office who make timely requests must be afforded that same opportunity.[94] To ensure that competing candidates will be able to ascertain what equal opportunities they are entitled to, we will require the DBS provider to maintain a political file similar to the one maintained by broadcasters.[95] We will retain the definitions of "use" and "legally qualified candidate" in current rules and policies. As in the case of Section 312(a)(7), we intend to resolve any issues involving DBS providers' equal opportunities obligations in the context of particular cases.

c. Lowest Unit Charge

46. Section 315(b) of the Act and Section 73.1942 of the Commission's Rules provide that broadcasters may not charge any legally qualified candidate more than the lowest unit charge ("LUC") for advertising on the station during certain periods preceding the election. Under the LUC rules, a candidate may not be charged more than the station's most favored commercial advertisers would be charged for comparable time.[96] The LUC provisions apply throughout the 45-day period prior to a primary or runoff election and the 60-day period prior to a general or special election. The *1993 NPRM* sought comment on our proposal to apply these rules and the corresponding policies set forth in prior Commission orders to DBS providers.[97]

47. We recognize the difficulties enumerated by commenters in applying the LUC requirements to DBS providers. ASkyB asserts that the programmer, rather than the DBS provider, sells commercial time on all DBS channels that include advertising.[98] SBCA argues that DBS providers cannot determine an appropriate LUC in the absence of a meaningful advertising base and

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[93] *See* DirecTV Comments at 14-15; USSB Comments at 3 and 1993 Comments at 6; *see also* Primestar Comments at 10-11.

[94] *See* 47 C.F.R. 73.1941(c) (a request must be made within one week of the day on which the first prior use giving rise to the right of equal opportunities occurred).

[95] *See* 47 C.F.R. 73.1943 (requiring the licensee to keep and permit public inspection of a complete record of all requests for broadcast time made and an notation showing the disposition, charges, etc.).

[96] *See Codification of the Commission's Political Programming Policies*, 7 FCC Rcd at 689-90.

[97] *1993 NPRM*, 8 FCC Rcd at 1592.

[98] *See* ASkyB Comments at 5-8.

the LUC rule should not apply until DBS providers develop meaningful and consistent advertising sales.[99]

48. Section 335 requires that the Commission apply Section 315 of the Act to DBS service providers. The LUC provisions are an integral part of Section 315. If advertising is sold on DBS systems, legally qualified candidates must be afforded the benefit of the LUC during the pre-election periods prescribed by Section 315. Although we recognize that DBS providers do not currently have commercial rates on which to base a LUC determination, they can set a reasonable rate, based on consideration of marketplace factors such as what other media charge to reach a similar audience if they sell time to candidates pursuant to Sections 312 or 315 or otherwise choose to do so.[100] DBS providers, like broadcasters and cable operators, must disclose to candidates information about rates and discount privileges and give any discount privileges to candidates.[101] Nothing in our rules would prevent a DBS provider from making time available without charge on a nondiscriminatory basis, if it wished to do so.

2. Opportunities for Localism

49. Section 335(a) requires the Commission "to examine the opportunities that the establishment of direct broadcast satellite service provides for the principle of localism under [the] Act, and the methods by which such principle may be served through technological and other developments in, or regulation of, such service." In the *1993 NPRM*, the Commission asked whether technological advances have made it possible to accommodate local programming.[102] The Commission stated that any regulations regarding DBS and localism would necessarily depend on whether it is technically possible and economically feasible.[103]

50. Commenters were divided on whether the technology exists to justify imposing a localism requirement on DBS providers, and if so, whether it would be economically feasible. For instance, commenters such as NCTA, the Small Cable Business Association, and Time Warner, representing the cable industry, argue that DBS providers can and should comply with a localism

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[99] SBCA June 30 letter at 2.

[100] We do not agree with ASkyB Comments at 8 that we should use the 50% direct cost formula of Section 335(b) as a benchmark for calculating the lowest unit charge for political sales because we find no justification for so constraining DBS operators in the sale of political advertising time.

[101] *See Codification of Commission's Political Programming Policies*, 7 FCC Rcd at 683-687.

[102] *1993 NPRM*, 8 FCC Rcd at 1595.

[103] *Id.* at 1596.

requirement.[104] NCTA states that if a DBS provider is the functional equivalent of a cable operator, then equal regulatory measures should be applied.[105]

51. The Small Cable Business Association and NATOA encourage the Commission to impose a variety of local programming obligations, including "public, educational, government" use channels[106] and local advertising insertions.[107] Time Warner argues that regulatory responsibilities of DBS providers should be equivalent to those imposed on cable operators to ensure parity and fairness between competing multichannel video programming distributors.[108] The Alliance supports the use of spot beam technology to deliver local and regional noncommercial programming. It states that scarcity of spectrum in the DBS industry demands government regulation to protect noncommercial programming, nationally and locally.[109]

52. DBS providers argue against imposing any localism requirement on the grounds that satisfying such requirements would not be technically or economically feasible.[110] SBCA notes that the national scope of satellite technology makes anything but national broadcasting an inefficient use of very valuable spectrum.[111] Tempo contends that DBS providers' limited channel capacity and national service technology prevent delivery of service to local markets throughout the country.[112] Local - DBS says, in contrast, that the technical and financial feasibility of localism in DBS does exist.[113]

53. The legislation provides no guidance on how to define "localism" in the context of DBS services. If localism means special programming for individual localities, we note that, although spot beam technology is available and could be used to regionalize programming, DBS providers may

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[104] *See* NCTA Reply Comments at 14-16; Small Cable Business Ass'n Comments at 9-11; Time Warner Comments at 39-40.

[105] NCTA Comments at 9-12.

[106] Public, educational and government use channels ("PEG") are defined in Section 611 of the Act. 47 U.S.C. § 611.

[107] Small Cable Business Ass'n Comments at 9-16; NATOA 1993 Comments at 8-9.

[108] *See* Time Warner Comments at 6.

[109] *See* Alliance Comments at 5.

[110] *See, e.g.*, USSB Comments at 8-9; SBCA Reply Comments at 3-4; Tempo Comments at 20-21.

[111] *See* SBCA Reply Comments at 4-5.

[112] *See* Tempo Comments at 20-21.

[113] Local - DBS 1993 Comments at 4.

lack the channel capacity needed to serve all localities across the country. If localism refers to carrying local broadcast channels, then there are legal barriers to the Commission's ability to impose such a localism requirement. The Satellite Home Viewer Act of 1988, as amended,[114] prohibits a satellite carrier, including a DBS operator, from offering television network stations, pursuant to the compulsory copyright license, to subscribers who can receive a local affiliate of that network using a conventional over-the-air antenna or to those subscribers who have subscribed to a cable system in the past 90 days that carries the local affiliate.[115] No commenter has argued that the 1992 Cable Act should be interpreted as amending the Satellite Home Viewer Act.

54. To the extent that DBS providers, by law, cannot offer local signal retransmission, the Commission could not require DBS providers to offer local signal retransmission. Moreover, although there have been significant technological developments in the DBS industry since the Commission first developed rules for DBS and some DBS providers are providing limited local service, no DBS provider has the technical capability to provide local service to all markets in the country.[116] We agree with APTS/CPB,[117] however, that if the legal and technical issues regarding localized programming are resolved, we may consider requiring DBS providers to offer some amount of locally-oriented programming. We also support legislative changes to the Satellite Home Viewer Act that would remove any legal impediments to local signal retransmission by DBS licensees. Allowing DBS to provide local programming would expand the scope of the services DBS providers could offer and could enhance significantly DBS providers' ability to compete with cable.

3. Public Interest or Other Obligations

55. The Commission noted in the *1993 NPRM* that Section 335(a) provides a basis upon which to impose public interest obligations in addition to the political broadcasting requirement of Section 335(a) and the educational and informational programming requirement of Section 335(b).[118] The Commission tentatively concluded that additional obligations were not compatible with the flexible regulatory approach we have traditionally applied to DBS. Nevertheless, the Commission sought comment on whether it should impose additional obligations on DBS providers apart from those already mandated by Section 335.

56. Cable-Related Obligations. The Commission received diametrically opposing comments on whether certain obligations applicable to cable providers should also apply to DBS

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[114] 17 U.S.C. §119.

[115] *See Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act*, (rel. November 17, 1998; FCC 98-302).

[116] We note that EchoStar provides local signals to some of its subscribers and is advertising expansion of the number of markets that will receive local signals. EchoStar Comments at 5-6.

[117] APTS/CPB Comments at 35-36.

[118] *1993 NPRM*, 8 FCC Rcd at 1595-1596.

providers. The cable industry argues that the Commission should apply to DBS providers most, if not all, of the public interest obligations imposed on the cable industry in order to achieve regulatory parity. NCTA asserts that the phrase "other requirements" in Section 335(a) of the Act should be interpreted to include those obligations imposed on the cable industry, including must-carry obligations, program access rules, channel occupancy limits, syndicated exclusivity, network non-duplication and sports blackout requirements, leased and PEG channel access requirements, cross-ownership prohibitions, and local taxes and other fees.[119] Similarly, the Small Cable Business Association asserts that equivalent rules are necessary to provide a level, competitive playing field within the multichannel video programming distribution market and that without these requirements, there will be a lack of parity among DBS, cable and Open Video Systems ("OVS").[120] It encourages the Commission to adopt regulatory requirements for DBS similar to those for OVS because OVS provides similar competition to cable.[121]

57. Time Warner states that there is no indication that DBS providers could not compete with cable under analogous regulation, arguing that the DBS industry is no longer at a competitive disadvantage because it has more than doubled its subscribership between 1995 and 1996 and has made significant advances in compression technology over the past few years.[122] Time Warner concludes that the Commission should review the existing cable regulations and, if they are still found to be essential to the public interest, these regulations should be imposed equally on DBS providers. If, however, the Commission finds that these obligations are no longer necessary, then such obligations should no longer be imposed on the cable industry.[123]

58. DirecTV strongly opposes the cable industry's attempt to establish regulatory parity between DBS and cable. To do so, it asserts, would ignore the differences between the two services and would undermine the Congressional goal of reducing barriers to entry to the MVPD market.[124] SBCA emphasizes that since cable is a regional and local wireline distributor of television programming, it is subject to regulation by both the FCC and local franchising authorities.[125] USSB cautions the Commission to analyze the motivation for the comments of the cable industry and asserts they are an attempt to stifle a potentially significant competitor. USSB suggests that the demand of

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[119] *See* NCTA Comments at 9-20; *see also* Small Cable Business Ass'n Comments at 16-18; US West Comments at 5.

[120] *See* Small Cable Business Ass'n Comments at 16; NATOA 1993 Comments at 4-5. For a definition of OVS, *see* 47 C.F.R § 76.1500.

[121] *Id.*

[122] *See* Time Warner Comments at 20.

[123] *Id.* at 6.

[124] *See* DirecTV Reply Comments at 11-12.

[125] *See* SBCA Reply Comments at 14.

the cable industry to have franchise fees and local property taxes imposed on DBS providers is an attempt to limit competition between DBS and cable.

59. We decline to impose upon the DBS industry now the type of additional programming requirements advocated by the cable industry for a number of reasons. First, DBS and cable are separate and distinct services, warranting separate and distinct obligations. In establishing DBS in 1982, the Commission made clear that the service offers unique public benefits on a national scope.[126] While some DBS providers have sought authority to offer limited local signals, the primary coverage area for DBS is national. Cable, on the other hand, is primarily a regional or local service that does not possess any of the national attributes associated with the DBS service.

60. In addition, we find that DBS is a relatively new entrant attempting to compete with an established, financially stable cable industry. DBS providers currently have far less market power than cable operators. One indicator of market power is market share. We note that, although the DBS industry has grown significantly since 1992, it still claims just under eight million subscribers in contrast to cable's 64 million customers.[127] Moreover, cable can provide local service, while DBS can only do so on a limited scale. Because of the disparity in market power between DBS providers and cable operators, we find unpersuasive the cable industry's call for "regulatory parity" for entities that are not similarly situated. Additional obligations on DBS providers might hinder the development of DBS as a viable competitor to cable.

61. The 1992 Cable Act and its legislative history reflect Congressional concern that horizontal concentration in the cable television industry, combined with extensive vertical integration (*i.e.*, combined ownership of cable systems and suppliers of cable programming), created an imbalance of market power, both between cable operators and program vendors and between incumbent cable operators and their multichannel competitors (*e.g.*, satellite providers). We have found that concentration in the cable industry has limited competition and consumer choice in the MVPD market.[128] As a result of market concentration, Congress and the Commission have imposed on cable providers must-carry obligations, program access rules, channel occupancy limits, syndicated exclusivity, network non-duplication and sports blackout requirements, and leased channel access requirements. Competitive concerns raised by the concentration of cable providers are not present with DBS services and therefore similar rules are not necessary. We have asked for comment on the issue of cross-ownership rules for DBS providers and the effectiveness of such rules in addressing the

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[126] *See* Inquiry into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites for the period following the 1983 Regional Administrative Radio Conference, *Report and Order*, 90 FCC 2d 676, 685-686 (1982); *National Association of Broadcasters v. FCC*, 740 F.2d 1190, 1197-99 (D.C. Cir. 1984).

[127] There are currently 7.3 million DBS and DTH-FSS subscribers and over 64 million cable subscribers. *See supra* ¶ 4.

[128] *See* Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage, *Report and Order*, 8 FCC Rcd 3359 (1993).

potential for anticompetitive behavior in a separate proceeding.[129] With respect to local taxes, we note that Congress preempted the ability of local jurisdictions to impose taxes on direct-to-home satellite services.[130]

62. Other Public Interest Programming. CTW and CME suggest that Section 335(a) provides the Commission with the discretion to include children's programming as a component of the public service obligations required of DBS providers.[131] In addition, CME suggests that the Commission impose guidelines to prevent over-commercialization of children's DBS programming.[132] CTW also encourages the Commission to enact guidelines for DBS providers similar to the 1996 children's programming rules adopted by the Commission which govern conventional broadcasters.[133] In addition, Encore and DAETC support using a set-aside for children's programming.[134] DAETC would like the Commission to require DBS providers to reserve 3% of their available capacity for public interest programming, under Section 335(a), with 1% of that set-aside to be devoted to children's programming.[135]

63. In addition to children's programming, commenters have suggested that other types of special interest programming be included. For example, DAETC states that Section 335(a) public interest programming could include local programming of interest to minority and underserved communities, and national and regional civic programming.[136] Alliance also asserts that in enacting the 1992 Cable Act, Congress intended that DBS services carry a diversity of programming and information which would serve the public interest.[137] BET and HITN urge the Commission to adopt a requirement for programming geared toward diverse minority and ethnic groups.[138]

64. We conclude that, although Section 335(a) provides ample authority for us to impose other public interest programming requirements upon DBS providers, we will not exercise our

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[129] *See DBS Consolidation NPRM*, 13 FCC Rcd at 6910.

[130] *See* § 602 of the Telecommunications Act of 1996.

[131] *See* CTW Comments at 7; CME Comments at 4.

[132] CME Comments at 10-12.

[133] *See* CTW Comments at 4.

[134] Encore Comments at 12-13; DAETC Comments at 7.

[135] *See* DAETC Comments at 7.

[136] *See id.*

[137] Alliance Comments at 6-7.

[138] BET Reply Comments at 4; HITN Comments at 3-4.

authority at this time. DBS is still a relatively young industry and we decline to impose any additional obligations on the DBS industry before we see how DBS serves the public. As the DBS industry matures, it may develop a variety of ways to address the needs of its subscribers. Any further obligations imposed on it would be burdensome at this time and could prevent it from realizing its potential as a robust multichannel competitor to cable.[139] If it becomes evident that there is a need for regulatory intervention to assure carriage of this type of public interest programming, we will reconsider this conclusion.

C. Carriage Obligations for Educational and Informational Programming

65. The 1992 Cable Act requires the Commission to adopt rules requiring DBS providers to make available channel capacity for programming of an educational or informational nature. Specifically, Section 335(b) of the Act states:

> (1) CHANNEL CAPACITY REQUIRED.--The Commission shall require, as a condition of any provision, initial authorization, or authorization renewal for a provider of direct broadcast satellite service providing video programming, that the provider of such service 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.
>
> (2) USE OF UNUSED CHANNEL CAPACITY.--A provider of such service may utilize for any purpose any unused channel capacity required to be reserved under this subsection pending the actual use of such channel capacity for noncommercial programming of an educational or informational nature.
>
> (3) PRICES, TERMS, AND CONDITIONS; EDITORIAL CONTROL.-- A provider of direct broadcast satellite service shall meet the requirements of this subsection by making channel capacity available to national educational programming suppliers, upon reasonable prices, terms and conditions, as determined by the Commission under paragraph (4). The provider of direct broadcast satellite service shall not exercise any editorial control over any video programming provided pursuant to the subsection.
>
> (4) LIMITATIONS.--In determining reasonable prices under paragraph (3)--
> (A) the Commission shall take into account the nonprofit character of the programming provider and any Federal funds used to support such programming;
>
> (B) the Commission shall not permit such prices to exceed, for any channel made available under this subsection, 50 percent of the total direct costs of making such channel available; and
>
> (C) in the calculation of total direct costs, the Commission shall exclude--

[139] *See* Primestar Comments at 7-8; Tempo Comments at 3-4.

(i) marketing costs, general administrative costs, and similar overhead costs of the provider of direct broadcast satellite service; and

(ii) the revenue that such provider might have obtained by making such channel available to a commercial provider of video programming.

(5) DEFINITIONS.--For purposes of this subsection-

(A). . . .

(B) The term "national educational programming supplier" includes any qualified noncommercial educational television station, other public telecommunications entities, and public or private educational institutions.[140]

66. The *1993 NPRM* solicited comment on issues related to channel capacity, responsibility for programming, the definition of national educational programming suppliers, the definition of noncommercial programming of an educational or informational nature, the use of unused channel capacity and the determination of rates. The Commission noted in the *1993 NPRM* that the legislative history indicates that the purpose of Section 335(b) "is to define the obligation of direct broadcast satellite service providers to provide a minimum level of educational programming."[141] It also states that the reservation requirement was cast in terms of a four to seven percent range to give "the Commission the flexibility to determine the amount of capacity to be allotted."[142]

1. Channel Capacity

67. The legislative history states that the Commission should consider the total channel capacity of a DBS system in establishing set-aside requirements.[143] The first question in calculating total channel capacity is whether Section 335(b) requires that discrete channels or a percentage of cumulative time be reserved. The Alliance, DAETC and Encore suggest that educational and informational programming be supplied on discrete channels.[144] Other commenters advocate a flexible approach in order to accommodate a variety of programmers with varying audiences.[145] They suggest

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[140] 47 U.S.C. § 335(b).

[141] House Committee on Energy and Commerce, H.R. Conf. Rep. No. 102-862, at 222 (1992) (*Conference Report*); *see also 1993 NPRM*, 8 FCC Rcd at 1596.

[142] *Conference Report* at 222; *see also 1993 NPRM*, 8 FCC Rcd at 1596.

[143] *See Conference Report* at 222.

[144] *See* Alliance Reply Comments at 4-5; Encore Comments at 16; DAETC Reply Comments at 22-23; *see also* Research TV Comments at 12-13; US West Comments at 8.

[145] *See* APTS/PBS Comments at 39; DirecTV Comments at 6-8; America's Health Network Comments at 3-4; Primestar Comments at 17; SBCA Comments at 14; USSB Comments at 5; Tempo Comments at 13; EchoStar Reply Comments at 3; NRTC Reply Comments at 1.

that the set-aside requirement should be measured in terms of hours, so that such programming will air over a variety of channels at certain times of the day.[146]

68. We conclude that discrete channels should be reserved to fulfill the noncommercial reservation requirements of Section 335(b). We agree with Encore, DAETC and Alliance that using specific channels, rather than randomly placing educational and informational programming will assure continuity, predictability and easier monitoring and enforcement. Requiring the set aside of discrete channels will make it easier for consumers to locate such programming on one or more particular channels.[147] We find support for this conclusion in the express language of Section 335(b)(1), which refers to the set-aside requirement as a percentage of channel capacity and not in terms of hours. It may be true, as SBCA argues, that providing channel capacity on an hour-equivalency basis will permit programmers to target specific audiences and facilitate distance learning.[148] We conclude, however, that to address the reservation requirements on a cumulative time basis would involve overwhelming computation, monitoring, and enforcement problems. We will require DBS providers to ensure that programming is offered on consistent channels at consistent times in order to provide continuity and predictability for viewers.

a. Determination of Total Channel Capacity

69. Having concluded that Section 335(b) requires the reservation of discrete channels, we must determine how to calculate total channel capacity of a DBS system and whether we should count the number of channels licensed or allotted to a DBS distributor or whether we should count the number of channels supplied to customers. The *1993 NPRM* noted that the latter approach would take into account the expansion of the number of channels by compression techniques as suggested by the legislative history.[149] Section 335(b) merely refers to "channel capacity." US West urges that in calculating total channel capacity, we should count the number of channels supplied to customers. Some commenters support the use of total transponder bandwidth in determining the statutory set-aside

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[146] *Id.*

[147] *See* Encore Comments at 16; DAETC Reply Comments at 23.

[148] SBCA Further Comments at 11-12.

[149] *1993 NPRM*, 8 FCC Rcd at 1596. The legislative history states that the Commission may consider the availability of or use by DBS operators of compression technologies. Senate Report at 92. Compression technologies refers to the ability to compress sufficient information to display multiple video programs into the spectrum currently allotted for one channel. As a result, it is generally acknowledged that by using compression technology today, one transponder can accommodate eight to ten channels of programming.

[150] *See, e.g.*, US West Comments at 8.

aside.[151] This would include all video, audio and instructional capacity, as well as channels that are not being used for DBS service.[152] Other commenters support only the inclusion of channels devoted to unduplicated full motion video programming.[153] Additionally, a few commenters who support a video-only interpretation suggest that information-only, or "barker" channels used for on-screen programming and instructions, should be excluded from the definition of available channels.[154]

70. The legislative history refers to "total channel capacity" but is silent as to whether that capacity means the capacity for all types of transmissions or the capacity used for video programming.[155] We conclude that channel capacity, for the purpose of applying Section 335 (b), should be based on the total channel capacity that is being, or could be, used to provide video programming. Barker and other informational guide channels will be included as available channels for determining the required set aside, as they are video channels supplied to the customers. In addition, unused channels that could be used to provide DBS service will be included in the set aside calculation. We conclude that because Section 335(b) refers to services providing video programming, channels used for audio or other non-video services will not be included.[156] In addition, a DBS licensee is not required to provide any video programming for the first five years of the license term and is only required to use half of its total capacity for video programming thereafter.[157] Thus, using all channels, both video and non-video, licensed or allotted to a DBS licensee as the baseline measurement for applying Section 335 (b) is not appropriate. Further, DBS providers using their capacity for data or audio transmission cannot insert noncommercial video programming on those channels at all.

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[151] *See* Alliance Comments at 8-9; APTS/PBS Comments at 39; Research TV Comments at 12 ; University of Texas/University of Virginia Comments at 1; HITN Comments at 12; NCTA Reply Comments at 6.

[152] *See* Research TV Comments at 12; PBS Comments at 40; NCTA Reply Comments at 6.

[153] *See* Tempo Comments at 7; NRTC Reply Comments at 5.

[154] *See* DirecTV Comments at 6; Primestar Further Comments at 14-15.

[155] Conference Report at 222 (Commission should take into account total channel capacity in establishing reservation requirement). *See infra* IV(A)(2).

[156] We note that we have asked for comments about channel capacity in another context. In Carriage of the Transmissions of Digital Television Broadcast Stations, Amendments to Part 76 of the Commission's Rules, *Notice of Proposed Rulemaking*, CS Docket No. 98-120, FCC 98-153 (rel. July 10, 1998), Fed. Reg. 63 FR 42330 (rel. Aug. 7, 1998); we solicit comments on the definition of "usable activated channels" in the context of digital broadcast television carriage. Our conclusion about channel capacity in the context of DBS services is not dispositive in the case of must carry for digital television by cable systems.

[157] *See Revision of Rules and Policies for the Direct Broadcast Satellite Service*, 11 FCC Rcd. 9712, ¶¶ 12-17 (1995); *Potential Uses of Certain Orbital Allocations by Operators in the Direct Broadcast Satellite Service*, 6 FCC Rcd. 2581 , 2582 (1991) (stating that alternative uses could lessen DBS development risks).

71. We recognize that advances in digital compression technology will continue to expand the number of programming channels that can be offered to customers in a given amount of spectrum. In addition, the number of available channels will change depending on the complexity of the type of programming transmitted. For example, full motion sports programs require more spectrum than news programs featuring talking reporters. Thus, the total number of programming channels offered by a DBS licensee on all its satellites can vary on a weekly or even a daily basis. To address these fluctuations, we will require each DBS licensee to calculate on a quarterly basis the number of channels available for video programming on all its satellites. Each DBS licensee then will use the average of these quarterly measurements during the year to ascertain the total number of channels for purposes of determining the number of reserved channels. DBS providers will be required to record these quarterly channel measurements and average calculations as well as their response to any capacity changes in logs kept at their main offices and available to the Commission and to the public.

b. Reservation Percentage

72. The *1993 NPRM* sought comment on the percentage of channel capacity to reserve for programming of an educational and informational nature. In addition, the Commission sought comment on whether DBS systems with relatively large total channel capacity should be subjected to a greater reservation requirement than systems with relatively less total capacity.[158] The Commission proposed using a sliding scale so that systems with a certain number of channels would be required to reserve a specific number of whole channels for the noncommercial set aside.[159]

73. Commenters are divided on the appropriate percentage of channel capacity that should be set aside for educational and informational purposes. Some advocate that we should adopt a full seven percent reservation requirement now, arguing that the DBS industry has grown since the statute's enactment and that there has been an increase in the number of channels available on DBS systems, as well as in the number of DBS subscribers.[160] APTS/PBS argues that there is ample programming available to justify a set-aside of seven percent and that this higher percentage could also stimulate

[158] *1993 NPRM*, 8 FCC Rcd at 1596.

[159] The legislative history of this provision states: "The Committee intends that the Commission consider the total channel capacity of a DBS system in establishing reservation requirements. Accordingly, the Commission may determine to subject DBS systems with relatively large total channel capacity to a greater reservation requirement than systems with relatively less total capacity. In determining a DBS system's channel capacity, the Commission may consider the availability of or the use by a DBS operator of compression technologies. This subsection permits a provider of such service to use any unused channel capacity designated pursuant to this subsection until the use of channel capacity is obtained, pursuant to written agreement, for public use." House Report at 293-294.

[160] *See* US West Comments at 6; Research TV Comments at 8-11; APTS/PBS Comments at 37-39.

production of more non-commercial programming.[161] DBS providers, however, urge the Commission to apply the statutory minimum of four percent arguing that the industry is still in the early stages of developing and there is a limited amount of programming available to attract a national viewing audience.[162]

74. After considering the arguments of the commenters, we conclude that we should require DBS providers to reserve four percent of their channel capacity exclusively for noncommercial educational and informational programming. In the event that the four percent calculation creates any fraction of a channel, we will require the DBS provider to round the calculation upward.[163] We choose four percent, instead of a higher number, because we find it in the public interest to put the minimum burden on this industry that currently has relatively little market power. We find that imposing the maximum set-aside percentage now might hinder DBS in developing as a viable competitor in the MVPD market and that this factor outweighs possible benefits in establishing a higher percentage. Since we adopt the minimum reservation percentage, we need not adopt a sliding scale. We expect that DBS providers will begin carrying educational and informational programming as expeditiously as possible after the effective date of the rules.[164] DBS providers have been aware of these programming obligations for a significant time. As a result, it is reasonable to expect that they will be able to begin airing educational and informational programming shortly after the effective date of the rules. We will monitor their compliance. Additionally, the public interest programming provided for in this order must be made available to all of a DBS provider's subscribers without additional charge.

c. Impact on Existing Programming Contracts

75. The *1993 NPRM* sought comment on whether DBS providers who are offering service pursuant to existing contracts with programming suppliers should have all existing services grandfathered and be subject to reservation requirements only if they add new programming to their service offerings.[165] We conclude that the reservation requirement applies notwithstanding existing programming contracts. DBS providers will have to make available sufficient channel capacity

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[161] Letter to Rosalee Chiara, International Bureau, Federal Communications Commission, from Marilyn Morhman-Gillis, Lonna M. Thompson, Association of America's Public Television Stations, and Gregory Ferenbach, Public Broadcasting Service (Sept. 22, 1997) (APTS/PBS *Ex Parte* Letter) at 5.

[162] *See e.g.* ASkyB Comments at 13; DirecTV Comments at 5; Primestar Comments at 13-14; SBCA Comments at 10; USSB Comments at 11; Tempo Comments at 5; EchoStar Reply Comments at 3; NRTC Reply Comments at 3-4.

[163] For example, if a DBS provider supplies 120 video channels to customers, we will require a DBS provider to reserve initially five channels for noncommercial programming of an educational or informational nature. Four percent of 120 channels amounts to 4.8 channels. Under the rules adopted here, this figure would be rounded up to 5 channels. *See 1993 NPRM*, 8 FCC Rcd at 1596-1597.

[164] *See* ¶ ¶ 138 & 139.

[165] *1993 NPRM*, 8 FCC Rcd at 1597.

fulfill the reservation requirement, regardless of existing programming contracts. Allowing DBS providers to apply the reservation percentage only to new contracts would further delay giving effect to the Congressional goal of providing noncommercial educational and informational programming through DBS and would put a disproportionate burden on new entrants that may not have existing programming contracts. We agree with ASkyB and PBS that the industry has had sufficient notice -- the relevant provisions were found constitutional two years ago -- that public interest obligations would be applied so that grandfathering is not necessary.[166] These rules will not become effective for at least 60 days after publication in the *Federal Register*.[167]

2. National Educational Programming Supplier

a. Scope of Term

76. Pursuant to Section 335(b)(3), DBS providers must make the reserved channels available to "national educational programming suppliers" upon certain terms. Section 335(b)(5)(B) provides that the term national educational programming supplier "includes any qualified noncommercial educational television station, other public telecommunications entities, and public or private educational institutions." The *1993 NPRM* sought comment as to the scope of the term "national educational programming supplier"[168] and whether the Commission should adopt the definitions of "noncommercial educational broadcast station," "public broadcasting entity" and "public telecommunications entity" contained in Section 397 of the Act. The Commission also asked commenters to consider whether the eligibility criteria for the Instructional Television Fixed Service (ITFS) are relevant here.[169]

77. Neither this section of the statute nor the legislative history define "noncommercial educational broadcast station," "public broadcasting entity" or "public telecommunications entity." In the absence of any other Congressional guidance we conclude it is reasonable to look to other

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[166] *See* ASkyB Comments at 23-24; APTS/CPB Comments at 19. We note also that the Commission decided not to grandfather programming contracts for cable channels designed for leased access, *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Leased Commercial Access, *Report and Order*, 12 FCC Rcd 5276 (rel. Feb. 4, 1997).

[167] *See* ¶ 134, *infra*; *see also* 5 CFR 1320 (Implementation of Paperwork Reduction Act). DBS providers must be offering this educational and informational programming to the public no latter than six months after the effective date of the rules.

[168] *1993 NPRM*, 8 FCC Rcd at 1597.

[169] ITFS licensees may be accredited educational institutions, governmental organizations engaged in the formal education of enrolled students, or nonprofit organizations whose purposes are educational and include providing educational and instructional television material to such accredited institutions and governmental organizations. 47 CFR § 74.932(a).

provisions of the Act in which those terms are defined. Our analysis of the comments refers us to Section 397 of the Act.[170]

78. Noncommercial Educational Television Station Section 397(6) of the Act defines a "noncommercial educational broadcast station" as a television or radio broadcast station that (i) "is eligible to be licensed by the Commission as a noncommercial educational radio or television broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association," or (ii) "is owned and operated by a municipality and which transmits only noncommercial programs for educational purposes."[171] We agree with ASkyB and DAETC that we should adopt the definition of "noncommercial educational broadcast station" in Section 397(6) for the purpose of defining "noncommercial educational television station" in Section 335(b)(5). As the D.C. Circuit stated in Time Warner, the DBS set-aside represents a new application of the well-settled government policy long followed in the broadcast service of ensuring public access to noncommercial programming.[172] Therefore, we believe it is appropriate to use the definitions of noncommercial educational television station and public telecommunication entity used in the noncommercial broadcast context. We also note that Section 615(1) of the Act further defines such a station to include any television broadcast station that has as its licensee an entity eligible to receive a community service grant from the Corporation for Public Broadcasting.

79. Public Telecommunications Entity Section 397(12) defines "public telecommunications entity" as any enterprise which (i) "is a public broadcast station or a noncommercial telecommunications entity" and (ii) "disseminates public telecommunications services to the public." A "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 a nonprofit private foundation, corporation 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 station."[173] These entities are required to disseminate "public telecommunications services," which are defined as noncommercial educational and cultural radio and television programs, and related noncommercial instructional or informational material.[174]

80. Public and Private Educational Institutions Section 397 of the Act does not define the term "public or private educational institutions." We must look elsewhere for guidance in defining that term. APTS/CPB and HITN suggest incorporating the eligibility criteria established by the rules

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[170] *See* DAETC Comments at 12.

[171] *See* 47 U.S.C. §397(6).

[172] *See Time Warner*, 93 F.3d at 976.

[173] 47 U.S.C. § 397(7). The means of dissemination include, but are not limited to, coaxial cable, optical fiber, broadcast translators, cassettes, discs, microwave, or laser transmission through the atmosphere.

[174] *See* 47 U.S.C. § 397(14).

for instructional television fixed stations ("ITFS") contained in Section 74.932 of the Commission's rules[175] because the types of services provided by educational institutions and ITFS are analogous.[176] Section 74.932(a) provides that a license for an ITFS will be issued only to an accredited institution or to a governmental organization engaged in the formal education of enrolled students or to a nonprofit organization whose purposes are educational and include providing educational and instructional television material to such accredited institutions and governmental organizations.[177]

81. Research TV advocates limiting access to reserved channel capacity to accredited institutions so that those institutions would get a larger share of channel capacity.[178] We see nothing in the language or apparent purpose of Section 335(b) that suggests the category should be so limited, however. Indeed, to limit the definition of public or private educational institutions to accredited institutions could stifle a variety of sources of educational and informational programming. Because we are aware of no evidence that Congress, in adopting Section 335(b) intended a different criteria, we adopt the ITFS criteria in interpreting "public and private educational institutions."

82. Additional Entities We next address whether the term "national educational programming supplier" is limited to noncommercial educational television stations, public telecommunications entities and public and private educational institutions. APTS/PBS contends that only those entities -- the ones expressly identified in section 335(b)(5)(B) -- are eligible to use the reserved channels. It argues that use of the word "includes" prior to the list of entities "signifies an intent to confine the term to the categories named in the definition."[179] Other commenters argue that the list of eligible entities was not intended to be exclusive. For example, Encore urges the Commission to broadly interpret Section 335(b)(1) to permit for-profit as well as nonprofit program suppliers to provide "noncommercial programming of an educational or informational nature" for the reserved channels, arguing that more inclusive eligibility will result in better program service.[180]

83. We do not believe that the list of entities in Section 335(b)(5)(B) was intended to be an exclusive list of entities that can qualify as national educational programming suppliers. We conclude that use of the term "includes" in that section indicates that what follows is a nonexclusive

[175] *See* 47 C.F.R. § 74.932(a). ITFS are intended primarily to provide formal educational or cultural development to students enrolled in accredited public or private institutions or colleges or universities.

[176] APTS/CPB Comments at 23; HITN Comments at 1.

[177] *See* 47 C.F.R. 74.932(a)

[178] Research TV Reply Comments at 14-15.

[179] APTS/PBS Comments at 14.

[180] Encore Comments at 11-12. *See also* DirecTV Comments at 5; USSB Comments at 10.

list that may be enlarged upon.[181] Neither case cited by APTS/PBS refutes the great weight of precedent supporting the view that use of the term "includes" in a statute is intended to be nonexclusive. *McQuilken* rejected an argument that convictions under 18 U.S.C. § 860, which prohibits the sale of drugs on school property, were governed by the sentencing relief provisions of 18 U.S.C. § 3553(f). Section 3553(f), however, expressly listed five sections of the federal criminal code falling within its ambit and did not use the word "includes."[182] Similarly, *Lopez* is inapposite because it did not address the interpretation of the word "including."[183]

84. Moreover, the use of the term "includes" in Section 335(b)(5)(B) contrasts with the use of the term "means" in the definition of "direct broadcast satellite service" in Section 335(b)(5)(A). Congress may be presumed to mean different things when it uses different words in the same section.[184] Thus, we believe that Section 335(b)(5)(A) defines the term "provider of direct broadcast satellite service," while Section 335(b)(5)(B) gives illustrative examples of "national educational programming suppliers." Furthermore, nothing in the legislative history suggests that the list of entities in Section 335(b)(5)(B) was intended to be an exclusive list of "national educational programming suppliers."

85. While we do not interpret Section 335(b)(5)(B) as an exclusive list of eligible program suppliers, we do believe that Congress intended to limit eligibility to entities that share the same essential characteristics as those listed. As a matter of statutory construction, it is reasonable to construe the list as providing general guidelines as to the types of programming suppliers for which Congress intended the channels would be set aside.[185] If the term "national educational programming suppliers" were *not* construed as limiting eligibility to some class of suppliers, then both the provision in Section 335(b)(3) stating that DBS providers must fulfill the requirements of Section 335(b) by making channel capacity available to "national educational programming suppliers" and the guidance provided in Section 335(b)(5)(B) concerning the eligible entities would be superfluous. In construing

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[181] *See, e.g., Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 99-100 (1941) ('including' is not one of all-embracing definition but connotes simply an illustrative application of the general principle); *Puerto Rico Maritime Shipping Authority v. ICC*, 645 F.2d 1102, 1112 n.26 (D.C. Cir. 1981) (it is hornbook law that the use of the word 'including' is illustrative, not exclusive); *Exxon Corporation v. Lujan*, 730 F. Supp. 1535, 1545 (D.Wyoming, 1990), *aff'd on other grounds*, 970 F.2d 757 (10th Cir. 1992) (use of the word 'includes' rather than the word 'means' in a regulatory definition indicates that what follows is a nonexclusive list which may be enlarged upon).

[182] *United States v. McQuilken*, 73 F.3rd 105, 107 (3d Cir.), *cert. denied*, 117 S. Ct. 89 (1996).

[183] *United States v. Lopez*, 938 F.2d 1293, 1295 (D.C. Cir. 1991).

[184] *See, e.g., Russello v. United States*, 464 U.S. 16, 23 (1983).

[185] *See Gustafson et.al. v. Alloyd Co.*, 513 U.S. 561, 575 (1995) (stating that "[a] word is known by the company it keeps (the doctrine of noscitur a sociis)."); *see also* Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 Columbia Law Review 833, 852 (1964) (discussing the meaning of words in series).

statutes, the courts strongly prefer an interpretation that gives meaning to all provisions of the statute to one that renders some provisions superfluous.[186] Therefore, we eschew an interpretation that would make any programmer eligible to use the reserved channels, without regard to its noncommercial character or goals.

86. We conclude that the term "national educational programming supplier" in Section 335(b)(5)(B) includes only noncommercial entities with an educational mission. The term should not be interpreted as including "commercial" entities organized for profit-making purposes. We believe that Congress intended to reserve channels for noncommercial programmers to ensure that DBS capacity would be available to programmers that are not driven by commercial incentives. We note that this is how the D.C. Circuit has interpreted the statute.[187] Indeed, all of the entities listed in Section 335(b)(5)(B) have an educational mission and, with one exception, all are exclusively nonprofit entities. In addition, the only category listed that includes entities that can ever be organized as for-profit entities -- private educational institutions -- are usually organized as nonprofit entities. Moreover, we believe that the eligibility of a programming supplier under the statute should depend on its noncommercial character, not merely whether its programming contains commercials.[188] We also note that Congress has defined providers of "noncommercial" service as nonprofit entities in other provisions of the Act.[189] In addition, it seems reasonable to assume that the provisions in Section 335(b)(4)(B) which specifically limit the charges for set-aside capacity were designed to benefit noncommercial entities rather than profit-making enterprises.[190]

87. Therefore, only noncommercial entities with an educational mission will qualify to use the reserved channels. We believe that the tax code definition of non-profit will apply to qualify an

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[186] *See, e.g., Hohn v. United States*, __ U.S. __, 118 S. Ct. 1969, 1976 (1998); *Kawaauhau v. Geiger*, __ U.S. __, 118 S. Ct. 974, 975, 977 (1998); *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 78-79 (1990). In *Arcadia v. Ohio Power Co., supra*, the Supreme Court rejected an interpretation of the Federal Power Act that rendered "the preceding enumeration of specific subjects entirely superfluous -- in effect adding to that detailed list 'or anything else.'" 498 U.S. at 78. Such an interpretation, the Court cautioned, "should not be adopted unless the language renders it unavoidable." *Id.*

[187] *See Time Warner v. FCC*, 93 F.3d 957, 976 (1995) (stating that Congress noted that economic realities of commercial broadcasting do not foster widespread commercial distribution of educational and cultural programs and that the government has recognized the potential effect of commercial pressures on educational stations).

[188] *See* SBCA Reply Comments at 7; USSB Comments at 10-11. *Cf.* Encore Reply Comments at 10.

[189] *See* 47 U.S.C. § 397(7) (for purposes of Part IV of Title III); 47 U.S.C. § 615(l)(1) (must-carry for noncommercial programming).

[190] We note that the Conference Report states that "the pricing structure was devised to enable national educational programming suppliers to utilize this reserved capacity." Conference Report at 100.

entity as an eligible national educational programming supplier.[191] Thus, an entity with an educational mission that is organized under the tax code as a nonprofit corporation will be eligible as a national educational programming supplier. We recognize, however, that some would-be suppliers may not be susceptible to classification under the tax code but may be potentially eligible for the set-aside as a national educational programming supplier within the meaning of the statute. An entity that is not organized as a nonprofit corporation may also qualify if it shows to the Commission's satisfaction that it is organized for a noncommercial purpose and has an educational mission. Furthermore, we do not intend to prevent participation by programming packagers or consolidators acting as agents on behalf of national educational programming suppliers as long as all entities contributing programming qualify as eligible entities under the statute. We will deal with such situations on a case-by-case basis.

88. We sought comment on whether noncommercial educational programming suppliers can enter into joint ventures with commercial entities, including DBS providers, and still qualify for access to the set-aside channels.[192] Several of the commenters favor allowing joint ventures between public and private entities.[193] According to ASkyB, Primestar, SBCA and Tempo, allowing DBS providers to enter into joint ventures with noncommercial programmers will encourage the development and funding of quality programming which not only meets the standards of Section 335(b), but also serves the needs of DBS providers and their customers.[194] Other commenters believe that joint ventures will lead DBS providers to control the programming provided on the reserved channels and therefore urge us to prohibit such joint ventures.[195] For example, APTS/PBS and the CTW[196] urge the Commission to deny eligibility for reserved capacity when the DBS provider has an ownership or similar relationship with the noncommercial program supplier that would give the DBS provider control over the programming. They also argue, however, that the Commission should not prohibit legitimate arrangements under which DBS providers, or any other for-profit entities, enter into joint ventures with a qualified national educational programming supplier but do not control programming decisions.[197]

89. We will permit joint ventures as long as participants demonstrate that the joint venture is noncommercial within the meaning of Section 335 and that the venture's mission is educational, as

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[191] 26 U.S.C.A. § 501(c)(3).

[192] *1993 NPRM* at 1598.

[193] *See* Knowledge TV Comments at 9; Encore Reply Comments at 14.

[194] *See* Primestar Further Comments at 20; ASkyB Comments at 21; Ex Parte Letter of Noggin, CTW, and Viacom dated August 19, 1998 (arguing that a joint venture between a non-profit and a for-profit corporation providing commercial-free programming should qualify for the set-aside).

[195] *See, e.g.*, Green Sphere 1993 Comments at 1.

[196] APTS/PBS Comments at 17-18. *See also* CTW Comments at 8-10.

[197] *Id. See also* Knowledge TV Comments at 9.

discussed above. We believe that this approach will facilitate the development of quality educational and informational programming in furtherance of the objectives of Section 335 by providing additional sources of funding for noncommercial programmers without altering the noncommercial nature of the programming.

90. Finally, Research TV urges the Commission to allocate equal set-aside capacity to each of the three categories of entities listed in the statute so that noncommercial educational television licensees, public telecommunications entities, and accredited public or private educational institutions are each entitled to use a specific portion of the set-aside capacity.[198] There is nothing in the statute or its legislative history that suggests such a rigid approach to channel allocation based on programmer category, and we do not believe that such an approach would serve the public interest. Moreover, we have decided that the listing of eligible entities in Section 335(b)(5)(B) was intended to be illustrative rather than exclusive, so other eligible entities would be unfairly excluded by Research TV's suggested approach. Therefore, we will not require that portions of the set-aside capacity be dedicated exclusively to certain types of qualified programmers. Research TV's suggestion differs from our rule setting a limit on the number of channels controlled by a single national educational programming supplier. The channel limitation is designed to prevent the reserved capacity from being dominated by one or a few programmers but is not based on programmer categories.

b. Definition of the Term "National"

91. In the *1993 NPRM*, the Commission sought comment on whether the term "national" in the definition of "national educational programming supplier" has any significance, noting that most of the entities included in the definition were perceived to be local in nature. HITN submits that to qualify as a "national" programming supplier, an entity would have to demonstrate that it is authorized, either by the Commission or through some other contractual obligation, to provide programming to viewers in different areas of the country.[199] Deutsche Welle Television urges the Commission to view the term "national educational programming supplier" broadly to include international noncommercial public broadcasters such as Deutsche Welle.[200]

92. There is no guidance in the statute or the legislative history with respect to the term "national."[201] Defining the term narrowly to mean entities perceived to be national in nature could effectively preclude carriage of many educational programming suppliers that are included in the

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[198] Research TV Comments at 18, 21. *See also* University of Texas Comments at 1; University of Virginia Comments at 1-2.

[199] *See* HITN Comments at 9.

[200] Deutsche Welle Television Comments at 2-3.

[201] The definition of "national" was only tangentially referenced in the legislative history documents, the closest reference being, "The term 'national education programming supplier' includes any qualified noncommercial educational television stations, other public telecommunications entities or public or private institutions." House Conference Report at 101.

statutory list of qualifying programmers and might severely limit the amount of noncommercial educational and information programming available on DBS. Upon review of the comments, we conclude that we should interpret the term "national" broadly so as to include local, regional, or national domestic nonprofit entities that qualify under the definitions listed above and produce noncommercial programming designed for a national audience. We also find that the definition should include international nonprofit programmers that satisfy the terms of the definitions in Section 397 of the Act and the Commission's ITFS rules. This approach will further Congress' underlying objective of enriching the public with a diverse core of educational and informational programming from nonprofit sources.

3. Noncommercial Programming of an Educational or Informational Nature

93. Section 335(b)(1) requires that the reserved channels be used "exclusively for noncommercial programming of an educational or informational nature." The *1993 NPRM* noted that the term "noncommercial programming of an educational or informational nature" is not defined in the statute. The *1993 NPRM* sought comment on whether the Commission should define this term or simply identify categories of national educational programming suppliers.[202]

94. We conclude that our rules need not elaborate on the term "educational and informational" programming and that a DBS provider can comply with the reservation requirement by affording access to programming supplied by specific categories of noncommercial entities.[203] We will reconsider this conclusion, however, if it appears that more specific guidance on the definition of this term is necessary. In other words, although parties must comply with the statutory requirement that the reserved channels be used "exclusively for noncommercial programming of an educational or informational nature," we will not define this phrase more specifically at this time. Entities meeting this definition will be bona fide nonprofit programmers and educational institutions, and DBS licensees will be prohibited from exercising any editorial control over programming carried on the reserved channels. Given this and their nonprofit, educational mission, we find that the eligible programmers will have every incentive to provide educational and informational programming on their reserved channels.

95. Since we do not specifically define eligible educational and informational programs, we cannot accept CTW's suggestion to set aside capacity for children's TV, or USCC and Dominion's request to include religious programming.[204] The definition of "national educational programming supplier" is designed to ensure that only qualified noncommercial entities are included. Our

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[202] *1993 NPRM*, 8 FCC Rcd at 1598.

[203] *See* APTS/PBS Comments at 10.

[204] CTW Comments at 4; USCC Comments at 2-3; Dominion Comments at 2-3. We have already discussed and declined to adopt additional public interest obligations under Section 335(a), including setting aside capacity for children's programming. *See* Section IV.B.3.

conclusion will provide access for a wide array of programs.[205] We note that, in order to qualify as noncommercial programming, the programmer cannot include advertisements.[206]

4. Implementation of Section 335(b)(3)

96. The *1993 NPRM's* focus with regard to the portion of Section 335(b) specifying that DBS providers "shall not exercise any editorial control over any video programming provided [on the reserved educational channels]" was on responsibility for the programming in the event that Commission rules or federal statutes such as those prohibiting obscenity or defamation are violated.[207] The Commission tentatively concluded that it would follow the approach it takes in enforcing Section 315(a) of the Act, under which a licensee may not censor material broadcast by or on behalf of a candidate, and, thus, the responsibility for the programming and any harm it may cause, such as defamation, remains with the candidate.[208] It also sought comment on whether a noncommercial program provider using reserved channel capacity must comply with the political broadcasting requirements imposed by Section 335, and if so, how those obligations should be enforced. Finally, referring to a then-pending rulemaking on indecency on cable leased access channels, the *1993 NPRM* also sought comment on whether there were limited circumstances in which a DBS provider could refuse carriage of programming or restrict its dissemination.[209]

a. Editorial Control

97. The commenters in this proceeding raised a separate issue about the practical application of the "editorial control" language in Section 335(b)(3). While all concede that the statutory language apparently prohibits DBS providers from editing or otherwise requiring changes in the content of programming provided by national educational programming suppliers for the reserved channels, some commenters have argued that Congress may have also intended to prohibit DBS providers from selecting among qualified programmers or determining placement of programs on DBS

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[205] *See* NRTC Comments at 6-7 (urging Commission to define qualifying programming broadly).

[206] Section 399B of the Act defines "advertisement" as:

> Any message or other programming material which is broadcast or otherwise transmitted in exchange for any remuneration, and which is intended: (1) to promote any service, facility, or product offered by any person who is engaged in such offering for profit; (2) to express the views of any person with respect to any matter of public importance or interest; or (3) to support or oppose any candidate for political office. *See also* 47 CFR 73.621.

[207] *1993 NPRM*, 8 FCC Rcd at 1597.

[208] *See Farmers Educational and Cooperative Union of America v. WDAY, Inc.*, 360 U.S. 525 (1959) (broadcasters not responsible for defamation caused by political candidates advertisement).

[209] *1993 NPRM*, 8 FCC Rcd at 1597.

systems.[210] Others argue that the provision allows providers to choose among qualified programmers but not to select individual programs.[211] Still others urge a narrow reading of the prohibition, arguing that it does not limit either the choice of programming or programmers, but only prevents a provider from altering the content of programs.[212]

98. DAETC, for example, argues that Section 335 employs the same language as Section 612 of the Act, which requires cable systems to make "leased access" channels available for commercial use by unaffiliated persons.[213] DAETC quotes language from relevant legislative history of Section 612 asserting that it indicates that the leased access prohibition was intended to restrict the cable operator's ability to exercise control over the selection of programming, and argues that the same restriction should apply to DBS providers.[214] The Alliance and Primestar, however, disagree that cable leased access should be the model for DBS.[215] Primestar states that the purpose of Section 335(b) is not to assure source diversity, which was the objective in Section 612, but is instead to establish an obligation to provide a minimum level of educational and informational programming.[216] In addition, because Section 335 directs DBS providers to reserve capacity for noncommercial programming of an educational or informational nature supplied by specified types of programmers, Primestar argues that it requires those providers to make certain decisions about content and source. Therefore, Primestar argues that a DBS provider must have the ability to choose among qualified programmers. APTS/PBS agrees that the best approach would be to allow DBS providers to select from among the qualified noncommercial entities but argues that the prohibition on editorial control would prohibit them from choosing the specific programs for their systems.[217]

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[210] *See* Alliance Comments at 4; DAETC Comments at 18-20; Research TV Comments at 24; University of Texas Comments at 1; University of Virginia Comments at 2.

[211] *See, e.g.*, APTS/PBS Comments at 34.

[212] *See, e.g.*, USSB Reply Comments at 4-5.

[213] DAETC Comments at 17-18.

[214] *Id.* at 14, *citing* H. Rep. 98-934, 98th Cong., 1st Sess. at 51-52 (1984) (noting that the Committee is extremely concerned with the potential risk posed by indirect editorial control being exercised by a cable operator over use of leased access channels).

[215] Alliance Comments at 3; letter to Magalie Roman Salas, Secretary, FCC, from Benjamin J. Griffin, Counsel to Primestar (Dec. 12, 1997) (Primestar 1997 Letter) at 1-3.

[216] Primestar 1997 Letter at 2; *see also* SBCA Reply Comments at 11 (stating that there is no basis for the statement that the statute closely tracks the PEG and leased access cable models and that DBS providers must have "the right to make unique program service selections both to fit their respective program packages and formats and to differentiate themselves from their cable and DBS competitors").

[217] APTS/PBS Comments at 48.

99. To resolve this controversy, we turn first to the language of the statute. On its face, Section 335(b)(3) requires DBS providers to make "channel capacity available to national educational programming suppliers" but prohibits the DBS provider from exercising "any editorial control over any video programming provided [on the reserved channels]" (emphasis added). The statute does not, on its face, ban selection of programmers. For the reasons discussed below, we disagree with those parties who would have us read such a ban into the statute nonetheless. We conclude that the best reading of the editorial control language is that it prohibits DBS providers from controlling the selection of, or in any way editing or censoring, individual programs that will be carried on the reserved channels. It does not, however, prohibit DBS operators from selecting from among national educational programming suppliers so long as the DBS provider does not refuse to make unused reserved capacity available to qualified suppliers. Nor does it prohibit DBS providers from refusing to carry non-qualifying programming or ineligible programmers.

100. We specifically disagree with those commenters contending that the term "editorial control" necessarily bans selection among qualified national educational programming suppliers. It is important to consider this term in the context of this statute. Here, Congress established certain eligibility requirements for programmers who are entitled to use the reserved channels. In addition, it required that the reserved channels be used "exclusively for noncommercial programming of an educational or informational nature."[219] Thus, the statute itself limits the group of eligible programmers. If the DBS provider selects from among these eligibles, we see no reason to conclude that allowing the DBS provider to select the programmer would contravene the fundamental Congressional purpose of making noncommercial educational or informational programming available. Further, in our view, the statutory language indicates that Congress did not intend the ban on editorial control to bar selection of programmers: the ban comes into play only after the programmer is selected.[220]

101. The cases cited by DAETC do not persuade us otherwise. For the most part, these cases deal with cable leased access provisions, which, as we explain below, are not controlling with regard to interpretation of Section 335. Moreover, while we recognize that it can be argued that the power to select a programmer could be characterized as "editorial" in nature, that fact does not end the debate here. In this context, one must go on to ask whether that editorial function is one that Congress intended to ban through its use of the phrase "any editorial control over any video programming." We conclude it is not. As an initial matter, the text of the editorial control ban does not by its express terms, as explained above, extend to the selection of programmers. In addition, as discussed in paragraphs 105-110 below, where, as here, Congress specifically designated the type of programming to be provided on these channels, it would be illogical to simultaneously ban the DBS provider from selecting programmers. Such a conclusion would make it much more difficult to

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[218] *See* 47 U.S.C. §335(b)(3) and 335(b)(5)(B); para. 78-90, *supra*.

[219] 47 U.S.C. § 335 (b)(1).

[220] Indeed, use of the past tense in the term "programming provided" supports this reading of the statute. At the selection stage, no programming is yet being provided.

enforce the congressional purpose of making noncommercial, educational programming available on the DBS satellites. Indeed, this situation could be deemed analogous to the broadcasting context where licensees are held responsible for implementing statutory mandates.[221] And, as discussed above at paragraph 23, the better interpretation of an arguably ambiguous statute is one that facilitates enforcement, rather than one that makes enforcement difficult.

102. We also reject arguments that our interpretation of Section 335 is constrained by our reading of similar language in the cable leased access provision. Section 335 only prohibits DBS providers from exercising "editorial control over programming," while the cable leased access provision, Section 612, also prohibits cable operators from "in any other way consider[ing] the content of such programming." The omission of this last clause from the DBS provision suggests that DBS providers are not necessarily barred from *considering* certain factors relating to programming in selecting programmers, but are prohibited from exercising *control* over such programming. Thus, we believe DBS providers might permissibly consider a variety of factors in deciding which programmers to select, including the broad genres of programming they plan to provide (*e.g.*, cultural, documentary, children's educational), the programmers' experience, reliability, and reputation for quality programming, and the quality of programming they may have produced in the past. They may not, however, require the programmers they select to include particular series or programs on their channels as a condition of carriage. In this regard, we specifically differ with our dissenting colleague. We are unwilling to assume that DBS operators will improperly attempt to influence programming content through their selection process. Thus, we conclude at this time that the power to select among qualified programmers does not amount to "editorial control" that Congress sought to prohibit in Section 335(b)(3). If in the future, it appears that DBS operators seek to use the selection process as a means of improperly influencing programming provided on the reserved channels, we will take appropriate action. We decline to establish at the present time a complicated regulatory structure that sets out specific and detailed rules addressing the particular conduct DBS providers can or cannot engage in while selecting programmers. We conclude that such detailed rules are unnecessary where only four entities are actually providing DBS service, at this time, and where we have no reason to believe that these entities will not fulfill their obligations under the rules.

103. We recognize that this approach is different from the one we have taken with respect to cable leased access channels, but we believe that this difference is justified not only by differences in the language of the two editorial control prohibitions, as discussed above, but also by differences in the distinct statutory schemes of which they are a part.

104. The "leased access" provisions of the Cable Act[222] were designed to open up a portion of capacity on monopoly cable systems to diverse sources of programming. As the District of Columbia Circuit explained in *Time Warner*:

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[221] *See Broadcast Station Operator Requirements*, 59 FR 64378, 64379 (1994) (stating that the Commission holds the broadcast station licensee responsible for rule violations).

[222] *See* 47 U.S.C. 532(a), as amended.

> Leased access was originally aimed at bringing about "the widest possible diversity of information sources" for cable subscribers. Congress thought cable operators might deny access to programmers if operators disapproved of the programmer's social or political viewpoint, or if the programmers' offerings competed with those the operators were providing.[223]

When Congress amended the Cable Act in 1992, it added a second rationale for the leased access requirement: "to promote competition in the delivery of diverse sources of video programming."[224] Thus, the leased access provision was designed to carve out a space on cable systems specifically for the purpose of creating a "soap box" of sorts, where different community viewpoints could be aired without the threat of censorship by the cable operator based on the "programmer's social or political viewpoint, or if the programmers' offerings competed with those the operators were providing."[225] Given that purpose, it made perfect sense to impose a first-come, first-served system for allocating the set-aside capacity, and to deny the cable operator any authority to screen out or select certain speakers or certain content.[226] To do otherwise would have given the monopoly cable operator the power to choose its "competitors," thereby largely defeating the purpose of the set-aside.

105. Section 335 has a decidedly different purpose. It furthers the historic Congressional and Commission policy of carving out a haven for educational and informational programming that need not compete with commercial offerings and that can operate free of commercial imperatives to maximize audience size.[227] In the *Time Warner* decision, the D.C. Circuit viewed the DBS set-aside as "nothing more than a new application of a well-settled government policy of ensuring public access to noncommercial programming."[228] The court reviewed the history of Congressional initiatives to reserve spectrum for educational program services and protect those services from "commercial pressures."[229]

106. Because the language and legislative purposes of the two statutory schemes are different, we conclude that we are not compelled to implement the DBS and leased access prohibitions

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[223] *See Time Warner*, 93 F.3d at 968.

[224] *See* 47 U.S.C. §532(a), as amended.

[225] *Time Warner*, 93 F.3d at 968; H.R. Rep. No. 934, 98th Cong., 2d Sess. 48 (1984) (recognizing that cable operators have market power to exclude programming that "competes with a program service already being provided by that cable system").

[226] *See Leased Access Implementation Order*, 12 FCC Rcd 5267, 5316.

[227] *See Time Warner*, 93 F.3d at 976.

[228] *Time Warner*, 93 F.3d at 976 (the court cautioned that "the government does not dictate the specific content that DBS operators are required to carry").

[229] *Id., citing FCC v. League of Women Voters*, 468 U.S., 364, 367 (1984).

in exactly the same way. This is particularly the case in light of the fact that the provisions governing cable leased access had not been interpreted by the Commission prior to passage of the 1992 Cable Act. When Congress adopted the DBS set-aside and its editorial control prohibition in 1992, the leased access prohibition did not have the settled meaning now ascribed to it. It was only in 1997 that the Commission interpreted the leased access provision as banning selection of programmers.[230] Thus, in adopting the editorial control language applicable to DBS licensees, Congress did not do so with the expectation that it would be interpreted as broadly as we have interpreted the cable leased access provisions.

107. Moreover, as a policy matter, we do not think it wise to interpret the editorial control prohibition more broadly than the statutory language requires. While the DBS set-aside has been upheld in the face of a facial First Amendment challenge,[231] we must nevertheless be sensitive in implementing the statute to the First Amendment rights of DBS providers to create a high-quality program service as well as the First Amendment rights of noncommercial programmers to exercise editorial control over their programming. If we were to deny DBS providers the power to select the national educational programming suppliers who will be able to utilize the reserved channels, then when demand for the channels exceeds capacity, such suppliers would either have to be selected without regard to the content of their programming -- *i.e.*, on a first-come, first-served basis or by random selection -- or through some other mechanism such as the third party approach advocated by some of the commenters. We do not believe that the former method is likely to result in the best possible service to the public. And, we see little advantage in simply transferring to a third party the power to select programmers -- even if we could determine who that third party should be.

108. Most importantly, we do not believe that the purpose of the DBS channel reservation would be frustrated by permitting DBS providers to select among qualified programmers when the reserved channels cannot accommodate all eligible programmers who wish to use the channels. To the contrary, the Congressional purpose will be furthered by allowing DBS providers to ensure that their subscribers receive educational and informational programming that will serve their needs and interests. The interpretation we adopt today will allow them to do so. At the same time, our interpretation will further the purpose of the statute to shield noncommercial programmers who utilize the reserved channels from commercial pressures that might be brought to bear on them if the DBS provider could require them to provide specific programs or interfere with their editorial discretion over programming. A few commenters suggest that if DBS providers are allowed to select programmers, they will favor widely-distributed programming services that are already carried on DBS systems or that otherwise have wide audience appeal, and that programmers whose services are designed for smaller or "niche" audiences will be disfavored.[232] We are not willing to assume that DBS operators acting to serve the needs of their subscribers will choose programmers that only appeal

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[230] *See Leased Access Implementation Order*, 12 FCC Rcd at 5316.

[231] *See Time Warner*.

[232] *See* Reply Comments of Research TV at 16; Comments of the Consortium for School Networking and International Society for Technology in Education, Summary at 1-2.

to mass audiences. Moreover, we find nothing in the statute or its legislative history, indicating any concern by Congress that one class of eligible programmers might be favored over any other.

109. We emphasize that in recognizing that DBS operators have the power to select among qualified program suppliers, we do not intend to prevent the operators from electing to use a consortium or clearinghouse of educators and public interest specialists to choose among qualifying programs that would be aired on the set-aside capacity.[233] We believe that, if feasible, the creation of such a clearinghouse could benefit the industry and the public. A clearinghouse would have the greatest benefit to the public if it is composed of diverse members, including educators, community leaders, nonprofit programmers, children's advocates and public broadcasters. Such membership should ensure access to the reserved capacity by a broad and diverse group of qualifying programmers.

110. With regard to qualifications, we recognize that someone must make the determination that programmers who wish to use the reserved channels are eligible under the statute to do so and that the programming carried on the reserved channels qualifies under the statute as noncommercial programming of an educational or informational nature. We think that Congress intended that DBS providers make these determinations. Accordingly, we find that DBS providers should be responsible for ensuring that the obligations imposed by the statute are fulfilled.[234] In order to avoid undue intrusion into the programming decisions of qualified programmers, however, we do not believe that it would be appropriate for DBS providers to pre-screen all programming carried on the reserved channels. Rather, if an abuse of the reserved channels by a particular programmer comes to the DBS provider's attention, it can then take action to ensure that only qualified programs are carried on the reserved channels by that programmer in the future.

111. This approach is consistent with the Second Circuit's recent interpretation of Section 611 of the Communications Act, which allows franchising authorities to require that cable channels be reserved for "public, educational, or governmental use," and prohibits cable operators from exercising editorial control over any channels so provided.[235] In construing that provision, the Second Circuit reasoned:

> Congress could not have authorized cities to require cable system operators to allot PEG channels to them and at the same time have left cities free to use these allotted channels for purposes beyond the scope of PEG purposes. . . . Having established the required category, Congress must have expected that the contracting party would be able to make sure that a city was not exceeding the scope of what Congress permitted a city to require. . . . [C]able

[233] *See, e.g.*, Knowledge TV Reply Comments at 5; Primestar Reply Comments at 19; SBCA Comments at 20-22.

[234] *See* para. 15-32, *supra*.

[235] *See Time Warner Cable of New York City v. Bloomberg L.P.*, 118 F.3d 917, 928 (2d Cir. 1997).

> operators may enforce the boundaries of the categories they are obliged to offer municipalities at no charge without violating [the editorial control prohibition].[236]

The same reasoning applies to the DBS provision. Thus, DBS providers may reject programmers or programming that they believe in good faith are ineligible under the statute to use the reserved channels. Of course, if a noncommercial programmer believes that a DBS provider has misinterpreted the eligibility requirements or abused its discretion, it can always file a complaint with the Commission.

112. In addition, we believe that a DBS provider can set technical quality standards for programming carried on its satellite system that can be applied to all programming, including that carried on the set-aside channels. We do not believe that even-handed application of technical quality standards amounts to "editorial control" of programming content.

113. In the *1993 NPRM*, the Commission also asked whether a DBS provider can refuse carriage or restrict dissemination of programs on the reserved channels as cable providers can under Section 532 of the Act.[237] We agree with DAETC that there is no basis in the law for the Commission to carve out a similar exception for DBS providers for programming carried on the reserved channels that is "indecent" or otherwise illegal.[238] The cable statute expressly authorizes cable operators to refuse to carry "indecent programming."[239] The DBS provision contains no such allowance. In light of the statutory prohibition on exercising editorial control, Section 335 does not appear to allow DBS operators to refuse to carry any particular program unless it does not qualify for carriage under Section 335.

114. In sum, consistent with our interpretation of Section 335, DBS providers will be required to make capacity available only to qualified programmers and they may select among such programmers when demand exceeds the capacity of their reserved channels. They may not, however, require the programmers they select to include particular series or programs on their channels. Nor may they alter or censor the content of the programming or otherwise exercise any control over the programming. As we note above, we expect that DBS providers will begin expeditiously to air educational and informational programming.[240] To aid in monitoring and enforcing the obligations of DBS providers, we will require them to maintain files available for public inspection concerning use of the reserved capacity. These files should identify the entities that request access, the entities to whom noncommercial capacity is being provided, the amount of capacity being provided to each entity, the

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236 *Id.* at 928-29.

237 Section 532 permits a cable operator to exclude from leased access channels any programming that the operator "reasonably believes" is indecent. 47 U.S.C. § 532(h).

238 DAETC Comments at 20.

239 Section 612 (c)(2) of the Act.

240 *See* Section IV C. B., *supra*.

conditions under which it is being provided and the rates, if any, being paid by the entity, and, when access is denied, a brief description of the reason or reasons why access was denied. This will permit the Commission and the public to monitor compliance with the requirements of Section 335(b). It will also provide the entities eligible for Section 335(b) capacity with a central source of information regarding what capacity is available.

b. Non-commercial channel limitation.

115. Several commenters suggest that the Commission limit the amount of set aside capacity allocated by DBS providers to individual national educational programming suppliers.[241] For example, ASkyB argues that in order to promote production of additional programming, providers should be allowed to devote no more than half of their set-aside capacity to existing services such as PBS, C-Span, and the Learning Channel.[242] DAETC similarly argues that the Commission should limit programmer access to one channel per DBS system.[243] PBS, however, opposes limiting the reserved channels controlled by any one programmer.[244]

116. In order to ensure that access to non-commercial channels is not dominated by a few national educational program suppliers, we limit to one the number of channels that can be initially allocated to a single qualified program provider on each DBS system. We find that limiting the amount of set-aside capacity a DBS provider can allocate to a single qualified noncommercial programmer will promote increased development of quality educational and informational programming for carriage on the set-aside channels. Prohibiting a DBS provider from initially allocating more than one set-aside channel to a single programmer will increase the opportunity for other qualifying, non-affiliated national educational programming suppliers to gain access. This will make available to the U.S. viewing public a greater variety of educational and informational programs and will provide an opportunity for carriage of programming that might not otherwise be shown such as programming directed at traditionally underserved audiences.

117. Imposition of this limitation, we believe, is amply justified by Congress's intention to foster through Section 335(b) a robust and editorially diverse noncommercial educational programming service. Section 335(a) requires the Commission to "impose . . . public interest or other requirements for providing video programming." As traditionally interpreted in the broadcast and cable context, the

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[241] *See* ASkyB Comments at 19; Alliance Comments at 14; Research TV Comments at 19-20; DAETC Comments at 16-17.

[242] ASkyB Comments at 19.

[243] DAETC Comments at 16-17.

[244] APTS/PBS Reply Comments at 12-13.

public interest is served by affording the public diverse programming.[245] In addition, as discussed in detail above, paras. 108-113, we have not construed Section 335(b)'s prohibition on licensee editorial control over the reserved channel programming to be as expansive a prohibition on licensee discretion as the similar statutory ban on cable operators' control over cable leased access channels. Nevertheless, we believe that it is reasonable to infer that Section 335(b) reflects Congress' desire that this set-aside capacity be a forum for a range of noncommercial voices that otherwise might not be heard. We believe it would frustrate Congress' goal to permit the set-aside capacity to be dominated by a single programming voice where there are other noncommercial voices seeking to be heard. The modest channel limitation that we adopt today will further that congressional objective. As noted above, the channel limitation may foster program services serving a variety of educational needs by ensuring access to more national educational programming suppliers. Each of those suppliers can bring unique resources, editorial perspectives, and expertise to their programming services. Accordingly, we believe that this reasonable limitation will complement and enhance the statutory scheme envisioned in Section 335(b), as well as serve the overall public interest objectives in Section 335(a).

118. In order to ensure that a particular programmer will be allowed access to only one channel, we will require that individual programmers, in fact, be separate entities. If two national educational programming suppliers are directly or indirectly under common control or ownership, we will treat them as one entity for purposes of obtaining access to the reserved channels. In applying this provision, we will define cognizable ownership and other interests according to our Commission's broadcast attribution rules.[246] These rules seek to identify those interests in, or relationships with, an entity that confer on their holders a degree of influence or control such that the holders have a realistic potential to affect the programming decisions of the entity or other core operating functions. As such, we believe they can appropriately be applied in the context of determining whether two national educational programming suppliers are separate entities.

119. To meet its obligations under the channel cap we adopt here, a DBS operator may not initially select a qualified programmer to fill more than one of its reserved channels. If after all qualified entities that have sought access have been offered access on at least one channel, a provider may allocate an additional channel to a qualified programmer without having to make additional efforts to secure other qualified programmers. We believe this approach will assure that a variety of

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[245] In making initial licensing decisions between competing applicants, the Commission has long given "primary significance" to "diversification of control of the media of mass communications". *National Citizens Committee for Broadcasting v. FCC*, 436 U.S. 7754, 795 (1978). The Commission stated that the fundamental purpose of the multiple ownership rules is "to promote diversification of program and service viewpoints as well as to prevent any undue concentration of economic power contrary to the public interest." *Amendment of Section 3.35, 3.240 and 3.636*, 18 FCC Rcd. 288 (1953).

[246] *See* 47 C.F.R. § 73.3555 note 1 & 2. The Commission is currently reviewing the broadcast attribution rules to determine whether they should be modified in certain respects to make them more precise and clear. *See Further Notice of Proposed Rule Making* in MM Docket Nos. 94-150, 92-51 & 87-154, 11 FCC Rcd 19895 (1996). We expect any modifications made in this proceeding will also apply in determining whether two national educational programming suppliers are separate entities.

noncommercial programmers have an opportunity to obtain access while ensuring that these channels are used as intended.

c. Liability for Violations

120. Commenters have raised the issue of whether DBS providers can be held liable for the content of the programming aired on the set-aside channels. For example, Primestar argues that the absence of an explicit immunity provision in Section 335 renders them vulnerable to civil and criminal liability as a result of the programming, and thus requires that DBS providers be able to choose among qualified programmers.[247] MAP, on the other hand, argues that, under applicable precedent, the Commission can find that Section 335 implicitly grants DBS providers immunity from liability for programming over which they have no control.[248] Because Section 335 prohibits DBS providers from exercising any editorial control over programming utilizing the reserved channels, we interpret the statute in accordance with the Supreme Court's holding in *Farmers Educational and Cooperative Union of America v. WDAY*,[249] as immunizing the DBS providers from liability under state and local laws as a result of the content of the programming.

121. In *Farmers Union*, the Supreme Court held that Section 315 of the Act bars broadcasters from censoring defamatory statements made during political broadcasts that they are required by the statute to carry, and therefore implicitly grants them federal immunity from liability for such statements. The fact that Congress did not explicitly grant such immunity by statute was not dispositive. The Court found that the grant of immunity was implicit in the statute because imposing liability for programming broadcasters could not censor "would sanction the unconscionable result of permitting civil and perhaps criminal liability to be imposed for the very conduct the statute demands of the licensee."[250] The same principle applies here. Section 335(b) prohibits DBS providers from exercising "any editorial control" over noncommercial programming using the set-aside capacity, and thus implicitly grants them immunity from liability under state and local law for distributing such programming. By the same token, we will enforce any requirements imposed by the Act or our rules, other than these public interest obligations, against the programmers who supply such programming, rather than the DBS providers who carry it under Section 335.

d. Applicability of Political Broadcasting Rules to the Noncommercial Set Aside Capacity

122. We agree with APTS/CPB that the channel capacity set-aside under 335(b) is not subject to the public interest obligations referred to in Section 335(a), including the political

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[247] Primestar *Ex parte* Presentation, December 12, 1997.

[248] *See* September 29, 1998 *Ex Parte* filing by Media Access Project.

[249] 360 U.S. 525 (1959) (Farmers Union).

[250] 360 U.S. at 531.

broadcasting requirements.[251] The statutory language makes clear that noncommercial programming suppliers are not considered DBS providers for purpose of either Section 335(a) or Section 335(b). Rather, as noted above, DBS providers are licensees under Part 25 or Part 100 of the Commission's rules.[252] Since Section 335(a) imposes the political broadcasting requirement only on "providers of DBS service" the noncommercial program suppliers are not subject to those requirements. In addition, as APTS/CPB notes, given the limited amount of capacity required to be reserved for noncommercial use and the large number of candidates who could potentially request time under Section 312(a)(7) of the Communications Act, requiring noncommercial programming suppliers to give federal candidates reasonable access to their DBS capacity could interfere with the intended use of that capacity for educational purposes.[253]

e. Refusal to Carry Programming Supplier

123. In the *1993 NPRM*, the Commission asked whether a DBS provider can refuse carriage of programming on the educational and informational set-aside or can restrict its dissemination as cable providers can pursuant to Section 532 of the Act. We agree with DAETC that there is no basis in the law for the Commission to carve out a similar exception for DBS providers for programming that is "indecent" or otherwise illegal on the educational and informational set-aside.[254] The cable statute expressly authorizes cable operators to refuse to carry "indecent programming."[255] The DBS statute contains no such provision. In light of the statutory prohibition on exercising editorial control, Section 335 does not appear to allow DBS operators to refuse to carry any particular program. This does not, however, mean that a DBS provider is prevented from making an initial threshold determination as to whether a programmer is qualified for carriage or whether the programming proposed is noncommercial, educational, or informational. DBS providers need this initial threshold discretion in order to provide them with some ability to screen programming which they provide to viewers but which they have no editorial control over. Moreover, this approach is consistent with judicial interpretation of the editorial control prohibition for public, educational, and governmental set-aside channels provided by cable operators.[256] In addition, a DBS provider can set technical quality standards for programming carried on its satellite system and these standards can be applied to programming on the set-aside channels.

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[251] APTS/CPB Comments at 33.

[252] *See* Section IV.A.

[253] APTS/CPB Comments at 34.

[254] DAETC Comments at 20.

[255] Section 612 (c)(2) of the Act.

[256] *See* Section 611 of the Act (setting out guidelines for the establishment of cable channels for public, educational, or governmental use); *Time Warner Cable of New York City v. Bloomberg L.P.*, 118 F.3d 917 (2d Cir. 1997).

5. Unused Channel Capacity

124. Section 335(b)(2) of the Communications Act permits a DBS provider to utilize for any purpose any unused channel capacity required to be reserved under this subsection pending the actual use of such channel capacity for noncommercial programming of an educational or informational nature.[257] The Commission noted in the *1993 NPRM* that neither the statute nor the legislative history defines what constitutes "use" of a channel. The Commission further noted, however, that the legislative history appears to indicate that the DBS provider may use these reserved channels until the use of such channel is obtained pursuant to a written agreement with a qualified programmer. Accordingly, the Commission sought comment on what constitutes "use" of a reserved channel by a noncommercial programmer that would trigger an end to the DBS provider's ability to use channels for any other purposes. We received no comments on this issue, however.

125. At the time that the statute was enacted, only limited DBS service was available.[258] Today, DBS operators are providing service to customers. To the extent that channels reserved for noncommercial programming are not used, we conclude that DBS providers may take advantage of the unused capacity provision of the statute by placing commercial programming on those reserved channels. The statutory language is quite clear and anticipates that DBS providers can use all capacity until noncommercial programming is available. A DBS provider will however, be required to vacate reserved capacity, regardless of contractual obligations, within a reasonable time after a qualified programmer's request for access has been received. Further, each DBS provider must make reasonable, good faith efforts to identify qualified national educational programming suppliers to satisfy its obligations under our rules and begin carrying educational and informational programming according to the time periods established in Section D of this order.

6. Reasonable Prices, Terms, and Conditions

126. Section 335(b)(4) states that, in determining reasonable prices, the Commission shall take into account the nonprofit character of the programmer to whom the capacity is provided and any federal funds used to support the programming. The statute also provides that the Commission shall not allow prices to exceed 50 percent of the direct costs of making the channel available. Further, in calculating direct costs, the statute states that the Commission shall exclude marketing costs, general administrative costs, and similar overhead costs of the DBS provider as well as the revenue that such DBS provider might have obtained by making such capacity available to a commercial provider of video programming.

127. The Commission sought comments on: 1) what costs should be included in the determination of appropriate rates, and 2) what rates are reasonable. In addition, the Commission sought comment on whether some individual programmers should be entitled to a rate even lower than

[257] 47 U.S.C. § 335(b)(2).

[258] This was actually limited DTH service offered by Primestar.

50% of the direct costs, what the appropriate percentage would be and what would be the financial impact on DBS providers.

128. DBS providers generally urge the Commission to adopt an expansive definition of "direct costs" so as to include such items as construction and launch of the satellite, and a share of the telemetry, tracking and control costs.[259] For example, DirecTV urges the Commission to consider a full range of costs, including receiving and uplink costs, additional personnel necessary to implement public service programming, the costs of construction, launch and operation of satellites, as well as various costs related to the distribution of non-commercial services.[260] Similarly, EchoStar urges the Commission to consider the large upfront costs of entry into the DBS market in determining rates for public service programmers. Echostar believes that auction payments, acquisition of permits and licenses, construction, launch, insurance, uplink, tracking and control functions should all be considered.[261]

129. The Alliance argues that, if any fees are charged, direct costs should be limited to marginal costs, that is, only the additional costs of making transponder capacity available for noncommercial programming.[262] APTS/PBS asserts that the Commission should define direct costs narrowly to facilitate the use of reserved channel capacity.[263] APTS/PBS states that "direct costs" do not include fixed costs that would be incurred regardless of mandatory access for noncommercial programming, such as construction and launch of the satellite.[264] DAETC urges the Commission to exclude common and joint costs from the direct cost calculation. DAETC recommends that the Commission bar as direct costs research and development, construction, launch and operation of the satellite, insurance, and the proportionate share of auction payment, arguing that DBS providers will incur these costs regardless of Section 335.

130. We adopt a narrow definition of direct costs because we find that such a definition is more consistent with Congressional intent. The legislative history of the House bill states that direct costs should include only the costs of transmitting the signal to the uplink facility and the direct costs of uplinking the signal to the satellite.[265] Although the House language was modified, there is nothing

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[259] *See* EchoStar Comments at 6-7; PrimeStar Comments at 19; Tempo Comments at 14; USSB Comments at 12-13; ASkyB Comments at 22; DirecTV Comments at 26; SBCA Comments at 22-23.

[260] *See* DirecTV Comments at 26.

[261] *See* EchoStar Comments at 7-8.

[262] Alliance Comments at 15.

[263] APTS/PBS Comments at 19.

[264] *Id.* at 24.

[265] House Committee on Energy and Commerce, H.R. Rep. No. 102-628, 102d Cong., 2d Sess. 294, 295 (1992); *see also 1993 NPRM*, 8 FCC Rcd at 1599.

in the legislative history to indicate that Congress intended noncommercial programmers to share the cost of construction and launch and other costs of operating the satellite generally. If noncommercial educational or informational programmers are forced to share those expenses, the costs of leasing channels could keep many programmers out of the market, thus defeating Congress' desire to make noncommercial programming readily available. We conclude that costs that can be specifically allocated to noncommercial programmers are those that are directly related to making the capacity available to noncommercial programmers. These include, as APTS/PBS notes, incremental labor required for traffic management at the uplink facility, incremental compression equipment, incremental labor required to authorize viewers to receive particular programming and any backhaul costs actually incurred by the DBS provider in order to transmit the noncommercial educational or informational programming.[266] If a DBS provider has an authorization center or procedure used solely for the provision of noncommercial channels, such costs may be allocable to noncommercial programmers as well.

131. Next we address the issue of what rates are appropriate for the channels to be set aside under Section 335(b). The statute gives certain guidelines for the Commission to apply. First, Section 335(b)(4) says the Commission should take into account the nonprofit character of the programmers and any federal funds used to support programming. Second, the statute provides that the Commission shall not allow rates to exceed 50 percent of the direct costs, which we have defined above.

132. Some commenters contend that DBS providers should set aside capacity for noncommercial programmers free of charge or that the Commission should develop a sliding scale for fees charged to programmers, based on their ability to pay.[267] DirecTV urges us to adopt a narrow interpretation of programmers eligible for the 50 percent reduced rate provision of Section 335(b)(4). It argues that the 50 percent reduction should not apply to other educational or informational programs that may satisfy the Section 335(b)(1) obligation. DirecTV also believes that a distinction should be made between "for-profit" and "not-for-profit" national educational program suppliers. It argues that programmers should be free to negotiate with DBS suppliers directly to determine appropriate rates and consideration.[268] APTS/PBS asserts that where a noncommercial entity cannot secure government funding for its programming, the 50 percent cut-rate should apply.[269] EchoStar suggests that the Commission allow DBS providers to set rates.[270]

133. We agree with EchoStar that we should not be involved in setting rates for noncommercial programmers because we do not set rates for satellite capacity in any other context

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[266] *See* APT/PBS Ex Parte Letter at 3.

[267] Alliance Comments at 15; DAETC Comments at 13-14.

[268] *See* DirecTV Comments at 25.

[269] APTS/PBS Ex Parte Letter at 2.

[270] EchoStar Comments at 7-8.

We therefore adopt our tentative conclusion in the *1993 NPRM* that we will let DBS providers and noncommercial programmers negotiate rates. We will address any disputes with respect to rates in the context of a complaint proceeding. We conclude that the 50 percent cap applies to all qualified programmers and not just those who receive no outside funding for their programs. The statute does not give us any basis upon which to differentiate among noncommercial educational and informational programming based on the availability of outside financing.

134. We decline to adopt the terms and conditions suggested by APTS/PBS such as requiring consistently-available blocks of time, consistent identification, and including offerings in the lowest priced program package.[271] While we believe that DBS providers should consider such terms and conditions as they comply with the statutory requirements, we will follow a more flexible approach and not mandate such terms and conditions in our rules because this is consistent with our policy to avoid excessive regulatory involvement in programming arrangements.

D. Effective Date

135. Several commenters addressed the issue of allowing a phase-in period for compliance with these statutory public interest requirements. DBS providers recommend a phase-in period of six months to two years to implement the requirements and to allow restructuring of existing contracts.[272] Other commenters suggest that the rules should take effect immediately. DAETC urges the Commission to enforce capacity availability within 45 days from the release of the implementation order, stressing that the industry has been on notice for five years, since the *1993 NPRM*, that these obligations would be imposed.[273]

136. After weighing the comments regarding the effective date of our rules, we conclude that a long phase-in period is unnecessary. We recognize, however, that DBS providers and programmers need some amount of time in which to solidify plans and execute contracts. We are requiring each DBS provider make available the channel capacity for educational and informational programming of a noncommercial nature as soon as our rules become effective .[274] This means DBS providers must open a window at that time to allow interested programming suppliers to enter into discussions with the DBS providers regarding program carriage. We are also requiring that programming intended to fulfill the provisions of this section must be made available to the public no later than six months after these rules are effective. Until the four percent of capacity is filled with qualified programming, DBS providers may not assert that capacity is unavailable if there are qualified

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[271] APTS/PBS Comments at 25. USSB argues, however, that there is no need to define "reasonable prices, terms and conditions." USSB Further Comments at 10.

[272] *See* SBCA Further Comments at 13; DirecTV Comments at 21; Primestar Further Comments at 26.

[273] *See* DAETC Comments at 25.

[274] *See* discussion *infra*. Final approval of these rules pursuant to the Paperwork Reduction Act could take as long as 120 days.

entities seeking carriage who are ready to meet the prices, terms and conditions established by the DBS provider. In setting these time periods, we believe that we will assure prompt compliance while allowing sufficient time for developing and producing quality noncommercial educational and informational programming.

E. Administrative Procedural Matters

137. Initial Paperwork Reduction Act of 1995 Analysis This NPRM contains either a proposed or modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget ("OMB") to take this opportunity to comment on the information collections contained in this NPRM, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as other comments on this NPRM; OMB comments are due 60 days from date of publication of this NPRM in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

Written comments by the public on the proposed and/or modified information collections are due 60 days from publication in the Federal Register. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed and/or modified information collections on or before 60 days after date of publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room C1804, 445 12th Street, S.W., Washington, DC 20554, or via the Internet to jboley@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 17th Street, N.W., Washington, DC 20503 or via the Internet to fain_t@al.eop.gov.

V. CONCLUSION

138. For the reasons discussed above, we adopt this *Report and Order* to implement the mandate of the Cable Television Consumer Protection and Competition Act of 1992.

VI. ORDERING CLAUSES

139. Accordingly, IT IS ORDERED that Part 100 of the Commission's rules is hereby amended as set out in Appendix B.

140. IT IS FURTHER ORDERED that the Commission's Office of Managing Director SHALL SEND a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

141. IT IS FURTHER ORDERED that the amendments to Part 100 of the Commission's rules, 47 CFR Part 100, and the Commission's policies, rules and requirements established in this

Report and Order shall take effect 60 days after publication of the amendments in the *Federal Register*, or in accordance with the requirements of 5 U.S.C. § 801(a)(3) and 44 U.S.C. § 3507, whichever occurs later. The Commission will publish a notice announcing the effective date of this *Order*.

142. IT IS FURTHER ORDERED that the Commission SHALL SEND a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

143. This *Report and Order* is issued under Section 0.261 of the Commission's rules, 47 C.F.R. § 0.261 (1996). Petitions for reconsideration under Section 1.106 of the Commission's rules, 47 C.F.R. § 1.106 (1996), or applications for review under Section 1.115 of the Commission's rules, 47 C.F.R. § 1.115 (1996), may be filed within 30 days of the date of public notice of this *Report and Order* (See 47 C.F.R. § 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary

STATEMENT OF CHAIRMAN WILLIAM E. KENNARD

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

In many respects, the public interest obligations imposed by Congress under section 25 of the 1992 Cable Act were truly visionary. When Congress enacted section 25, DBS was but a glimmer on the horizon. But Congress wisely recognized, long before many, the potential of DBS to provide high quality, diverse programming to even the most remote areas of this country. So, too, did Congress recognize the importance of making sure that spectrum, a critical natural resource, is used for the benefit of all the American people. As the Supreme Court has recently stated, "assuring that the public has access to a multiplicity of informational sources is a governmental purpose of the highest order."[275] I believe we should take this interest very seriously in managing the spectrum, and as long as I am Chairman, I will work diligently to make sure that this Commission does so as well.

To harness DBS's potential to enhance the lives of the American public, Congress set aside a portion of the spectrum used by DBS to ensure that we have access to quality programming--programming for children, senior citizens, distance learning, health care applications, and for celebrating our diversity. Just as Congress has set aside for the public's enjoyment and benefit public spaces for parks and playgrounds, so will this "digital space" operate to ensure a richer diversity of educational and social opportunities.

It is now up to the DBS operators and the many programmers poised to take advantage of this set-aside to meet the challenge of enhancing the quality and variety of public interest programming available to the public. If recent developments are any indication, I expect the public to benefit tremendously. Long gone are the days when "public interest" programming was synonymous with "boring." Today, creative operators and programmers are responding aggressively to the public's yearning for quality public interest programming and using the various media at their disposal to meet this challenge.

While I am pleased that this Order opens up a wide array of opportunities for educational and informational DBS programming, I am disappointed in the way the Order interprets section 25's prohibition against DBS operators exercising "editorial control." I am concerned that by allowing DBS operators to select among eligible programmers, we run the risk that they will be less willing to chose and allow on to their systems diverse programming sources. We have a great opportunity here. Congress has made spectrum available. There are abundant sources of quality programming. There are parents and children all across this country who are anxious for quality broadcasts. There are groups of people, separated by geography but with common interests -- for example, language minorities and the disabled --, who can be brought together through this medium. In enacting section

[275] Turner Broadcasting System, Inc. v. Federal Communications Commission, 512 U.S. 622, 663 (1994).

25. Congress wisely sought to foster opportunities for new, alternative programming -- programming that might not always fit neatly within DBS operators' notion of what is commercially viable but that would nevertheless respond effectively to unmet public needs. In my view, the decision to allow DBS operators to select programmers makes achievement of this vision much more challenging.

Despite my concerns about this aspect of our decision, I remain confident that we can successfully achieve Congress's vision of an open and vibrant public space that enriches the lives of the American viewing public. My faith that we can achieve this vision stems both from the steps we have taken to limit the amount of set-aside channels that any single programmer can use, the fact that DBS operators will be prohibited from selecting, editing or altering the content of set-aside programming, and from my confidence that the DBS industry, an industry that has grown, matured and prospered despite amazing odds, will rise to the challenge of making these channels truly available to new and exciting programmers, as Congress intended.

And in this sense, I would like to congratulate those DBS operators who have already started to provide quality educational and informational programming. They demonstrate that the DBS industry is indeed open to new ideas and new paradigms. They show that DBS can respond to the needs of latch key children, provide foreign language programming so that hard working immigrant families can have the benefit of education, and help to raise the level of political discourse in this nation.

I challenge all DBS operators to follow the example of those who are already doing ground-breaking work in this area, and seize this tremendous opportunity. I challenge them to keep expanding their reach among the American viewing public while also giving something extremely valuable back. I will be following developments closely in the hope that they do.

Statement of Commissioner Harold W. Furchtgott-Roth, Dissenting In Part

Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Public Interest Obligations, MM Docket 93-25

I am pleased to support the vast majority of the decisions made in this Report and Order ("R&O"). I believe that we are bound by the directives of section 335 to establish set-asides on DBS systems. I am glad, however, that within the bounds of our discretion we have approached the implementation of this provision with a relatively light regulatory hand, picking four percent of capacity as the set-aside requirement and declining generally to impose additional public interest obligations on DBS providers. I commend the International Bureau, as well as the Mass Media Bureau and others who collaborated on this document, for their fine work.

I must dissent, however, from one portion of this R&O: the section that imposes a one-channel-per-customer limitation on DBS providers. I see nothing in the statute that speaks to the question of how space on the set-aside channels -- once the percentage of channel capacity has been established by the Commission -- should be divvied up or allocated among qualified program national educational programming suppliers. And I see nothing in the statute that suggests that the Commission should, by rule, attempt to secure a certain kind of composition or representation on the set-aside as among such suppliers.

With all due respect to the majority, there is nothing in section 335(b) about "programming on the reserved channels com[ing] from a variety of sources." *Supra* at para. 117. To refresh, what that section actually says is: the Commission must require licensees to "reserve a portion" of channel capacity "exclusively for noncommercial programming of an educational or informational nature," section 335(b)(1); DBS providers "may utilize . . . unused channel capacity," section 335(b)(2); DBS providers can satisfy the statute if they "mak[e] channel capacity available to national educational programming suppliers, upon reasonable prices, terms, and conditions," section 335(b)(3); and DBS providers may not "exercise any editorial control" over "video programming," section 335(b)(3). There is no reference to, or any indication of concern about, a diversity, variety, or multiplicity of noncommercial educational and informational programming.

Moreover, although the item purports in this section to rely on section 335(a)'s "public interest" authorization as a basis for the channel limitation, *supra* at para. 117, we previously expressly declined in this item "to impose any additional obligations on the DBS industry before we see how DBS serves the public" because "it would be burdensome at this time and could prevent [the industry] from realizing its potential." *Supra* at para. 64. This proposition ought to hold equally true here, and I think it does.

Finally, the channel limitation is also inconsistent with our decision that the statutory ban on editorial control extends only to the selection and editing of programming, not to the antecedent step of the selection of programmers. While the R&O thus concludes in one part that nothing in the statute bars DBS providers from choosing among qualified programmers when demand for channel space exceeds supply, *see supra* paras. 97-114, the item, in the next breath, seeks to constrain DBS providers in their selection of programmers with this rule, *see id.* at paras. 115-119. Either the statute reaches

the programmer selection process, or it does not. Because its plain terms belie such reach, I would not have adopted this limitation.

SEPARATE STATEMENT OF COMMISSIONER MICHAEL K. POWELL DISSENTING IN PART

Re: Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992; and Direct Broadcast Satellite Public Interest Obligations (MM Docket No. 93-25).

We have been asked to implement various mandates Congress imposed on Direct Broadcast Satellite (DBS) operators as part of the 1992 Cable Act. In most parts of this order, I believe that we have implemented the will of Congress and I fully support those portions of the order. To my mind, however, in one part of the order, the majority is not implementing the will of Congress, but inventing it. Because I am unwilling to speculate in order to regulate, I respectfully dissent from that portion of the item.

As an initial matter, let me briefly address the issue of Editorial control. Although I understand and respect that others may have different interpretations of the statute, I believe, for the reasons explained in the order, that our interpretation of the statute is faithful to Congress' intent and will produce the best result for the American people. My judgement in this regard is buoyed by the fact that the results produced by any other interpretation of the statute strike me as either unworkable or overly intrusive. For example, alternatives such as a subscriber survey strike me as administratively burdensome. Indeed, I have great difficulty imagining how such a process would work. Other alternatives suggested by the commenters, such as the proposal to require some third party decisionmaker, smack of undue government intrusion contrary to our principles of free speech. The only other obvious alternative, requiring some form of first-come, first-served access, is unlikely to produce the best use of this valuable spectrum.

This leads me to the aspect of this decision from which I must respectfully dissent, the portion of the decision that imposes an initial limit of one channel per DBS system for each national educational programming supplier. In my view, this is an artificial limitation not called for by the statute nor needed as a policy matter. With regard to the law, I note that on its face, the statute seeks to ensure that a type of programming – noncommercial educational and informational programming – is available to the American people subscribing to DBS service. Nothing in the statute indicates that the FCC should go beyond ensuring that DBS operators make capacity available for such programming to also adopt rules about <u>who</u> will provide the programming. Rather, so long as the DBS operator makes the capacity available to programmers that fall within the category of programmers specified by Congress and those programmers provide the type of programming contemplated by the statute, the congressional intent will be fulfilled. We need go no further.

I also object to this limitation as a matter of policy. This rule is over-regulatory and depends upon speculative conclusions that government intrusion is necessary to ensure diversity and variety on these channels. I see no basis for such a conclusion. Each of the DBS operators offering service today provides a wide variety of programming that runs the gamut from entertainment to news, information and instruction. These operators clearly have found that diversity in programming helps to gain subscribers - some seven million or so and growing. Given this dynamic in the industry, I see no

reason to intrude. Under these circumstances, I cannot support this limitation and will respectfully dissent from this portion of the order.

STATEMENT OF COMMISSIONER GLORIA TRISTANI, DISSENTING IN PART

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

My disagreement with the majority centers on the following sentence in Section 335(b)(3): "The provider of direct broadcast satellite service shall not exercise any editorial control over any video programming provided pursuant to this subsection." The majority believes that this sentence can be read to give DBS operators complete freedom in selecting and renewing video *programmers* to use the set-aside capacity without violating the prohibition on the exercise of any editorial control over any of the video *programming* that is shown. I do not.

The majority's position depends upon a basic fiction: that nothing that occurs between a DBS operator and a programmer amounts to "editorial control" over the actual programming that is provided to subscribers so long as the programmer formally retains the right to run the programming of its choice. Thus, according to the majority, a DBS operator could: (1) decide which programmers to carry based on specific programming line-ups; (2) discuss with programmers the particular programs that will be carried and when; and (3) terminate a programmer because it did not like the content of the programmer's offerings. In the majority's view, none of this would amount to any editorial control by the DBS operator so long as the programmer is permitted, as a legal matter, to make the final decision about what programming will be run.

This fiction cannot withstand scrutiny. First, it defies reality to argue that the editorial slate is somehow "wiped clean" after a carriage agreement is signed. For instance, assume that a DBS operator is choosing between two qualified children's programmers -- PBS, which carries Sesame Street, and a start-up children's channel, which carries a similar program called Poppy Street. If the DBS operator chooses to carry PBS rather than the start-up, it seems self-evident to me that the operator has exercised *some* editorial control over whether its subscribers will see Sesame Street or Poppy Street.

True, under the majority's view PBS could drop Sesame Street from its line-up and the DBS operator would have no legal recourse to stop them. But such changes will likely be rare. Many national programming services have established channel line-ups that are relatively stable as programmers attempt to develop viewer loyalty and brand identity. More importantly, no programmer will want to antagonize the entity that has sole control over whether its carriage contract will be renewed by reneging on programming commitments made during the selection process. Indeed, since the majority has not prescribed any minimum duration for carriage contracts, a DBS operator could keep programmers on a short leash by only entering into short-term contracts.

But even assuming that a programmer occasionally exercises independent editorial judgment contrary to the DBS operator's wishes, the majority's scheme would still run afoul of the statute. The statute does not prohibit DBS operators from exercising *complete* editorial control over *all* of the video programming on the set-aside capacity, but from exercising *any* editorial control over *any* such

programming. Thus, the statute is violated even if a DBS operator only exercises the slightest editorial control over a single program on a single channel.

Since, as a practical matter, the DBS operator is bound to have some influence over some of the programming that is shown, in the end the majority's argument depends upon the proposition that a programmer's legal right to ignore the DBS operator's wishes is enough to satisfy the statute *even if that right is not exercised.* This is like saying that a television network exercises no editorial control over the programming that viewers see because its affiliates may have the legal right to preempt any particular show. It also has a certain through-the-looking-glass logic: the party that chooses the programming that subscribers see does not exercise any editorial control over what subscribers see; the only party exercising editorial control over what subscribers see is the one that could choose what subscribers see, but does not.

If the majority were serious about its programmer-programming distinction, it would need to provide far more detailed rules on permissible conduct before, during and after the set-aside selection process. It is not enough to leave these issues to case-by-case determinations; these are issues that every DBS operator and every programmer need resolved before they can do business. On termination issues, alone, for instance, a whole host of issues present themselves. Can a DBS operator require programmers to sign "at will" contracts and simply terminate a programmer if they do not like its content? If not, how long do contracts have to run? Six months? A year? Five years? What are acceptable reasons for non-renewal? Can it be based on dislike of particular content, or only on a desire to change from, say, a children's channel to distance learning?

Instead of the majority's complicated fiction, I would have adopted a simpler approach. Congress clearly intended that a sliver of the DBS operator's spectrum be set aside for programming free from the operator's control. In practice, the only way to accomplish that directive is to prohibit the DBS operator from deciding which programmers will occupy the set-aside capacity. This need not be a burdensome process, nor need it deprive subscribers of the qualified programming they would find most attractive. I think it would be acceptable under the statute, for example, for the DBS operator to create a list of qualified programmers seeking carriage and then to survey its subscribers about the programming they would prefer. A subscriber survey would be quick and easy to administer, would create an attractive set-aside package and, most importantly, would remove any question about the DBS operator exercising editorial control. Although today's Order in no way requires such an approach, neither is it precluded and it may help insulate a DBS operator from charges of improper editorial influence.

Appendix A

1993 Commenters

Association of America's Public Television Stations and Corporation for Public Broadcasting (APTS/CPB)
Black Entertainment Television (BET)
Continental Satellite Corporation (Continental Satellite)
Consumer Federation of America (CFA)
DirecTV, Inc. (DirecTV)
Discovery Communications, Inc.
Dominion Video Satellite, Inc.
Ann A. Dunn
Educational Broadcasting Corp.
GE American Communications, Inc. (GE Americom)
Green Sphere, Inc.
GTE Spacenet Corporation (GTE Spacenet)
Hispanic Information and Telecommunications Network, Inc.
Home Box Office
Patrick M. Juarez
Local-DBS, Inc.
Mind Extension University, Inc.
Minneapolis Television Network
National Captioning Institute, Inc.
National Association of Telecommunications Officers and Advisors (NATOA)
Primestar Partners L.P. (Primestar)
Satellite Broadcasting and Communications Association of America (SBCA)
Shamrock Broadcasting, Inc.
St. Petersburg Junior College
Staten Island Journal
United States Satellite Broadcasting Company Inc. (USSB)

1997 Commenters

ACTV, Inc.
Advanced Communications Engineering, Inc.
America's Health Network
Alliance for Community Media and National Association of Telecommunications Officers and Advisors (Alliance)
American Sky Broadcasting, LLC (AskyB)
Association of America's Public Television Stations and Public Broadcasting System (APTS/PBS)
Children's Television Workshop (CTW)
Center for Media Education, et. al. (CME)
Colorado State University
Consortium for School Networking (CoSN)

Cornell University
Denver Area Educational Telecommunications Cooperative, Inc., et. al. (DAETC)
Deutsche Well Television
Dominion Video Satellite, Inc. (Dominion)
EchoStar Communications Corporation (EchoStar)
Encore Media Group, LLC (Encore)
Foundation for Educational Advancement Today
GE American Communications, Inc. (GE Americom)
Michael Gruber
Hispanic Information and Telecommunications Network, Inc. (HITN)
International Society for Technology in Education (ISTE)
INTERNEWS
JEC Knowledge TV (Knowledge TV)
MCI Communication Corporation (MCI)
Morality in Media, Inc. (Morality in Media)
National Cable Satellite Corp., d/b/a C-SPAN and C-SPAN 2
National Cable Television Association, Inc. (NCTA)
National Rural Telecommunications Cooperative (NRTC)
Noggin
Ohio State University
Oklahoma State University
Philadelphia Park
Primestar Partners, L.P.
Research TV
R/L DBS, L.L.C. (R/L DBS)
Satellite Broadcasting and Communications Association of America (SBCA)
Small Cable Business Association (Small Cable Business Ass'n)
Tempo Satellite, Inc. (Tempo)
Texas A&M University
Time Warner Cable (Time Warner)
United States Catholic Conference (USCC)
University of Kentucky
University of Las Vegas
University of Nebraska
United States Satellite Broadcasting Company, Inc. (USSB)
University of Texas/University of Virginia (Texas/Virginia)
US West, Inc.

Appendix B

Rule Changes to 47 C.F.R. Part 100 of the Commission's Rules

1. Part 100 of the Commission's Rules and Regulations (Chapter I of Title 47 of the Code of Federal Regulations) is amended to add section 100.5 to read as follows:

PART 100-DIRECT BROADCAST SATELLITE SERVICE

Subpart A - General Information

Sec.
100.1 Basis and purpose
100.3 Definitions
100.5 Public Interest Obligations

2. The authority citation for part 100 is amended to read as follows:

Authority: 47 U.S.C. §§ 154, 303, 335, 309 and 554.

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§100.5 Public Interest Obligations

(a) DBS providers are subject to the public interest obligations set forth in paragraphs (b) and (c) below. For purposes of this rule, DBS providers are any of the following:

(1) entities licensed pursuant to 47 C.F.R. Part 100 or

(2) entities licensed pursuant to part 25 of this title that operate satellites in the Ku-band fixed satellite service and that sell or lease capacity to a video programming distributor that offers service directly to consumers providing a sufficient number of channels so that four percent of the total applicable programming channels yields a set-aside of at least one channel of non-commercial programming pursuant to subsection c of this rule, or

(3) non-U.S. licensed satellite operators in the Ku-band that offer video programming directly to consumers in the United States pursuant to an earth station license issued under part 25 of this title and that offer in a sufficient number of channels to consumers so that four percent of the total applicable programming channels yields a set-aside of one channel of non-commercial programming pursuant to subsection c of this rule,

(b) Political Broadcasting Requirements:

(1) *Reasonable Access.* DBS providers must comply with § 312(a)(7) of this title by allowing reasonable access to, or permitting purchase of reasonable amounts of time for, the use of their facilities by a legally qualified candidate for federal elective office on behalf of his or her candidacy.

(2) *Use of Facilities.* DBS providers must comply with § 315 of this title by providing equal opportunities to legally qualified candidates.

(c) Carriage Obligation for Noncommercial Programming.

(1) *Reservation Requirement.* DBS providers shall reserve four percent of their channel capacity exclusively for use by qualified programmers for noncommercial programming of an educational or informational nature. Channel capacity shall be determined annually by calculating, based on measurements taken on a quarterly basis, the average number of channels available for video programming on all satellites licensed to the provider during the previous year. DBS providers may use this reserved capacity for any purpose until such time as it is used for noncommercial educational or informational programming.

(2) *Qualified Programmer.* For purposes of these rules, a qualified programmer is:

(A) a noncommercial educational broadcast station as defined in §397(6) of this title,

(B) a public telecommunications entity as defined in §397(12) of this title,

(C) an accredited nonprofit educational institution or a governmental organization engaged in the formal education of enrolled students (A publicly supported educational institution must be accredited by the appropriate state department of education; a privately controlled educational institution must be accredited by the appropriate state department of education or the recognized regional and national accrediting organizations.), or

(D) a nonprofit organization whose purposes are educational and include providing educational and instructional television material to such accredited institutions and governmental organizations.

(E) other noncommercial entities with an educational mission

(3) *Editorial Control*

(A) A DBS operator will be required to make capacity available only to qualified programmers and may select among such programmers when demand exceeds the capacity of their reserved channels.

(B) A DBS operator may not require the programmers it selects to include particular programming on its channels.

(C) A DBS operator may not alter or censor the content of the programming provided by the qualified programmer using the channels reserved pursuant to this subsection.

(4) *Non-commercial channel limitation*

A DBS operator cannot initially select a qualified programmer to fill more than one of its reserved channels except that, after all qualified entities that have sought access have been offered access on at least one channel, a provider may allocate additional channels to qualified programmers without having to make additional efforts to secure other qualified programmers.

(5) *Rates, Terms and Conditions.*

(A) In making the required reserved capacity available, DBS providers cannot charge rates that exceed costs that are directly related to making the capacity available to qualified programmers. Direct costs include only the cost of transmitting the signal to the uplink facility and uplinking the signal to the satellite.

(B) Rates for capacity reserved under subparagraph (c)(1) shall not exceed 50 percent of the direct costs as defined in subparagraph (c)(3)(A) above.

(C) Nothing in this section shall be construed to prohibit DBS providers from negotiating rates with qualified programmers that are less than 50 percent of direct costs or from paying qualified programmers for the use of their programming.

(D) DBS providers shall reserve discrete channels and offer these to qualifying programmers at consistent times to fulfill the reservation requirement described in these rules.

(6) *Public File.*

(A) Each DBS provider shall keep and permit public inspection of a complete and orderly record of:

(i) quarterly measurements of channel capacity and yearly average calculations on which it bases its four percent reservation, as well as its response to any capacity changes;

(ii) a record of entities to whom noncommercial capacity is being provided, the amount of capacity being provided to each entity, the conditions under which it is being provided and the rates, if any, being paid by the entity;

(iii) a record of entities that have requested capacity, disposition of those requests and reasons for the disposition; and

(iv) a record of all requests for political advertising time and the disposition of those requests.

(B) All records required by this paragraph shall be placed in a file available to the public as soon as possible and shall be retained for a period of two years.

(7) *Effective Date.*

DBS providers are required to make channel capacity available pursuant to subsection c of this rule upon the effective date. Programming provided pursuant to this rule must be available to the public no later than six months after the effective date.

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Appendix C

FINAL REGULATORY FLEXIBILITY ANALYSIS-AMENDMENT OF THE COMMISSION'S REGULATORY POLICIES TO REQUIRE DIRECT BROADCAST SATELLITE SERVICE TO COMPLY WITH PUBLIC INTEREST STANDARDS UNDER SECTION 335 OF THE COMMUNICATIONS ACT OF 1934 (DBS Public Interest Order)

As required by Section 603 of the Regulatory Flexibility Act (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the *Notice of Proposed Rulemaking 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* in MM Docket No. 93-25.[276] The Federal Communications Commission sought public comment on the proposals in the notice, including comment on the IRFA. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA, as amended by the Contract with America Advancement Act of 1996, (CWAA), Pub. L. No. 104-121, 110 Stat. 847 (1996).

A. Need for, and Objectives of, the DBS Public Interest Order:

In the *DBS Public Interest Order*, the Commission implements Section 25 of the Cable Television Consumer Protection and Competition Act of 1992 as codified at Section 335 of Communications Act of 1934, as amended. Section 25 directs the Commission to impose public interest obligations on DBS providers, including access for political candidates and reservation of capacity for educational and informational programming. DBS and direct-to-home fixed satellite service (DTH-FSS) are multi-channel video programming distribution (MVPD) services serving approximately 9.2 million households. The Commission's goal has been to create flexible, practical rules to achieve statutory objectives without stifling industry growth.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA:

One comment was filed in direct response to the questions posed in the IRFA. The Small Cable Business Association (SCBA) observed that "small entities including cable, broadcast, PEG access groups and communities across the country suffer harm from DBS' ability to unfairly compete for market share because DBS does not have to provide local programming or comply with associated regulations and financial burdens."[277]

SCBA asked the Commission in its 1997 comments to "ensure small cable access to programming."[278] SCBA echoed the sentiments of other commenters when claiming that growth in

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[276] *Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992*, Notice of Proposed Rulemaking, 8 FCC Rcd 1589 (1993) (*Notice*).

[277] SCBA Comments to the Initial Regulatory Flexibility Analysis at 2 (April 28, 1997).

[278] SCBA 1997 Comments to MM Docket No. 93-25 at 26 (SBCA 1997 Comments).

DBS would hurt local programmers in smaller markets.[279] For example, NCTA noted that if a DBS provider is the functional equivalent of a cable operator, then equal regulatory measures should be applied.[280]

At this time, there remain several obstacles to the provision of local programming on a nationwide basis by DBS providers. DBS providers lack the technical capacity to provide special programming for all individual localities in the nation. There are legal barriers to carrying local broadcast channels. The Satellite Home Viewer Act of 1988, as amended,[281] prohibits a satellite carrier, including a DBS operator, from offering television network stations to subscribers who can receive a local affiliate of that network using a conventional over-the-air antenna or to those subscribers who have subscribed to a cable system in the past 90 days that carries the local affiliate. Therefore it is not possible at this time to impose localism requirements on DBS providers.

C. Description and Estimate of the Number of Small Entities Subject to the Rules:

The Commission has not developed its own definition of "small entity" for purposes of licensing satellite-delivered services. Accordingly, we rely on the definition of "small entity" provided under the Small Business Administration (SBA) rules applicable to Communications Services, Not Elsewhere Classified.[282] A "small entity" under these SBA rules is defined as an entity with $[illegible]$ million or less in annual receipts. The number of employees working for a "small entity" must be 750 or fewer.

Under the Small Business Act, a "small business concern" is one that: 1) is independently owned and operated; 2) is not dominant in its field of operation; and 3) meets any additional criteria established by the Small Business Administration.[283]

There are four licenses of DBS services under Part 100 of the Commission's Rules. Three of those licensees are currently operational. Each of the licensees which are operational have annual revenues in excess of the threshold for a small business. There is one licensee of DBS services under part 25 of the Commission's rules, GE Americom, which is not a small business entity.

The Commission rules also apply to DBS satellite systems licensed by foreign administrations. These systems, of which there will be a limited number, by and large are not yet operational. We are therefore unable to estimate the number of small business entities.

D. Description of Projected Reporting, Record Keeping and Other Compliance Requirements:

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[279] SCBA 1997 Comments at 9-10.

[280] *See* NCTA Comments at 14-16.

[281] 17 U.S.C. §119.

[282] 1987 Standard Industrial Classification Manual; 13 C.F.R. Part 121.

[283] *See* 15 U.S.C. §632.

[284] 47 U.S.C. 100.

The *DBS Public Interest Order* mandates that every DBS service provider maintain a complete and orderly record (public file) of compliance with public interest standards, including information on channels reserved for public access, on-site at its corporate headquarters. All required records shall be retained for a period of two years. Every DBS licensee shall keep and permit public inspection of its public file, which must include:

(i) yearly measurements of channel capacity and average calculations on which it bases its four percent reservation, as well as its response to any capacity changes;

(ii) a record of entities to whom noncommercial capacity is being provided, the amount of capacity being provided to each entity, the conditions under which it is being provided and the rates, if any, being paid by the entity; and

(iii) a record of entities that have requested capacity and the disposition of those requests.

(iv) a record of all requests for channel time made by political candidates and the disposition of those requests.

These rules are designed to provide a mechanism for the Commission to ensure compliance with its rules and to allow the public access to information needed to determine opportunities for political candidate advertising and educational informational programming.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered:

There will be minimal economic impact on small businesses because there are only minor record-keeping requirements being imposed. No alternatives were considered because the Commission needs this information in order to monitor compliance with its rules.

The Commission will apply the same rules to foreign-licensed systems as have been applied to U.S. licensed systems. Non-U.S. satellite systems must have been issued an earth station license to operate under Part 25 of the Commission's rules.

Report to Congress: The Commission will send a copy of the *DBS Public Interest Order* including this FRFA, to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996. *See* 5 U.S.C. § 801(a)(1)(A). A summary of the *DBS Public Interest Order* and this FRFA will also be published in the Federal Register, 5 U.S.C. § 604(b), and will be sent to the Chief Counsel for Advocacy of the Small Business Administration.