



DOCKET FILE COPY ORIGINAL

GEORGETOWN UNIVERSITY LAW CENTER
INSTITUTE FOR PUBLIC REPRESENTATION

Douglas L. Parker
Director
Hope Babcock
Associate Director
Environmental Law Project
Angela J. Campbell
Associate Director
Citizens Communications Center Project
Randi M. Albert
Visiting Professor
Sunil H. Mansukhani
Caroline S. Park
Fellows

RECEIVED

MAR 11 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

RECEIVED
MAR 11 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

March 11, 1999

Federal Communications Commission
Office of the Secretary
445 12th Street S.W.
Washington, D.C. 20554

Re: Petition for Reconsideration of Order, 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

Dear Ms. Salas:

Attached, please find a hard copy version of the Petition for Reconsideration filed March 10, 1999 on behalf of the Center for Media Education, et al. We submitted this petition via E-mail last night.

We tried to submit this petition using the Commission's Electronic Comment Filing System ("ECFS"). However, we surmise that there must have been system or server problems because the transmission remained stalled in the transfer mode for hours. We used seven computers at three different locations, but still were unable to transmit the document. Eventually, we submitted the document via E-mail. We preferred not to use this method because the integrity of our document was compromised. The footnotes, spacing, font and tabbing were all altered.

As a courtesy to the Commission and to ease integration into the system, we are therefore submitting 5 paper copies.

Sincerely,

A handwritten signature in black ink that reads "Randi M. Albert". The signature is written in a cursive, flowing style.

Randi M. Albert, Esq.
Jeneba Jalloh, Esq.
Institute for Public Representation
Citizens Communications Center Project
Georgetown University Law Center
600 New Jersey Avenue, Suite 312
Washington, DC 20001
(202) 662-9535

Counsel for CME, et al.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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

RECEIVED
MAR 11 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

PETITION FOR RECONSIDERATION

Of Counsel

Margaret A. Rutherford
Law Student
Georgetown University Law Center

Randi M. Albert, Esq.
Jeneba Jalloh, Esq.
Institute for Public Representation
Citizens Communications Center Project
Georgetown University Law Center
600 New Jersey Avenue, Suite 312
Washington, DC 20001
(202) 662-9535

March 10, 1999

Counsel for CME, et al.

SUMMARY

CME, et al. seek reconsideration of the portions of the Commission's Order that (1) declined to adopt rules imposing commercial limits on children's programming aired on DBS and (2) required DBS providers to maintain a public file only at their national headquarters. As the Commission acknowledges, it has ample authority to subject DBS providers to public interest requirements. The rules, as adopted, fail to provide adequate protection for children against the harms associated with over-commercialization. In addition, the rules fail to provide meaningful access to public information files.

Both the Commission and Congress have long recognized the harms arising from over-commercialization during children's programming, and CME, et al. believe that the Commission's reasons for not imposing commercial limits on children's programming aired on DBS lack merit. The Commission overstates the nascent stage of the DBS industry and the differences between cable and DBS. Furthermore, the benefits of imposing commercial limits outweigh the potential burdens on DBS providers.

In addition, allowing DBS providers to maintain public files only at their national headquarters will severely limit public access to important information. Because DBS is a national service, interested parties could be located thousands of miles from a DBS provider's national headquarters. The Commission should facilitate interaction between the public and the DBS industry by promoting telephone and Internet access to industry records. These methods would not create an unreasonable burden and would ensure that public file rules continue to serve the public interest.

TABLE OF CONTENTS

Summary i

**I. Commercial Advertising Should Be Limited During Children’s Programming
Provided by DBS Services to Prevent Harm to Children 2**

**A. The Commission’s reasons for not requiring DBS providers to impose
commercial limits lack merit 4**

**B. The benefits of imposing commercial limits outweigh the potential burdens
on DBS providers 8**

**II. Allowing DBS Providers to Maintain Public Files Only at Their National Headquarters
Will Severely Limit Public Access to Important Information 10**

**A. The Commission’s plans to require DBS providers to make their public
files available only at their national headquarters would limit the
public’s ability to monitor the industry 11**

**B. The Commission should adopt rules promoting access to DBS providers’
public files 12**

Conclusion 14

RECEIVED

MAR 11 1999

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Federal Communications Commission
Office of Secretary

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

TO: The Commission

PETITION FOR RECONSIDERATION

Pursuant to Section 1.429 of the Rules, 47 C.F.R. § 1.429, the Center for Media Education, Peggy Charren, American Academy of Child and Adolescent Psychiatry, American Association of School Administrators, American Psychological Association, Association of Independent Video and Filmmakers, Benton Foundation, Center for Science in the Public Interest, Children’s Defense Fund, Consumer Federation of America, Mediascope, National Association of Elementary School Principals, National Association of School Psychologists (hereinafter collectively referred to as “CME, et al.”) respectfully ask the Commission to reconsider its Report and Order, Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Public Interest Obligations, FCC 98-307, MM Docket No. 93-25, (rel. February 8, 1999) (“Order”).

Specifically, CME, et al. request that the Commission adopt rules that 1) require Direct

Broadcast Satellite (“DBS”) providers to impose commercial limits on children’s programming and 2) make DBS providers’ public files accessible to the public. Such obligations would be consistent with the D.C. Circuit’s determination in Time Warner v. FCC, 83 F.3d 957, 975 (D.C. Cir. 1996) that DBS providers can be subject to public interest obligations.

I. Commercial Advertising Should Be Limited During Children’s Programming Provided by DBS Services to Prevent Harm to Children.

In its Order, the FCC declined to impose certain programming limits on DBS operators, including commercial limits during children’s programming.¹ The Commission reasoned that such obligations would be burdensome on the “relatively young” DBS industry.² Moreover, the Commission concluded that the differences between DBS services and cable made it unfair to hold DBS providers to the same obligations as cable operators.³ CME, et al. argue that in light of the established harm caused by over-commercialization in children’s programs, these rationales lack sufficient merit to justify the FCC’s decision not to impose commercial limits.

Both the Commission and Congress have articulated the problems associated with over-commercialization during children’s programming. In 1974, the Commission issued its first policy statement identifying over-commercialization as a harm and recommending the adoption of certain preventative practices.⁴ Specifically, the FCC found that because children cannot

¹ See Order ¶¶62 - 64.

² See id. ¶ 64.

³ See id. ¶59.

⁴ See Children’s Television Report and Policy Statement, 50 FCC 2d 1 (1974), 55 FCC 2d 691 (1975), aff’d, ACT v. FCC, 564 F.2d 458 (D.C. Cir. 1977) [hereinafter 1974 Policy Statement]

distinguish between programs and advertising they must be protected from certain commercial practices.⁵ Broadcasters' failure to adhere to these guidelines led Congress to enact the Children's Television Act in 1990.⁶ The Commission implemented the statute in the 1991 Children's Television Rules.⁷

In the 1996 Children's Programming Rules,⁸ the Commission highlighted the immense influence television has on children. The Commission pointed out that many children watch television before they are exposed to formal education.⁹ The Commission recognized that "television reaches children earlier and for more hours per day than any other educational

(The Commission recommended limiting advertising during children's programming on television to "not more than 9.5 minutes per hour on weekends and not more than 12.5 minutes per hour on weekdays." It recommended adequate separation between commercial and program matter ("bumpers"). Additionally, the Commission discouraged the use of program talent to deliver commercials ("host-selling") or comment on them ("lead-in/lead-outs"), and the prominent display of brand name products on a show's set ("tie-ins").

⁵ See 1974 Policy Statement, 50 FCC 2d at 11, 15.

⁶ 1990 Children's Television Act, Pub. L.No. 101-437, 104 Stat. 996 (1990); 47 U.S.C. § 303a(b).

⁷ See Policies and Rules Concerning Children's Television Programming, 6 FCC Rcd 2111 (1991) [hereinafter 1991 Children's Television Rules] (enacting advertising time limits during children's programming).

⁸ See Policies and Rules Concerning Children's Television Programming and Revision of Programming Policies for Television Broadcast Stations, 11 FCC Rcd 10660, 10665 (1996) [hereinafter 1996 Children's Programming Rules](describing the potential influence television has on children and adopting guidelines regarding minimum hours of children's programming).

⁹ Id. at 10666; see also Jeffrey Stanger, Television in the Home 1998: The Third Annual National Survey of Parents and Children in The Third Annual Annenberg Public Policy Center's Conference on Children and Television: A Summary (1998) (finding that 42 percent of children age 2 to 17 have a television in their bedroom).

influence except perhaps family.”¹⁰ Specifically, “one researcher’s estimate of the amount of time pre-schoolers spend watching television range[s] from 13.3 to 27.8 hours/week.”¹¹

By not imposing commercial limits, the Commission has effectively ignored the potential harm to children that may arise from over-exposure to commercial advertising in the nine million households that receive their television programming through DBS services. These children should not be penalized for receiving their programs through a newer medium. DBS providers have already begun to sell commercials to be aired in addition to the national ads that are pre-packaged by the network they carry.¹² Without FCC mandated limits in place, child viewers are unprotected. By imposing commercial limits on DBS providers, the Commission will be acting consistently with Congress’ intent in the 1990 Children’s Television Act and its own published determinations.

A. The Commission’s reasons for not requiring DBS providers to impose commercial limits lack merit

The Commission offers two reasons for not imposing commercial limits on children’s programming provided over DBS: the newness of the industry and the differences between DBS and cable. CME, et al. argue that the Commission overstates the nascent stage of the DBS industry. In addition, CME et al. argue that the differences between DBS services and cable do

¹⁰See 1996 Children’s Programming Rules at 10666.

¹¹ Id.; See also Daniel Anderson, The Impact on Children’s Education: Television’s Influence on Cognitive Development. U.S. Department of Education. Working Paper No. 2. April 1988; S. Hrg. 101-69. April 12, 1989 (testimony of Daniel Anderson).

¹² Joe Schlosser, CTTD Sells DirecTV Ads: Satellite broadcaster taps veteran sales unit for first foray into national ad market, BROADCASTING & CABLE, Feb. 22, 1999, 37.

not warrant exempting DBS providers from meeting basic public interest obligations.

The DBS industry has experienced tremendous growth in the past six years and would not be burdened by imposing commercial limits on its children's programming. Back in 1993, the Commission proposed that only the minimal public interest requirements of the 1992 Cable Act¹³ should be imposed on DBS providers because DBS was a new service.¹⁴ Since that time, the number of DBS subscribers has dramatically increased.¹⁵ Last year, the industry reported a 2.6 percent increase in market share.¹⁶ Today, DirecTV is the 3rd largest multichannel video provider behind number one, TCI (14.3 million subscribers), and number two, Time Warner (12.4 million subscribers).¹⁷ After completing the expected \$1.2 billion acquisition of U.S. Satellite Broadcasting this spring, DirecTV will have over 7 million subscribers.¹⁸ In addition,

¹³Cable Television Consumer Protection & Competition Act of 1992, Pub.L. No. 102-385, 106 Stat. 1460 (1992).

¹⁴ See Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Notice of Proposed Rulemaking, 8 FCC Rcd 5631 (1993).

¹⁵ "Satellite TV operators had more than 10 million subscribers at the end of 1998, according to SkyTrends Research firm." DBS Poised for Continued Growth, Panelists Say at Satellite 99, COMMUNICATIONS DAILY, February 5, 1999, at Today's News.

¹⁶ See Marc Crossman, DBS is on the Move Once More, Via Satellite, May 1, 1998; see also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Fifth Annual Report, FCC 98-335, ¶ 7 (Rel. Dec. 23, 1998) [hereinafter Annual Report 3d] (summarizing the status of competition in markets for the delivery of video programming).

¹⁷ See 370 Channels Possible: DirecTV Parent Buys Primestar and High Power Assets for \$1.82 Billion, COMMUNICATIONS DAILY, Jan. 25, 1999 [hereinafter 370 Channels].

¹⁸ See id.

DBS provider, EchoStar, has more than 2 million subscribers.¹⁹

The on-going growth, stability, and economic vitality of the DBS industry is also reflected by DirecTV parent Hughes Communication's recent announcement that it has struck a deal to acquire PrimeStar for \$1.82 billion.²⁰ Hughes Chairman Michael Smith stated that as a result of this transaction, DirecTV is projected to have a \$300-\$400 million operating profit and \$5 billion in revenues, based on having 9 million subscribers, by 2000.²¹ Figures like these indicate that the DBS industry is economically strong, and its continued growth will not be impeded by the imposition of commercial limits. The Commission should not employ a "wait and see" approach to protecting 9 million homes from the harms associated with over-commercialization when the industry's growth will not be threatened by these minimal obligations.

Similarly, the differences between DBS and cable do not justify the Commission's decision to refrain from imposing commercial limits on children's programming aired on DBS. From the consumer's perspective, DBS providers deliver the identical service as cable operators and broadcasters.²² Therefore, the Commission should not try to draw a distinction between cable and DBS that has the effect of exposing children to well-established harms. The welfare of

¹⁹ See id.

²⁰ See id.

²¹ Id.

²² See CME Comments, Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket No. 93-25, 13 [hereinafter CME Comments].

a child watching DBS is as important as a child viewing cable or network television. Moreover, the average household makes the choice to subscribe to DBS without realizing that there are no rules to protect children from the dangers of over-commercialization. It is the Commission's responsibility to control the amount of exposure to confusing child-directed advertising; this mandate is independent of whether the program is aired through DBS or cable.

Moreover, the Commission must recognize that in some rural areas, DBS providers offer the only programming option for many families.²³ Indeed, "more than half of all DBS customers live in rural areas where most either can't get cable or are served by low capacity cable systems."²⁴ Children living in these areas may be exposed to the full spectrum of hazards from over-commercialization.²⁵ Because these subscribers have no options besides DBS, it is especially critical that the Commission enforce commercial limits in these situations.

Finally, the differences between DBS and cable will be further reduced once DBS begins to air local programming. Last month, Senator Orrin Hatch (R-UT) introduced a bill that would allow DBS carriers to serve local markets with local TV stations.²⁶ Policy makers maintain that the provision of local TV programming on DBS would be the most important step "to promote

²³ See DBS Post Record Month in December, MULTICHANNEL NEWS, Jan. 11, 1999.

²⁴ David Lieberman, Rate Hikes: Justified by Costs or a Raw Deal?, USA TODAY, Mar. 16, 1998, at 3B.

²⁵ See Kathy Chen, in Satellite TV Carriers Fight with Networks, Lawmakers Scramble to Fend Off PR Disaster, WALL ST. J., Feb. 1999, at A24.

²⁶ See Hatch Introduces DBS Local-Carriage Bill, MULTICHANNEL NEWS, Jan. 25, 1999. Congress is very interested in increasing the competition to cable operators because of the March 31 cable rate deregulation deadline. Therefore, it is likely that this bill will be passed.

competition to cable operators."²⁷ With local programming, even more viewers will choose DBS services and all justifications for not imposing commercial limits on DBS will disappear.

B. The benefits of imposing commercial limits outweigh the potential burdens on DBS providers

CME, et al. argue that the certainty created by requiring DBS providers to impose commercial limits on children's programming will be beneficial to the public, the FCC, and the DBS industry itself. In addition, CME, et al. maintain that the benefits of imposing commercial limits outweigh the possible burdens. It is consistent with the FCC's mandate under Section 25 to impose these public interest obligations when the benefit outweighs the potential burden.²⁸

Imposing commercial limits on children's programs aired on DBS is the best way to ensure that children are protected from the established harms arising from advertising practices aimed at children. Adopting rules that impose commercial limits has been demonstrated to be the only effective means of ensuring compliance with established guidelines. In 1974, the Commission allowed broadcasters to adopt voluntary limits.²⁹ Because broadcasters did not comply with these limits, Congress and the FCC were compelled to mandate the same limits suggested in the 1974 Policy Statement at a later time.³⁰ Imposing commercial limits on DBS

²⁷ Id.

²⁸ See generally Time Warner v. FCC, 83 F.3d 957, 975 (D.C. Cir. 1996) .

²⁹ See 1974 Policy Statement.

³⁰ See 1990 Children's Television Act, supra note 6. See also 1991 Children's Television Rules, supra note 7. In addition, in the 1996 Children's Television Rules, the Commission conceded that its initial regulations implementing the CTA were not effective because broadcasters' obligations were not clearly defined. Id. ¶¶ 2 & 5.

providers now will prevent unnecessary reevaluations by the FCC in the future.

In addition, DBS providers benefit from having definitive standards. If DBS providers incorporate commercial limits in children's programming, it will only enhance the industry's potential for growth. Subscribers will appreciate knowing that DBS is subject to rules that protect children from over-commercialization.³¹ Furthermore, Congress is concerned with introducing meaningful competition to the cable industry³² and better business planning occurs in an atmosphere of certainty. Because revisiting this issue in the future would create an administrative burden for the Commission, the better alternative would be to delineate specific rules at this time.

Finally, the burden on DBS providers of complying with such a rule would be minimal. Most of the children's programming aired on DBS is also provided to cable.³³ Cable has consistently provided high-quality programming while adhering to commercial limits. Because the limits are already incorporated into the cable programs, the burden imposed on DBS providers is slight. Therefore, the Commission should impose these limits now to promote the

³¹ A recent survey indicates that 87% of the respondents favored a proposal to limit the number of commercials that could be shown during children's television shows. Lake Snell Perry & Associates, Television in the Digital Age: Findings from focus groups and a survey conducted for The Project on Media Ownership and The Benton Foundation, Dec. 1998.

³² See e.g. DBS Network Feed Cutoff Upheld by Judge, WARREN'S CABLE REGULATION MONITOR, Mar. 1, 1999. In the recent debates over DBS carriage of local broadcast signals, members of the Senate Commerce Committee reiterated their interest in promoting the development of DBS as a viable competitive alternative to cable. Id.

³³ See Appendix to CME Reply Comments, MM Docket No. 93-25.

tremendous benefits of certainty and protection of children.

II. Allowing DBS providers to maintain public files only at their national headquarters will severely limit public access to important information

The Commission should reconsider its conclusion that DBS providers' public files be available to the public only at the providers' national headquarters.³⁴ This policy limits public access to this information and is contrary to the public interest. Because DBS is a national service, subscribers, political candidates and programmers seeking information from a DBS provider could be located anywhere throughout the country. It would pose an unreasonable burden on these members of the public to have to travel to a DBS providers' headquarters to obtain records of the providers' use of their noncommercial capacity and their dispositions of requests for political advertising time.³⁵

In proceedings concerning broadcasting and cable, the FCC has previously outlined reasons for promoting access to public files.³⁶ In addition, it has established guidelines for facilitating public access to these files.³⁷ These same rationales apply to DBS, and the Commission should adopt similar rules to ensure public access to DBS providers' public files.

³⁴ See Order at ¶ 41; see also Order at Appendix B.

³⁵ DirecTV has its headquarters in El Segundo, CA. Primestar is located in Englewood, CO. Echostar is located in Littleton, CO. Thus, a subscriber or programmer who resides in Washington, DC who wants to compare the DBS providers' records would have to make a cross-country journey.

³⁶ See, e.g., Review of the Commission's Rules Regarding the Main Studio and Public Inspection Files of Broadcast Television and Radio Stations, 13 FCC Rcd 15691(1998) [hereinafter Main Studio Order].

³⁷ Id.

A. The Commission's plans to require DBS providers to make their public files available only at their national headquarters would limit the public's ability to monitor the industry

The Commission has repeatedly stated that it relies on the public to monitor the media industry and to bring misconduct to its attention for a determination of whether such actions are consistent with the public interest. In Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966), the Court noted that “the Commission has always viewed its regulatory duties as guided, if not limited, by our national tradition that public response is the most reliable test of ideas and performance in broadcasting as in most areas of life.” Over the years, the Commission itself has expressed its reliance on public monitoring of industry. For example, in Deregulation of Radio, 73 FCC 2d 457, 535 (1979), the Commission stated, “[w]e expect and encourage the public to keep the Commission informed as to how well the marketplace is performing. Based upon complaints from the public, we will monitor market performance.” Similarly, in Revision of Programming and Commercialization Policies, Ascertainment Requirements and Program Log Requirements for Commercial TV Stations, 98 FCC 2d 1076, 1091 (1984), the Commission noted, “[a]s we have stated on numerous proceedings, citizen complaints and formal petitions to deny provide an important monitoring function in our regulatory endeavors.”³⁸ The public can fulfill its monitoring role only if the Commission facilitates access to industry records. Much of the information in these public files is important to the public and cannot be obtained from any other source.

³⁸ See also Policies and Rules Concerning Children's Television Programming, Revision of Programming Policies for Television Broadcast Stations, 11 FCC Rcd 10660, 10682 (1996).

B. The Commission should adopt rules promoting access to DBS providers' public files

The Commission should adopt rules facilitating access to DBS providers' public files based on the rules currently in place for broadcasters. In the Main Studio Order, the Commission recognized that many members of the public will seek access to broadcasters' public files by telephone, rather than by visiting the main studio.³⁹ Based on this conclusion, the Commission adopted rules to facilitate the interaction between the public and the broadcasters. These same rules should be adopted for DBS services.

DBS providers should have the same public file information access requirements that the Commission set forth in the Main Studio Order⁴⁰ for broadcasters. DBS providers should be required to make available, by mail upon telephone request, photocopies of documents in their public files.⁴¹ Providers should also assist callers by answering questions about the actual contents of the station's public file.⁴² In addition, providers should be encouraged to put information on the Internet.⁴³ Each of the DBS providers has a website,⁴⁴ and the burden of

³⁹ See supra note 36, at 15692.

⁴⁰ See supra note 36, at 15700.

⁴¹ Id. Providers may require individuals requesting documents to pay for photocopying and the provider should pay for postage. Id.

⁴² Id.

⁴³ Id.; see also CME Comments, supra note 22, at 15.

⁴⁴ See <<http://www.directv.com>>; <<http://www.usstvtv.com>>; <<http://www.primestar.com>>; <<http://www.directv.com>>; <<http://www.dishnetwork.com>>.

placing this additional material on the site would be minimal. By providing access to information over the telephone or on the Internet, providers will be more aware of its viewers' concerns and more responsive to audience needs in programming. Public file access rules would enable viewers "to monitor a station's performance and encourage a continuing dialogue between [DBS providers] and its viewers."⁴⁵ Furthermore, public file access rules allow the Commission to ensure that the rules continue to serve the public interest without imposing unnecessary regulations. Thus, the minimal burden that increasing public access would impose on DBS providers is outweighed by the significant benefit that would accrue to the public and the Commission.

⁴⁵ Supra note 36, at 15691-15692.

Conclusion

CME, et al. urge the Commission to reconsider its decisions regarding commercial limits and public file requirements and to revise this order in a manner consistent with the public interest. DBS providers should offer these basic public protections given the industry's financial vigor and the minimal burden these obligations would impose on the companies.

Of Counsel

Margaret A. Rutherford
Law Student
Georgetown University Law Center

March 10, 1999



Randi M. Albert, Esq.
Jeneba Jalloh, Esq.
Institute for Public Representation
Citizens Communications Center Project
Georgetown University Law Center
600 New Jersey Avenue, Suite 312
Washington, DC 20001
(202) 662-9535

Counsel for CME, et al.