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FEDERAL COMMUNICATIONS COMMISSION
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Before The

FEDERAL COMMUNICATIONS COMMISSION

Washington, DC 20554

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In the Matter of	)	
	)	
Implementation of Section 25	)	
of the Cable Television Consumer	)	MM Docket 93-25
Protection and Competition Act of 1992	)	
	)	
Direct Broadcast Satellite	)	
Public Service Obligations	)	

OPPOSITION AND COMMENTS OF THE SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION

Andrew R. Paul
Senior Vice President
Andrew S. Wright
Vice President,
Government and Legal Affairs
Satellite Broadcasting &
Communications Association
225 Reinekers Lane
Suite 600
Alexandria, VA 22314

May 20, 1999

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OPPOSITION AND COMMENTS
OF THE
SATELLITE BROADCASTING AND
COMMUNICATIONS ASSOCIATION

Pursuant to Section 1.429 of the Commission's rules, The Satellite Broadcasting and Communications Association (SBCA) hereby submits its strong opposition to the petitions for reconsideration filed by the Small Cable Business Association (SCBA) and Time Warner Cable in this proceeding. SBCA also provides its comments in support of the Petition for Reconsideration of The Association of American Public Television Stations (APTS) and the Public Broadcasting Service (PBS).

The SBCA has participated in this rulemaking proceeding since its commencement by the Commission in May 1993, and it has worked with the Commission during the long and arduous process of formulating the DBS public service obligations as directed by the 1992 Cable Act. In responding to the cable industry's unfounded request for reconsideration in this matter, SBCA will

reiterate the major precepts that are at the foundation of the DBS public service requirements. With regard to the joint petition filed by the Public Broadcasting Service (PBS) together with the Association of America's Public Television Stations (APTS), the SBCA supports their limited request for reconsideration.

I. INTRODUCTION

Both the Congress, when it enacted Section 25 of the 1992 Cable Act, and the Commission, in its implementation of the DBS public service rules pursuant to Section 25, have recognized the inherent structural, competitive and regulatory differences between the cable and DBS industries. In its Report and Order the Commission stated:

> 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. 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.[1]

The Commission is to be congratulated on an excellent job in fashioning the DBS public service rules so as to enhance competition, taking into account the differences between the services while implementing an effective public service programming complement for the DBS industry.

DBS is a nationwide subscription television service delivered by satellites whose signals enable it to "pass" all consumer households within their footprints. Unlike cable, DBS does not have monopoly power within any community nor

[1] DBS Public Interest Order, paragraph 59.

does it require local easements or rights of way. The DBS industry also differs competitively from cable in that -- in addition to competing with cable operators, DBS providers compete with each other. Cable operators, on the other hand, are local distribution services that are the beneficiaries of local and regional monopolies that enable them to tailor many of their program offerings to the local audiences they serve. They do not compete with each other, except in a minimal number of overbuilds. The public service obligations imposed upon cable operators correctly reflect their local orientation and the monopolistic position they hold within their service areas.

Thus, the obligations that cable operators bear as leased access and PEG requirements are the result of their unique, privileged position in the marketplace. That special status is reflected in the unabated growth in cable rates that consumers have experienced, even before the March 31,1999, expiration of limited rate regulation under the 1992 Act.

In addition, cable penetration is significantly higher than that of DBS: The Commission's Fifth Annual Report to Congress on the status of competition in the multichannel video programming distribution (MVPD) market states that incumbent cable operators still serve 85 percent of all MVPD subscribers. DBS's market share is only 10 percent of MVPD subscribers.

Having recognized the significant difference between the two services, the Commission set the framework for the public service program rules that it issued in its Report and Order.

II. TIME WARNER CABLE AND THE SCBA SEEK TO HAVE THE COMMISSION PREVENT EFFECTIVE COMPETITION TO CABLE

The cable industry's petitions in this case demonstrate that in spite of the enormous market power it enjoys, and the current comparatively low rate of DBS penetration, cable operators are beginning to feel competitive pressure from alternative MVPD's, especially DBS operators. The demands of Time Warner Cable and the SCBA are not based on a reasonable reading of Section 25 of the Act. Rather, they appear to be a desperate effort to protect the cable monopoly from effective competition. Nowhere in the statute is there evidence of Congressional intent to "level the regulatory playing field" as Time Warner Cable urges. Rather, Time Warner Cable seeks to protect cable's monopoly by inviting the Commission to utilize its authority to find a previously unknown obligation to create a playing field that, contrary to being "level," would be slanted to advantage cable's current monopoly position in the market. In its rulemaking in this matter the Commission has firmly and correctly rejected this approach.

No matter what the cable industry may attempt to portray, DBS providers have not been exempted from an appropriate public service obligation. Clearly, the Commission properly formulated the DBS public service obligations with an eye to the public interest inherent in encouraging healthy competition to cable. Cable's desired model would serve only to maintain a video marketplace dominated by entrenched local monopolies. The public interest model that Congress and the Commission have created for DBS takes into account, and is justified by the very real fact, that, at present there is little competition to cable,

and the DBS distribution structure is sufficiently different from cable so as to warrant a format that is more readily adapted to a national video service.

Congress established by statute that the DBS industry should be required to set aside between 4 and 7 percent of its channel capacity for public service programming. Congress then gave the Commission the discretion to determine by rulemaking an appropriate level of reserved channels within that range. The Commission concluded that four percent was the appropriate number in view of current competitive conditions in the MVPD marketplace. The Commission stated that it chose four percent: "because we find it in the public interest to put the minimum burden on this industry that currently has 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."[2] It is also important to note that the four percent public service obligation requires the dedication of channel capacity that henceforth will essentially never be available to a provider for any application except public service programming. Congress and the Commission decided that imposing that level of channel capacity would be a fair burden for the DBS industry as a national video service provider in discharging its public interest obligations as a member of the multichannel video program provider community.

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[2] Id, paragraph 74.

In reality, the type of regulation that the cable industry seeks to have the Commission impose on DBS is much more far-reaching than mere public interest programming. It is a flagrant attempt to apply stringent regulatory measures to prevent the further development of an effective competitor to cable. In view of cable's market power and its monopolistic control over such a vast portion of the video marketplace, the petitioners' demands do not warrant any changes by the Commission in its recently adopted rules on public service obligations by DBS providers.

III. FLEXIBILITY IN PROGRAM SELECTION

During the comment phase of this proceeding, SBCA emphasized the need for DBS providers to have the ability to exercise flexibility in the creation of their blocs of public service programming. This would enable them both to tailor that programming to the needs of their respective subscriber bases, as well as to differentiate their services from their competitors. For that reason, SBCA supports the petitions filed by PBS and APTS to remove the restriction of only one reserved public interest channel per qualified programmer.

There is no statutory basis for restricting channel usage in this fashion. Both Commissioner Powell and Commissioner Furchtgott-Roth dissented on this particular issue, and SBCA agrees with their analyses. The statute calls for a public service set-aside of 4 to 7 percent, but mandates no further conditions regarding the use of the reserved channels. Given the healthy number of channels that will be made available under the rules, it is hard to conceive that

any qualified public service programmer will be denied carriage if the restriction is lifted. SBCA urges the Commission to reconsider this part of its rules.

In a related issue, Time Warner Cable has also petitioned the Commission to exclude as public service qualified programmers, those services (such as C-SPAN) already available from a DBS provider on the effective date of the new rules. This is simply another attempt to increase the burden on DBS providers and to use this proceeding to make competition to cable from DBS more difficult to achieve. It would require a provider to continue to carry a qualified public service programmer in addition to the four percent mandated by the rules. Neither the Congress nor the Commission envisioned such a result when the DBS public service concept was formulated. There is no basis in the statute to even suggest that the Commission should consider applying such an unforeseen rule, and the SBCA strongly opposes it.

IV. CONCLUSION

The Commission is to be commended for its work in developing and promulgating the DBS public service rules. It is important that the DBS providers now have the opportunity to implement them; offer the benefit of them to their subscribers; and shape their public service offerings so as to appeal to the audiences served.

The petitions for reconsideration filed by the cable industry in this case are not persuasive and should not convince the Commission to reconsider carefully crafted and balanced conclusions reflected in the Report and Order. The Commission and DBS providers must be given the latitude to make those rules

work to satisfy the public policy intended by the 1992 Cable Act, as well as develop public service programming that will be attractive to a national viewer base. For these reasons, it is crucial that the Commission reject the petitions of Time Warner Cable and the SCBA. The SBCA again urges the Commission to grant the petition of PBS and APTS to abolish the one channel restriction on qualified, individual public service programmers.

Respectfully submitted,

SATELLITE BROADCASTING AND
COMMUNICATIONS ASSOCIATION

BY: _____
Andrew R. Paul
Senior Vice President

_____
Andrew S. Wright
Vice President, Government and Legal Affairs

SBCA
225 Reinekers Lane
Suite 600
Alexandria, VA 22314

May 20, 1999

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by the undersigned, Andrew S. Wright, this 20th day of May, 1999, by First class U.S. Mail, postage prepaid, to the following:

Joseph A. Godles, Esq.
Goldberg, Godles, Wiener & Wright
1229 Nineteenth Street, NW
Washington, DC 20036

Lisa M. Chandler, Esq.
Bienstock & Clark
5360 Holiday Terrace
Kalamazoo, MI 49009

Peter A. Rohrbach, Esq.
Hogan & Hartson
555 Thirteenth Street, NW
Washington, DC 20004

Angie Kronenberg, Esq.
Willkie Farr & Gallagher
1155 21st St., NW
Washington, DC 20036

Marilyn Mohrman-Gillis
Association of America's Public
Television Stations
1350 Connecticut Avenue, NW
Suite 200
Washington, DC 20036

Gregory Ferenbach
Public Broadcasting Service
1320 Braddock Place
Alexandria, VA 22314

Arthur H. Harding, Esq.
Fleischman and Walsh, L.L.P.
1400 Sixteenth Street, NW
Suite 600
Washington, DC 20036

Randi M. Albert, Esq.
Institute for Public Representation
Citizens Communications Center
Project
Georgetown University Law Center
600 New Jersey Avenue, Suite 312
Washington, DC 20001

Andrew Jay Schwartzman
Gigi B. Sohn
Media Access Project
1707 L Street, NW
Suite 400
Washington, DC 20036

Gary Epstein
Latham & Watkins
1001 Pennsylvania Ave., NW
Suite 1300
Washington, DC 20004-2505

Andrew S. Wright