

Magalie Roman Salas
Secretary

FN1. 47 U.S.C. § 335.

FN2. 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.

FN3. See, e.g., Knowledge TV Comments at 2-6

FN4. See, e.g., Research TV Comments at 4-6.

FN5. 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.

FN6. See, e.g., Satellite News, February 2, 1998 at 6, citing Report by the Consumer Electronics Manufacturing Association.

FN7. 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).

FN8. Sky Report (May 1998).

FN9. See Tempo Satellite, Inc., 13 FCC Rcd. 11068 (1998) (granting extension of due diligence deadline for commencing service).

FN10. 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 p 71.

FN11. 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

FN12. The Ku-band frequencies are 11.7 GHz - 12.2 GHz and 14.0 GHz - 14.5 GHz.

FN13. 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.

FN14. Sky Report (May 1998). To provide its DTH-FSS service, Primestar leases transponder capacity on an FSS satellite licensed to GE American. Primestar is not itself a Commission licensee.

FN15. 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.

FN16. DBS Order at p 84.

FN17. *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).

FN18. 47 U.S.C. s 335.

FN19. *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).

FN20. *Daniels Cablevision, Inc. v. U.S.*, 835 F. Supp. 1 (D D.C. 1993).

FN21. *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996) (Time Warner).

FN22. 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.

FN23 See 47 U.S.C. s335(a).

FN24. 47 U.S.C. ss 335(b)(5)(A)(i) and (ii).

FN25. 1993 NPRM, 8 FCC Rcd at 1589.

FN26. *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).

FN27. 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. s 100.1(b).

FN28. 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.

FN29. *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 p 13

FN30 1993 NPRM, 8 FCC Rcd at 1590

FN31 See SBCA 1993 Comments at 5, DirecTV 1993 Comments at 7; APTS/CPB 1993 Comments at 6, CFA 1997 Comments at 2

FN32. See APTS/PBS Comments at 30-31.

FN33. See SBCA 1993 Comments at 5-6.

FN34. See CFA 1993 Comments at 2-3.

FN35. Current licensees are: DirecTV, USSB, EchoStar, MCI, R/L DBS, TEMPO and Dominion Video.

FN36. 47 U.S.C. § 335(b)(5)(A)(ii).

FN37. 1993 NPRM, 8 FCC Rcd at 1591.

FN38. See APTS/PBS Comments at 30-34; see also CME comments at 16-17.

FN39. See APTS/PBS Comments at 31-34; Primestar 1993 Comments at 6-7.

FN40. See SBCA 1993 Comments at 9-10; GTE Spacenet 1993 Comments at 5; DirecTV 1993 Comments at 11.

FN41. SBCA 1993 Comments at 10.

FN42. *Id.* at 10. -

FN43. See DirecTV 1993 Comments at 11-12.

FN44. CME Comments at 16-17.

FN45. Section 335 (b)(1).

FN46. See CME Comments at 16-17; APT/PBS Comments at 32-33.

FN47. GE Americom Further Reply Comments at 4-5.

FN48. See APTS/PBS Comments at 33; CME Comments at 16-17.

FN49. See APTS/PBS Comments at 33.

FN50. See GE Americom Further Reply Comments at 6, n. 6; see also Time Warner Comments at 45-48.

FN51. 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.

FN52. 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.

FN53. 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.

FN54. 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

FN55 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).

FN56 SBCA Comments at 6.

FN57. 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.

FN58. 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.

FN59. 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).

FN60. See, e.g., Televisa 13 FCC Rcd 10074 (1997)

FN61. See ASkyB Comments at 24; see also Morality in Media Comments at 4-5.

FN62. Disco II Order at p 173.

FN63. Id.

FN64. Disco II Order at p 166.

FN65. 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.

FN66. 47 C.F.R. s25.131(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).

FN67. Disco II Order at pp 188, 201.

FN68 See para 28 supra.

FN69 47 U S C s 335(a)

FN70 1993 NPRM, 8 FCC Rcd at 1593

FN71 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 comply with the broadcasting requirements. EchoStar June 30 letter at 1-2.

FN72. 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.

FN73. 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*).

FN74. See *id.* at 4612.

FN75. 1993 NPRM, 8 FCC Rcd at 1594.

FN76. See DAETC Comments at 8-9.

FN77. 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.

FN78. See *SBCA Comments* at 12-15; *SBCA June 30, 1998 letter* at 1.

FN79. See *Primestar Comments* at 8.

FN80. *EchoStar June 30 letter* at 1.

FN81. See *SBCA Comments* at 17-18; *ASkyB Comments* at 5.

FN82. See *DirecTV Comments* at 14.

FN83. See DAETC Comments at 8-9.

FN84. See *Codification of the Commission's Political Programming Policies*, 7 FCC Rcd. 678, 681 (1991) (providing general guidelines for reasonable access).

FN85. We note that Section 315, but not Section 312(a)(7), applies to cable operators.

FN86. 47 U.S.C. §315(a); 47 C.F.R. §73.1941

FN87. 47 C.F.R. §73.1940.

FN88. 1993 NPRM, 8 FCC Rcd 1589, 1594.

FN89. See *Tempo Comments* at 18-19; *Primestar Comments* at 10; but cf. *Home Box Office 1993 Comments* at 6-7.

FN90. *Tempo Comments* at 18-19, *Primestar Comments* at 11-12.

FN91. See *Primestar Comments* at 11.

FN92. See DAETC Comments at 9, citing *Becker v. FCC*, 95 F.3d 75, 80 (D.C. Cir. 1996).

FN93. See DirecTV Comments at 14-15; USSB Comments at 3 and 1993 Comments at 6; see also Primestar Comments at 10-11.

FN94. 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).

FN95. 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.).

FN96. See *Codification of the Commission's Political Programming Policies*, 7 FCC Rcd at 689-90.

FN97. 1993 NPRM, 8 FCC Rcd at 1592.

FN98. See ASkyB Comments at 5-8.

FN99. SBCA June 30 letter at 2.

FN100. 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.

FN101. See *Codification of Commission's Political Programming Policies*, 7 FCC Rcd at 683-687.

FN102. 1993 NPRM, 8 FCC Rcd at 1595.

FN103. *Id.* at 1596.

FN104. See NCTA Reply Comments at 14-16; Small Cable Business Ass'n Comments at 9-11; Time Warner Comments at 39-40.

FN105. NCTA Comments at 9-12.

FN106. Public, educational and government use channels ("PEG") are defined in Section 611 of the Act. 47 U.S.C. § 611.

FN107. Small Cable Business Ass'n Comments at 9-16; NATOA 1993 Comments at 8-9.

FN108. See Time Warner Comments at 6.

FN109. See Alliance Comments at 5.

FN110. See, e.g., USSB Comments at 8-9, SBCA Reply Comments at 3-4; Tempo Comments at 20-21.

FN111. See SBCA Reply Comments at 4-5.

FN112. See Tempo Comments at 20-21.

FN113. Local - DBS 1993 Comments at 4.

FN114. 17 U.S.C. § 119.

FN115. See *Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home*

Viewer Act, (rel. November 17, 1998, FCC 98- 302).

FN116. 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

FN117. *APTS/CPB Comments* at 35-36

FN118. 1993 NPRM, 8 FCC Rcd at 1595-1596.

FN119. See *NCTA Comments* at 9-20; see also *Small Cable Business Ass'n Comments* at 16-18, *US West Comments* at 5.

FN120. 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. s 76.1500.

FN121. *Id.*

FN122. See *Time Warner Comments* at 20.

FN123. *Id.* at 6.

FN124. See *DirectTV Reply Comments* at 11-12.

FN125. See *SBCA Reply Comments* at 14.

FN126. 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).*

FN127. There are currently 7.3 million DBS and DTH-FSS subscribers and over 64 million cable subscribers. See *supra* p 4.

FN128. 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).*

FN129. See *DBS Consolidation NPRM, 13 FCC Rcd* at 6910

FN130. See s 602 of the *Telecommunications Act of 1996.*

FN131. See *CTW Comments* at 7, *CME Comments* at 4.

FN132. *CME Comments* at 10-12.

FN133. See *CTW Comments* at 4.

FN134. *Encore Comments* at 12-13; *DAETC Comments* at 7

FN135. See *DAETC Comments* at 7

FN136 See *id*

FN137 *Alliance Comments* at 6-7

FN138 BET Reply Comments at 4; HITN Comments at 3-4

FN139 See Primestar Comments at 7-8; Tempo Comments at 3-4

FN140. 47 U.S.C. § 335(b).

FN141. 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.

FN142. Conference Report at 222, see also 1993 NPRM, 8 FCC Rcd at 1596.

FN143. See Conference Report at 222.

FN144. 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.

FN145. 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.

FN146. Id.

FN147. See Encore Comments at 16; DAETC Reply Comments at 23.

FN148. SBCA Further Comments at 11-12.

FN149. 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.

FN150. See, e.g., US West Comments at 8.

FN151. 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.

FN152. See Research TV Comments at 12; PBS Comments at 40, NCTA Reply Comments at 6.

FN153. See Tempo Comments at 7; NRTC Reply Comments at 5.

FN154. See DirecTV Comments at 6; Primestar Further Comments at 14-15

FN155. Conference Report at 222 (Commission should take into account total channel capacity in establishing reservation requirement). See *infra* IV(A)(2).

FN156. 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.

FN157. See Revision of Rules and Policies for the Direct Broadcast Satellite Service, 11 FCC Rcd 9712 pp

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)

FN158. 1993 NPRM, 8 FCC Rcd at 1596

FN159. 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.

FN160. See US West Comments at 6; Research TV Comments at 8-11; APTS/PBS Comments at 37-39

FN161. 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, 7.

FN162. 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.

FN163. 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.

FN164. See p p 138 & 139.

FN165. 1993 NPRM, 8 FCC Rcd at 1597

FN166. 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)

FN167. See p 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 later than six months after the effective date of the rules.

FN168. 1993 NPRM, 8 FCC Rcd at 1597.

FN169. 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 s 74.932(a)

FN170. See DAETC Comments at 12

FN171. See 47 U.S.C. s397(6)

FN172. See Time Warner, 93 F.3d at 976

FN173 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

FN174. See 47 U.S.C. § 397(14).

FN175. 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

FN176 APTS/CPB Comments at 23; HITN Comments at 1.

FN177. See 47 C.F.R. 74.932(a)

FN178. Research TV Reply Comments at 14-15.

FN179. APTS/PBS Comments at 14.

FN180. Encore Comments at 11-12. See also DirecTV Comments at 5; USSB Comments at 10.

FN181. 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).

FN182. *United States v. McQuilken*, 73 F.3d 105, 107 (3d Cir.), cert. denied, 117 S. Ct. 89 (1996).

FN183 *United States v. Lopez*, 938 F.2d 1293, 1295 (D.C. Cir. 1991).

FN184. See, e.g. *Russello v. United States*, 464 U.S. 16, 23 (1983)

FN185. 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).

FN186. See, e.g., *Hohn v. United States*, 524 U.S. 236, 118 S. Ct. 1969, 1976 (1998); *Kawaauhau v. Geiger*, 523 U.S. 57, 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*

FN187. 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).

FN188 See SBCA Reply Comments at 7; USSB Comments at 10-11. Cf. Encore Reply Comments at 10.

FN189 See 47 U.S.C. § 397(7) (for purposes of Part IV of Title III), 47 U.S.C. § 615(1)(1) (must-carry for noncommercial programming)

FN190 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

FN191. 26 U.S.C.A. § 501(c)(3).

FN192. 1993 NPRM at 1598.

FN193. See Knowledge TV Comments at 9, Encore Reply Comments at 14

FN194. 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).

FN195. See, e.g., Green Sphere 1993 Comments at 1.

FN196. APTS/PBS Comments at 17-18. See also CTW Comments at 8-10.

FN197. Id. See also Knowledge TV Comments at 9.

FN198. Research TV Comments at 18, 21. See also University of Texas Comments at 1; University of Virginia Comments at 1-2.

FN199. See HITN Comments at 9.

FN200. Deutsche Welle Television Comments at 2-3.

FN201. 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.

FN202. 1993 NPRM, 8 FCC Rcd at 1598.

FN203. See APTS/PBS Comments at 10.

FN204. CTW Comments at 4; USCC Comments at 2-3; Donunion 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.

FN205. See NRTC Comments at 6-7 (urging Commission to define qualifying programming broadly).

FN206. 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.

FN207. 1993 NPRM, 8 FCC Rcd at 1597

FN208. 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)

FN209. 1993 NPRM, 8 FCC Rcd at 1597

FN210. See Alliance Comments at 4; DNETC Comments at 18-20; Research TV Comments at 24; University of

Texas Comments at 1; University of Virginia Comments at 2

FN211 See, e.g., APTS/PBS Comments at 34.

FN212. See, e.g., USSB Reply Comments at 4-5.

FN213. DAETC Comments at 17-18

FN214. *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).

FN215. 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.

FN216. 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").

FN217. APTS/PBS Comments at 48.

FN218. See 47 U.S.C. s335(b)(3) and 335(b)(5)(B); para 78-90, *supra*.

FN219. 47 U.S.C. s 335 (b)(1).

FN220. 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.

FN221. See Broadcast Station Operator Requirements, 59 FR 64378, 64379 (1994) (stating that the Commission holds the broadcast station licensee responsible for rule violations).

FN222. See 47 U.S.C. 532(a), as amended.

FN223. See *Time Warner*, 93 F.3d at 968.

FN224. See 47 U.S.C. s532(a), as amended.

FN225. *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").

FN226. See Leased Access Implementation Order, 12 FCC Rcd 5267, 5316.

FN227. See *Time Warner*, 93 F.3d at 976.

FN228. *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").

FN229 *Id.*, citing *FCC v League of Women Voters*, 468 U S 364, 367 (1984)

FN230 See Leased Access Implementation Order, 12 FCC Rcd at 5316

FN231 See *Time Warner*

FN232. 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.

FN233. See, e.g., Knowledge TV Reply Comments at 5, Primestar Reply Comments at 19, SBCA Comments at 20-22.

FN234. See para. 15-32, *supra*.

FN235. See *Time Warner Cable of New York City v. Bloomberg L.P.*, 118 F.3d 917, 928 (2d Cir. 1997).

FN236. *Id.* at 928-29.

FN237. 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. s 532(h).

FN238. DAETC Comments at 20.

FN239. Section 612 (c)(2) of the Act.

FN240. See Section IV C. B., *supra*.

FN241. See ASkyB Comments at 19; Alliance Comments at 14; Research TV Comments at 19-20; DAETC Comments at 16-17.

FN242. ASkyB Comments at 19.

FN243. DAETC Comments at 16-17.

FN244. APTS/PBS Reply Comments at 12-13.

FN245. 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. 775, 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).

FN246. See 47 C.F.R. s 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

FN247. Primestar Ex parte Presentation, December 12, 1997

FN248. See September 29, 1998 Ex Parte filing by Media Access Project.

FN249. 360 U.S. 525 (1959) (Farmers Union)

FN250. 360 U.S. at 531

FN251. APTS/CPB Comments at 33

FN252 See Section IV A

FN253. APTS/CPB Comments at 34.

FN254 DAETC Comments at 20

FN255. Section 612 (c)(2) of the Act.

FN256. 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).

FN257. 47 U.S.C. s 335(b)(2).

FN258. This was actually limited DTH service offered by Primestar.

FN259. See *EchoStar* Comments at 6-7; *PrimeStar* Comments at 19; *Tempo* Comments at 14; *USSB* Comments at 12-13; *ASkyB* Comments at 22; *DirectTV* Comments at 26; *SBCA* Comments at 22-23.

FN260. See *DirectTV* Comments at 26.

FN261. See *EchoStar* Comments at 7-8.

FN262. *Alliance* Comments at 15.

FN263. APTS/PBS Comments at 19.

FN264. *Id.* at 24.

FN265. 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.

FN266. See *APT/PBS Ex Parte Letter* at 3.

FN267. *Alliance* Comments at 15; *DAETC* Comments at 13-14.

FN268. See *DirectTV* Comments at 25.

FN269 *APT/PBS Ex Parte Letter* at 2

FN270. *EchoStar* Comments at 7-8.

FN271. 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.

FN272 See *SBCA Further Comments* at 13; *DirectTV* Comments at 21; *Primestar Further Comments* at 26.

FN273 See *DAETC* Comments at 25.

FN274 See discussion *infra* Final approval of these rules pursuant to the Paperwork Reduction Act could take as long as 120 days

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." [FN275] 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 choose 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 *23313 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.

FN275 Turner Broadcasting System, Inc. v. Federal Communications Commission, 512 U.S. 622, 663 (1994)

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 divided 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 *23315 the programmer selection process, or it does not. Because its plain terms belie such reach, I would not have adopted this limitation.

*23316 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 who 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 *23317 reason to intrude. Under these circumstances, I cannot support this limitation and will respectfully dissent from this portion of the order.

*23318 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 renegeing 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 *23319 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.

*23320 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)
*23321 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

*23322 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 1 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. ss 154, 303, 335, 309 and 554.

§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:

*23323 (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

*23324 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

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. [FN276] 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." [FN277]

SCBA asked the Commission in its 1997 comments to "ensure small cable access to programming." [FN278] SCBA echoed the sentiments of other commenters when claiming that growth in *23326 DBS would hurt local programmers in smaller markets. [FN279] For example, NCTA noted that if a DBS provider is the functional equivalent of a cable operator, then equal regulatory measures should be applied. [FN280]

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, [FN281] 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. [FN282] A "small entity" under these SBA rules is defined as an entity with \$11.0 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. [FN283]

There are four licenses of DBS services under Part 109 of the Commission's Rules. [FN284] 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

*23327 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. s 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. s 604(b), and will be sent to the Chief Counsel for Advocacy of the Small Business Administration.

FN276. 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).

FN277. SCBA Comments to the Initial Regulatory Flexibility Analysis at 2 (April 28, 1997)

FN278. SCBA 1997 Comments to MM Docket No. 93-25 at 26 (SBCA 1997 Comments)

FN279. SCBA 1997 Comments at 9-10

FN280. See NCTA Comments at 14-16

FN281. 17 U.S.C. s 119

FN282. 1987 Standard Industrial Classification Manual, 15 C.F.R. Part 121

FN283. See 15 U.S.C. s632

FN284. 47 U.S.C. 100

ERRATUM

DA 98-2619

Erratum Released. December 23, 1998

Report and Order FCC 98-307 (released November 25, 1998) is hereby corrected by substituting the following for paragraph 143:

143. Petitions for reconsideration under Section 1.429 of the Communications's rules, 47 C.F.R. s 1.429 (1996), may be filed within 30 days of the date of publication of this Report and Order in the Federal Register (See 47 C.F.R. s 1.4(b)(1)).

FEDERAL COMMUNICATIONS COMMISSION

for Thomas S. Tycz

Chief

Satellite and Radiocommunication Division

International Bureau

1998 WL 814482 (F.C.C.), 13 F.C.C.R. 23,254 13 F C C.R. 24,279, 13 FCC Rcd. 23,254, 13 FCC Rcd. 24,279, 14 Communications Reg. (P&F) 290

END OF DOCUMENT