

Appendix A -- Rule Changes

Part 25 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 25 – SATELLITE COMMUNICATIONS**SUBPART J PUBLIC INTEREST OBLIGATIONS**

1. The authority citation for Part 25 reads as follows:

AUTHORITY: 47 U.S.C. 701-744. Interprets or applies Sections 4, 301, 302, 303, 307, 309, 312, 315, 332, and 335 of the Communications Act, as amended, 47 U.S.C. Sections 154, 301, 303, 307, 309, 312, 315, 332 and 335 unless otherwise noted.

2. Section 25.701 is revised to read as follows:

§ 25.701 Public interest obligations.

- (a) DBS providers are subject to the public interest obligations set forth in paragraphs (b), (c), (d), (e) and (f) of this section. As used in this section, DBS providers are any of the following:
 - (1) Entities licensed to operate satellites in the 12.2 to 12.7 GHz DBS frequency bands; or
 - (2) Entities licensed to 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 paragraph (e) of this section, 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 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 paragraph (e) of this section.

(b) Political broadcasting requirements --

- (1) Legally qualified candidates for public office for purposes of this section are as defined in 47 CFR § 73.1940.
- (2) DBS origination programming is defined as programming (exclusive of broadcast signals) carried on a DBS facility over one or more channels and subject to the exclusive control of the DBS provider.
- (3) Reasonable access.
- (i) DBS providers must comply with Section 312(a)(7) of the Communications Act of 1934, as amended, 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.
- (ii) Weekend Access. For purposes of providing reasonable access, DBS providers shall make facilities available for use by federal candidates on the weekend before the election if the DBS provider has provided similar access to commercial advertisers during the year preceding the relevant election period. DBS providers shall not discriminate between candidates with regard to weekend access.
- (4) Use of facilities; equal opportunities. DBS providers must comply with Section 315 of the Communications Act of 1934, as amended, by providing equal opportunities to legally qualified candidates for DBS origination programming.
- (i) General requirements. Except as otherwise indicated in section 25.701(b)(3), no DBS provider is required to permit the use of its facilities by any legally qualified candidate for public office, but if a DBS provider shall permit any such candidate to use its facilities, it shall afford equal opportunities to all other candidates for that office to use such facilities. Such DBS provider shall have no power of censorship over the material broadcast by any such candidate. Appearance by a legally qualified candidate on any:

(A) Bona fide newscast;

(B) Bona fide news interview;

(C) Bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary); or

(D) On the spot coverage of bona fide news events (including, but not limited to political conventions and activities incidental thereto)

shall not be deemed to be use of a DBS provider's facility. (section 315(a) of the Communications Act.)

(ii) Uses. As used in this section and § 25.701(c), the term "use" means a candidate appearance (including by voice or picture) that is not exempt under paragraphs 25.701(b)(3)(i)(A) through (i)(D) of this section.

(iii) Timing of Request. A request for equal opportunities must be submitted to the DBS provider within 1 week of the day on which the first prior use giving rise to the right of equal opportunities occurred: Provided, however, That where the person was not a candidate at the time of such first prior use, he or she shall submit his or her request within 1 week of the first subsequent use after he or she has become a legally qualified candidate for the office in question.

(iv) Burden of proof. A candidate requesting equal opportunities of the DBS provider or complaining of noncompliance to the Commission shall have the burden of proving that he or she and his or her opponent are legally qualified candidates for the same public office.

(v) Discrimination between candidates. In making time available to candidates for public office, no DBS provider shall make any discrimination between candidates in practices, regulations, facilities, or services for or in connection with the service rendered pursuant to this part, or make or give any preference to any candidate for public office or subject any such candidate to any prejudice or disadvantage; nor shall any DBS provider make any contract or other agreement that shall have the effect of permitting any legally qualified candidate for any public office to use DBS origination programming to the exclusion of other legally qualified candidates for the same public office.

(c) Candidate rates.

(1) Charges for use of DBS facilities. The charges, if any, made for the use of any DBS facility by any person who is a legally qualified candidate for any public office in connection with his or her campaign for nomination for election, or election, to such office shall not exceed:

- (i) During the 45 days preceding the date of a primary or primary runoff election and during the 60 days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the DBS provider for the same class and amount of time for the same period.
- (A) A candidate shall be charged no more per unit than the DBS provider charges its most favored commercial advertisers for the same classes and amounts of time for the same periods. Any facility practices offered to commercial advertisers that enhance the value of advertising spots must be disclosed and made available to candidates upon equal terms. Such practices include but are not limited to any discount privileges that affect the value of advertising, such as bonus spots, time sensitive make goods, preemption priorities, or any other factors that enhance the value of the announcement.
- (B) The Commission recognizes non preemptible, preemptible with notice, immediately preemptible and run of schedule as distinct classes of time.
- (C) DBS providers may establish and define their own reasonable classes of immediately preemptible time so long as the differences between such classes are based on one or more demonstrable benefits associated with each class and are not based solely upon price or identity of the advertiser. Such demonstrable benefits include, but are not limited to, varying levels of preemption protection, scheduling flexibility, or associated privileges, such as guaranteed time sensitive make goods. DBS providers may not use class distinctions to defeat the purpose of the lowest unit charge requirement. All classes must be fully disclosed and made available to candidates.
- (D) DBS providers may establish reasonable classes of preemptible with notice time so long as they clearly define all such classes, fully disclose them and make them available to candidates.
- (E) DBS providers may treat non preemptible and fixed position as distinct classes of time provided that they articulate clearly the differences between such classes, fully disclose them, and make them available to candidates.
- (F) DBS providers shall not establish a separate, premium priced class of time sold only to candidates. DBS providers may sell higher priced non preemptible or fixed time to candidates if such a class of time is made available on a bona fide basis to both candidates and commercial advertisers, and provided such class is not functionally equivalent to any lower priced class of time sold to commercial advertisers.
- (G) [Reserved]
- (H) Lowest unit charge may be calculated on a weekly basis with respect to time that is sold on a weekly basis, such as rotations through particular programs or dayparts. DBS providers electing to calculate the lowest unit charge by such a method must include in that calculation all rates for all announcements scheduled in the rotation, including

announcements aired under long term advertising contracts. DBS providers may implement rate increases during election periods only to the extent that such increases constitute "ordinary business practices," such as seasonal program changes or changes in audience ratings.

- (I) DBS providers shall review their advertising records periodically throughout the election period to determine whether compliance with this section requires that candidates receive rebates or credits. Where necessary, DBS providers shall issue such rebates or credits promptly.
 - (J) Unit rates charged as part of any package, whether individually negotiated or generally available to all advertisers, must be included in the lowest unit charge calculation for the same class and length of time in the same time period. A candidate cannot be required to purchase advertising in every program or daypart in a package as a condition for obtaining package unit rates.
 - (K) DBS providers are not required to include non cash promotional merchandising incentives in lowest unit charge calculations; provided, however, that all such incentives must be offered to candidates as part of any purchases permitted by the system. Bonus spots, however, must be included in the calculation of the lowest unit charge calculation.
 - (L) Make goods, defined as the rescheduling of preempted advertising, shall be provided to candidates prior to election day if a DBS provider has provided a time sensitive make good during the year preceding the pre election periods, respectively set forth in paragraph (c)(1)(i) of this section, to any commercial advertiser who purchased time in the same class.
 - (M) DBS providers must disclose and make available to candidates any make good policies provided to commercial advertisers. If a DBS provider places a make good for any commercial advertiser or other candidate in a more valuable program or daypart, the value of such make good must be included in the calculation of the lowest unit charge for that program or daypart.
- (ii) At any time other than the respective periods set forth in paragraph (c)(1)(i) of this section, DBS providers may charge legally qualified candidates for public office no more than the charges made for comparable use of the facility by commercial advertisers. The rates, if any, charged all such candidates for the same office shall be uniform and shall not be rebated by any means, direct or indirect. A candidate shall be charged no more than the rate the DBS provider would charge for comparable commercial advertising. All discount privileges otherwise offered by a DBS provider to commercial advertisers must be disclosed and made available upon equal terms to all candidates for public office.
- (2) If a DBS provider permits a candidate to use its facilities, it shall make all discount privileges offered to commercial advertisers, including the lowest unit charges for each class and length of time in the same time period and all corresponding discount privileges, available on equal terms to all candidates. This duty includes an affirmative duty to disclose to candidates information

about rates, terms, conditions and all value enhancing discount privileges offered to commercial advertisers, as provided herein. DBS providers may use reasonable discretion in making the disclosure; provided, however, that the disclosure includes, at a minimum, the following information:

- (i) A description and definition of each class of time available to commercial advertisers sufficiently complete enough to allow candidates to identify and understand what specific attributes differentiate each class;
 - (ii) A description of the lowest unit charge and related privileges (such as priorities against preemption and make goods prior to specific deadlines) for each class of time offered to commercial advertisers;
 - (iii) A description of the DBS provider's method of selling preemptible time based upon advertiser demand, commonly known as the "current selling level," with the stipulation that candidates will be able to purchase at these demand generated rates in the same manner as commercial advertisers;
 - (iv) An approximation of the likelihood of preemption for each kind of preemptible time; and
 - (v) An explanation of the DBS provider's sales practices, if any, that are based on audience delivery, with the stipulation that candidates will be able to purchase this kind of time, if available to commercial advertisers.
- (3) Once disclosure is made, DBS providers shall negotiate in good faith to actually sell time to candidates in accordance with the disclosure.
- (d) Political file. Each DBS provider shall keep and permit public inspection of a complete and orderly political file and shall prominently disclose the physical location of the file, and the telephonic and electronic means to access the file.
- (1) The political file shall contain, at a minimum:
 - (i) A record of all requests for DBS origination time, the disposition of those requests, and the charges made, if any, if the request is granted. The "disposition" includes the schedule of time purchased, when spots actually aired, the rates charged, and the classes of time purchased; and
 - (ii) A record of the free time provided if free time is provided for use by or on behalf of candidates.

- (2) DBS providers shall place all records required by this section in a file available to the public as soon as possible and shall be retained for a period of four years until December 31, 2006, and thereafter for a period of two years.
- (3) DBS providers shall make available, by fax, e-mail, or by mail upon telephone request, photocopies of documents in their political files and shall assist callers by answering questions about the contents of their political files. Provided, however, that if a requester prefers access by mail, the DBS provider shall pay for postage but may require individuals requesting documents to pay for photocopying. To the extent that a DBS provider places its political file on its website, it may refer the public to the website in lieu of mailing photocopies. Any material required by this section to be maintained in the political file must be made available to the public by either mailing or website access or both.
- (e) Commercial limits in children's programs.
- (1) No DBS provider shall air more than 10.5 minutes of commercial matter per hour during children's programming on weekends, or more than 12 minutes of commercial matter per hour on week days.
- (2) This rule shall not apply to programs aired on a broadcast television channel which the DBS provider passively carries, or to channels over which the DBS provider may not exercise editorial control, pursuant to 47 U.S.C. 335(b)(3).
- (3) DBS providers airing children's programming must maintain records sufficient to verify compliance with this rule and make such records available to the public. Such records must be maintained for a period sufficient to cover the limitations period specified in 47 U.S.C. 503(b)(6)(B).
- Note 1 to § 25.701(e): *Commercial matter* means airtime sold for purposes of selling a product or service.
- Note 2 to § 25.701(e): For purposes of this section, children's programming refers to programs originally produced and broadcast primarily for an audience of children 12 years old and younger.
- (f) 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:
- (i) A noncommercial educational broadcast station as defined in section 397(6) of the Communications Act of 1934, as amended,

- (ii) A public telecommunications entity as defined in section 397(12) of the Communications Act of 1934, as amended,
 - (iii) 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
 - (iv) A nonprofit organization whose purposes are educational and include providing educational and instructional television material to such accredited institutions and governmental organizations.
 - (v) Other noncommercial entities with an educational mission.
- (3) Editorial control.
- (i) 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.
 - (ii) A DBS operator may not require the programmers it selects to include particular programming on its channels.
 - (iii) 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 section.
- (4) Non-commercial channel limitation. A DBS operator cannot initially select a qualified programmer to fill more than one of its reserved channels except that, after all qualified entities that have sought access have been offered access on at least one channel, a provider may allocate additional channels to qualified programmers without having to make additional efforts to secure other qualified programmers.
- (5) Rates, terms and conditions.
- (i) 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.
 - (ii) Rates for capacity reserved under paragraph (a) of this section shall not exceed 50 percent of the direct costs as defined in this section.

- (iii) 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.*
 - (iv) 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.
- (i) In addition to the political file requirements in section 25.701(d), each DBS provider shall keep and permit public inspection of a complete and orderly record of:
 - (A) 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;
 - (B) 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;
 - (C) A record of entities that have requested capacity, disposition of those requests and reasons for the disposition.
 - (ii) 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 this section 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.

APPENDIX B

FINAL REGULATORY FLEXIBILITY CERTIFICATION

The Regulatory Flexibility Act of 1980, as amended (RFA),¹⁴¹ requires that a regulatory flexibility analysis be prepared for notice-and-comment rule making proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."¹⁴² The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."¹⁴³ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.¹⁴⁴ A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).¹⁴⁵

The Order on Reconsideration mandates that DBS providers maintain political files that contain, at a minimum, (i) a record of all requests for DBS origination time, the disposition of those requests, and the charges made, if any, if the request is granted. The "disposition" includes the schedule of time purchased, when spots actually aired, the rates charged, and the classes of time purchased; and (ii) a record of the free time provided if free time is provided for use by or on behalf of candidates. DBS providers must also maintain records sufficient to verify compliance with the rules establishing commercial limits for children's programming. Because DBS provides subscription services, DBS falls within the SBA-recognized definitions of "Cable Networks" and Cable and Other Program Distribution."¹⁴⁶ These definitions provide that small entities are ones with \$12.5 million or less in annual receipts.¹⁴⁷ Small businesses, i.e. ones with less than \$12.5 million in annual receipts, do not have the

¹⁴¹ The RFA, *see* 5 U.S.C. § 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

¹⁴² 5 U.S.C. § 605(b).

¹⁴³ 5 U.S.C. § 601(6).

¹⁴⁴ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

¹⁴⁵ 15 U.S.C. § 632.

¹⁴⁶ 13 C.F.R. § 121.201, North American Industry Classification Systems (NAICA) codes 513210 and 513220.

¹⁴⁷ 13 C.F.R. § 121.201, NAICS codes 513210 and 513220.

financial ability to become DBS licensees because of the high implementation costs associated with satellite services. Because this is an established service, with limited spectrum and orbital resources for assignment, we estimate that no more than 15 entities will be Commission licensees providing these services. In addition, because of high implementation costs and limited spectrum resources, we believe that none of the 15 licensees will be small entities. We expect that no small entities will be impacted by this rulemaking. Therefore, we certify that the requirements of the Order on Reconsideration will not have a significant economic impact on a substantial number of small entities.

We note that the American Cable Association ("ACA") (formerly the Small Cable Business Association) filed a Petition for Reconsideration of the *First Report and Order's* Final Regulatory Flexibility Analysis, claiming generally that the Commission failed to properly take into account the harm that would be caused to small cable operators by the lack of rules requiring DBS providers to carry all local broadcast programming.¹⁴⁸ The Order on Reconsideration finds that although the Final Regulatory Flexibility Analysis issued in conjunction with the *First Report and Order* was adequate, in any event the intervening adoption of broadcast signal carriage rules for DBS, similar to those imposed on cable systems, has alleviated the concerns articulated by ACA.

Therefore, we certify that the rules in this Order will not have a significant economic impact on a substantial number of small entities.

¹⁴⁸ Petition for Reconsideration filed Mar. 9, 1999.

**SEPARATE STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

RE: Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992; Direct Broadcast Satellite Public Interest Obligations; Second Order on Reconsideration of the First Report and Order.

Although not ideal, I support today's Second Order on Reconsideration because it corrects two glaring deficiencies of our First Order on Reconsideration. Today's action adopts rules implementing the political broadcasting obligations of DBS and takes steps to ensure that the political files of DBS operators are readily accessible. In addition, the Order moves forward to limit the over-commercialization of children's programming on DBS. I dissented to the First Order on Reconsideration, highlighting these areas of concern. I appreciate my colleagues' willingness to remedy these problems. I look forward to working through a number of other issues with respect to DBS operators in the near future, including clarifying that DBS providers may not discriminate against some local broadcasters in a market by requiring consumers to obtain a second dish to receive those signals.

**SEPARATE STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN**

Re: Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Digital Broadcast Satellite Public Interest Obligations; Sua Sponte Reconsideration of Memorandum Opinion and Order on Reconsideration of First Report and Order

While not perfect, I support this Order. Today's action presses forward the expectations of Congress concerning the public interest responsibilities of direct broadcast satellite service providers. Given the evolution of DBS, the Commission's adoption of specific rules implementing political broadcasting requirements and protecting children from excessive commercialization is a positive and practical step. Specific rules provide certainty to DBS providers, political candidates, and the viewing public.