

BUCKET FILE COPY ORIGINAL
Before the
Federal Communications Commission
Washington, D.C. 20554

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

**MEMORANDUM OPINION AND ORDER
ON RECONSIDERATION OF
THE FIRST REPORT AND ORDER**

Adopted: April 9, 2003

Released: March 25, 2004

By the Commission: Commissioner Copps approving in part, dissenting in part and issuing a statement.

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I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we consider petitions for reconsideration and other pleadings filed in response to our *First Report and Order*¹ implementing Section 25 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").² For the reasons discussed below, we conclude that the Commission's interpretation and implementation of Section 25 of the 1992 Cable Act was correct, but that some clarification is in order. Therefore we deny the petitions for reconsideration.

2. At this time DBS providers are complying with the public interest obligations specified in the *First Report and Order*. In response to Commission inquiry, the three operating DBS providers, DirecTV, Inc., EchoStar Satellite Communications Corporation, and Dominion Video Satellite, Inc., state that each has set aside at least four percent of its channel capacity to satisfy the public interest obligation and is providing a broad range of informational and educational programming, including programming relating to international news, public affairs, family life, foreign language instruction, and academic instruction on various levels.³

II. BACKGROUND

3. In 1992, Congress directed the Commission to initiate a rulemaking to impose certain public interest obligations on direct broadcast satellite ("DBS") providers, including political broadcasting rules.⁴ In 1998, the Commission adopted the *First Report and Order*, which implements these statutory obligations.

4. The Commission's rules apply to "providers of direct broadcast satellite service." These include entities licensed pursuant to Part 100 of the Commission's rules⁵; entities licensed pursuant to Part

¹ *Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Public Interest Obligations*, Report and Order, 13 FCC Rcd 23254 (1998) ("*First Report and Order*")

² P. L. No. 102-385, 106 Stat. 1460 (1992)

³ See DirecTV, Inc., FCC File No. EB-00-IH-0060; EchoStar Communications Corporation, FCC File No. EB-00-IH-0014; and Dominion Video Satellite, Inc., FCC File No. EB-00-IH-00-68. Current programming carried pursuant to the rule includes, e.g., NASA-TV, Inspirational Network, Free Speech TV, Hispanic Information and Communications Network, and Educating Everyone.

⁴ Section 25 of the 1992 Cable Act is codified at Section 335 of the Communications Act of 1934 ("the Act"), 47 U.S.C. § 335.

⁵ On June 13, 2002 the Commission released a *Report and Order* eliminating Part 100 of the Commission's Rules. The Commission moved Section 100.5 to Section 25.701 and eliminated the reference to entities licensed pursuant to Part 100. Instead, the new rule in section 25.701 (a)(1) defines DBS Providers as entities licensed to operate satellites in the 12.2-12.7 DBS frequency bands. *Policies and Rules for the Direct Broadcast Satellite Service*, 17 FCC Rcd 11331 (2002) at paras. 22-24. For purposes of this Report and Order, any reference to Part 100 licensees means entities defined in Section 25.701(a)(1).

25 of the Commission's rules to provide fixed-satellite service ("FSS"), via the Ku-band,⁶ that sell or lease transponder capacity to a video program distributor who offers direct-to-home FSS ("DTH-FSS") to consumers; and non-U.S. licensed satellites providing DBS or DTH-FSS services in the United States. As required by statute, the rules require DBS providers to comply with certain statutory political broadcasting requirements granting candidates for federal office reasonable access to a licensee's facilities on an equal basis with other federal candidates at the lowest rate available. DBS providers must also comply with statutory equal opportunities provisions. As part of the public interest obligations, Congress also mandated that DBS providers set aside channel capacity for noncommercial programming and offer access to educational programmers at reasonable prices, terms and conditions. To implement that requirement, the rules impose program carriage obligations on DBS providers, requiring them to set aside four percent of their channel capacity exclusively for noncommercial educational and informational programming and to make the capacity available at reasonable prices. Access to the noncommercial and informational capacity is limited to bona fide noncommercial national educational programming suppliers, and access is limited to one channel per supplier as long as demand for such capacity exceeds the available supply. The rules allow a DBS provider initially to select qualified, noncommercial programmers, but prohibit a DBS provider from altering or censoring the content of the programming aired on the noncommercial channels. Finally, the rules require that each DBS provider maintain a public file containing a complete and orderly record concerning its compliance with both the political broadcasting and the noncommercial educational and informational programming requirements.⁷

5. Nine petitions for reconsideration and related pleadings were filed in response to the *First Report and Order*.⁸ The petitioners raise concerns regarding whether the Commission has correctly determined what entities are defined as DBS providers, whether it has properly implemented the Commission's political broadcasting requirements for DBS providers, and whether it has adequately addressed the issue of localism. Petitioners also assert that the Commission should have applied certain additional obligations to DBS providers, should have taken steps to protect children from harm associated with over-commercialization, should have prohibited DBS providers from meeting their public service obligation with existing programming, and challenge the Commission's determination to limit access to capacity reserved for educational and informational programming to one channel per national educational programming supplier.

⁶ The Ku-band frequencies referenced in the statute are 11.7 GHz – 12.2 GHz and 14.0 GHz – 14.5 GHz.

⁷ See 47 C.F.R. §25.701

⁸ Petitions for reconsideration were filed by the American Cable Association ("ACA") (formerly the Small Cable Business Association), which filed two separate petitions, America's Public Television Stations and Public Broadcasting Service ("APTS/PBS"), Center for Media Education, *et al* ("CME"), Denver Area Educational Telecommunications Consortium, Inc., *et al* ("DAETC"), GE American Communications, Inc. ("GE Americom"), Loral Space and Communications Ltd ("Loral"), PanAmSat Corporation ("PanAmSat"), and Time Warner Cable ("Time Warner") Pursuant to 47 C.F.R. § 0,231(i), the Secretary determined that, because of operational problems with the Commission's Electronic Filing System, petitions for reconsideration filed after the March 10, 1999 filing deadline would be accepted as timely filed. Oppositions to petitions for reconsideration were filed by the Alliance for Community Media ("Alliance"), APTS/PBS, DAETC and CME, DirecTV, Inc ("DirecTV"), and Satellite Broadcasting and Communications Association ("SBCA"). Replies were filed by the ACA, APTS/PBS, DirecTV, GE Americom, Loral, and Time Warner

III. DISCUSSION

6. Reconsideration is appropriate only where the petitioner either shows a material error or omission in the original order or raises additional facts not known or existing at the petitioner's last opportunity to present such matters. A petition for reconsideration of a final rulemaking proceeding must state with particularity the respects in which the petitioner believes the action taken by the Commission should be changed.⁹ We find that none of the petitioners' requests warrants reconsideration and therefore we deny all of the petitions. We also clarify some aspects of the DBS public interest obligations

A. Definition of Providers of DBS Service

7. Several petitioners assert that the Commission erred when it defined the term "providers of DBS service" to include satellite operators licensed pursuant to Part 25 of the Commission's rules. In the *First Report and Order*, the Commission found that the term included both Part 100 licensees and Part 25 licensees.¹⁰

8. The Commission found that entities licensed under Part 25 of its rules were providers of DBS service, for several reasons. Entities that could be included within the definition of DBS for purposes of Section 335 are DBS licensees and FSS licensees that lease capacity to DTH-FSS providers, video programmers, other program suppliers or distributors, or other third party lessees that resell capacity to individual programmers.¹¹ The Commission pointed out that Section 335 of the Act specifies that a "provider of DBS services" includes any distributor that both uses Ku-band frequencies to provide DTH-FSS service and is licensed under Part 25.¹² In interpreting this language, the *First Report and Order* found that Congress's conjunctive use of the word "and" implies that the term distributor means an entity that controls a certain number of FSS channels and is licensed under Part 25. In other words, the FSS satellite licensee is the DBS provider for purposes of Section 335, rather than the entity that leases DTH-FSS capacity. If Congress had intended otherwise, the Commission found, it would have instead written the statutory definition to cover a distributor that uses a "Ku-band satellite ... that is licensed..." under Part 25.¹³

9. In addition, Section 335 of the Act requires the Commission to impose the DBS public interest obligations "as a condition of any provision, initial authorization, or authorization renewal for a provider of direct broadcast satellite service...."¹⁴ The Commission determined that the quoted language

⁹ 47 C.F.R. § 1.429(c)

¹⁰ See *First Report and Order*, 13 FCC Rcd at 23261-62

¹¹ *Id.* at 23262.

¹² See 47 U.S.C. § 335(b)(5)(A)(ii)

¹³ See *First Report and Order*, 13 FCC Rcd at 23262-63

¹⁴ See 47 U.S.C. § 335(b)(1).

suggests that Congress intended the Commission to impose the public interest obligations on entities that it licenses and that the obligations do not directly extend to lessees of satellite capacity or programming distributors.¹⁵ The Commission also recognized that imposing the public interest obligations on the FSS Part 25 licensee facilitates enforcement of the requirements, as the Commission's enforcement authority over non-licensees is more limited.¹⁶ Finally, the Commission determined that holding the DBS and FSS satellite licensees responsible for public interest obligations facilitates fair and efficient administration of the rule, since it places the Commission in a position to apply the same public interest obligation regulatory scheme to both Part 100 and FSS Part 25 licensees.¹⁷ The rules allow FSS licensees to rely on compliance certifications from lessee customers and distributors certifying compliance with the public interest obligation rules.¹⁸

10. Four petitioners contend that the Commission erred by defining entities licensed under Part 25 as DBS providers and, therefore, subjecting them to the public interest obligations of Section 335 of the Act. The petitioners contend that the Commission's interpretation of the statute misconstrues Congress's intent, which they argue is to apply the public service obligations to the distributors of DTH service who compete directly with Part 100 DBS licensees and not to FSS satellite licensees who have nothing to do with DTH service. The petitioners submit that had Congress intended Section 335 to include FSS Part 25 satellite licensees it would have specifically stated so, as it did for Part 100 licensees. Instead, the petitioners contend that Section 335 reaches those entities that distribute and control video programming offered directly to subscribers whether the distributor is a satellite licensee or not.¹⁹

11. Next the petitioners argue that the Commission's reliance on Section 335's requirement that it enforce the DBS public interest requirements as a condition of licensing is unpersuasive. For example, PanAmSat argues that a more plausible interpretation of the statutory language concerning initial authorizations and renewals is that it was intended to apply to licensees in the DBS service. PanAmSat also posits that the reference to "any provisions" in the statute, in addition to initial authorizations, and renewals, indicates that Congress intended that the public interest requirements should extend to non-licensees that distribute DTH-FSS programming.²⁰

¹⁵ See *First Report and Order*, 13 FCC Rcd at 23263

¹⁶ *Id.* at 23264.

¹⁷ *Id.*, see also *Policies and Rules for the Direct Broadcast Satellite Service*, *supra* note 5, (consolidating DBS service rules with other satellite services, including DTH-FSS in Part 25).

¹⁸ See *First Report and Order*, 13 FCC Rcd at 23264-65

¹⁹ See, e.g., Loral Petition for Reconsideration ("Loral Petition"), filed March 10, 1999, at 4-5; PanAmSat Petition for Reconsideration ("PanAmSat Petition"), filed March 10, 1999, at 3-4; Time Warner Petition for Reconsideration ("Time Warner Petition"), filed March 10, 1999, at 15-18; GE Americom Petition for Reconsideration ("GE Americom Petition"), filed March 10, 1999, at 6-9. DAETC and CME in their joint opposition comment suggest that the rules should apply to both the FSS licensee and the program distributor. See DATEC and CME Joint Opposition, filed May 6, 1999, at 25.

²⁰ See PanAmSat Petition at 4

12. The same four petitioners also dispute the view that the Commission is limited in its ability to enforce the public interest obligations against non-licensees.²¹ The petitioners explain that, while a program distributor that is not a licensee does not have a license to revoke, the Commission has broad authority over interstate communications. The Commission's authority, these petitioners submit, provides it with the power to levy forfeitures and to issue cease-and-desist orders to ensure that non-licensees comply with its rules and regulations. Consequently, the petitioners argue, there is no need for FSS licensees to be burdened with public interest compliance.

13. At the notice phase of this proceeding, the Commission acknowledged that Section 335's definition of a DBS provider was broad enough to apply to a number of different entities, including the FSS satellite licensee and lessees of FSS capacity that distribute video programming directly to subscribers.²² We agree with petitioners that the definition of DBS provider could include lessees of FSS capacity that distribute video programming to subscribers. We are not, however, persuaded that Congress intended that the ultimate responsibility for complying with public service obligations rests with non-licensees.²³ The petitioners proffer many of the same arguments that were considered in the *First Report and Order*.²⁴ For the reasons set forth in the *First Report and Order*, we remain convinced that the statute's requirement to make capacity available, its definition of a provider of DBS service, and inclusion of entities licensed under Part 25 of the Commission's rules, clearly indicates that Congress intended that Part 25 Commission licensees be subject to the requirements of Section 335. This interpretation facilitates the Commission's orderly administration of the public interest obligations. It also enables the Commission to apply the same public interest regulatory requirements to both Part 100 and FSS Part 25 satellite operators. Moreover, because the Commission maintains ownership information for satellite licensees, and does not have similar records for lessees or program distributors, monitoring licensees is easier and enforcement is more effective.

14. We are also not persuaded that forfeitures and cease-and-desist orders or other enforcement remedies arising from the Commission's general authority to regulate interstate communications are as effective as the Commission's broad range of defined powers over its licensees. In addition, it is the satellite licensee, not the Commission, which has the closest connection to its lessee that is the distributor of programming to subscribers. Recognizing, however, that satellite licensees may not be ideally suited to monitor and enforce the public interest requirements, the Commission developed a procedure to permit FSS Part 25 licensees to delegate their responsibility for Section 335 compliance to

²¹ See, e.g., Loral Petition at 8-9; PanAmSat Petition at 4-7; Time Warner Petition at 20-21; GE Americom Petition 11-15

²² See, e.g., *Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Public Interest Obligations*, Notice of Proposed Rule Making, 8 FCC Rcd 1589, 1591 (1993) ("NPRM")

²³ See, e.g., GTE Spacenet Corporation Comments, filed May 24, 1993, at 2-10; DirecTV Comments, filed May 25, 1993, 8-11; GE Americom Reply Comments, filed July 14, 1993, at 2-13; Time Warner Comments, filed April 28, 1997.

²⁴ See *First Report and Order*, 13 FCC Rcd at 23262-65

the programming distributors. The Commission permitted licensees to demonstrate compliance with the public service obligations by relying on certifications from distributors that the obligations are being fulfilled, provided the licensee's reliance is reasonable.²⁵ However, because the rules adopted in the *First Report and Order* do not specifically provide for certification, we agree with Loral that the rules should be clarified to permit FSS Part 25 licensees to rely reasonably on certifications by lessees or programmers for the DBS public interest obligations.²⁶ Thus, we clarify that an FSS Part 25 licensee may demonstrate compliance with the provisions of Sections 100.5(b) and (c) of the Commission's rules (new Section 25.701(b) and (c)) by submitting a certification from a distributor that expressly states that the distributor has complied with the obligations of Section 335 of the Act. Moreover, we will not hold an FSS Part 25 licensee responsible for a distributor's false certification that it has complied with the public service requirements if the licensee could reasonably have concluded that the certification was not fraudulent. Because we believe that it is generally appropriate for a licensee to rely on the accuracy of certifications by program distributors offering a DTH-FSS service, licensees will not be required to verify compliance by distributors unless there is evidence that the distributor has not met its obligation. If a satellite licensee has reason to believe that its customer-distributor is not complying with these rules or has falsely certified compliance, the licensee should report the situation to the Commission for appropriate action. We believe that under this scheme, placing the ultimate compliance responsibility on the satellite licensees is not unduly burdensome, as certification requirements can be included in satellite carriage and leasing contracts.

15. The *First Report and Order* also defined "providers of DBS" to include non-U.S. licensed satellites that provide DBS service to subscribers in the United States so as to comply with the nondiscriminatory market access policies adopted by the Commission in the *DISCO II* proceeding.²⁷ Essentially, *DISCO II* requires non-U.S. satellite operators providing access to the U.S. market to comply with all Commission rules applicable to U.S. satellite operators, including DBS public interest obligations.²⁸

16. PanAmSat questions the legitimacy of including non-U.S. satellite licensees in the definition of "providers of DBS service."²⁹ PanAmSat contends that extending the Section 335 public interest obligations to foreign-licensed FSS systems is both inconsistent with notions of international comity and overly burdensome. PanAmSat states that under the current formulation of the rule, an FSS system providing service primarily outside the United States could be required to comply with the DBS public interest requirements even though it may only have a single U.S. subscriber. PanAmSat argues that this would have the consequence of regulating program content provided by a foreign-licensed

²⁵ *Id.* at 23264-65

²⁶ See Loral Petition at 10-12.

²⁷ See *First Report and Order*, 13 FCC Rcd at 23266-68.

²⁸ See *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, 24168 (1997) (*DISCO II*)

²⁹ See PanAmSat Petition at 7-8

satellite operator primarily to an audience residing in a foreign country. PanAmSat states this would call into question the U.S. commitment to free flow of information across international borders, and this country's traditional opposition to attempts by other countries to block U.S. transmissions based on content restrictions. Furthermore, PanAmSat adds, it makes little sense to impose purely domestic regulatory requirements, such as U.S. political broadcasting obligations, on satellite services that are delivered to subscribers who reside in foreign countries. PanAmSat argues that the public interest benefit, if any, that U.S. citizens might derive from enforcing these obligations is outweighed by the costs that would be incurred by the non-U.S. licensed satellite operator in order to comply with the obligations and by the Commission enforcing them.

17. We are not persuaded by PanAmSat's arguments. Non-U.S. licensees will only be subject to the U.S. public interest obligations rules if they offer service to subscribers in the United States in a package consisting of 25 channels or more, and then only with respect to services provided in the United States.³⁰ Furthermore, in two similar international satellite agreements entered into by the United States, one with Mexico and another with Argentina, the administrations have agreed to permit each country to require foreign-licensed satellite systems to comply with a "modicum" of each other's domestic content restrictions.³¹

B. Political Broadcasting Requirements

18. Section 335 of the Act requires that the Commission establish rules applying the political broadcasting provisions of Sections 312(a)(7) and 315 of the Act to providers of DBS service.³² Section 312(a)(7) requires that a candidate for federal elective office be provided reasonable access to broadcast facilities. Section 315 requires that a candidate for any public office be allowed the same opportunities to use broadcast facilities that are afforded all other candidates for the same office, including rates that do not exceed the lowest unit charge ("LUC") paid by the station's most favored commercial advertisers.³³

19. In formulating rules to apply the requirements of Sections 312 and 315 to DBS, the

³⁰ The public interest obligations only apply to an FSS Ku-band satellite licensee that offers enough channels, four percent of which would require the licensee to reserve one channel of qualified programming. See 47 C.F.R. § 25.701(a)(3).

³¹ 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.

³² 47 U.S.C. §§ 312(a)(7), 315.

³³ Section 315(b) limits the LUC requirement to a timeframe consisting of the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate. See 47 U.S.C. §§ 315(b)(1), (2).

Commission recognized that there are fundamental differences between DBS systems and traditional terrestrial broadcast stations.³⁴ Unlike broadcasters, DBS licensees, at the time the *First Report and Order* was adopted, did not originate programming, sell advertising, or generally transmit localized programming. Given these differences, the Commission decided that it was appropriate that the DBS political broadcasting rules afford DBS providers flexibility to ensure that DBS is not hampered by unnecessary regulation.³⁵

20. Because DBS systems provide service on a nationwide basis, as opposed to terrestrial broadcast stations that principally serve the area in or near the communities in which the stations are licensed, the Commission found that presidential and vice presidential candidates are the only federal candidates that would likely be willing to assume the expense that national exposure would entail and, thus, deferred a decision on whether and under what circumstances a candidate for a congressional office would be entitled to access. In addition, the Commission determined that any public benefit that might be realized from requiring coverage of congressional races might not justify the technical and financial burdens that the obligation would entail.³⁶

21. The Commission left it to the DBS service providers to determine what constitutes reasonable access in the context of a varied multi-channel environment. Relevant factors to consider include the amount of time requested, the number of candidates involved, potential programming disruption, and any technical difficulties that may arise from providing access to candidates. Reasonable alternatives for providing access should also be taken into consideration. The Commission also noted that any complaint filed against a DBS provider with respect to its obligations under Section 312(a)(7) will be evaluated by the Commission to determine whether the provider's actions were within the spirit of the statute and in compliance with the Commission's rules and policies on political broadcasting. The Commission required that DBS providers maintain a public file of requests for political advertising and the disposition of these requests in order to assist in evaluations of compliance with the political broadcasting rules.³⁷

22. The Commission took a similar approach for implementing the requirements of Section 315 of the Act. The *First Report and Order* incorporated Section 315 equal opportunity provisions into Commission's rules, as well as the policies delineated in previous Commission orders on the subject, and stated that compliance with these provisions will be determined on a case-by-case basis. In addition, the Commission determined that DBS providers will be required to keep a record of all requests for broadcast time and the disposition of the requests in their public file, to enable competing candidates to review other candidates' advertising access and rates.³⁸

³⁴ See *First Report and Order*, 13 FCC Rcd at 23273

³⁵ See 47 C.F.R. § 25.701(b).

³⁶ See *First Report and Order* 13 FCC Rcd at 23269-70

³⁷ *Id.* at 23270-71

³⁸ *Id.* at 23272-73.

23. The *First Report and Order* also took into consideration the unique nature of the DBS service in applying Section 315's lowest unit charge provisions. The Commission noted that LUC provisions apply if political advertising is sold on DBS systems.³⁹ When the *First Report and Order* was released, DBS providers did not have commercial advertising rates for political or comparable advertising. The Commission determined that DBS providers could set a rate that they believe is reasonable, taking into account marketplace factors such as the rate other electronic media charge political candidates to reach audiences of comparable size. Nevertheless, DBS providers, like broadcasters and cable operators, are required to disclose information to candidates about rates and discount privileges⁴⁰

24. One petitioner, DAETC, takes issue with the manner in which the political broadcasting requirements were implemented in the *First Report and Order*. DAETC contends that the requirements are needlessly vague and place an unjustified reliance upon case-by-case decision making for resolving disputes concerning compliance with the requirements. According to DAETC, the Commission puts concerns about burdens placed on DBS providers ahead of the needs of political candidates. Consequently, DAETC argues that the Commission fails to affirm the policy that a candidate's needs are the primary factor in assessing time requests under Section 312(a)(7). DAETC also asserts that each request must be considered on an individualized basis and that the DBS provider must make every effort to accommodate the candidate's stated purpose for requesting airtime. DAETC submits that the Commission's action implies that under Section 312(a)(7)'s reasonableness standard, DBS providers can segregate political advertisements from regular programming channels and that it is permissible for DBS providers to adopt blanket policies relegating candidates' advertisements to certain portions of the broadcast day. In addition, DAETC alleges that the Commission improperly concluded that it can and should defer consideration of whether congressional candidates may obtain access to DBS systems. DAETC argues that Section 312(a)(7) specifies, without limitation, that all federal candidates are entitled to access DBS systems for advertisements.⁴¹ DAETC argues that the Commission should adopt specific rules and policies that will facilitate the enforcement of Sections 312(a)(7) and 315, and that will make it clear that DBS providers and terrestrial broadcasters have the same political broadcast advertisement obligations.⁴²

25. We are not persuaded by DAETC's arguments. DAETC fails to take into account the technical and geographic differences between DBS and terrestrial broadcast systems and that the Commission's political broadcasting requirements have to accommodate these differences. It also appears that DAETC has misinterpreted the Commission's application of the political broadcasting requirements for DBS providers. For the reasons explained below, we conclude that DAETC has failed to demonstrate that the political broadcasting requirements specified in the *First Report and Order* warrant revision.

³⁹ *Id.* at 23274

⁴⁰ *Id.* at 23273-74.

⁴¹ See DAETC Petition for Reconsideration ("DAETC Petition"), filed March 11, 1999, at 2-14.

⁴² *Id.* at 20-23.

26. To the extent that the *First Report and Order* may have been unclear with respect to federal candidates for congressional office, we clarify that under Section 312(a)(7) all federal candidates, presidential and congressional, are entitled to reasonable access. We do not mean to imply that congressional candidates did not possess reasonable access rights under Section 335. The *First Report and Order* recognized, however, that because DBS is essentially a nationally delivered service, it would appear to be unlikely that congressional candidates would use DBS service for political advertising, given that this would require them to incur the expense of paying for advertising to reach a national audience for a local election. The introduction of local-into-local service by DBS providers does not change this conclusion because DBS providers cannot alter or insert advertising into retransmitted broadcast signals. Indeed, since the *First Report and Order* was adopted in 1998, the Commission has received no reasonable access complaints from congressional candidates in connection with DBS service providers. We also noted in the *First Report and Order* that, of additional significance, the number of congressional candidates nationally is large and the potential burden on a national DBS provider to provide access to all federal candidates could be substantial and thus access could be inherently unworkable. We indicated that the number of such congressional candidates would be but one of the factors for a DBS provider to consider in responding to a reasonable access request, just as is the case with our enforcement of Section 312(a)(7) for terrestrial broadcasting where we look at the multiplicity of federal candidates in a broadcaster's service community.

27. We therefore clarify here that we will address the appropriate implementation of Section 312(a)(7) for congressional candidates if, and when, individual cases arise. In doing so, we will use the rationales and interpretations of terrestrial broadcasting precedent to determine what is reasonable under the particular circumstances of a specific federal candidate's request for DBS access. This extensive universe of precedent in terrestrial broadcasting will be instructive in resolving any controversies that may arise in the context of DBS.

28. For all of these reasons, we take issue with DAETC's assertion that the *First Report and Order* was too vague and that it placed an unjustified reliance on a case-by-case analysis. First, it is impossible for this Commission to anticipate the nature of reasonable access cases in the context of DBS, which is different from the terrestrial broadcasting model. We merely recognized this obvious distinction between the two unique forms of technology and indicated that we would attempt to apply our extensive precedent for terrestrial broadcasting to circumstances in DBS as they arise. Moreover, the case-by-case approach is consistent with the Commission's and the courts' longstanding enforcement of Section 312(a)(7).⁴³ The case-by-case approach is also entirely consistent with the Commission's and the courts' interpretation that federal candidates are entitled to deference in terms of their individualized needs, which typically are different from campaign to campaign and within any particular market. Thus, the scheme set out in the *First Report and Order* establishing a case-by-case analysis conforms with the longstanding policy and law in this area.

29. Next, DAETC contends that the Commission's application of Section 315 of the Act governing equal access to broadcast facilities at lowest unit rates is confusing. DAETC contends that

⁴³ See *Commission Policy Enforcing Section 312(a)(7) of the Communications Act*, Report and Order, 68 FCC 2d 1079 (1978), see also *Carter/Mondale Presidential Committee, Inc.*, 74 FCC 2d 631, recon. denied, 74 FCC 2d 657, *aff'd sub nom CBS Inc. v FCC*, 629 F 2d 1, (D.C. Cir. 1980), *aff'd* 453 U.S. 367 (1981).

the language of the *First Report and Order*, is so imprecise that it is difficult to discern how the Commission intends to apply Section 315's obligations to DBS providers. According to DAETC, it appears that under the Commission's formulation, candidates seeking equal access to broadcast facilities are not necessarily entitled to time on the same channel as the broadcast necessitating a response, but only to audiences of equal size. DAETC also asserts that under the Commission's rules, DBS providers are not required to abide by the LUC rules that apply to broadcasters and cable operators if they do not sell commercial advertising time.⁴⁴

30. We decline to adopt DAETC's suggestion to specifically prescribe by rule exactly how the obligations imposed by Section 315 will apply to DBS providers, such as whether a candidate is entitled to time on the same channel as the broadcast that gives rise to the right to equal time. The Commission stated unequivocally that the equal opportunities provisions of the statute and the Commission's rules, as well as related policies delineated in prior Commission orders, will apply to DBS providers.⁴⁵ Thus, if a legally qualified candidate is afforded access to a DBS system, all other candidates for the same office must be afforded equal opportunities. We believe that it is premature, however, to prescribe exactly what type of use of DBS facilities will be considered to afford equal opportunities. Since adoption of the *First Report and Order*, the Commission has received no complaints regarding DBS operators' compliance with their obligation to provide equal opportunities to candidates for public office. Thus, we have no experience in assessing the technical, operational, other factors that may affect DBS operators' provision of equal opportunities. As indicated above in discussing Section 312(a)(7), we believe that there may be significant differences between DBS and terrestrial broadcasters that may affect how the political broadcasting rules apply to DBS operators. Therefore, as we stated in the *First Report and Order*, we believe that it is most appropriate to assess whether equal opportunities have been provided in response to a candidate request on a case-by-case basis, taking into account the particular factual circumstances.

31. Nor do we find adequate grounds to reconsider or change our rules relating to the application of Section 315(b)'s LUC obligations. In the *First Report and Order* the Commission plainly stated that DBS providers are required to afford legally qualified candidates the benefits of the LUC.⁴⁶ It did not exempt DBS providers from this obligation, as suggested by DAETC.⁴⁷ Rather, it took into consideration the fact that, at the time the rules were adopted, DBS providers generally did not have commercial advertising rates available to make a LUC determination and, therefore, the Commission allowed DBS providers to rely on marketplace factors for setting reasonable rates. The situation may have changed since the *First Report and Order* and if a DBS provider is now selling advertising time on its system, that provider is expected to comply with the Commission's established procedures for determining LUC.⁴⁸

⁴⁴ See DAETC Petition at 14-20.

⁴⁵ See *First Report and Order*, 13 FCC Rcd at 23273.

⁴⁶ *Id.* at 23274.

⁴⁷ *Id.*

⁴⁸ *Id.*

32. Finally, DAETC and CME contend that the public file requirements adopted in the *First Report and Order* requiring maintenance of records on sales of advertising to candidates are inadequate. Both petitioners maintain that because parties seeking to inspect a DBS provider's public files could be located anywhere throughout the country, it may be difficult for those who do not reside near the DBS provider's headquarters to obtain access to the files. In order to alleviate the geographic burden on parties seeking to inspect a DBS provider's public files, the petitioners request that the Commission adopt rules based on rules recently enacted by the Commission for terrestrial broadcasters.⁴⁹

33. The Commission has stated that DBS providers are required to comply with the public file obligation within the spirit of the Act's political broadcasting requirements.⁵⁰ Specifically, we expect DBS providers to abide by the same public file obligations as terrestrial broadcasters. In addition, because DBS is a national service and each provider's headquarters is not necessarily readily accessible to many of its viewers, we expect DBS providers to make available, by mail upon telephone request, photocopies of documents in their public files. We also expect that DBS providers will assist callers by answering questions about the contents of the DBS providers' public files. DBS providers may require individuals requesting documents to pay for photocopying, but the provider should pay for postage. DBS providers are also encouraged to put as much of their public files as practical on their respective websites. In view of these requirements and expectations, we do not find that reasonable access by the public to a DBS provider's files requires that the provider maintain a public file in every community that receives its signal.

C. Opportunities for Localism

34. Section 335(a) requires the Commission "to examine the opportunities that the establishment of direct broadcast satellite service provides for the principle of localism under [the] Act, and the methods by which such principle may be served through technological and other developments in, or regulation of, such service."⁵¹ There is no legislative guidance for the Commission to rely upon in defining "localism" in the context of DBS service. For example, there is no indication of whether localism refers to special programming for individual localities or if it refers to local broadcast channel carriage. In the *First Report and Order* the Commission noted that DBS providers lack the channel capacity to serve all localities in the country. At the same time, the Commission acknowledged that the Satellite Home Viewer Act of 1988 ("1988 SHVA") severely limited DBS providers' retransmission of local programming, but deferred an in-depth study of localism until the technical and legal issues were resolved through pending legislation that eventually became the Satellite Home Viewer Improvement Act of 1999 ("1999 SHVIA").⁵²

⁴⁹ See DAETC Petition at 23 and CME Petition for Reconsideration ("CME Petition"), filed March 11, 1999, at 10.

⁵⁰ See *First Report and Order*, 13 FCC Rcd at 23271

⁵¹ 47 U.S.C. § 335(a)

⁵² See *First Report and Order*, 13 FCC Rcd at 23274-76, see also *Pub. Law 106-113*, 113 Stat. 1501, 1501A-526 to 1501A-545 (November 29, 1999)

35. ACA (formerly the Small Cable Business Association) contends that the Commission has not given serious consideration to the manner in which DBS can serve the principle of localism. ACA states that the Commission has failed to meet its statutory obligation under Section 335(a). According to ACA, the Commission's failure is due to the fact that its analysis is based on a stale record. ACA submits that the Commission has not taken into account advances in technology that will enable DBS providers to offer widespread local programming, or recent legislative activity foreshadowing changes to the 1988 SHVA.⁵³ Moreover, ACA adds that, since the release of the *First Report and Order*, two significant events have taken place affecting the implementation of localism on DBS. In its comments ACA points out that several major DBS mergers have been approved, raising the prospect of a significantly restructured DBS industry. In addition, ACA explains that the two largest DBS providers have announced intentions to offer local-into-local broadcast stations to subscribers.⁵⁴ ACA filed a second 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.⁵⁵

36. ACA is correct in noting that since the *First Report and Order* the DBS industry has experienced a number of significant changes. Many of the legal and technical impediments to the transmission of local television broadcasts are now eroding. The 1999 SHVIA has become law,⁵⁶ permitting "satellite carriers"⁵⁷ to offer subscribers local-into-local service in markets across the

⁵³ See ACA Petition for Reconsideration ("ACA Petition"), filed March 10, 1999, at 5-14.

⁵⁴ See ACA Reply, filed June 1, 1999, at 4-6. ACA filed these comments prior to the Commission's November 1999 Order adopting rules implementing SHVIA. See *Implementation of the Satellite Home Viewer Act of 1999: Broadcast Signal Carriage Issues, Retransmission Consent Issues*, CS Docket Nos. 00-96 & 99-363, Report and Order, 16 FCC Rcd 1918 (2000).

⁵⁵ Petition for Reconsideration filed March 9, 1999; See *First Report and Order*, 13 FCC Rcd at 23325.

⁵⁶ The SHVIA was enacted as Title 1 of the Intellectual Property and Communications Omnibus Reform Act of 1999 ("IPACORA") (relating to copyright licensing and carriage of broadcast signals by satellite carriers, codified in scattered sections of 17 and 47 U.S.C.), Pub. L. No. 106-113 Stat. 1501, 1501A-526 to 1501A-545 (Nov. 29, 1999).

⁵⁷ The term "DBS provider" is encompassed by the term "satellite carrier." The 1999 SHVIA uses satellite carrier. See, e.g., Section 338(h)(4) of the Act, 47 U.S.C. § 338(h)(4), and Section 119(d) of title 17, United States Code, 17 U.S.C. § 119(d). These statutes define satellite carrier as "an entity that uses the facilities of a satellite or satellite service licensed by the Federal Communications Commission and operates in the Fixed-Satellite Service under part 25 of title 47 of the Code of Federal Regulations or the Direct Broadcast Satellite Service under part 100 of title 47 of the Code of Federal Regulations, to establish and operate a channel of communications for point-to-multipoint distribution of television station signals, and that owns or leases capacity or a service on a satellite in order to provide such point-to-multipoint distribution, except to the extent that such entity provides such distribution pursuant to tariff under the Communications Act of 1934, other than for private home viewing." 17 U.S.C. § 119(d). In this order we use the term DBS provider when discussing the 1999 SHVIA.

country.⁵⁸ On the technical side, advancements have been made in signal compression technology that give DBS providers additional capacity and the ability to carry local broadcast stations. DBS providers are taking advantage of these opportunities. According to the major DBS providers' websites, DirecTV offers local television service packages to subscribers in over 52 markets with 48 more coming soon and EchoStar offers similar packages in 62 markets.⁵⁹ It also appears that the expansion in local-into-local service may have contributed to the over 3 million, 19%, increase in DBS subscribership between June 2000 and June 2001, making DBS the country's fastest growing competitor in the multichannel video programming distribution ("MVPD") marketplace.⁶⁰

37. The 1999 SHVIA has significantly enhanced the programming offered by DBS providers. Although DBS remains primarily a national service, in addition to traditional satellite and cable programs, many DBS subscribers are now receiving retransmissions of local terrestrial broadcast stations. Thus, without the necessity of Commission intervention, market demand has compelled DBS providers to devote a portion of their system channel capacity to locally originated programs. The statutory requirement to comply with carriage obligations in the 1999 SHVIA has been implemented through a separate Commission proceeding, and DBS providers are now required to carry all local broadcast stations that request carriage, within each local market that the carriers choose to serve through reliance on the Section 122 statutory copyright license.⁶¹ Because satellite channel capacity is limited by technical constraints, we do not believe it will serve the public interest to impose additional requirements to "further the principle of localism" at this time. DBS providers, at this time, only serve selected markets with local channels. We believe that imposing additional obligations on DBS providers could further cut into channel capacity and could have the unintended consequence of foreclosing local-into-local service in some markets. Therefore, we find that local concerns are being addressed by DBS providers through local program carriage of terrestrial broadcasters' signals for local-into-local service. We also find 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.

D. Additional Obligations

38. In 1998, the Commission determined in the *First Report and Order* that it would not impose

⁵⁸ "Local-into-local service" refers to the ability to provide local broadcast channels to subscribers who reside in the local TV station's market, which is defined as a Designated Market Area ("DMA"). See 17 U.S.C. § 122(j)(2)(A).

⁵⁹ See <http://www.directv.com> and <http://www.dishnetwork.com> (viewed on April 24, 2003).

⁶⁰ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming* Eighth Annual Report, CS Docket No. 01-129, FCC Rcd (2002) ("2001 Competition Report"). See also *Policies and Rules for the Direct Broadcast Satellite Service*, *supra* note 5, at para.10.

⁶¹ See 47 C.F.R. §76.66.

additional obligations, similar to those imposed on cable operators, on DBS providers.⁶² The Commission said that DBS, unlike cable, does not possess sufficient market power to raise anti-competitive concerns warranting additional obligations. The Commission therefore concluded that, given the disparity in market power between the two services, imposing additional obligations on DBS providers might hinder the development of DBS as a viable competitor to cable.⁶³ Time Warner argues that the Commission erred in making this determination.⁶⁴

39. In November 1999, the 1999 SHVIA became law imposing many of the same obligations imposed on cable operators in exchange for a compulsory copyright license enabling DBS providers to offer local broadcast stations. Under the 1999 SHVIA and the Commission's implementation, DBS providers must comply with regulations such as syndicated exclusivity, network non-duplication, sports blackout, and broadcast channel carriage requirements similar to cable operators.⁶⁵ Thus, many of the obligations advocated by Time Warner are now required by law.

40. Although the 1999 SHVIA imposed on DBS providers many obligations similar to those imposed on cable operators, it did not require that DBS providers be subject to public interest obligations equivalent to cable operators' public, education and governmental ("PEG") access obligations. Time Warner urges the Commission on reconsideration to impose such obligations. Because operators of open video systems ("OVS"),⁶⁶ which are also relatively new entrants to the MVPD marketplace, are subject to PEG access requirements,⁶⁷ Time Warner asserts that there is no

⁶² Such obligations included must carry obligations, program access rules, channel occupancy limits, syndicated exclusivity, network non duplication and sports blackout, leased and PEG channel access requirements, cross ownership prohibitions, and local taxes and other fees. *First Report and Order*, 13 FCC Rcd at 23277.

⁶³ See *First Report an Order*, 13 FCC Rcd at 23276-78.

⁶⁴ See Time Warner Petition at 3-4. ACA comments, filed before the 1999 SHVIA was passed, that the operators of small cable systems will suffer disproportionately if they have to comply with must carry rules while DBS providers are allowed to select and choose which local stations to carry. See ACA Petition at 16-18.

⁶⁵ See 47 U.S.C. §§ 338(c)(1), 339(b)(1)(A), (B), see also *Implementation of the Satellite Home Viewer Improvement Act of 1999, Application of Network Nonduplication, Syndicated Exclusivity, and Sports Blackout to Satellite Retransmissions*, Report and Order 15 FCC Rcd 21688 (2000); *Implementation of the Satellite Home Viewer Act of 1999, Broadcast Signal Carriage Issues, Retransmission Consent Issues*, CS Docket Nos. 00-96 & 99-363, Report and Order, 16 FCC Rcd 1918 (2000).

⁶⁶ Open video systems were established by Congress as a means for local exchange carriers to enter the video market place. They are regulated under Part 76 of the Commission's rules. See, e.g., *Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems*, Report and Order and Notice of Proposed Rulemaking, 11 FCC Rcd 14639 (1996).

⁶⁷ Pursuant to Title VI of the Act, cable television operators can be required by a franchising authority to designate channel capacity on their systems for PEG access purposes. They are can also be required to provide adequate financial support for PEG access. See 47 U.S.C. §§ 611(b), 621(a)(4)(B). PEG access requirements are imposed on cable operators as part of their public interest obligations as local video programming distributors. See H R. Rep. No 934, 98th Cong., 2d Sess. 47-48 (1984) (adopting the Cable Communications Policy Act of 1984 ("1984 Cable Act"))

reason for exempting DBS providers from these requirements.⁶⁸ Time Warner further argues that DBS providers should be required to provide funding to support the creation of local programming to air on PEG-type channels. Absent a requirement to offer locally oriented programming, Time Warner suggests that DBS providers should be required to contribute five percent of their gross receipts to support the creation and development of programming aired on the Public Broadcast Service ("PBS"). According to Time Warner, this amount is equivalent to the local franchise fees paid by most cable operators. Time Warner states that it views PBS as the national equivalent of noncommercial PEG programming and that a PBS support obligation for DBS providers would be equivalent to a cable operator's local PEG access support obligations.⁶⁹

41. We agree with DirecTV and SBCA that Time Warner has not established good cause for imposing a PEG-type obligation on DBS providers.⁷⁰ Time Warner has not demonstrated that Congress intended, as it did with OVS,⁷¹ that the Commission adopt the regulations Time Warner advocates. As the Commission noted in the *First Report and Order*, Congress has preempted the ability of local jurisdictions to impose any tax or fee on DBS services.⁷² More importantly, the Commission determined that the 1992 Cable Act was passed in order to remedy the competitive disadvantages faced by DBS providers struggling for a share of the MVPD market.⁷³ Imposing the additional regulations proposed by Time Warner would divert DBS providers' channel capacity away from the provision of local-into-local service and effectively negate the Commission's efforts to create a competitive MVPD market by limiting the ability of DBS to compete with cable and offer more consumer choices. In addition, there is no indication in the language of Section 335 of the Act, that Congress wanted the Commission to impose PEG access obligations on DBS providers. In fact, in the *First Report and Order* the Commission pointed out that the PEG requirements that apply to cable operators are entirely different from the public interest requirements applicable to DBS providers. On the one hand, the PEG access rules are designed to create a "soap box" of sorts for the expression of different viewpoints without fear of censorship. On the other hand, the DBS public interest requirements are designed to create a haven for educational and informational programming that need not compete with commercial offerings.⁷⁴ We also note that when Congress proposed the 1999 SHVIA, it had a further opportunity to impose the same PEG obligations on DBS providers as exist for cable operators. Although Congress did impose many regulations similar to those imposed on cable operators on DBS providers in the 1999 SHVIA, it did not require PEG access. We therefore find no grounds to impose PEG obligations on DBS providers.

⁶⁸ See Time Warner Petition at 3-10

⁶⁹ *Id.* at 10-12. DATEC and CME in their joint opposition comments strongly disagree that PBS is the national equivalent of PEG access. See DATEC and CME Joint Opposition at 29, fn. 24.

⁷⁰ See, e.g., DirecTV Opposition at 5-8; SBCA Opposition, filed May 20, 1999, at 4-6.

⁷¹ See 47 U.S.C. § 573(c).

⁷² See *First Report and Order*, 13 FCC Rcd at 23279

⁷³ *Id.* at 23278

⁷⁴ *Id.* at 23297-99.

E. Guidelines Concerning Commercialization of Children's Programming

42. In the *First Report and Order*, the Commission found that Section 335(a) provides authority for the Commission to impose other public interest programming requirements on DBS providers, including guidelines concerning the commercialization of children's programming. The Commission declined, however, to impose programming obligations not required by the statute, principally because it felt that any additional obligations imposed on the DBS industry at that stage in its development would be burdensome and could prevent DBS from realizing its potential as a robust competitor to cable. Nevertheless, the Commission said that the issue of additional public interest programming requirements will be reexamined if it becomes evident that regulatory intervention is needed to ensure that the needs of children are not overlooked.⁷⁵

43. CME, which advocated the adoption of requirements regarding children's programming when the *First Report and Order* was adopted,⁷⁶ contends that the Commission's reasons for not imposing commercial limits lack merit. According to CME, the Commission overstates both the newness of the DBS industry and the differences between DBS and cable services.⁷⁷ In support of its assertions, CME points out that the DBS industry has experienced tremendous growth since this proceeding was initiated in 1993 and that two of its providers, DirecTV and EchoStar, have established a substantial presence in the MVPD marketplace. Consequently, CME submits that there is no justification for the Commission's reserved approach and that it is time to protect the millions of DBS subscribing homes from the harms associated with over-commercialization.⁷⁸ CME argues that the Commission cannot justify its approach based on the differences between DBS and cable. CME claims that, from the consumer's perspective, DBS providers deliver the same service as cable operators and broadcasters. [] continues by saying that the DBS service's increased provision of local programming in fact creates greater similarities between DBS, cable and, broadcasting.⁷⁹

44. CME further contends that the Commission overstates the oppressiveness of CME's commercial limitation proposal. CME's position is that the benefits of imposing commercial limits on children's programming outweigh the potential burdens. Imposing commercial limits on children's programs, CME argues, has been established as the best way to protect children from the evils of over-commercialization. Furthermore, adds CME, the burden on DBS providers to comply with commercial

⁷⁵ See *First Report and Order*, 13 FCC Rcd at 23279-80.

⁷⁶ CME urged the Commission to take the following actions: First, to establish a "safe harbor" that will enable a DBS provider to meet its public interest obligations with regard to the children in its audience in the same way as terrestrial broadcasters. Second, to apply to DBS providers the rules and policies concerning commercial advertising that currently apply to children's television programming on terrestrial television and cable. Third, to ensure that these obligations apply to all DBS providers. Finally, to develop reporting requirements as enforcement mechanisms to ensure compliance with these obligations. See CME Comments, filed April 28, 1997, at 4-17

⁷⁷ See CME Petition at 4-5.

⁷⁸ *Id.* at 5-6

⁷⁹ *Id.* at 6-8,

limits is minimal since most of the programming aired on DBS is also provided to cable, which has children's commercial limits.⁸⁰

45 While we appreciate CME's concerns, we are not convinced that a need has been demonstrated that would justify the imposition of additional regulatory requirements at this time. There is no evidence that children's programming carried by DBS providers, as contrasted with other providers, is over-commercialized. As CME points out, most of the programming offered on DBS is the same programming delivered by cable, including local broadcast programming, all of which is subject to the statutory requirements.⁸¹ And there is no evidence in the record that any DBS offered children's programming contains commercial material in an amount injurious to the interests of children or that exceeds the amount in broadcast or cable programming. Because, when Congress enacted Section 335 just two years after it passed the Children's Television Act, it chose not to include children's advertising limits in the requirements for DBS, independent application of these limits by the Commission, would need to be justified based on the administrative record before us. Accordingly, absent a demonstration that children may be at risk because of excessive commercialization particularly associated with children's programming provided by DBS, we believe that further restrictions on DBS providers at this time have not been shown to be warranted. Consequently, although we will continue to monitor DBS children's programming for evidence of "over-commercialization," we decline to adopt CME's proposal at this time.

F. Programming on Reserved Capacity

46. Section 335(b)(1) specifies that the Commission must require that a DBS provider reserve a portion of its channel capacity, "equal to not less than 4 percent nor more than 7 percent, exclusively for noncommercial programming of an educational or informational nature."⁸² In response to this mandate, the Commission selected four percent as the capacity reservation percentage.⁸³

47. Time Warner asserts that DBS providers should not be allowed to fulfill the four percent reservation obligation by carrying noncommercial, educational and informational programming that was already being offered to subscribers before the *First Report and Order* was adopted. Time Warner argues that allowing DBS providers to do so would defeat the purpose of having a separate reservation obligation. Time Warner asserts that Congress intended that a DBS provider's reserved capacity should be available exclusively for programmers that represent interests that are not currently being served.⁸⁴ Time Warner is supported by comments from DAETC and CME that contend that prohibiting DBS

⁸⁰ *Id.* at 8-10

⁸¹ See Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. §§ 303a, 303b, 394

⁸² See 47 U.S.C § 335(b)(1).

⁸³ See *First Report and Order*, 13 FCC Rcd at 23285.

⁸⁴ See Time Warner Petition at 12-14.

providers from satisfying the reservation requirement with existing programming will result in greater diversity of media sources on DBS systems.⁸⁵

48. We decline to amend the rule as requested by Time Warner. If the programming is of the type that fulfills the statutory requirement for noncommercial programming of an educational or informational nature, there is no reason to deny a DBS operator credit solely because it carried the programming voluntarily before the set-aside went into effect. We believe that the amendment that Time Warner advocates would unfairly penalize those DBS providers that complied with the requirement before they were obligated to do so. Time Warner has not cited anything in the statute or its legislative history indicating that Congress intended that the reservation requirement be implemented in this manner. As DirecTV and SBCA point out, a DBS provider should not be barred from fulfilling its public interest obligation with qualified programming simply because the programming happens to have a widespread appeal, rather than a narrow focus on the specific needs of a particular group of viewers.⁸⁶ Moreover, as we noted above, DBS providers are now providing a wide range of public interest programming on their reserved channels, some of which appear to be designed to serve the particular needs of viewers that may have been overlooked in the past.⁸⁷ Accordingly, we will not make this change.

G. Noncommercial Channel Limitation

49. The *First Report and Order* limited access to the reserved capacity on each DBS system to one channel per qualified program supplier as long as demand for such capacity exceeds the available supply.⁸⁸ The Commission imposed this limit in order to ensure that a few national educational program suppliers would not dominate access to the noncommercial channels.⁸⁹ The Commission reasoned that the limitation would promote the development of quality educational and informational programming, as well as provide increased access opportunities for smaller, less well-funded noncommercial program suppliers.⁹⁰ The Commission also determined that the limitation comports with Congress's intent to foster robust and editorially diverse programming on the reserved channels.⁹¹

50. APTS/PBS assert that the single programmer restriction is not supported by the statute and therefore, should be removed. According to APTS/PBS, Section 335(b),⁹² authorizes the reservation of

⁸⁵ See DAETC and CME Joint Opposition, filed May 6, 1999, at 28-30.

⁸⁶ See DirecTV Opposition at 14-15 and SBCA Opposition at 7.

⁸⁷ See *supra* at ¶ 2.

⁸⁸ See *First Report and Order* at 23302.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 23302-04.

⁹² The petitioners' citations are to Section 25 of the 1992 Cable Act. We refer in the text to parallel Section 335 citations in order to avoid confusion.

DBS capacity for noncommercial educational programmers and does not suggest that there should be any limitation on the amount of reserved capacity that can be occupied by a single programmer. These petitioners state that the statute's only requirement is that DBS providers make capacity available to qualified programmers at reasonable prices and on reasonable terms and conditions. Thus, concludes APTS/PBS, given the absence of any indication that Congress intended such a limitation, the Commission lacks authority to impose any restrictions.⁹³

51. The petitioners further contend that the one-channel-per-programmer limit is inconsistent with the Commission's interpretation of the ban on editorial control contained in Section 335(b). The Commission found that the editorial control ban does not bar DBS providers from selecting programmers when demand for reserved capacity exceeds the available supply. APTS/PBS claim the one-channel-per-programmer restriction is inconsistent with this discretion given to DBS providers to select the qualified programmers offered access to these channels.⁹⁴

52. APTS/PBS also assert that the Commission is not justified in suggesting that the one-channel-per-programmer restriction will result in a greater diversity of programming because there is no indication that Congress intended to promote greater diversity when it enacted the 1992 Cable Act. APTS/PBS contend that Congress's intent was simply to provide a minimum level of educational programming and to rely on the marketplace to create diversity.⁹⁵

53. In addition to a lack of legal justification, APTS/PBS argue that there is no factual support in the record for the one-channel restriction and that there is no basis for the Commission's conclusion that the restriction will provide the viewer with a greater variety of programming. These petitioners argue that the Commission decision could be encouraging less diverse programming because few noncommercial programmers have comparable financial resources and production skills to commercial programmers. APTS/PBS contend that requiring that a DBS provider limit noncommercial programmers to a single channel may actually result in programming that is neither diverse nor high quality. APTS/PBS, therefore, submit that a DBS provider should not be barred from assigning several channels of the reserved capacity to a single programmer, such as PBS or an individual public television station, if the DBS provider believes the programmer offers the best available noncommercial programming.⁹⁶

54. DAETC and CME disagree with APTS/PBS and contend that the Commission's adoption of the one-channel-per-programmer limitation is sound as a matter of law and policy. DAETC and CME maintain that the Commission has ample authority to adopt rules promoting diversity of viewpoints and that the one-channel limit is not at odds with the ban on editorial control.⁹⁷ They also argue that the

⁹³ See, e.g., APTS/PBS Petition for Reconsideration ("APTS/PBS Petition"), filed March 10, 1999, at 4-5.

⁹⁴ *Id.* at 6.

⁹⁵ *Id.* at 7-8.

⁹⁶ *Id.* at 8-11.

⁹⁷ See DAETC and CME Joint Opposition at 17.

limit will, in fact, produce the desired effect of serving audiences that are often overlooked. They contend that without the rule, DBS providers might choose one or only a few programmers, and that those programmers might not serve audiences that have been traditionally underserved or perhaps not served at all.⁹⁸ DAETC and CME view the one-channel limitation essentially as a compromise whereby, in exchange for the small burden of being required to choose several different programmers, DBS providers are given the much greater benefit of editorial freedom.⁹⁹

55. We believe that the Commission's decision to adopt a one-channel-per-programmer limitation, when demand for reserved channels exceeds the four percent reservation requirement, was sound as a matter of law and policy. In carrying out Congress' mandate to impose an obligation on DBS providers to devote a portion of their channel capacity to noncommercial programming of an educational or informational nature, the Commission determined that "it would frustrate Congress' goal to permit the set-aside capacity to be dominated by a single programming voice where there are other noncommercial voices seeking to be heard."¹⁰⁰ The fact that Section 335 does not specifically provide for the limitation in no way invalidates the legitimacy of the Commission's action.¹⁰¹ Congress identified the promotion of diversity of views and information as one of the purposes of the 1992 Cable Act.¹⁰² The Courts have also determined that promoting diversity of media sources is a proper Commission goal¹⁰³ and, specifically, that the Commission has the authority to apply rules promoting source diversity.¹⁰⁴ Finally, Section 335 expressly allows the Commission to impose "public interest or other requirements for providing video programming,"¹⁰⁵ and we believe that imposition of the one-channel limitation in order to foster diversity of programming is an appropriate exercise of that authority. Consequently, we find that the Commission's decision to adopt the one-channel-per-programmer limitation was sound as a matter of law.

56. The one-channel limitation is also sound public policy. While we agree that a large, highly experienced, and well funded noncommercial programmer may be capable of consistently producing an array of high quality programs, the fact remains that multiple views from the same programmer does not

⁹⁸ *Id.* at 16.

⁹⁹ *Id.* at 18

¹⁰⁰ *First Report and Order*, 13 FCC Rcd at 23303.

¹⁰¹ See, e.g., *United States v. Southwest Cable*, 392 U.S. 157, 177-178 (1968) (ruling that the Commission is empowered to perform any and all acts, make such rules and regulations, and issue such orders it deems necessary to for the execution of its functions, provided its actions are consistent with the Act). See also 47 U.S.C. §§ 154(i), 303(r)

¹⁰² See 1992 Cable Act, § 2(b)(1), Pub. L. No. 102-385, 106 Stat. 1460, 1463 (1992).

¹⁰³ See, e.g., *FCC v. NCCB*, 436 U.S. 775, 794 (1978) (confirming that diversification is a relevant factor in broadcast renewal proceedings).

¹⁰⁴ See *NAB v. FCC*, 740 F.2d 1190, 1207-09 (D.C. Cir. 1984) (upholding the Commission's ownership restrictions as a means of promoting diversity).

¹⁰⁵ 47 U.S.C. § 335(a)

provide the benefits of source diversity since that programmer decides what programs will be produced and offered.¹⁰⁶ The Commission adopted the one-channel-per-programmer limit to promote diversity of voices.¹⁰⁷ In other words, the purpose of the limitation is to foster "the widest possible dissemination of information from diverse and antagonistic sources."¹⁰⁸ We believe that the goal of promoting diversity is best achieved by having multiple programmers competing for the capacity reserved for noncommercial programming. Furthermore, we do not find the one-channel limitation on programmers unduly burdensome on DBS providers. In view of the Commission's policy allowing DBS providers to select among qualified programmers, the one-channel-per-programmer requirement permits the Commission to minimize the burdens it places on DBS providers while retaining effective oversight to ensure that programming is not dominated by a single voice. DBS providers, therefore, are given wide latitude to select programmers, but their discretion is tempered to ensure that it does not result in domination by one or two major programmers when other noncommercial entities are seeking access. Indeed, the programmers currently carried in compliance with our rules include a wide variety of entities such as educators, NASA, ethnic programmers, and religious programmers. In addition, DBS providers are free to carry more than one program from a single programmer provided they count only one channel per qualified programmer to satisfy their reservation obligations.¹⁰⁹ Thus, DBS providers retain significant discretion in putting together subscriber offerings without unduly limiting the diversity of their public interest programmers. Finally, it should be remembered that the one-channel limitation pertains only to those channels reserved in compliance with the four percent reservation.

IV. CONCLUSION

57. For the reasons discussed above, we reaffirm the Commission's interpretation of Section 335 as reflected in the implementing rules. The record shows that the Commission's public interest rules have facilitated provision of a wide range of noncommercial programming to DBS subscribers. We find no basis to revise those rules. Consequently, we deny the petitions for reconsideration.

¹⁰⁶ See DAETC and CME Joint Opposition at 14.

¹⁰⁷ See *First Report and Order*, 13 FCC Rcd at 23302-03.

¹⁰⁸ *Associated Press v. United States*, 326 U.S. 1, 20 (1945), see also *Id.*.

¹⁰⁹ See Letter to Gregory Ferenbach, Senior Vice President and General Counsel, Public Broadcasting Service, from Roderick K Porter, Acting Chief, International Bureau, FCC, dated June 18, 1999, clarifying that the noncommercial channel limitation does not preclude DBS providers from carrying more than one programming service offered by the same qualified programmer provided that the DBS provider can only count one of these services for purposes of meeting its reservation obligation.

VII. ORDERING CLAUSES

58. Accordingly, IT IS ORDERED that the petitions for reconsideration filed by the American Cable Association (including its petition for reconsideration of the Final Regulatory Flexibility Act analysis), America's Public Television Stations and the Public Broadcasting Service, the Denver Area Educational Telecommunications Consortium, Inc., *et al.*, GE American Communications, Inc., Loral Space and Communications Ltd, PanAmSat Corporation, the Center for Media Education, *et al.*, and Time Warner Cable ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in cursive script, reading "Marlene H. Dortch".

Marlene H. Dortch
Secretary

**STATEMENT OF
COMMISSIONER MICHAEL J. COPPS
APPROVING IN PART AND DISSENTING IN PART**

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

I dissent in part from this Order because the majority concludes that important public interest rules with which cable and broadcast operators must comply should not be extended to direct broadcast satellite operators. I highlight below two of the issues that concern me the most in this Order.

First, the Order says the rules on political programming should be different for DBS. In Section 335, Congress expressly directed that the political broadcasting requirements of sections 312(a)(7) and 315 apply to DBS. Yet, the Commission determines that it is premature to adopt specific rules to implement this requirement, notwithstanding that there are such rules for cable and broadcast. In the *First Report and Order* this decision was made, in part, because DBS operators were not selling advertising. But today DBS providers sell advertising. If DBS companies are now contracting with programmers to leave ad slots open, then are filling those slots with advertising of their own choosing and at their own rates, the time is now to roll up our sleeves and determine how to implement the statutory requirements. Why wait until problems arise, especially because they may occur in the heat of an election? Clarity today will increase predictability and certainty for candidates for public office, for DBS operators, and for the public. Additionally, given the national scope of DBS's activities, I believe that we should require DBS operators to make their public files readily accessible. Disclosure is good for everyone.

The Commission also decides not to adopt any rules that protect against over-commercialization of children's programming, even though cable and broadcast television must comply with such rules. It states that no protections are needed because "most of the programming offered by DBS is the same programming delivered by cable, including local broadcast programming." Given the harms of over-commercialization in children's programming, I believe we ought to apply commercial limits to DBS just as we apply rules to cable and broadcast.

I am pleased, however, that the Commission plans to address these issues in a *sua sponte* reconsideration decision.