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Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

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Federal Communications Commission  
Office of Secretary

In the Matter of )  
 )  
RFD Communications, Inc. )  
DBS Set Aside Qualifications )  
 )

Docket No. \_\_\_\_\_

To: Office of the Secretary  
Attn: Chief, Media Bureau

STAMP & RETURN

PETITION FOR DECLARATORY RULING

FARM JOURNAL, INC.

John R. Feore, Jr.  
Margaret L. Miller  
Kevin P. Latek

Its Attorneys

DOW, LOHNES & ALBERTSON, PLLC  
1200 New Hampshire Avenue, N.W.  
Suite 800  
Washington, D.C. 20036-6802  
(202) 776-2000

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## SUMMARY

By this Petition, Farm Journal, Inc. seeks a Commission declaration confirming that RFD Communications, Inc. ("RFD-TV") fails to satisfy the eligibility requirements of an educational programming supplier for purposes of the direct broadcast satellite ("DBS") reservation, or "set aside," of channel capacity for educational and/or informational content. As directed by Congress, the FCC restricted the use of the set aside channel capacity to public and nonprofit entities with educational missions. This Petition demonstrates, however, that RFD-TV's programming includes blatant and pervasive commercial advertisements, such that the programming completely disqualifies RFD-TV as a qualified programmer of any reserved DBS channel capacity.

RFD-TV's programming is rife with outright commercial advertisements that promote for-profit products and services. The advertisements violate every basic tenet of permissible donor acknowledgements, including the bans on comparative or qualitative descriptions, calls to action, pricing information, and inducements to buy. As a result, RFD-TV routinely and directly violates the bedrock statutory restriction that DBS noncommercial educational set aside programming not include commercial advertisements.

Accordingly, the Commission should declare that RFD-TV does not qualify as a national educational programming supplier for DBS set aside purposes. The sooner the Commission acts, the sooner the public will receive the full benefit of the DBS set aside requirements through the replacement of RFD-TV's pervasively commercial programming with *bona fide* noncommercial educational programming from a qualified national educational programmer.

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continuous production and syndication since 1982, and “U.S. Farm Report. . . Town & Country Living,” which has been in continuous production and syndication since 1975.

RFD’s history actually goes back to around 1988, when RFD-TV’s founder and president launched a 24/7 *for profit*, C-Band satellite delivered television programming service targeting rural America and the agricultural community. That venture was also known as “RFD-TV.” The first incarnation of RFD-TV went bankrupt in a year or so. In 2000, EchoStar, as part of its satisfaction of its “DBS set aside” requirement, offered to RFD-TV to carry a similar noncommercial service. Thereafter, both EchoStar and Directv launched RFD-TV on one of their “set aside” channels earlier this decade. Nevertheless, as described herein, RFD-TV actually operates in much the same manner as the prior for-profit commercial programming service. As such, RFD-TV lacks the qualifications required of DBS noncommercial set aside programmers and therefore must be declared ineligible to receive such preferential treatment.

In the Cable Television Consumer Protection and Competition Act of 1992 (“1992 Cable Act”), Congress directed the FCC to impose certain public interest obligations on DBS providers, including a set aside of channel capacity for noncommercial programming.<sup>1</sup> The Commission’s rules therefore require DBS providers to set aside four percent of their channel capacity exclusively for noncommercial programming of an educational or informational nature.<sup>2</sup> The Commission has approached the definition of acceptable noncommercial educational and

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<sup>1</sup> Communications Act of 1934, 47 U.S.C.A. § 335(a) (2005). *See 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*”), *on recon.*, 19 FCC Rcd 5854 (2003), *vacated in limited part*, 19 FCC Rcd 5647 (2004) (replacing political broadcasting requirements and guidelines concerning commercialization of children’s programming). As part of the set aside requirement, Congress mandated that DBS providers offer access to educational programmers at reasonable prices, terms, and conditions. 47 U.S.C. § 335(b)(3).

<sup>2</sup> 47 C.F.R. § 25.701(f)(1).

informational programming in this context by examining and defining the type of programmers qualified to supply such content.<sup>3</sup>

The 1992 Cable Act limits set aside channels to “national educational programming suppliers.”<sup>4</sup> The Commission has concluded that the term “national educational programming supplier,” as defined in Section 335(b)(5)(B) of the Communications Act of 1934, as amended (“Communications Act”), “includes only noncommercial educational entities with an *educational mission*. The term should not be interpreted as including ‘commercial’ entities organized for profit-making purposes.”<sup>5</sup>

The FCC’s Rules specify five classes of nonprofit entities that qualify as a national educational programming supplier for DBS set aside purposes:<sup>6</sup>

1. noncommercial educational broadcast television stations, as defined in Section 397(6) of the Communications Act;
2. public telecommunications entities as defined in Section 397(12) of the Communications Act;
3. accredited nonprofit educational institutions or governmental organizations engaged in the formal education of enrolled students;
4. nonprofit educational organizations that provide educational and instructional television material to educational institutions; and
5. other noncommercial entities with an educational purpose.

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<sup>3</sup> *First Report and Order* at 23287, et seq.

<sup>4</sup> 47 U.S.C. § 335(b)(3).

<sup>5</sup> *First Report and Order* at 23290 (emphasis added).

<sup>6</sup> See 47 C.F.R. § 25.701(f)(2). In addition to the five classes of qualified noncommercial, public, non-profit, and educational entities outlined in the rules, a for-profit entity may apply to the FCC for a case-by-case determination of DBS set aside eligibility, by demonstrating that it (a) is organized for a noncommercial purpose and has an educational mission; or (b) is a consolidator of programming from programmers who are themselves eligible programming suppliers. *First Report and Order* at 23291. To date, the FCC has not granted any for-profit entity’s application for DBS set aside eligibility.

With respect to the final class of qualified entities, the Commission has explained that the “tax code definition of non-profit will apply to qualify an entity as an eligible national educational programming supplier” and that an “entity with an *educational mission* that is organized under the tax code as a nonprofit corporation will be eligible.”<sup>7</sup> RFD-TV does not satisfy any of these criteria.

**I. RFD-TV is Not a Qualified Programming Supplier under the DBS Set Aside Rules.**

RFD-TV does not qualify under any of the applicable categories of educational programming suppliers. First, RFD-TV is not a noncommercial educational broadcast station, given that RFD-TV is not an FCC-licensed television station at all, noncommercial educational or otherwise. Second, RFD-TV is not a public telecommunications entity, which the Communications Act defines as “a public broadcast station or a noncommercial telecommunications entity” that “disseminates public telecommunications services to the public.”<sup>8</sup> RFD-TV fails short of the initial prong of the definition in that it is neither a public broadcast station, nor a noncommercial telecommunications entity, the latter of which the Communications Act requires to have “been organized primarily for the purpose of disseminating audio or visual noncommercial educational and cultural programs.”<sup>9</sup> As described below in Section II, RFD-TV’s programming is by no means noncommercial educational, as defined by FCC regulations, and RFD-TV’s operations appear to be inconsistent with that required of an entity organized as a tax-exempt, nonprofit organization with a primary noncommercial or educational purpose. Likewise, RFD-TV fails to meet the second prong of the definition of a public telecommunications entity because it cannot be said to disseminate “public

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<sup>7</sup> *First Report and Order* at 23290-23291 (emphasis added).

<sup>8</sup> 47 U.S.C. § 397(12).

<sup>9</sup> 47 U.S.C. § 397(7)(B).

telecommunications services,” which are defined by the Act as “noncommercial educational and cultural radio and television programs, and related noncommercial instructional or informational material.”<sup>10</sup> Again, as Section II below explains in great detail, RFD-TV provides a variety of programming content, but it can hardly be considered *noncommercial* programming, as it includes commercials.

Third, RFD-TV is not an accredited educational institution. Fourth, RFD-TV is not an educational organization that provides educational and instructional television programming to educational institutions.

Finally, RFD-TV does not appear to operate as a tax-exempt organization with an educational mission. Concurrent with this Petition, Farm Journal is filing a complaint with the Internal Revenue Service (“IRS”) alleging that the operations of RFD-TV are inconsistent with tax-exempt status under Section 501(c)(3) of the Internal Revenue Code (the “IRS Complaint”). *See Attachment I hereto.* The IRS Complaint alleges that RFD-TV operates as a for-profit company by airing traditional commercial television advertisements and long-form paid programming; by selling commercial broadcasting at commercial rates; and by otherwise conducting its business as a for-profit company. Like the IRS, the Commission must take note of RFD-TV’s substantial profits and its direct competition with a commercial firm. Moreover, the fact that RFD-TV reports no revenues from contributions, but apparently sizeable revenues from its commercial television business, further evidence the commercial nature of RFD-TV’s operations. In short, RFD-TV does not appear to operate in a manner consistent with that of a tax-exempt organization.

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<sup>10</sup> 47 U.S.C. § 397(14).

## II. RFD-TV's Programming Disqualifies RFD-TV from the DBS Set Aside.

The Communications Act, in Section 335(b)(1), requires that DBS utilize the set aside channels "exclusively for noncommercial programming of an educational or informational nature." Although the FCC did not elaborate further on the definition of "educational and informational" programming in the *First Report and Order*, it nonetheless made clear that entities meeting the definition of qualified programmers would necessarily be "bona fide nonprofit programmers and educational institutions" with an educational mission.<sup>11</sup>

Not surprisingly, the Commission concluded that its definition of "national educational programmer supplier" is "designed to ensure that only qualified noncommercial entities are included," further noting that such programming simply "cannot include advertisements."<sup>12</sup> The FCC referred to Section 399B of the Communications Act for the definition of "advertisement."<sup>13</sup> Section 399B states, in pertinent part:

§ 399B. Offering of certain services, facilities, or products by public broadcast station

- (a) For purposes of this section, the term "advertisement" means any message or other programming material which is broadcast or otherwise transmitted in exchange for any remuneration, and which is intended - (1) to promote any service, facility, or product offered by any person who is engaged in such offering for profit; (2) to express the views of any person with respect to any matter of public importance or interest; or (3) to support or oppose any candidate for political office.<sup>14</sup>

The FCC has refined the distinction between illegal advertisements versus permissible enhanced donor acknowledgements (also known as underwriting announcements) for noncommercial licensees over the past twenty-plus years, but in each case, the FCC made

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<sup>11</sup> *First Report and Order* at 23293.

<sup>12</sup> *Id.* at 23293-23294.

<sup>13</sup> *Id.*

<sup>14</sup> 47 U.S.C. §399b, which was added by Public Law 97-35, 95 Stat. 731, Aug. 13, 1981; 47 FR 36179, Aug. 19, 1982.

abundantly clear that promoting the goods and services of a for-profit entity by a noncommercial licensee violates Section 399B.<sup>15</sup>

RFD-TV's programming runs afoul of these bedrock restrictions on the content of reserved capacity channels. In particular, RFD-TV airs outright commercial advertisements in direct violation of the FCC's regulations governing noncommercial licensees (and in some cases what amount to program-length infomercials) throughout each day. Indeed, RFD-TV not only acts like, but is, a commercial entity. As such, RFD-TV's programming is not noncommercial; RFD-TV cannot be considered an educational programmer; and RFD-TV does not qualify to use DBS capacity set aside by Congress and the FCC for educational programming.

**A. RFD-TV's Programming Contains Blatant and Pervasive Commercial Advertisements.**

As shown in the video program clips set forth in the enclosed compact disc (labeled Exhibit 3 to the attached IRS Complaint), RFD-TV's "noncommercial" programming is rife with blatant commercial advertisements that promote for-profit products and services. Most of these commercials aired between August 31, 2005 and September 9, 2005; the last two aired on November 5, 2005. These video program clips include the following announcements:<sup>16</sup>

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<sup>15</sup> Commission Policy Concerning The Noncommercial Nature Of Educational Broadcasting Stations, 7 FCC Rcd 827 (April 11, 1986); Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations, 97 FCC 2d 255 (1984) ("1984 Order"); Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations. 90 FCC 2d 895 (1982) ("1982 Order"); Second Report and Order, 86 FCC 2d 141 (1981); First Report and Order and Notice of Proposed Rule Making, 69 FCC 2d 200 (1978); Hispanic Broadcast System, Inc., Licensee of Noncommercial Educational Station WQQZ(FM), Clermont, Florida, DA 05-349 (rel. Feb. 9, 2005).

<sup>16</sup> Information in parentheses describes the visual component accompanying the audio.

**(1) Program:** Gaither Homecoming Hour. **Product:** "He Touched Me, the Gospel of Elvis Presley 2-volume video cassette set, plus 2-CD or 2-audio cassette set." **Duration:** 2 min, 10 sec. **Frequency:** This advertisement ran three times during the program.

**Transcript:** Elvis, the king of rock and roll. Now for the first time ever we see him in a whole new light. (Elvis wearing blue jumpsuit singing He Touched Me-- from late 60's early 70's) He touched me -- the gospel music of Elvis Presley (Elvis in 50's in white suit jacket singing Swing Down Sweet Chariot). This unique 2 volume video keepsake captures intimate interviews and powerful performances that reveal a side of Elvis that only his close friends & family have know until now. (shows Elvis wearing purple jump suit with gold scarf with JD Summers and group after concert singing Rock My Soul and Tell me Why) If you call now to order this amazing video set you'll also receive an exclusive 2 cassette or 2 CD collectors edition of 40 gospel favorites sung as only Elvis could sing them. (Shows Elvis wearing red suit jacket during late 60's singing Won't You Tell Me When Will I Go to the Lord) All 40 songs have been digitally re-mixed and re-mastered so you can experience each masterpiece with more clarity than ever before. (shows Elvis in various scenes from different concerts and shows wearing leather jacket and pants, white suite, 50's black and white tweed jacket and red suit singing Hand in the Hand of the Man who Calmed the Seas) A video keepsake featuring this inside look at Elvis' gospel roots is a priceless edition to any music collection, and it can be yours along with a bonus cassette or CD 2-pack collectors edition for only \$69.95 plus shipping and handling. To order have your credit card ready and call the number on the screen or send your check or money order to Elvis Offer, PO Box 119 Alexandria, IN 46001. Remember Elvis as never before. (shows video, Visa/Mastercard/Discover and phone number)

**(2) Program:** Horsecity Dot Com. **Product:** "Impact Gel Saddle Pad." **Duration:** 30 sec.

**Transcript:** (shows someone hitting impact gel saddle pad with a hammer and not crushing M&M's) You can protect your horse's back like this -- and like this. (shows man putting gel saddle pad on horse) The impact gel saddle pad by Horse Tracks is a revolutionary product that uses state of the art technology to put a significant level of comfort between you, your saddle and your horse. Used by AQHA world champions and trail riders alike, the impact gel pad is one saddle pad that proves its worth with every ride. You can find a dealer near you on our website [impactgel.com](http://impactgel.com). (shows phone number and website address)

**(3) Program:** Horsecity Dot Com. **Product:** "Winnie's Cookies." **Duration:** 30 sec.

**Transcript:** (shows container of Winnie's Cookies) Winnie's Cookies has a sample waiting for you. (shows woman feeding horse cookies) Trainers, clinicians and horse owners agree that one of the reasons their horses look good and perform so well (shows horses running around) is because of Winnie's Cookies. (shows woman talking about cookies) Winnie's Cookies work. Not only are they organic and they've got, you know, all the essential things in them, but the horses absolutely love them. (shows horse eating cookies) Winnie's Cookies is so sure that you and your horse will love their product they want to send you a sample. Our phone number for your Winnie's sample cookies packet is 866-946-6437. (shows phone number and website) Winnie's Cookies works like a supplement tastes like a treat.

**(4) Program:** Horsecity Dot Com. **Product:** "Bug Check." **Duration:** 33 sec.

**Transcript:** (shows man talking with someone riding horse in background) Pleasure, Performance, or pasture puppies pet, we all want what's best for our horses. Our mission at the Natural Horse Vet is to provide natural alternatives. Alternatives that work. (shows picture of bottle of Bug Check) Bug Check, no more sprays, no more chemicals. Just a small amount each day on the feed will significantly reduce the fly and mosquito population plus it is healthy -- not potentially harmful. (shows man rubbing dog's neck) It's our goal to provide the most effective natural alternatives for you your horse and even your pet. So visit your veterinarian, visit your tack store or visit us on line for our special offers. (shows phone number and website)

**(5) Program:** Horsecity Dot Com. **Product:** "Horsecity.com website." **Duration:** 30 sec.

**Transcript:** (shows Horsecity.com logo and website info) Horsecity.com -- the premiere equestrian destination on the internet today. Offering you more than just news you can use, we've got trucks, we've got horse trailers, plus we've got every equine discipline and breed found on the pleasure trail or in the show ring listed for sale in our classified. It's all just a quick click away. Buying or selling, horsecity classifieds offer results that bring users back time and time again. With over fifteen million dollars of horses and related items on line now, you're sure to find what you're searching for. Log on now [horsecity.com](http://horsecity.com). Keeping the horse world connected. (shows phone number and website)

**(6) Program: Horsecity Dot Com. Product: "Cover-All." Duration: 30 sec.**

**Transcript:** (shows people riding horses then Darrell Olsen standing inside his Cover-All barn) Hi, my name is Darrell Olsen and I love horses. One of the reasons we bought our Cover-All was because we wanted to train year round. And its cooler in the summer time and a lot warmer in the winter time and here it's big and, and wide open, it's nice that nothing's in the way. I've had a metal clad building and I've had the Cover-All. And the horses seem to react a lot better with the coverall. Of all the buildings I've had, and been in, this is the perfect building for horse and rider. (shows phone number and website)

**(7) Program: Horsecity Dot Com. Product: "Necessity." Duration: 30 sec.**

**Transcript:** (shows copy of magazine of Valley Vet Supply) Valley Vet Supply. Your one stop shop for all things equine and the rest of your farm too. One of their premier products is Necessity. Champions from all walks of the equine sports field choose Necessity. (shows bottle of Necessity) Twenty-one vitamins, trace minerals and amino acids plus glucosamine and MSM. Whether you're riding a local trail or winning at the national finals rodeo Necessity is the choice of champions. (shows someone riding horse) We're online at [valleyvet.com](http://valleyvet.com) and our phone number is 1-800-356-1005. (shows phone number and website)

**(8) Program: Horsecity Dot Com. Product: "Hoofjack." Duration: 30 sec.**

**Transcript:** (Shows man cleaning horse's foot) Hoofjack by Equine Innovations is a hoof support system designed with the comfort of the horse and the user in mind. (shows Hoofjack) From the equine enthusiast to the professional farrier, Hoofjack's innovative design makes hoof maintenance easier, more comfortable. Hoofjack is suitable on all horse sizes from the miniature to the draft. (shows horse's foot on Hoofjack) With the many attachments, Hoofjack is versatile enough for equine dentistry and minor surgical procedures. Instructional video available on line at [hoofjack.com](http://hoofjack.com). (shows phone number and website)

**(9) Program: Horsecity Dot Com. Product: "Tizwhiz Feeds." Duration: 30 sec.**

**Transcript:** (shows bag of horse food being opened) There are so many choices on the market when it comes to feeding your horse. That's why complex feeding questions deserve solid answers and that's the foundation on which Tizwhiz feeds have stood for over 50 years. (shows bucket being filled with horse food) From feeding a new foal to helping to your high dollar performance horse get that extra boost, Tizwhiz feeds are rooted in years of research and are backed by some of the nation's most trusted horse owners. (shows horse eating out of someone's hand) Tizwhiz feeds for serious horse owners who take a professional approach to caring for their horses. (shows bags of Tizwhiz and phone number)  
(shows field with fence) (shows phone number and website)

**(10) Program: Horsecity Dot Com. Product: "Gardner Fence Systems." Duration: 30 sec.**

**Transcript:** Gardner Fence Systems offers premium maintenance free vinyl horse fences for all fencing applications. Horse owners agree (man standing with mountains in background and fence) it'll add value to your property, it'll add safety to your horses, and it'll be something you'll be very proud of for many, many years. (shows US map) Picking up the supplies for your next horse fencing project is much easier with so many locations across the country. You can also take advantage of the on-line fence calculator to get an instant quote. (shows farm with fence) Gardner Fence Systems - safe, maintenance free horse fence for the horse industry. (shows phone number and website)

**(11) Program: Horsecity Dot Com. Product: "Weaver Leather Brand Tack & Equipment." Duration: 30 sec.**

**Transcript:** (shows people riding horses) In the performance arena or on the trail, if you're searching for the best looking highest quality tack, (shows tack shop store) look no farther than Weaver Leather Brand Tack and Equipment. Whether your ultimate rush comes from racing the clock or the solitary peace of a wooded trail, you'll find the style and substance you've been looking for at your local Weaver dealer. (shows man shopping in Weaver shop) The hottest colors, the most exciting new styles and durability you can always count on. One look and you'll see the difference. Weaver Leather Products are available at your local tack store. You can find a dealer at 1-800-Weaver1. (shows phone number and website)

**(12) Program: Big Joe Show. Product: "Big Joe TV Polkafest 4 CD set." Duration: 1 min, 26 sec. Frequency: This advertisement ran three times during the program.**

**Transcript:** Polka Paul from Omaha Nebraska and Big Joe is the best in the West. (shows people dancing with a man talking in a mic). Yes, yes, yes its available to you now. (shows people talking and the picture of the CD in

front) The four CD set that we made of four of the Medina polka festivities we have a few left over. That's right, a minimum number is left over and you can get your 4 CD set for only \$39.95, that's 72 polka's and waltz's. (shows CD and price) You'll want to order yours today. (shows CD and address) That's right, sit down and send in your check or your money order to Polka Cassettes of Nebraska, PO Box 3643, Omaha, NE zip it up 68103 or (shows CD and phone numbers & internet address) you can order on our toll free line that's 1-800-257-6552 that spells out 1-800-25-Polka or get on the internet that's [www.polkacatalog.com](http://www.polkacatalog.com). Order yours today. (Shows Big Joe talking) Nebraska Polka and we'll be right back after these chosen words. Take it away. (shows people dancing and CD in front) (shows phone number and website)

**(13) Program: Big Joe Show. Product: "A Salute to the American Farmer & Rancher CD or cassette." Duration: 1 min, 12 sec. Frequency: This advertisement ran two times during the program.**

**Transcript:** Fun, fun fun, it's exciting. Order it today. A salute to the American Farmer and Rancher. Only \$18.00 includes shipping and handling. (shows CD) 22 great polkas and waltz's such as the Old John Deere Polka, also the John Deere Waltz, for the rancher, Horsie Keep Your Tail Up, at the farm, why of course its Apple, Peaches, Pumpkin Pie. One hour six minutes long. CD or cassette. Either one only \$18.00. Order yours today by mail (shows CD and address) to Polka Cassettes of Nebraska, Post Office Box 3643, Omaha, NE zip it up 68103 or (shows CD and phone number and internet address) order by phone toll free 1-800-257-6552, 1-800-25-Polka easy enough, order on the internet, [www.polkacatalog.com](http://www.polkacatalog.com). (shows website)

**(14) Program: RV Today. Product: (Program and advertiser lead-in). Duration: 40 sec.**

**Transcript:** (shows golfer and RV driving down road) Golf at Pebble Beach as we tee-off on this exciting edition of RV Today. RV Today is brought to you by Goodyear. (shows scenery with Goodyear logo in front) RV'ing made easy on the wings of Goodyear. By Good Sam VIP, (shows scenery with Good Sam VIP logo in front) America's RV insurance specialist for over 25 years, and by the SUV of RV's, (shows scenery with Lance Camper logo in front) Lance Camper, America's favorite truck camper. Coming up, we finish our Tioga make-over project. (shows two men inside RV talking) (shows phone number and website)

**(15) Program: RV Today. Product: "Goodyear G670 RV tires." Duration: 30 sec.**

**Transcript:** (shows RV driving through trees) The great outdoors calls your name, but don't leave home without a set of Goodyear G670 RV tires, the choice for your home away from home. (shows RV and tires) The G670 RV made specifically for the RV'er. Visit Goodyear's website or a Goodyear retailer today. Learn about its quiet smooth ride, the G670 RV, the tire that makes RV part of its name, quiet yet durable. When the road comes calling on the wings of Goodyear. (shows website)

**(16) Program: RV Today. Product: "Jayco RV." Duration: 30 sec.**

**Transcript:** (Shows couple in a RV. Man showing little girl how to fix fishing line and says Gotta hook the string in the loop. Man knocks at door, woman says "baked an apple pie." Man at door says you guys are going to have to leave - we open at 9:00 - people are making themselves at home in an RV in a store parking lot) With over 80 floor plans and hundreds of dealers, it's easy to find your Jayco - leaving it - that can be hard. Jayco, America's most livable RVs.

**(17) Program: RV Today. Product: "Blue Ox RV supplies." Duration: 30 sec.**

**Transcript:** (shows safe door with Blue Ox logo on it - when opened, family appears in RV waving) Blue Ox has it all. A family of products for every RV. Sway Pro - the most user friendly hitch (shows hitch) you can find. Tru center when you need steering control (shows steering control) Blue Ox has it. Sport carriers (shows sport carriers on back of RV) when your ride needs a ride. Think Blue Ox from tow bars (shows tow bar on back of RV) to brakes, Blue Ox has it all. And for the ultimate in customer care, you can count on us to meet your needs (shows RVers picnicking) 24 hours a day, seven days a week. Blue Ox. Count on it.

**(18) Program: RV Today. Product: "Lance Camper." Duration: 30 sec.**

**Transcript:** I'm a Lance Camper, I'm a partner to a pickup truck. We can go places no other RV dare. I'll be your cabin by a mountain stream, (shows truck with camper by stream) we'll take your boat, (shows truck and camper pulling boat) (shows truck and camper with horse trailer) your horses or your other toys. I'll be a second home. (shows truck and camper driving around) We'll go everywhere. I'm a Lance Camper, of course. I'm America's favorite truck camper. (shows phone number and website)

**(19) Program: RV Today. Product: "Born Free Motor Coach." Duration: 30 sec.**

**Transcript:** (shows RV driving down road) The Born Free Motor Coach is the premiere touring vehicle. Its aerodynamic styling make it the most drivable coach in our industry. Safety is our mission as we surround you with a 2" tubular steel roll bar cage. We're known for our state of the art fiberglass, probably the best cabinet shop in the industry. If you're looking for drivability, safety and 21<sup>st</sup> Century styling, Born Free is the best. Sold factory direct - one price pricing. (shows phone number)

**(20) Program: RV Today. Product: "Good Sam Insurance." Duration: 60 sec.**

**Transcript:** (shows man talking with a puzzle behind him) When you need insurance for your car, our auto insurers may be a good fit, but trying to fit your RV into traditional auto insurance could leave you without the coverage you need. With the Good Sam vehicle plan (shows man talking with RV in background), RV's are not just a good fit they're a perfect fit. For years the Good Sam Club has made RV'ing safer, more enjoyable and saved its members money on specialized insurance for RVs. Like full replacement cost coverage should you ever have a total loss, personal effects coverage for contents and attachments, suspension of coverage when your RV is not in use, and specialized coverage for full-timers. (show couple talking) We switched to Good Sam VIP because they're RV people specializing in RV insurance. Good Sam VIP not only fills your RV specialized insurance needs, but by switching you may save over \$300, and should you have a claim, you could save thousands which all adds up to unbeatable values. Call now and get a free tool kit with a free VIP rate comparison. Call 1-800-236-4022. (shows phone number and website)

**(21) Program: RV Today. Product: (Program and advertiser lead-in). Duration: 20 sec.**

**Transcript:** (shows scenic background with logos of companies) RV Today is brought to you by Newmar Corporation. Experience affordable quality in a new Cypress 5<sup>th</sup> wheel. By Goodyear, RV'ing made easy on the wings of Goodyear, and by Jayco, America's most livable RV.

**(22) Program: RV Today. Product: "American Crystal Sugar." Duration: 30 sec.**

**Transcript:** (Shows man and woman) - [Woman says:] -- Is this all of it? [Man says:] -- \$2300 in just two weeks. Can we go fishing now? Woman says - Your \$2300 plus my \$2400 makes \$4700. Come work at American Crystal Sugar during the beet harvest and have your RV campsites paid while you earn up to \$2000 or more in just two weeks and world class hunting and fishing is just around the corner. (couple in RV - man says, What'll it be tonight Gladys, walleye or trout). (shows phone number and website)

**(23) Program: RV Today. Product: "Cypress 5<sup>th</sup> Wheel." Duration: 30 sec.**

**Transcript:** (shows couple looking at trees and then an RV) Experienced RV'ers recognize and appreciate the unsurpassed quality of Newmar craftsmanship. (shows outdoor scenes) Discover it for yourself in the all new affordable Cypress 5<sup>th</sup> wheel featuring Newmar's distinctive design and innovative features. Explore new growth with Newmar quality. It's our way of life and your key to the best RV'ing can be. To learn more, visit a Newmar dealer or go to [Newmarcorp.com](http://Newmarcorp.com). (shows website)

**(24) Program: RV Today. Product: "Dometic RV products." Duration: 30 sec.**

**Transcript:** (various pictures of people with RV's) At Dometic, we understand the importance of keeping life simple, comfortable, convenient. That's why we build products that are central to enjoying the RV lifestyle. Our spacious refrigerators, china toilets, efficient air conditioners and array of awnings, help keep RV'ers nourished, protected, clean and refreshed and ready for the next adventure. Dometic, it's your sign of comfort on the road. (shows website)

**(25) Program: Living the Country Life. Product: "Morton Buildings." Duration: 60 sec.**

**Transcript:** (shows a Morton Buildings sign and office building) At Morton Buildings we know that everyone has unique building dreams. In order to help your dreams come true, we offer a wide range of options. (shows a series of Morton Buildings in different styles and sizes) Whether you're looking for something basic, elaborate or something in between, we can make your vision a reality. (shows Morton Building representative discussing plans with a man and a woman) We also coordinate with you from concept to completion. At Morton Buildings, we're your one stop building shop. (a woman shares her positive comments) The first thing I say is well it's a Morton building and it's the best, and you can look around and I, go ahead look at all the brochures, calling other people, get bids but you're not going to get anything better, for the horse, for the money, for, for every reason and I'm always

recommending Morton and I would do it again. To view our gallery of buildings and to find out more about who we are and what we do, please visit our website at [mortonbuildings.com](http://mortonbuildings.com). (shows phone number and website)

**(26) Program: *Living the Country Life*. Product: "Mantis 'Swift Split' Log Splitter." Duration: 60 sec.**  
Transcript: (shows a man and a woman relaxing in front of a fireplace) For cozy nights by the fire or to warm your home all winter, nothing heats better than wood. But if you're tired of splitting wood by hand (shows man splitting wood by hand) or renting large machines (shows man pushing a large wood splitting machine), why not let the Swift Split do it for you. (shows two people using the product) The Swift Split by Mantis is easy to store and easy to use and it's electric. Just plug it in and you're ready to split. Its solid steel design and five-ton hydraulic force can cut through the toughest logs up to 12 inches thick. (shows women using the splitter in garages) And because it's electric, the Swift Split runs quietly and cleanly and can even be used indoors for small jobs or during bad weather. All you do is load your log, push both buttons and watch it go. (shows man and woman demonstrating the splitter) Split as much or as little as you need when you need it. We're so confident you'll love the swift split, that we're offering a one year money back guarantee. We call it the Mantis Promise and it's the only one of its kind. The Swift Split, the easy splitter from Mantis. (shows phone number and website)

These twenty-six excerpts demonstrate – conclusively – that RFD-TV uses its “noncommercial” DBS set aside channel to air commercial advertisements in direct violation of Section 325 of the Communications Act and the Commission’s rules. The advertisements promote the goods and services of for-profit entities.<sup>17</sup> Moreover, the advertisements violate every basic tenet of permissible donor acknowledgements, including the bans on comparative or qualitative descriptions, calls to action, pricing information, and inducements to buy. In addition, some of RFD-TV’s advertisements run for such long lengths of time (as much as two minutes and ten seconds) that the spots cannot help but violate the ban on promoting for-profit goods and services.<sup>18</sup>

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<sup>17</sup> Furthermore, even assuming for the sake of argument that the RFD-TV itself did not receive remuneration directly from the advertisers, that fact is of no consequence. Section 399B does not require that the consideration involved be supplied directly by the sponsor or underwriter itself. See *In re Window to the World Communications, Inc. (WTTW(TV))*, DA 97-2535 (MMB Rel. Dec. 3, 1997), *forfeiture reduced*, 15 FCC Rcd 10025 (EB 2000); *Jones College, Licensee of Noncommercial Educational Station WKTZ-FM, Jacksonville, Florida*, 18 FCC Rcd 24971 (MMB Rel. Dec. 1, 2003).

<sup>18</sup> See Board of Education of New York (WNYE-TV), 7 FCC Rcd 6864 (MMB 1992); Technology Information Foundation, Ltd., Licensee of Low Power Noncommercial Educational Station WLFK-LP, Eau Claire, Wisconsin, DA 04-3555, (rel. Nov. 9, 2004) (“Although the Commission has not imposed quantitative guidelines on the length of underwriting announcements, it has noted that the longer they are, the more promotional they tend to be.”).

**B. RFD-TV's Programming Includes Program Length Infomercials.**

Finally, RFD-TV essentially airs program-length commercials for live auctions of livestock, apparently in exchange for payments. The auctions take place live "on air" to permit viewers to bid on and purchase the livestock shown on the screen. On September 1, 2005, RFD-TV aired a livestock auction seemingly produced by and for Superior Livestock Auctions, Inc. over the course of approximately 150 minutes. The enclosed CD includes the first five minutes of that auction, and Exhibit 4 to the attached IRS Complaint provides a transcript of the video clip. While relatively short, this introductory segment alone demonstrates that the livestock auction constitutes outright paid commercial programming that belongs on a commercial channel. In fact, the opening two sentences make clear the infomercial's inherently commercial nature:

I'd just like to say thank you to everybody that came today and also to the viewing audience on RFD-TV that there'll be some buyers there, we want to thank you for joining us also. We stand behind these cattle 100% and if there's any problems, if you buy one, it's our problem, not yours.<sup>19</sup>

Such programming has no place on a DBS channel "set aside" for "noncommercial educational" use. Unfortunately, the September 1st auction was hardly an isolated affair. RFD-TV frequently airs live auctions from Superior Livestock Auction and apparently at least one other company. While some auctions occur over only a few hours, some are day-long events that displace RFD-TV's "regularly scheduled" programming. To take just two recent examples, the programming schedule from RFD-TV's web-site that is reprinted in Exhibit 2 to the IRS Complaint indicates that RFD-TV broadcast a live video auction on Thursday November 17, 2005, from 8:00 a.m. until 7:00 p.m. and another live video auction on Friday, November 18,

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<sup>19</sup> See Exhibit A.

2005, from 8:00 a.m. until 3:30 p.m. In other words, the majority of daytime hours in just these two days were comprised of livestock auctions.

The auctions unquestionably are a commercial activity because they are provided primarily to generate revenue for RFD-TV and as a means for auction companies and RFD-TV viewers to conduct business. The broadcast of the auctions, which occur several days a week and last several hours each, therefore appear to be directly contrary to RFD's status as a tax-exempt, noncommercial entity.

For all these reasons, RFD-TV's programming does not qualify as "noncommercial" for DBS set aside purposes. The past and continued airing of RFD-TV's programming on a channel set aside by Congress for noncommercial educational use has made a mockery of Section 325 of the Communications Act. The Commission should act immediately to ensure that the DBS set aside channels at issue are used exclusively for the noncommercial and educational programming as Congress directed by granting this Petition forthwith.

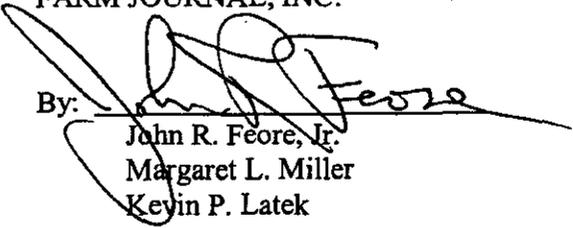
**III. Conclusion**

In implementing the congressional mandate to set aside DBS channel capacity for “national educational programming suppliers, the Commission faithfully construed the statutory language and intent of Congress in limiting eligibility for set aside channels to “noncommercial educational entities with an *educational mission*.” This Petition presents the Commission with the question of whether a commercial entity organized and operating for profit-making purposes can and should be permitted to occupy set aside channels on Directv and EchoStar.

We submit that the public interest requires the Commission to declare RFD-TV ineligible to use a DBS set aside channel. In doing so, the Commission will permit the public to reap the full benefit of *bona fide* noncommercial educational programming service on the DBS set aside channels as Congress intended – and directed.

Respectfully submitted,

FARM JOURNAL, INC.

By: 

John R. Feore, Jr.  
Margaret L. Miller  
Kevin P. Latek

Its Counsel

Dow, Lohnes & Albertson, PLLC  
1200 New Hampshire Avenue, N.W.  
Suite 800  
Washington, D.C. 20036-6802  
(202) 776-2000  
November 28, 2005



**ATTACHMENT 1**

**IRS COMPLAINT**

DOW, LOHNES & ALBERTSON, PLLC  
ATTORNEYS AT LAW

WASHINGTON, D.C.

JOHN R. FEORE, JR.  
DIRECT DIAL 202-776-2786  
jfeore@dowlohnesc.com

1200 NEW HAMPSHIRE AVENUE, N.W. • SUITE 800 • WASHINGTON, D.C. 20036-6802  
TELEPHONE 202-776-2000 • FACSIMILE 202-776-2222  
www.dowlohnesc.com

ONE RAVINIA DRIVE • SUITE 1600  
ATLANTA, GEORGIA 30346-2108  
TELEPHONE 770-901-8800  
FACSIMILE 770-901-8874

November 28, 2005

**VIA UPS**

Ms. Teresa Ciolek  
Internal Revenue Service  
Exempt Organizations Examination Division  
SE:T:EO:E  
1100 Commerce Street MC:4910:DAL  
Dallas, Texas 75242

**Re: RFD Communications, Inc. (EIN 75-2906765)**

**Complaint Regarding Operations Inconsistent  
With Tax-Exempt Status Under I.R.C. § 501(c)(3)**

Dear Ms. Ciolek:

This Complaint (the "Complaint") is submitted on behalf of Farm Journal, Inc. ("Farm Journal") to inform the IRS of certain operations of RFD Communications, Inc. (EIN 75-2906765) ("RFD") that Farm Journal believes are inconsistent with RFD's status as a charitable organization under I.R.C. § 501(c)(3) and that should lead the IRS to revoke RFD's tax-exempt status.

Attached for your reference as **Exhibit 1** is a copy of a separate pleading (the "FCC Petition") that we are concurrently submitting to the Federal Communications Commission ("FCC") about RFD. The FCC Petition demonstrates that the television programming provided by RFD for Direct Broadcast Satellite ("DBS") carriage contains blatant commercial advertisements and, therefore, violates the Congressional and FCC eligibility requirements for carriage on the direct broadcast satellite (such as Directv and EchoStar) channels that Congress specifically reserved for use for noncommercial programming of an educational or information nature (the "DBS set aside").

It is manifestly against public policy for RFD to enjoy the benefit of tax-exempt status under § 501(c)(3) while operating a television channel on Directv and EchoStar in clear violation of the laws governing the DBS set-aside program.

Farm Journal is a for-profit company that produces, distributes and sells advertising on two national television programs that target rural America and the agricultural community. Farm Journal believes that it is subject to unfair competition from RFD, because RFD is receiving substantial benefits from its tax-exempt status, yet it appears to be operating in the

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same manner as a for-profit broadcasting company by (i) providing paid advertising and commercial broadcasting at commercial rates, and (ii) otherwise conducting its business as a for-profit company.

In addition, it appears that (a) RFD has engaged in private inurement and/or excess benefit transactions; and (b) RFD is the direct successor to a for-profit company launched by RFD's president, Patrick Gottsch. We also note that RFD's Forms 990 indicate that RFD will fail the public support test and become a private foundation in 2006, which will impact any self-dealing transactions in the future.

The information presented herein is based on our understanding of all relevant and available facts as of this time. Farm Journal researched these facts based on, among other things, RFD's programming, RFD's tax filings, published news articles, and communications with those closely familiar with RFD's business. There may be other sources of information that would shed additional light on the issues raised herein. We urge the IRS to investigate RFD's activities in detail, including further exploring the facts presented in this letter and ascertaining any additional relevant facts that may bear on Farm Journal's belief that RFD's operations fail to comply with the operational test under I.R.C. § 501(c)(3) and the regulations thereunder.

#### **Background**

RFD is a tax-exempt organization under I.R.C. § 501(c)(3). RFD's web address is [www.RFDTV.com](http://www.RFDTV.com). Its 2003 Form 990 lists the following address:

22424 Wright Plaza  
Elkhorn, Nebraska 68022

This is also the address listed for its President, Patrick Gottsch. RFD's sales and administrative activities are performed at this office in Elkhorn, Nebraska. RFD produces its programming in the Northstar Studios in Nashville, Tennessee.

RFD's primary activity is the operation of a 24-hour television channel RFD-TV. RFD-TV is broadcast through Direct-To-Home ("DTH") systems on DirecTV Channel 379 and Dish (EchoStar) Channel 9409, and on several cable systems. The DTH systems charge RFD a below-market rate to carry RFD-TV as required by the FCC for noncommercial educational programming on the "DBS set aside" channels. (As noted above, we are enclosing a copy of our FCC Petition which discusses these FCC set-aside requirements in more detail and explains that RFD-TV fails to satisfy the FCC requirements.)

RFD-TV's programming is directed at a rural audience and the agricultural community. Farm Journal competes directly with RFD-TV, because Farm Journal produces, syndicates, and sells advertising on its own two rural lifestyle and agricultural news programs to television stations all across the country. Farm Journal's two programs are "AgDay," which has been in continuous production and syndication since 1982, and "U.S. Farm Report . . . Town & Country Living" ("U.S. Farm Report"), which has been in continuous production and syndication since

1975. The agricultural community comprises a large audience. However, the agricultural broadcasting market is highly competitive and has a very limited pool of large advertisers.

### **RFD-TV's Commercial Programming and Advertising**

In the 1992 Cable Act, Congress added a new Section 335(b) to the Communications Act of 1934, as amended, to set aside a certain amount of channel capacity on DBS systems for "national educational programming suppliers" to provide "exclusively . . . noncommercial programming of an educational or informational nature" at terms and rates for carriage that are substantially less onerous than market terms. 47 U.S.C. § 335(b). In implementing this statutory provision, the FCC concluded that the term "national educational programming supplier" "includes only noncommercial educational entities with an *educational mission*. The term should not be interpreted as including 'commercial' entities organized for profit-making purposes." *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, 23290 (1998) ("*First Report and Order*") (emphasis added), *on recon.*, 19 FCC Rcd 5854 (2003), *vacated in limited part*, 19 FCC Rcd 5647 (2004) (replacing political broadcasting requirements and guidelines concerning commercialization of children's programming). Furthermore, the FCC determined that the DBS "set aside" channel capacity could be used only by qualified noncommercial entities whose programming simply "cannot include advertisements." *Id.* at 23293-23294. To define "advertisement," the FCC invoked Section 399B of the Communications Act, which provides the operative definition of "advertisement" for noncommercial educational television stations (also known as public television stations). *Id.* (citing 47 U.S.C. § 399B). Consequently, whether RFD qualifies as a "noncommercial educational entit[y] with an educational mission" for purposes of the DBS set aside turns on whether RFD satisfies the same FCC – and the same IRS – requirements to which noncommercial (public) television stations must adhere.

In several revenue rulings, the IRS has held that organizations that produce educational programming can qualify as charitable organizations under I.R.C. § 501(c)(3) by providing such programming in compliance with the FCC requirements. Rev. Rul. 76-443, 1976-2 C.B. 149; Rev. Rul. 76-4, 1976-1 C.B. 145; *see also* Rev. Rul. 66-220, 1966-2 C.B. 209 (public radio station held FCC license to provide noncommercial educational broadcasting). In those rulings, the IRS concluded that "[t]he absence of commercial advertising is a key factor in determining the noncommercial nature of the programming activity." Rev. Rul. 76-443; Rev. Rul. 76-4. The IRS has allowed such organizations to collect "small fees . . . to help defray the organization's production costs of the programs" when the fees were "substantially less than those charged by commercial program production companies." Rev. Rul. 76-4; *see also* Rev. Rul. 76-443 (organization collected a "nominal fee"). In addition, the IRS has held that a tax-exempt organization's commercial programming and sale of commercial advertising (i) constitutes an unrelated trade or business activity subject to the unrelated business income tax and (ii) can be provided only for an insubstantial amount of air time. Rev. Rul. 78-385, 1978-2 C.B. 174; *see also* Rev. Rul. 68-563, 1968-2 C.B. 212 (public radio station did "not sell time for commercial broadcasts or advertising").

*Ms. Ciolek*

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RFD-TV's programming schedule is set forth on its website. A copy of a recent programming schedule is attached as **Exhibit 2**. The schedule shows that RFD's programming is directed to a rural audience and the agricultural community, which places it in direct competition with Farm Journal's programming. A large portion of the RFD-TV programming is supported by traditional commercial television advertisements (discussed below). In addition, certain programming such as the Superior Livestock Auction (also discussed below) constitutes commercial programming and advertising.

We have enclosed a CD, as **Exhibit 3**, containing a representative sample of video clips from RFD-TV showing extensive commercial advertising and programming on RFD-TV. We also have included a transcript of the commercial advertisements on the CD as **Exhibit 4**. The CD contains video clips from the following:

*1. Traditional Commercial Television Advertisements*

The enclosed CD shows 24 traditional commercial television advertisements that appear during RFD-TV's regular programming. The samples provided are all from programming recorded during the period August 31, 2005, to September 7, 2005. Many of these advertisements were broadcast multiple times during this period. The commercials on the CD plainly are advertisements for the sale of products and services for for-profit companies that far exceed the parameters of acceptable acknowledgements of sponsors. Among the products advertised in the commercials on the attached CD are the following:

Advertisement 1	Elvis Presley CDs
Advertisement 2	saddle pads
Advertisement 3	horse vitamins
Advertisement 4	horse feed additive to repel bugs
Advertisement 5	trucks, trailers, horses and related items
Advertisement 6	a type of farm building
Advertisement 7	horse vitamins
Advertisement 8	an implement to hold a horse's hoof for trimming and shoeing
Advertisement 9	horse feed
Advertisement 10	horse fence
Advertisement 11	saddles and other leather products
Advertisement 12	polka CDs
Advertisement 13	polka CD
Advertisement 14	specialty tires, recreational vehicle insurance, truck campers
Advertisement 15	specialty tires
Advertisement 16	recreational vehicles
Advertisement 17	recreational vehicle supplies
Advertisement 18	truck camper
Advertisement 19	recreational vehicle

Advertisement 20	recreational vehicle insurance
Advertisement 21	specialty tires, recreational vehicle
Advertisement 22	advertisement for employee position at sugar company
Advertisement 23	recreational vehicle
Advertisement 24	recreational vehicle appliances and supplies

These commercials are representative of the type of commercials found throughout RFD-TV's programming, and they continue today. On November 5, 2005, for example, RFD-TV premiered a new thirty-minute program entitled "Living the Country Life." As also reflected in the CD, this presentation includes numerous commercials that plainly are advertisements for the sale of products by for-profit companies. Among the products advertised in the commercials on the attached CD are the following:

Advertisement 25	building designer/supplier
Advertisement 26	log-splitter

These are merely examples of the traditional commercial television advertisements that are broadcast on RFD-TV. A thorough review of RFD-TV's programming reveals that such commercial advertisements air pervasively.

The revenue from these commercial advertisements, which we believe is very substantial, is not identified on RFD's Form 990 (except for a token amount listed on Part VII, line 93). Accordingly, the IRS should investigate the extent of RFD's commercial advertising and ascertain the amount of RFD's advertising revenue.

## 2. *Superior Livestock Auction*

The Superior Livestock Auction is, as the name implies, a livestock auction, but in this case conducted live on television. A more detailed description of the live television auction process is provided by an explanation on RFD's website, attached as **Exhibit 5**. According to a Superior Livestock Auction Press Release, dated November 21, 2005, attached as **Exhibit 6**, Superior Livestock Auction is the nation's leader in marketing load-lots of cattle via satellite and the Internet, and RFD-TV is the only television channel on which the Superior Livestock Auctions are aired. The magnitude of the business transacted in these auctions is illustrated by the attached press release which states that cattle producers from 23 states consigned over 28,000 head of livestock to the auction held on November 18, 2005, on RFD-TV.

RFD-TV frequently airs live auctions from Superior Livestock Auction. While some auctions occur over only a few hours, some are day-long events that displace RFD-TV's "regularly scheduled" programming. To take just two recent examples, the programming schedule from RFD-TV's website that is reprinted in **Exhibit 2** indicates that RFD-TV broadcast a live video auction on Thursday, November 17, 2005, from 8:00 a.m. until 7:00 p.m. and another live video auction on Friday, November 18, 2005, from 8:00 a.m. until 3:30 p.m. In other words, the majority of daytime hours in just these two