

*Before the*  
**FEDERAL COMMUNICATIONS COMMISSION**  
**WASHINGTON, DC 20554**

In the Matter of	)	
	)	
RFD Communications, Inc.	)	MB Docket No. 06-92
DBS Set Aside Qualifications	)	
	)	

**COMMENTS OF FREE PRESS**

Free Press<sup>1</sup> respectfully submits these comments in response to the Commission's *Request for Comment on Petition for Declaratory Ruling Regarding RFD Communications, Inc. and its Eligibility to Be Carried as a DBS Public Interest Noncommercial Programmer* (released April 20, 2006). These Comments address the necessity for prompt and vigorous enforcement of the DBS set-aside requirements in light of the blatant non-compliance of RFD Communications, Inc.-- and of Echostar and DirecTV -- with the requirements of 47 U.S.C. §335.

**INTRODUCTION**

Section 25 of the 1992 Cable Act, codified at 47 U.S.C. §335, establishes a reservation of direct broadcast (DBS) capacity for noncommercial use. In implementing this provision, the Commission stating that

The record in this proceeding reveals the wide variety of programming that could be available on DBS systems as a result of our implementation of these provisions. Distance learning programs on all grade levels could greatly expand educational opportunities for many segments of society. In addition, some commenters have proposed offerings that would allow major universities to share research projects with

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<sup>1</sup>Free Press is a national nonpartisan organization working to increase informed public participation in crucial media policy debates, and to generate policies that will produce a more competitive and public interest-oriented media system with a strong nonprofit and noncommercial sector. It has approximately 200,000 members, including many who are subscribers to DBS and who create non-commercial video programming.

consumers across the country. Rural libraries could benefit from expanded resources. Other possible programming could include children's educational programming, as well as a wide array of medical, historical, and scientific programming. We expect that the decisions we make here will contribute to enhanced viewing opportunities for consumers throughout the United States.

*Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Public Interest Obligations*, 13 FCC Rcd 5647, ¶3 (1998) (“*First Report and Order*”), *on recon.*, 19 FCC Rcd 5854 (2003), *vacated in limited part*, 19 FCC Rcd 5674 (2004) (footnotes omitted).

This expectation has largely been met over recent years. There is, indeed, a wide variety of programming which has been made available *via* the DBS set-aside. There are many more applicants for this capacity than the two major DBS operators have been able to accommodate.<sup>2</sup> While DBS set aside programming can educate and inform Americans of all ages and socioeconomic backgrounds wherever they reside and work, this extraordinary value can be fully realized only if the Commission follows the unequivocal dictates of Congress to make the set-aside programming a reservoir of affordable and accessible noncommercial educational and informational content.

It is therefore a matter of significance that at least one set-aside channel has been misused. The record in this proceeding establishes that both DirecTV and Echostar have permitted RFD Communications, Inc. ("RFD-TV") to pollute this precious preserve of publicly owned spectrum with commercial, non-educational programming that does not, by any stretch of the imagination, qualify for carriage on the set-aside capacity. Carriage of RFD-TV in lieu of qualified programming deprives the public of access to any of the numerous other legitimate non-commercial programmers which have been denied space on the DBS set-aside channels and denies such programmers the ability to speak

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<sup>2</sup>The Echostar and DirecTV public files show that many more programmers seek carriage than they can accommodate. In addition, a 2004 survey submitted in the Daystar/Dominion proceedings listed numerous programmers eager for space on the reserved capacity.

to the public.

The fact that RFD-TV has belatedly met with FCC staff to offer vague promises of future compliance does not obviate the need for action. To the contrary, this underscores the fact that the DBS operators have not been diligent in protecting the purpose of the set-aside, and that the Commission must move with alacrity. Thus, the Commission should demonstrate the importance of this matter by issuing a strong and clear declaration of the unlawful nature of RFD-TV's current practices and showing a willingness to take prompt and swift steps to enforce Section 335 in the future.

**I. THE COMMISSION MUST PROMPTLY ENSURE THAT THE DBS SET-ASIDE CHANNELS ARE USED FOR NON-COMMERCIAL PURPOSES.**

Farm Journal, Inc. has presented incontrovertible evidence that RFD-TV has been airing impermissible commercial programming on channel capacity that is supposed to be reserved exclusively for non-commercial programming, as required by 47 USC §335. The Commission has the discretion to issue a declaratory ruling to terminate a controversy or remove an uncertainty. 5 USC §554(e); 47 CFR § 1.2. The Commission, in this case, should promptly issue a ruling declaring RFD-TV to be in violation of 47 USC §335.

The Commission has always interpreted the public interest standard on the Communications Act as including within it the First Amendment goal of assuring that the public receive access to diverse programming from diverse and antagonistic sources. *See, e.g., Red Lion Broadcasting Co. v. FCC*, 395 US 367 (1969) (“[T]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”). In assuring that direct broadcast satellites (“DBS”) used their spectrum for public, as well as private, purposes, Congress enacted 47 USC §335 to define the means by which public access

rights would be assured on the DBS service. Congress intended Section 335(b) “to define the obligation of direct broadcast satellite service providers to provide a minimum level of educational programming.” House Committee on Energy and Commerce, H.R. Conf. Rep. No 102-862, at 222 (1992). Among other requirements, Section 335 required operators to reserve between 4 and 7 percent of their channel capacity “exclusively for noncommercial programming of an educational or informational nature.” The Commission’s rules, therefore, require DBS operators to set aside four percent of their channel capacity exclusively for noncommercial programming of an educational or informational nature (“set-aside”). 47 CFR §25.701(f)(1).

The record in this proceeding shows that, for more than five years, DirecTV and Echostar have complacently carried RFD-TV on their satellites notwithstanding the clearly impermissible character of RFD-TV’s service. There is no indication that either has taken any steps to protect the integrity of the DBS set-aside, even after Farm Journal, Inc. presented unequivocal evidence of the clearly commercial nature of the RFD-TV programming.<sup>3</sup> Indeed, RFD-TV carried a livestock auction in the days preceding the deadline for filing comments in this proceeding. See Exhibit B. There is strong reason to believe that there is other suspect programming on the set-aside channels.<sup>4</sup>

While it ought to be obvious to any observer, including Echostar and DirecTV, that RFD-TV is not qualified to be on the set-aside space, and that the programming on RFD-TV is clearly commercial in nature, it is apparent that DirecTV and Echostar will take no action to protect the set

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<sup>3</sup>Thus, any claim that DirecTV and/or Echostar can rely upon certifications from RFD-TV is misplaced. The licensees have been on actual notice for almost six months, yet have taken no steps to enforce Section 335.

<sup>4</sup>In particular, Dominion Satellite filed a complaint against Echostar’s carriage of Daystar on its set-aside space. Dominion alleges, *inter alia*, that Daystar’s programming is not non-commercial in nature. Daystar has also requested declaratory relief on the same issues. See File No. EB-IH0018.

aside absent a Commission declaration that the RFD-TV service does not meet the requirements of Section 335.

The need for Commission action is in no way diminished by the fact RFD-TV has recently met with Commission staff regarding this matter and appears to have conceded that it has used the set-aside improperly. *See Ex Parte Presentation in MB Docket No. 06-92*, May 18, 2006 (“RFD-TV has established a detailed plan to ensure compliance with the FCC’s relevant underwriting standards”). To the contrary, RFD-TV’s admission underscores the abject failure of DirecTV and Echostar to preserve the non-commercial nature of the set-aside and the non-delegable responsibility of the Commission to protect the needs of the listeners and programmers Free Press represents by issuing the requested ruling.

## **II. RFD COMMUNICATIONS HAS BEEN AIRING COMMERCIAL PROGRAMMING ON THE DBS SET-ASIDE, IN VIOLATION OF THE COMMUNICATIONS ACT.**

At issue is whether RFD-TV programming constitutes “noncommercial programming of an educational or informational nature” as required under Section 335(b)(1) of the Communications Act. Section 335(b)(1) of the Communication Act requires that the reserved channels on DBS systems be used “exclusively for noncommercial programming of an educational or informational nature.” The Commission has not defined the term “educational or informational” programming. *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 5647, ¶ 94 (1998) (“*First Report and Order*”), *on recon.*, 19 FCC Rcd 5854 (2003), *vacated in limited part*, 19 FCC Rcd 5674 (2004). However, the Commission has provided guidance as to what constitutes “noncommercial” programming. The Commission has determined that “in order to qualify as noncommercial programming, the programmer cannot include advertisements.” *Id.* at ¶ 95.

The Commission has referred to Section 399B to define “advertisement.” *Id.* at n. 206. Section 399B defines “advertisement” as “any message or other programming material which is broadcast or otherwise transmitted in exchange for any remuneration, and which is intended ... to promote any service, facility, or product offered by any person who is engaged in such offering for profit.”

The Commission has also referenced 47 CFR §73.621 as providing guidance for what constitutes impermissible commercial advertising. *Id.* at n. 206. Section 73.621(d) prohibits the broadcast of “programs produced by or at the expense of, or furnished by persons other than the licensee” when “consideration [other than] the furnishing of the program and the costs incidental to its production and broadcast are received by the licensee.” Additionally, Section 73.621(e) prohibits the broadcast of “promotional announcements on behalf of for profit entities ... at any time in exchange for the receipt, in whole or in part, of consideration to the licensee, its principals, or employees. However, acknowledgments of contributions can be made.”

The Commission has determined that “consideration”

encompasses the contribution of programming material and funds, goods and/or services used for programming, as well as in kind contributions (*e.g.*, studio equipment) which frees station funds for programming purposes. A public broadcaster is precluded from promoting an individual’s or entity’s goods, services or activities, where the broadcaster receives or reasonably anticipates the receipt of consideration from such individual or entity (other than a non-profit organization). Thus, a public broadcaster’s decision to promote third parties must be based on public-spirited determinations rather than economic considerations. Where consideration ... is provided, the public broadcaster is, however, required to acknowledge the donor under 47 CFR § 73.1212.

*Commission Policy Concerning the Noncommercial Educational Nature of Educational Broadcasting Stations*, 90 FCC 2d 895, ¶26 (1982) (“1982 Order”). Thus, while commercial advertising is prohibited, the regulations, however, do provide an exception for donor and underwriter announcements.

Donor and underwriter announcements allow the station to air acknowledgments that provide:

(1) logograms or slogans which identify but do not promote; (2) location information; (3) value neutral descriptions of a product line or service; and (4) brand and trade names and product or service listings. *Commission Policy Concerning the Noncommercial Educational Nature of Educational Broadcasting Stations*, 97 FCC 2d 255, ¶13 (1984) (“1984 Order”). On the other hand, donor and underwriter announcements cannot include such things as calls to action, price information, or comparative or qualitative descriptions. See *American Heritage Media, Inc. (KFLP-LP)*, Letter Re Application for Station License, November 3, 2005. Additionally, while the Commission has not adopted quantitative restrictions on the length of underwriting announcements, it has, however, noted that the longer they are, the more promotional they tend to be. See *Board of Education of New York (WNYE-TV)*, Letter of Caution, 7 FCC Rcd 6864 (MMB 1992). Broadcasters are expected to exercise reasonable, “good faith” judgment in determining whether a donor or underwriter announcement promotes or merely identifies the underwriter. *1982 Order* at ¶26.

A review of some of the sponsors of the announcements indicate that the announcements are sponsored by for-profit entities.<sup>5</sup> For example, the product “Impact Gel Saddle Pad” is produced by Impact Gel Equine. Impact Gel Equine is registered in Wisconsin as a domestic limited liability company. Gardner Fence Systems is registered in Minnesota as a (for profit) domestic corporation. Born Free is registered in Iowa as a registered for-profit domestic corporation. The product “Cypress 5<sup>th</sup> Wheel” is produced by Newmar Corporation. Newmar Corporation is registered as a for-profit domestic corporation. The Commission should further inquire into the legal status of the remaining sponsors, but it is evident that RFD-TV has allowed for-profit companies to place announcements

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<sup>5</sup>Exhibit B provides the corporate organization records of some of the announcement sponsors.

on its channel.<sup>6</sup>

These announcements, sponsored by the for-profit entities, also cannot constitute donor or underwriter acknowledgments. A review of the programming information provided in Farm Journal Inc.'s petition indicates that RFD-TV has engaged in significant and obvious commercial advertising, which cannot fall within the exemption allowing for donor and underwriter announcements and thus violates Section 73.621(e). The announcements listed in Farm Journal, Inc.'s petition air information that is strictly and obviously prohibited by the regulations, and any good-faith judgment cannot determine otherwise.

For example, many of the announcements provide pricing information. *See Farm Journal Petition* at 8-12.<sup>7</sup> Other announcements include calls to action. *Id.* at 8-12.<sup>8</sup> Almost all of the announcements contain comparative or qualitative descriptions. *Id.* at 8-12.<sup>9</sup> Finally, many of the

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<sup>6</sup>The Commission should also make further inquiry into whether RFD-TV, did in fact, receive consideration from these entities for the announcements.

<sup>7</sup>For example, announcements with pricing information include: "He Touched Me, the Gospel of Elvis Presley 2-volume video cassette set, plus 2-CD or 2-audio cassette set;" "Big Joe TV Polkafest 4 CD Set;" "A Salute to the American Farmer & Rancher CD or cassette;" "Good Sam Insurance."

<sup>8</sup>For example, announcements with calls to action include "Bug Check" ("visit us on line for our special offers"); "Gardner Fence System" ("take advantage of the on-line fence calculator to get an instant quote"); "Big Joe TV Polkafest 4 CD Set" ("Order yours today"); "A Salute to the American Farmer & Rancher CD or cassette" ("Order yours today by mail"); "Cypress 5<sup>th</sup> Wheel" (visit a Newmar dealer); and "Morton Building" ("please visit our website").

<sup>9</sup>For example, announcements with comparative or qualitative descriptions include "Impact Gel Saddle Pad" (saddle pad "is a revolutionary product that uses state of the art technology"); "Tizwhiz Feeds" ("Tizwhiz feeds are rooted in years of research and are backed by some of the nation's most trusted horse owners"); "Weaver Leather Brand Tack & Equipment" (the "hottest colors, the most exciting new styles and durability you can always count on"); "Born Free Motor Coach" ("We're known for our state of the art fiberglass.... Born Free is the best.") and "Mantis Swift Split Log Splitter" ("it's the only one if its kind").

announcements run for over 30 seconds. *Id.* at 8-12.<sup>10</sup> While there is no quantitative standard, the Commission has previously found announcements ranging from 36 to 49 seconds are in “excessive length” *Technology Information Foundation, Ltd.*, 19 FCC Rcd 22191, ¶ 7 (EB 2004), and therefore are more likely to be commercial advertisements.

In addition to the commercial advertisements, RFD-TV also airs program length infomercials, which including live auctions. Again, it is evident that these infomercials are not permitted donor and underwriter announcements. Based on the information provided in Farm Journal, Inc.’s petition, these infomercials contain pricing information (*i.e.*, how much to bid), calls for action (*i.e.*, encouraging viewers to bid on the merchandise), and qualitative information (*i.e.*, “We stand behind these cattle 100%”). Consequently, these infomercials constitute impermissible commercial advertisements under Section 73.621(e).

Additionally, the Commission should request information regarding the production of the infomercial and any revenues RFD-TV may generate from these auctions. This inquiry will determine if there is also a violation under Section 73.621(d). That is, if the infomercial was not produced by RFD-TV and RFD-TV also shares revenues from the auction, this could constitute consideration. As a result, the infomercials would not only constitute impermissible commercial advertising, but also impermissible commercial programming.

## CONCLUSION

These circumstances cry out for prompt Commission action. RFD-TV, and perhaps others,

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<sup>10</sup> For example, “He Touched Me, the Gospel of Elvis Presley 2-volume video cassette set, plus 2-CD or 2-audio cassette set” ran for 130 seconds; “Big Joe TV Polkafest 4 CD Set” ran for 86 seconds; “A Salute to the American Farmer & Rancher CD or cassette” ran for 72 seconds; “Good Sam Insurance” ran for 60 seconds” and “Morton Buildings” ran for 60 seconds.

are misusing the scarce space set aside for the educational needs of the American public. The DBS operators have turned a blind eye to the problem. In the absence of FCC action making it clear that the law means what it says, they have no incentive to protect the integrity of the set-aside.

Accordingly, the Commission should promptly grant the Farm Journal, Inc. petition, declare that RFD-TV is not a qualified educational programming supplier within the meaning of 47 USC §335, that RFD-TV's programming is commercial in nature, place DBS licensees on notice that they will be held accountable for knowingly acquiescing in the carriage of program channels on the DBS set-aside which are incontrovertibly commercial in nature, and grant all such other relief as may be just and proper.

Respectfully submitted,

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