

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	MM Docket No. 93-8
Implementation of Section 4(g) of)	
the Cable Television Consumer)	
Protection and Competition)	
Act of 1992)	
)	
Home Shopping Station Issues)	

**COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

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Executive Summary

The National Association of Broadcasters hereby responds to the Commission's request to update the record regarding a petition for reconsideration about broadcast stations that air home shopping programming. The Commission's 1993 conclusions that home shopping stations serve the public interest, and are accordingly qualified for cable carriage, comport with the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act") and are supported by the record. There are no legal or policy reasons to reverse the Commission's decision at this late date.

Section 4(g) of the 1992 Cable Act required the Commission to conduct a proceeding to determine whether broadcast television stations predominantly utilized for the transmission of sales presentations or program length commercials serve the public interest. In conducting this public interest inquiry, Section 4(g) specifically instructed the Commission to consider three factors: (1) the viewing of such stations; (2) the level of competing demands for the spectrum allocated to such stations; and (3) the role of such stations in providing competition to non-broadcast services offering similar programming. The statute then specified that any home shopping station that the Commission concluded served the public interest would also qualify for must carry under the Cable Act.

After conducting the required proceeding, the Commission in 1993 determined, based on the three statutory factors and the overwhelming majority of comments, that home shopping broadcast stations serve the public interest and are therefore eligible for mandatory cable carriage. In a petition for reconsideration filed in 1993, the Center for the Study of Commercialism ("CSC") claimed that the Commission improperly conducted the public interest inquiry.

However, CSC's attacks on the Commission's decision are incorrect and lack relevance under the clear terms of Section 4(g). The Commission properly concluded, under each of the three factors set forth by Congress in the statute, that home shopping stations serve the public interest. Television industry and legal developments since 1993, including the Supreme Court's affording of greater First Amendment protections to commercial speech, only further support the Commission's decision. Moreover, broadcasters have clearly relied for the last 14 years on the Commission's determination and its consequences for stations' must carry rights. CSC has presented no basis in law or fact for reversing the Commission's decision, and thus the Commission should deny CSC's petition.

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To: The Commission

**COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters (“NAB”)¹ submits these comments in response to the Commission’s request² to update the record regarding the Center for the Study of Commercialism’s (“CSC”) Petition for Reconsideration³ in the captioned proceeding. Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992 (“Cable Act”) required the Commission to conduct a proceeding to determine whether broadcast stations that “predominantly” air home shopping content serve the public interest, convenience and necessity, and are thus qualified for cable carriage under the Cable Act. As the NAB has demonstrated

¹ The National Association of Broadcasters is a trade association that advocates on behalf of more than 8,300 free, local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the Courts.

² *Commission Seeks to Update The Record For A Petition For Reconsideration Regarding Home Shopping Stations*, Public Notice, DA 07-2005 (May 4, 2007) (“*Public Notice*”).

³ Petition for Reconsideration of the Center for the Study of Commercialism in MM Docket No. 93-8, filed August 23, 1993 (“*Petition*”).

through previous filings in this proceeding,⁴ home shopping broadcast stations operate in the public interest and are therefore eligible for mandatory cable carriage. The Commission correctly determined in its 1993 *Report and Order*⁵ that home shopping stations operate in the public interest, as defined under Section 4(g), and there is no basis for reversing that determination now.⁶ In fact, both legal and industry developments since the adoption of the *Report and Order* only bolster the Commission's decision. Broadcasters have relied, moreover, for 14 years on the *Report and Order*'s conclusions and their consequences for stations' must carry rights. The Commission should accordingly deny CSC's request for reconsideration.

I. The Commission's Conclusion That Home Shopping Stations Serve The Public Interest Comports With The Cable Act And Is Supported By The Record.

Section 4(g) of the Cable Act directed the Commission to undertake a proceeding to determine whether "broadcast television stations that are predominantly utilized for the transmission of sales presentations or program length commercials" (*i.e.*, home shopping broadcast stations) serve the public interest, convenience and necessity. 47 U.S.C. § 534(g)(2). In conducting this public interest inquiry, Section 4(g) instructed the Commission to consider three factors: "the viewing of such stations, the level of competing demands for the spectrum allocated to such stations, and the role of such stations in providing competition to non-broadcast services offering similar programming." *Id.* The statute then specified that any home shopping

⁴ Comments of the National Association of Broadcasters in MM Docket No. 93-8, filed March 29, 1993 ("NAB Comments"); Opposition of the National Association of Broadcasters to Petition for Reconsideration in MM Docket No. 93-8, filed September 30, 1993 ("NAB Opposition").

⁵ *Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 8 FCC Rcd 5321 (1993) ("*Report and Order*").

⁶ *See Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 42 (1983) ("an agency changing course . . . is obligated to supply a reasoned analysis for the change").

station that the Commission concluded served the public interest would also qualify for must carry under the Cable Act. *Id.* But even if the Commission determined that one or more home shopping stations failed to serve the public interest, Section 4(g) required the Commission to allow these station licensees a “reasonable period within which to provide different programming, and shall not deny such stations a renewal expectancy solely because their programming consisted predominantly of sales presentations or program length commercials.” *Id.*

After conducting the required proceeding, the Commission in 1993 determined, based on the three factors set forth in the statute and the “overwhelming majority of comments,” that home shopping broadcast stations served the public interest, should not be required to modify their program formats to retain or obtain renewal of their licenses, and were eligible for mandatory cable carriage.⁷ In its subsequent Petition, CSC claimed that the Commission improperly conducted the public interest inquiry. Specifically, CSC alleged that the agency ignored the issue of “excessive commercialization” and failed to consider whether the spectrum used for home shopping stations “could be put to better use by non-broadcast services.”⁸

As NAB explains below, CSC’s attacks on the 1993 *Report and Order* are incorrect and lack relevance under Section 4(g). The Commission properly concluded, under each of the three factors set forth by Congress in the statute, that home shopping stations serve the public interest. Television industry and legal developments since 1993 only further support the Commission’s decision. Moreover, broadcasters have clearly relied for the last 14 years on the *Report and Order*’s conclusions and their consequences for stations’ must carry rights in making significant

⁷ *Report and Order* at ¶¶ 2, 36.

⁸ Petition at ii-iii.

business decisions, including whether to sell or acquire television stations. For all these reasons, there is no basis for now reversing the Commission's 1993 determinations, and CSC's Petition should therefore be denied.

A. CSC's "Overcommercialization" Claims Are Unmeritorious.

In its Petition, CSC argued that the Commission failed to consider in its public interest analysis the significant amount of commercial programming aired by home shopping stations.⁹ CSC is wrong. The Commission directly considered this argument at paragraphs 24-28 of its *Report and Order*, but found it unpersuasive. Indeed, the Commission recognized that CSC's argument was, in effect, a claim that commercial material does not serve the public interest and that market forces would not limit commercial content. It analyzed both contentions and found, on the public interest point, that home shopping stations provide an important service and, on the market forces point, found no evidence to suggest that these stations would survive if viewers were dissatisfied.

Moreover, CSC's "overcommercialization" claim is irrelevant in this proceeding because excessive commercialization is not one of the factors set forth by Congress to be considered under Section 4(g). None of the three factors Congress explicitly directed the Commission to consider in its public interest determination even refer to the amount of commercial programming aired by home shopping stations. As the Commission stated in the *Report and Order*, "[h]ad Congress found that the market had failed [to control the level of commercialization], we believe that it would specifically have so stated."¹⁰

⁹ *Public Notice* at ¶ 6 (requesting comment on this assertion).

¹⁰ *Report and Order* at ¶ 27.

CSC’s continuing allegation that the excessive commercialization of home shopping broadcast stations “is incompatible with the public interest”¹¹ is contrary to the record and the Commission’s express findings in this proceeding. As previously explained by NAB, there is a substantial public interest in the carriage of information about products and commercial transactions on broadcast stations. The U.S. free market economy depends on the availability of a free flow of information about goods and services, which consumers can use to make informed choices.¹² Home shopping broadcast stations often include information about products that may help consumers make more educated decisions about purchases. The Supreme Court itself has recognized that, in light of our nation’s free enterprise economy, “the free flow of commercial information” not only serves individual consumers and the “general public interest,” but is in fact “indispensable.”¹³

As previous commenters in this proceeding explained, home shopping programming provides a particularly valuable service to certain viewers, including the disabled and the elderly, those lacking transportation, and consumers in rural areas who have restricted access to national discount distributors with goods at competitive prices. Additionally, home shopping broadcast stations serve an important purpose in the marketplace, providing competition to both local and national retailers, as well as to cable and satellite home shopping channels. *See* Cable Act § 4(g), 47 U.S.C. § 534(g)(2) (directing FCC to consider “role” of home shopping broadcast “stations in providing competition to nonbroadcast services offering similar programming”).

¹¹ Petition at 3.

¹² NAB Opposition at 6.

¹³ *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 764-765 (1976).

In the *Report and Order*, the Commission recognized all of these varied benefits that home shopping stations provide to viewers.¹⁴ The fact that home shopping stations do provide such benefits to viewers and are not incompatible with the public interest, as asserted by CSC, is demonstrated by the “continued success” and “significant viewer support” of these stations.¹⁵ See Cable Act § 4(g), 47 U.S.C. § 534(g)(2) (directing FCC to consider “the viewing” of home shopping stations in making public interest determination). After all, “if viewers were dissatisfied with their level of commercialization,” there would be no reason for these home shopping stations to have “survive[d] in an increasingly competitive video marketplace.”¹⁶ The CSC not only ignores all of the benefits that home shopping broadcast stations provide, and their support by viewers, but also requests reconsideration based on “overcommercialization” claims outside the scope of the factors Congress specifically set forth for the Commission to consider in making the requisite public interest determination.

However, even if the allegedly excessive amount of commercial programming on home shopping stations was an appropriate factor to consider further in this proceeding, CSC’s assertion that the Commission’s public interest inquiry should focus solely on the programming involving “sales presentations” is legally flawed. CSC claims that the legislative history of Section 4(g) supports its view that only sales presentation programming, not station performance taken as a whole, should be the focus of the Commission’s public interest inquiry under Section

¹⁴ See *Report and Order* at ¶¶ 4-6, 13-22, 28.

¹⁵ *Report and Order* at ¶ 6.

¹⁶ *Id.* at ¶ 27.

4(g).¹⁷ CSC’s characterization of the Commission’s public interest inquiry not only runs counter to the language of Section 4(g), but also congressional intent as expressed in the 1996 Telecommunications Act and the increased First Amendment protections afforded to commercial speech under recent Supreme Court precedent.

As NAB has previously argued in detail, the language of Section 4(g) is clear.¹⁸ The Cable Act requires the Commission to determine whether “broadcast television *stations* that are predominantly utilized for the transmission of sales presentations or program length commercials are serving the public interest, convenience, and necessity” (emphasis added).¹⁹ The statute clearly directs the Commission to determine whether the stations themselves are serving the public interest, not just whether certain programming on those stations met a public interest test. Had Congress’ intention been different, Section 4(g) could easily have been drafted to make clear that it was sales presentation programming, or the home shopping format itself, that should be the focus of the Commission’s public interest determination. Instead, Section 4(g) explicitly directs the Commission to make three specific determinations about home shopping “stations.” Given the clarity of the statutory language, there is no need for further inquiry into congressional intent behind Section 4(g).²⁰

¹⁷ Petition at 3-5 (maintaining that the “non-sales programming broadcast by typical home shopping stations was *irrelevant* to the question” of whether stations with home shopping program formats serve the public interest) (emphasis added).

¹⁸ NAB Opposition at 1-4.

¹⁹ NAB Opposition at 2, quoting 47 U.S.C. § 534(g)(2).

²⁰ See, e.g., *Darby v. Cisneros*, 509 U.S. 137 (1993) (recourse to legislative history found unnecessary in light of plain meaning of statutory text in question). NAB also notes that CSC’s claim that the “legislative history of Section 4(g) supports” its view of the statute is based solely on a single quote from the Congressional record. See Petition at 4-5.

Congress has also made clear, subsequent to the Commission's decision in this proceeding, that the Commission's public interest determinations are to be made as to the station as a whole, not any particular programs aired by that station. Section 204 of the Telecommunications Act of 1996, adding subsection 309(k) to the Communications Act, requires the Commission to renew a broadcast station license if the *station* has served the public interest.²¹ Making a public interest determination based solely on the fact that the station airs certain programming or has a specific type of format would directly contradict Section 309(k). In any event, NAB notes that, since CSC filed its Petition in 1993, all television stations in the U.S., including home shopping stations, have twice undergone the license renewal process. The Commission has therefore determined on multiple occasions that stations choosing to air home shopping programming can and do in fact serve the public interest – presumably even if they air amounts of such programming that CSC deems “excessive.”

Given the Commission's repeated findings that home shopping stations serve the public interest, there can be no valid policy or legal reason for the Commission to now regard sales presentation programming (even if the “predominant” programming on a station) as inherently incompatible with the public interest. As previously pointed out by NAB, when Congress first adopted the system of privately owned broadcast stations, it accepted the inclusion of commercial programming as the way to financially support that system.²² Since the revenues derived from carriage of commercial speech make it possible to produce and transmit all types of

²¹ “If the licensee of a broadcast station submits an application to the Commission for renewal of such license, the Commission shall grant the application if it finds, *with respect to that station*, during the preceding term of its license—(A) the *station* has served the public interest, convenience, and necessity.” 47 U.S.C. § 309(k)(1) (emphasis added).

²² NAB Opposition at 5-6.

programming, including entertainment, news and public affairs, it would only be appropriate to view commercial speech itself as advancing the public interest.

Moreover, NAB observes that CSC's Petition in essence calls for restrictions on commercial speech, which would raise serious First Amendment concerns. The Petition rests on an underlying assumption that commercial programming lacks value and should be disfavored by government policy. Such an assumption is contrary to law, however. As previously discussed by NAB in this proceeding, the courts have recognized the right to disseminate truthful information needed for consumers to make informed decision about products and services.²³ Commercial speech receives a high level of protection under the First Amendment, and government regulation of truthful commercial speech is subject to increasingly stringent judicial scrutiny. In the 14 years since CSC filed its Petition, the Supreme Court has substantially strengthened commercial speech protections.²⁴ Sales presentations and program length commercials aired on broadcast stations therefore must be accorded significant First Amendment protection. If the Commission were to accept CSC's assumption that home shopping broadcast stations do not operate in the public interest, simply because of their programming format or the allegedly "excessive" amounts of commercial programming they air, it would raise serious First Amendment issues. The Commission's acceptance of CSC's position would also be contrary to

²³ NAB Opposition at 6. *See also Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980) (setting forth a four-part test for assessing whether a regulation of commercial speech comports with the First Amendment).

²⁴ *See, e.g., 44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996) (law banning the advertisement of retail liquor prices held to be unconstitutional because it failed to directly advance the State's asserted interest in promoting temperance and was more extensive than necessary to serve that interest); *Greater New Orleans Broadcasting Ass'n v. U.S.*, 527 U.S. 173 (1999) (federal law banning the broadcast advertising of privately operated commercial casino gambling found unconstitutional); *Lorillard Tobacco v. Reilly*, 533 U.S. 525 (2001) (state regulations restricting the advertising and sale of tobacco products held unconstitutional).

the agency's long-standing policy not to regulate the programming formats of broadcast stations.²⁵

B. Section 4(g) Does Not Require the Commission to Consider Non-Broadcast Uses in its Public Interest Analysis.

As described above, one of the three factors set forth in Section 4(g) required the Commission to examine “the level of competing demands for the spectrum allocated to [home shopping broadcast stations].” 47 U.S.C. § 534(g)(2). The Commission previously correctly determined that Section 4(g) did not require the consideration of non-broadcast uses in relation to the level of competition for broadcast spectrum allocated to home shopping stations. In the *Report and Order*, the Commission found that Congress had not intended for non-broadcast services to be a part of the Commission's public interest inquiry.²⁶ Subsequent actions by Congress regarding broadcast spectrum and the progress of the digital television transition have further bolstered the Commission's conclusion in the *Report and Order*.

In CSC's initial comments in this proceeding, it contended that this statutory factor should be interpreted broadly and, when evaluating the level of competing spectrum demands, the Commission should include demands from non-broadcast services, such as public safety.²⁷ CSC's Petition asserted that the Commission failed to properly consider its proposed interpretation of the statutory language. However, it is apparent from the *Report and Order* that the Commission fully considered CSC's argument and properly concluded that it was not appropriate to consider possible competing demands of non-broadcast services.²⁸ Other than a

²⁵ See *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981).

²⁶ *Report and Order* at ¶ 8.

²⁷ *Report and Order* at ¶ 7 (citations omitted).

post hoc rationalization in a letter from Congressman John Dingell to FCC Chairman James Quello,²⁹ CSC provided no explanation as to how the Commission erred in concluding that the statute did not require it to consider non-broadcast spectrum uses.

As an initial matter, the post-enactment letter from Congressman Dingell, upon which CSC exclusively relied to support its position, is “entitled to little weight” in interpreting the meaning of Section 4(g). *Cobell v. Norton*, 428 F.3d 1070, 1075 (D.C. Cir. 2005) (finding “[p]ost-enactment legislative history” to be “oxymoronic”). As the Court of Appeals for the D.C. Circuit has observed, “members of Congress have no power, once a statute has been passed, to alter its interpretation by post-hoc ‘explanations’ of what it means” While legislative history “forms the background against which Congress adopt[s]” a statute, “[p]ost-enactment statements are a different matter, and they are *not to be considered by an agency or by a court as legislative history.*”³⁰

The Commission’s original conclusion is clearly correct. Section 4(g) required the Commission, in the event it found that one or more home shopping broadcast stations did not operate in the public interest, to provide an opportunity for those stations to change their programming.³¹ What CSC is asking the Commission to consider makes no sense given this

²⁸ See *Report and Order* at ¶¶ 7-12.

²⁹ Petition at 9-10. CSC relies on a letter sent by Congressman Dingell on June 22, 1993, in which he discussed Section 4(g).

³⁰ *Hazardous Waste Treatment Council v. U.S. EPA*, 886 F.2d 355, 365 (D.C. Cir. 1989) (emphasis added). The Supreme Court has also expressly found that post-enactment congressional actions, deliberations and statements are entitled to little weight in interpreting statutory language. See, e.g., *Massachusetts v. EPA*, 127 S.Ct. 1438, 1460 & fn. 27 (2007); *Heintz v. Jenkins*, 514 U.S. 291, 297-98 (1995); *Clarke v. Securities Industry Association*, 479 U.S. 388, 407 (1987).

plain language of the statute. Even if the Commission had considered non-broadcast uses in its public interest evaluation and determined that those non-broadcast uses would better serve the public interest, the only recourse open to the Commission under the statute would have been to effectively deny home shopping stations the benefits of mandatory must carry. The statute certainly did not require, or indeed even permit, the Commission to reallocate broadcast spectrum. In fact, Section 4(g) said nothing whatsoever about reallocating spectrum from home shopping stations, but specifically gave those licensees, even if they failed to serve the public interest, the opportunity “to provide different programming” – *i.e.*, to develop other *broadcast* uses. CSC’s argument that Section 4(g) required the Commission to consider non-broadcast uses in its analysis of competing demands for spectrum is thus clearly contrary to the terms of the statute.³²

Congressional action taken in relation to the digital television (“DTV”) transition further demonstrates both the legal deficiencies and practical irrelevance of CSC’s argument. As part of the DTV transition, Congress has statutorily mandated the reallocation of a portion of the

³¹ “In the event that the Commission concludes that one or more of such stations are not serving the public interest, convenience, and necessity, the Commission shall allow the licensees of such stations a reasonable period within which to provide different programming, and shall not deny such stations a renewal expectancy solely because their programming consisted of predominantly of sales presentations or program length commercials. 47 U.S.C. § 534(g)(2).

³² Indeed, NAB notes that, in the license renewal context, Congress has directed the Commission to no longer consider even competing *broadcast* uses. Under Section 309(k)(4), added to the Communications Act in 1996, Congress specifically prohibited the Commission from determining whether the public interest would be better served if a broadcast license were granted to a person other than the renewal applicant. 47 U.S.C. § 309(k)(4). In light of congressional intent expressed in the 1996 Telecommunications Act, it would be clearly inappropriate for the Commission (particularly in the absence of any clear directive from Congress) to now begin making judgments as to whether the public interest would be better served if home shopping station licenses were granted to other persons, whether for broadcast or non-broadcast uses.

broadcast spectrum to public safety and other non-broadcast commercial uses.³³ While reallocation of broadcast spectrum was clearly required by Congress as an element of the DTV transition, such reallocation to non-broadcast uses was not intended by Section 4(g) or, indeed, any other part of the Cable Act. It would therefore have been inappropriate for the Commission, as stated in the *Report and Order*, to consider non-broadcast uses in its public interest determination under Section 4(g).³⁴ If Congress had intended for the Commission to consider reallocating broadcast spectrum to competing non-broadcast uses, it surely would have expressly stated this intention in the statute. Moreover, to the extent that CSC has in the past urged the Commission to consider competing non-broadcast uses due to a concern for obtaining spectrum for other important uses, such concerns are now much less pressing. As a result of the DTV transition, significant spectrum has already been reallocated to public safety and other important uses, thus ameliorating any conceivable concern that home shopping stations are utilizing spectrum needed for these other non-broadcast uses.³⁵

³³ The digital television transition statutorily requires the Commission to recover of a total of 108 MHz of spectrum currently used for broadcast television. Twenty-four megahertz of spectrum will be used for public safety needs and the remaining 84 will be auctioned for other services, including advanced wireless services. *See* 47 U.S.C. § 309(j)(14); *Reallocation of Television Channels 60-69, the 746-806 MHz Band*, Report and Order, 12 FCC Rcd 22953 (1998); *Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59)*, Report and Order, 17 FCC Rcd 1022 (2002).

³⁴ “Accordingly we shall interpret the second criterion to refer only to competing demands of other television broadcasters. We believe that our interpretation is fully consistent with Congress’s clearly expressed intent that we take into consideration the scarcity of the spectrum.” Report and Order at ¶ 8.

³⁵ NAB also notes that the number of television broadcast stations “predominantly” utilized for the transmission of home shopping programming is likely quite low. BIA’s database currently identifies only six television stations as having an affiliation as “Shopping Networks.”

II. Conclusion

In its 1993 *Report and Order*, the Commission appropriately concluded, in accordance with the three factors set forth in Section 4(g), that home shopping broadcast stations served the public interest and were eligible for cable carriage. The Commission should again reject CSC's assertions that issues of excessive commercialization should be included in its public interest determination under Section 4(g). Additionally, the Commission properly determined that Section 4(g) did not require the Commission to consider the level of competing non-broadcast uses for spectrum allocated to home shopping stations. Home shopping programming should not be regarded as an inherently less desirable category of television programming, especially such that this programming should be seen as incompatible with the public interest and unqualified for mandatory cable carriage. Disfavoring programming in this manner due to its content would raise serious First Amendment concerns.

In sum, CSC has presented no basis in law or fact for reversing the Commission's decision, especially as television industry and legal developments since 1993 have only bolstered the Commission's previous conclusions. There is also no reason to overturn, at this late date, broadcasters' legitimate reliance on the Commission's 1993 determinations and their effect on

stations' must carry rights. For all the reasons detailed above, the Commission should deny CSC's Petition.

Respectfully submitted,

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