

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

In the Matter of)	
)	
Implementation of Section 4(g) of the)	
Cable Television Consumer Protection)	MM Docket No. 93-8
Act of 1992)	
)	
Home Shopping Station Issues)	
To: Office of the Secretary		
Attn.: The Commission		

COMMENTS OF COCOLA BROADCASTING COMPANIES, ION MEDIA NETWORKS, INC., AND JOVON BROADCASTING CORPORATION

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July 18, 2007

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SUMMARY

The Commission has no reason to reconsider its conclusion that home shopping stations serve the public interest, convenience, and necessity. The *Report and Order* provides a well-reasoned analysis of an extensive record and clear explanations of the Commission's decision. Its conclusions are fully consistent with the overwhelming majority of comments supplied during the period that Congress established for the Commission's home shopping station proceeding. Moreover, the unambiguous statutory language and legislative history of the 1992 Cable Act support the Commission's conclusions.

The *CSC Petition* provides no basis on which the Commission would be justified in reconsidering its decision. CSC supplies no evidence that the Commission acted arbitrarily and capriciously. Reviewing the record now, 14 years after the statutory public interest analysis period closed, will not overcome the deficiencies in CSC's arguments. Indeed, reviewing the record more than 5,000 days after the 270 day period identified clearly by Congress in 1992 would in itself constitute arbitrary and capricious administrative action and a clear violation of Congressional intent. Supplemental material from today has no rational connection to the *Report and Order*. Nothing in the record, the *CSC Petition*, or the Supreme Court's First Amendment jurisprudence would justify disqualifying any station's cable carriage status based on content. The Commission rightfully rejected CSC's arguments 14 years ago and has no choice but to do so again.

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Cocola Broadcasting Companies, Ion Media Networks, Inc., and Jovon Broadcasting Corporation,¹ by their attorneys and in response to the *Public Notice* released in the above-referenced proceeding,² hereby submit their Comments and urge the Commission to deny the Petition for Reconsideration of the Commission’s *Report and Order*.³ Contrary to the Center for the Study of Commercialism’s (“CSC”) assertions, the Commission concluded properly in 1993

¹ Cocola Broadcasting Companies, Ion Media Networks, Inc., and Jovon Broadcasting Corporation are the licensees of numerous commercial television stations broadcasting programming generally identified with stations not-affiliated with one of the four major television broadcast networks. This programming includes, for some of their stations, shopping-type programming broadcast during the overnight hours or at select hours during the broadcast day.

² *Commission Seeks to Update the Record for a Petition for Reconsideration Regarding Home Shopping Stations*, MM Docket No. 93-8, *Public Notice*, 22 FCC Rcd 8550 (2007) (“*Public Notice*”). The Media Bureau extended the deadline for the filing of initial comments until today. *Order Granting Extension of Time for Filing Comments and Reply Comments*, MM Docket No. 93-8, *Order*, 22 FCC Rcd 9958 (MB 2007).

³ Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992 Home Shopping Station Issues, MM Docket No. 93-8, *Report and Order*, 8 FCC Rcd 5321 (1993) (“*Report and Order*”).

that home shopping stations served the public interest, convenience, and necessity. CSC fails to support its claims of arbitrary and capricious contravention by the Commission of Congressional directives in reaching its decision in 1993. Reconsideration now, 14 years later, would in itself be arbitrary and capricious. CSC further fails to demonstrate that disqualifying home shopping stations' cable carriage rights would pass constitutional muster under the First Amendment. For these reasons, the Commission has no basis to reconsider its well-reasoned conclusion in the *Report and Order*.

INTRODUCTION

The Commission's determination of whether "home shopping stations" *served* the public interest in late 1992 - early 1993 began with a mandate from Congress to promptly complete a rulemaking proceeding within 270 days and ended shortly thereafter with an FCC order granting these stations the same cable carriage rights as all other commercial television stations. Pursuant to Section 4(g) of the 1992 Cable Act, the Commission conducted a notice and comment proceeding 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."⁴ This Congressional mandate directed the Commission to evaluate home shopping stations' public interest service by considering 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 nonbroadcast services offering similar programming.⁵

⁴ Cable Television Consumer Protection and Competition Act of 1992, § 4(g), Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified at 47 U.S.C. § 534(g)) (emphasis added) (the "1992 Cable Act").

⁵ 47 U.S.C. § 534(g)(2).

Congress directed the Commission to qualify home shopping stations as “local commercial television stations” if consideration of these three factors revealed that home shopping stations served the public interest.⁶ Section 4(a) of the 1992 Cable Act entitles local commercial television stations to demand carriage of their signals on local cable television systems.⁷ Congress, in its wisdom, did not direct the Commission to consider extraneous factors favored by critics of home shopping stations’ unique television programming format or by any other special interest group.

The Commission, in obedience to the clear language of the 1992 Cable Act, solicited public comment on whether home shopping stations were serving the public interest, convenience, and necessity under these three statutory public interest factors.⁸ In addition, the Commission sought comment on a number of additional public interest factors:

- (1) Whether the assumptions underlying the deregulation of the commercial guidelines were still valid in 1993;
- (2) Whether home shopping stations provided a needed or valuable service for people who either lacked the time or ability to obtain goods outside the home or who otherwise benefited from the type of marketing process involved; and,
- (3) How home shopping stations met their public interest obligations.⁹

The Commission received 58 Comments and nine Replies,¹⁰ which also provided new justifications beyond the statutory and additional public interest factors.¹¹ This material constituted a substantial amount of evidence for the Commission to consider.

⁶ See 47 U.S.C. § 534(g)(2). “In the event that the Commission concludes that one or more of such stations are serving the public interest, convenience and necessity, the Commission shall qualify such stations as local commercial television stations for purposes of subsection (a).” *Id.*

⁷ 47 U.S.C. § 534(a).

⁸ *Notice of Proposed Rulemaking in MM Docket No. 93-8*, 8 FCC Rcd 660, ¶¶ 6-9 (1993) (“*NPRM*”).

⁹ *NPRM; Report and Order* at ¶ 24.

After examining the substantial record, which comprised evidence under many public interest factors in addition to the three required by Congress, the Commission concluded properly that home shopping stations served the public interest, convenience, and necessity in 1993.¹² The “overwhelming majority” of Comments supported this conclusion.¹³ Far from constituting arbitrary and capricious administrative action, the Commission followed Congress’ clear mandate by basing its findings as to home shopping stations on a well-reasoned review of a complete record.

Reconsideration now, 14 years after the statutory inquiry period closed, would be arbitrary and capricious as would reconsideration based on new record material. Congress intended a speedy and content-neutral proceeding. The *Report and Order* reflects the Commission’s consistent application of clear Congressional intent to avoid violating any licensees’ First Amendment rights.

¹⁰ *Report and Order* at n.2. In addition to these pleadings submitted by parties familiar with the Commission’s rules, great numbers of ordinary citizens wrote or faxed the Commission to share their personal stories. Indeed, “the Commission was flooded with correspondence attesting to the community service provided by [home shopping] stations.” Separate Statement of Chairman James H. Quello, MM Docket No. 93-8, *Report and Order*, 8 FCC Rcd 5321 (1993). The Commission should reconsider its apparent decision to grant part of the *CSC Petition*, the assertion that the Commission relied improperly on *ex parte* submissions. *Public Notice* at n. 18 (citing *CSC Petition* at 8-9). These prematurely excluded materials have no equal in answering the Commission’s original request for comment because they are contemporary with Congress’ mandate to determine whether home shopping stations “are serving” the public interest (*i.e.*, in late 1992 – early 1993). Due to the impracticality of commenting on the record today regarding fourteen year old facts, CSC’s claim of unfairness arising from unnamed parties’ inability to rebut the material therefore is moot.

¹¹ *Report and Order* at ¶¶ 32-35 (nurturing minority broadcast television station ownership).

¹² *Report and Order* at ¶ 36.

¹³ “The overwhelming majority of comments in this proceeding contend that home shopping broadcast stations do serve the public interest, that their programming format does not adversely affect their renewal expectancy, and that they should be eligible for mandatory cable carriage. Based on the record before us, we conclude that home shopping stations serve the public interest, and we thereby qualify them as local commercial television stations for the purposes of mandatory cable carriage.” *Report and Order* at ¶ 2.

I. The Commission Concluded Properly in 1993 That Home Shopping Stations Serve the Public Interest, Convenience, and Necessity.

In response to the Commission's May 4, 2007 request for comment on the issues presented in CSC's Petition for Reconsideration, Commenters submit that the Commission considered thoroughly the amount of home shopping stations' commercial content in its 1993 *Report and Order*. Commenters further submits that the Commission properly rejected CSC's argument that Congress intended the Commission to consider non-broadcast demands on the spectrum allocated to home shopping stations. As discussed below, the Commission must reject CSC's reconsideration request because the facts and relevant law fully support the original decision.

A. The Commission Fully Addressed the Amount of Commercial Content in Home Shopping Station Programming.

Contrary to CSC's assertion that the Commission acted arbitrarily and capriciously in determining whether home shopping stations served the public interest in 1993,¹⁴ the Commission studied the commercial matter aspect of the home shopping station programming format in great detail in issuing the *Report and Order*. An agency's action is not "arbitrary and capricious" if the agency has examined the relevant data and articulated a rational explanation.¹⁵ As the Courts have explained,

[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that

¹⁴ Petition for Reconsideration filed by the Center for the Study of Commercialism, MM Docket No. 93-8, filed Aug. 23, 1993 ("*CSC Petition*").

¹⁵ *Motor Vehicle Mfr.'s Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.¹⁶

CSC surely can not assert that the Commission failed to consider the three statutory factors; that the *Report and Order* ran counter to the evidence in the record; or, that the Commission's conclusions provoked such disbelief in reasonable people as to have no credibility (*i.e.*, that the *Report and Order* was “so implausible that it could not be ascribed to a difference in view”). Thus, CSC is relegated to attempting to demonstrate that the Commission “entirely failed to consider an important aspect” of the Congressionally-mandated inquiry.

Extensive analysis of commercial programming. Rather than “entirely fail[ing] to consider” in its public interest analysis the amount of commercial programming in the home shopping station programming format, the Commission considered this aspect exhaustively. Congress did not include the amount of commercial programming in its list of enumerated public interest factors. Instead, Congress incorporated commercial matter into the object of the Section (4)(g) analysis: “broadcast television stations that are predominantly utilized for the transmission of sales presentations or program-length commercials.”¹⁷

The very first subject matter on which the Commission sought comments in this proceeding was how it should identify such television stations.¹⁸ The Commission defined these television stations as “home shopping stations” in both the *NPRM* and in the *Report and Order*.¹⁹ This defined term saturates the *NPRM* and *Report and Order* with a constant reference to these

¹⁶ *Motor Vehicle Mfr.'s Ass'n*, 463 U.S. at 43.

¹⁷ 47 U.S.C. § 534(g)(2).

¹⁸ *NPRM* at ¶ 5. The Commission declared the technical definition to be a moot issue after concluding that each factor demonstrated conclusively home shopping stations' service to the public interest, convenience, and necessity. *Report and Order* at n.4 (mooting the issue and eliminating the interim definition established in a prior 1992 Cable Act implementation proceeding).

¹⁹ *NPRM* at ¶ 1; *Report and Order* at ¶ 1.

television stations' commercial programming, appearing over 120 times in the *Report and Order* alone. The Commission thus examined home shopping station commercial matter thoroughly.

Exaggerated factual assertions. CSC asserts in its Petition that “the Commission *looked solely* to the 4^{1/2} minutes per hour of ‘public interest’ programming provided by home shopping stations, and ignored the 55^{1/2} minutes of commercial matter per hour that engulfs it.”²⁰ In fact, the Commission *looked comprehensively* to a substantial amount of public interest programming broadcast by many home shopping station licensees, not merely Silver King Communications, Inc.’s (“Silver King”) hourly 4^{1/2} minute “In Your Interest” program.²¹

The Commission also considered a host of Silver King non-commercial programming as part of its public interest analysis, including public service announcements, program-length features, and four more hours of nonentertainment programming that aired each Sunday.²² The *CSC Petition* fails to mention the Commission’s analysis of Silver King’s additional public interest programming. CSC’s core assertion that home shopping stations broadcast “55^{1/2} minutes of commercials” per hour therefore ignores a record that disputes the factual basis of CSC’s argument. Moreover, the Commission looked to Silver King’s weekly station group averages of “7.6% local programming, 7.6% news and public affairs programming, and 10.2% total nonentertainment programming.”²³ (These figures do not address *entertainment*

²⁰ *CSC Petition* at 2 (emphasis added); *see also, id.* at 3-6 (focusing repeatedly on CSC’s “4^{1/2}/55^{1/2} minutes” assertion and ignoring more pertinent analyses in the *Report and Order*).

²¹ *E.g., Report and Order* at ¶ 29 (noting that “we have received detailed listings of the public interest programming of many licensees of home shopping stations”); *see also, id.*, at ¶¶ 34-35 (discussing public interest programming aired by Jovon Broadcasting Co., Pan Pacific Television, Inc., and Miracle Rock Church).

²² *Report and Order* at ¶¶ 29-31 (*looking additionally* at non-commercial programming broadcast in the public interest by Silver King, the same home shopping station licensee, beyond its hourly 4^{1/2} minute locally-produced program, “In Your Interest”).

²³ *Report and Order* at ¶ 30.

programming, such as syndicated comedies or children’s cartoons.) **When added together, these weekly averages alone represent more than three times CSC’s “4^{1/2} minutes per hour” canard.**

In the very same paragraphs that the *CSC Petition* cited to accuse the Commission of acting arbitrarily and capriciously by ignoring the other 55^{1/2} minutes per hour of home shopping station programming, the *Report and Order* documented the Commission’s substantial public interest analysis of this programming. For instance, the Commission discussed home shopping station licensees’ issue-responsive programming that addressed drug and alcohol abuse, AIDS, race relations, homelessness, basic legal knowledge for non-English-speaking viewers, local political debates and live election coverage, Persian War updates, weekly reports from a local Member of Congress, programs on Persian and Islamic culture, and primetime Chinese language news.²⁴ The Commission also considered evidence submitted by a number of Commenters, demonstrating that home shopping station stations’ public interest programming met or exceeded that of most in-market, independent UHF stations.²⁵

The Commission’s extensive public interest analysis of many home shopping station licensees’ substantial public interest programming irrefutably rebuts CSC’s assertion that the Commission acted arbitrarily and capriciously by choosing “to completely ignore the issue of whether 55^{1/2} minutes of commercials an hour is contrary to the public interest.”²⁶

Structural guarantees of public interest service. The Commission’s public interest requirements and the marketplace doom any commercial television station that fails to serve the

²⁴ *Report and Order* at ¶¶ 29-31, 35.

²⁵ *Report and Order* at ¶ 30.

²⁶ *See CSC Petition* at 3.

public interest. Licensees that do not comply with the Commission's public interest requirements face the risk of financial penalties and denial of license renewal applications. Home shopping stations, like all other commercial television stations, are subject to the Commission's public interest rules, which regulate children's television commercial limits, core programming, and informational matters; emergency information; candidate lowest unit charge and political file maintenance; equal employment opportunities; and, the local public inspection file, among others.²⁷

Home shopping stations that fail to serve their viewers' needs will not survive in the competitive broadcast television marketplace. Viewership makes or breaks commercial broadcast stations. In 1993, the Commission concluded that the marketplace served home shopping television viewers' needs, rejecting CSC's unsupported claim that the home shopping station format enables licensees to evade market forces.²⁸ The Commission must reject CSC's unsupported assertions that it acted arbitrarily and capriciously in 1993 by "ignoring" home shopping station programming in the *Report and Order*.

B. CSC Has Not Submitted Evidence to Support its Assertion That the Commission Failed to Interpret Congressional Intent Correctly.

Statements by individual legislators purporting to establish Congressional intent can not be given controlling effect; they provide evidence of Congressional intent only if they are consistent with the statutory language and other legislative history.²⁹ CSC argues that the June 22, 1993 letter from Chairman Dingell demonstrates a Congressional instruction to consider

²⁷ E.g., 47 C.F.R. §§ 73.670, 73.671, 73.673, 73.1250, 73.1942, 73.1943, 73.2080, 73.3526.

²⁸ *Report and Order* at ¶ 27.

²⁹ *Brock v. Pierce County*, 476 U.S. 253, 263 (1986) (citing *Grove City College v. Bell*, 465 U.S. 555, 567 (1984)).

nonbroadcast uses of the spectrum allocated to home shopping stations. Can the Commission rely on statements made months or years after enactment when they contradict pre-enactment legislative history? CSC admits that the Dingell Letter is not as persuasive as other evidence of legislative intent and CSC has failed to introduce any other such evidence.³⁰

CSC fails to disclose that only the Senate debated and passed the “competing demands for the spectrum allocated” statutory language that the Dingell Letter purports to clarify, not the House of Representatives. Nor does CSC attempt to explain how one Member may establish the intent of the other chamber of Congress. The pre-conference House version of the bill did not require the Commission to conduct a proceeding to determine whether home shopping stations qualified for must-carry; instead, the House bill permitted cable system operators to deny home shopping stations carriage.³¹

The Dingell Letter is thus inconsistent with both the statutory language and other legislative history. The Commission must reject CSC’s proffer because it is wholly insufficient to establish Congressional intent. The Commission examined the statutory language and its legislative history in 1993 and rightly concluded that Congress did not intend the Commission to consider nonbroadcast uses of the broadcast television spectrum.³² CSC’s proffer simply does not satisfy the *Brock v. Pierce County* Court’s test.

³⁰ CSC *Petition* at 11 (citing this document as the “Dingell Letter” and admitting the weakness of such post-enactment legislative history documentation); see *Report and Order* at ¶¶ 7-8 (rejecting CSC’s proffer of a colloquy between two Representatives, concluding this material appears to express a concern with spectrum scarcity affecting broadcasters).

³¹ H.R. 4850, 102nd Cong. § 614(f) (as passed by House of representatives, July 23, 1992) (providing “(F) SALES PRESENTATIONS AND PROGRAM LENGTH COMMERCIALS – Nothing in this Act shall require a cable operator to carry on any tier, or prohibit a cable operator from carrying on ant tier, the signal of any commercial television station or video programming service that is predominantly utilized for the transmission of sales presentations or program length commercials.”).

³² *Report and Order* at ¶¶ 7-8.

C. CSC Does Not Support its Assertion that the Commission Acted Arbitrarily and Capriciously.

Contrary to CSC’s assertion that the Commission acted arbitrarily and capriciously by not addressing the Dingell Letter, which was prepared just nine days before the adoption of the *Report and Order*,³³ Commenters submit that the Commission acted properly by following the plain language of the 1992 Cable Act. Even if a court were to find as ambiguous the statutory language that CSC asserts is clarified by the Dingell Letter, the Commission’s statutory construction fully satisfies the *Chevron* “reasonableness” test. The Commission interpreted the subject language, “the level of competing demands for the spectrum allocated to such stations,” as referring to only “competing demands of other television broadcasters.”³⁴ In support of its statutory interpretation, the Commission enunciated a well-reasoned explanation that comports with evidence in the record and requires no reconsideration.

When a court reviews an administrative agency’s construction of a statute that the agency administers, the court must determine whether the intent of Congress is clear; if so, the agency must observe Congress’ unambiguously expressed intent.³⁵ If, however, the intent of Congress is ambiguous, the agency must apply a permissible statutory construction.³⁶ The courts grant wide latitude to agencies in construing the statutes that they administer, recognizing that such administration “necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.”³⁷

³³ *CSC Petition* at 9-11.

³⁴ *Report and Order* at ¶ 8 (interpreting the second statutory factor and rejecting CSC’s interpretation).

³⁵ *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 487 U.S. 837, 842-43 (1984).

³⁶ *Chevron*, 487 U.S. at 843.

³⁷ *Chevron*, 487 U.S. at 843 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).

Courts defer to agency execution of authority delegated by Congress unless that execution is arbitrary, capricious, or manifestly contrary to the statute.³⁸ Permissible agency constructions of ambiguous statutory provisions must constitute “reasonable” policy choices.³⁹ The *Chevron* Court provided further interpretive guidance, concluding that “the meaning of a word must be ascertained in the context of achieving particular objectives, and the words associated with it may indicate that the true meaning of the series is to convey a common idea.”⁴⁰

The objective of Section 4(g). The *particular objective* of the Section 4(g) proceeding was to explore whether home shopping stations served the public interest, convenience, and necessity in 1993. Section 4(g) did not provide for reallocating spectrum to “higher uses” if the Commission determined that home shopping stations failed to serve the public interest. Instead, the statute instructed the Commission to allow home shopping stations a period of time to develop other formats in the event that it determined this format did not serve the public interest.⁴¹ The 1992 Cable Act did not contemplate reallocating spectrum to other services, merely to stations using different broadcast television programming formats.

The particular objective of the Section 4(g) proceeding did not relate to spectrum scarcity. CSC urged the Commission in 1993 to “determine whether there are ‘higher uses’ for the [home shopping station] spectrum” and cited the Dingell Letter to support its argument that

³⁸ *Chevron*, 487 U.S. at 844.

³⁹ *Chevron*, 487 U.S. at 844-45.

⁴⁰ *Chevron*, 487 U.S. at 861.

⁴¹ 47 U.S.C. § 534(g)(2); *see also*, *Report and Order* at ¶ 8 (concluding that this instruction expressed Congressional intent to consider only broadcast uses for the home shopping station spectrum).

the statute's use of "allocated" indicated nonbroadcast considerations.⁴² The rapid pace of technological innovation and government policy outran this argument years ago.

Congress and the Commission have addressed spectrum scarcity many times since 1993 through legislation, auctions, rulemaking, rebanding, and amendments to the table of allotments. For instance, Congress and the Commission have enabled television stations to use DTV companion channel bandwidth to broadcast primary and high definition DTV streams during the DTV transition, in addition to broadcasting traditional analog signals on licensees' legacy channels. The Commission will have ample spectrum resources for reallocation to a wide variety of "higher uses" when broadcasters surrender their non-elected channels at the conclusion of the DTV transition in 2009.

Words associated with "allocated." The *words associated* with "allocated" in the series, "competing demands for the spectrum allocated to such stations," under the second statutory factor *indicate the true meaning of the series was to convey the common idea* of competition between broadcast television stations. The associated words do not indicate competition between broadcast television and some other service or use, such as public safety. To make the actual statutory language express what CSC argues that Congress intended, the words in this series would require new meanings or additional words to convey a new common idea.

Words missing from the series. Had Congress inserted "nonbroadcast" in the second factor (*i.e.*), by requiring the Commission to consider "the level of competing **nonbroadcast** demands for the spectrum allocated to such stations"), CSC's assertion might have merit. But Congress did not insert this word. Congress did insert "nonbroadcast" in the third factor, which indicates that its absence from this second factor was deliberate. The absence of "nonbroadcast"

⁴² *CSC Petition* at 10-11.

from the second enumerated factor therefore is more persuasive evidence of the Commission's proper interpretation of Congressional intent than a colloquy between two Representatives on the issue of competition between broadcasters for the use of scarce spectrum and a post-enactment statement prepared mere days before the Commission adopted the *Report and Order*.

Indeed, the Commission concluded that no aspect of the spectrum utilized by home shopping stations in 1993 justified a reallocation inquiry.⁴³ The Commission rejected CSC's contention because, if Congress truly intended to address spectrum scarcity when enacting the 1992 Cable Act, its intent would more aptly be interpreted as examining the needs of other broadcast television licensees for the spectrum used by home shopping stations.⁴⁴

Questions CSC is unable to answer. If CSC asserted correctly that the 1992 Cable Act required the Commission to consider nonbroadcast demand for the broadcast television spectrum, why did Congress not enumerate even one such alternative use in the statute (*e.g.*, HDTV, emergency, or public safety)? Can CSC explain why, in nearly fifteen years, Congress has not legislated the very instructions that CSC argued in 1993 were so clearly the intent of Congress? The clarity of hindsight disproves CSC's 14 year-old assertion that the Commission erred in determining Congressional intent.

As discussed above, CSC failed to support its assertions that the Commission acted arbitrarily and capriciously in considering the content of home shopping station programming and the competition for the spectrum used by these stations. The factual material CSC offered to argue that the Commission ignored home shopping station commercial matter, the hourly 4^{1/2}

⁴³ *Report and Order* at ¶ 8.

⁴⁴ *Report and Order* at ¶ 8 (rejecting CSC's argument that a colloquy between Representatives Dingell and Eckart represented the intent of Congress to "consider the scarcity of broadcasting frequencies" as an instruction to consider *non-broadcasting* uses such as public safety).

minute “In Your Interest” program, is misleading. The *CSC Petition*, not the *Report and Order*, ignores critical factual material, the Commission’s repeated references to home shopping stations’ commercial nature throughout this proceeding and these stations’ additional public interest programming.

Moreover, the arbitrary and capricious standard more aptly would be applied to CSC’s desired review of nonbroadcast competition for home shopping station spectrum, a “factor[] which Congress has not intended it to consider,” than to the Commission’s well-reasoned conclusions in the *Report and Order*. To survive judicial review, the Commission’s interpretation must merely be “reasonable.” The *Report and Order* exceeds this minimum threshold. The *CSC Petition* urges action that would fail to meet this standard. For these reasons, Commenters encourage the Commission to deny the *CSC Petition*.

II. Reconsidering the *Report and Order* Would be Arbitrary and Capricious.

The Commission requested comment on current facts regarding home shopping station programming and compliance with certain public interest obligations to aid in ruling on the *CSC Petition*.⁴⁵ The statutory language that established the Commission’s home shopping station proceeding does not authorize the Commission’s review beyond the 270th day following enactment of the 1992 Cable Act, *i.e.*, July 3, 1993.⁴⁶ The Commission assembled a complete record in 1993, based on data from the time period Congress established and that period expired more than 5,000 days ago. No further information is required, nor would supplemental information be at all probative in reconsidering the Commission’s well-reasoned conclusions in the *Report and Order*.

⁴⁵ *Public Notice* at ¶¶ 1, 8.

⁴⁶ 47 U.S.C. § 534(g)(2).

A. Supplemental Information from 2007 Has No Rational Connection to the Commission's Conclusions in 1993.

Under the arbitrary and capricious standard, a reviewing court may not set aside an administrative agency's rule if it is "rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute."⁴⁷ The agency must "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"⁴⁸ While the Commission may understandably wish to review a record that includes fresh data, information that originates 14 years after the fact is inapplicable to the Commission's conclusions in 1993. Reconsideration based on such material without a rational connection to the Commission's conclusions in 1993 would be unreasonable and unjustifiable.

The only factors relevant to this proceeding are home shopping stations' service in the public interest between October 5, 1992, the date of enactment, and July 3, 1993, 270 days later. Were the Commission to reconsider the *Report and Order*, a reviewing court could find no rational connection between current facts and the inquiry mandated in 1992 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."⁴⁹ The Commission could not articulate a satisfactory explanation for such reconsideration, given the significant changes in the home shopping station format, broadcasting in general, and virtually every other aspect of modern communications during this 14 year gulf.

⁴⁷ *Motor Vehicle Mfr. 's Ass'n*, 463 U.S. at 42-43.

⁴⁸ *Motor Vehicle Mfr. 's Ass'n*, 463 U.S. at 43 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

⁴⁹ See 47 U.S.C. § 534(g)(2) (emphasis added).

B. Reconsidering the Commission’s 1993 Conclusions Beyond the Statutory 270 Day Period Would Be Unreasonable.

Legislative history demonstrates that Congress intended the Commission to analyze home shopping station service to the public interest quickly, in 1993, not in the following decade. A federal agency must follow Congress’ unambiguously expressed intent when construing statutes.⁵⁰ The courts, in reviewing agency constructions, will defer to “reasonable” policy choices made by the agency.⁵¹ For instance, the U.S. Supreme Court, in *Chevron*, deferred to the Environmental Protection Agency’s statutory construction because legislative history plainly identified the policy concerns that motivated the statute’s enactment and the agency’s interpretation was consistent with one of those concerns.⁵²

Congress’s overriding policy concern in enacting the 1992 Cable Act was to preserve access to free television programming, irrespective of content or format.⁵³ The text of Section 4(g) provides a clear instruction: the Commission “shall complete a proceeding” within 270 days of the 1992 Cable Act’s enactment date.⁵⁴ Adopting the *Report and Order* one day before the July 3, 1993 deadline indicated a reasonable policy choice and proper interpretation of the statute. The Commission’s action in 1993 thereby responded to Congress’ concern to swiftly preserve access to free television programming by home shopping stations.

Legislative history supports the Commission’s interpretation of the statute as requiring prompt action in 1992-1993 on the basis of then-current facts. Construing Section 4(g) to permit

⁵⁰ *Chevron*, 487 U.S. at 842-43.

⁵¹ *Chevron*, 487 U.S. at 844-45.

⁵² *Chevron*, 487 U.S. at 862-63.

⁵³ *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 646 (1994); *see id.* at 662 (detailing Congressional purpose, which excluded limiting commercial content).

⁵⁴ 47 U.S.C. § 534(g)(2).

reconsideration now, 14 years later, is inconsistent with the policy concerns that motivated the statute's enactment and its legislative history. Reconsidering the *Report and Order* now, therefore, would reflect an unreasonable statutory interpretation.

As the legislative history demonstrates, Congress intended the Commission to determine as quickly as possible whether home shopping stations qualified for must-carry status. Section 4(g), as originally passed by the Senate, would have required the Commission to "commence" the home shopping station proceeding within 90 days.⁵⁵ The current statutory requirement to "complete" the Commission's determination within 270 days replaced this language in conference.⁵⁶ Indeed, Representative Markey (D-MA) confirmed that the post-conference language, upon enactment, granted the Commission some latitude in conducting the home shopping proceeding "as long as it does not take more than 270 days for the process."⁵⁷

As a result of modifying the text in conference and passing the 1992 Cable Act in its current form over a presidential veto, Congress established beyond dispute that it intended the Commission to complete the home shopping proceeding as quickly as possible. Adding more than 5,000 additional days to the statutory maximum of 270 would be unreasonable and thus arbitrary and capricious.

In sum, the Commission compiled a complete record during the 270 day inquiry period in 1992-1993. Supplemental information offers no probative value to the determination mandated by Section 4(g) of the 1992 Cable Act. Reconsideration 14 years after the statutory period closed, whether based on this proceeding's ample record from 1992-1993 or on supplemental

⁵⁵ S.12, 102nd Cong. § 614(g) (as passed by Senate, Jan. 31, 1992).

⁵⁶ H. Rep. Conf. Rpt. on S.12, H8683 (H.R. Sept. 17, 1992).

⁵⁷ H. Rep. Conf. Rpt. on S.12, H8683 (H.R. Sept. 17, 1992) (Statement of Rep. Markey).

information, would comprise an unreasonable statutory interpretation, contradict the clear intent of Congress, and represent arbitrary and capricious administrative action. Accordingly, the Commission must deny the *CSC Petition*.

III. The First Amendment Precludes Discrimination Against Stations Based Merely on Commercial Programming Content.

Granting the relief sought by CSC would jeopardize the Commission's television cable carriage rules because commercial speech enjoys First Amendment protection from government infringement. Congress crafted Section 4(g) of the 1992 Cable Act carefully to avoid violating the First Amendment by imposing content-neutral carriage regulations. Granting CSC's Petition and finding that home shopping station programming does not serve the public interest because its content is *commercial* would undermine this clear Congressional intent. Moreover, the courts would surely overturn any Commission decision to engage in such *prima facie* content-based discrimination.

A. CSC Failed to Address Constitutional Limits on the Federal Government's Ability to Restrict Commercial Speech.

Commercial speech does not lose its First Amendment protection because it is communicated for profit, as in a paid advertisement.⁵⁸ While the Constitution shields commercial speech to a somewhat lesser extent than other forms of constitutionally guaranteed speech, the First Amendment denies the federal government complete power to suppress or regulate its expression.⁵⁹

⁵⁸ *Buckley v. Valeo*, 424 U.S. 1, 35-39 (1976). "Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information." *Central Hudson Gas Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 561-62 (1980).

⁵⁹ *Central Hudson*, 447 U.S. at 562-63. These Comments do not address obscenity or other forms of expression that enjoy little or no First Amendment protection.

Under the limitations imposed by the First Amendment, the government may restrict commercial speech that is misleading or related to unlawful activity.⁶⁰ To restrict commercial speech that is *not* misleading or related to unlawful activity: (i) the government must assert a substantial state interest to justify the infringement; (ii) the restriction must directly advance this interest,⁶¹ and, (iii) the government must demonstrate that a restriction of commercial speech is reasonably fitted to the government’s objective.⁶²

Even when the government meets these burdens, it may not discriminate against commercial speech on the basis of its content. **The government may impose reasonable time, place or manner restrictions on protected speech *only if* these restrictions are “adequately justified without reference to the content of the regulated speech.”**⁶³ The government may not regulate speech on the basis of hostility towards the underlying message expressed.⁶⁴ Content-based regulation of speech is presumptively unconstitutional⁶⁵, subject to “the most exacting scrutiny.”⁶⁶ In particular, the United States Supreme Court has prohibited the

⁶⁰ *Central Hudson*, 447 U.S. at 563-64 (citations omitted).

⁶¹ *Central Hudson*, 447 U.S. at 564.

⁶² *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 480-81 (1989) (superseding the *Central Hudson* narrow tailoring requirement, in the context of on-campus merchandizing materials).

⁶³ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citations omitted) (imposing additional restrictions).

⁶⁴ *E.g., R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992).

⁶⁵ *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991).

⁶⁶ *See Turner Broad. System, Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994) (citations omitted) (noting that U.S. Supreme Court precedents “apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content”).

government from discriminating against commercial speech merely because it is “commercial” or due to a generalized distaste for “commercialism.”⁶⁷

For instance, the Court overturned a municipal law that banned locating news racks on public property to distribute merchandising publications because this government action did not apply in an equal, content-neutral manner to other forms of protected speech, such as traditional newspapers.⁶⁸ **This opinion is analogous directly to CSC’s objection to commercial programming: the Court refused to accept the city’s justification, that commercial speech has “low value,” for this content-based restriction.**⁶⁹

The *CSC Petition* attacks “excessive commercialization” and argues that the spectrum used by home shopping stations may have “higher uses” by non-commercial speakers.⁷⁰ CSC fails, however, to reconcile its agenda with the First Amendment. CSC fails to allege that home shopping station commercial programming is misleading or related to unlawful activity. CSC also fails to show that Section 4(g) of the 1992 Cable Act asserts a substantial state interest to justify disqualifying home shopping stations from equal status with all other commercial television stations, to implement a restriction to advance this interest directly, and to demonstrate a reasonable fit between the restriction and the government objective. Moreover, CSC’s desired

⁶⁷ See, e.g., *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993); *Edenfield v. Fane*, 507 U.S. 761 (1993).

⁶⁸ *Discovery Network*, 507 U.S. at 429.

⁶⁹ *Discovery Network*, 507 U.S. at 429.

⁷⁰ E.g., *CSC Petition* at 3, 11.

relief would constitute *prima facie* content-based discrimination. The government may not deny “valuable government benefits” based on the speaker’s choice of lawful expression.⁷¹

If the Commission were to grant the *CSC Petition* and accept its argument that home shopping stations do not serve the public interest, the Commission would deny home shopping stations the valuable carriage benefit, due solely to their commercial programming content.

B. Congress Drafted Section 4(g) of the 1992 Cable Act Carefully to Avoid Discriminating Against Stations Based on Commercial Content.

Congress clearly intended to avoid content-based infringements of commercial speech in establishing home shopping station qualifications for cable carriage. Legislative history in the Senate, and previous judicial findings,⁷² demonstrate this unambiguous Congressional intent. On January 29, 1992, Senator John Breaux (D-LA) introduced Senate Amendment 1502 to deny mandatory cable carriage to home shopping stations.⁷³ Senator Breaux explained, “I do not think that these types of 24-hour stations that do nothing but broadcast commercials ought to be given that greater privilege of the must-carry status.”⁷⁴ The Senate passed the Breaux Amendment, with a further amendment discussed below. Today, the Breaux Amendment constitutes the foundation of Section 4(g)(1) of the 1992 Cable Act.⁷⁵

⁷¹ *E.g.*, *Perry v. Sinderman*, 408 U.S. 593, 597 (1972) (reiterating that, while a person may have no “right” to a government benefit, the government “may not deny a benefit to a person on a basis that infringes his constitutionally-protected interests—especially, his interest in freedom of speech”).

⁷² *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 646 (1994) (“Our review of the Act and its various findings persuades us that Congress’ overriding objective in enacting must-carry was not to favor programming of a particular subject matter, viewpoint, or format....”).

⁷³ See 138 CONG. REC. S561, at S570-71 (daily ed. Jan. 29, 1992) (statement of Sen. Breaux, expressing a personal distaste for commercial content).

⁷⁴ 138 CONG. REC. S561, at S570-71 (daily ed. Jan. 29, 1992) (statement of Sen. Breaux).

⁷⁵ “(g) Nothing in this section shall require a cable operator to carry on any tier, or prohibit a cable operator from carrying on any tier, the signal of any commercial television station or video programming service that is predominantly utilized for the transmission of sales presentations or

In floor debate, Senator Harry Reid (D-NV) expressed his concern that Senator Breaux's amendment would insert in the legislation a constitutionally impermissible content-based restriction:

I believe, contrary to what has been put forward, that this amendment [S.AMDT.1502] will jeopardize the constitutionality of must carry. Content regulation is a clear assault on the first amendment. In fact, the amendment currently before us approaches a bill of attainder. We are taking away the right of access from a legitimate business.⁷⁶

Immediately thereafter, Senator Bob Graham (D-FL) proposed a second-degree amendment, S.AMDT.1503, that directed the Commission to apply "a consistent, not an economically discriminatory, standard."⁷⁷ The Senate passed this amendment, indicating a strong Congressional intent to reject content-based discrimination against home shopping stations. The Graham amendment is nearly identical to the enacted statutory provision in Section 4(g)(2), which establishes the parameters of the Commission's home shopping station proceeding.⁷⁸ Together, the Breaux and Graham Amendments form the current station eligibility provision in Section 4(g) of the 1992 Cable Act.

program-length commercials." 138 CONG. REC. S561, at S570-71 (daily ed. Jan. 29, 1992) (statement of Sen. Breaux, introducing S.AMDT.1502 to S.12).

⁷⁶ 138 CONG. REC. S561, at S572 (daily ed. Jan. 29, 1992) (statement of Sen. Reid).

⁷⁷ 138 CONG. REC. S561, at S580-81 (daily ed. Jan. 29, 1992) (statement of Sen. Graham).

⁷⁸ "Within 90 days after the date of enactment of this Act, the Federal Communications Commission shall commence an inquiry to determine whether broadcast television stations whose programming consists predominantly of sales presentations are serving the public interest, convenience, and necessity. The Commission shall take into consideration the viewing of such stations, the level of competing demands for the channels allocated to such stations, and the role of such stations in providing competition to nonbroadcast services offering similar programming. 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 due to their prior programming." 138 CONG. REC. S561, at S580-81 (daily ed. Jan. 29, 1992) (statement of Sen. Graham, introducing S.AMDT.1503 to S.AMDT.1502 to S.12).

Statements by individual legislators provided to establish Congressional intent should be given controlling effect when they are consistent with the statutory language and other legislative history.⁷⁹ The Breaux and Graham Amendments are not only consistent with the statutory language, they comprise the statutory language (less minor edits made later in the legislative process). Floor debate on these amendments by Senators Reid, Graham, and Danforth indicate unambiguous Congressional intent to bar from the 1992 Cable Act content-based discrimination against home shopping station commercial programming. This legislative history is printed in the Congressional Record and applies directly to the issue before the Commission.

Unlike CSC's proffer of the Dingell Letter—which was prepared months *after* the 1992 Cable Act became effective, indeed, just days before the Commission adopted the *Report and Order*—the Commission must give controlling effect to this on-point, consistent, and multi-source evidence of Congressional intent. Congress intended a content-neutral review and that is what the Commission successfully accomplished.

⁷⁹ *Brock*, 476 U.S. at 263 (citing *Grove City College v. Bell*, 465 U.S. 555, 567 (1984)).

CONCLUSION

Consistent with the 1992 Cable Act's statutory text and legislative history, the Commission concluded properly in 1993 that home shopping stations serve the public interest, convenience, and necessity. The *Report and Order* provides well-reasoned explanations for each of the Commission's conclusions. CSC has failed to provide any valid point of law or material fact that could justify reconsideration.

The original record is complete and requires no supplementation to support the Commission's order. Further review now, 14 years after Congress directed the Commission to complete its analysis, is unnecessary and ill-advised. Congress and the Commission developed a practical and constitutional cable carriage rule 14 years ago that should not be disturbed on grounds that constitute *prima facie* content-based discrimination. For these reasons, Commenters urge the Commission to deny the *CSC Petition*.

Respectfully submitted,

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July 18, 2007