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

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

SECOND ORDER ON RECONSIDERATION OF FIRST REPORT AND ORDER

Adopted: March 3, 2004 **Released: March 25, 2004**

By the Commission: Commissioners Copps and Adelstein issuing separate statements.

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I. INTRODUCTION

1. For the reasons discussed below, we vacate the Order on Reconsideration[1] adopted in this proceeding and adopt in its place the following Sua Sponte Order on Reconsideration and accompanying rules.[2] This Order reaches results that differ from the Order on Reconsideration with respect to two sections: the Political Broadcasting Requirements and Guidelines Concerning Commercialization of Children's Programming.[3]

2. In this *Memorandum Opinion and Order,* we consider petitions for reconsideration and other pleadings filed in response to our *First Report and Order*[4] implementing Section 25 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").[5] For the reasons discussed below, we conclude that the Commission's interpretation and implementation of Section 25 of the 1992 Cable Act was generally correct, but that clarification and codification of political broadcasting rules for Direct Broadcast Satellite service providers is in order. In addition, we find that revision of our conclusion regarding advertising limits for children's programming is warranted. Therefore we grant in part and deny in part the petitions for reconsideration.

3. At this time DBS providers are complying with the public interest obligations specified in the *First Report and Order.* In response to Commission inquiry, the three operating DBS providers, DirecTV, Inc., EchoStar Satellite Communications Corporation, and Dominion Video Satellite, Inc., state that each has set aside at least four percent of its channel capacity to satisfy the public interest obligation and is providing a broad range of informational and educational programming, including programming relating to international news, public affairs, family life, foreign language instruction, and academic instruction on various levels.[6]

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[1] FCC 03-78 (adopted Apr. 9, 2003).

[2] S*ee* Appendix A.

[3] We also update some information about the DBS industry in paragraph 38. The textual changes appear in the following paragraphs: 1, 2, 7, 19-35, 38, 39, 44-49, 61-67 and Appendices A and B. Otherwise, this Sua Sponte Reconsideration is identical to the Order on Reconsideration adopted on April 9, 2003. We also note that since the adoption of the first *Order on Reconsideration*, in April 2003, a new DBS service operated by Cablevisions Systems Corporation and marketed under the name of VOOM began providing service to customers on October 15, 2003. *See www.voom.com/util/press/press093003.isp* (viewed on Jan.. 16, 2004).

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

[5] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

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

II. BACKGROUND

4. In 1992, Congress directed the Commission to initiate a rulemaking to impose certain public interest obligations on direct broadcast satellite ("DBS") providers, including political broadcasting rules.[7] In 1998, the Commission adopted the *First Report and Order,* which implements these statutory obligations.

5. The Commission's rules apply to "providers of direct broadcast satellite service." These include entities licensed pursuant to Part 100 of the Commission's rules[8]; entities licensed pursuant to Part 25 of the Commission's rules to provide fixed-satellite service ("FSS"), via the Ku-band,[9] that sell or lease transponder capacity to a video program distributor who offers direct-to-home FSS ("DTH-FSS") to consumers; and non-U.S. licensed satellites providing DBS or DTH-FSS services in the United States. As required by statute, the rules require DBS providers to comply with certain statutory political broadcasting requirements granting candidates for federal office reasonable access to a licensee's facilities on an equal basis with other federal candidates at the lowest rate available. DBS providers must also comply with statutory equal opportunities provisions. As part of the public interest obligations, Congress also mandated that DBS providers set aside channel capacity for noncommercial programming and offer access to educational programmers at reasonable prices, terms and conditions. To implement that requirement, the rules impose program carriage obligations on DBS providers, requiring them to set aside four percent of their channel capacity exclusively for noncommercial educational and informational programming and to make the capacity available at reasonable prices. Access to the noncommercial and informational capacity is limited to bona fide noncommercial national educational programming suppliers, and access is limited to one channel per supplier as long as demand for such capacity exceeds the available supply. The rules allow a DBS provider initially to select qualified, noncommercial programmers, but prohibit a DBS provider from altering or censoring the content of the programming aired on the noncommercial channels. Finally, the rules require that each DBS provider maintain a public file containing a complete and orderly record concerning its compliance with both the political broadcasting and the noncommercial educational and informational programming requirements.[10]

6. Nine petitions for reconsideration and related pleadings were filed in response to the *First Report and Order.*[11] The petitioners raise concerns regarding whether the Commission has correctly

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

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

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

[10] *See* 47 C.F.R. § 25.701.

[11] Petitions for reconsideration were filed by the American Cable Association ("ACA") (formerly the Small Cable Business Association), which filed two separate petitions, America's Public Television Stations and Public (continued….)

determined what entities are defined as DBS providers, whether it has properly implemented the Commission's political broadcasting requirements for DBS providers, and whether it has adequately addressed the issue of localism. Petitioners also assert that the Commission should have applied certain additional obligations to DBS providers, should have taken steps to protect children from harm associated with over-commercialization, should have prohibited DBS providers from meeting their public service obligation with existing programming, and challenge the Commission's determination to limit access to capacity reserved for educational and informational programming to one channel per national educational programming supplier.

III. DISCUSSION

7. Reconsideration is appropriate only where the petitioner either shows a material error or omission in the original order or raises additional facts not known or existing at the petitioner's last opportunity to present such matters. A petition for reconsideration of a final rulemaking proceeding must state with particularity the respects in which the petitioner believes the action taken by the Commission should be changed.[12] We find that some of the petitioners' requests warrant reconsideration and therefore we grant in part some of the petitions and deny the remaining petitions. We also clarify some aspects of the DBS public interest obligations.

A. Definition of Providers of DBS Service

8. Several petitioners assert that the Commission erred when it defined the term "providers of DBS service" to include satellite operators licensed pursuant to Part 25 of the Commission's rules. In the *First Report and Order,* the Commission found that the term included both Part 100 licensees and Part 25 licensees.[13]

9. The Commission found that entities licensed under Part 25 of its rules were providers of DBS service, for several reasons. Entities that could be included within the definition of DBS for purposes of Section 335 are DBS licensees and FSS licensees that lease capacity to DTH-FSS providers, video programmers, other program suppliers or distributors, or other third party lessees that resell

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Broadcasting Service ("APTS/PBS"), Center for Media Education, *et al.* ("CME"), Denver Area Educational Telecommunications Consortium, Inc., *et al.* ("DAETC"), GE American Communications, Inc. ("GE Americom"), Loral Space and Communications Ltd. ("Loral"), PanAmSat Corporation ("PanAmSat"), and Time Warner Cable ("Time Warner"). Pursuant to 47 C.F.R. § 0.231(i), the Secretary determined that, because of operational problems with the Commission's Electronic Filing System, petitions for reconsideration filed after the Mar. 10, 1999 filing deadline would be accepted as timely filed. Public Notice, Report No. 2326 (Apr. 15, 1999) Oppositions to petitions for reconsideration were filed by the Alliance for Community Media ("Alliance"), APTS/PBS, DAETC and CME, DirecTV, Inc. ("DirecTV"), and Satellite Broadcasting and Communications Association ("SBCA"). Replies were filed by the ACA, APTS/PBS, DirecTV, GE Americom, Loral, and Time Warner.

[12] 47 C.F.R. § 1.429(c).

[13] *See First Report and Order,* 13 FCC Rcd at 23261-62.

capacity to individual programmers.[14] The Commission pointed out that Section 335 of the Act specifies that a "provider of DBS services" includes any distributor that both uses Ku-band frequencies to provide DTH-FSS service and is licensed under Part 25.[15] In interpreting this language, the *First Report and Order* found that Congress's conjunctive use of the word "and" implies that the term distributor means an entity that controls a certain number of FSS channels and is licensed under Part 25. In other words, the FSS satellite licensee is the DBS provider for purposes of Section 335, rather than the entity that leases DTH-FSS capacity. If Congress had intended otherwise, the Commission found, it would have instead written the statutory definition to cover a distributor that uses a "Ku-band satellite ... that is licensed..." under Part 25.[16]

10. In addition, Section 335 of the Act requires the Commission to impose the DBS public interest obligations "as a condition of any provision, initial authorization, or authorization renewal for a provider of direct broadcast satellite service...."[17] The Commission determined that the quoted language suggests that Congress intended the Commission to impose the public interest obligations on entities that it licenses and that the obligations do not directly extend to lessees of satellite capacity or programming distributors.[18] The Commission also recognized that imposing the public interest obligations on the FSS Part 25 licensee facilitates enforcement of the requirements, as the Commission's enforcement authority over non-licensees is more limited.[19] Finally, the Commission determined that holding the DBS and FSS satellite licensees responsible for public interest obligations facilitates fair and efficient administration of the rule, since it places the Commission in a position to apply the same public interest obligation regulatory scheme to both Part 100 and FSS Part 25 licensees.[20] The rules allow FSS licensees to rely on compliance certifications from lessee customers and distributors certifying compliance with the public interest obligation rules.[21]

11. Four petitioners contend that the Commission erred by defining entities licensed under Part 25 as DBS providers and, therefore, subjecting them to the public interest obligations of Section 335 of the Act. The petitioners contend that the Commission's interpretation of the statute misconstrues Congress's intent, which they argue is to apply the public service obligations to the distributors of DTH service who compete directly with Part 100 DBS licensees and not to FSS satellite licensees who have nothing to do with DTH service. The petitioners submit that had Congress intended Section 335 to

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[14] *Id.* at 23262.

[15] *See* 47 U.S.C. § 335(b)(5)(A)(ii).

[16] *See First Report and Order,* 13 FCC Rcd at 23262-63.

[17] *See* 47 U.S.C. § 335(b)(1).

[18] *See First Report and Order,* 13 FCC Rcd at 23263.

[19] *Id.* at 23264.

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

[21] *See First Report and Order,* 13 FCC Rcd at 23264-65.

include FSS Part 25 satellite licensees it would have specifically stated so, as it did for Part 100 licensees. Instead, the petitioners contend that Section 335 reaches those entities that distribute and control video programming offered directly to subscribers whether the distributor is a satellite licensee or not.[22]

12. Next the petitioners argue that the Commission's reliance on Section 335's requirement that it enforce the DBS public interest requirements as a condition of licensing is unpersuasive. For example, PanAmSat argues that a more plausible interpretation of the statutory language concerning initial authorizations and renewals is that it was intended to apply to licensees in the DBS service. PanAmSat also posits that the reference to "any provisions" in the statute, in addition to initial authorizations, and renewals, indicates that Congress intended that the public interest requirements should extend to non-licensees that distribute DTH-FSS programming.[23]

13. The same four petitioners also dispute the view that the Commission is limited in its ability to enforce the public interest obligations against non-licensees.[24] The petitioners explain that, while a program distributor that is not a licensee does not have a license to revoke, the Commission has broad authority over interstate communications. The Commission's authority, these petitioners submit, provides it with the power to levy forfeitures and to issue cease-and-desist orders to ensure that non-licensees comply with its rules and regulations. Consequently, the petitioners argue, there is no need for FSS licensees to be burdened with public interest compliance.

14. At the notice phase of this proceeding, the Commission acknowledged that Section 335's definition of a DBS provider was broad enough to apply to a number of different entities, including the FSS satellite licensee and lessees of FSS capacity that distribute video programming directly to subscribers.[25] We agree with petitioners that the definition of DBS provider could include lessees of FSS capacity that distribute video programming to subscribers. We are not, however, persuaded that Congress intended that the ultimate responsibility for complying with public service obligations rests with non-licensees.[26] The petitioners proffer many of the same arguments that were considered in the *First Report*

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

[23] *See* PanAmSat Petition at 4.

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

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

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

and Order.[27] For the reasons set forth in the *First Report and Order,* we remain convinced that the statute's requirement to make capacity available, its definition of a provider of DBS service, and inclusion of entities licensed under Part 25 of the Commission's rules, clearly indicates that Congress intended that Part 25 Commission licensees be subject to the requirements of Section 335. This interpretation facilitates the Commission's orderly administration of the public interest obligations. It also enables the Commission to apply the same public interest regulatory requirements to both Part 100 and FSS Part 25 satellite operators. Moreover, because the Commission maintains ownership information for satellite licensees, and does not have similar records for lessees or program distributors, monitoring licensees is easier and enforcement is more effective.

15. We are also not persuaded that forfeitures and cease-and-desist orders or other enforcement remedies arising from the Commission's general authority to regulate interstate communications are as effective as the Commission's broad range of defined powers over its licensees. In addition, it is the satellite licensee, not the Commission, which has the closest connection to its lessee that is the distributor of programming to subscribers. Recognizing, however, that satellite licensees may not be ideally suited to monitor and enforce the public interest requirements, the Commission developed a procedure to permit FSS Part 25 licensees to delegate their responsibility for Section 335 compliance to the programming distributors. The Commission permitted licensees to demonstrate compliance with the public service obligations by relying on certifications from distributors that the obligations are being fulfilled, provided the licensee's reliance is reasonable.[28] However, because the rules adopted in the *First Report and Order* do not specifically provide for certification, we agree with Loral that the rules should be clarified to permit FSS Part 25 licensees to rely reasonably on certifications by lessees or programmers for the DBS public interest obligations.[29] Thus, we clarify that an FSS Part 25 licensee may demonstrate compliance with the provisions of Sections 100.5(b) and (c) of the Commission's rules (new Section 25.701(b) and (c)) by submitting a certification from a distributor that expressly states that the distributor has complied with the obligations of Section 335 of the Act. Moreover, we will not hold an FSS Part 25 licensee responsible for a distributor's false certification that it has complied with the public service requirements if the licensee could reasonably have concluded that the certification was not fraudulent. Because we believe that it is generally appropriate for a licensee to rely on the accuracy of certifications by program distributors offering a DTH-FSS service, licensees will not be required to verify compliance by distributors unless there is evidence that the distributor has not met its obligation. If a satellite licensee has reason to believe that its customer-distributor is not complying with these rules or has falsely certified compliance, the licensee should report the situation to the Commission for appropriate action. We believe that under this scheme, placing the ultimate compliance responsibility on the satellite licensees is not unduly burdensome, as certification requirements can be included in satellite carriage and leasing contracts.

16. The *First Report and Order* also defined "providers of DBS" to include non-U.S. licensed satellites that provide DBS service to subscribers in the United States so as to comply with the

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[27] *See First Report and Order,* 13 FCC Rcd at 23262-65.

[28] *Id.* at 23264-65.

[29] *See* Loral Petition at 10-12.

nondiscriminatory market access policies adopted by the Commission in the *DISCO II* proceeding.[30] Essentially, *DISCO II* requires non-U.S. satellite operators providing access to the U.S. market to comply with all Commission rules applicable to U.S. satellite operators, including DBS public interest obligations.[31]

17. PanAmSat questions the legitimacy of including non-U.S. satellite licensees in the definition of "providers of DBS service." [32] PanAmSat contends that extending the Section 335 public interest obligations to foreign-licensed FSS systems is both inconsistent with notions of international comity and overly burdensome. PanAmSat states that under the current formulation of the rule, an FSS system providing service primarily outside the United States could be required to comply with the DBS public interest requirements even though it may only have a single U.S. subscriber. PanAmSat argues that this would have the consequence of regulating program content provided by a foreign-licensed satellite operator primarily to an audience residing in a foreign country. PanAmSat states this would call into question the U.S. commitment to free flow of information across international borders, and this country's traditional opposition to attempts by other countries to block U.S. transmissions based on content restrictions. Furthermore, PanAmSat adds, it makes little sense to impose purely domestic regulatory requirements, such as U.S. political broadcasting obligations, on satellite services that are delivered to subscribers who reside in foreign countries. PanAmSat argues that the public interest benefit, if any, that U.S. citizens might derive from enforcing these obligations is outweighed by the costs that would be incurred by the non-U.S. licensed satellite operator in order to comply with the obligations and by the Commission in enforcing them.

18. We are not persuaded by PanAmSat's arguments. Non-U.S. licensees will only be subject to the U.S. public interest obligations rules if they offer service to subscribers in the United States in a package consisting of 25 channels or more, and then only with respect to services provided in the United States.[33] Furthermore, in two similar international satellite agreements entered into by the United States, one with Mexico and another with Argentina, the administrations have agreed to permit each country to require foreign-licensed satellite systems to comply with a "modicum" of each other's domestic content restrictions.[34]

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[30] *See First Report and Order,* 13 FCC Rcd at 23266-68.

[31] *See Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to provide Domestic and International Satellite Service in the United States,* Report and Order, 12 FCC Rcd 24094, 24168 (1997) (*DISCO II*).

[32] *See* PanAmSat Petition at 7-8.

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

[34] *See* Protocol Concerning the Transmission and Reception of Signals form Satellites for the Provision of Direct-to-Home Satellite Services in the United States of America and the United Mexican States (Nov. 8, 1996), Article VI; Agreement Between the Government of the United States of America and the Government of the Argentine Republic Concerning the Provision of Satellite Facilities and the Transmission and Reception of Signals to and (continued….)

B. Political Broadcasting Requirements

19. In our First Order on Reconsideration in this proceeding, we concluded that it was premature to adopt specific rules implementing political broadcasting obligations for DBS providers. We instead chose to follow a case by case approach that we believed would offer more flexibility in responding to specific circumstances presented by complaints which would highlight the issues involved in applying rules for terrestrial broadcasters to a national subscription service such as DBS.[35] Having reconsidered this issue sua sponte, however, we conclude that specific rules in this area may serve a useful function in providing some guidance to providers and political candidates regarding their respective obligations and rights, particularly during the upcoming national elections. We conclude that we can adapt the cable and broadcast political broadcasting rules to accommodate the differences between those services and DBS. We also conclude that the broad guidance afforded by these rules will not hamper the evolution of the political broadcasting requirements as applied to DBS in specific cases. To ensure that the rules we adopt are appropriate, we direct the Media Bureau to compile a staff report after the next election cycle that evaluates the operation of the new DBS rules. The report should include an examination of any complaints or concerns received regarding the new rules. The rules we adopt will apply to DBS as described in the following paragraphs and are the same as those applied to cable and broadcast with slight modifications to account for unique characteristics of DBS service.

20. Section 335 of the Act requires that the Commission establish rules applying the political broadcasting provisions of Sections 312(a)(7) and 315 of the Act to providers of DBS service.[36] Section 312(a)(7) requires that a candidate for federal elective office be provided "reasonable access" to broadcast facilities. Section 315 requires that a candidate for any public office be allowed the same opportunities to use broadcast facilities that are afforded all other candidates for the same office ("equal opportunity"), including rates that do not exceed the lowest unit charge ("LUC") paid by the station's most favored commercial advertisers.[37]

21. In formulating rules to apply the requirements of Sections 312 and 315 to DBS, the Commission recognized that there are fundamental differences between DBS systems and traditional terrestrial broadcast stations.[38] Unlike broadcasters, DBS licensees, at the time the *First Report and Order* was adopted, did not originate programming, sell advertising, or generally transmit localized programming. Given these differences, the Commission decided that it was appropriate that the DBS

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from Satellites for the Provision of Satellite Services to Users in the United States of America and the Republic of Argentina (June 5, 1998), Article VI.

[35] First Order on Reconsideration at paras 27-33.

[36] 47 U.S.C. §§ 312(a)(7), 315.

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

[38] *See First Report and Order,* 13 FCC Rcd at 23273.

political broadcasting rules afford DBS providers flexibility to meet their obligations in a practical and meaningful way, consistent with the intent of the law.[39] The *First Report and Order* also required that DBS providers maintain a public file of requests for broadcast time and political advertising and the disposition of these requests in order to assist in evaluations of compliance with the political broadcasting rules and to enable competing candidates to review other candidates' advertising access and rates.[40]

22. In general, in its Petition for Reconsideration, DAETC objected to the manner in which the political broadcasting requirements were implemented in the *First Report and Order*[41] and urged the Commission to adopt specific rules and policies to facilitate the enforcement of Sections 312(a)(7) and 315, as well as to clarify that DBS providers have the same political broadcast advertisement obligations as do terrestrial broadcasters.[42] We reconsider aspects of that decision here, as discussed in detail below, and conclude that it is now appropriate to adopt political broadcast rules that will expressly apply to DBS providers. We will derive the new rules for DBS providers from the existing rules that apply to terrestrial broadcasters or to cable operators, whichever is most appropriate.

23. Reasonable Access. Because DBS systems generally provide service on a nationwide basis, as opposed to terrestrial broadcast stations that principally serve the area in or near the communities in which the stations are licensed, the Commission found that presidential and vice presidential candidates were the federal candidates most likely to undertake the expense for national exposure on DBS systems and, thus, deferred a decision on whether and under what circumstances a candidate for a congressional office would be entitled to access.[43] The *First Report and Order* noted also that the number of congressional candidates nationally is large, and the potential technical and financial burden on a national DBS provider to provide access to all federal candidates could be substantial and thus access could be inherently unworkable.[44] Thus, the Commission determined that any public benefit that might be realized from requiring coverage of congressional races might not justify the technical and financial burdens that the obligation would entail.[45]

24. DAETC argued that the Commission did not affirm the policy that a candidate's needs are the primary factor in assessing requests for time under Section 312(a)(7) and that the DBS provider must make every effort to accommodate the candidate's stated purpose for requesting airtime.[46] Most importantly, DAETC contended that the Commission improperly concluded that it should defer

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[39] *Id.* at 23271.

[40] *See First Report and Order,* 13 FCC Rcd at 23270-73. *See also* 47 C.F.R. § 25.701(c)(6).

[41] *See* DAETC Petition for Reconsideration ("DAETC Petition"), filed Mar. 11, 1999, at 2-14.

[42] *Id.* at 20-23.

[43] *See First Report and Order,* 13 FCC Rcd at 23270.

[44] *Id.*

[45] *Id*. at 23269-70.

[46] *Id.*

consideration of whether congressional candidates may obtain access to DBS systems. DAETC argued that Section 312(a)(7) specifies, without limitation, that all federal candidates are entitled to access DBS systems for advertisements.

25. The *First Report and Order* left it to the DBS service providers to determine what constitutes reasonable access in the context of a varied multi-channel environment on a national platform.[47] Although we are prescribing specific rule provisions, we reiterate here that relevant factors to be considered include the amount of time requested, the number of candidates involved, potential programming disruption, and technical difficulties that might arise from providing access to candidates.[48] Reasonable alternatives for providing access are also required to be taken into consideration. Complaints filed against DBS providers with respect to obligations under Section 312(a)(7) will be evaluated to determine whether the provider's actions are within the spirit of the statute and in compliance with the Commission's rules and policies on political broadcasting.

26. We disagree with DAETC's arguments relating to the balancing involved in assessing reasonable access requests. No change in established policy is being introduced here. In the Carter/Mondale case, the Court of Appeals said "…the interests of broadcasters and candidates must be balanced in determining what constitutes reasonable access … ."[49] In affirming the Court of Appeals in the Carter/Mondale case, the Supreme Court stated that:

> broadcasters are required to tailor their responses to accommodate, as much as reasonably possible, a candidate's stated purpose in seeking air time. In responding to access requests, however, broadcasters may also give weight to such factors as the amount of time previously sold to the candidate, the disruptive impact on regular programming, and the likelihood of requests for time by rival candidates under the equal opportunities provision of § 315 (a).[50] Just as we consider the multiplicity of federal candidates in a broadcaster's service community in our enforcement of Section 312(a)(7) for terrestrial broadcasting, the number of congressional candidates seeking access would be one of the factors for a DBS provider to consider in responding to a reasonable access request. To the extent that the *First Report and Order* may have been unclear with respect to federal candidates for congressional office, we clarify that under Section 312(a)(7) all federal candidates, presidential and congressional, are entitled to reasonable access.

27. DAETC also objected to a perceived implication that Section 312(a)(7)'s reasonableness standard would permit DBS providers to segregate political advertisements from regular programming channels and to adopt blanket policies relegating candidates' advertisements to certain portions of the

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[47] *Id.* at 23271.

[48] *See CBS Inc. v. FCC,* 453 U.S. 367, 387 (1981) (*Carter/Mondale)* where the Court discussed the obligations of broadcasters in responding to access requests.

[49] 629 F. 2d 1, 22-23 (D.C. Cir. 1980)

[50] *Carter/Mondale*, 453 U.S. at 387.

broadcast day.[51] We disagree that the *First Report and Order* implied this reading of the statute, and we reiterate that a DBS provider, like a terrestrial broadcaster, may not summarily refuse access to a particular daypart or channel but must provide reasonable access to the facilities it controls.[52]

28. Although we have received no reasonable access complaints from any federal candidates, including congressional candidates, in connection with DBS providers, we believe that the DBS industry has matured and expanded in the ways described below that warrant imposing more detailed political broadcasting rules. In particular it appears that DBS providers are now capable and willing to sell advertising time on their DBS facilities.[53] In addition, the introduction of spot beam technologies is making DBS a more flexible service with greater potential to serve individual markets or regions. Although this flexibility to date has been used almost entirely for the carriage of local television broadcast signals (each individually subject to the political broadcasting requirements), there is now a greater potential for the introduction of other local services. These changes will have to be factored into providers' responses to federal candidate access requests and into our determination of whether these responses are reasonable.

29. We therefore adopt rules now to clarify our implementation of Section 312(a) (7) for all qualified federal candidates.[54] These rules are modeled on the rules that apply to broadcast licensees.[55] In applying these rules, we will use the rationales and interpretations of terrestrial broadcasting precedent to determine what is reasonable under the particular circumstances of a specific federal candidate's request for DBS access. This extensive precedent in terrestrial broadcasting will be instructive in resolving controversies that may arise in the context of DBS compliance.[56] In addition, the Staff Report we are requiring following the completion of the 2004 presidential election cycle should analyze if, how,

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[51] *See* DAETC petition at 12.

[52] *In the Matter of Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 FCC 2d 1079, 1090 (1978).

[53] *See, e.g.,* http://www.hughes.com/ir/pr/03_07_28_dtv.asp (DirecTV announcement of arrangement with Nielsen Media Research and Sony Pictures Television concerning data for advertising sales by DirecTV); and *Multichannel News*, p.55 (July 28, 2003) (DirecTV will sell advertising time by clustering the 100 networks it carries into eight demographic clusters. "DirecTV's commercial inventory averages two national minutes per hour – sometimes three minutes – with the avails positioned during the same local ad breaks the networks' cable affiliates get."). *See also* Media Access Project *ex parte* submissions dated July 17, and July 30, 2003; and http://www.dishnetwork.com/content/aboutus/index.shtml (EchoStar site for link to advertiseondish@echostar.com).

[54] *See* amended rule section 25.701(b)(3) in Appendix A.

[55] Section 312(a)(7) does not apply to cable operators; therefore, there are no cable rules concerning reasonable access. *See In the Matter of Codification of the Commission's Political Programming Policies,* 7 FCC Rcd 678, 680-81 n.11 (1991).

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

and to what extent federal candidates are using reasonable access to DBS facilities. Such a Staff Report on reasonable access, and, as discussed below, the equal opportunity provisions, can assist us in tailoring the rules more specifically to the DBS providers' operations, as well as the candidates' experiences. A Staff Report can also examine how the use of DBS facilities differs from the terrestrial broadcasting model.

30. Equal Opportunity. The *First Report and Order* incorporated Section 315 equal opportunity provisions into the Commission's rules, as well as the policies delineated in previous Commission orders on the subject, and stated that compliance with these provisions will be determined on a case-by-case basis. The Commission stated unequivocally that the equal opportunities provisions of the statute and the Commission's rules, as well as related policies delineated in prior Commission orders, will apply to DBS providers.[57] Thus, if a legally qualified candidate is afforded access to a DBS system, all other candidates for the same office must be afforded equal opportunities. DAETC and MAP object that the Commission has not promulgated detailed rules governing equal opportunity for DBS providers that are comparable to the rules for terrestrial broadcasters and cable operators.[58] We have scant information in the record on whether and how DBS providers offer access or insert commercial time on the programming they carry.[59] Nor is there evidence on the type or extent of other programming originated by DBS providers.[60] Since adoption of the *First Report and Order*, the Commission has received no complaints regarding DBS operators' compliance with their obligation to provide equal opportunities to candidates for public office. Nevertheless, we believe it is appropriate to adopt specific requirements delineating DBS providers' existing obligations under the statute. Because the DBS service is a MVPD, we will adapt the cable rules that implement the equal opportunity requirements for DBS, including the equally applicable limitation to programming originated by DBS providers. DBS providers primarily carry programming, including advertising, provided by programmers that are not controlled by the DBS provider. In the cable context, the equal opportunity requirements are limited to programming originated by the cable operator, "origination cablecasting."[61] As in the cable context, DBS origination programming (which likewise

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[57] *See First Report and Order,* 13 FCC Rcd at 23273.

[58] *See* DAETC Petition at 21-23. *See also* Media Access Project *ex parte* at 2, 6 (July 30, 2003).

[59] Both DirecTV and EchoStar appear to offer advertising opportunities, but how such opportunities are implemented and where commercials appear are not in the record. *See, supra,* note [12].

[60] The DirecTV and EchoStar websites indicate that they offer subscribers "barker" or "information" channels containing information about the respective satellite system and its offerings. *See, e.g.,* http://www.directv.com/DTVAPP/SearchDetailAction.do?current=ProgramSearchbyTitle&program_id=9980110465&program_title=DIRECTV+Pricing+and+Packaging+Info.&event_code=&time_zone=est&start_date_time=200308061600&end_date_time=200308071600 (DirecTV offers Information on channels 998 and 999); and http://204.95.170.116/dishsite/listings/progdetails.asp?prog_id=1698136 (EchoStar Information Channel, Info 101) In addition, EchoStar offers "Charlie Chat" on which EchoStar Chairman Charlie Ergen discusses topics of interest to subscribers. *See* http://www.dishnetwork.com/content/customerCare/charlie_chat/index.shtml.

[61] *See In the Matter of Amendment of Part 74, Subpart K, of the commission's Rules and Regulations Relative to Community Antenna Television Systems; and Inquiry into the Development of Communications Technology and Services to Formulate Regulatory Policy and Rulemaking and/or Legislative Proposals,* First Report and Order, 20 FCC 2d 201, paras. 40-47 (1969); *Use of Broadcast and Cable Facilities by Candidates for Public Office,* 34 FCC 2d 510 (1972); *see also, In Re Request of A.H. Belo Corp. for Declaratory Ruling*, 11 FCC Rcd 12306, (continued….)

includes advertising and other insertions) will be defined as: "Programming (exclusive of broadcast signals) carried on a DBS facility over one or more channels and subject to the exclusive control of the DBS provider."[62]

31. DAETC also criticized the Commission's formulation that candidates seeking equal access to broadcast facilities are not necessarily entitled to time on the same channel as the broadcast necessitating a response, but only to audiences of equal size. It is long-established Commission policy that "equal opportunity" requires "approximately equal audience potential" but not exactly the same time of day, same day of the week, nor "exactly the same programs or series of programs."[63] Consistent with this policy, we reiterate that for DBS providers, as for terrestrial broadcasters or cable operators, the equal opportunity provision prohibits discrimination among competing candidates but does not necessarily entitle candidates to time on the same channel or program as the broadcast that gives rise to the right to equal time.[64] To the extent practicable, we intend to apply the existing rules and precedents to DBS providers, but adjust this application in the future as necessary to reflect differences in technology and sales practices. DAETC also raises arguments relating to the general operation of the political broadcast rules but unrelated to the specific application of these rules to the DBS service.[65] Such arguments may be better addressed elsewhere or in particular cases in which they may arise.

32. Lowest Unit Charge. In the *First Report and Order* the Commission stated that DBS providers are required to afford legally qualified candidates the benefits of the LUC.[66] It did not exempt DBS providers from this obligation. DAETC contended that the Commission's application of the use of broadcast facilities at lowest unit rates was confusing, and that the Commission had found that DBS providers were not required to abide by the LUC rules if they do not sell commercial advertising time.[67] In fact, the *First Report and Order* took into consideration the unique nature of the DBS service in applying Section 315's lowest unit charge provisions while recognizing that LUC provisions apply to

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12307 at n. 3 (MMB 1996); and *In Re Request of A&E Television Networks for Declaratory Ruling*, 15 FCC Rcd 10796 at n. 2 (MMB 2000).

[62] *Compare* 47 C.F.R. § 76.5(p). *See also* amended rule section 25.701(b)(2) in Appendix A.

[63] *See* The Law of Political Broadcasting and Cablecasting: A Political Primer 1984 Edition, 100 FCC 2d 1476, 1504-1506 (1984). *See also* 47 C.F.R. §§ 73.1941(e) and 76.205(e) (prohibiting discrimination against or preference to any candidate in making time available under the equal opportunity provisions); and amended rule section 47 C.F.R. § 25.701(b)(4)(v) in Appendix A.

[64] *See Becker v FCC,* 95 F. 3d 75,84 (1996) quoting 1984 Political Primer, 100 FCC 2d at 1505. *See also*, *Carter/Mondale, Inc.*, 74 FCC 2d 631, recon. denied, 74 FCC 2d 657, aff'd sub nom. *CBS Inc. v FCC*, 629 F. 2d 1, 22-23 (D.C. Cir. 1980), aff'd 453 U.S. 367 (1981); In *the Matter of Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Public Service Obligations*, 8 FCC Rcd 1589, 1594 (1993).

[65] *See* DAETC Petition at 14-17.

[66] *See First Report and Order,* 13 FCC Rcd at 23274.

[67] S*ee* DAETC Petition at 18-19.

political advertising sold on DBS systems.[68] At the time the *First Report and Order* was adopted, DBS providers did not have commercial advertising rates for political or comparable advertising. Therefore, the Commission determined that DBS providers could set a rate that they believe is reasonable, taking into account marketplace factors such as the rate other electronic media charge political candidates to reach audiences of comparable size. The Commission also decided that DBS providers, like broadcasters and cable operators, are required to disclose information to candidates about rates and discount privileges.[69]

33. Although the Commission's decision was appropriate based on the information available in 1998, we conclude now that the DBS industry has matured, as described above. Therefore, we find that it is proper now to offer more specific guidance by adapting the LUC rules from the cable context and applying them to DBS providers.[70] A DBS provider that sells advertising time on its system is expected to comply with the Commission's established procedures for determining LUC. As described above, we expect the 2004 presidential election cycle to provide an opportunity for candidates and DBS providers to develop experience in the practical operation and effect of these new rules. A Staff Report following the completion of the election cycle can help us to determine whether and how to revise the rules to better suit the DBS operation.

34. Political File. Finally, DAETC and CME contend that the public file requirements adopted in the *First Report and Order* requiring maintenance of records on sales of advertising to candidates are inadequate. Both petitioners maintain that because parties seeking to inspect a DBS provider's public files could be located anywhere throughout the country, it may be difficult for those who do not reside near the DBS provider's headquarters to obtain access to the files. In order to alleviate the geographic burden on parties seeking to inspect a DBS provider's public files, the petitioners requested that the Commission adopt rules based on the rules for terrestrial broadcasters' public files.[71]

35. The Commission has stated that DBS providers are required to comply with the public file obligation within the spirit of the Act's political broadcasting requirements.[72] Specifically, we adopt rules to require DBS providers to abide by political file obligations similar to those requirements placed on

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[68] *See First Report and Order,* 13 FCC Rcd at 23274.

[69] *See First Report and Order,* 13 FCC Rcd at 23273-74.

[70] *See* amended rule section 25.701(c) in Appendix A.

[71] *See* DAETC Petition at 23 and CME Petition for Reconsideration ("CME Petition"), filed Mar. 11, 1999, at 10, citing *Main Studio and Public Inspection Files of Broadcast Television and Radio Stations* ("*Main Studio Order*"), 13 FCC Rcd 15691 (1998). The conclusion relied upon by DAETC in its Petition was significantly revised upon reconsideration of the *Main Studio Order*, which excluded a station's political file from the accommodations imposed on other parts of a station's public file. *See In the Matter of Review of the Commission's Rules Regarding the Main Studio and Local Public Inspection Files of Broadcast Television and Radio Stations*, 14 FCC Rcd 11113, 11122 (1999)

[72] *See First Report and Order,* 13 FCC Rcd at 23271.

terrestrial broadcasters and cable systems.[73] Because DBS is a national service and each provider's headquarters is not necessarily readily accessible to most of its viewers and to candidates, we require DBS providers to make their political files available upon telephone or electronic request. They may provide access to the file by fax, e-mail, via Internet website access, or, if so requested, by mailing photocopies of the documents in their political files. We expect that DBS providers will assist callers by promptly answering questions about how to access the contents of the DBS providers' political files. DBS providers may require individuals requesting documents to pay for photocopying if the requester prefers delivery by mail, but the DBS provider must pay for postage. DBS providers are encouraged to put their political files on their respective web sites but must provide alternatives for individuals who do not have Internet access. . In view of these requirements and expectations, we do not find it necessary to require that a provider maintain a public file in every community that receives its signal. We do, however, require, that DBS providers prominently disclose the toll-free telephone number and e-mail address of the department responsible for responding to requests for access to the political file.[74] In addition, because DBS experience with the political broadcasting rules is relatively new, and to facilitate a future Staff Report, we will require that DBS providers maintain all requests for time from candidates or individuals on behalf of candidates, including general requests for availabilities and rate information.[75] In addition, and for the same reasons, DBS providers will be required to retain information in their political files for four years, until 2006, and thereafter for two years, as is required of cable operators and terrestrial broadcast stations.[76]

C. Opportunities for Localism

36. Section 335(a) requires the Commission "to examine the opportunities that the establishment of direct broadcast satellite service provides for the principle of localism under [the] Act, and the methods by which such principle may be served through technological and other developments in, or regulation of, such service." [77] There is no legislative guidance for the Commission to rely upon in defining "localism" in the context of DBS service. For example, there is no indication of whether localism refers to special programming for individual localities or if it refers to local broadcast channel carriage. In the *First Report and Order* the Commission noted that DBS providers lack the channel capacity to serve all localities in the country. At the same time, the Commission acknowledged that the Satellite Home Viewer Act of 1988 ("1988 SHVA") severely limited DBS providers' retransmission of local

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[73] *See* amended rule section 25.701(d) in Appendix A.

[74] Unlike cable systems or terrestrial broadcast stations in a candidate's community, the home office location and corporate telephone number to reach DBS providers are not necessarily well known or easy to find. For that reason, providing contact information on the website or as part of the "phone tree" reached by published toll-free number is necessary to constitute a prominent disclosure by DBS providers.

[75] *Compare, In the Matter of Codification of the Commission's Political Programming Policies*, Memorandum Opinion and Order, 7 FCC Rcd 4611, 4626 n. 150 (1992) ("…we leave to the discretion of broadcasters to determine what exactly constitutes a 'request for time.'")

[76] *See* amended rule section 25.701(d) in Appendix A; *compare* 47 C.F.R. §§ 73.1943 and 76.1701.

[77] 47 U.S.C. § 335(a).

programming, but deferred an in-depth study of localism until the technical and legal issues were resolved through pending legislation that eventually became the Satellite Home Viewer Improvement Act of 1999 ("1999 SHVIA").[78]

37. ACA (formerly the Small Cable Business Association) contends that the Commission has not given serious consideration to the manner in which DBS can serve the principle of localism. ACA states that the Commission has failed to meet its statutory obligation under Section 335(a). According to ACA, the Commission's failure is due to the fact that its analysis is based on a stale record. ACA submits that the Commission has not taken into account advances in technology that will enable DBS providers to offer widespread local programming, or recent legislative activity foreshadowing changes to the 1988 SHVA.[79] Moreover, ACA adds that, since the release of the *First Report and Order,* two significant events have taken place affecting the implementation of localism on DBS. In its comments ACA points out that several major DBS mergers have been approved, raising the prospect of a significantly restructured DBS industry. In addition, ACA explains that the two largest DBS providers have announced intentions to offer local-into-local broadcast stations to subscribers. [80] ACA filed a second Petition for Reconsideration of the *First Report and Order*'s Final Regulatory Flexibility Analysis, claiming generally that the Commission failed to properly take into account the harm that would be caused to small cable operators by the lack of rules requiring DBS providers to carry all local broadcast programming.[81]

38. ACA is correct in noting that since the *First Report and Order* the DBS industry has experienced a number of significant changes. Many of the legal and technical impediments to the transmission of local television broadcasts are now eroding. The 1999 SHVIA has become law,[82] permitting "satellite carriers"[83] to offer subscribers local-into-local service in markets across the country.[84]

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

[79] *See* ACA Petition for Reconsideration ("ACA Petition"), filed Mar. 10, 1999, at 5-14.

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

[81] Petition for Reconsideration filed Mar. 9, 1999; S*ee First Report and Order,* 13 FCC Rcd at 23325.

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

[83] The term "DBS provider" is encompassed by the term "satellite carrier." The 1999 SHVIA uses satellite carrier. *See, e.g.,* Section 338(h)(4) of the Act, 47 U.S.C. § 338(h)(4), and Section 119(d) of title 17, United States Code, 17 U.S.C. § 119(d). These statutes define satellite carrier as "an entity that uses the facilities of a satellite or satellite service licensed by the Federal Communications Commission and operates in the Fixed-Satellite Service under part 25 of title 47 of the Code of Federal Regulations or the Direct Broadcast Satellite Service under part 100 of title 47 of the Code of Federal Regulations, to establish and operate a channel of communications for point-
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On the technical side, advancements have been made in signal compression technology that give DBS providers additional capacity and the ability to carry local broadcast stations. DBS providers are taking advantage of these opportunities. According to the major DBS providers' websites, DirecTV offers local television service packages to subscribers in 64 markets with 59 more announced for 2004 and EchoStar offers similar packages in 104 markets.[85] It also appears that the expansion in local-into-local service may have contributed to the over 8 million, 57%, increase in DBS subscribership between June 2000 and June 2003, making DBS the country's fastest growing competitor in the multichannel video programming distribution ("MVPD") marketplace.[86]

39. The 1999 SHVIA has significantly enhanced the programming offered by DBS providers. In addition to traditional satellite and cable programs, many DBS subscribers are now receiving retransmissions of local terrestrial broadcast stations. These local stations are proving popular and DBS systems are devoting a portion of their system channel capacity to locally originated programming. The statutory requirement to comply with carriage obligations in the 1999 SHVIA has been implemented through a separate Commission proceeding, and DBS providers are now required to carry all local broadcast stations that request carriage, within each local market that the carriers choose to serve through reliance on the Section 122 statutory copyright license.[87] Because it is not clear to what degree the satellite channel capacity may be limited by technical constraints, or whether market demand will result in local-into-local service in all parts of the country, we do not believe it will serve the public interest to impose additional requirements to "further the principle of localism" at this time. We also find that although the Final Regulatory Flexibility Analysis issued in conjunction with the *First Report and Order* was adequate, in any event the intervening adoption of broadcast signal carriage rules for DBS, similar to those imposed on cable systems, has alleviated the concerns articulated by ACA.

D. Additional Obligations

40. In 1998, the Commission determined in the *First Report and Order* that it would not impose additional obligations, similar to those imposed on cable operators, on DBS providers.[88] The Commission

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to-multipoint distribution of television station signals, and that owns or leases capacity or a service on a satellite in order to provide such point-to-multipoint distribution, except to the extent that such entity provides such distribution pursuant to tariff under the Communications Act of 1934, other than for private home viewing." 17 U.S.C. §119(d). In this order we use the term DBS provider when discussing the 1999 SHVIA.

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

[85] *See http://www.directv.com* and *http://www.dishnetwork.com* (viewed on Feb. 6, 2004).

[86] *See In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Tenth Annual Report*, FCC 04-5, __FCC Rcd___(Jan. 28, 2004). *See also Policies and Rules for the Direct Broadcast Satellite Service, supra note 5 at para.10.*

[87] See 47 C.F.R. §76.66.

[88] Such obligations included must carry obligations, program access rules, channel occupancy limits, syndicated exclusivity, network non duplication and sports blackout, leased and PEG channel access (continued….)

said that DBS, unlike cable, does not possess sufficient market power to raise anti-competitive concerns warranting additional obligations. The Commission therefore concluded that, given the disparity in market power between the two services, imposing additional obligations on DBS providers might hinder the development of DBS as a viable competitor to cable.[89] Time Warner argues that the Commission erred in making this determination.[90]

41. In November 1999, the 1999 SHVIA became law imposing many of the same obligations imposed on cable operators in exchange for a compulsory copyright license enabling DBS providers to offer local broadcast stations. Under the 1999 SHVIA and the Commission's implementation, DBS providers must comply with regulations such as syndicated exclusivity, network non-duplication, sports blackout, and broadcast channel carriage requirements similar to cable operators.[91] Thus, many of the obligations advocated by Time Warner are now required by law.

42. Although the 1999 SHVIA imposed on DBS providers many obligations similar to those imposed on cable operators, it did not require that DBS providers be subject to public interest obligations equivalent to cable operators' public, education and governmental ("PEG") access obligations. Time Warner urges the Commission on reconsideration to impose such obligations. Because operators of open video systems ("OVS"),[92] which are also relatively new entrants to the MVPD marketplace, are subject to PEG access requirements,[93] Time Warner asserts that there is no reason for exempting DBS providers

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requirements, cross ownership prohibitions, and local taxes and other fees. *First Report and Order*, 13 FCC Rcd at 23277.

[89] *See First Report an Order,* 13 FCC Rcd at 23276-78.

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

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

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

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

from these requirements.[94] Time Warner further argues that DBS providers should be required to provide funding to support the creation of local programming to air on PEG-type channels. Absent a requirement to offer locally oriented programming, Time Warner suggests that DBS providers should be required to contribute five percent of their gross receipts to support the creation and development of programming aired on the Public Broadcast Service ("PBS"). According to Time Warner, this amount is equivalent to the local franchise fees paid by most cable operators. Time Warner states that it views PBS as the national equivalent of noncommercial PEG programming and that a PBS support obligation for DBS providers would be equivalent to a cable operator's local PEG access support obligations. [95]

43. We agree with DirecTV and SBCA that Time Warner has not established good cause for imposing a PEG-type obligation on DBS providers.[96] Time Warner has not demonstrated that Congress intended, as it did with OVS,[97] that the Commission adopt the regulations Time Warner advocates. As the Commission noted in the *First Report and Order*, Congress has preempted the ability of local jurisdictions to impose any tax or fee on DBS services.[98] More importantly, the Commission determined that the 1992 Cable Act was passed in order to remedy the competitive disadvantages faced by DBS providers struggling for a share of the MVPD market.[99] Imposing the additional regulations proposed by Time Warner would divert DBS providers' channel capacity away from the provision of local-into-local service and effectively negate the Commission's efforts to create a competitive MVPD market by limiting the ability of DBS to compete with cable and offer more consumer choices. In addition, there is no indication in the language of Section 335 of the Act, that Congress wanted the Commission to impose PEG access obligations on DBS providers. In fact, in the *First Report and Order* the Commission pointed out that the PEG requirements that apply to cable operators are entirely different from the public interest requirements applicable to DBS providers. On the one hand, the PEG access rules are designed to create a "soap box" of sorts for the expression of different viewpoints without fear of censorship. On the other hand, the DBS public interest requirements are designed to create a haven for educational and informational programming that need not compete with commercial offerings.[100] We also note that when Congress proposed the 1999 SHVIA, it had a further opportunity to impose the same PEG obligations on DBS providers as exist for cable operators. Although Congress did impose many regulations similar to those imposed on cable operators on DBS providers in the 1999 SHVIA, it did not require PEG access. We therefore find no grounds to impose PEG obligations on DBS providers.

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[94] *See* Time Warner Petition at 3-10.

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

[96] *See, e.g.,* DirecTV Opposition at 5-8; SBCA Opposition, filed May 20, 1999, at 4-6.

[97] *See* 47 U.S.C. § 573(c).

[98] *See First Report and Order,* 13 FCC Rcd at 23279

[99] *Id.* at 23278.

[100] *Id.* at 23297-99.

E. Guidelines Concerning Commercialization of Children's Programming

44. In our April Order on Reconsideration in this proceeding, we determined not to adopt rules on children's advertising because we concluded that there was insufficient evidence of a problem. [101] Having reconsidered this issue sua sponte, however, we conclude that a different approach is warranted. We have decided that it is better to take action to protect children from excessive commercialization before we are presented with evidence of abuses. Although Section 335(a) does not require commercialization guidelines for children's programming on DBS, such guidelines are consistent with our public interest programming authority in this section. Accordingly, we conclude that prophylactic rules should be adopted that will protect children while imposing minimal burdens on DBS providers. The rules we adopt in this regard are described in the following paragraphs.

45. In the *First Report and Order,* the Commission found that Section 335(a) provides authority for the Commission to impose other public interest programming requirements on DBS providers, including guidelines concerning the commercialization of children's programming. The Commission declined, however, to take any action, principally because it felt that any additional obligations imposed on the DBS industry at that stage in its development would be burdensome and could prevent DBS from realizing its potential as a robust competitor to cable. Nevertheless, the Commission said that the issue of additional public interest programming requirements will be reexamined if it becomes evident that regulatory intervention is needed to ensure that the needs of children are not overlooked. [102]

46. CME, which advocated the adoption of requirements regarding children's programming when the *First Report and Order* was adopted,[103] contends that the Commission's reasons for not imposing commercial limits lack merit. According to CME, the Commission overstates both the newness of the DBS industry and the differences between DBS and cable services.[104] In support of its assertions, CME points out that the DBS industry has experienced tremendous growth since this proceeding was initiated in 1993 and that two of its providers, DirecTV and EchoStar, have established a substantial presence in the MVPD marketplace. Consequently, CME submits that there is no justification for the Commission's reserved approach and that it is time to protect the millions of DBS subscribing homes from the harms associated with over-commercialization.[105] CME argues that the Commission cannot

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[101] FCC 03-78 at para 45.

[102] *See First Report and Order,* 13 FCC Rcd at 23279-80.

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

[104] *See* CME Petition at 4-5.

[105] *Id.* at 5-6.

justify its approach based on the differences between DBS and cable. CME claims that, from the consumer's perspective, DBS providers deliver the same service as cable operators and broadcasters. CME continues by saying that the DBS service's increased provision of local programming in fact create greater similarities between DBS, cable and, broadcasting.[106]

47. CME further contends that the Commission overstates the oppressiveness of CME's commercial limitation proposal. Imposing commercial limits on children's programs, CME argues, has been established as the best way to protect children from the evils of over-commercialization. Furthermore, adds CME, the burden on DBS providers to comply with commercial limits is minimal since most of the programming aired on DBS is also provided to cable, which has children's commercial limits.[107]

48. Based on the growth, penetration level, and technological advances of DBS, as described below, we find CME's arguments persuasive and that reconsideration is warranted. We agree with CME that the benefits of imposing commercial limits on children's programming outweigh the potential burdens. Therefore upon reconsideration, we will require DBS providers to comply with the rules regarding commercial limits on children's programming that apply to cable operators.[108] As of June 2002, DBS subscribership stood at over 20 million households, representing 20.% of all subscribers to multichannel video programming.[109] Given this penetration level, we believe it is now timely and appropriate to exercise our authority under Section 335(a) to ensure that children in DBS households are protected from excessive commercialism on television. A blanket exemption for DBS would expose a significant number of children to the risk of over-commercialization, contrary to Congress' intent in enacting the Children's Television Act of 1990.[110] While the Children's Television Act specifically applies to broadcasters and cable operators, we do not believe that this was intended as a specific and permanent exemption for DBS, which was not yet a commercial service in 1990. Consequently, we shall amend Part 25 of the Commission's rules to include the commercial limits on children's programming that apply to cable operators.[111]

49. We do not believe that compliance with the children's television rules on commercial limits will be burdensome. Many of the programming services carried by DBS providers are the same as are carried by cable systems around the country and thus this programming already complies with the

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[106] *Id.* at 6-8,

[107] *Id.* at 8-10.

[108] *See* 47 C.F.R. §76.225. As we determined in the context of applying some of the political broadcasting rules to DBS, in this case the rules applicable to cable operators are better suited to other MVPDs such as DBS.

[109] *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Tenth Annual Report*, *supra* note 87.

[110] Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, codified at 47 U.S.C. Sections 303a, 303b, 394.

[111] *See* amendments to rules *infra* Appendix A.

commercial restrictions. In addition, as we did in the cable context, we will relieve DBS providers from compliance with our rules where a specific statutory scheme prevents a DBS provider from controlling the programming involved.[112] Thus, for example, where a DBS provider passively retransmits a broadcast signal pursuant to statute, it will not be held responsible for compliance with the commercial limits on the channel.

F. Programming on Reserved Capacity

50. Section 335(b)(1) specifies that the Commission must require that a DBS provider reserve a portion of its channel capacity, "equal to not less than 4 percent nor more than 7 percent, exclusively for noncommercial programming of an educational or informational nature."[113] In response to this mandate, the Commission selected four percent as the capacity reservation percentage.[114]

51. Time Warner asserts that DBS providers should not be allowed to fulfill the four percent reservation obligation by carrying noncommercial, educational and informational programming that was already being offered to subscribers before the *First Report and Order* was adopted. Time Warner argues that allowing DBS providers to do so would defeat the purpose of having a separate reservation obligation. Time Warner asserts that Congress intended that a DBS provider's reserved capacity should be available exclusively for programmers that represent interests that are not currently being served.[115] Time Warner is supported by comments from DAETC and CME that contend that prohibiting DBS providers from satisfying the reservation requirement with existing programming will result in greater diversity of media sources on DBS systems.[116]

52. We decline to amend the rule as requested by Time Warner. If the programming is of the type that fulfills the statutory requirement for noncommercial programming of an educational or informational nature, there is no reason to deny a DBS operator credit solely because it carried the programming voluntarily before the set-aside went into effect. We believe that the amendment that Time Warner advocates would unfairly penalize those DBS providers that complied with the requirement before they were obligated to do so. Time Warner has not cited anything in the statute or its legislative history indicating that Congress intended that the reservation requirement be implemented in this manner. As DirecTV and SBCA point out, a DBS provider should not be barred from fulfilling its public interest obligation with qualified programming simply because the programming happens to have a widespread appeal, rather than a narrow focus on the specific needs of a particular group of viewers.[117] Moreover, as

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[112] *See Policies and Rules Concerning Children's Television Programming, Report and Order*, 6 FCC Rcd 2111, 2113 (1991); *Order on Reconsideration,* 6 FCC Rcd 5093, 5094 (1991).

[113] *See* 47 U.S.C § 335(b)(1).

[114] *See First Report and Order,* 13 FCC Rcd at 23285.

[115] *See* Time Warner Petition at 12-14.

[116] *See* DAETC and CME Joint Opposition, filed May 6, 1999, at 28-30.

[117] *See* DirecTV Opposition at 14-15 and SBCA Opposition at 7.

we noted above, DBS providers are now providing a wide range of public interest programming on their reserved channels, some of which appears to be designed to serve the particular needs of viewers that may have been overlooked in the past.[118] Accordingly, we will not make this change.

G. Noncommercial Channel Limitation

53. The *First Report and Order* limited access to the reserved capacity on each DBS system to one channel per qualified program supplier as long as demand for such capacity exceeds the available supply.[119] The Commission imposed this limit in order to ensure that a few national educational program suppliers would not dominate access to the noncommercial channels.[120] The Commission reasoned that the limitation would promote the development of quality educational and informational programming, as well as provide increased access opportunities for smaller, less well-funded noncommercial program suppliers.[121] The Commission also determined that the limitation comports with Congress's intent to foster robust and editorially diverse programming on the reserved channels.[122]

54. APTS/PBS assert that the single programmer restriction is not supported by the statute and therefore, should be removed. According to APTS/PBS, Section 335(b)[123] authorizes the reservation of DBS capacity for noncommercial educational programmers and does not suggest that there should be any limitation on the amount of reserved capacity that can be occupied by a single programmer. These petitioners state that the statute's only requirement is that DBS providers make capacity available to qualified programmers at reasonable prices and on reasonable terms and conditions. Thus, concludes APTS/PBS, given the absence of any indication that Congress intended such a limitation, the Commission lacks authority to impose any restrictions.[124]

55. The petitioners further contend that the one-channel-per-programmer limit is inconsistent with the Commission's interpretation of the ban on editorial control contained in Section 335(b). The Commission found that the editorial control ban does not bar DBS providers from selecting programmers when demand for reserved capacity exceeds the available supply. APTS/PBS claim the one-channel-per-programmer restriction is inconsistent with this discretion given to DBS providers to select the qualified programmers offered access to these channels.[125]

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[118] *See supra* at ¶ *2*.

[119] *See First Report and Order* at 23302.

[120] *Id.*

[121] *Id.*

[122] *Id.* at 23302-04.

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

[124] *See, e.g.,* APTS/PBS Petition for Reconsideration ("APTS/PBS Petition"), filed Mar. 10, 1999, at 4-5.

[125] *Id.* at 6.

56. APTS/PBS also assert that the Commission is not justified in suggesting that the one-channel-per-programmer restriction will result in a greater diversity of programming because there is no indication that Congress intended to promote greater diversity when it enacted the 1992 Cable Act. APTS/PBS contend that Congress's intent was simply to provide a minimum level of educational programming and to rely on the marketplace to create diversity.[126]

57. In addition to a lack of legal justification, APTS/PBS argue that there is no factual support in the record for the one-channel restriction and that there is no basis for the Commission's conclusion that the restriction will provide the viewer with a greater variety of programming. These petitioners argue that the Commission decision could be encouraging less diverse programming because few noncommercial programmers have comparable financial resources and production skills to commercial programmers. APTS/PBS contend that requiring that a DBS provider limit noncommercial programmers to a single channel may actually result in programming that is neither diverse nor high quality. APTS/PBS, therefore, submit that a DBS provider should not be barred from assigning several channels of the reserved capacity to a single programmer, such as PBS or an individual public television station, if the DBS provider believes the programmer offers the best available noncommercial programming.[127]

58. DAETC and CME disagree with APTS/PBS and contend that the Commission's adoption of the one-channel-per-programmer limitation is sound as a matter of law and policy. DAETC and CME maintain that the Commission has ample authority to adopt rules promoting diversity of viewpoints and that the one-channel limit is not at odds with the ban on editorial control.[128] They also argue that the limit will, in fact, produce the desired effect of serving audiences that are often overlooked. They contend that without the rule, DBS providers might choose one or only a few programmers, and that those programmers might not serve audiences that have been traditionally underserved or perhaps not served at all.[129] DAETC and CME view the one-channel limitation essentially as a compromise whereby, in exchange for the small burden of being required to choose several different programmers, DBS providers are given the much greater benefit of editorial freedom.[130]

59. We believe that the Commission's decision to adopt a one-channel-per-programmer limitation, when demand for reserved channels exceeds the four percent reservation requirement, was sound as a matter of law and policy. In carrying out Congress' mandate to impose an obligation on DBS providers to devote a portion of their channel capacity to noncommercial programming of an educational or informational nature, the Commission determined that "it would frustrate Congress' goal to permit the set-aside capacity to be dominated by a single programming voice where there are other noncommercial voices seeking to be heard."[131] The fact that Section 335 does not specifically provide for the limitation in

[126] *Id.* at 7-8.

[127] *Id.* at 8-11.

[128] *See* DAETC and CME Joint Opposition at 17.

[129] *Id.* at 16.

[130] *Id.* at 18.

[131] *First Report and Order,* 13 FCC Rcd at 23303.

no way invalidates the legitimacy of the Commission's action.[132] Congress identified the promotion of diversity of views and information as one of the purposes of the 1992 Cable Act.[133] The Courts have also determined that promoting diversity of media sources is a proper Commission goal[134] and, specifically, that the Commission has the authority to apply rules promoting source diversity.[135] Finally, Section 335 expressly allows the Commission to impose "public interest or other requirements for providing video programming,"[136] and we believe that imposition of the one-channel limitation in order to foster diversity of programming is an appropriate exercise of that authority. Consequently, we find that the Commission's decision to adopt the one-channel-per-programmer limitation was sound as a matter of law.

60. The one-channel limitation is also sound public policy. While we agree that a large, highly experienced, and well funded noncommercial programmer may be capable of consistently producing an array of high quality programs, the fact remains that multiple views from the same programmer does not provide the benefits of source diversity since that programmer decides what programs will be produced and offered.[137] The Commission adopted the one-channel-per-programmer limit to promote diversity of voices.[138] In other words, the purpose of the limitation is to foster "the widest possible dissemination of information from diverse and antagonistic sources."[139] We believe that the goal of promoting diversity is best achieved by having multiple programmers competing for the capacity reserved for noncommercial programming. Furthermore, we do not find the one-channel limitation on programmers unduly burdensome on DBS providers. In view of the Commission's policy allowing DBS providers to select among qualified programmers, the one-channel-per-programmer requirement permits the Commission to minimize the burdens it places on DBS providers while retaining effective oversight to ensure that programming is not dominated by a single voice. DBS providers, therefore, are given wide latitude to select programmers, but their discretion is tempered to ensure that it does not result in domination by one or two major programmers when other noncommercial entities are seeking access. Indeed, the programmers currently carried in compliance with our rules include a wide variety of entities such as educators, NASA, ethnic programmers, and religious programmers. In addition, DBS providers are free

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

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

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

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

[136] 47 U.S.C. § 335(a).

[137] *See* DAETC and CME Joint Opposition at 14.

[138] *See First Report and Order,* 13 FCC Rcd at 23302-03.

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

to carry more than one program from a single programmer provided they count only one channel per qualified programmer to satisfy their reservation obligations. [140] Thus, DBS providers retain significant discretion in putting together subscriber offerings without unduly limiting the diversity of their public interest programmers. Finally, it should be remembered that the one-channel limitation pertains only to those channels reserved in compliance with the four percent reservation.

IV. CONCLUSION

61. For the reasons discussed above, we reaffirm the Commission's interpretation of Section 335 as reflected in the implementing rules with the exception of political broadcasting rules and rules limiting advertising on children's programming. Consequently, we grant in part and deny in part the petitions for reconsideration.

V. PAPERWORK REDUCTION ACT ANALYSIS

62. This Report and Order contains modified information collections subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collections contained in the proceeding.

63. Written comments by the public on the modified information collections are due [60 days from date of publication in the Federal Register] Written comments must be submitted by the public, Office of Management and Budget (OMB), and other interested parties on the modified information collections on or before [60 days from date of publication in the Federal Register] In addition to filing comments with the Secretary, a copy of any Paperwork Reduction Act comments on the information collections contained herein should be submitted to Judith B. Herman, Federal Communications Commission, Room 1-C804, 445 12th Street, SW, Washington, D.C. 20554, or via the Internet to Judith-B.Herman @fcc.gov and to Kim A. Johnson, OMB Desk Officer, Room 10236 NEOB, 725 17th Street, N.W., Washington, D.C. 20503 or via the Internet to KimA.Johnson@omb.eop.gov or by fax to 202-395-5167.

VI. REGULATORY FLEXIBILITY ACT CERTIFICATION

64. A Final Regulatory Flexibility Act Certification is attached hereto as Appendix B.

VII. ORDERING CLAUSES

65. Accordingly, IT IS ORDERED that the petitions for reconsideration filed by the American Cable Association (including its petition for reconsideration of the Final Regulatory Flexibility Act

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

analysis), America's Public Television Stations and the Public Broadcasting Service, GE American Communications, Inc., Loral Space and Communications Ltd., PanAmSat Corporation,, and Time Warner Cable ARE DENIED and the petitions for reconsideration filed by the Denver Area Educational Telecommunications Consortium, *et al* and the Center for Media Education, *et al*, ARE GRANTED to the extent discussed herein, and ARE OTHERWISE DENIED.

66. IT IS FURTHER ORDERED, pursuant to the authority contained in sections 4, 301, 302, 303, 307, 309, 312, 315, 332, and 335 of the Communications Act, as amended, 47 U.S.C. Sections 154, 301, 303, 307, 309, 312, 315, 332, and 335, that revised 47 C.F.R. §25.701 SHALL BECOME EFFECTIVE thirty (30) days after publication of the text or summary thereof in the Federal Register, except sections 25.701(d)(1)(i)&(ii),(2),&(3); 25.701(e)(3); and 25.701 (f)(6)(i)&(ii) which involve Paperwork Reduction Act burdens, which SHALL BECOME EFFECTIVE immediately upon announcement in the Federal Register of OMB approval.

67. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Order on Reconsideration, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

Appendix A -- Rule Changes

Part 25 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 25 – SATELLITE COMMUNICATIONS

SUBPART J PUBLIC INTEREST OBLIGATIONS

1. The authority citation for Part 25 reads as follows:

AUTHORITY: 47 U.S.C. 701-744. Interprets or applies Sections 4, 301, 302, 303, 307, 309, 312, 315, 332, and 335 of the Communications Act, as amended, 47 U.S.C. Sections 154, 301, 303, 307, 309, 312, 315, 332 and 335 unless otherwise noted.

2. Section 25.701 is revised to read as follows:

§ 25.701 Public interest obligations.

(a) DBS providers are subject to the public interest obligations set forth in paragraphs (b), (c), (d), (e) and (f) of this section. As used in this section, DBS providers are any of the following:

(1) Entities licensed to operate satellites in the 12.2 to 12.7 GHz DBS frequency bands; or

(2) Entities licensed to operate satellites in the Ku band fixed satellite service and that sell or lease capacity to a video programming distributor that offers service directly to consumers providing a sufficient number of channels so that four percent of the total applicable programming channels yields a set aside of at least one channel of non commercial programming pursuant to paragraph (e) of this section, or

(3) Non U.S. licensed satellite operators in the Ku band that offer video programming directly to consumers in the United States pursuant to an earth station license issued under part 25 of this title and that offer a sufficient number of channels to consumers so that four percent of the total applicable programming channels yields a set aside of one channel of non commercial programming pursuant to paragraph (e) of this section.

(b) Political broadcasting requirements --

(1) Legally qualified candidates for public office for purposes of this section are as defined in 47 CFR § 73.1940.

(2) DBS origination programming is defined as programming (exclusive of broadcast signals) carried on a DBS facility over one or more channels and subject to the exclusive control of the DBS provider.

(3) Reasonable access.
(i) DBS providers must comply with Section 312(a)(7) of the Communications Act of 1934, as amended, by allowing reasonable access to, or permitting purchase of reasonable amounts of time for, the use of their facilities by a legally qualified candidate for federal elective office on behalf of his or her candidacy.
(ii) Weekend Access. For purposes of providing reasonable access, DBS providers shall make facilities available for use by federal candidates on the weekend before the election if the DBS provider has provided similar access to commercial advertisers during the year preceding the relevant election period. DBS providers shall not discriminate between candidates with regard to weekend access.

(4) Use of facilities; equal opportunities. DBS providers must comply with Section 315 of the Communications Act of 1934, as amended, by providing equal opportunities to legally qualified candidates for DBS origination programming.

(i) General requirements. Except as otherwise indicated in section 25.701(b)(3), no DBS provider is required to permit the use of its facilities by any legally qualified candidate for public office, but if a DBS provider shall permit any such candidate to use its facilities, it shall afford equal opportunities to all other candidates for that office to use such facilities. Such DBS provider shall have no power of censorship over the material broadcast by any such candidate. Appearance by a legally qualified candidate on any:

(A) Bona fide newscast;

(B) Bona fide news interview;

(C) Bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary); or

(D) On the spot coverage of bona fide news events (including, but not limited to political conventions and activities incidental thereto)

shall not be deemed to be use of a DBS provider's facility. (section 315(a) of the Communications Act.)

(ii) Uses. As used in this section and § 25.701(c), the term "use" means a candidate appearance (including by voice or picture) that is not exempt under paragraphs 25.701(b)(3)(i)(A) through (i)(D) of this section.

(iii) Timing of Request. A request for equal opportunities must be submitted to the DBS provider within 1 week of the day on which the first prior use giving rise to the right of equal opportunities occurred: Provided, however, That where the person was not a candidate at the time of such first prior use, he or she shall submit his or her request within 1 week of the first subsequent use after he or she has become a legally qualified candidate for the office in question.

(iv) Burden of proof. A candidate requesting equal opportunities of the DBS provider or complaining of noncompliance to the Commission shall have the burden of proving that he or she and his or her opponent are legally qualified candidates for the same public office.

(v) Discrimination between candidates. In making time available to candidates for public office, no DBS provider shall make any discrimination between candidates in practices, regulations, facilities, or services for or in connection with the service rendered pursuant to this part, or make or give any preference to any candidate for public office or subject any such candidate to any prejudice or disadvantage; nor shall any DBS provider make any contract or other agreement that shall have the effect of permitting any legally qualified candidate for any public office to use DBS origination programming to the exclusion of other legally qualified candidates for the same public office.

(c) Candidate rates.

(1) Charges for use of DBS facilities. The charges, if any, made for the use of any DBS facility by any person who is a legally qualified candidate for any public office in connection with his or her campaign for nomination for election, or election, to such office shall not exceed:

(i) During the 45 days preceding the date of a primary or primary runoff election and during the 60 days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the DBS provider for the same class and amount of time for the same period.

(A) A candidate shall be charged no more per unit than the DBS provider charges its most favored commercial advertisers for the same classes and amounts of time for the same periods. Any facility practices offered to commercial advertisers that enhance the value of advertising spots must be disclosed and made available to candidates upon equal terms. Such practices include but are not limited to any discount privileges that affect the value of advertising, such as bonus spots, time sensitive make goods, preemption priorities, or any other factors that enhance the value of the announcement.

(B) The Commission recognizes non preemptible, preemptible with notice, immediately preemptible and run of schedule as distinct classes of time.

(C) DBS providers may establish and define their own reasonable classes of immediately preemptible time so long as the differences between such classes are based on one or more demonstrable benefits associated with each class and are not based solely upon price or identity of the advertiser. Such demonstrable benefits include, but are not limited to, varying levels of preemption protection, scheduling flexibility, or associated privileges, such as guaranteed time sensitive make goods. DBS providers may not use class distinctions to defeat the purpose of the lowest unit charge requirement. All classes must be fully disclosed and made available to candidates.

(D) DBS providers may establish reasonable classes of preemptible with notice time so long as they clearly define all such classes, fully disclose them and make them available to candidates.

(E) DBS providers may treat non preemptible and fixed position as distinct classes of time provided that they articulate clearly the differences between such classes, fully disclose them, and make them available to candidates.

(F) DBS providers shall not establish a separate, premium priced class of time sold only to candidates. DBS providers may sell higher priced non preemptible or fixed time to candidates if such a class of time is made available on a bona fide basis to both candidates and commercial advertisers, and provided such class is not functionally equivalent to any lower priced class of time sold to commercial advertisers.

(G) [Reserved]

(H) Lowest unit charge may be calculated on a weekly basis with respect to time that is sold on a weekly basis, such as rotations through particular programs or dayparts. DBS providers electing to calculate the lowest unit charge by such a method must include in that calculation all rates for all announcements scheduled in the rotation, including announcements aired under long term advertising contracts. DBS providers may implement rate increases during election periods only to the extent that such increases

constitute "ordinary business practices," such as seasonal program changes or changes in audience ratings.

(I) DBS providers shall review their advertising records periodically throughout the election period to determine whether compliance with this section requires that candidates receive rebates or credits. Where necessary, DBS providers shall issue such rebates or credits promptly.

(J) Unit rates charged as part of any package, whether individually negotiated or generally available to all advertisers, must be included in the lowest unit charge calculation for the same class and length of time in the same time period. A candidate cannot be required to purchase advertising in every program or daypart in a package as a condition for obtaining package unit rates.

(K) DBS providers are not required to include non cash promotional merchandising incentives in lowest unit charge calculations; provided, however, that all such incentives must be offered to candidates as part of any purchases permitted by the system. Bonus spots, however, must be included in the calculation of the lowest unit charge calculation.

(L) Make goods, defined as the rescheduling of preempted advertising, shall be provided to candidates prior to election day if a DBS provider has provided a time sensitive make good during the year preceding the pre election periods, respectively set forth in paragraph (c)(1)(i) of this section, to any commercial advertiser who purchased time in the same class.

(M) DBS providers must disclose and make available to candidates any make good policies provided to commercial advertisers. If a DBS provider places a make good for any commercial advertiser or other candidate in a more valuable program or daypart, the value of such make good must be included in the calculation of the lowest unit charge for that program or daypart.

(ii) At any time other than the respective periods set forth in paragraph (c)(1)(i) of this section, DBS providers may charge legally qualified candidates for public office no more than the charges made for comparable use of the facility by commercial advertisers. The rates, if any, charged all such candidates for the same office shall be uniform and shall not be rebated by any means, direct or indirect. A candidate shall be charged no more than the rate the DBS provider would charge for comparable commercial advertising. All discount privileges otherwise offered by a DBS provider to commercial advertisers must be disclosed and made available upon equal terms to all candidates for public office.

(2) If a DBS provider permits a candidate to use its facilities, it shall make all discount privileges offered to commercial advertisers, including the lowest unit charges for each class and length of time in the same time period and all corresponding discount privileges, available on equal terms to all candidates. This duty includes an affirmative duty to disclose to candidates information about rates, terms, conditions and all value enhancing discount privileges offered to commercial advertisers, as provided herein**.** DBS providers may use reasonable discretion in making the

disclosure; provided, however, that the disclosure includes, at a minimum, the following information:

(i) A description and definition of each class of time available to commercial advertisers sufficiently complete enough to allow candidates to identify and understand what specific attributes differentiate each class;

(ii) A description of the lowest unit charge and related privileges (such as priorities against preemption and make goods prior to specific deadlines) for each class of time offered to commercial advertisers;

(iii) A description of the DBS provider's method of selling preemptible time based upon advertiser demand, commonly known as the "current selling level," with the stipulation that candidates will be able to purchase at these demand generated rates in the same manner as commercial advertisers;

(iv) An approximation of the likelihood of preemption for each kind of preemptible time; and

(v) An explanation of the DBS provider's sales practices, if any, that are based on audience delivery, with the stipulation that candidates will be able to purchase this kind of time, if available to commercial advertisers.

(3) Once disclosure is made, DBS providers shall negotiate in good faith to actually sell time to candidates in accordance with the disclosure.

(d) Political file. Each DBS provider shall keep and permit public inspection of a complete and orderly political file and shall prominently disclose the physical location of the file, and the telephonic and electronic means to access the file.

(1) The political file shall contain, at a minimum:

(i) A record of all requests for DBS origination time, the disposition of those requests, and the charges made, if any, if the request is granted. The "disposition" includes the schedule of time purchased, when spots actually aired, the rates charged, and the classes of time purchased; and

(ii) A record of the free time provided if free time is provided for use by or on behalf of candidates.

(2) DBS providers shall place all records required by this section in a file available to the public as soon as possible and shall be retained for a period of four years until December 31, 2006, and thereafter for a period of two years.

(3) DBS providers shall make available, by fax, e-mail, or by mail upon telephone request, photocopies of documents in their political files and shall assist callers by answering questions about the contents of their political files. Provided, however, that if a requester prefers access by mail, the DBS provider shall pay for postage but may require individuals requesting documents to pay for photocopying. To the extent that a DBS provider places its political file on its website, it may refer the public to the website in lieu of mailing photocopies. Any material required by this section to be maintained in the political file must be made available to the public by either mailing or website access or both.

(e) Commercial limits in children's programs.

(1) No DBS provider shall air more than 10.5 minutes of commercial matter per hour during children's programming on weekends, or more that 12 minutes of commercial matter per hour on week days.

(2) This rule shall not apply to programs aired on a broadcast television channel which the DBS provider passively carries, or to channels over which the DBS provider may not exercise editorial control, pursuant to 47 U.S.C. 335(b)(3).

(3) DBS providers airing children's programming must maintain records sufficient to verify compliance with this rule and make such records available to the public. Such records must be maintained for a period sufficient to cover the limitations period specified in 47 U.S.C. 503(b)(6)(B).

Note 1 to § 25.701(e): *Commercial matter* means airtime sold for purposes of selling a product or service.

Note 2 to § 25.701(e): For purposes of this section, children's programming refers to programs originally produced and broadcast primarily for an audience of children 12 years old and younger.

(f) Carriage obligation for noncommercial programming--

(1) Reservation requirement. DBS providers shall reserve four percent of their channel capacity exclusively for use by qualified programmers for noncommercial programming of an educational or informational nature. Channel capacity shall be determined annually by calculating, based on measurements taken on a quarterly basis, the average number of channels available for video programming on all satellites licensed to the provider during the previous year. DBS providers may use this reserved capacity for any purpose until such time as it is used for noncommercial educational or informational programming.

(2) Qualified programmer. For purposes of these rules, a qualified programmer is:

(i) A noncommercial educational broadcast station as defined in section 397(6) of the Communications Act of 1934, as amended,

(ii) A public telecommunications entity as defined in section 397(12) of the Communications Act of 1934, as amended,

(iii) An accredited nonprofit educational institution or a governmental organization engaged in the formal education of enrolled students (A publicly supported educational institution must

be accredited by the appropriate state department of education; a privately controlled educational institution must be accredited by the appropriate state department of education or the recognized regional and national accrediting organizations), or

(iv) A nonprofit organization whose purposes are educational and include providing educational and instructional television material to such accredited institutions and governmental organizations.

(v) Other noncommercial entities with an educational mission.

(3) Editorial control.

(i) A DBS operator will be required to make capacity available only to qualified programmers and may select among such programmers when demand exceeds the capacity of their reserved channels.

(ii) A DBS operator may not require the programmers it selects to include particular programming on its channels.

(iii) A DBS operator may not alter or censor the content of the programming provided by the qualified programmer using the channels reserved pursuant to this section.

(4) Non-commercial channel limitation. A DBS operator cannot initially select a qualified programmer to fill more than one of its reserved channels except that, after all qualified entities that have sought access have been offered access on at least one channel, a provider may allocate additional channels to qualified programmers without having to make additional efforts to secure other qualified programmers.

(5) Rates, terms and conditions.

(i) In making the required reserved capacity available, DBS providers cannot charge rates that exceed costs that are directly related to making the capacity available to qualified programmers. Direct costs include only the cost of transmitting the signal to the uplink facility and uplinking the signal to the satellite.

(ii) Rates for capacity reserved under paragraph (a) of this section shall not exceed 50 percent of the direct costs as defined in this section.

(iii) Nothing in this section shall be construed to prohibit DBS providers from negotiating rates with qualified programmers that are less than 50 percent of direct costs or from paying qualified programmers for the use of their programming.

(iv) DBS providers shall reserve discrete channels and offer these to qualifying programmers at consistent times to fulfill the reservation requirement described in these rules.

(6) Public file.

(i) In addition to the political file requirements in section 25.701(d), each DBS provider shall keep and permit public inspection of a complete and orderly record of:

(A) Quarterly measurements of channel capacity and yearly average calculations on which it bases its four percent reservation, as well as its response to any capacity changes;

(B) A record of entities to whom noncommercial capacity is being provided, the amount of capacity being provided to each entity, the conditions under which it is being provided and the rates, if any, being paid by the entity;

(C) A record of entities that have requested capacity, disposition of those requests and reasons for the disposition.

(ii) All records required by this paragraph shall be placed in a file available to the public as soon as possible and shall be retained for a period of two years.

(7) Effective date. DBS providers are required to make channel capacity available pursuant to this section upon the effective date. Programming provided pursuant to this rule must be available to the public no later than six months after the effective date.

APPENDIX B

FINAL REGULATORY FLEXIBILITY CERTIFICATION

The Regulatory Flexibility Act of 1980, as amended (RFA),[141] requires that a regulatory flexibility analysis be prepared for notice-and-comment rule making proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."[142] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[143] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[144] A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[145]

The Order on Reconsideration mandates that DBS providers maintain political files that contain, at a minimum, (i) a record of all requests for DBS origination time, the disposition of those requests, and the charges made, if any, if the request is granted. The "disposition" includes the schedule of time purchased, when spots actually aired, the rates charged, and the classes of time purchased; and (ii) a record of the free time provided if free time is provided for use by or on behalf of candidates. DBS providers must also maintain records sufficient to verify compliance with the rules establishing commercial limits for children's programming. Because DBS provides subscription services, DBS falls within the SBA-recognized definitions of "Cable Networks" and Cable and Other Program Distribution."[146] These definitions provide that small entities are ones with $12.5 million or less in annual receipts.[147] Small businesses, i.e. ones with less than $12.5 million in annual receipts, do not have the

[141] The RFA, *see* 5 U.S.C. § 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[142] 5 U.S.C. § 605(b).

[143] 5 U.S.C. § 601(6).

[144] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[145] 15 U.S.C. § 632.

[146] 13 C.F.R. § 121.201, North American Industry Classification Systems (NAICA) codes 513210 and 513220.

[147] 13 C.F.R. § 121.201, NAICS codes 513210 and 513220.

financial ability to become DBS licensees because of the high implementation costs associated with satellite services. Because this is an established service, with limited spectrum and orbital resources for assignment, we estimate that no more than 15 entities will be Commission licensees providing these services. In addition, because of high implementation costs and limited spectrum resources, we believe that none of the 15 licensees will be small entities. We expect that no small entities will be impacted by this rulemaking. Therefore, we certify that the requirements of the Order on Reconsideration will not have a significant economic impact on a substantial number of small entities.

We note that the American Cable Association ("ACA") (formerly the Small Cable Business Association) filed a Petition for Reconsideration of the *First Report and Order*'s Final Regulatory Flexibility Analysis, claiming generally that the Commission failed to properly take into account the harm that would be caused to small cable operators by the lack of rules requiring DBS providers to carry all local broadcast programming.[148] The Order on Reconsideration finds that although the Final Regulatory Flexibility Analysis issued in conjunction with the *First Report and Order* was adequate, in any event the intervening adoption of broadcast signal carriage rules for DBS, similar to those imposed on cable systems, has alleviated the concerns articulated by ACA.

Therefore, we certify that the rules in this Order will not have a significant economic impact on a substantial number of small entities.

[148] Petition for Reconsideration filed Mar. 9, 1999.

SEPARATE STATEMENT OF
COMMISSIONER MICHAEL J. COPPS

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

Although not ideal, I support today's Second Order on Reconsideration because it corrects two glaring deficiencies of our First Order on Reconsideration. Today's action adopts rules implementing the political broadcasting obligations of DBS and takes steps to ensure that the political files of DBS operators are readily accessible. In addition, the Order moves forward to limit the over-commercialization of children's programming on DBS. I dissented to the First Order on Reconsideration, highlighting these areas of concern. I appreciate my colleagues' willingness to remedy these problems. I look forward to working through a number of other issues with respect to DBS operators in the near future, including clarifying that DBS providers may not discriminate against some local broadcasters in a market by requiring consumers to obtain a second dish to receive those signals.

SEPARATE STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN

Re: Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Digital Broadcast Satellite Public Interest Obligations; Sua Sponte Reconsideration of Memorandum Opinion and Order on Reconsideration of First Report and Order

While not perfect, I support this Order. Today's action presses forward the expectations of Congress concerning the public interest responsibilities of direct broadcast satellite service providers. Given the evolution of DBS, the Commission's adoption of specific rules implementing political broadcasting requirements and protecting children from excessive commercialization is a positive and practical step. Specific rules provide certainty to DBS providers, political candidates, and the viewing public.