

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

In the Matter of
Farm Journal, Inc.
Petition For Declaratory Ruling
MB Docket No. 06-92

ORDER AND DECLARATORY RULING

Adopted: November 28, 2006

Released: December 4, 2006

By the Commission:

I. INTRODUCTION

1. In this Order, we grant the Petition for Declaratory Ruling filed by Farm Journal, Inc. ("Farm Journal") seeking a finding that RFD-TV, a programming service owned and operated by RFD Communications, Inc., fails to qualify for carriage by direct broadcast satellite ("DBS") providers in fulfillment of their public interest obligations under 47 C.F.R. § 25.701. Specifically, Farm Journal alleges that RFD-TV's programming contains commercial advertisements and is therefore ineligible for carriage on channels that DBS providers reserve for qualified nonprofit organizations or noncommercial educational entities. For the reasons discussed below, based upon the specific facts and circumstances found in this matter before us, we find that RFD-TV does not qualify for carriage on capacity set aside by DBS providers pursuant to section 25.701(f)(1) of our rules when it acts like a commercial entity and favors certain programming. Accordingly, we conclude that, so long as it engages in this conduct, RFD-TV does not meet the criteria to be classified as a programmer qualified to be carried on any DBS channel capacity so reserved under the Commission's Part 25 rules.

II. BACKGROUND

2. In the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), Congress directed the Commission to impose certain public interest obligations on DBS providers, including a set-aside of channel capacity for noncommercial educational or informational programming. Section 25.701(f)(1) of the Commission's rules, which implements this statutory provision, requires DBS providers to reserve four percent of their channel capacity exclusively for use by "qualified programmers for noncommercial programming of an educational or informational nature." Section 25.701(f)(2) of the

1 Petition for Declaratory Ruling of Farm Journal Inc. (Nov. 28, 2005) ("Farm Journal Petition").

2 47 U.S.C. § 335(a). See Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Public Interest Obligations, Report and Order, 13 FCC Rcd 23254 (1998) ("First Report and Order"), on recon., 19 FCC Rcd 5854 (2004), vacated in limited part, 19 FCC Rcd 5647 (2004). As part of the set aside requirement, Congress mandated that DBS providers offer access to educational programmers at reasonable prices, terms, and conditions. 47 U.S.C. § 335(b)(3).

3 47 C.F.R. § 25.701(f)(1). In making the required reserved capacity available, DBS providers may not charge rates that "exceed costs that are directly related to making the capacity available to qualified programmers." 47 C.F.R. § 25.701(f)(5)(i).

rules sets forth the definition of what constitutes a “qualified programmer” for the purposes of this carriage obligation.⁴ Pursuant to this rule, a “qualified programmer” is either: (a) a noncommercial educational broadcast station as defined in section 397(6) of the Communications Act of 1934, as amended; (b) a public telecommunications entity as defined in section 397(12) of the Communications Act of 1934, as amended; (c) an accredited nonprofit educational institution or a governmental organization engaged in the formal education of enrolled students; (d) a nonprofit organization whose purposes are educational and include providing educational and instructional television material to such accredited institutions and governmental organizations; or (e) an other noncommercial entity with an educational mission.⁵ An entity being carried on a DBS provider’s set-aside capacity must air only “noncommercial programming of an educational or informational nature.”⁶

3. On November 28, 2005, Farm Journal filed a Petition for Declaratory Ruling asking the Commission to find that RFD-TV fails to satisfy the eligibility requirements of an educational programming supplier for purposes of carriage by DBS providers in fulfillment of their public interest obligations under 47 C.F.R. § 25.701.⁷ Farm Journal alleges that RFD-TV’s programming contains commercial advertisements and is therefore ineligible for carriage on channels that DBS providers reserve for qualified nonprofit organizations or noncommercial educational entities.⁸ By Public Notice released on April 20, 2006, the Media Bureau established that comments should be filed by May 22, 2006, and replies by June 6, 2006.⁹ These dates were later extended.¹⁰

4. A number of parties, including Farm Journal and Free Press, argue that RFD-TV is abusing the DBS set-aside rules by airing commercial programming.¹¹ In its comments, Farm Journal alleges that RFD-TV airs on its DBS set-aside channel live, for-profit livestock auctions conducted by a large for-profit livestock company called Superior Livestock Auctions, Inc. (“Superior”).¹² Likewise, Free Press argues that “RFD-TV has been airing impermissible commercial programming” on channel capacity that should be reserved exclusively for non-commercial programming.¹³ Both Farm Journal and Free Press generally argue that the Commission should prohibit DBS providers from carrying RFD-TV programming pursuant to the Commission’s Part 25 set-aside rules. In effect, these parties argue that RFD-TV is acting like a commercial enterprise, and so the Commission should more carefully scrutinize RFD-TV’s actions and programming before allowing RFD-TV to take advantage of the Part 25 set-aside requirements for DBS providers.

⁴ 47 C.F.R. § 25.701(f)(2).

⁵ *Id.*

⁶ 47 C.F.R. § 25.701(f)(1).

⁷ See Farm Journal Petition at 4-13. While Farm Journal also asks the Commission to find that RFD-TV is not a qualified programmer under 47 C.F.R. § 25.701, there is not an adequate record for the Commission to reach such a decision at this time.

⁸ See Farm Journal Petition at 4-13.

⁹ *Request For Comment On Petition For Declaratory Ruling Regarding RFD Communications, Inc. and Its Eligibility To Be Carried as a DBS Public Interest Noncommercial Programmer*, MB Docket No. 06-92, Public Notice, DA 06-906 (rel. Apr. 20, 2006).

¹⁰ *Farm Journal, Inc.*, MB Docket No. 06-92, Order, DA 06-1088 (rel. May 24, 2006).

¹¹ Farm Journal Reply at 1-6; Free Press Comments at 5-9.

¹² Farm Journal Reply at 3-6.

¹³ Free Press Comments at 3.

5. RFD-TV responds that it is the only nationally-distributed television network devoted exclusively to serving the needs and interests of the nation's rural community.¹⁴ In particular, RFD-TV argues that its programming "provides specific educational or informational value to its viewers," and that it "provides coverage of various auctions of livestock in order to inform viewers, and not . . . to facilitate a commercial transaction."¹⁵ According to RFD-TV, these auctions provide ranchers and other individuals with "valuable, real-time information" on factors that affect the economic health of the cattle industry.¹⁶

6. Superior creates its own video content through Superior Productions, a division of Superior Film Productions, L.L.C.¹⁷ According to Superior's web site, Superior Productions has been the broadcast and production division of Superior Livestock Auction since 1993, and annually produces and broadcasts over 500 hours of live television for Superior Livestock Auction.¹⁸

III. DISCUSSION

7. Under the Commission's rules, a "qualified programmer" is either: (a) a noncommercial educational broadcast station as defined in section 397(6) of the Communications Act of 1934, as amended; (b) a public telecommunications entity as defined in section 397(12) of the Communications Act of 1934, as amended; (c) an accredited nonprofit educational institution or a governmental organization engaged in the formal education of enrolled students; (d) a nonprofit organization whose purposes are educational and include providing educational and instructional television material to such accredited institutions and governmental organizations; or (e) an other noncommercial entity with an educational mission.¹⁹ RFD-TV does not claim to be a noncommercial educational broadcast station (given that it is not a licensed television station at all, noncommercial or otherwise); an accredited educational institution; or an educational organization that provides educational and instructional television programming to educational institutions.²⁰ RFD-TV does argue that it meets the criteria established in section 25.701(f)(2) of the Commission's rules because it is a "public charity organized for the purpose of delivering educational and instruction programming to rural America."²¹ Even if RFD-TV should be considered a noncommercial entity with an educational mission under section 25.701(f)(2)(e) of the Commission's rules, however, we find that it is not acting like a noncommercial entity with an educational mission in this instance. Because RFD-TV favors certain programming, maintains a significant exclusive relationship with Superior, a commercial enterprise, and acts as if it is a commercial enterprise, we conclude that RFD-TV cannot avail itself of the DBS set-aside provisions contained in section 25.701 of the Commission's rules at this time.

8. Although airing auctions may have educational and informational benefit to some viewers, we find that, in this case, any such benefits are secondary to RFD-TV's primary purpose behind airing these livestock auctions, which, as noted, is to increase revenue for Superior. In reaching this conclusion, we have taken particular notice of the fact that: (1) RFD-TV maintains a direct, exclusive relationship with Superior; (2) Superior is a commercial enterprise; (3) RFD-TV promotes Superior

¹⁴ Opposition of RFD Communications, Inc. to Farm Journal, Inc. Petition for Declaratory Ruling ("RFD Opposition") at 1.

¹⁵ *Id.* at 4.

¹⁶ *Id.*

¹⁷ See <http://www.superiorlivestock.com/Superior.sla?sp=spa>.

¹⁸ *Id.*

¹⁹ 47 C.F.R. § 25.701(f)(2).

²⁰ See Farm Journal Petition at 4-5; RFD Opposition.

²¹ RFD-TV Opposition at 2-3.

livestock auctions to the exclusion of those of competing livestock auction companies; and (4) Superior provides the largest source of funding for RFD-TV's sponsorship revenue. The fact that auctions performed by other livestock auctioneers are not featured on RFD-TV further leads us to conclude that the primary purpose of such Superior auctions programming is commercial, and not educational or informational in nature. In short, RFD-TV and Superior act as if they are partners working in unison and engaged in a single commercial enterprise. Some commenters point to the existence of a special relationship between RFD-TV and Superior, and the record and public sources of information indicate that there is a significant and ongoing relationship between RFD-TV and Superior.²² Indeed, RFD-TV acknowledges that Superior provides a regular source of funding to RFD-TV in the form of sponsorship payments, and these payments amount to a significant portion of RFD-TV's total revenue derived from sponsorship payments.²³

9. RFD-TV's web site indicates that RFD-TV airs only those livestock auctions conducted by Superior, to the exclusion of livestock auctions performed by other auctioneers.²⁴ This undercuts RFD-TV's claim that its airing of these auctions is for educational or informational purposes. Moreover, such transmissions are not intermittent; an analysis of RFD-TV's web site indicates that RFD-TV appears to broadcast Superior auctions from around the country on a regularly-scheduled basis. By airing the programming of Superior to the exclusion of others, RFD-TV provides the livestock auctions of one company a leg up on the livestock auctions conducted by other companies. Moreover, RFD-TV's provision of such an improper advantage to Superior indicates that RFD-TV maintains an interest in, and is likely invested in the success of, this commercial enterprise. Publicly-available sources of information confirm the special relationship between RFD-TV and Superior and tout it as a competitive advantage for Superior.²⁵ Third, the relationship between RFD-TV and Superior is significant and appears to extend beyond the mere airing of livestock auctions.²⁶ For example, RFD-TV's senior management includes the former Sales Director of Superior.²⁷ RFD-TV provides substantial information on its web site about Superior's business (including direct contact information), how a Superior livestock auction works (including definitions of commonly-used terms), and how to participate in a Superior livestock auction. Indeed, RFD-TV's web site acknowledges that it maintains a special relationship with Superior, noting that the commercial enterprise "teamed up with RFD-TV" and touting that, through programming distributed by RFD-TV, Superior "sells over 1.3 million head of cattle a year over the television."²⁸

²² See, e.g., Free Press Comments at 9, Ex. A.

²³ See RFD-TV Opposition at 17, n.23. We understand their sponsorship payments constitute approximately 20 percent of RFD-TV's total revenue derived from sponsorship payments and has been as high as 60 percent.

²⁴ See Farm Journal Comments at Ex. D (describing Superior livestock auctions); Farm Journal Reply at 3-6; Western Video Comments at 1 (arguing that Superior uses carriage on RFD-TV to create "a non-level playing field"); Intermountain Comments at 2 (arguing that RFD-TV has abused its non-profit status by providing Superior "with the ability to artificially lower their prices creating an unfair competitive advantage"); Turner Media Group Comments at 4 (arguing that RFD-TV has "abused its non-profit status by carrying for-profit auctions provided exclusively by Superior").

²⁵ See Chris Clayton, *Council Bluffs, Iowa, Cattle Auction Cashes In on Technology, Casino*, OMAHA WORLD-HERALD, June 26, 2003. In this article, Superior senior management is quoted as saying that RFD-TV "expands the buyers" and "gives the ability for people to see what the market trends are." *Id.* at 1. In fact, in at least one newspaper article, the senior management of RFD-TV noted that "[p]robably 98 percent of the cattle will be sold today to people watching at home or in their offices." *Id.*

²⁶ See <http://www.rfdtv.com/shows/superior.asp>.

²⁷ See <http://www.fcc.gov/cgb/rural/bios/patrickgottsch.html>. The publicly available biography notes both the commercial focus of Superior livestock auctions and the use of satellite television as the means for delivering such programming in the marketplace.

²⁸ See <http://www.rfdtv.com/shows/superior.asp>.

Likewise, the record and publicly-available information also indicate that Superior informs the viewing public of its special relationship with RFD-TV.²⁹ For example, Superior describes itself in an agricultural publication as engaged in “[c]ommercial cattle marketing through the use of bi-weekly satellite video auctions broadcast on RFD-TV, daily Internet auctions, private treaty listing services.”³⁰ This apparent affiliation serves as just one more signal that RFD-TV is acting like a commercial enterprise.

10. For these reasons, we find that RFD-TV is acting like a commercial enterprise instead of a noncommercial entity with an educational mission. This is the type of conduct that noncommercial educational broadcast stations, public telecommunications entities, accredited nonprofit educational institutions or governmental organizations engaged in the formal education of enrolled students -- nonprofit organizations whose purposes are educational and include providing educational and instructional television material to accredited institutions and governmental organizations -- do not undertake. Nor do we expect noncommercial entities with an educational mission to engage in this type of inherently commercial activity.

11. Thus, we conclude that RFD-TV may not use DBS set-aside capacity to air the Superior livestock auctions. In reaching our decision, we are informed by the basic purpose underlying the DBS set-aside rule, namely, that programming suppliers offer educational and informational content without a commercial purpose, either on the part of the content provider or the programming supplier itself. In this case, the record is replete with evidence of RFD-TV’s connection and interest in promoting Superior’s livestock auctions to the exclusion of other livestock auctions.

12. In addition, Farm Journal cites a number of other shows aired by RFD-TV that it alleges contain commercial advertisements promoting for-profit products and services, including the HorseCity.com, Gaither Homecoming Hour, Big Joe Show, RV Today, and Living the Country Life programs.³¹ According to Farm Journal, these programs exhibit and tout merchandise, direct viewers to commercial websites, or seek to sell products such as music CDs.³² Because we grant Farm Journal’s Petition based on the specific facts and circumstances related to RFD-TV’s airing of the Superior livestock auctions and its interest in and connection to this commercial venture, we do not address at this time the question of whether this other conduct disqualifies RFD-TV as a qualified programmer under section 25.701 of the Commission’s rules. We recognize the seriousness of these allegations, however, and emphasize that we may address these issues at a later date.

²⁹ Farm Journal Reply at 5 (quoting Superior employees during on-air auctions as they make references about the arrangement with RFD-TV).

³⁰ 43 Agri Marketing, E-commerce/E-Business 10, ¶ 6, available at 2006 Westlaw 3639491 (Jan. 1, 2006).

³¹ Farm Journal Petition at 8-12.

³² *Id.*

IV. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 4(i) and (j), and 335 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), and 335, and section 25.701 of the Commission's rules, 47 C.F.R. § 25.701, Farm Journal, Inc.'s Petition for Declaratory Ruling is HEREBY GRANTED to the extent discussed herein.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary