

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

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

REPLY COMMENTS OF

CAMPAIGN LEGAL CENTER
BENTON FOUNDATION
NEW AMERICA FOUNDATION
COMMON CAUSE
AND
OFFICE OF COMMUNICATION, INC., UNITED CHURCH OF CHRIST

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August 2, 2007

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SUMMARY

Despite the fact that the very purpose of this reopened comment period is to give parties the opportunity to refresh the record, the comments in opposition barely address the materially changed factual circumstances which the Commission is obliged to consider in its decision in this matter.

The Commission cannot base its decision in this matter solely upon the record as it existed in 1993. For one thing, the Commission always has inherent authority to revisit past decisions based on changed circumstances. In any event, the Commission must always base public interest determinations on the best facts available to it.

Several parties claim that the extended delay in resolving this matter precludes the Commission from acting on the petition for reconsideration at this time. However, there is no statutory or case law which supports the view that a petitioner for reconsideration can be deprived of its right to obtain reconsideration. The Commission complied with Section 4(g)(2) of the 1992 Cable Act by issuing a decision within the 270 day deadline for action; the statute cannot be plausibly construed to require reconsideration to be completed within that initial deadline, or to conclude that Congress intended to deny parties the right to seek timely reconsideration.

Several of the licensees recount at great length the claimed societal benefits of home shopping programming. None of them, however, discuss why, in light of changed circumstances since 1993, it is now necessary for this material to be delivered *via* scarce over-the-air television spectrum.

In light of clear precedent, there is no basis to claim that the Commission lacks authority to regulate excessive commercialization, or that grant of the reconsideration petition would violate Section 326 or the First Amendment.

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REPLY COMMENTS OF CAMPAIGN LEGAL CENTER, *ET AL.*

CLC, *et al.* respectfully replies to comments submitted in this proceeding by various licensees and the National Association of Broadcasters. These parties have opposed reconsideration in this docket for several reasons, none of which is meritorious.

The parties opposing reconsideration (collectively, “opponents”) do not seriously dispute, much less provide any new information to rebut, petitioner Center for Study of Commercialism’s (“CSC”) assertion that there was dispositive reliance on an unknown number of *ex parte* communications which are not part of the record in this case. Indeed, despite the fact that the very purpose of this reopened comment period is to give parties the opportunity to refresh the record, the various opposition comments barely address the materially changed factual circumstances which the Commission is obliged to consider in its decision in this matter.

With respect to what the opponents do say, much of it is directed at a defense of *full-time* home shopping formats, rather than *half-time* home shopping, which is what was put at issue in the pending petition for reconsideration. See CSC Petition for Reconsideration at pp. 6-9. That aside, a good bit of the opponents’ rhetoric is devoted to claims that the Commission may not refresh the record, that it is too late in the day for the Commission to act, encomia about the supposed benefits and services provided by home shopping channels, and to sweeping assertions that the Communi-

cations Act and the First Amendment preclude the Commission from setting limits on excessive commercialization.

CLC, *et al.* will address these arguments in turn.

I. THE COMMISSION HAS THE DISCRETION, AND THE DUTY, TO UPDATE THE RECORD.

Several parties appear to believe that the Commission should base its decision exclusively on the record as it existed as of 1993, and, seemingly, that the Commission lacks the authority to request updated information. Cocola Broadcasting, *et al.* go so far as to claim that it would be arbitrary and capricious to reconsider the Commission's 1993 decision. Comments of Cocola Broadcasting, *et al.*, pp. 15-19.

To the extent that it is suggested that the Commission needs specific authority under Section 4(g)(2) to conduct this proceeding, opponents' arguments are beside the point. For one thing, the Commission has inherent authority to reopen any proceeding as necessary. *See, e.g., Dun & Bradstreet Corp. v. United States Postal Service*, 946 F.2d 189, 193 (2d Cir. 1991) ("It is widely accepted that an agency may, on its own initiative, reconsider its interim or even its final decisions, regardless of whether the applicable statute and agency regulations expressly provide for such review."); *Trujillo v. General Electric Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980) ("Administrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider."); *Albertson v. FCC*, 182 F.2d 397, 399 (D.C. Cir. 1950) (same). More fundamentally, the Commission indubitably has authority under the public interest standard of the Communications Act to adopt any appropriate policy with respect to what constitutes service in the public interest and, specifically, to adopt policies with respect to excessive commercial-

ization. See, e.g., *Amendment of Part 3 of the Commission's Rules and Regulations With Respect to Advertising on Standard, FM and Television Broadcasting Stations*, 36 FCC 45, 47 (1964) (“The Federal Communications Commission has...consistently taken the position that [overcommercialization] was an important element in judging the overall program performance of an applicant or licensee.”). See also, *id.*, 36 FCC at 50-61 (legal opinion of the General Counsel concluding that the Commission has “the authority, and indeed the responsibility, to insure that the advertising practices of an applicant...are consistent with the public interest;...”).

Thus, the Commission does not need Section 4(g)(2) or, indeed, this reconsideration proceeding, to conduct the inquiry it has undertaken here.¹ Even were this not so, it is clearly not an abuse of discretion to fulfill the longstanding obligation to respond to CSC’s petition for reconsideration or to solicit comments to update the record. As the D.C. Circuit has held,

[r]egardless of the formal status of a party, or the technical merits of a particular petition, the FCC ‘should not close its eyes to the public interest factors’ raised by material in its files.^{FN32} We have noted that, as a general matter, the federal regulatory agencies should construe pleadings filed before them so as to raise rather than avoid important questions. They ‘should not adopt procedures that foreclose full inquiry into broad public interest questions, either patent or latent.’^{FN33}

^{FN32.} *Southwestern Publishing Co. v. FCC*, 100 U.S.App.D.C. 251, 254, 243 F.2d 829, 832 (1957).

^{FN33.} *Midwestern Gas Transmission Co. v. FPC*, 103 U.S.App.D.C. 360, 368, 258 F.2d 660, 668 (1958).

Retail Store Employees Union, Local 880 v. FCC, 436 F.2d 248, 254 (D.C. Cir. 1970).)

II. THE COMMISSION’S EXTENDED DELAY IN RESOLVING THIS MATTER DOES NOT RELIEVE IT OF THE DUTY TO ACT NOW.

A number of the parties claim that they, and not the viewing public, are the aggrieved parties

¹Insofar as the Administrative Procedure Act requires notice and comment, the Commission has effectively complied with that requirement as well.

in this proceeding. They complain that they may face new public interest responsibilities were the Commission to take particular actions not to their liking. They argue that the extended delay in acting on the pending reconsideration petition somehow deprives the Commission of the authority to act. Citing general principles about the virtues of administrative finality, it is claimed that the Commission's extended inaction in this docket at some point ripened into finality, and that the Commission may not now complete this docket. Shop NBC goes so far as to lay the blame upon CSC, suggesting that CSC was obliged to seek the extraordinary remedy of *mandamus*. Comments of Shop NBC at p. 7, n.22.

There is nothing in the statutory or case law which states that a timely-filed request for action is deemed denied as of a date certain.² Indeed, while this is surely one of the older cases on the Commission's docket, it is not the first time that the Commission has failed to act for very long periods of time. In no similar case has a party ever been penalized for being patient by awaiting agency action. *See, e.g., Radio Television News Directors Association v. FCC*, 159 F.3d 636, 1998 WL 388796 (D.C. Cir. 1998) (unpublished) (accepting review of proceeding initiated 15 years earlier). It is true that a party has a right to seek *mandamus*, but there is no case law declaring that this relief must be sought by a date certain. Moreover, *mandamus* is an extraordinary remedy, which

²Cases cited by Shop NBC entirely inapposite. Comments of Shop NBC at p. 4, p. 8. *Concerned Citizens of Bridesberg v. EPA*, 836 F.2d 777 (3d Cir. 1987) involved the reopening of a previously closed proceeding in the absence of any petitions for reconsideration or other pleading. In light of the fact that the Court held that the EPA was required to initiate a proceeding and solicit comment, the case actually supports what the FCC did here. *Belville Mining Co. v. U.S.*, 999 F.2d 989 (6th Cir. 1993) strongly contradicts Shop NBC's position. It lists numerous cases, none of which hold that an agency must act within a certain time frame, but several of these cases emphasize that agencies have broad discretion in handling reconsideration. The *Belville* court concludes that "Even if an agency lacks express statutory authority to reconsider an earlier decision, an agency possesses inherent authority to reconsider administrative decisions,...." *Id.*, 999 F.2d at 998.

poses considerable litigation risk to the movant and is not generally granted, *see, e.g., In re Shurberg*, 1997 WL 362755 (D.C. Cir. 1997) (unpublished); *Portland Cellular Partnership v. FCC*, 1994 WL 584630 (D.C. Cir. 1994) (unpublished); *Press Broadcasting v. FCC*, 1994 WL 405766 (D.C. Cir. 1994) (unpublished).

Shop NBC places great reliance on the Supreme Court's decision in *CAB v. Delta Airlines*, 367 U.S. 316 (1961). However, there are several major distinctions between that case and the circumstances presented here, most importantly, that the Commission has given notice of its intention to act on reconsideration and afforded parties the opportunity to comment and refresh the record. *See id.*, 367 U.S. at 321 ("The issue in this case is narrow and can be stated briefly: Has Congress authorized the Board to alter, without formal notice or hearing, a certificate of public convenience and necessity, once that certificate has gone into effect?")

III. SECTION 4(g)(2) DOES NOT CONSTRAIN THE FCC'S AUTHORITY TO ACT ON RECONSIDERATION.

Several parties also argue that the Commission lacks authority to take any action in this proceeding, because the Commission was constrained to complete action here by the 270 day statutory deadline for action contained in Section 4(g)(2).³

There is no basis for this claim. While it is true that the statute establishes a deadline for agency action, there is nothing in the plain language or logical construction of the statute that suggests that this means that the agency must take all action, including reconsideration, by that date, much less that Congress intended to deny parties the statutory right to seek reconsideration. Thus, reading Section 4(g)(2) *in pari materia* with Section 405 of the Communications Act, which gives parties

³It is noteworthy that Jovan, Home Shopping Network and the NAB all filed oppositions to the reconsideration petition in 2003, yet none of them raised this argument.

the right, and often, the obligation,⁴ to seek reconsideration, the only possible reading of Section 4(g)(2) is that it commands the Commission to issue a decision (*i.e.*, “complete a proceeding”) within 270 days.⁵

Claims that the Commission lacks authority to act on reconsideration subsequent to the statutory deadline for initial action are further belied by the fact that the Commission conducted post-deadline reconsideration in numerous proceedings mandated by the 1992 Cable Act. *See e.g., In The Matter Of Implementation Of Section 11(c) of The Cable Television Consumer Protection And Competition Act Of 1992*, 15 FCCRcd 1167 (2000); *In the Matter of Implementation of Sections of The Cable Television Consumer Protection And Competition Act of 1992*, 12 FCCRcd 5267 (1997); *In The Matter of Implementation of Section 17 of The Cable Television Consumer Protection And Competition Act of 1992, Compatibility Between Cable Systems and Consumer Electronics Equipment*, 11 FCCRcd 4121 (1996); *In The Matter of Implementation of The Cable Television Consumer Protection And Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage* 10 FCCRcd 3105 (1994); *In The Matter of Implementation of The Cable Television Consumer Protection And Competition Act of 1992 Broadcast Signal Carriage Issues*, 9 FCCRcd 6723 (1994); *In The Matter Of Implementation Of The Cable Television Consumer Protection And Competition Act Of 1992, Development Of Competition And Diversity In*

⁴Under Section 405, reconsideration is often a necessary prerequisite to judicial review, so denial of the right to seek reconsideration effectively extinguishes the right of judicial review.

⁵Shop NBC claims that there is significance in that other provisions of the 1992 Cable Act “simply directed the Commission to ‘issue regulations’” within a time certain. Comments of Shop NBC at 5. The difference in language is simply that, unlike the mandates to which Shop NBC referred, Congress did not direct the Commission to take any particular regulatory action, only that it consider the question of how to treat home shopping stations.

Video Programming Distribution And Carriage, 9 FCCRcd 4415 (1994).

Ironically, although Shop NBC now contends that the Commission lacks authority to conduct reconsideration after the 270 day deadline, it clearly had no compunction in seeking reconsideration of the Commission's decision implementing the commercial leased access provision mandated by Section 9 of the 1992 Cable Act. That provision directed the Commission to "establish rules" within 180 days and contained no mandatory periodic review provision. Subsequent to the statutory deadline in that proceeding, ValueVision International, Inc., which now does business under the name Shop NBC, thereafter filed a petition for reconsideration. *See In The Matter of Implementation of Sections of The Cable Television Consumer Protection And Competition Act of 1992: Rate Regulation, Leased Commercial Access*, 11 FCCRcd 16933 (1996); *See ValueVision Petition for Reconsideration*, pp. 1, 13 (filed 6/21/1993) (ValueVision "submits the following petition for reconsideration with respect to the leased access provisions of the Report and Order...(released May 3, 1993)."). The FCC did not address the petition for reconsideration for nearly three years.

IV. THE PARTIES HAVE FAILED TO DEMONSTRATE THAT OVER-THE-AIR HOME SHOPPING SERVICES PROVIDE AN ESSENTIAL SERVICE UNAVAILABLE BY OTHER MEANS.

A number of the opponents recount at great length the claimed societal benefits of home shopping programming. None of them, however, discuss why, in light of changed circumstances since 1993, it is now necessary for this material to be delivered *via* scarce over-the-air television spectrum. As CLC, *et al.* demonstrated in their initial comments, at pp 7-11, MVPD penetration is now nearly 90%, and the evolution of e-commerce on the internet has created a new and ubiquitous mechanism for responding to the needs of the home bound.

The Comments of WQED Multimedia are especially telling in this regard. It solicited

endorsements from viewers in an effort to demonstrate that its home shopping programming serves the public interest. WQED Multimedia provided selected snippets from sixty-three of these expressions of viewer support, presumably the ones which it considered most helpful to its cause. Comments of WQED Multimedia, Exhibit A. Even so, of those 63 statements, only three are from viewers who confirm that they do not subscribe to cable.⁶ None of the three give any reason as to why they do not subscribe to cable, although since they are presumably capable of buying goods sold on WQED, it is unlikely that they cannot afford basic cable. No fewer than 14 viewers clearly that they have access to, and utilize cable-delivered home shopping, and thus are not exclusively on over-the-air home shopping services.⁷ Four others do not refer to use of multiple home shopping but specifically discuss the fact that they do, indeed, subscribe to cable.⁸ Significantly, one respondent

⁶Comments of Earl Kerry, Barbara Huber, and Janet Wargo.

⁷*See, e.g.*, Comments of Barbara O’Neill Lane (“I have been a QVC customer as long as there’s been a QVC.”); Comments of Carol Goldstein (“I also watch QVC and HSN....”); Patricia Prozac (“I find the services offered with home shopping networks on cable invaluable.”); Joyce Hartlett (“the home shopping channels are valuable to us”); Comments of Janice Lytle (parents “do a lot of shopping thru the shopping networks....”); Comments of Terry Basie (“continue with the home shopping programs”); Comments of Nancy Harrigan (“shopping over the cable is very important to me”); Comments of Carol Plati (“I also buy many, many things from QVC and from HSN....”); Comments of Lindy Decario (“I’ve purchased items from all four/three cable stations....”); Comments of Anonymous (July 9, 2007, 10:17 a.m.) (“I enjoy watching the shopping networks....I think they should keep it on the cable channels.”); Comments of Anonymous (July 9, 2007, 3:18 p.m.) (“you guys might get rid of the Shopping Network on the television, the cable....”); Comments of Paul Hicky (I would not like it removed from the cable.”); Comments of Nancy McDonald (“I frequently watch Home Shopping channels....”); Comments of Joan Menzietti (On Comcast channel 4 in my area, you have ShopNBC.”);

⁸*See, e.g.*, Comments of Anonymous (June 23, 2007); Comments of Al Novakowski; Comments of Sharon Michael; Comments of Jamie Forsythe.

clearly indicates that she considers other programming formats more important than home shopping.⁹

V. A FINDING THAT OVER-THE-AIR TELEVISION HOME SHOPPING FOR AT LEAST HALF OF THE BROADCAST DAY DOES NOT VIOLATE SECTION 326 OR THE FIRST AMENDMENT.

Many of the parties claim that a determination that home shopping formats do not constitute service in the public interest would be a violation of the Communications Act or the First Amendment. This is just not so.¹⁰

To a considerable degree, opponents' constitutional arguments are directed at a straw man. In connection with this as well as other aspects of the proceeding, many of the opponents concentrate their fire on claims relating to the adverse consequences of a substantially *full-time* home shopping format. The source of this confusion is that, because the Commission concluded that all home shopping formats are in the public interest, it declined to define the statutory term "predominantly utilized for the transmission of sales presentations...." as it appears in Section 4(g)(2) of the 1992 Cable Act. However, CSC, as well as CLC, *et al.*, have argued only that the Commission should define the statutory term as referring stations devoting more than *one-half* of the broadcast day to home shopping.

The consequence of this is that the issues are not well-framed. For example, whatever hard-

⁹Comments of Sharon Michael ("I would not want it there if it had to take off you know some of the more cultural programs.");

¹⁰As noted above, the matter at issue is made to seem more extreme than it is in actuality because many of the opponents address their arguments to prohibitions on all home shopping formats, whereas the petition for reconsideration argues only for adoption of a determination with respect to stations utilizing a shopping format for more than half of their broadcast day. Thus, even if the NAB were correct in arguing that there is a substantial public interest in receiving access to truthful commercial speech, Comments of NAB at p. 9, the question posed by the petition for reconsideration is whether half of the broadcast day is sufficient to satisfy that alleged interest.

ships might result from a ruling that full-time home shopping formats are not consistent with operation in the public interest, the alleged burdens are substantially lessened if the Commission were to limit its ruling to stations broadcasting shopping for more than half of their broadcast day. There are many stations, including several dozen operated by ION Networks, operating 12-15 hours per day of home shopping; for them, the burden of a 12 hour limitation would be quite minimal, especially since the law allows them six months to modify their formats.

In any event, however, the Commission's power to place limitations on excessive commercialization cannot be doubted. As the Commission stated in its definitive *Blue Book*, "the public interest clearly requires that the amount of time devoted to advertising shall bear a reasonable relationship to the amount of time devoted to programs." *Public Service Responsibility of Broadcast Licensees*, FCC Mimeograph No. 81575 (1946) at p. 132; *Amendment of Part 3 of the Commission's Rules and Regulations With Respect to Advertising on Standard, FM and Television Broadcasting Stations*, *supra*, 36 FCC at 61 ("In sum, the statute bestows upon the Commission the authority to adopt a rule prescribing the maximum amount of broadcast time a licensee may devote to commercial advertising.")¹¹ And, as *CLC, et al.* have previously explained, when the Commission lifted its processing guidelines on commercialization, it did so on the assumption that marketplace forces would adequately restrain excessive commercialization and promised to revisit this matter as necessary. *See Comments of CLC, et al.*, p. 4 (*citing UCC v. FCC*, 707 F.2d 1414, 1438 (D.C. Cir. 1983)).

Despite this clear and venerable precedent, several parties claim that the determination

¹¹*See also, id.*, 36 FCC at 58 ("the Commission may take into account the nature and character of the applicant's programming proposals or performance in determining whether the public interest would be served by renewal of license.").

expressly contemplated by Section 4(g)(2) is censorship inconsistent with Section 326 of the Communications Act and the First Amendment. But here, too, Commission precedent is unambiguously to the contrary:

Nor do we think there is merit to the contention that a regulation directed to commercials would contravene Section 326 of the first amendment* * * * The courts have reasoned that the denial of a license upon a ground reasonably related to the public interest is neither censorship nor an abridgement of the right of free speech....

* * * *

We also wish to stress that with respect to the section 326 contention, no distinction can be made here between Commission action on a case-by-case basis or by rule. The cases establish that a rule in this area, reasonably related to the public interest, is not censorship nor violative of the First Amendment.

Amendment of Part 3 of the Commission's Rules and Regulations With Respect to Advertising on Standard, FM and Television Broadcasting Stations, supra, 36 FCC at 53-54.

The opponents nonetheless persist. They argue, for example, that establishing a policy on home shopping formats would be an impermissible content-based restriction on speech. *See, e.g.*, Comments of Home Shopping Network at p. 11 (arguing that “it would be unconstitutionally intrusive for the Commission to judge the value of non-public affairs programming or to penalize a broadcast station...based on the quantity of ‘commercial’ programming broadcast....”) However, even ignoring the fact that broadcasters are subject to a higher degree of regulation than other speakers, *see Reno v. ACLU*, 521 U.S. 844, 867 (1998) (citing *FCC v. Pacifica Foundation*, 428 U.S. at 748), the Supreme Court made clear in *Turner Broadcasting System v. FCC*, 512 U.S. 622 (1995), that Congress and the FCC may adopt viewpoint-neutral rules designed to promote broadcast service in the public interest.¹²

¹²“[L]aws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content-neutral. *See, e.g., City Council of Los Angeles v. Taxpayers for Vincent*, 466 U. S. 789, 804 (1984) (ordinance prohibiting the posting of signs on public

The position advanced by these opponents would also apply with equal force to the commercial limits contained in the Children’s Television Act of 1991 (“CTA”), and render unconstitutional that statute and the regulations promulgated thereunder. The Commission has rejected precisely such arguments, holding that the CTA “is [not] constitutionally unacceptable because it ‘dictates the removal of one form of content over another.’” *Children’s Television Obligations of Digital Television Broadcasters, Second Order on Reconsideration and Second Report and Order*, 21 FCCRcd 11065, 11073 (2006).

CONCLUSION

WHEREFORE, CLC, *et al.* ask that the Commission grant the relief requested and grant all such other relief as may be just and proper.

Respectfully submitted,

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property ‘is neutral -indeed it is silent - concerning any speaker's point of view’); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U. S. 640, 649 (1981) (State Fair regulation requiring that sales and solicitations take place at designated locations ‘applies evenhandedly to all who wish to distribute and sell written materials or to solicit funds’).” *Id.*, 512 U.S. at 643.