

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of)
)
The Establishment of Policies and Service Rules for the)
Broadcasting Satellite Service at 17.3-17.7 GHz Frequency)
Band and at the 17.7-17.8 GHz Frequency Band)
Internationally and at the 24.77-25.25 GHz Frequency Band) IB Docket No. 06-123
For Fixed Satellite Services Providing Feeder Links to the)
Broadcasting Satellite Service and for the Broadcasting)
Satellite Service Operating Bidirectionally in the)
17.3-17.7 GHz Frequency Band)

To: The Commission

COMMENTS OF
THE NATIONAL HISPANIC MEDIA COALITION, THE NEW AMERICA
FOUNDATION, HAWAII CONSUMERS, PROMETHEUS RADIO PROJECT, MEDIA
ALLIANCE, THE BENTON FOUNDATION AND U.S. PIRG

Media Access Project, on behalf of The National Hispanic Media Coalition, The New America Foundation, Hawaii Consumers, Prometheus Radio Project, Media Alliance, the Benton Foundation and U.S. PIRG (collectively “NHMC, *et al.*”) respectfully submit these comments.

NHMC, *et al.* support the Commission’s preliminary conclusion to apply the existing public interest obligations mandated by Section 335 of the Communications Act (47 USC §335) to spectrum authorized for DBS services in the above captioned proceeding (“the *NPRM*”). But the Commission’s proposal does not go far enough; because this proceeding will dramatically expand the available spectrum for DBS providers, the Commission should also expand the current spectrum capacity set aside pursuant to Section 335 (“public interest set aside”), and revisit its previous conclusions that DBS operators cannot use their capacity to serve the interests of localism.

INTRODUCTION

In 1993, the Commission began a proceeding to implement Section 25 of the 1992 Cable Act,

which required the Commission to impose mandatory public interest obligations on DBS service providers, set aside a minimum of 4% of DBS spectrum capacity for carriage of non-commercial public service programming. The Commission also asked about other means that the DBS service could foster the traditional values of localism governing broadcast services. *In re Implementation of Section 25 of the 1992 Cable Television Consumer Protection and Competition Act of 1992*, 8 FCCRcd 1589 (1993) (“1993 NPRM”).

In the 1993 NPRM, the Commission tentatively decided not to adopt more than the 4% statutory minimum set aside rather than a larger amount (up to the authorized 7%), or impose additional public interest obligations to account for the “nascent stage of DBS development.” *Id.* at 1597. In doing so, however, the Commission also suggested that it would reevaluate and increase the set aside over time. *Id.*

In 1998, the Commission adopted its initial proposal, set the public interest set aside at the statutory minimum of 4% of a DBS operator’s capacity, and declined to impose any new public interest obligations in the service of localism. *In re Implementation of Section 25 of the Cable Television Consumer Protection Act of 1992*, 13 FCCRcd 23254, 23285 (1998) (“1998 Order”). The Commission reiterated its concern that development of DBS might be stunted if the Commission “burdened” a “young industry” with “excessive regulation,” *Id.* at 23280, and that adopting more than the statutory minimum could “hinder DBS in developing as a viable competitor in the MVPD market.” *Id.* at 23285. Again, however, the Commission restated its intention to reassess at a later date and impose new public interest obligations as appropriate. *Id.* at 23280.

Given the considerable expansion of capacity contemplated by the Commission in this proceeding, the Commission should require that DBS operators provide a concomitant increase in their

public service obligations to return value to the public for use of the public resource of scarce orbital slots and scarce spectrum. *Cf.* 47 USC §309(j)(3)©), §336(d).

While the current set aside provides significant and valuable public benefit, it continues to fall far short of what it could provide to the public if the Commission fully implemented Section 335. As the Commission is aware, the demand for carriage on the public interest set aside far exceeds the available space. Even applying the 4% to the expanded capacity granted in the *NPRM*, as proposed by the Commission, will not provide enough capacity to satisfy the demand for carriage on the public interest set aside. Congress intended the public interest set aside to serve a broad set of programming and educational needs, particularly the “disparate needs of specific communities of interest, linguistically distinct groups, minority and ethnic groups, and other groups.” “Cable Television Consumer Protection and Competition Act of 1992,” H. Rep. 102-628 at 124. But many of these needs continue to remain unmet as a consequence of the Commission’s failure to increase the size of the public interest set aside towards its statutory maximum despite the continued growth of the DBS industry since 1998.

The rationale the Commission originally advanced for selecting the statutory minimum of 4% no longer applies. More than 14 years after the 1992 Act, the Commission can no longer consider DBS a “nascent,” or even a “young,” industry. DBS has matured and achieved profitability as a direct consequence of numerous statutory benefits and licenses, such as the program access rules and mechanical licenses for the carriage of local signals. The time has come for the Commission to undertake the promised reassessment of the public interest set aside to ensure that the public receives the full dividends Congress intended when it passed Section 335.

ARGUMENT

I. SECTION 335 APPLIES TO DBS SERVICES AUTHORIZED ON THE 17/24 GHZ SPECTRUM.

The Commission has tentatively concluded that Section 335 applies to new DBS services authorized in this proceeding to operate in the 17/24 GHz bands. *NPRM* at ¶¶20-21. The *NPRM* also asks how DBS operators authorized on new bands “will promote service to all regions in the United States, particularly traditional underserved areas, such as Alaska and Hawaii, and other remote and underserved areas in the United States.” *Id.* at ¶23.

NHMC, *et al.* support the Commission’s initial conclusion that DBS operators, whether previously licensed or granted new licenses pursuant to this proceeding, authorized to provide DBS services on new frequencies, must meet the public interest obligations required by Congress and Commission rules on the DBS service. As early as the Commission’s first *Notice of Proposed Rulemaking* designed to implement the public interest obligations imposed by the 1992 Cable Act, the Commission considered what entities Congress intended to cover with Section 335. *In re Implementation of Section 25 of the 1992 Cable Television Consumer Protection and Competition Act of 1992*, 8 FCCRcd 1589 (1993). Given the ambiguity in the statutory definition, the Commission determined that Congress intended the public interest obligations established pursuant to Section 335, including the public interest set aside and obligations to serve the interests of localism, to flow from the license to use the public spectrum. *1998 Order*, 13 FCCRcd at 23263-65.

For the same reason, DBS licensees authorized on new spectrum fall within the ambit of the mandatory public interest obligations imposed by Section 335. Such a construction is consistent with statutory language, past Commission precedent, legislative history, and Commission treatment of

similar statutory provisions that reference Commission regulations to provide a definition.

As the Commission found in 1998, it is important that Section 335 apply equally to all providers of DBS service on the ITU-authorized Ku Band, regardless of how licensed. *1998 Order* 13 FCCRcd at 23264. This emphasis on licensee capacity and is consistent with the legislative history. The Senate Committee Report, the House Committee Report, and the Conference Committee Report all state that the Commission should consider “the *total* capacity of a DBS system in establishing reservation requirements.” “Cable Television Consumer Protection Act of 1991,” S. Rep. 102-92 at 92 (“Senate Report”); “Cable Television Consumer Protection and Competition Act of 1992,” H. Rep. 102-628 at 124 (“House Report”); “Cable Television Consumer Protection and Competition Act of 1992,” H. Rep. 102-862 at 100 (“Conference Report”)(emphasis supplied).

In the past, when Congress has defined services by reference to Commission rules without some other limiting language (*e.g.*, “at the time of passage of this Act”), the Commission has understood this language to provide considerable authority to the Commission to expand the definition over time. For example, in 1982, Congress authorized the Commission to license by rule a “citizens band radio service” (among other services) that services licensed by rule would “have the meanings given them by the Commission by rule.” 47 USC 307(e). In 1996, the Commission used that authority to redefine “citizens band radio service” so as to create the “family radio service” (FRS). Although quite different in form and use from the citizens band radio service of 1982, the Commission concluded that the broad grant of authority by Congress to define “citizen band radio” by rule permitted it to authorize FRS under this provision. *Amendment of Part 95 of the Commission’s Rules to Establish a Very Short Distance Two-Way Radio Service*, 11 FCCRcd 12977 (1996).

Here, where Congress has mandated that the public interest obligations of Section 335 apply

to “any provision, initial authorization, or authorization renewal for a provider of direct broadcast satellite service providing video programming,” 47 USC §335(b)(1), and defines DBS with reference to the Commission’s own rules, 47 USC §335(b)(5)(A), the same principle applies. Congress did not intend to “freeze” the DBS service any more than it intended to “freeze” the citizens band radio service. To the contrary, Congress clearly intended that as the Commission altered the authorization for DBS service over time, the mandatory public interest obligations of Section 335 would apply to the expanded DBS services.

Finally, to the extent there is any dispute that the services authorized in the *NPRM* operate on bands other than the “Ku bands” and therefore are not subject to the mandatory public interest obligations of Section 335, the Commission can impose equivalent obligations under its traditional public interest authority. Section 335 did not act to limit the Commission’s authority to impose public interest obligations on DBS providers or other spectrum users. Rather, Section 335 explicitly overruled the Commission’s decision to exclude subscription DBS operators from traditional broadcast public interest obligations. *See Subscription Video*, 2 FCCRcd 1001 (1987), *aff’d sub nom. National Association For Better Broadcasting v. FCC*, 849 F.2d 665 (D.C. Cir. 1988). Section 335 thus represents a minimum mandatory requirement for any DBS licensee. Therefore, to the extent any DBS service authorized by the *NPRM* falls outside the statutory definition of Section 335(b)(5)(A), the Commission may still impose equivalent public interest obligations on the basis of its general authority under Title III.

II. THE COMMISSION SHOULD INCREASE THE PUBLIC INTEREST SET ASIDE TO THE STATUTORY MAXIMUM OF SEVEN PERCENT, AND SHOULD RECONSIDER HOW DBS PROVIDERS CAN BETTER SERVE THE TRADITIONAL INTERESTS OF LOCALISM.

While the Commission has reached the appropriate tentative conclusion to apply the requirements of Section 335 to the new spectrum it proposes to authorize for provision of DBS services, the Commission does not go far enough. In 1993, the Commission proposed that it would “reassess” its decision to impose the statutory minimum of a 4% public interest set aside as DBS evolved from a “nascent industry.” *1993 NPRM* at 1597. In 1998, the Commission again concluded that it should not burden a “young industry” with a significant set aside because the Commission feared that requiring anything more than the statutory minimum would make it impossible for DBS providers to challenge the dominance of incumbent cable providers. *1998 Order* at 23285.

This were dubious rationales when it was when first advanced by the Commission. That aside, there can be no doubt that these reasons for imposing only the barest statutory minimum of 4% have long since ceased to be valid. Over 14 years have passed since the passage of the 1992 Cable Act. MVPD is a mature and profitable industry, with 90% of Americans subscribing to either terrestrial providers or DBS.

NHMC, *et al.* certainly agree that incumbent cable operators remain the dominant MVPD providers. But cable market power has nothing to do with “burdening” DBS operators with a greater public interest set aside or other public interest obligations designed to promote localism. To the contrary, cable market power persists because the Commission declines to take appropriate action to end abuses of market power that allow cable operators to undermine competition. The refusal of the Commission to end the “terrestrial loophole” has far more to do with cable’s continued dominance

than public interest obligations on DBS providers.

The reassessment the Commission promised in 1993 is long overdue, and should begin with this *NRPM*. The Commission here proposes to provide significant new capacity to DBS providers. The legislative history is emphatic that the drafters of the 1992 Act intended “that the Commission consider the total channel capacity of a DBS system in establishing reservation requirements. Accordingly, the Commission may determine to subject DBS with relatively large total channel capacity to a greater reservation requirement than a system with relatively less total capacity.” Conference Report at 100. *See also* Senate Report at 92; House Report at 124. As the Commission vastly expands the available spectrum to DBS providers, it must once again “consider the total capacity of DBS providers.”

The public files that DIRECTV and Echostar maintain pursuant to Section 335 reveal that these companies receive far more requests for carriage under the public interest set aside than they can fulfill. Expanding the set aside would further the intent of the drafters of Section 335 that the set aside provide programming for linguistic minorities, ethnic minorities, and other traditionally underserved communities. House Report at 124.

Similarly, the Commission should revisit its decision in 1998 that it should impose no other public interest obligations beyond the minimum mandated by statute. In the instant *NPRM*, the Commission asks how it can encourage service to traditionally underserved geographic regions, such as Alaska and Hawaii. This question deserves broader consideration than the technical issues raised by the *NPRM*. The Commission should not merely seek to ensure that Americans in Alaska and Hawaii have access to the same breadth of programming services available in the 48 continuous states, an important public interest objective in its own right. The Commission should also seek to ensure

that the unique cultural heritage of these states – of both indigenous peoples and more recent immigrants – is captured in the programming services available to the residents of these states through DBS.

Indeed, given the continued decline in the quality of local service by local terrestrial licensees, the importance of using DBS to provide local service has increased since the Commission's *1993 NPRM* and *1998 Order*. Despite necessary changes on reconsideration in 2004, *see In re Implementation of Section 25 of the 1992 Cable Television Consumer Protection and Competition Act of 1992*, 19 FCCRcd 5854 (2003), *vacated in part*, 19 FCCRcd 5647 (2004), the Commission still has far to go before it has unleashed the capacity of DBS providers to promote the interests of localism.

CONCLUSION

The Commission properly recognizes that new spectrum authorized in this *NPRM* remains subject to the mandatory public interest set aside and other public interest obligations required by Section 335. But the Commission's proposal fails to capitalize on the opportunity presented here to expand the public interest set aside and reexamine how DBS can serve the interests of localism. Rather than simply extend the status quo, the Commission should seize this opportunity to expand the public interest set aside to the statutory maximum of 7%.

Respectfully submitted,

Harold Feld
Andrew Jay Schwartzman
Media Access Project
1625 K Street, NW
Washington, DC 20006
(202) 232-4300

October 16, 2006