
STATEMENT OF COMMISSIONER GLORIA TRISTANI, DISSENTING IN PART

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

My disagreement with the majority centers on the following sentence in Section 335(b)(3): "The provider of direct broadcast satellite service shall not exercise any editorial control over any video programming provided pursuant to this subsection." The majority believes that this sentence can be read to give DBS operators complete freedom in selecting and renewing video *programmers* to use the set-aside capacity without violating the prohibition on the exercise of any editorial control over any of the video *programming* that is shown. I do not.

The majority's position depends upon a basic fiction: that nothing that occurs between a DBS operator and a programmer amounts to "editorial control" over the actual programming that is provided to subscribers so long as the programmer formally retains the right to run the programming of its choice. Thus, according to the majority, a DBS operator could: (1) decide which programmers to carry based on specific programming line-ups; (2) discuss with programmers the particular programs that will be carried and when; and (3) terminate a programmer because it did not like the content of the programmer's offerings. In the majority's view, none of this would amount to any editorial control by the DBS operator so long as the programmer is permitted, as a legal matter, to make the final decision about what programming will be run.

This fiction cannot withstand scrutiny. First, it defies reality to argue that the editorial slate is somehow "wiped clean" after a carriage agreement is signed. For instance, assume that a DBS operator is choosing between two qualified children's programmers -- PBS, which carries Sesame Street, and a start-up children's channel, which carries a similar program called Poppy Street. If the DBS operator chooses to carry PBS rather than the start-up, it seems self-evident to me that the operator has exercised *some* editorial control over whether its subscribers will see Sesame Street or Poppy Street.

True, under the majority's view PBS could drop Sesame Street from its line-up and the DBS operator would have no legal recourse to stop them. But such changes will likely be rare. Many national programming services have established channel line-ups that are relatively stable as programmers attempt to develop viewer loyalty and brand identity. More importantly, no programmer will want to antagonize the entity that has sole control over whether its carriage contract will be renewed by renegeing on programming commitments made during the selection process. Indeed, since the majority has not prescribed any minimum duration for carriage contracts, a DBS operator could keep programmers on a short leash by only entering into short-term contracts.

But even assuming that a programmer occasionally exercises independent editorial judgment contrary to the DBS operator's wishes, the majority's scheme would still run afoul of the statute. The statute does not prohibit DBS operators from exercising *complete* editorial control over *all* of the video programming on the set-aside capacity, but from exercising *any* editorial control over *any* such

programming. Thus, the statute is violated even if a DBS operator only exercises the slightest editorial control over a single program on a single channel.

Since, as a practical matter, the DBS operator is bound to have some influence over some of the programming that is shown, in the end the majority's argument depends upon the proposition that a programmer's legal right to ignore the DBS operator's wishes is enough to satisfy the statute *even if that right is not exercised*. This is like saying that a television network exercises no editorial control over the programming that viewers see because its affiliates may have the legal right to preempt any particular show. It also has a certain through-the-looking-glass logic: the party that chooses the programming that subscribers see does not exercise any editorial control over what subscribers see; the only party exercising editorial control over what subscribers see is the one that could choose what subscribers see, but does not.

If the majority were serious about its programmer-programming distinction, it would need to provide far more detailed rules on permissible conduct before, during and after the set-aside selection process. It is not enough to leave these issues to case-by-case determinations; these are issues that every DBS operator and every programmer need resolved before they can do business. On termination issues, alone, for instance, a whole host of issues present themselves. Can a DBS operator require programmers to sign "at will" contracts and simply terminate a programmer if they do not like its content? If not, how long do contracts have to run? Six months? A year? Five years? What are acceptable reasons for non-renewal? Can it be based on dislike of particular content, or only on a desire to change from, say, a children's channel to distance learning?

Instead of the majority's complicated fiction, I would have adopted a simpler approach. Congress clearly intended that a sliver of the DBS operator's spectrum be set aside for programming free from the operator's control. In practice, the only way to accomplish that directive is to prohibit the DBS operator from deciding which programmers will occupy the set-aside capacity. This need not be a burdensome process, nor need it deprive subscribers of the qualified programming they would find most attractive. I think it would be acceptable under the statute, for example, for the DBS operator to create a list of qualified programmers seeking carriage and then to survey its subscribers about the programming they would prefer. A subscriber survey would be quick and easy to administer, would create an attractive set-aside package and, most importantly, would remove any question about the DBS operator exercising editorial control. Although today's Order in no way requires such an approach, neither is it precluded and it may help insulate a DBS operator from charges of improper editorial influence.