

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

**OPPOSITION TO AND RESPONSE TO
PETITIONS FOR RECONSIDERATION OF
DAETC and CME, *et al.***

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Summary

DAETC and CME, *et al.* submit this pleading largely to oppose APTS/PBS's petition, which asks the FCC to repeal its one channel per programmer limit on the DBS noncommercial set-aside. Contrary to APTS/PBS's allegations, the FCC has ample authority to adopt rules that promote viewpoint diversity on the DBS noncommercial set-aside. The courts have repeatedly upheld the FCC's authority under the public interest standard of the Communications Act to adopt regulations to promote diversity on the nation's mass media. In addition, the FCC has specific authority in Section 25(a) of the 1992 Cable Act to adopt public interest requirements for DBS operators.

Moreover, the Commission has every reason to suspect that, in the absence of the rule, DBS providers might choose one or a few programmers, and that those programmers might reflect the commercial values of the DBS operators. DAETC and CME *et al.* believe that the noncommercial set-aside should serve audiences not well served in the commercial marketplace. Ironically, APTS/PBS, whose existence is predicated on the recognition of market failures, asks in their Petition that the Commission apply commercial marketplace principles in the noncommercial arena.

To grant the APTS/PBS Petition would unbalance the FCC's compromise implementing the DBS noncommercial set-aside. After careful consideration, the Commission rejected DAETC and CME, *et al.*'s arguments and allowed DBS operators to select the programmers that will appear on the set-aside. To minimize the effect of this decision, the Commission adopted the one-channel limit. DAETC and CME, *et al.* do not believe the FCC should have allowed the DBS operators to choose noncommercial programmers, but are willing to accept the compromise and will see whether this system will produce diverse programming on the set-aside. If the FCC grants APTS/PBS's Petition,

however, DAETC and CME, *et al.* will be forced to renew its objections to the Commission's interpretation of the ban on editorial control.

Additionally, DAETC and CME, *et al.* oppose the petitions of three satellite companies and Time Warner which challenge the FCC's decision to hold Part 25 licensees ultimately responsible for the public interest obligations rather than the direct-to-home programmers ("DTH providers") who lease or buy spectrum from these licensees. These parties assert that the Commission's rule reflects an improper reading of Section 335 of the Communications Act. In fact, Section 335 affords the Commission authority over Part 25 licensees and consequently, the power to impose public interest obligations on these licensees.

DAETC and CME, *et al.* are however concerned that the Part 25 licensees may be reluctant to enforce the obligations upon the DTH providers if required to do so. If the Commission decides to exercise its authority over these licensees and to hold them ultimately responsible for compliance with the public interest obligations, DAETC and CME, *et al.* ask the FCC to intensify the compliance and certification requirements. Alternatively, given the reluctance of these licensees to properly enforce these obligations, the Commission should consider imposing the obligations on the DTH providers directly. Case law supports the FCC's exercise of authority over ancillary non-licensees. The DTH providers control the programming content and imposing the obligations on them may be the best means of ensuring that they are met.

Finally, in the interest of promoting diversity and encouraging the development of new noncommercial programming, DAETC and CME, *et al.* support Time Warner's suggestion that the set-aside be filled with programming other than that already being aired by the DBS provider.

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OPPOSITION TO AND RESPONSE TO
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I. Introduction

DAETC and CME, *et al.*¹ submit the following Opposition and Response to Petitions for Reconsideration, pursuant to Section 1.429(f) of the Commission's rules, 47 C.F.R. §1.429(f), regarding *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) (“*Order*”). DAETC and CME, *et al.* submit this pleading largely to oppose APTS/PBS's petition, which asks the Commission to repeal its noncommercial set-aside rule that

¹ DAETC and CME *et al.* include Denver Area Educational Telecommunications Consortium, Inc., Center for Media Education, A*DEC, Alliance for Community Media, American Psychological Association, Benton Foundation, Center for Science in the Public Interest, Peggy Charren, National Association of Elementary School Principals, National Association of School Psychologists, Office of Communication, Inc. of the United Church of Christ.

"limit[s] to one the number of channels that can be initially allocated to a single qualified program provider on each DBS system." *Order* at ¶116; *see also* 47 C.F.R. § 100.5(c)(4).

Contrary to APTS/PBS's allegations, the Commission has ample authority to adopt rules that promote a diversity of viewpoints on the DBS noncommercial set-aside. The courts have repeatedly upheld the Commission's authority under the public interest standard of the Communications Act to adopt regulations to promote the diversity of voices on the nation's mass media. In addition, the Commission has specific authority in Section 25(a) of the 1992 Cable Act, codified at 47 U.S.C. § 335, to adopt public interest requirements for DBS operators. Moreover, a one-channel limit is necessary. Considerations of administrative simplicity alone make it likely that without a one-channel set-aside limit DBS operators will choose a few national programming suppliers to appear on the set-aside. Furthermore, commercial pressures and the ambitious plans of APTS/PBS threaten the diversity of the set-aside.

In any event, the FCC's decision is neither inconsistent nor arbitrary and capricious as APTS/PBS allege. The Commission sought to minimize administrative burdens and retain effective oversight of the set-aside while also addressing policy concerns that it not be dominated by a single voice. Thus, it agreed to interpret the statutory ban on editorial control as granting wide latitude to DBS operators to select programmers, but limited the adverse policy effects of that decision by adopting a parallel provision limiting that discretion. Adopting a balanced set of rules addressing several concerns is not arbitrary and capricious.

To grant APTS/PBS's Petition would unbalance the Commission's compromise implementing the DBS noncommercial set-aside. In its *Order*, the Commission rejected DAETC and CME, *et al.*'s arguments and interpreted the ban on editorial control in Section 25, codified at 47 U.S.C.

§ 335(b)(3), to allow DBS operators to select the programmers that will appear on the set aside. To minimize the effect of this decision, the FCC adopted the one-channel per noncommercial programmer limit. If it chooses to rescind or diminish its one-channel limit in some way, DAETC and CME, *et al.* will be forced to renew their objections to the Commission's interpretation of the ban on editorial control.

DAETC and CME, *et al.* also oppose the petitions of Time Warner and the three Part 25 licensees who ask the Commission to impose public interest obligations only on direct-to-home video programming distributors (“DTH providers”), such as Echostar, Primestar or DirectTV, rather than the satellite companies who lease or sell spectrum capacity to such providers. A proper reading of Section 335 of the Communications Act reveals that the Commission has clear authority over Part 25 licensees. Additionally, case law supports the Commission’s ancillary authority over non-licensees such as the DTH providers. Thus, the Commission should recognize that it has adequate authority to impose public interest obligations on both the DTH providers as well as the Part 25 licenses. However, to the extent that the satellite companies may be unwilling to enforce the obligations on the DTH providers who lease or buy capacity from them, the Commission should impose the obligations on the DTH providers instead.

Finally, DAETC and CME, *et al.* agree with Time Warner’s argument that the set-aside should be used to carry new noncommercial programming. Thus, to ensure that the Commission achieves its goal of opening channel capacity to encourage the development of new educational or informational programming, it should require that DBS providers fill the set-aside with programs other than those already carried.

II. The Commission's Decision to Adopt a One-Channel Limit is Sound as a Matter of Law and Policy.

APTS/PBS seek reconsideration of the Commission's decision to adopt a one-channel per noncommercial programmer limit. APTS/PBS Petition at 4. Relying on its authority in Section 335(a) and the purpose of Section 335(b), the Commission concluded that this rule will increase development of quality educational and informational programming, will ensure the set-aside is not dominated by a few national educational program suppliers, and will encourage the carriage of programming that would not otherwise be shown. *DBS Order* at ¶¶116, 117. These purposes are well-accepted means to achieve viewpoint and source diversity in the mass media, and the Commission's authority to adopt similar rules has been repeatedly upheld by the courts.

A. The Commission has Ample Authority to Adopt Rules Promoting Diversity of Viewpoints.

APTS/PBS incorrectly argue that the Commission lacks authority to adopt the one-channel limit. Commission rules promoting a diversity of viewpoints have been specifically upheld as a proper implementation of the Communications Act under Sections 154(i) and 303(r), 47 U.S.C. §§ 154(i), 303(r). Moreover, as the Commission explicitly found, the 1992 Cable Act and Section 25 provide a sound basis for the one-channel limit. *See Order* at ¶117.²

1. The Commission's General Authority Provides Sufficient Jurisdiction for the One-Channel Limit.

APTS/PBS are wrong that the Commission may not adopt the one-channel rule unless a specific statutory provision directs its conduct. All precedent is to the contrary. Most recently, the Supreme Court, construing the Communications Act in *Iowa Utilities v. FCC*, 119 S. Ct. 721 (1999),

² In addition, DAETC and CME *et al.* encourage the Commission to assert its authority to adopt these rules under Sections 303(r) and 154(i) as outlined below.

found that "even though 'Commission jurisdiction' always follows where the Act 'applies,' Commission jurisdiction (so-called 'ancillary' jurisdiction) *could* exist even where the Act does *not* apply." *Id.* at 850 (emphasis in original). Thus, the Commission is permitted to adopt implementing regulations even when they are not explicitly required by the Act. *See id.* at 852; *see also, e.g., United States v. Southwest Cable*, 392 U.S. 157, 177-178 (1968) (finding "we may not 'in the absence of compelling evidence that such was Congress' intention . . . prohibit administrative action imperative for achievement of the agency's ultimate goals.").

The Supreme Court also upheld the Commission's conclusion that a national broadcast station ownership cap, which closely resembles the one-channel limit, was authorized under Section 303(r) because it promoted source diversity, and thus furthered the public interest.³ *FCC v. NCCB*, 436 U.S. 775, 793 (1978).⁴ The Court found that "the Commission has long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints" *Id.* at 780. It further found that

[t]he First Amendment . . . values underlying the Commission's diversification policy may properly be considered by the Commission in determining where the public

³ As explained more fully *infra* at IIB, source diversity refers to the goal of promoting the dissemination of information from separately-owned or controlled sources.

⁴ *See also United States v. Storer Broadcasting Company*, 351 U.S. 192, 202-3 (1956) (citing Sections 154(i) and 303(r) to find that "[t]he challenged [numerical ownership limits are] . . . not specifically authorized by statute. But that is not the limit of the Commission's rulemaking authority."); *NBC v. United States*, 319 U.S. 190, 209-224 (1943) (upholding Commission limits on chain radio broadcasting to preserve the right of station licensees to consider programming from alternative networks pursuant to Section 303(r) among other sections). Other courts have concluded that the Commission may exercise its general authority to promote source diversity. *See NAITPD v. FCC*, 516 F.2d 526 (2d Cir. 1975) (upholding the *Mt. Mansfield* court's decision adopting prime time access rules after several years of post-implementation experience); *Mt. Mansfield*, 442 F.2d 470, 477 (2d Cir. 1971) (upholding prime time access rules under Section 303(r), whose purpose was, *inter alia*, to promote source diversity).

interest lies, and, in particular to the First Amendment goal of achieving 'the widest possible dissemination of information from diverse and antagonistic sources.'

Id. at 795 (citations omitted). The Court endorsed the lower court's finding that the FCC had acted to "enhance the diversity of information without on-going government surveillance of the content of speech." *Id.* at 801-02. The Supreme Court's reasoning fully applies to the reasons cited by the Commission in support of the one-channel limit.

The D.C. Circuit has considered the Commission's authority to apply rules promoting source diversity in the DBS industry. *NAB v. FCC*, 740 F.2d 1190 (D.C. Cir. 1984). In *NAB v. FCC*, the D.C. Circuit upheld the Commission's decision *not* to apply a single-channel limit to the nascent DBS industry. *Id.* at 1207. The D.C. Circuit stated, however:

In approving suspension of the ownership restrictions, we add a final caveat. Diversification of media viewpoints and control remains an important component of the FCC's statutory mandate to regulate communications 'in the public interest.' Neither our approval nor the FCC's action intimates that diversification is no longer salient to the mission with which the Commission has been charged.

Id. at 1208. The D.C. Circuit then concluded that future developments in the DBS industry might warrant a limitation that would promote source diversity. It specifically stated that such restrictions might include "limiting the number of DBS channels on one satellite controlled by a single firm . . . [or] *limiting the total number of DBS channels controlled by a single firm*" *Id.* at 1208-09 (emphasis added).⁵

Thus, the argument that the Commission lacks authority to impose such a limitation is without foundation. In fact, although courts have concluded that much more drastic ownership and channel

⁵ The court also noted that the Commission expressly reserved the right to impose multiple channel restrictions once greater experience with DBS had been gained. *See DBS Order*, 90 FCC 2d 676, 713 (1982).

limits can be appropriate, the Commission has chosen here to adopt a narrowly targeted restriction specifically for an important public purpose.

2. The One-Channel Limit is Authorized by Section 25(a).

APTS/PBS question the Commission's reliance on Section 25(a) and argue that Section 25(b) precludes adoption of a one channel limit. APTS/PBS further suggest that they have the right to be the sole non-commercial programmer on the set-aside. *See* APTS/PBS Petition at 4-8.

The Commission was not required to rely upon its general authority in Section 303(r) and 154(i) of the Act to justify the one-channel limit because Section 335(a) authorizes the one-channel limit. Congress also directed the Commission to "initiate a proceeding to impose, on providers of direct broadcast satellite service, public interest or other requirements for providing video programming." 47 U.S.C. § 335(a). APTS/PBS conclude that this section is insufficient authority because it "relates only to general public interest obligations of DBS operators, including political broadcasting requirements." APTS/PBS Petition at 7.

APTS/PBS's argument is not logical. It appears that APTS/PBS not only believe DBS operators' "public interest obligations" should have no specific application, but that the FCC is prohibited from creating specific applications in spite of plain statutory language to the contrary. Further, APTS/PBS mischaracterize the relevance of the political broadcasting rules in Section 335(a). The statute states: "[a]ny regulations prescribed pursuant to such rulemaking shall, *at a minimum*, apply [Sections 315 and 312(a)(7)] to providers of direct broadcast satellite service providing video programming." 47 U.S.C. § 335(a) (emphasis added). Those sections are a *minimum* below which the Commission cannot descend: the statute clearly contemplates obligations beyond the political

broadcasting requirements.⁶ Despite this language, the only public interest obligation imposed by the Commission was the one-channel limit on the non-commercial set-aside. *See Order* at ¶¶59-64 (generally deciding not to impose detailed public interest requirements on DBS providers "although the Section 335(a) provides ample authority" to do so).⁷

APTS/PBS argue that the Commission cannot use Section 25(a) to inform its implementation of Section 25(b). APTS/PBS Petition at 7. In support of this argument, APTS/PBS point to the general rule of statutory construction that the "specific governs the general" and cite two cases that stand for this proposition. *Id.* APTS/PBS are incorrect that Section 25(b) is so specific as to preclude the one-channel limit. Section 25(b) provides absolutely no detail with respect to how programmers will be selected to appear on the set-aside. In addition, nothing in Section 25(b) is inconsistent with the Commission's adoption of a one channel limit. The cases cited by APTS/PBS are inapposite to the question presented here.⁸

3. The One-Channel Limit is Fully Consistent with the Express Legislative Intent and Goals of Section 25(b).

⁶ APTS/PBS's argument also ignores the fact that Section 315(a) is not limited to political broadcasting issues. Section 315(a) also includes within it a separate requirement that licensees operate in the public interest. Thus, Section 335(a) includes, via Section 315(a), a public interest obligation similar to that contained in Section 303(r).

⁷ DAETC and CME, *et al.* raised objections in their Petition for Reconsideration to the Commission's decision not to impose commercial limits on children's programming aired by DBS providers.

⁸ Neither *Morales v. TWA*, 504 U.S. 374 (1992) nor *Morton v. Mancari*, 417 U.S. 535 (1974) are applicable to the facts at hand. In each of these cases, the general and specific provisions were contradictory to one another. The Commission is faced with no such choice here. Section 25(a) and 25(b) can be implemented in a complementary fashion as the Commission has done.

APTS/PBS discuss the failure of Congress to identify diversity of noncommercial voices as a goal of the 1992 Cable Act. APTS/PBS Petition at 5, 6-7. Congress did find, however, that diversity of voices *in general* was a concern. Section 2(b)(1) of the 1992 Cable Act states that a purpose of the Act is to "promote the availability to the public of a diversity of views and information through cable television and other video distribution media." 1992 Cable Act, § 2(b)(1), Pub. L. No. 102-385, 106 Stat. 1460, 1463 (1992). Even APTS/PBS concede that "Congress sought to promote programming diversity by requiring the inclusion of some noncommercial programming in what is otherwise a service with a commercial focus" APTS/PBS Petition at n.16. APTS/PBS point to nothing that indicates Congress intended to exclude noncommercial programming from its general policy goals in favor of diverse sources of information.

Perhaps the oddest and most self-defeating aspect of the APTS/PBS petition is their request that the Commission rely on market forces to fulfill the goals of Section 25. APTS/PBS Petition at 7. Congress indicated in Section 2(b)(2) of the 1992 Cable Act that it wishes to "rely on the marketplace *to the maximum extent feasible* " to promote diversity of views. 1992 Cable Act, § 2(b)(2), 106 Stat. at 1463 (emphasis added). By including the words "to the extent feasible," Congress expressly recognized that the marketplace may not always produce diverse sources of information. In adopting Section 25(b), Congress itself determined that the market would not provide sufficient noncommercial programming on DBS systems absent government intervention. The *noncommercial* set-aside, therefore, is the area where it would be the least appropriate for the Commission to rely on market forces to achieve source diversity. It is ironic that APTS/PBS whose very existence is predicated on the recognition of market failures now ask the Commission to apply marketplace principles in the noncommercial arena.

While APTS/PBS place great reliance on what Congress did *not* say with respect to noncommercial source diversity, they completely ignore what Congress did say with respect to public broadcasting and the set-aside. Although APTS/PBS possess the temerity to argue that the Commission is interfering with "the opportunity that Congress provided for public television programming to be shown on the set-aside capacity," APTS/PBS Petition at 8, *Congress did not designate the set-aside for public television alone*. Congress clearly could have specified such language, but it did not. Instead, Congress defined eligible programmers far more broadly to include "any qualified noncommercial educational television station, other public telecommunications entities, and public or private educational institutions." 47 U.S.C. § 335(b)(5)(B).

Thus, APTS/PBS envision an entitlement they do not have. Although their lobbying activities are irrelevant to the Commission's interpretation of the statute, it is possible that APTS/PBS believe that they should be the only beneficiaries of Section 25(b) because they lobbied on behalf of this legislation before Congress. Assuming this were ever a relevant consideration, it still would not create an exclusive entitlement because many other interest groups and their representatives, including counsel for DAETC and CME *et al.*, also attempted to persuade Congress to adopt Section 25(b). Even if some members of Congress believed that public broadcasting should be the sole beneficiary of the set-aside, those members evidently did not persuade their colleagues to adopt an express provision restricting the set-aside to programming produced by public television stations. Absent such language, the Commission is fully authorized to conclude that the public benefits from hearing more than one noncommercial viewpoint.⁹

⁹ Commissioner Powell's concern that the Commission "inferred" a desire on Congress's part to promote source diversity, *see* APTS/PBS Petition at 5, does not mean that the Commission is without authority to act. As DAETC and CME, *et al.* have demonstrated above,

B. The Need for a One-Channel Limit is Clear.

APTS/PBS argue that the Commission's decision to impose a one-channel limit is not supported by the record, that government intervention is not necessary to ensure that DBS operators choose diverse noncommercial programming, and that the one-channel limit could deprive viewers of programming diversity. APTS/PBS Petition at 8. However, the record supports the decision to impose the one-channel limit. The Commission carefully considered what principles should guide the selection of noncommercial programmers that will appear on the set-aside. For example, DAETC and CME, *et al.* opposed allowing DBS operators to select programmers specifically because such an interpretation would diminish the diversity of programming appearing on the set-aside.¹⁰ In addition, the Commission specifically considered PBS's opposition to DAETC *et al.*'s proposal to limit programmers to one channel. *Order* at ¶115 (citing DAETC *et al.* Comments at 16-17).

APTS/PBS argue that the one-channel limit could result in less diversity on the noncommercial set-aside. APTS/PBS Petition at 11. APTS/PBS's arguments on this point misunderstand the fundamental purpose of the Commission's policies in this area and the type of diversity that is the subject of the FCC's concern. Source diversity is not the same as subject or format diversity. Source diversity refers to the fundamental First Amendment goal of promoting "the widest possible dissemination of information from *diverse and antagonistic sources*" *Associated*

the Commission's action is fully warranted without any such inference. Source diversity is a goal of the 1992 Cable Act, the Communications Act, long-standing Commission policy, and furthers Sections 335(a) and (b) of the Communications Act.

¹⁰ *See, e.g., ex parte* letter from Cheryl A. Leanza, Staff Attorney, Media Access Project to Magalie Roman Salas, Secretary, FCC (August 27, 1998); *ex parte* letter from Gigi B. Sohn, Executive Director, Media Access Project to Magalie Roman Salas, Secretary, FCC (Oct. 9, 1998); *ex parte* letter from John Schwartz, President, DAETC to William E. Kennard, Chairman, FCC (Oct. 9, 1998).

Press v. United States, 326 U.S. at 20 (emphasis added). By definition, then, multiple shows from the same programmer are not diverse. As the Court has elsewhere aptly explained "the divergence of [commonly controlled] viewpoints cannot be expected to be the same as if they were antagonistically run." *FCC v. NCCB* at 797.¹¹

If APTS/PBS are allowed to monopolize the set-aside as they wish, certain viewpoints will likely not be represented. Because it is government-funded, public television is subject to political pressures. Depending on the political views that have currency at a particular time, public television has been accused of favoring either conservative or liberal viewpoints.¹² This political vulnerability makes APTS/PBS less likely to cover certain issues because elected officials are watching.¹³

¹¹ APTS/PBS's statement that PBS and local television stations have libraries of programming covering "a wide range of *subjects*," APTS/PBS Petition at 9 (emphasis added), demonstrates APTS/PBS's failure to understand the concerns that led the Commission to adopt the limit in the first place.

¹² *See, e.g.*, Bill Carter, "Conservatives Call for PBS to Go Private or Go Dark," *N.Y. Times*, April 30, 1992 at A1 (citing critics who argued that the public affairs shows aired on PBS have a "liberal tilt"); Parenti, Michael, "The myth of a liberal media." 55 *The Humanist* at 7 (January 1995) (noting that "more than 70 percent of PBS' s prime-time shows are funded wholly or in major part by four giant oil companies.").

¹³ Despite public television's mandate that it serve unserved audiences there is no guarantee that it will do so. *See, e.g.*, Janine Jacket, *Film Rejection Highlights PBS Bias* (visited Apr. 20, 1999) <<http://www.fair.org/extra/9801/pbs-film-reject.html>> (discussing PBS's decision not to air the documentary "Out At Work" discussing workplace discrimination against gays and lesbians); *FAIR Issues New Study On PBS's MacNeil/Lehrer and ABC's Nightline* (visited Apr. 20, 1999) < <http://www.fair.org/reports/macneil-study.html>> (finding that 90 percent of MacNeil/Lehrer's guests were white, and 87 percent were male, and noting that female guests tended to "speak less than men; public interest representatives . . . tended to speak less than government officials; women, people of color and public interest activists . . . appeared later in the program"). In addition, government grant policies, such as NTIA's PTFP funding criteria, limit public television's ability to transmit religious programming.

APTS/PBS state that the Commission has no reason to believe that DBS operators will not choose diverse programming in the absence of the rule. APTS/PBS at 8. However, the Commission has every reason to suspect that, without the rule, DBS operators might choose one or a few programmers, and that those programmers might not serve unserved audiences. Administrative simplicity alone may encourage DBS operators to contract with a limited number of programmers. In addition, as businesses, DBS operators respond to commercial incentives and values when making programming decisions. Without some encouragement to cast a wide net in their search for programmers, commercial DBS operators will continue to respond to market forces when they select programmers for the noncommercial set-aside.¹⁴ Finally, APTS/PBS's strenuous pleadings against the rule provide evidence that APTS/PBS have every intention of using multiple, or possibly all, set-aside channels. Without the rule, fewer sources would appear on the set-aside.

C. The Commission's Adoption of the One-Channel Limit is Not Self-Contradictory.

APTS/PBS incorrectly argue that the Commission's decision to adopt the one-channel limit is inconsistent with its interpretation of the ban on editorial control in Section 25(b) and with the conclusion that imposing further public interest obligations under Section 25(a) would burden DBS operators. APTS/PBS Petition at 6, 7, n.18. In fact, the Commission's interpretation of the editorial control ban lays the groundwork for its rule. In the face of strong arguments to the contrary, the Commission concluded that DBS operators should be able to select the programmers that will appear on the set-aside. In recognition of the arguments set forth by DAETC and CME, *et al.* that this

¹⁴ "[S]ince 1939, the government has 'recognized the potential effect of . . . commercial pressures on educational stations' by reserving radio frequencies and television channels for educational use." *Time Warner v. FCC*, 93 F.3d 957, 977 (D.C. Cir. 1996) (quoting *League of Women Voters*, 468 U.S. 364, 367 (1984)).

interpretation would produce an outcome inconsistent with the goals of Section 25(b), *Order* at ¶117, the FCC adopted a one-channel limit to mitigate the adverse policy effects of its statutory interpretation. Contrary to APTS/PBS's contention, the Commission's decision to grant DBS operators great flexibility through its interpretation of § 335(b)(3) does not prevent it from adopting *all* limitations on DBS operators' behavior. Choosing a lesser limitation in place of a greater one is not unreasonable. As the Commission explains, it balanced several concerns when implementing Section 25. *See, e.g., Order* at ¶117.

Similarly, the Commission's decision to reject virtually all of the public interest obligations it considered pursuant to Section 25(a) does not preclude adoption of the one-channel limit. The Commission is fully authorized to consider each proposed rule and balance the benefits and burdens that each may produce. The Commission was concerned that most of the obligations proposed to implement Section 25(a) would impose a significant burden on DBS operators. *Order* at ¶¶59, 64. DBS operators opposed most of those suggestions. *See Order* at ¶¶58, 64, n.139. The one-channel limit, on the other hand, is opposed by APTS/PBS, not by DBS operators. DBS operators apparently believe that the freedom they obtained under the Commission's interpretation of the editorial control ban outweighs the small burden on them to choose several different programmers.

III. The Commission Must Not Rescind or Diminish the One-Channel Limit Without Correctly Re-Interpreting the Statutory Ban on Editorial Control.

DAETC and CME, *et al.* argued vociferously in this docket in favor of a statutory interpretation that would prevent DBS operators from selecting the programmers which will appear on the noncommercial set aside. *See, e.g., ex parte* letter from Cheryl A. Leanza to Magalie Roman Salas (Sept. 9, 1998). In addition to relying on the plain language of the statute, DAETC and CME,

et al. argued that the policy goals in favor of source diversity described in parts I and II of this opposition, *see supra* pp. 1, 4, would be furthered if DBS operators were prevented from selecting noncommercial programmers. *See, e.g.,* DAETC, *et al.* Reply Comments at 12-14; *ex parte* letter from Cheryl A. Leanza, Staff Attorney, Media Access Project to Magalie Roman Salas, Secretary, FCC (August 27, 1998); *ex parte* letter from John Schwartz, President, DAETC to William E. Kennard, Chairman, FCC (Oct. 9, 1998). While DAETC and CME, *et al.* do not believe the Commission's interpretation of Section 335(b)(3) is correct, they are willing to accept the Commission's compromise and will see whether this system will produce diverse programming on the set-aside. For this reason, DAETC and CME, *et al.* did not ask the Commission to reconsider its interpretation of Section 335(b)(3)'s ban on editorial control. After years of delay, it is more important to provide noncommercial programming to the public than it is to fight over the mechanisms to do so.

It appears that APTS/PBS, however, are ill-disposed to conciliation. If the Commission chooses to rescind or diminish its one-channel limit in some way, DAETC and CME, *et al.* will be forced to renew its objections to the Commission's interpretation of the ban on editorial control.¹⁵ The carefully balanced compromise cannot be allowed to unravel.

IV. The Commission Should Ensure the Public Interest Obligations to DBS Subscribers Are Met by Implementing Effective Enforcement Measures.

¹⁵ For example, DAETC and CME, *et al.* would argue that the plain language which prohibits DBS operators from exercising "any editorial control over programming" on the noncommercial set-aside also prohibits them from selecting programmers because, as a practical matter, it is impossible to choose a programmer without considering its programming. 47 U.S.C. § 335(b)(3). *See, e.g.,* DAETC, *et al.* Reply Comments at 13-16; *ex parte* letter from Cheryl A. Leanza, Staff Attorney, Media Access Project to Magalie Roman Salas, Secretary, FCC (Sept. 2, 1998).

Several petitioners agree with DAETC and CME, *et al.* that the Commission erred by not imposing additional public interest obligations on DBS providers and that the Commission should take affirmative steps to ensure that the public interest obligations to DBS subscribers are met. *See* CME, *et al.* Petition at 2, SCBA Petition at 6, APTS/PBS Petition at 5, Time Warner Petition at 3. However, some DBS licensees have filed petitions arguing that they should be not held accountable for adhering to the minimum obligations that the FCC imposed. *See* Loral Space and Communications Ltd. Petition at 5 (“Loral”), PanAmSat Corporation Petition at 5-11 (“PanAmSat”), and GE American Communications Inc. Petition at 5-11 (“GE American”). The Commission has clear regulatory authority over these licensees. However, to the extent that these Part 25 licensees are unwilling to implement public interest obligations on DTH providers, DAETC and CME, *et al.* ask that the Commission strengthen the certification process to ensure effective compliance and/or impose public interest obligations directly on DTH providers. The Commission has exercised ancillary authority over non-licensees in the past and should assert this authority over DTH providers now to ensure that the public interest obligations are met.

A. The Commission has Ample Authority to Regulate Both Licensees and Non-licensees to Ensure Public Interest Obligations to DBS Subscribers are Met.

In its *Order*, the Commission justified its decision to define Part 25 licensees as “DBS providers” in Section 335 for the purpose of imposing public interest obligations on those licensees, *see Order* at ¶ 21 (citing 47 U.S.C. § 335(b)(5)(A)(ii)), by reasoning that “it has greater enforcement powers over licensees.” *See Order* at ¶ 23.

In their petitions for reconsideration, three satellite companies and Time Warner disagree with the Commission’s reasoning and state that the Commission improperly broadened the scope of

licensees subject to public interest obligations. *See* Loral Petition at 8, PanAmSat Petition at 4, GE Americom Petition at 8, Time Warner Petition at 10. They claim that the Commission has authority to impose those obligations on DBS providers directly without holding the space station licensee ultimately accountable. *See id.* These parties argue that the FCC’s reasoning is inconsistent with prior instances when the Commission exercised ancillary authority over non-licensees. *See id.*

The petitions for reconsideration largely focus on showing that Section 335 does not explicitly extend regulatory jurisdiction to cover licensees who do not control programming, rather than addressing the Commission’s established and broad authority to ensure that its mandate is fulfilled. Under this mandate, the Commission has ample power to regulate DBS programmers.

The principle underlying the FCC’s authority to regulate non-licensees was initially enunciated in 1943, in *NBC v. United States*, 319 U.S. 190 (1943). Program networks are not themselves licensed, but the Court recognized the FCC’s ancillary power over NBC radio affiliates despite the absence of explicit statutory authority. The Court was persuaded by the Commission’s recognition that without the ability to regulate non-licensee networks, its mission “to give widespread coverage to programs which otherwise would not be heard beyond the reception area of a single station” would be compromised. *Id.* at 198. The Supreme Court, in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968) again supported the FCC’s authority over non-licensees when it upheld the FCC’s authority to regulate cable systems without explicit Congressional authorization.

United States v. Southwestern Cable Co. has been frequently cited in later cases.¹⁶ In *Mount Mansfield v. FCC*, for example, the Commission successfully asserted its authority to impose obligations and restrictions on TV networks. 442 F. 2d 470 (2d Cir. 1971). The Court held that "[t]he fact that the statute contains no explicit authority to regulate the activity of networks is not conclusive." *Id.* at 480. Moreover, the underlying rules in *Mt. Mansfield*, which placed an outer limit on the amount of programming that networks could generate, are comparable to the FCC rules at issue here.¹⁷

In 1981, the Supreme Court in *CBS v. FCC*, 453 U.S. 367 (1981), yet again upheld the Commission's enforcement of Section 312(a)(7) on unlicensed networks because it found that the FCC must be allowed flexibility to fulfill the goal of preserving access of federal candidates to broadcasting. The Court reasoned that the Commission's jurisdiction was "reasonably ancillary" to

¹⁶ See *NAB v. FCC*, 740 F.2d 1190 (D.C. Cir. 1984); *MCI v. AT&T*, 512 U.S. 218 (1994) (citing the Supreme Court's consistent interpretation of the Communications Act as affording the Commission ample leeway to interpret and apply its statutory powers and responsibilities); *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 190 (1997) (applying *Southwestern Cable* to the government's broad authority in a First Amendment challenge to Congress' decision to require cable stations to carry broadcast signals.)

¹⁷ In contrast, this situation is significantly distinct from the one in *FCC v. Midwest Video Corporation*, 440 U.S. 689 (1979), where the court struck down rules promulgated by the FCC requiring cable operators to make available certain channels for access by third parties and furnish equipment and facilities for access purposes. Using the holding in *United States v. Southwestern*, the Court reasoned that those rules "were not reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." *Id.* In the context of DBS public interest obligations, the Commission clearly has the authority to regulate the satellite providers.

the effective enforcement of the individual licensee's obligations under the Communications Act. *Id.* at 391 n.14.¹⁸

It is of particular note that the Commission's authority to impose DBS public interest requirements on non-licensed DBS providers has already been upheld by the D.C. Circuit. In *NAB v. FCC*, 740 F.2d 1190 (D.C. Cir. 1984) (affirming FCC's ability to exercise authority over DBS without express congressional authorization), the court rejected arguments very much like those of the petitioners in this Docket. It reversed the Commission for failing to justify its refusal to impose programming obligations on non-licensee "customer-programmers." 740 F.2d at 1203. Stressing the Commission's power to adapt regulations to fit changing circumstances, the court looked to whether the Congressional goal of ensuring access to diversity would be met without asserting jurisdiction over those unlicensed parties. The court noted that the Commission had in the past, imposed broadcast regulation on non-licensee programmers, for example, by making unlicensed TV networks accountable for compliance with Section 312(a)(7). *See CBS v. FCC*, 453 U.S. 367 (1981). Acknowledging that the Commission does not "ordinarily" do so, the court explained that in most circumstances such regulation is not needed because the Commission can easily "appl[y] the statute directly to the entities responsible for program selection and transmission- the broadcast licensees." 740 F.2d at 1204-05. But, where such an approach is insufficient to meet statutory goals, it held, "the

¹⁸DAETC and CME, *et al.* also note that the Court has endorsed the Commission's ancillary authority in other areas of the media as well. In *NCCB v. FCC*, the court examined whether the ban on ownership of broadcast stations by newspapers exceeded the Commission's authority and found that "[a]lthough no provision of the Communications Act expressly grants the Commission authority to restrict newspaper ownership of broadcast stations, such express authority is not essential to the validity of Commission regulations." 555 F.2d 938, 951 (D.C. Cir. 1977) (citing *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968)).

Commission has available a variety of means for regulating DBS consistent with the statutory command." *Id.* at 1205.¹⁹

Although DAETC and CME, *et al.* agree with the satellite companies and Time Warner that the Commission has authority to enforce the public interest obligations on non-licensee DTH providers, DAETC and CME, *et al.* do not agree that the Commission's inclusion of Part 25 licensees as "DBS providers" was incorrect. Rather, DAETC and CME, *et al.* maintain that the Commission has authority over both DTH providers and Part 25 licensees, and believe the Commission should impose the obligations on either of these parties depending on which would best further the public interest obligations to DBS subscribers. Furthermore, the Commission should make clear that by definition, the parties obligated under section 335(b)(5) are also subject to any future public interest obligation the Commission promulgates under 335(a). The Commission must take this opportunity to protect the public by taking definitive action.

B. The Commission Must Ensure Adequate Enforcement of its Rules by Holding Satellite Licensees and/or DTH Providers Accountable.

The Commission should exercise its authority over satellite companies and DTH providers to ensure that public interest obligations are effectively implemented.²⁰ The satellite licensees have

¹⁹ Time-Warner's references to the FCC's closed captioning and EEO rules are factually accurate but legally irrelevant. It is true that those regulations are imposed on licensees, not programmers, but that is because the Commission specifically determined that this was more efficient. *In re Closed Captioning and Video Description of Video Programming*, 13 FCC Rcd 3272 (1997).

²⁰ Regardless of what this or a future Commission may do, the FCC clearly has authority to require Part 25 licenses to comply with the requirements of Section 335(a).

expressed reluctance to be held ultimately responsible for the DBS public interest obligations of DTH providers. *See* Loral Petition at 2, GE Americom Petition at 5-11, PanAmSat at 3-7. Therefore, the Commission should interpret Section 335 in a manner which imposes public interest obligations on DTH providers directly because they are the parties who control content programming and from whom the public will seek redress for service and programming concerns.

The unwillingness of Part 25 licensees to be an enforcement body is apparent from their petitions. For example, Loral not only argues that Part 25 licensees should not be held responsible for the public interest obligations of DTH providers, but also asks the Commission to clarify whether Part 25 licensees could rely on certificates of compliance from distributors to show that they are meeting requirements for non-commercial, educational, and informational programming set-asides and political access. *See* Loral Petition at 9-15. Loral also requests that the Commission permit Part 25 licensees to rely upon the accuracy of the certificates of compliance without requiring the licensee to verify such compliance. *See id.* In support of these requests, Loral claims that verification would be burdensome on licensees. *Id.* Finally, Loral suggests that Part 25 licensees should not be liable for compliance where a provider falsely certifies that the public interest obligations are being met. *Id.*

DAETC and CME, *et al.* strongly oppose these suggestions because relaxing compliance and verification obligations would allow room for DTH providers to make misrepresentations and omissions. In addition, as the Commission notes in the *Order*, without accountability or liability for violations of the rules, the Part 25 licensees would have no incentive to look for misrepresentations made by the DTH providers in their certifications of compliance. *See Order* at ¶ 23. The Commission

thus ought to strengthen the certification process to ensure compliance or impose the obligations on DTH providers directly.

Given the reluctance of Part 25 licensees to monitor and enforce public interest obligations of DTH providers, imposing responsibility for public interest obligations on DTH providers may be the most effective method for enforcement. As the Commission acknowledges, the DTH providers, and not the satellite companies, have control over the content of the programs aired on DBS. *See Order at ¶ 25*. For instance, DirecTV, Primestar and Echostar decide which network packages to carry on their channels.²¹ In addition, citizens are likely to approach the DTH provider if they have concerns about programming.²² If DTH providers re-route citizen inquiries to Part 25 licensees, members of the public may be dissuaded from seeking redress of their concerns which will likely decrease public participation in enforcing and monitoring public interest obligations.²³ When the DTH providers are held responsible for compliance, then the final result may be better programming to meet the needs of the public.

²¹ *See generally*, DirecTV Homepage, *Enjoy More Choices than Cable Can Deliver!*, (visited Apr. 26, 1999) <<http://www.acspublish.com/dse/directv1.html>>, Primestar Homepage, *Installation Deals: The Leaves Aren't All that are Dropping!*, (visited Apr. 26, 1999) <<http://www.acspublish.com/dse/prime1.html>>, Dish Network Homepage (excerpted from FAQ) (visited Apr. 26, 1999) <<http://www.acspublish.com/dse/dish1.html>>.

²² The Commission has recognized that the public tends to contact the programming provider. For example, in the broadcasting context, the Commission amended the public file rules of broadcasters to enhance public access to information. *See Review of the Commission's Rules Regarding the Main Studio and Public Inspection Files of Broadcast Television and Radio Stations*, 13 FCC Rcd 15691(1998).

²³ If a member of the public seeks information on DBS public interest compliance from a DTH provider, the provider may not be able to assist him because it might not have this information. The citizen may not persist in trying to obtain this information if redirected to an unfamiliar Part 25 licensee. Thus, the customer service aspect of providing public information is lost when the direct provider of services is not responsible for compliance.

V. The Commission Should Enforce the Public Interest Obligations in a Manner That Advances the Goals of Diversity.

DAETC and CME, *et al.* implore the Commission to fulfill its mandate in a manner that advances the goals of diversity. Congress enacted the channel capacity set-aside to promote diverse noncommercial educational programming. *See* 47 U.S.C. § 335(b). DAETC and CME, *et al.* agree with Time Warner that the Commission should not allow DBS providers to satisfy the 4% channel capacity set-aside requirement by carrying programs that are otherwise eligible, but are already airing as of the effective date of the channel capacity reservation rules.²⁴ *See* Time Warner Petition at 12-15. Requiring DBS providers to fill the set-aside with new additional programs will result in the diversity of media sources Congress intended when it implemented the Communications Act and will increase the opportunities for additional voices.²⁵

²⁴ While DAETC and CME, *et al.* agree with Time Warner's suggestion regarding channel capacity, they do not agree with Time Warner's suggestion that DBS providers should provide financial support to PBS because PBS is not the equivalent to public educational and governmental ("PEG") access television, *see* Time Warner Petition at 10. Cable PEG channels serve a wide range of community groups. *See* Alliance for Community Media, *Quick Facts on Media Access*, ("public access television is . . .the community's medium"); *see also* Sylvia Moreno, *Students in the Studio, Access Channel Produces Shows and Experience*, WASHINGTON POST, July 23, 1998, at 2. In contrast, PBS is national, and airs only a limited amount of community news and public affairs programming. Thus, the programming options available via various PEG channels cannot qualitatively compare with PBS. *See* Patricia Aufderheide, *A Funny Thing is Happening to TV's Public Forum*, COLUMBIA JOURNALISM REVIEW, Nov/Dec 1991; *see also* *Producers defy the trend against home-brewed local shows*, Current Online Briefing (visited Apr. 26, 1999) <<http://www.current.org/brew1.html>> ("With economics heavily favoring national and regional production, public TV and radio stations are producing fewer and fewer programs for consumption only in their local area"); *see also* *PBS Corporate Facts: An overview of the Public Broadcasting Service* (visited Apr.21, 1999) <<http://www.pbs.org/insidepbs/facts/overview.html>> (noting that out of 171 licensees operating 350 PBS member stations only 8 (5%) are local educational or municipal authorities).

²⁵ Many new and diverse networks want to launch including several that offer non-commercial, educational programming. *See* CABLEVISION, *Database: Announced Services*, Sept. 21, 1998, at 49. *See also* comments of CME, *et al.* at 6-7, n.6 in Implementation of Section of the

Both Congress and Supreme Court have determined that diversity of programming is in the public interest. The Supreme Court has recently reaffirmed that there is an “important governmental interest” in “promoting the widespread dissemination of information from a multiplicity of sources.” *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 180-81 (1997) (quoting *Turner Broadcasting System Inc. v. FCC*, 512 U.S. 662 (1994)). Moreover, in the DBS context, the D.C. Circuit stated in *Time Warner v. FCC*, that “it is the right of the viewers and listeners, not the right of broadcasters, that is paramount . . . It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is critical here.” 93 F. 3d 957, 975 (D.C. Cir. 1996) (citing *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 390 (1969)). The court went on to say that “an essential goal of the First Amendment is to achieve the widest possible dissemination of information from diverse sources.” *Id.* (citing *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 799 (1978)).

DBS providers may make decisions to air certain programs based on factors other than diversity (like profit and mass appeal). Without limiting the set-aside to new programming, additional non-commercial programming may not otherwise be aired, thus limiting the diversity of voices.

CONCLUSION

The Commission was correct to adopt a one-channel limit and should reject APTS/PBS arguments to the contrary. Furthermore, the Commission has broad authority to ensure that its mandate to impose public interest obligations on DBS service providers is fulfilled and has ample power to regulate the provision of DBS service and the parties that provide that service, whether it

Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation; Leased Commercial Access, 11 FCC Rcd 16933 (1996) (*Leased Access*); see also Reply Comments of CME, *et al.* at App. 6 in *Leased Access*.

is the DTH providers or the Part 25 licensees. Finally, in order to succeed with its goal of opening channel capacity to encourage the development of new educational or informational programming, the Commission should require that DBS providers fulfill their 4% channel capacity set-aside with programs other than those already carried.

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Certificate of Service

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