

**FOR FURTHER INFORMATION CONTACT:** Frank Lucia, Compliance and Information Bureau, (202) 418-1220.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's *Third Report and Order* in FO Dockets 91-171/91-301, adopted December 14, 1998, and released December 23, 1998.

The full text of this Federal Communications Commission's (FCC) *Third Report and Order* is available for inspection and copying during normal business hours in the FCC's Public Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C. 20554. The complete text may also be purchased from the Commission's duplication contractor, International Transcription Service, Inc., 1231 20th Street, NW, Washington, D.C. 20336; phone: (202) 857-3800, facsimile: (202) 857-3805.

### Synopsis of Third Report and Order

The FCC adopted a *Third Report and Order* which declined to mandate rules that require the installation of selective channel switching equipment at cable systems. This equipment prevents program interruption on broadcast channels carried on cable systems during cable initiated EAS activations. The FCC has not changed or amended the rules that provide for cable and broadcast stations entering into voluntary written agreements that prevent EAS interruption to a broadcast station. Finally, the *Third Report and Order* also rejected arguments to preempt provisions of local franchise agreements that require local emergency messages. The record indicates that many local municipalities use cable franchise agreements as a primary means of alerting residents to non-weather related local emergencies.

### Background

EAS replaced the Emergency Broadcast System (EBS), and uses various communications technologies, such as broadcast stations and cable systems, to alert the public regarding national, state and local emergencies. EAS, compared to EBS, includes more sources capable of alerting the public and specifies new equipment standards and procedures to improve alerting capabilities.

In 1994 the Commission issued a *Report and Order and Further Notice of Proposed Rulemaking* 59 FR 67090, December 28, 1994. This proceeding directed broadcast stations and cable system participation in EAS. In our *Memorandum Opinion and Order*, 10 FCC Rcd 11494 (1995), we responded to petitions for reconsideration filed regarding the *Report and Order and*

*Further Notice of Proposed Rulemaking*. We found no merit in arguments asserting that the statutory language exempts local broadcast station programming from interruption by cable system EAS requirements. The *Memorandum Opinion and Order* also rejected NAB's arguments that EAS interruptions violate provisions set forth in the Copyright Act and the Commissions must carry rules.

The *Second Report and Order*, which was released in September of 1997, modified some of the requirements in the *Report and Order* and addressed issues raised in the *FNPRM* that applied to wired and wireless cable systems. The *Second Report and Order* also declined to exercise preemption of local cable franchise agreements unless a jurisdiction takes action that interferes with the national warning functions of EAS.

### Legal Basis

Authority for issuance of this Third Report and Order is contained in Sections 4(i), 257, 303(b), 303(g), 303(r), 309(j), and 332(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 257, 303(b), 303(g), 303(r), 309(j), and 332(a).

### List of Subjects

#### 47 CFR Part 11

Emergency alert system.

#### 47 CFR Part 76

Cable television.

Federal Communications Commission.

**Magalie Roman Salas,**

*Secretary.*

[FR Doc. 99-2863 Filed 2-5-99; 8:45 am]

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## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 100

[MM Docket 93-25; FCC 98-307]

### Direct Broadcast Satellite Public Interest Obligations

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** In this document, the Commission imposes requirements on Direct Broadcast Satellite Service (DBS) providers to comply with the political broadcast rules of the Communications Act of 1934, as amended, and mandates that DBS providers reserve between 4 percent and 7 percent of their channel capacity exclusively for

“noncommercial programming of an educational or informational nature.” These rules will provide for the carriage on DBS systems of qualified political candidates for national office and will make DBS channel capacity available to “national educational programming suppliers,” upon reasonable prices, terms, and conditions.

**DATES:** Effective June 15, 1999 except for § 100.5(c)(6) which contains information collection requirements that are not effective until approved by the Office of Management and Budget. The FCC will publish a document in the **Federal Register** announcing the effective date for that section. Written Comments regarding the Paperwork Reduction Act requirements in § 100.5(c)(6) should be submitted on or before April 9, 1999.

**ADDRESSES:** Comments regarding the paperwork reduction act requirements in § 100.5(c)(6) should be submitted to Les Smith at 445 12th Street S.W., Rm. 1-A804, Washington D.C. 20554 or via internet at lesmith@fcc.gov; phone 202-418-0217.

**FOR FURTHER INFORMATION CONTACT:** For more information regarding the *Report and Order* contact Rosalee Chiara (202) 418-0754 or James Taylor (202) 418-2113 of the International Bureau. For more information regarding the information collections and to submit comments, contact Les Smith at 202-418-0217; 445 12th Street S.W., Rm. 1-A804, Washington D.C. 20554 or via internet at lesmith@fcc.gov, and Timothy Fain, OMB Desk Officer, Rm. 10236 NEOB, 725 17th Street, N.W., Washington, D.C. 20503 or fain\_t@al.eop.gov.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's *Report and Order* in MM Docket No. 93-25; FCC 98-307, adopted November 19, 1998 and released on November 25, 1998. The complete text of this *Report and Order* is available for inspection and copying during normal business hours in the FCC Reference Center (Room), 445 12th Street, S.W. Washington, D.C. 20554, and also may be purchased from the Commission's copy contractor, International Transcription Service, Inc., 1231 20th Street, N.W., Washington, DC 20036, telephone: 202-857-3800, facsimile: 202-857-3805.

### Summary of Report and Order

1. On March 2, 1993 the Commission released a Notice of Proposed Rulemaking to implement Section 25 of the 1992 Cable Television Consumer Protection and Competition Act of 1992

("1992 Cable Act").<sup>1</sup> Specifically, Section 25 of the 1992 Cable Act, which added new Section 335 to the Communications Act of 1934, as amended, (the Act) required the Commission to impose on providers of Direct Broadcast Satellite Service (DBS), the political programming requirements of Sections 312(a)(7) and 315 of the Act and adopt rules requiring the set aside of channels for noncommercial educational and informational programming. In addition, Section 25 also directed the Commission to examine the opportunities for localism.

2. On September 16, 1993 the United States District Court for the District of Columbia held that Section 25 of the 1992 Cable Act was unconstitutional.<sup>2</sup> On August 30, 1996, the United States Court of Appeals for the District of Columbia Circuit reversed the District Court.<sup>3</sup> In light of the interval between the original Notice of Proposed Rulemaking and the appellate court decision, the Commission released a Public Notice on January 31, 1997 seeking to update and refresh the record.<sup>4</sup> Following review of the comments provided, the Commission released the Report and Order summarized here.

3. *Entities responsible for complying with DBS public interest obligations.* The Commission will hold part 100 and part 25 DBS licensees ultimately responsible for compliance with these rules. Licensees will, however, be able to demonstrate compliance with the public service obligations by relying on certifications from distributors that expressly state that they have complied with the public service obligations. Satellites licensed under Part 25, but operating in the C-band, are not covered by these rules because the statute specifies only Ku-band licensees. In the case of Part 25 licensees, the Commission has imposed a threshold for inclusion under the rules that requires an entity control at least enough programming channels so that 4 percent of the total programming channels available for video yields a set-aside of at least one noncommercial, educational or informational programming channel.

4. *Application of public service obligations to foreign satellites entering the U.S. Market.* Section 25.137 of the

Commission's rules requires that earth stations operating with non-U.S. licensed satellites be licensed by the Commission. As a condition of its license, the Commission will require the earth station licensee communicating with a non-U.S. licensed satellite to comply with Section 335 public interest rules.

5. *Application of the political broadcasting provisions of Section 335(a).* Section 335(a) of the Act states, among other things, that any regulations shall, at a minimum, impose the political broadcast rules of Sections 312 and 315 of the Act.

6. *Access for Federal Candidates.* Section 312(a)(7) of the Act requires broadcasters to allow legally qualified candidates for federal office reasonable access to their facilities. Access can be provided on a free or paid basis. Since the passage of Section 312(a)(7), the Commission's policy has generally been to defer to the reasonable, good faith judgment of licensees as to what constitutes "reasonable access" under the circumstances present in a particular case. Factors the Commission would consider in reviewing such a case include the number of candidates requesting time, the technical difficulties in satisfying the request, and the availability of reasonable alternatives.

7. The Commission will monitor DBS providers' performance in this area so that it can modify the Commission's rules if necessary and as experience dictates. The Commission will require DBS providers to maintain a file available to the public at the providers' headquarters containing requests for political advertising time and disposition of those requests. Where DBS providers carry the programming of a terrestrial broadcast television station, it is the responsibility of the terrestrial broadcaster and not the DBS provider to satisfy the political broadcasting requirements of Sections 312(a)(7).

8. *Equal Opportunities.* In conformance with statutory mandate, the Commission will apply the equal opportunities provisions of Section 315(a) of the Act, Section 73.1940 of the Commission's rules, and the policies delineated in prior Commission orders to DBS providers. DBS providers will be required to ensure, by contractual means or otherwise, that these rules are followed. If one legally qualified candidate is afforded access to a DBS system, all other candidates for the same office who make timely requests must be afforded that same opportunity.<sup>5</sup> To

ensure that competing candidates will be able to ascertain what equal opportunities they are entitled to, we will require the DBS provider to maintain a political file similar to the one maintained by broadcasters.<sup>6</sup> The *Report and Order* retains the definitions of "use" and "legally qualified candidate" in current rules and policies. The Commission will resolve issues involving DBS providers' equal opportunities obligations in the context of particular cases.

9. *Lowest Unit Charge.* If advertising is sold on DBS systems, legally qualified candidates must be afforded the benefit of the lowest unit charge (LUC) during the pre-election periods prescribed by Section 315 of the Act. Section 315(b) of the Act and Section 73.1942 of the Commission's rules provide that broadcasters may not charge any legally qualified candidate more than the LUC for advertising on the station during certain periods preceding the election. Although DBS providers do not currently have commercial rates on which to base a LUC determination, they can set a reasonable rate, based on consideration of marketplace factors such as what other media charge to reach a similar audience if they sell time to candidates pursuant to Sections 312 or 315 of the Act or otherwise choose to do so. DBS providers, like broadcasters and cable operators, must disclose to candidates information about rates and discount privileges and give any discount privileges to candidates. A DBS provider may make time available without charge on a nondiscriminatory basis.

10. *Opportunities for Localism.* Section 335(a) also requires the Commission "to examine the opportunities that the establishment of direct broadcast satellite service provides for the principle of localism under [the] Act, and the methods by which such principle may be served through technological and other developments in, or regulation of, such service." Although there have been significant technological developments in the DBS industry since the Commission first developed rules for DBS, and some DBS providers are providing limited local service, no DBS provider has the technical capability to provide local service to all markets in the country. If legal and technical issues regarding localized programming are resolved, the Commission may consider

use giving rise to the right of equal opportunities occurred).

<sup>6</sup> See 47 CFR 73.1943 (requiring the licensee to keep and permit public inspection of a complete record of all requests for broadcast time made and a notation showing the disposition, charges, etc.).

<sup>1</sup> In the Matter of Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Public Service Obligations, 8 FCC Rcd. 1589 (1993).

<sup>2</sup> *Daniels Cablevision, Inc. v. United States*, 835 F. Supp. 1 (D.D.C. 1993).

<sup>3</sup> *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996).

<sup>4</sup> Public Notice (No. 72078, rel. January 31, 1997).

<sup>5</sup> 47 CFR 73.1941(c) (a request must be made within one week of the day on which the first prior

requiring DBS providers to offer some amount of locally-oriented programming.

11. *Public Interest or Other Obligations.* The *Report and Order* does not impose upon the DBS industry additional programming requirements. The Commission found that DBS is a relatively new entrant attempting to compete with an established, financially stable cable industry. Although the DBS industry has grown significantly since 1992, it still claims just under eight million subscribers in contrast to cable's 64 million customers. Additional obligations on DBS providers might hinder the development of DBS as a viable competitor to cable. The Commission concluded that, although Section 335(a) provides ample authority to impose other public interest programming requirements upon DBS providers, it would not exercise its authority at this time. If it becomes evident that there is a need, the Commission will reconsider this conclusion.

12. *Carriage Obligations for Educational and Informational Programming.* The 1992 Cable Act requires the Commission to adopt rules requiring DBS providers to make available channel capacity for programming of an educational or informational nature. The Commission concluded that discrete channels should be reserved to fulfill the noncommercial reservation requirements of Section 335(b) to assure continuity, predictability and easier monitoring and enforcement. Requiring the set aside of discrete channels will make it easier for consumers to locate such programming on one or more particular channels.

13. *Determination of Total Channel Capacity.* For the purpose of applying Section 335(b), channel capacity should be based on the total channel capacity that is being, or could be, used to provide video programming. Barker and other informational guide channels will be included as available channels for determining the required set aside, as they are video channels supplied to the customers. In addition, unused channels that could be used to provide DBS service will be included in the set aside calculation. Channels used for audio or other non-video services will not be included.

14. Because advances in digital compression technology will continue to expand the number of programming channels that can be offered to customers in a given amount of spectrum and the number of available channels will change depending on the complexity of the type of programming transmitted, the total number of

programming channels offered by a DBS licensee on all its satellites can vary on a weekly or even a daily basis. To address these fluctuations, each DBS licensee will have to calculate on a quarterly basis the number of channels available for video programming on all its satellites. Each DBS licensee will then use the average of these quarterly measurements during the year to ascertain the total number of channels for purposes of determining the number of reserved channels. DBS providers will be required to record these quarterly channel measurements and average calculations as well as their response to any capacity changes in logs kept at their main offices and available to the Commission and to the public.

15. *Reservation Percentage.* The Commission concluded that DBS providers will be required to reserve four percent of their channel capacity exclusively for noncommercial educational and informational programming. In the event that the four percent calculation creates any fraction of a channel, the DBS provider will round the calculation upward.<sup>7</sup> The public interest programming provided for in this order must be made available to all of a DBS provider's subscribers without additional charge.

16. *Impact on Existing Programming Contracts.* The Commission concluded that the reservation requirement applies notwithstanding existing programming contracts and DBS providers will have to make available sufficient channel capacity to fulfill the reservation requirement, regardless of existing programming contracts.

17. *National Educational Programming Supplier.* Pursuant to Section 335(b)(3), DBS providers must make the reserved channels available to "national educational programming suppliers" upon certain terms. Section 335(b)(5)(B) provides that the term national educational programming supplier "includes any qualified noncommercial educational television station, other public telecommunications entities, and public or private educational institutions." Neither this section of the statute nor the legislative history define "noncommercial educational broadcast station," "public broadcasting entity" or "public telecommunications entity." In the absence of any other Congressional guidance the Commission looked to

<sup>7</sup>For example, if a DBS provider supplies 120 video channels to customers, the provider will have to reserve initially five channels for noncommercial programming of an educational or informational nature. Four percent of 120 channels amounts to 4.8 channels. Under the rule this figure would be rounded up to 5 channels.

other provisions of the Act in which those terms are defined such as Section 397 of the Act.

18. Section 397(6) of the Act defines a "noncommercial educational broadcast station" as a television or radio broadcast station that (i) "is eligible to be licensed by the Commission as a noncommercial educational radio or television broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association," or (ii) "is owned and operated by a municipality and which transmits only noncommercial programs for educational purposes." The Commission found it appropriate to use the definition of noncommercial educational television station and public telecommunication entity used in the noncommercial broadcast context and noted that Section 615(1) of the Act further defines such a station to include any television broadcast station that has as its licensee an entity eligible to receive a community service grant from the Corporation for Public Broadcasting.

19. Section 397(12) of the Act defines "public telecommunications entity" as any enterprise which (i) "is a public broadcast station or a noncommercial telecommunications entity" and (ii) "disseminates public telecommunications services to the public." A "noncommercial telecommunications entity" is defined as "any enterprise which is owned and operated by a state, a political or special purpose subdivision of a state, a public agency, or a nonprofit private foundation, corporation or association, and has been organized primarily for the purpose of disseminating audio or video noncommercial educational and cultural programs to the public by means other than a primary television or radio broadcast station."<sup>8</sup> These entities are required to disseminate "public telecommunications services," which are defined as noncommercial educational and cultural radio and television programs, and related noncommercial instructional or informational material.<sup>9</sup>

20. Section 397 of the Act does not define the term "public or private educational institutions." The Commission looked elsewhere for guidance in defining that term including incorporating the eligibility criteria established by the rules for instructional

<sup>8</sup> 47 U.S.C. 397(7). The means of dissemination include, but are not limited to, coaxial cable, optical fiber, broadcast translators, cassettes, discs, microwave, or laser transmission through the atmosphere.

<sup>9</sup> 47 U.S.C. 397(14).

television fixed stations ("ITFS") contained in Section 74.932 of the Commission's rules because the types of services provided by educational institutions and ITFS are analogous.<sup>10</sup> Section 74.932(a) provides that a license for an ITFS will be issued only to an accredited institution or to a governmental organization engaged in the formal education of enrolled students or to a nonprofit organization whose purposes are educational and include providing educational and instructional television material to such accredited institutions and governmental organizations. The Commission adopted the ITFS criteria in interpreting "public and private educational institutions."

21. *Additional Entities.* The Commission determined that the list of entities in Section 335(b)(5)(B) was not intended to be an exclusive list of entities that can qualify as national educational programming suppliers but a nonexclusive list that may be enlarged upon. Although the Commission did not interpret Section 335(b)(5)(B) as an exclusive list of eligible program suppliers, the Commission found that Congress intended to limit eligibility to entities that share the same essential characteristics as those listed.

22. *The Report and Order* states that the term "national educational programming supplier" in Section 335(b)(5)(B) includes only noncommercial entities with an educational mission. The term should not be interpreted as including "commercial" entities organized for profit-making purposes. The Commission found that the eligibility of a programming supplier under the statute should depend on its noncommercial character, not merely whether its programming contains commercials.

23. The Commission also found that the tax code definition of non-profit will apply to qualify an entity as an eligible national educational programming supplier.<sup>11</sup> Thus, an entity with an educational mission that is organized under the tax code as a nonprofit corporation will be eligible as a national educational programming supplier. An entity that is not organized as a nonprofit corporation may also qualify if it shows to the Commission's satisfaction that it is organized for a noncommercial purpose and has an educational mission. The *Report and Order* permits joint ventures as long as participants demonstrate that the joint venture is noncommercial within the

meaning of Section 335 and that the venture's mission is educational.

24. *Definition of the Term "National".* The Commission interpreted the term "national" broadly so as to include local, regional, or national domestic nonprofit entities that qualify under the definitions listed above and produce noncommercial programming designed for a national audience. The Commission also found that the definition should include international nonprofit programmers that satisfy the terms of the definitions in Section 397 of the Act and the Commission's ITFS rules.

25. *Noncommercial Programming of an Educational or Informational Nature.* Section 335(b)(1) requires that the reserved channels be used "exclusively for noncommercial programming of an educational or informational nature." The Commission concluded that the rules need not elaborate on the term "educational and informational" programming and that a DBS provider can comply with the reservation requirement by affording access to programming supplied by specific categories of noncommercial entities. The Commission will reconsider this conclusion, however, if it appears that more specific guidance on the definition of this term is necessary.

26. *Implementation of Section 335(b)(3); Editorial Control.* Section 335(b)(3) requires DBS providers to make channel capacity available to national educational programming suppliers but prohibits the DBS provider from exercising any editorial control over any video programming provided on the reserved channels. The Commission concluded that the best reading of the editorial control language is that it prohibits DBS providers from controlling the selection of, or in any way editing or censoring, individual programs that will be carried on the reserved channels. The *Report and Order* does not, however, prohibit DBS operators from selecting among national educational programming suppliers so long as the DBS provider does not refuse to make unused reserved capacity available to qualified suppliers. Nor does it prohibit DBS providers from refusing to carry non-qualifying programming or ineligible programmers.

27. The Commission rejected arguments that the interpretation of Section 335 is constrained by similar language in the cable leased access provision. Section 335 only prohibits DBS providers from exercising "editorial control over programming," while the cable leased access provision, Section 612, also prohibits cable operators from "in any other way

consider[ing] the content of such programming." The Commission found that omission of this last clause from the DBS provision suggests that DBS providers are not necessarily barred from considering certain factors relating to programming in selecting programmers, but are prohibited from exercising control over such programming. Thus, DBS providers might consider a variety of factors in deciding which programmers to select, including the broad genres of programming they plan to provide (e.g., cultural, documentary, children's educational), the programmers' experience, reliability, and reputation for quality programming, and the quality of programming they may have produced in the past. They may not, however, require the programmers they select to include particular series or programs on their channels as a condition of carriage. If in the future, it appears that DBS operators seek to use the selection process as a means of improperly influencing programming provided on the reserved channels, the Commission will take appropriate action.

28. The *Report and Order* does not prohibit the operators from electing to use a consortium or clearinghouse of educators and public interest specialists to choose among qualifying programs that would be aired on the set-aside capacity. With regard to qualifications, the *Report and Order* recognizes that someone must make the determination that programmers who wish to use the reserved channels are eligible under the statute to do so and that the programming carried on the reserved channels qualifies under the statute as noncommercial programming of an educational or informational nature. The Commission found that DBS providers should be responsible for ensuring that the obligations imposed by the statute are fulfilled. In order to avoid undue intrusion into the programming decisions of qualified programmers, however, the Commission does not believe that it would be appropriate for DBS providers to pre-screen all programming carried on the reserved channels. Rather, if an abuse of the reserved channels by a particular programmer comes to the DBS provider's attention, it can then take action to ensure that only qualified programs are carried on the reserved channels by that programmer in the future.

29. DBS providers may not alter or censor the content of the programming or otherwise exercise any control over the programming. To aid in monitoring and enforcing the obligations of DBS

<sup>10</sup> 47 CFR 74.932(a). ITFS are intended primarily to provide formal educational or cultural development to students enrolled in accredited public or private institutions or colleges or universities.

<sup>11</sup> 26 U.S.C. 501(c)(3).

providers, we will require them to maintain files available for public inspection concerning use of the reserved capacity. These files should identify the entities that request access, the entities to whom noncommercial capacity is being provided, the amount of capacity being provided to each entity, the conditions under which it is being provided and the rates, if any, being paid by the entity, and, when access is denied, a brief description of the reason or reasons why access was denied.

30. *Non-commercial channel limitation.* In order to ensure that access to non-commercial channels is not dominated by a few national educational program suppliers, the *Report and Order* limits to one the number of channels that can be initially allocated to a single qualified program provider on each DBS system. The Commission found this will make a greater variety of educational and informational programs available to the U.S. viewing public and will provide an opportunity for carriage of programming that might not otherwise be shown.

31. In order to ensure that a particular programmer will be allowed access to only one channel, the Commission will require that individual programmers be separate entities. If two national educational programming suppliers are directly or indirectly under common control or ownership, they will be treated as one entity for purposes of obtaining access to the reserved channels. In applying this provision, the Commission will define cognizable ownership and other interests according to the Commission's broadcast attribution rules.<sup>12</sup> Those rules seek to identify those interests in, or relationships with, an entity that confer on their holders a degree of influence or control such that the holders have a realistic potential to affect the programming decisions of the entity or other core operating functions. If, after all qualified entities that have sought access have been offered access on at least one channel, a provider may allocate an additional channel to a qualified programmer without having to make additional efforts to secure other qualified programmers.

32. *Liability for Violations.* Because Section 335 prohibits DBS providers from exercising any editorial control over programming utilizing the reserved channels, the Commission interpreted the statute in accordance with the Supreme Court's holding in *Farmers Educational and Cooperative Union of*

*America v. WDAY*,<sup>13</sup> as immunizing the DBS providers from liability under state and local laws as a result of the content of the programming. Section 335(b) prohibits DBS providers from exercising "any editorial control" over noncommercial programming using the set-aside capacity, and thus implicitly grants them immunity from liability under state and local law for distributing such programming. By the same token, the Commission will enforce any requirements imposed by the Act or our rules, other than these public interest obligations, against the programmers who supply such programming, rather than the DBS providers who carry it under Section 335.

33. *Applicability of Political Broadcasting Rules to the Noncommercial Set Aside Capacity.* The statutory language makes clear that noncommercial programming suppliers are not considered DBS providers for purpose of either Section 335(a) or Section 335(b) and are not subject to those requirements.

34. *Refusal to Carry Programming Supplier.* Section 335 does not appear to allow DBS operators to refuse to carry any particular program. This does not, however, mean that a DBS provider is prevented from making an initial threshold determination as to whether a programmer is qualified for carriage or whether the programming proposed is noncommercial, educational, or informational. The Commission found this approach consistent with judicial interpretation of the editorial control prohibition for public, educational, and governmental set-aside channels provided by cable operators. In addition, a DBS provider can set technical quality standards for programming carried on its satellite system and these standards can be applied to programming on the set-aside channels.

35. *Unused Channel Capacity.* Section 335(b)(2) of the Communications Act permits a DBS provider to utilize for any purpose any unused channel capacity required to be reserved under this subsection pending the actual use of such channel capacity for noncommercial programming of an educational or informational nature. A DBS provider will however, be required to vacate reserved capacity, regardless of contractual obligations, within a reasonable time after a qualified programmer's request for access has been received.

36. *Reasonable Prices, Terms, and Conditions.* The Commission concluded

that costs that can be specifically allocated to noncommercial programmers are those that are directly related to making the capacity available to noncommercial programmers. These include, incremental labor required for traffic management at the uplink facility, incremental compression equipment, incremental labor required to authorize viewers to receive particular programming, and any backhaul costs actually incurred by the DBS provider in order to transmit the noncommercial educational or informational programming. If a DBS provider has an authorization center or procedure used solely for the provision of noncommercial channels, such costs may be allocated to noncommercial programmers as well.

37. With regard to rates that are appropriate for the set aside channels under Section 335(b), the statute gives certain guidelines for the Commission to apply. First, Section 335(b)(4) says the Commission should take into account the nonprofit character of the programmer and any federal funds used to support programming. Second, the statute provides that the Commission shall not allow rates to exceed 50 percent of the direct costs, which we have discussed above.

38. The Commission thinks that it should not be involved in setting rates for noncommercial programmers because the Commission does not set rates for satellite capacity in any other context. The Commission will address any disputes with respect to rates in the context of a complaint proceeding. Because the statute does not give the Commission any basis upon which to differentiate among noncommercial educational and informational programming based on the availability of outside financing, the Commission concluded that the 50 percent cap applies to all qualified programmers and not just those who receive no outside funding for their programs.

39. *Effective Date.* The Commission concluded that a long phase-in period is unnecessary. The Commission recognized, however, that DBS providers and programmers need some amount of time in which to solidify plans and execute contracts. The Commission will require each DBS provider make available the channel capacity for educational and informational programming of a noncommercial nature as soon as the rules become effective. DBS providers must open a window at that time to allow interested programming suppliers to enter into discussions with the DBS providers regarding program carriage. Programming intended to fulfill the

<sup>12</sup> 47 CFR 73.3555 note 1 & 2.

<sup>13</sup> 360 US 525 (1959) (*Farmers Union*).

provisions of this section must be made available to the public no later than six months after these rules are effective. Until the four percent of capacity is filled with qualified programming, DBS providers may not assert that capacity is unavailable if there are qualified entities seeking carriage who are ready to meet the prices, terms and conditions established by the DBS provider.

#### Ordering Clauses

40. Accordingly, *it is ordered* that Part 100 of the Commission's rules is hereby amended as set out.

41. *It is further ordered* that the Commission's Office of Managing Director shall send a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

42. *It is further ordered* that the amendments to part 100 of the Commission's rules, 47 CFR part 100, and the Commission's policies, rules and requirements established in this *Report and Order* shall take effect 60 days after publication of the amendments in the **Federal Register**, or in accordance with the requirements of 5 U.S.C. 801(a)(3) and 44 U.S.C. 3507, whichever occurs later. The Commission will publish a notice announcing the effective date of this *Report and Order*.

43. *It is further ordered* that the Commission shall send a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

44. This *Report and Order* is issued under § 0.261 of the Commission's rules, 47 CFR 0.261 (1996). Petitions for reconsideration under § 1.429 of the Commission's rules, 47 CFR 1.429 (1996), or applications for review under Section 1.115 of the Commission's rules, 47 CFR 1.115 (1996), may be filed within 30 days of the date of this *Report and Order* in the **Federal Register** (See 47 CFR 1.4(b)(1)).

#### Paperwork Reduction Act

The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with

a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

*OMB Approval Number:* New.

*Title:* Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Public Interest Obligations.

*Form No.:* NA.

*Type of Collection:* New Collection.

*Respondents:* Business or other for-profit.

*Number of Respondents:* 8.

*Estimated Time for Response:* 12 hours.

*Total Annual Burden:* 96 hours.

*Needs and Uses:* The information will be used by the Federal Communications Commission (FCC) and interested members of the public to monitor DBS providers' compliance with public interest obligations. Without such information, the FCC could not determine whether DBS providers have complied with their obligations.

#### List of Subjects in 47 CFR Part 100

Satellite.

Federal Communications Commission.

**Magalie Roman Salas,**

*Secretary.*

#### Rule Changes

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 100 as follows:

#### PART 100—DIRECT BROADCAST SATELLITE SERVICE

1. The authority citation for part 100 is amended to read as follows:

**Authority:** 47 U.S.C. 154, 303, 335, 309 and 554.

2. Add § 100.5 to read as follows:

#### Subpart A—General Information

##### § 100.5 Public interest obligations.

(a) DBS providers are subject to the public interest obligations set forth in paragraphs (b) and (c) of this section.

For purposes of this rule, DBS providers are any of the following:

(1) Entities licensed pursuant to 47 CFR part 100; or

(2) Entities licensed pursuant to part 25 of this chapter that operate satellites in the Ku-band fixed satellite service and that sell or lease capacity to a video programming distributor that offers service directly to consumers providing a sufficient number of channels so that four percent of the total applicable programming channels yields a set-aside of at least one channel of non-commercial programming pursuant to paragraph (c) of this section, or

(3) Non-U.S. licensed satellite operators in the Ku-band that offer video programming directly to consumers in the United States pursuant to an earth station license issued under part 25 of this title and that offer in a sufficient number of channels to consumers so that four percent of the total applicable programming channels yields a set-aside of one channel of non-commercial programming pursuant to paragraph (c) of this section.

(b) *Political broadcasting requirements*—(1) *Reasonable access.* DBS providers must comply with § 312(a)(7) of the Communications Act of 1934, as amended, by allowing reasonable access to, or permitting purchase of reasonable amounts of time for, the use of their facilities by a legally qualified candidate for federal elective office on behalf of his or her candidacy.

(2) *Use of facilities.* DBS providers must comply with § 315 of the Communications Act of 1934, as amended, by providing equal opportunities to legally qualified candidates.

(c) *Carriage obligation for noncommercial programming*—(1) *Reservation requirement.* DBS providers shall reserve four percent of their channel capacity exclusively for use by qualified programmers for noncommercial programming of an educational or informational nature. Channel capacity shall be determined annually by calculating, based on measurements taken on a quarterly basis, the average number of channels available for video programming on all satellites licensed to the provider during the previous year. DBS providers may use this reserved capacity for any purpose until such time as it is used for noncommercial educational or informational programming.

(2) *Qualified programmer.* For purposes of these rules, a qualified programmer is:

(i) A noncommercial educational broadcast station as defined in § 397(6)

of the Communications Act of 1934, as amended.

(ii) A public telecommunications entity as defined in § 397(12) of the Communications Act of 1934, as amended.

(iii) An accredited nonprofit educational institution or a governmental organization engaged in the formal education of enrolled students (A publicly supported educational institution must be accredited by the appropriate state department of education; a privately controlled educational institution must be accredited by the appropriate state department of education or the recognized regional and national accrediting organizations.), or

(iv) A nonprofit organization whose purposes are educational and include providing educational and instructional television material to such accredited institutions and governmental organizations.

(v) Other noncommercial entities with an educational mission.

(3) *Editorial control.*

(i) A DBS operator will be required to make capacity available only to qualified programmers and may select among such programmers when demand exceeds the capacity of their reserved channels.

(ii) A DBS operator may not require the programmers it selects to include particular programming on its channels.

(iii) A DBS operator may not alter or censor the content of the programming provided by the qualified programmer using the channels reserved pursuant to this section.

(4) *Non-commercial channel limitation.* A DBS operator cannot initially select a qualified programmer to fill more than one of its reserved channels except that, after all qualified entities that have sought access have been offered access on at least one channel, a provider may allocate additional channels to qualified programmers without having to make additional efforts to secure other qualified programmers.

(5) *Rates, terms and conditions.* (i) In making the required reserved capacity available, DBS providers cannot charge rates that exceed costs that are directly related to making the capacity available to qualified programmers. Direct costs include only the cost of transmitting the signal to the uplink facility and uplinking the signal to the satellite.

(ii) Rates for capacity reserved under paragraph (c)(1) of this section shall not exceed 50 percent of the direct costs as defined in this section.

(iii) Nothing in this section shall be construed to prohibit DBS providers

from negotiating rates with qualified programmers that are less than 50 percent of direct costs or from paying qualified programmers for the use of their programming.

(iv) DBS providers shall reserve discrete channels and offer these to qualifying programmers at consistent times to fulfill the reservation requirement described in these rules.

(6) *Public file.* (i) Each DBS provider shall keep and permit public inspection of a complete and orderly record of:

(A) Quarterly measurements of channel capacity and yearly average calculations on which it bases its four percent reservation, as well as its response to any capacity changes;

(B) A record of entities to whom noncommercial capacity is being provided, the amount of capacity being provided to each entity, the conditions under which it is being provided and the rates, if any, being paid by the entity;

(C) A record of entities that have requested capacity, disposition of those requests and reasons for the disposition; and

(D) A record of all requests for political advertising time and the disposition of those requests.

(ii) All records required by this paragraph shall be placed in a file available to the public as soon as possible and shall be retained for a period of two years.

(7) *Effective date.* DBS providers are required to make channel capacity available pursuant to paragraph (c) of this section upon the effective date. Programming provided pursuant to this rule must be available to the public no later than six months after the effective date.

\* \* \* \* \*

[FR Doc. 99-1346 Filed 2-5-99; 8:45 am]

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

RIN 1018-AC88

#### Endangered and Threatened Wildlife and Plants; Determination of Whether Designation of Critical Habitat for the Coastal California Gnatcatcher is Prudent

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of determination.

**SUMMARY:** We, the U.S. Fish and Wildlife Service, have reconsidered our

prudence finding for designating critical habitat for the coastal California gnatcatcher (*Polioptila californica californica*). We listed the coastal California gnatcatcher as a threatened species under the Endangered Species Act of 1973, as amended (Act) on March 30, 1993. At that time, we determined that designation of critical habitat was not prudent because designation would not benefit the coastal California gnatcatcher and would increase the degree of threat to the species. On May 21, 1997, the United States Court of Appeals for the Ninth Circuit issued an opinion that required us to issue a new decision regarding the prudence of designating critical habitat for the coastal California gnatcatcher. This notice of determination responds to that court order.

**DATES:** We made the finding announced in this document on January 21, 1999.

**ADDRESSES:** The complete file for this prudence reconsideration is available for inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 2730 Loker Avenue West, Carlsbad, California 92008.

**FOR FURTHER INFORMATION CONTACT:** Ken S. Berg, Field Supervisor, at the above address (telephone: 760/431-9440; facsimile 760/431-9624).

**SUPPLEMENTARY INFORMATION:**

#### Background

We listed the coastal California gnatcatcher (*Polioptila californica californica*) (gnatcatcher) as a threatened species under the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*) on March 30, 1993 (58 FR 16742). This small, insectivorous songbird typically occurs in several distinctive subassociations of the coastal sage scrub plant community. Coastal sage scrub vegetation is composed of relatively low-growing, dry-season deciduous, and succulent plants. Characteristic plants of this community include coastal sagebrush (*Artemisia californica*), various species of sage (*Salvia* spp.), California buckwheat (*Eriogonum fasciculatum*), lemonadeberry (*Rhus integrifolia*), California encelia (*Encelia californica*), prickly pear and cholla cactus (*Opuntia* spp.), and various species of *Haplopappus*. The gnatcatcher exhibits a strong affinity to coastal sage scrub vegetation dominated by coastal sagebrush, although in some portions of its range (e.g., western Riverside County) other plant species may be more abundant. The species occurs below about 912 meters (m) (3,000 feet (ft)) in elevation. The species remains