

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

In the Matter of	)	
	)	
<b>Advanced Communications Corporation</b>	)	
	)	
Application for Extension of Time to Construct, Launch, and Operate a Direct Broadcast Satellite System	)	File Nos. DBS-94-11EXT
	)	
Application for Consent to Assign Direct Broadcast Satellite Construction Permit from Advanced Communications Corporation to Tempo DBS, Inc.	)	DBS-94-15ACP
	)	
Application for Modification of Direct Broadcast Satellite Service Construction Permit	)	DBS-94-16MP
	)	

**MEMORANDUM OPINION AND ORDER**

Adopted: October 16, 1995

Released: October 18, 1995

\* By the Commission: Commissioner Quello dissenting and issuing a statement ;  
Commissioner Barrett dissenting and issuing a statement;  
Commissioners Ness and Chong issuing separate statements.

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## I. INTRODUCTION

1. Before us are several Applications for Review of a Memorandum Opinion and Order issued by the International Bureau that: (1) denied Advanced Communications Corporation ("ACC") an extension of time in which to construct, launch, and operate its Direct Broadcast Satellite ("DBS") system; and (2) dismissed as moot ACC's applications for consent to assign its DBS construction permit to Tempo DBS, Inc. and to modify its permit to conform to the specifications of satellites currently under construction for Tempo Satellite, Inc.<sup>14</sup> Tempo Satellite is an affiliate of Tempo DBS and a current DBS permittee; both Tempo Satellite and Tempo DBS are wholly owned by Tele-Communications, Inc. ("TCI"), the country's largest cable multiple systems operator ("MSO"). These Applications for Review have been opposed by a number of parties, including most other DBS permittees.

2. We affirm the International Bureau's finding that ACC failed to meet its due diligence obligation of proceeding expeditiously with construction and launch of its DBS system. In 1984, the Commission assigned to ACC scarce public resources -- orbital positions and channels -- at no cost, requiring only that ACC proceed with due diligence to provide the DBS service it had promised. As the Bureau found, after more than a decade, including one four-year extension of time, ACC has not met the Commission's due diligence standards. Accordingly, we affirm the Bureau's decision to cancel ACC's construction permit. Because we deny the extension requested by ACC, its assignment and modification

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<sup>14</sup> Advanced Communications Corp., 77 Rad. Reg. 2d (P&F) 1160 (DA 95-944, April 27, 1995) ("Bureau Order").

applications have been rendered moot, and thus will be dismissed. The channels and orbital locations previously assigned to ACC will therefore revert to the public for reassignment.

3. With this decision, we also announce that before the end of this month we will initiate a rulemaking to establish a new methodology for reassigning DBS channels and orbital positions that become available as a result of either cancellation by the Commission or surrender by permittees. Our thinking at this point is that opening a window for new applications for DBS authorizations for these channels (and orbital positions), and then deciding among mutually exclusive applications by auction, will best serve the public interest. Since one of our primary goals is to expedite the provision of additional DBS service in order to foster competition both among DBS providers and between DBS and cable, we intend to meet the following timetable:

October 27, 1995	Notice of Proposed Rulemaking issued
December 12, 1995	Final Report & Order issued
January 17, 1996	New rules become effective
January 18, 1996	Channels reassigned; if competitive bidding chosen, auction begun and completed in one day

This is an ambitious timetable, but we are committed to achieving an expedited reassignment in order to minimize or avoid altogether any disruption in the development of the DBS service or in the business plans of those eager to participate in that development. By devising and implementing a system for reassigning ACC's channels within three months, we will resolve the reassignment issue in time for any potential recipient of those channels to proceed with its business plans with little or no interruption.

4. In making this decision, we also deny a request by EchoStar Satellite Corporation for an investigation of and sanctions for alleged improper and undisclosed *ex parte* contacts in this proceeding.<sup>24</sup> Since the prohibited *ex parte* presentations were promptly disclosed once their significance became known, and since the arguments made in those presentations have been raised by petitioners in this proceeding and fully addressed by EchoStar and other opponents, we conclude that no harmful prejudice has occurred.

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<sup>24</sup> In both its Opposition and in a June 13, 1995 letter to the Managing Director, EchoStar requested, *inter alia*, an investigation into whether additional undisclosed prohibited *ex parte* communications had occurred in the proceeding, and for imposition of sanctions against those who have already admitted to making such prohibited communications.

## II. BACKGROUND

### A. The Evolution of the DBS Service

5. In 1982, we granted the first authorizations for DBS service -- satellite systems that would deliver video programming "direct to home" via backyard receiving dishes.<sup>3/</sup> Our primary goals in initiating this new service were to provide additional competition to existing program providers such as cable television, to provide improved service to remote areas of the country, and to encourage innovative new programming and services.<sup>4/</sup> DBS operators would transmit satellite signals from one or more of the eight orbital positions allocated to the United States pursuant to the Region 2 Plan adopted at the 1983 Regional Administrative Radio Conference ("RARC-83").<sup>5/</sup> Thirty-two channels were available for use at each orbital location. With digital compression, each such "channel" currently can yield up to six channels of consumer programming.

6. Pursuant to our DBS rules and in lieu of stringent financial showings and subsequent Commission analysis, each DBS permittee must satisfy a two-prong due diligence requirement before a DBS license can be awarded.<sup>6/</sup> The first prong of our due diligence requirement mandates that each DBS permittee must begin construction or complete contracting for construction of its system within one year of grant of its construction permit. The second prong requires that each permittee must begin operation of its system within six years after receipt of its construction permit. Specific orbital positions and channels are assigned on a first-come, first-served basis upon a determination that the permittee has satisfied the first prong contracting requirement. Thus, specific orbital/channel assignments are made in the order that first-prong due diligence demonstrations are received from

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<sup>3/</sup> Direct Broadcast Satellite Service, 90 F.C.C.2d 676 (1982). DBS is a radiocommunication service in which signals from earth are retransmitted by high power, geostationary satellites for direct reception by small, relatively inexpensive earth terminals.

<sup>4/</sup> Id. at 680-82.

<sup>5/</sup> See Processing Procedures Regarding the Direct Broadcast Satellite Service, 95 F.C.C.2d 250 (1983) ("DBS Processing Order"). The Region 2 Plan adopted at RARC-83 allocates orbital positions and channels for use in the Broadcast Satellite Service ("BSS") in the Western hemisphere. The eight U.S. orbital positions, proceeding from east to west, are 61.5°W.L., 101°W.L., 110°W.L., 119°W.L., 148°W.L., 157°W.L., 166°W.L., and 175°W.L.

<sup>6/</sup> See 47 C.F.R. § 100.19(b); Direct Broadcast Satellite Service, 90 F.C.C.2d at 719.

permittees.<sup>71</sup> These requirements were intended to permit more orderly processing of applications and to ensure prompt and effective use of DBS spectrum resources.<sup>81</sup>

7. There have been five processing rounds for DBS applicants, the last in 1989. Prior to the last processing round, the limited number of applicants and channels requested, coupled with the flexibility of the international allocation of DBS resources in the Region 2 Plan, allowed us to grant authorizations at variance with that plan.<sup>91</sup> In the last round of DBS applications, however, requests for orbital/channel resources exceeded the available supply. In our 1989 order in Continental, we decided to assign half-CONUS<sup>101</sup> channels only in east/west pairs, so that each applicant could provide full-CONUS service. Service to the eastern half of the United States was to be provided from the four eastern orbital locations, and service to the western half of the country was to be provided from the four western locations. Accordingly, beginning in 1989, new applicants received paired east/west assignments, and existing construction permits were modified to comply with the new assignment scheme. However, we authorized conditional full-CONUS coverage from the eastern orbital positions, provided that such service proved feasible and in keeping with United States treaty obligations.<sup>111</sup>

#### B. ACC's History as a DBS Permittee

8. In 1984, we granted a six-year DBS construction permit to ACC, subject to the condition that it "proceed with the construction of its system with due diligence as defined in Section 100.19 of the Commission's rules."<sup>121</sup> In 1986, we determined that ACC had

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<sup>71</sup> DBS Processing Order, 95 F.C.C.2d at 253. Permittees apply separately for launch and operational authority once satellite construction is nearly complete. A license to operate a DBS satellite, for a five-year term, may be granted upon successful satellite launch and operation of the DBS service. See, e.g., Hughes Communications Galaxy, Inc., DA 95-979 (May 1, 1995).

<sup>81</sup> DBS Processing Order, 95 F.C.C.2d at 253; see also CBS, Inc., 99 F.C.C.2d 565, 568 (1984).

<sup>91</sup> For example, we had authorized the operation of two satellites at the same orbital location, with one satellite serving the eastern part of the country and one serving the western part of the country. See Continental Satellite Corp., 4 FCC Rcd 6292, 6293 (1989), partial recon. denied, 5 FCC Rcd 7421 (1990) ("Continental").

<sup>101</sup> Signals from DBS satellites that cover half of the continental United States are referred to as "half-CONUS" signals; those that cover the entire continental United States are referred to as "full-CONUS" signals.

<sup>111</sup> Continental, 4 FCC Rcd at 6292-93. At that time, the Commission did not have the resources necessary to determine whether full-CONUS service could be provided in technical compliance with the Region 2 Plan. Id.

<sup>121</sup> Satellite Syndicated Systems, Inc., 99 F.C.C.2d 1369, 1387 (1984).

satisfied the first prong of the due diligence requirement by contracting for the construction of two satellites.<sup>13/</sup> Accordingly, we granted ACC's request for 16 channels at each of two orbital locations: 110° and 148°.<sup>14/</sup> In a 1986 application to modify its construction permit, ACC requested assignment of additional channels at these locations. Pursuant to the assignment scheme adopted in Continental, we reserved (but did not assign) eleven additional pairs of channels for ACC, conditioned upon ACC's satisfaction of the first prong contract due diligence requirement for this modified DBS system.<sup>15/</sup>

9. In October 1989, ACC submitted satellite contract information in compliance with the first due diligence requirement for its modified system. In 1990, ACC requested a four-year extension of time, until December 7, 1994, to construct and operate its DBS system. ACC cited "factors outside its control" in support of its extension request: (1) that designs made obsolete by technological advances necessitated numerous modifications; and (2) that changes and uncertainty in the Commission's channel allocation policy had delayed construction. ACC said that it had nonetheless spent "considerable" energy and funds in advancing satellite technology, including DBS digital technology.<sup>16/</sup>

10. In April 1991, we granted ACC's extension request and assigned ACC 11 additional channels at 110° and 8 additional channels at 148°, based on our determination that it had satisfied the first prong contracting due diligence requirement for its modified system.<sup>17/</sup> The due diligence finding was based in part on ACC's contract payment schedule, under which it would have paid 14% of the total contract price by January 1992, 58.5% of the contract price by April 1993, and 83.5% of the contract price by January 1994, at which time its first satellite was scheduled for delivery. In granting the extension request, we specifically stated that "*in the future, continued reliance on experimentation, technological developments and changed plans will not necessarily justify an extension of a DBS*

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<sup>13/</sup> Tempo Enterprises, Inc., 1 FCC Rcd 20, 21-22 (1986) ("Tempo I").

<sup>14/</sup> Continental, 4 FCC Rcd at 6304 n.42.

<sup>15/</sup> Id. at 6301. Thus, the Commission held 11 additional pairs of channels for ACC, which would be given specific assignments if and when ACC demonstrated contracting due diligence with respect to those new channels.

<sup>16/</sup> Request for Additional Time to Construct and Launch Direct Broadcast Satellites, DBS-84-01EXT/88-05MP (filed Feb. 16, 1990).

<sup>17/</sup> Advanced Communications Corp., 6 FCC Rcd 2269, 2272 (1991), recon. denied, 6 FCC Rcd 6977 (1991) ("Advanced"). We assigned only eight channels at 148° since no more were available at that location. We denied ACC's request for three channels at 157° because ACC did not complete contracting for a fifth satellite at this location. Id. Three channels remain reserved for ACC but not yet assigned.

authorization," and noted that "there does now appear [to be] a need for stricter enforcement of the construction progress requirements of the DBS rules."<sup>18/</sup>

11. In August 1994, just four months before its construction permit was to expire, ACC requested a second four-year extension of time, based on the following assertions: (1) its three-year negotiation to reach a joint venture agreement; (2) modifications in its system design that delayed construction; (3) the "considerable" funds and "countless" hours expended to implement its system; and (4) regulatory delays in formulating channel assignment policy in Continental which affected the timing of the grant of ACC's modification requests.<sup>19/</sup>

12. Seven weeks later, or just two months before its permit was to expire, ACC requested consent to assign its DBS construction permit to Tempo DBS,<sup>20/</sup> which would in turn lease or sell the transponders at the 11C° orbital position to Primestar Partners L.P.<sup>21/</sup> The proposed assignment would permit Primestar's migration from medium-power direct-to-home fixed satellite service ("FSS") using approximately 36 to 40 inch receiving dishes, to high-power DBS service using 18 inch receiving dishes.<sup>22/</sup>

13. In anticipation of this assignment, ACC also filed an application to modify its permit to conform to the specifications of two satellites being built under Tempo Satellite's DBS permit for an eleven-channel DBS system to be operated at the 119° orbital location.<sup>23/</sup> The practical effect of this request is that neither ACC nor Tempo DBS would build the two satellites ACC had contracted to purchase from Martin Marietta that had been the basis for ACC's due diligence showings. Instead, ACC or Tempo DBS would use two satellites being built for Tempo Satellite under Tempo Satellite's construction permit. ACC asked the

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<sup>18/</sup> Id. at 2274 (emphasis added).

<sup>19/</sup> Request for Additional Time to Construct and Launch Direct Broadcast Satellites, DBS-84-01/94-11EXT (August 8, 1994).

<sup>20/</sup> Request for Consent to Assign DBS Authorizations, DBS-94-15ACP (September 28, 1994).

<sup>21/</sup> TCI owns twenty-two percent of Primestar. The cable system operators that have ownership interests in Primestar are TCI, Time Warner, Inc., Cox Enterprises, Comcast Cable, Continental Cablevision, and Newhouse Broadcasting Corporation. GE American Communications, Inc., which owns the satellite that is currently used to provide Primestar service, is also an equity partner in Primestar. See United States v. Primestar Partners, L.P., 1994-1 Trade Cas. (CCH) ¶ 70,562 (S.D.N.Y. 1994).

<sup>22/</sup> Tempo DBS App. for Review at 22.

<sup>23/</sup> Application for Modification of Construction Permit, DBS-94-16MP (October 14, 1994). In November 1994, ACC filed an amendment to this modification request. Amendment of Application for Modification of Construction Permit, DBS-94-16MP (November 16, 1994).

Commission to give it credit for Tempo Satellite's efforts in determining whether ACC had met its due diligence obligations.<sup>24/</sup>

14. Included with ACC's assignment application was a Capacity Purchase Agreement ("CPA") between ACC and TCI. Under the CPA, TCI would provide ACC with the two satellites being built for Tempo Satellite, and pay over \$45,000,000 in TCI common stock along with other monetary incentives. In return, ACC would irrevocably sell all of its rights to the transponder capacity on those satellites. This agreement was an alternative to the outright assignment of ACC's construction permit to Tempo DBS.<sup>25/</sup>

15. In April 1995, the International Bureau found that ACC had failed to comply with its due diligence obligations, and therefore denied ACC's request for extension of time to begin DBS operations.<sup>26/</sup> The Bureau concluded that ACC's failure to make any significant progress toward the launch and operation of its DBS system was the result of ACC's own business decisions, and that ACC also could not rely upon Tempo Satellite's investment in its satellites to satisfy ACC's due diligence obligations. Accordingly, ACC's DBS construction permit was cancelled, and its requests to assign and modify its permit were deemed moot.<sup>27/</sup> ACC and others have filed Applications for Review of that decision by the Commission,<sup>28/</sup> and these applications are opposed.<sup>29/</sup>

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<sup>24/</sup> See, e.g., ACC's Consolidated Opp. to Petitions to Deny at 15-18 (filed Nov. 23, 1994).

<sup>25/</sup> ACC App. for Review at 19; Tempo DBS App. for Review at 3 n.4, 6 n.10.

<sup>26/</sup> Bureau Order at ¶¶ 9-19.

<sup>27/</sup> *Id.* at ¶¶ 20-21.

<sup>28/</sup> The following parties filed Applications for Review ("App. for Review") on May 22, 1995: ACC; Tempo DBS, Inc.; Primestar Partners L.P.; General Instruments Corporation ("GIC"); and Cable Telecommunications Association ("CATA"). Some or all of these parties may be collectively referred to as "petitioners."

<sup>29/</sup> Dominion Video Satellite, Inc. filed an Opposition ("Opp.") to the Applications for Review on May 26, 1995. The following parties filed Oppositions on June 6, 1995: EchoStar Satellite Corporation; Directsat Corporation; DIRECTV, Inc.; MCI Telecommunications Corporation; Entertainment Made Convenient (Emc<sup>3</sup>) U.S.A., Inc.; Consumer Federation of America and the Center for Media Education; and the National Rural Telecommunications Cooperative. United States Satellite Broadcasting Company ("USSB") also filed Comments on the same date. Others filed informal comments in this proceeding as well. Some or all of these parties may be collectively referred to as "opponents." Also, as noted above, on June 13, 1995, EchoStar requested that the Managing Director undertake an investigation to determine whether any additional *ex parte* communications not permitted under our rules had occurred, and requested that sanctions be imposed against those who had admittedly engaged in prohibited presentations. The Managing Director has referred this matter to the full Commission. We address this matter in ¶¶ 75-79, *infra*.

16. DIRECTV asserts that CATA, GIC, and Primestar lack standing in this proceeding. None of these petitioners participated in the first stage of this proceeding. In such circumstances, Section 1.106(b)(1) of our rules, 47 C.F.R. §1.106(b)(1), requires that they "show good reason why it was not possible for [them] to participate in the earlier stages of the proceeding." These three petitioners have not made this showing, and their respective applications for review will be dismissed. All of their arguments have been raised by the other petitioners, however, and so are addressed in full.

### III. DISCUSSION

17. In support of their Applications for Review, petitioners argue, as detailed below, that the Bureau Order: (1) exceeds the Bureau's delegated authority; (2) conflicts with Commission precedent for considering due diligence and requests for extension of time; and (3) contravenes the Commission's goal of prompt initiation of competitive DBS service.<sup>30/</sup> To the contrary, we find that the Bureau did not exceed its delegated authority, and it correctly applied Commission precedent in holding that ACC had failed to meet its due diligence obligations.

#### A. Due Diligence Obligations

##### 1. *Delegated Authority.*

18. Petitioners contend that the Bureau exceeded its delegated authority in denying ACC's application for an extension of time.<sup>31/</sup> They assert that the Bureau Order constitutes an "unprecedented and inexplicable" break with Commission precedent, since it is the first time that a DBS construction permit has been cancelled based on a permittee's failure to meet the second prong of the due diligence rule.<sup>32/</sup> For the reasons stated below, we find that the Bureau's action was consistent with our precedent.<sup>33/</sup>

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<sup>30/</sup> ACC App. for Review at 11, 18; Tempo DBS App. for Review at 11-24.

<sup>31/</sup> Pursuant to Section 0.261 of the Commission's Rules, 47 C.F.R. § 0.261, the Chief of the International Bureau is delegated a wide range of authority to perform most of the functions of the bureau, which include "administer[ing] policies . . . [for] domestic and international satellite systems" and "monitor[ing] compliance with the terms and conditions of authorizations" such as those at issue in this proceeding. See 47 C.F.R. § 0.51(c)-(d). This delegated authority is subject to specific limitations that preclude action on applications that present novel questions of fact, law, or policy that cannot be resolved under outstanding precedents or guidelines, or that appear to justify a change in Commission policy. *Id.* at § 0.261(b).

<sup>32/</sup> See, e.g., ACC App. for Review at 1, 12-14; Tempo DBS App. for Review at 11-13.

<sup>33/</sup> In addition, we note that since we are now deciding this case on the merits, the issue of whether the Bureau exceeded its delegated authority is moot.

19. At the inception of DBS service, the Commission established a minimal number of rules designed to foster the development of the fledgling service.<sup>34/</sup> The Commission determined that the public interest would best be served by affording DBS permittees maximum flexibility in order to facilitate the introduction of a new service that was untried and unproven, both technically and financially.<sup>35/</sup> Among the few rules imposed was the two-part due diligence requirement, to which exceptions would be allowed only in the "most extraordinary circumstances."<sup>36/</sup>

20. Under the first prong of our due diligence rule, we have taken action against applicants who failed to go forward with the construction of a DBS system. Since the rule "was intended to ensure the prompt initiation of DBS service for the public," we said that it "must be enforced where permittees are allowed to hold spectrum resource for which other applicants exist."<sup>37/</sup> As a result, between 1984 and 1989, a total of seven permittees were stripped of their permits for failure to comply with the first due diligence requirement.<sup>38/</sup> In addition, we recently cancelled the orbital positions and channels (but not the construction permit) assigned to Dominion Video Satellite, Inc. for failure to demonstrate compliance the first due diligence requirement in a timely manner.<sup>39/</sup>

21. Nevertheless, throughout the first decade of DBS's existence -- what we have previously described as the "pioneering era" of this service<sup>40/</sup> -- the Commission exercised flexibility where the public interest so required. The Commission was reluctant to cancel construction permits for failure to initiate DBS service "in accord with a pre-established timetable set without the benefit of experience."<sup>41/</sup> For example, in granting ACC's first four-year extension, we based our decision on the substantial developments in DBS satellite technology, the Commission's development of its policy regarding channel and orbital

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<sup>34/</sup> There are only nine regulations directly applicable to DBS service. See 47 C.F.R. Part 100.

<sup>35/</sup> Direct Broadcast Satellite Service, 90 F.C.C.2d at 706-08.

<sup>36/</sup> DBS Processing Order, 95 F.C.C.2d at 254.

<sup>37/</sup> CBS, Inc., 99 F.C.C.2d at 571-72.

<sup>38/</sup> See CBS, Inc., 99 F.C.C.2d at 566, 571-73 (CBS and Graphic Scanning Corp.); Tempo I, 1 FCC Rcd at 21 (NEXSAT); RCA American Communications, Inc., 2 FCC Rcd 1204, 1205 (1987)(RCA Americom, Antares Satellite Corp., and Digital Paging of Texas, Inc.); Continental, 4 FCC Rcd at 6296 (1989)(DBSC).

<sup>39/</sup> Dominion Video Satellite, Inc., 8 FCC Rcd 6680, 6687 (1993), recon. denied, FCC No. 95-421 (Oct. 5, 1995)("Dominion"). The Dominion decision is discussed more fully in ¶ 25, *infra*.

<sup>40/</sup> E.g., Advanced, 6 FCC Rcd at 2274.

<sup>41/</sup> United States Satellite Broadcasting Co., 3 FCC Rcd 6858, 6860 (1988)("USSB I").

assignments, and the Challenger and Ariane launch vehicle failures of the late 1980's.<sup>42/</sup> Such factors, which would have been outside any permittee's control, were the type of "extraordinary circumstances" that justified extension.

22. But even as we granted such extensions, we separately cautioned that extensions would be more difficult to obtain in the future. We noted that:

[a]s circumstances have evolved and demand for DBS facilities may be increasing beyond the available supply of orbit/channel resource, there does now appear [to be] a need for stricter enforcement of the construction requirements of the DBS rules.<sup>43/</sup>

We stated that it is "imperative that inefficient use of DBS assignments, whether intentional or inadvertent, be prevented, particularly if it becomes evident that incumbent permittees are unjustifiably preventing additional promising parties from attempting to deliver DBS services."<sup>44/</sup> We also explicitly put permittees on notice that uncertainties in or miscalculations of the business climate are not factors beyond permittees' control that could justify an extension, but rather are risks that each permittee must bear alone: "[n]either other existing or potential DBS participants nor the Commission can, or should be expected to, accommodate their mistaken projections or modified expectations."<sup>45/</sup>

23. Four years ago, we said that "DBS continues to be 'unproven as a technology and as a commercial enterprise.'"<sup>46/</sup> In granting ACC's request for a four-year extension that year, however, we explicitly warned that "[t]here will soon come a time when the pioneering era of the development of DBS technology and service will come to an end."<sup>47/</sup>

24. The last four years have ushered in that new era. Two permittees (DIRECTV<sup>48/</sup>

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<sup>42/</sup> Advanced, 6 FCC Rcd at 2274.

<sup>43/</sup> USSB I, 3 FCC Rcd at 6861 (quoted in Advanced, 6 FCC Rcd at 2274).

<sup>44/</sup> Id.

<sup>45/</sup> Id. at 6859.

<sup>46/</sup> Advanced, 6 FCC Rcd at 2273 (quoting USSB I, 3 FCC Rcd at 6859).

<sup>47/</sup> Id. at 2274.

<sup>48/</sup> DIRECTV is a wholly-owned subsidiary of GM Hughes Electronics and an affiliate of Hughes Communications Galaxy, Inc. ("Hughes"). Hughes is a Commission licensee in the high-power DBS service, and DIRECTV is the DBS operating, customer service, and programming acquisition arm of

and USSB) already have their DBS systems in operation, and a third (EchoStar/Directsat) is to launch one satellite this fall and another in 1996. Tempo Satellite is scheduled to launch in June 1996. Under these circumstances, a permittee's inability or unwillingness to proceed with construction of its system weighs even more heavily against allowing it to retain its permit.<sup>49/</sup>

25. ACC argues that the Commission has applied a "flexible policy" as recently as 1993, when we issued our Dominion order.<sup>50/</sup> In that order, we stripped Dominion of its orbital/channel assignments because of its failure over a two-year period to respond to one Commission order and several requests from the staff for information necessary to demonstrate compliance with the first due diligence requirement.<sup>51/</sup> Dominion's inordinate delay in submitting the required information caused a prejudicial delay of assignments to other DBS permittees who were behind it in the assignment queue. The appropriate sanction in that situation was revocation of Dominion's assignments and sending it to the end of the assignment queue. In the same order, we also extended Dominion's DBS permit based on the "reasonable degree of continuity in [Dominion's] efforts to establish its DBS system."<sup>52/</sup> We noted that Dominion had developed a financing program, contracted for home receiving equipment, and obtained a contract for launch services -- all part of satisfying the *second* prong of due diligence.<sup>53/</sup> None of the demonstrated progress toward an operational DBS system that justified our flexibility in Dominion is present in this case.

26. It is true, however, that the Commission has never denied an extension of time to a DBS permittee for failure to progress toward compliance with the *second* due diligence requirement.<sup>54/</sup> From this, ACC argues that any decision to take such an action would be an "unprecedented and inexplicable" departure from Commission precedent.<sup>55/</sup>

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Hughes. Both Hughes and DIRECTV are subsidiaries of General Motors.

<sup>49/</sup> See USSB I, 3 FCC Rcd at 6858.

<sup>50/</sup> See ACC App. for Review at 15.

<sup>51/</sup> Dominion, 8 FCC Rcd at 6687.

<sup>52/</sup> Id. at 6688.

<sup>53/</sup> Id.

<sup>54/</sup> The Bureau Order erroneously stated that certain language quoted from USSB I was used in *denying* an extension to another DBS permittee. See Bureau Order at ¶ 13 (quoting USSB I, 3 FCC Rcd at 6859). This misstatement does not detract from the logic of the order, which was based on the Commission's often-expressed desire for stricter enforcement of due diligence requirements, rather than the outcome of any particular case.

<sup>55/</sup> See ACC App. for Review at 1.

27. We disagree. Consistency with prior precedent is not determined by whether the same *outcome* has been reached. Rather, it is determined by whether the Commission's rules and orders have been applied faithfully. We have repeatedly expressed our commitment to enforcing the due diligence rules. The fact that others have demonstrated sufficient commitment to justify extensions does not require us to grant *every* such request. As we explain below, if warranted under the circumstances of this case, we do not consider it a departure from precedent to cancel a DBS construction permit based on the permittee's failure to demonstrate sufficient progress toward compliance with the second prong of the due diligence requirement. We now turn to the question of whether the facts of this case justify cancellation of ACC's permit.

## 2. *Application of the Due Diligence Standard*

28. As we stated in granting ACC its first extension, "[t]he Commission closely scrutinizes all requests for extensions of time within which to comply with its rules and policies."<sup>56/</sup> In ruling on a request for extension of time, the Commission must assess the totality of circumstances: "those efforts made and those not made, the difficulties encountered and those overcome, the rights of all parties, and the ultimate goal of service to the public."<sup>57/</sup> The Bureau concluded from its assessment of the totality of the circumstances that ACC had made little progress in construction, launch, and initiation of a DBS system in the past decade -- particularly during its four-year extension -- and therefore that an extension was not justified.<sup>58/</sup> Upon close scrutiny of ACC's extension request, we conclude that the Bureau was correct.

29. ACC contends that it has not been "warehousing" its DBS authorizations. ACC has focused its argument upon three areas: (1) the efforts made by ACC in developing its DBS system; (2) the agreement between ACC and TCI for construction and launch of a satellite licensed to ACC; and (3) ACC's negotiations for a joint venture with another DBS permittee, EchoStar. In addition, ACC asserts that the circumstances of this case are indistinguishable from those of two other cases in which the Commission either granted an extension or allowed a transfer of control.<sup>59/</sup>

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<sup>56/</sup> Advanced, 6 FCC Rcd at 2274.

<sup>57/</sup> USSB I, 3 FCC Rcd at 6861.

<sup>58/</sup> Bureau Order at ¶¶ 13-20.

<sup>59/</sup> Id. at 19-20 (citing United States Satellite Broadcasting Co., 7 FCC Rcd 7247 (Vid. Svc. Div. 1992) ("USSB II") and Directsat Corp., 10 FCC Rcd 88,(1995)). These cases are discussed *infra*, ¶¶ 46-63.

a. ACC's Efforts

30. ACC argues that the Commission should consider its efforts "to make DBS a reality," including: (1) the promotion of digital transmission technology; (2) the development of plans to provide educational programming; (3) advocacy of interactive service by DBS systems; and (4) participation in legislative, regulatory, and publicity efforts to promote the development of DBS.<sup>60/</sup>

31. For purposes of our due diligence analysis, we must recognize that *none* of the efforts cited by ACC involves the actual construction of a DBS satellite or arrangement for launch- and operation-related services. While promotional efforts may be laudable, those efforts are not an adequate substitute for the concrete progress toward the construction and operation of a DBS system that is required under our rules.

32. In the past, we have specifically deemed such generalized efforts toward promoting the DBS service insufficient to satisfy the first due diligence prong. For example, although we "recognize[d] the efforts CBS has made to date in developing DBS and HDTV technology," we held that CBS had not met its due diligence obligation for the simple reason that it did not have a signed contract for the construction of its satellite.<sup>61/</sup> Similarly here, without demonstrated concrete progress toward construction and operation of a DBS system, we cannot say that the initial assignment of scarce public resources to ACC continues to be justified.

33. Since 1991, when we cautioned ACC and all other permittees that extensions would be more difficult to obtain in the future,<sup>62/</sup> we have granted extensions on only two occasions. The record in those cases demonstrated that the permittees had made significant progress toward the realization of a DBS system, including substantial monetary investment, arranging for financing for completion and launch of the system, contracting with suppliers of DBS home receiving equipment, and contracting for satellite launch services.<sup>63/</sup> These are the kinds of indicia of progress that we look for in evaluating an extension application. Neither these nor any comparable indicia are present in this case.

34. ACC asserts that it was the first to advocate the implementation of digital transmission technology, which it began to incorporate into planning for its system as early as

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<sup>60/</sup> Id. at 6-8.

<sup>61/</sup> CBS, Inc., 98 F.C.C.2d at 1069.

<sup>62/</sup> See Advanced, 6 FCC Rcd at 2274.

<sup>63/</sup> See Dominion, 8 FCC Rcd at 6688; USSB II, 7 FCC Rcd at 7251.

1986.<sup>64/</sup> ACC seeks credit for persevering in its efforts to drag the industry to this higher standard, noting the resistance of other permittees such as DIRECTV that ultimately came to adopt the same technology.<sup>65/</sup> We do not disparage these efforts. It is more notable, however, that DIRECTV, which originally opposed this technology, had sufficient time since we approved ACC's use of digital technology in 1991 not only to change its design to incorporate digital transmission, but also to construct and launch a satellite based on that design.<sup>66/</sup> During the same three year period, ACC -- which by its own admission had a five-year head start -- failed to progress toward the realization of its DBS system.

35. ACC also argues that the Bureau erroneously ignored ACC's continued compliance with the first due diligence requirement.<sup>67/</sup> In order to satisfy the first prong of the due diligence requirement for its first 16 paired channels, ACC submitted a construction contract that provided for complete construction of its two satellites by December 1990 and June 1991, respectively.<sup>68/</sup> After our order in Continental, ACC filed a due diligence showing for its 11 additional paired channels in October 1989 that provided for completion of its first satellite by June 1993, which six months later was revised to January 1994.<sup>69/</sup> But in May 1993, ACC submitted an amended contract with an updated timetable showing that construction on its first satellite would not begin until October 1993 (almost three years after it was originally supposed to be finished), with progress payments stretching until approximately September 1995.<sup>70/</sup> In April 1994, ACC submitted yet another amended contract that set April 1995 (four and a half years after the original *completion* date) as the new date for *beginning* construction, with progress payments stretching until March 1998.<sup>71/</sup> ACC states that it paid some still undisclosed amount for the "Systems Design and Definition Phase," nonetheless it has not made any progress payments for actual construction. Meeting the first due diligence requirement does not justify failing to fulfill the second. Otherwise,

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<sup>64/</sup> ACC App. for Review at 6.

<sup>65/</sup> *Id.* at 6-7.

<sup>66/</sup> See Hughes' Application for Minor Modification of Construction Permit and Technical Showing Regarding Compliance with International Requirements, FCC File No. DBS-91-02MP/Minor (July 15, 1991); Hughes Communications Galaxy, Inc., 8 FCC Rcd 8116 (1993)(launch authorization).

<sup>67/</sup> ACC App. for Review at 12.

<sup>68/</sup> See Tempo I, 1 FCC Rcd at 21.

<sup>69/</sup> See ACC Semi-Annual Report (dated April 4, 1990); Advanced, 6 FCC Rcd at 2270-72.

<sup>70/</sup> See ACC Semi-Annual Report (dated May 10, 1993).

<sup>71/</sup> See ACC Semi-Annual Report (dated April 27, 1994).

permittees could extend indefinitely their nonperformance by repeated modifications of their proposals. As we previously advised ACC, "construction must begin at some point."<sup>72/</sup>

36. In granting ACC its first four-year extension, we recognized that practical impediments beyond ACC's control justified flexibility. However, as ACC acknowledges, it has had at least three years since the Commission definitively established the orbital locations and technical parameters of ACC's permit.<sup>73/</sup> ACC has cited no factors outside its control to explain its lack of significant progress toward construction and launch of its satellites over that period, which comprised almost all of the four-year extension we previously granted. Due to its extended inaction and apparent lack of commitment to operating its own system, ACC is not "much closer to the threshold of providing service than any non-permittee," and thus has no claim to any comparative advantage that could justify an extension.<sup>74/</sup>

37. The bottom line is that ACC has not achieved any concrete progress toward the actual construction and operation of its DBS system. While its other activities may be laudable, our precedent makes it clear that diligent progress toward actual operation which must be the touchstone for our analysis of whether to grant an extension.

*b. The ACC/TCI Capacity Purchase Agreement*

38. In their Applications for Review, petitioners assert that the Bureau ignored the Capacity Purchase Agreement ("CPA"), which they characterize as a binding contract for the launch, deployment, and operation of satellites by ACC. They further aver that the \$250 million spent by Tempo Satellite on the satellites TCI agreed to provide to ACC should be attributed to ACC, and that it is TCI that is contributing to ACC's DBS program -- not the other way around.<sup>75/</sup>

39. Under the CPA, ACC would not pay for the construction, the launch, or the operation of any DBS satellites. ACC would not own any satellites. Its sole contribution would be the FCC permit. Indeed, the CPA provided for the complete and immediate liquidation and dissolution of ACC upon the consummation of this "sale" of transponder

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<sup>72/</sup> Tempo I, 1 FCC Rcd at 20.

<sup>73/</sup> See ACC App. for Review at 9-10.

<sup>74/</sup> See USSBJ, 3 FCC Rcd at 6860. ACC's reliance on the CPA to support its "threshold" argument is specious; any other entity that had been assigned ACC's channels and orbital locations could enter into the same agreement and instantly be just as close to initiating service as is ACC. See discussion of the CPA in Section III.A.2.b, *infra*.

<sup>75/</sup> See ACC App. for Review at 19; Tempo DBS App. for Review at 7-10. The CPA was not submitted as part of original extension application, but rather as part of the assignment application filed seven weeks later -- just before the end of its four-year extension.

capacity.<sup>76/</sup> In these circumstances, the CPA cannot fairly be characterized by petitioners as an arrangement by ACC for the launch, deployment, and operation of its own satellite system.<sup>77/</sup>

40. TCI, by contrast, would be responsible for virtually every aspect of the transaction and subsequent operation of the DBS system. Pursuant to the CPA, TCI would pay all costs for the "design, construction, launch, deployment, operation, and insurance of the satellite," and would be its actual owner.<sup>78/</sup> TCI would also be responsible for arranging and paying for appropriate facilities for tracking, telemetry, and control ("TT&C") of the satellite, and for performance of the TT&C functions once in operation.<sup>79/</sup>

41. ACC's assertion that the CPA demonstrates significant progress toward *its* construction and operation of *its* DBS system is not persuasive. The staff correctly focused on the fact that ACC's sole contribution to this DBS system appears to be its authorization to use public resources. Bureau Order at 6 n.24. ACC will have no part in the ongoing operation of the DBS system that will use its 27 channels at the 110° orbital location. Not only has ACC contracted away all control over the use of those channels as part of the CPA,<sup>80/</sup> but it has also agreed to immediately dissolve as part of the transaction. Moreover, the two satellites for which ACC seeks due diligence credit are currently part of Tempo Satellite's due diligence progress toward construction and operation of *its* DBS system.<sup>81/</sup> This agreement cannot be characterized as a demonstration of ACC's due diligence.

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<sup>76/</sup> See CPA at § 2.3. Upon dissolution, ACC would transfer its permit to its sole shareholder, Daniel Garner. Id. at § 9.1.2.

<sup>77/</sup> Some opponents assert that the CPA transaction would result in an unauthorized *de facto* transfer of control from ACC to TCI. See DIRECTV Opp. at 11; EchoStar Opp. at 10. Our resolution of this case on due diligence grounds has rendered that contention moot, and therefore we do not reach it.

<sup>78/</sup> See CPA at §§ 3.1, 3.3. The CPA provides that TCI's services in constructing and operating the satellites are "subject to ACC's ultimate control as holder of the FCC Authorization." Id. This does not lessen the inference that TCI, and not ACC, was to be responsible for paying for and providing virtually all relevant aspects of DBS operations.

<sup>79/</sup> Id. at § 3.4. In addition to providing one or more satellites and all related services necessary to their operation, TCI also agreed to: (1) make a non-refundable payment to ACC's sole shareholder, Daniel Garner, in the amount of \$600,000; and (2) deliver to ACC certificates representing 2,000,000 shares of Class A common stock of TCI, with a current market value in excess of \$45,000,000. See CPA at Recital C and § 2.2. TCI also made an interest-free loan of \$2,000,000 to Garner, and has been paying him \$30,000 per month since October 1994 for his services as a consultant. See ACC Agreement and Plan of Reorganization at § 3.4; Consulting Agreement at § 2(a).

<sup>80/</sup> See CPA at § 2.1.

<sup>81/</sup> See Tempo Satellite's Semi-Annual Report at 1 (dated May 18, 1995).

42. ACC also faults the Bureau for considering the extension request apart from the modification application and the assignment application, since the Commission assertedly "eschewed such a piecemeal approach" in USSB II.<sup>82/</sup> ACC's argument ignores a critical part of our reasoning in USSB II. Although the Commission found that granting USSB's extension and modification requests would serve the public interest, in order to grant them we first had to determine that USSB was in compliance with its due diligence obligations.<sup>83/</sup> Here, in contrast, the Bureau conducted its compliance analysis first, and its conclusion obviated the need for any further inquiry into the merits of the modification and assignment applications. This approach conforms fully with the Commission's longstanding policies on assignment of authorizations.<sup>84/</sup> In any event, reliance upon the proposed assignment to justify an extension would be futile, since our rules in the DBS service specifically provide that "[t]ransfer of control of the construction permit shall not be considered to justify extension of these [due diligence] deadlines."<sup>85/</sup>

c. *Negotiations with EchoStar*

43. ACC also cites as grounds for an extension its efforts from early 1992 to late 1994 to form a joint venture with another DBS permittee, EchoStar -- efforts that ultimately proved unsuccessful.<sup>86/</sup> During those negotiations, ACC initially amended its construction contract to delay the start of construction on its first satellite until October 1993, and then delayed the start date until April 1995.<sup>87/</sup>

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<sup>82/</sup> See ACC App. for Review at 19 (citing USSB II, 7 FCC Rcd at 7249).

<sup>83/</sup> USSB II, 7 FCC Rcd at 7250.

<sup>84/</sup> See Jefferson Radio Co. v. FCC, 340 F.2d 781, 783 (1964)(proposed assignment will not be considered until the Commission has determined that the assignor has not forfeited its authorization).

<sup>85/</sup> See 47 C.F.R. § 100.19(b).

<sup>86/</sup> See ACC App. for Review at 10-11. In progress reports to the Commission, ACC said, in April 1992, that it was engaged in "serious negotiations" that it expected to complete in "the next month or two." In August 1992, ACC reported it had signed a letter of intent that called for execution of an agreement within sixty days. In October 1992, ACC explained that negotiations were continuing, and in April 1993, stated it expected to reach an agreement within the next month. In May 1993, it reported it was still in "complex negotiations," and in October 1993, it claimed that negotiations were continuing. However, on December 30, 1994, ACC indicated that negotiations had failed.

<sup>87/</sup> See ¶ 35, *supra*.

44. We note that for over three years prior to its extension request, ACC had enough channels in a prime orbital location to create a robust DBS system.<sup>88/</sup> ACC nonetheless made a business decision to put off construction of its own satellites for three years while it negotiated to form a joint venture. That decision was ACC's to make, but it must bear the consequences of its actions in failing to proceed toward the launch and operation of its system during an extended period.

45. As the Bureau noted, the Commission has previously found that on-going negotiations do not justify an extension of DBS due diligence milestones: "failure to attract investors, an uncertain business situation, or an unfavorable business climate in general have never been adequate excuses for failure [to] meet a construction timetable in other satellite services."<sup>89/</sup> Accordingly, failed negotiations, and the associated delays they may entail, cannot provide any greater justification. These negotiations do not constitute adequate justification for the requested extension.

### 3. *Commission Precedent*

46. Petitioners also contend that the denial of ACC's assignment application directly conflicts with Commission precedent approving mergers and buyouts of DBS permittees. Specifically, petitioners argue that our actions in approving the sale of transponders from DIRECTV to USSB,<sup>90/</sup> and the transfer of control of a DBS permit from Directsat Corporation to EchoStar,<sup>91/</sup> mandate extension of ACC's construction permit. Upon review of these cases, we believe that neither case mandates such a result.

#### a. USSB II

47. The Commission first granted USSB's DBS construction permit in 1982.<sup>92/</sup> In 1988, we granted a four-year extension of that permit.<sup>93/</sup> We thereafter determined that USSB had complied with the first prong of the due diligence rules, and in 1990 assigned

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<sup>88/</sup> DIRECTV operates with 27 channels. USSB, which has 5 channels, operates independently. Of all existing DBS permittees, only DIRECTV has as many channels as ACC.

<sup>89/</sup> USSB I, 3 FCC Rcd at 6859.

<sup>90/</sup> See USSB II, 7 FCC Rcd at 7250-51.

<sup>91/</sup> See Directsat Corp., 10 FCC Rcd 88 (1995).

<sup>92/</sup> See CBS, Inc., 92 F.C.C.2d at 64.

<sup>93/</sup> See USSB I, 3 FCC Rcd at 6859-61.

USSB channels at three orbital positions, including five channels at 101°. <sup>94/</sup> On April 30, 1991, we assigned the remaining 27 channels at that orbital position to DIRECTV. <sup>95/</sup> In July 1991 -- less than three months later -- USSB and DIRECTV proposed joint use of a satellite then being constructed for DIRECTV to implement their respective DBS systems. The Commission approved that proposal, including the requested extension and modification of USSB's permit. <sup>96/</sup>

48. Petitioners argue that the staff ignored parallels between ACC's requests and the Commission's approval of the USSB/DIRECTV transaction. <sup>97/</sup> They say that USSB, like ACC, requested a second extension of time and modification of its construction permit to facilitate a cooperative venture. They say that USSB, like ACC, relied on a satellite planned for use in another permittee's DBS system to initiate its own DBS system. We disagree.

49. First, USSB had made a significant investment in its own DBS system, while ACC had not. Prior to grant of USSB's requests in 1992, USSB had accomplished the following: (1) spent more than \$23 million for a portion of a satellite, which constituted approximately forty percent of the price of its five-channel payload on the satellite; (2) arranged to finance the remaining completion and launch costs of the satellite; and (3) executed contracts with various suppliers of DBS home receiving systems. <sup>98/</sup>

50. By contrast, ACC's efforts to establish its own DBS system since the grant of its first extension of time have been minimal at best. Payments on ACC's satellite construction contract with Martin Marietta at the time of its application amounted to less than one percent of the contract price. <sup>99/</sup> Although the Bureau's ruling relied upon ACC's apparent failure to make substantial payment toward construction and operation of a satellite system -- and contrasted it with USSB's \$23 million investment -- ACC has failed to specify how much

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<sup>94/</sup> United States Satellite Broadcasting Co., 5 FCC Rcd 7576, 7577 (1990). USSB also was assigned three channels at 110° and eight channels at 148°. *Id.*

<sup>95/</sup> See Advanced, 6 FCC Rcd at 2270.

<sup>96/</sup> USSB II, 7 FCC Rcd at 7251.

<sup>97/</sup> See ACC App. for Review at 15-16; Tempo DBS App. for Review at 15-16.

<sup>98/</sup> USSB II, 7 FCC Rcd at 7250.

<sup>99/</sup> ACC Semi-Annual Report (dated May 10, 1993). ACC's semi-annual report dated April 27, 1994, notes that eleven payments have been made; neither this nor any other filing subsequent to May 1993, however, states specific amounts or percentages of the contract price paid. Moreover, under both the CPA and the assignment agreement, TCI is obligated to reimburse any payment made by ACC on its construction contract after September 8, 1994. See CPA at § 13.16; Agreement and Plan of Reorganization at § 13.16.

money it actually invested in the construction of its satellites.<sup>100/</sup> Nor has ACC proffered any other contract for launch- or operations-related services under which ACC must make any further investment in its system. ACC's efforts (up to and including its agreements with TCI and Tempo DBS) consisted principally of negotiations for a merger or transfer of its construction permit -- rather than development of its own DBS system.

51. Second, with regard to reliance on another permittee, USSB entered a cooperative venture while ACC proposes to dissolve -- the two are not the same. USSB constructed and owns part of a satellite and operates its own system independently of DIRECTV, with "full operational control" over the transponders it purchased and "sole discretion" as to the content of the programming to be transmitted over its channels.<sup>101/</sup> USSB has constructed its own national broadcast center, initiated and entered into its own contracts with programmers, and bears financial responsibility for its proportionate share (5/32) of the costs incurred in the development of a transmit/receive encryption system.<sup>102/</sup> Moreover, USSB had paid \$1.3 million for development of the satellites to be used for USSB's channels at the two other orbital locations that it does not share with DIRECTV, and had made separate arrangements for launch of those satellites.<sup>103/</sup> By contrast, ACC would own no part of the satellites to be launched: its control over the channels is irrevocably contracted away under the CPA and sold outright under the assignment agreement. ACC would also abandon its rights under its own satellite construction contract with Martin Marietta.<sup>104/</sup> USSB's partial satellite ownership and independent operation are not comparable to ACC's arrangements either to "sell" transponder capacity to TCI or to assign its entire permit to Tempo DBS.

52. Finally, the timing of ACC's extension, assignment, and modification requests indicates that it did not intend to implement its DBS system alone or in cooperation with other permittees. ACC requested assignment of its permit just eleven weeks before it would have expired. Prior to that request, ACC had repeatedly revised its construction schedule to

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<sup>100/</sup> To the extent ACC has submitted its construction contract with its semi-annual reports, it has redacted the figures for progress payments. Despite a request for these figures during an *ex parte* meeting with ACC, the company has not provided the requested information.

<sup>101/</sup> USSB II, 7 FCC Rcd at 7249.

<sup>102/</sup> See USSB Comments at 4.

<sup>103/</sup> Id. at 7251.

<sup>104/</sup> After consummation of either the CPA and the transfer agreement, ACC would be obligated to maintain the construction contract in effect "for the benefit of TCI" if necessary to maintain the construction permit, and TCI would reimburse ACC for any payments made on that contract. See CPA at §§ 7.2, 13.16; Agreement and Plan of Reorganization at §§ 7.3, 13.16.

delay milestones and payments.<sup>105/</sup> USSB, on the other hand, made its arrangements to share a satellite with DIRECTV at least a year in advance of the scheduled expiration of its construction permit, and less than three months after DIRECTV received its channel assignments at the common orbital location. Moreover, USSB made payments to DIRECTV totalling forty percent of the contract price before the Commission approved an extension of time, and continued to pay for development of two additional satellites, investing in the ultimate success of its own DBS system rather than speculating on the possibility of being rescued at the eleventh hour by a suitor.

53. USSB's investment in an independent DBS operation using a portion of DIRECTV's satellite is not analogous to ACC's proposal either to sell transponder capacity on a satellite that it never contracted to build, or to transfer its permit outright and have no further involvement in the DBS service. As Tempo DBS said, "ACC does not propose to make any contribution to the Tempo program."<sup>106/</sup> We consider the lack of ongoing involvement a key distinction between these two cases.

b. Directsat

54. Directsat received its DBS construction permit in August 1989.<sup>107/</sup> We determined that Directsat had satisfied the first due diligence requirement in November 1993, and accordingly assigned it 10 channels at 119°.<sup>108/</sup> Five months later, Directsat sought to transfer control of its permit to the parent company of EchoStar, which held 11 channels at the same orbital position.<sup>109/</sup> We granted authorization for that transfer, specifically approving the for-profit nature of the transaction.

55. ACC and the other petitioners have argued that our resolution of the Directsat case mandates approval of ACC's extension application.<sup>110/</sup> We disagree.

56. First, unlike ACC, Directsat *did not request an extension* of its DBS construction permit. Second, as we noted in granting the transfer application, Directsat's investment in the development of its DBS system had been "substantial," and its progress toward actual

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<sup>105/</sup> See ¶ 35, *supra*.

<sup>106/</sup> See Tempo DBS App. for Review at 10.

<sup>107/</sup> Continental, 4 FCC Rcd at 6300.

<sup>108/</sup> Directsat Corp., 8 FCC Rcd 7962 (Vid. Svc. Div. 1993). Directsat was also assigned one channel at 110° W.L. and 11 channels at 175° W.L. *Id.*

<sup>109/</sup> Directsat, 10 FCC Rcd at 88.

<sup>110/</sup> ACC App. for Review at 21; Tempo DBS App. for Review at 17-19.

implementation had been "steady and consistent with the schedule established in its construction contract."<sup>111/</sup> By contrast, ACC has consistently delayed the schedule established in its construction contract.<sup>112/</sup>

57. ACC argues that it has done as much as Directsat did, thus it too has proceeded with "due diligence."<sup>113/</sup> This contention is not supported by the facts. First, the measure of what constitutes due diligence is different depending on where the permittee is in the term of its construction permit. Put another way, we expect an applicant to have accomplished more at the end of a permit's life than in the middle.<sup>114/</sup> Second, even without this distinction, Directsat accomplished more than ACC has to date.

58. We recognize that a DBS permittee could encounter significant difficulty in proceeding with the construction of its system prior to receiving its specific orbital/channel assignments. Such information enables satellite contractors to order parts that are available only on several months' notice, complete satellite designs, and begin construction based on a particular satellite configuration.<sup>115/</sup> Until a permittee receives its orbital/channel assignments, there is a practical limitation on the progress it can make toward construction of its satellites. Moreover, a permittee without specific assignments is in no position to negotiate with other permittees for joint or coordinated development of their systems. Thus, we draw a distinction between the progress we expect from permittees who have received orbital/channel assignments and those who are awaiting such assignments.

59. In this case, ACC received channel and orbital assignments, based on its 1990 due diligence showing, in April 1991, over three years prior to the expiration of its permit. Directsat submitted its due diligence showing five months after ACC, but received its channel and orbital assignments in November 1993 -- two and a half years after ACC and less than two years prior to the expiration of its construction permit. Despite ACC's early receipt of orbital/channel assignments, it failed to commence satellite construction or come to terms with any DBS permittee on joint development of a DBS system. ACC's merger negotiations with EchoStar continued for almost three years, from early 1992 through late 1994, during which time ACC repeatedly deferred its satellite construction milestones. Directsat, by

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<sup>111/</sup> Directsat, 10 FCC Rcd at 89 (emphasis added).

<sup>112/</sup> See ¶ 35, *supra*.

<sup>113/</sup> ACC App. for Review at 21.

<sup>114/</sup> As we previously advised ACC, "the grant of Advanced's extension request is not dependent upon a comparison between its showing and that of [another DBS permittee], but is instead dependent upon the merits of its showing." *Advanced*, 6 FCC Rcd at 2274.

<sup>115/</sup> See *Dominion Video Satellite, Inc.*, DA 95-1734 (August 4, 1995).

contrast, successfully negotiated a merger with the same permittee, EchoStar, within five months of the award of its channel assignments.

60. When the Commission found that Directsat had satisfied the first prong of the due diligence obligation, it had a contract for delivery and launch of its first satellite in November 1997 and its second satellite in May 1998.<sup>116/</sup> When the Commission granted the transfer of control to EchoStar, Directsat was still proceeding toward construction under the same contract with virtually the same timetable.<sup>117/</sup> At the time the Commission found that ACC had met the first due diligence requirement as clarified in our Continental order, ACC's contract provided for delivery of its first satellite in January 1994.<sup>118/</sup> By May 1993, the delivery date had slipped to June 1996. By April 1994, construction was not even to start until April 1995, with delivery scheduled for the spring of 1998. All other payments and activities had been deferred accordingly.<sup>119/</sup> Unlike Directsat, ACC was not proceeding on the contract that we had previously considered and used as a basis for assessing due diligence. ACC essentially abandoned construction of its DBS system during its negotiations with EchoStar. ACC could have struck a deal earlier. Alternatively or in tandem, it could have proceeded to build its system. It made a business decision to do neither until its permit was about to expire.

61. The for-profit sale of a construction permit for an unbuilt radio or television broadcast station is prohibited by the Commission's rules.<sup>120/</sup> In Directsat, we said that the reasons underlying this restriction -- maintaining the integrity of the application process and promoting the expeditious inauguration of new service -- serve important Commission objectives. But we held that a similar restraint need not be applied to DBS precisely because we had adopted due diligence and semi-annual reporting requirements to accomplish these same ends.<sup>121/</sup>

62. Directsat stands for the proposition that there is no *per se* rule against selling a DBS construction permit for profit. It does not suggest that a construction permit should be extended for a party that has not been proceeding with due diligence, simply because that would allow the party to sell the permit for profit. In fact, the contrary is true. Directsat

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<sup>116/</sup> Directsat Corp., 8 FCC Rcd at 7964 n.4.

<sup>117/</sup> See Directsat Semi-Annual Report (dated August 16, 1994)(schedule calls for delivery of first satellite on January 2, 1998, and second satellite on July 2, 1998).

<sup>118/</sup> Advanced, 6 FCC Rcd at 2272.

<sup>119/</sup> ACC Semi-Annual Reports (dated May 10, 1993 and April 27, 1994).

<sup>120/</sup> See 47 C.F.R. § 73.3597(c)(2).

<sup>121/</sup> Directsat, 10 FCC Rcd at 89.

allows for-profit sales of permits based on the assumption that our due diligence rules will suffice to prevent warehousing.<sup>122/</sup> For this assumption to make any sense, we must enforce our due diligence rules, not extend the permit of those who have not met their obligations.

63. Directsat negotiated and consummated a transaction with EchoStar in five months that had eluded ACC for almost three years. While negotiating, Directsat continued to progress toward construction and operation of its DBS system, whereas ACC did not. Even ignoring the fact that Directsat did not request an extension of its permit, the circumstances of its case differ so markedly from the circumstances of this case that it serves only to demonstrate that a different outcome is appropriate here.<sup>123/</sup> Our Directsat decision therefore lends no support to ACC's position.

B. Method for Future Assignments of DBS Resources

64. The DBS due diligence rules were designed to ensure that permittees would go forward expeditiously with the development of their systems. In this case, ACC's lack of due diligence has resulted in a warehousing of spectrum from which it now seeks to profit. Such a result would be contrary to the public interest in the prompt and efficient use of DBS spectrum to provide a competitive service to the public. Since ACC has failed to fulfill its due diligence obligations, its DBS construction permit will be cancelled and the associated orbital channel assignments will revert to the public for reassignment.

65. In our Continental order, we stated that,

in the event the permit of any of these applicants, or of any of the current permittees, is surrendered or cancelled, the remaining permittees from this group will have the first right to additional allocations, apportioned equally, up to the number requested in their applications.<sup>124/</sup>

At that time, we determined that such an assignment scheme would result in the most prompt disposition of the then-pending applications, and therefore would be preferable to any

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<sup>122/</sup> The Commission's policy against warehousing is "designed to prevent an entity from acquiring, or retaining, orbital spectrum on the basis of speculative demand at the expense of other potential users." GTE Corp. and Southern Pacific Co., 94 F.C.C.2d 235, 261 (1983).

<sup>123/</sup> Petitioners assert that if we apply the same due diligence standard to Directsat as was applied to ACC, we will be forced to deny the extension requested by Directsat, whose permit expired on August 15, 1995. See ACC App. for Review at 18 n.38; Tempo DBS App. for Review at 20. We will apply the same criteria to Directsat as we have applied to ACC in determining whether an extension is justified.

<sup>124/</sup> Continental, 4 FCC Rcd at 6299.

available comparative procedure. In almost six years since that decision, we have not had occasion to reassign any surrendered or cancelled channels.

66. EchoStar, Directsat, DBSC, and Continental ask that we reassign ACC's channels to the remaining DBS permittees, in accordance with the assignment policy announced in Continental.<sup>125/</sup> However, based on the record in this proceeding, the development of DBS service and technology since 1989, and our new auction authority granted by Congress, we believe this assignment method appears no longer to serve the public interest. For the reasons discussed below, we are currently of the view that the Continental assignment scheme should be abandoned, and that recaptured channels (and associated orbital locations) should be subject to a new window for applications for DBS authorizations. This window would be open to new entrants and current permittees alike, and mutually exclusive applications would be decided by auction. Accordingly, we intend to issue a Notice of Proposed Rule Making that reflects this approach by the end of this month, and to reach a final determination before the end of the year.

67. In this order, we have discussed three important policy goals for DBS service: (1) efficient use of a valuable public resource (DBS channels); (2) promotion of DBS as a competitor to cable; and (3) prompt delivery of DBS service to the public. It appears that the current DBS assignment policy involves inherent administrative delay and uncertainty, and hence does not facilitate the rapid use of DBS spectrum resources for delivery of service to the public. The failure of existing procedures to produce numerous DBS operators has also impeded progress toward our goal of having DBS compete directly with cable.<sup>126/</sup> Moreover, the current assignment scheme appears to hamper implementation of viable DBS systems and may not reflect the evolution of the DBS industry since its adoption, and therefore may no longer be consistent with these goals. Nor is it consistent with the public interest in "recover[ing] for the public of a portion of the value of the public spectrum resource made available for commercial use."<sup>127/</sup>

68. In 1989, when the number of orbital locations and channels sought exceeded the number available in the last DBS processing round, lotteries and comparative hearings were

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<sup>125/</sup> Letter from EchoStar to William F. Caton, dated May 12, 1995; Letter from Directsat to William F. Caton, dated May 13, 1995; Letter from Continental to William F. Caton, dated June 19, 1995; and Letter from DBSC to William F. Caton, dated July 7, 1995.

<sup>126/</sup> This goal is shared by Congress, which indicated in the Cable Act of 1992 its strong support for services (like DBS) that compete with cable. See 47 U.S.C. § 748.

<sup>127/</sup> See 47 U.S.C. § 309(j)(3)(C). We note that MCI has stated that it would submit an opening bid of \$175 million for the 27 reclaimed channels at the 110° orbital location. See Letter from Gerald H. Taylor, President and Chief Operating Officer of MCI, to Hon. Reed E. Hundt (dated Oct. 10, 1995).

the only options for assigning these resources.<sup>128/</sup> Each of the then-available options for resolving mutually-exclusive applications involved complex processing procedures and significant regulatory delay. We resolved the issue by granting each application only to the extent that it was possible to award an equal number of channel reservations to each applicant.<sup>129/</sup> This assignment scheme favored mergers over mutual exclusivity among DBS permittees by assigning fewer channels than were sought by each permittee for construction of an independent DBS system.

69. This method of accommodating all applicants appears to have created significant delay in making DBS orbital/channel assignments. Unlike fixed-satellite service operators, which receive construction authorizations and orbital location assignments at the same time, DBS permittees are assigned specific channels and orbital locations on a first come, first served basis only after demonstrating proper satellite construction contracting.<sup>130/</sup> The due diligence analysis on which these assignments are based is time-consuming and exacting. While some permittees proceed apace as assignments are made, other permittees may seek to negotiate mergers or cooperative ventures, and put construction of a DBS system on hold while waiting for a clearer picture of ultimate orbital/channel assignments to emerge. Even sincere efforts to forge a cooperative DBS venture can involve delay as parties negotiate agreements and seek the necessary Commission approval of a merger or sale.<sup>131/</sup> Moreover, requests for extension of time, modification requests, and transfers or assignments all require independent review by the Commission, in addition to the analysis of each permittee's due diligence demonstration.

70. It appears that such delays would only be perpetuated by reassignment of ACC's channels under the policy announced in Continental. In that case, six permittees (other than ACC) received a total of 30 paired and 8 full-CONUS channels fewer than they had

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<sup>128/</sup> Continental, 4 FCC Rcd at 6293.

<sup>129/</sup> We reserved eight paired channels (the total number requested) for USSB and eleven paired channels each for ACC, Continental, EchoStar, Directsat, DBSC, Tempo Satellite, and Hughes/DIRECTV. Id. at 6300-01 and 6304 n.43. These channel reservations were 5 paired channels fewer than had been requested by ACC, EchoStar, Directsat, Tempo Satellite, DBSC, and DIRECTV, respectively, and 5 paired and 8 full-CONUS channels fewer than had been requested by Continental. Id. at 6295-97.

<sup>130/</sup> See, e.g., Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, 3 FCC Rcd 6972 (1988); American Satellite Co., 3 FCC Rcd 6969 (1988); see also Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in 2310-2360 MHz Frequency Band, FCC No. 95-229, June 15, 1995 (proposed rules provide for simultaneous grant of applications and assignment of orbital locations).

<sup>131/</sup> We reemphasize here that, while some delays may result during negotiations on mergers or cooperative arrangements, the negotiating parties must still comply with our due diligence requirements, and failure to make appropriate progress towards completion of an operational system is not excused by such negotiations.

requested.<sup>132/</sup> Under Continental, each of those permittees would have the first right to a *pro rata* distribution of ACC's cancelled channels. As a result, six permittees would be assigned four paired channels each, further complicating the already fractured distribution of DBS channels.<sup>133/</sup> Since four channels may not provide sufficient capacity to operate a viable system,<sup>134/</sup> such piecemeal assignment of channels could render the potentially full-CONUS orbital location at 110° unusable by any single permittee. We could then anticipate further delays as the permittees negotiated to aggregate a sufficient number of channels (by merger or buyout) to justify the expense of launching a DBS service at that location. In the meantime, the public would suffer as these valuable DBS resources went unused.

71. In addition, we fear that assigning channels pursuant to Continental will indefinitely delay completion of the last DBS processing round. This is a real prospect because the requests for a total of 30 paired and 8 full-CONUS channels of the six permittees who received fewer channels than requested in Continental could not be satisfied by distributing ACC's 27 cancelled pairs of channels. Absent a change in policy, these requests could only be satisfied upon cancellation or surrender of another's permit. Thus, existing DBS processing procedures, in combination with the policy adopted in Continental, have not fostered the swift construction and operation of DBS systems.

72. It is our current opinion that opening a window for new applications for DBS permits to use reclaimed channels (and orbital positions), and then deciding among mutually exclusive applications by auction, will best serve the public interest. EchoStar argues that the Commission may not revisit the Continental decision without prior notice to the public and a complete record on the issue of channel/orbital assignments.<sup>135/</sup> Our decision to initiate a rulemaking proceeding on these issues (*see* ¶ 66, *supra*) obviates these concerns. Moreover, our commitment to expedite that rulemaking will ensure that the cancelled channels are reassigned, either by auction or some other method, in January 1996.

73. It does not appear that adoption of a new assignment method would present a significant barrier to successful implementation of DBS service by the parties affected. All of the permittees have received the orbital/channel assignments that we specifically reserved for them in Continental, and no permittee has received any additional assignments as a result of

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<sup>132/</sup> See footnote 129, *supra*.

<sup>133/</sup> For example, Directsat has been assigned a single channel at 110°, and USSB has three channels at the same location. See footnotes 94 and 108, *supra*.

<sup>134/</sup> Tempo Satellite has recently indicated that even the 11 channels it has at 119° "are not sufficient for a competitive system." See letter from Richard E. Wiley to Hon. Reed E. Hundt at 2 (dated August 15, 1995).

<sup>135/</sup> See EchoStar Opp. at 32-33; Letter from EchoStar to William F. Caton, dated June 16, 1995.

cancelled or surrendered permits.<sup>136/</sup> Although existing permittees' DBS plans may be sufficiently flexible to incorporate additional channels, several are already, or very soon will be, successfully operating their DBS systems without the further assignments. Moreover, we suggested in Continental that permittees enter cooperative ventures if existing assignments proved insufficient. Permittees that have done so have met with success: Directsat has joined with EchoStar and they are scheduled to begin operations within months; DIRECTV and USSB currently provide independent services from a shared satellite. Thus, plans of existing permittees and licensees for DBS service will not be unduly disrupted if they receive no additional channels assignments.

74. For the foregoing reasons, we will initiate a rulemaking proceeding this month to consider new rules for the DBS service. This proceeding will consider new processing procedures and auction rules to assign any available DBS orbital/channel resources. We may also propose rule changes in the wake of DIRECTV/USSB's successful deployment of full-CONUS DBS service. We approved such service only on a conditional basis in 1989 due to uncertainty about its technical feasibility. In light of its apparent success, certain aspects of our assignment policy need to be reconsidered. We intend to adopt rules to usher in a new era of DBS service to the public, in which DBS orbital/channel assignments are swiftly utilized and the public reaps the full benefit of DBS spectrum resources.

C. EchoStar's Request as to Prohibited *Ex Parte* Communications

75. On May 30, 1995, the Commission's Acting Secretary, on behalf of the Managing Director, notified the parties of several prohibited *ex parte* communications that had occurred in this proceeding.<sup>137/</sup> These communications were comprised of: (1) three oral presentations by a CATA representative made by telephone to two Commissioners' legal assistants on May 2, 3, and 4, 1995; and (2) three oral presentations made by representatives of CATA, C-SPAN, and Comcast, respectively, to two Commissioners and their legal assistants on May 8, 1995, while they were attending the National Cable Television Association Convention. In reporting these *ex parte* communications, the Commission employees indicated that they were unaware at the time that the proceedings were restricted and also stated their belief that none of the persons making the presentations (none of whom were parties to the underlying proceeding) were aware that the proceedings were restricted.

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<sup>136/</sup> Two permittees have not yet received assignments for their western orbital locations only, one because it had not yet demonstrated due diligence in contracting for its western satellite, and the other because it had not yet indicated which western orbital location it preferred. See EchoStar, 7 FCC Rcd at 1771; Dominion Video Satellite, Inc., DA 95-1734 (August 4, 1995).

<sup>137/</sup> See Letter from William F. Caton, Acting Secretary, to Robert W. Johnson *et al.*, dated May 30, 1995. This notification was made pursuant to and in compliance with Section 1.1212(e) of the Commission's Rules, 47 C.F.R. § 1.1212(e).

76. Further, on May 15, 1995, the Chairman of General Instrument Corporation ("GIC"), which is also a non-party, made a written *ex parte* submission to all of the Commissioners. One week later, GIC notified the managing Director that, unaware of the proceeding's restricted status, it had made the impermissible written communication.<sup>138/</sup> GIC then served copies of its submission on all parties.

77. EchoStar has requested an investigation to determine whether any additional *ex parte* communications occurred while the proceeding was still restricted and such communications were therefore prohibited under the Commission's rules.<sup>139/</sup> Although on May 26, 1995, the Commission issued a public notice changing the status of this proceeding from restricted to non-restricted,<sup>140/</sup> and EchoStar subsequently used the opportunity afforded by this reclassification to hold discussions with Commission personnel, EchoStar contends that this "cannot cure the potential harm caused by prior prohibited efforts to influence the process."<sup>141/</sup> It therefore requests that the Commission issue an order to show cause why the Commission should not draw inferences adverse to the positions advocated in the *ex parte* communications, as a sanction for violation of the Commission's rules.

78. We see no reason to conduct an investigation into whether additional prohibited *ex parte* communications may have occurred. We note that as soon as Commission personnel learned that the proceeding in question was a restricted matter, appropriate disclosure of the oral contacts was made. We further note that as soon as GIC realized that its written presentation was not permissible under the Commission's *ex parte* rules, GIC itself promptly notified the Managing Director of the communications and served copies of the prohibited presentation upon the parties to the proceeding. In view of these circumstances, we have no reason to believe, and EchoStar has not offered evidence to suggest, that any additional presentations not permitted under the rules have occurred. We therefore deny EchoStar's request for an investigation.

79. We also deny EchoStar's request that we issue an order to show cause why the Commission should not draw inferences adverse to the positions taken in the improper *ex*

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<sup>138/</sup> See Letter from Ronald K. Machtley to Andrew Fishel, Managing Director, dated May 22, 1995.

<sup>139/</sup> See footnote 29, *supra*.

<sup>140/</sup> See Public Notice No. 54107 (Int'l Bur. May 26, 1995)("Ex Parte Notice"). Our rules provide that "the Commission retains the discretion to issue public notices setting forth modified or more stringent *ex parte* procedures." 47 C.F.R. § 1.1200(a). In this instance, because the application proceedings raised "complex legal and policy issues" and concerned "rapid developments in the DBS service, the Bureau determined that modification of the *ex parte* rules would "assist the Commission in developing a more complete record on which a well-reasoned decision can be made." Ex Parte Notice at 1. Although EchoStar questions the wisdom of the Bureau's reclassification of this proceeding, we decline to undo the Bureau's reasonable exercise of its discretion.

<sup>141/</sup> Letter from Philip L. Malet to Andrew Fishel, Managing Director, dated June 13, 1995, at 3.

*parte* communications. EchoStar has identified two specific arguments that it asserts were made in those presentations: (1) that grant of ACC's applications is necessary to ensure competition to DIRECTV; and (2) that grant of ACC's applications will provide digital programming capability to rural cable systems.<sup>142/</sup> We note that the persons who made the prohibited communications were not parties at the time the presentations were made and that, even though they have subsequently attempted to become participants in this proceeding, they have failed to satisfy the requirements for party status.<sup>143/</sup> In any event, we are not persuaded that any harmful prejudice has occurred that would warrant the requested sanction. The substance of the prohibited presentations were fully disclosed soon after they were made, similar arguments were made on the record of the proceeding, and EchoStar has thus had a full opportunity to respond to the substance of these claims both orally and in written submissions. We therefore deny EchoStar's request for sanctions.

#### IV. ORDERING CLAUSES

80. Accordingly, IT IS ORDERED that the Applications for Review filed by Advanced Communications Corporation and Tempo DBS, Inc. are DENIED.

81. IT IS FURTHER ORDERED that the Applications for Review filed by Primestar Partners, L.P., Cable Telecommunications Association, and General Instruments Corporation are DISMISSED for lack of standing.

82. IT IS FURTHER ORDERED that the Motion for Expedited Action filed by Tempo DBS, Inc. is DISMISSED AS MOOT.

83. IT IS FURTHER ORDERED that the Request by EchoStar Satellite Corporation for an investigation into and imposition of sanctions for prohibited *ex parte* communications in this proceeding is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton  
Acting Secretary

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<sup>142/</sup> See EchoStar Opp. at 42-43.

<sup>143/</sup> See ¶ 16, *supra*.

**Dissenting Statement of  
Commissioner James H. Quello**

**In the Matter of Advanced Communications Corp.**

In its decision today, the majority has changed the DBS due diligence rules in the middle of the game, unlawfully and unfairly disadvantaging an innocent participant. By a slim majority indicative of the difficult factual, legal and policy issues before us, the Commission has affirmed the International Bureau's finding that Advanced Communications Corp. failed to meet its due diligence obligation in the construction and launch of its DBS system. The result: Advanced's construction permit has been cancelled, its application to assign its DBS construction permit to Tempo has been dismissed as moot, and the channels and orbital locations previously assigned to ACC will likely be auctioned to the highest bidder. The practical public interest result of the majority decision: the future of a small cable operator "headend in the sky" has been jeopardized; the date for the arrival of first-ever DBS service to Alaska and Hawaii is unclear; and additional multichannel video programming competition from another DBS provider will be delayed.

Because this decision demonstrates a lack of understanding of the history of the DBS service, and because it fundamentally misapplies Commission precedent, I respectfully dissent.

**The History of the DBS Service**

I find it interesting that the two dissenters in this case are the two senior Commissioners at this Agency. In my view, this is no coincidence. My colleague and I have experienced firsthand the growing pains of a fifteen-year-old satellite service that many experts and pundits long ago wrote off as a technology that would never make it from the drawing board into the home. This skepticism was not without some foundation, given the substantial developments in DBS satellite technology, changes in Commission policy regarding channel and orbital assignments, and the Challenger and Ariane launch vehicle failures of the late 1980's, all of which necessitated changes in business plans, expenditure of additional funds, and delay. Moreover, my colleague and I have served on this Commission when it bravely refused, despite the dire predictions of these "experts," to abandon an industry that promised to offer subscribers an alternative to cable service.

It is this firsthand experience, together with the fact that the DBS industry is only beginning to become a viable and competitive service, that highlights to me the absurdity of the majority's decision to execute one of the survivors of this brush with marketplace death. As a veteran, this strikes me as somewhat akin to rewarding a survivor of the Charge of the Light Brigade by putting him in front of a firing squad.

Lest we inhibit the viability of a service that still needs relief from undue regulatory constraints that could inhibit its growth -- and by growth I mean the growth of a service that

includes numerous DBS providers that can compete with each other as well as with other multichannel video programming providers -- this Commission should have continued to apply its due diligence requirements in an even-handed and forward-thinking manner. Sadly, this goal will not be achieved. The decision by the majority in this case assumes that, because two DBS providers (including one owned by the largest corporation in America in 1994) launched service from a shared satellite in October of 1994, this service has "arrived." This rationale leads the majority to conclude that extensions of time can be denied, willy nilly, and that recovered spectrum should be auctioned off to anyone with a pocket deep enough to jump onto the DBS bandwagon late in the parade. This result is patently unfair to Advanced and the other DBS licensees and permittees who invested time and money 15 years ago when the possibilities that this service would become viable were minimal, at best. Moreover, this result, despite the ambitious timetable set by the majority, will result in further delays in the initiation of service by new DBS providers.

### **The Commission's Due Diligence Requirement**

In ruling on a request for extension of a DBS construction permit, the Commission considers "[t]he totality of the circumstances -- those efforts made and those not made, the difficulties encountered and those overcome, the rights of all parties, and the ultimate goal of service to the public." USSB I, 3 FCC Rcd 6858, 6859 (1988). In short, the Commission must weigh the delay in scheduled implementation of service against the claimed public interest benefits. USSB II, 7 FCC Rcd 7247, 7249 (Vid. Svc. Div. 1992).

The majority in this case finds that Advanced does not merit an extension because it made little progress toward construction, launch, and initiation of a DBS system, despite passage of "more than a decade, including one four-year extension of time." Majority Op. at para. 2. However, I believe that the efforts of Advanced were fully consistent with Commission precedent, and that the delay in service that will inevitably result from denial of Advanced's extension request will far exceed the minimal delay that would have resulted had Advanced's extension request and application for assignment of its construction permit to Tempo been granted. Had the Advanced/Tempo deal been allowed to proceed, a DBS satellite would likely have been launched in April 1996. One has only to look at the history of decisionmaking at this Agency to realize that it will only be through extreme luck bordering on divine intervention that the unrealistic timetable set forth in the majority decision is likely to be achieved. That decision anticipates that a major change in the policy for the reassignment of recovered channels, adoption of auction rules, and the completion of an auction, can all be finalized within the next three months.

Turning to the due diligence showing of Advanced, it is important to note that the only period relevant to the Commission's decision in this case is the four-year period following the grant of Advanced's first extension request, not the entire ten-year period since Advanced was granted a construction permit. The Commission previously ruled on Advanced's efforts during the initial six-year period following grant of a construction permit and that decision is not before us here. During this six-year period Advanced, like other

DBS providers, failed to commence operation of its system because the Commission's initial six-year construction milestone proved to be unrealistic. As the majority opinion recognizes, provision of DBS service was not feasible for the first six years that Advanced held its permit for the reasons I delineated above: substantial developments in DBS satellite technology, changes in Commission policy regarding channel and orbital assignments, and the Challenger and Ariane launch vehicle failures.

As to Advanced's efforts during the four years since its first extension was granted, it is relevant to note that Advanced did not receive its full complement of frequencies and orbital positions until April of 1991, in a decision that did not become final until November of 1991. The Commission has stated in two recent decisions that it is unrealistic to expect permittees to begin construction until the Commission has awarded them specific orbital slots and channels. See Continental Satellite Corp., 4 FCC Rcd 6292 (1989), partial recon. denied, 5 FCC Rcd 7421 (1990); Dominion Video Satellite, Inc., 8 FCC Rcd 6680 (1993), recon. denied, FCC No. 95-421 (Oct. 5, 1995). Therefore, for the first year of its four-year extension period, Advanced cannot have been expected to have demonstrated progress toward construction.

So we come down to the issue of what Advanced did, or did not do, between 1992 and 1995. In examining Advanced's efforts during this period, one must look to Commission precedent in which other DBS permittees have been granted extensions with showings similar to Advanced's. None of these extension requests were denied. While it cannot be argued that there are no distinctions between the due diligence showings of Advanced and the DBS applicants whose extension requests were granted, painted on a precedential backdrop in which the Commission stated that its regulatory priority was fostering the development of a fledgling service, they constitute distinctions without a difference.

In a decision adopted in January of this year, the Commission approved Directsat's for-profit sale of its construction permit for an unbuilt DBS system to EchoStar. Directsat Corp., 10 FCC Rcd 88 (1995). The Commission reasoned that for-profit sales of permits can be allowed in the DBS service because of the presence of our due diligence rules, which suffice to prevent warehousing of spectrum. Id. at 89. The Commission thus noted in Directsat Corp. that a significant amount of money had been invested in satellite construction and that construction milestones had been met. At the time the Commission approved the transfer, however, Directsat had expended 0.13% of the contract price for the construction of satellites and the construction phase of its satellites had not even begun. See Directsat Semi-Annual Progress Report, Exhibit E to Contract Modification No. 7, filed August 16, 1994.

Unfortunately, the majority in this case refused to attribute Tempo's investment and construction progress to Advanced, even though the Commission earlier this year had attributed Echostar's investment and construction progress to Directsat. Moreover, despite waxing eloquent for several pages, the majority fails to adequately explain why Advanced's showing is decisionally less significant than Directsat's in light of Directsat's August 1994

**Progress Report.** Specifically, the majority fails to note that, at the time their assignment applications were filed, Directsat had expended a mere 0.13% of the contract price and that this constituted due diligence; whereas Advanced's payments on its satellite contract were deficient because they amounted to less than one percent of the contract price. The majority also fails to note that the actual dollar amount expended by Advanced was later specified in a letter filed in the record dated September 19, 1995, as \$7-8 million. The actual dollar amount expended by Directsat prior to its merger with EchoStar, while not set forth in the majority opinion or in Directsat's 1994 Progress Report, is likely significantly less than the amount expended by Advanced.<sup>1</sup>

The majority attempts instead to distinguish the Advanced case from Directsat Corp. by claiming that Directsat requested only a transfer of its construction permit, not an extension of time to construct. Directsat's DBS authorization, however, expired on August 15, 1995, and EchoStar has applied for an extension. That EchoStar would require an extension was apparent at the time Directsat filed its transfer application. Moreover, the Commission in Directsat Corp. felt compelled to comment on Directsat's progress toward construction of its DBS system, a comment that presumably would have been unnecessary had the Commission felt that Directsat's due diligence was irrelevant. The key difference, then, between Directsat and Advanced appears to be the order in which the extension and transfer applications were submitted. This distinction without a difference should not be the key factor in determining the fate of a DBS permittee, and the majority offers no reason why it should be of decisional significance.

In 1991, the Commission granted a second extension of a permittee's construction permit in light of its contract to use satellites provided by a competitor. USSB II, 7 FCC Rcd at 7251. The Commission based its extension on the fact that the permittee, USSB, had complied with due diligence requirements by contracting to use transponders on a satellite designed, built and launched by DIRECTV. In fact, this Commission has maintained that DBS service will be expedited if DBS permittees "are free to seek Commission approval to combine assignments and resources through merger or buyout." Continental Satellite Corp., 4 FCC Rcd. at 6299 (1989). Like USSB and Directsat, Advanced heeded the Commission's admonition to proceed diligently by entering into a binding, non-contingent contract with Tempo DBS for delivery of satellites, but the Commission refused to credit Advanced with

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<sup>1</sup>The majority makes much of Advanced's "fail[ure] to specify how much money it actually invested in the construction of its satellites." Majority Op. at para 50. Apparently, the majority is unaware of the September 19, 1995, letter filed by Advanced as part of the record in this proceeding in which it revealed that \$7-8 million was paid toward construction of its satellites. Moreover, it is interesting to note that Commission rules do not require a permittee to reveal the actual amount it has invested in its satellite system; rather the rules require that the permittee reveal what percentage of the satellite cost it has invested. Advanced, like Directsat, fully complied with this requirement in filing its progress report with the Commission.

the construction progress made on the Tempo satellites. Significantly, Tempo DBS's contract to finance Advanced's satellite launch was not contingent on the transfer of channels.

The majority, in distinguishing USSB II and the case involving Advanced, points out that it considers "the lack of ongoing involvement a key distinction between these two cases." Majority Op. at para. 53. While in USSB II the ongoing involvement of USSB is clear, such "ongoing involvement" is less clear in Directsat Corp., where Directsat transferred control of its DBS authorization to the parent company of Echostar. Is "Directsat" still involved in the DBS business, or is it involved in name only? In my experience, when one company is bought out by another company, the company purchased is either eliminated entirely, or continues in name only under the complete control of the buyer. Again, the majority is, in my view, relying on a distinction without a difference in deciding to deny Advanced's extension request for this reason.

In conclusion, the majority has decided this case without taking full account of the history of this fledgling satellite service. Moreover, the majority has set up a series of tenuous and tortured distinctions without any difference in claiming that Advanced's situation is markedly different from that of other permittees in cases with remarkably similar facts. As a result, the majority gives companies that chose to sit out the hard developmental days of DBS a windfall chance to participate in a gold rush, and leaves one of the pioneers of the DBS service with only a panful of mica. This result squares with neither the law nor with equity, and therefore I dissent.

DISSENTING STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

In Re: Advanced Communications Corporation Application for Extension of Time To Construct, Launch, and Operate a Direct Broadcast Satellite System; Application for Consent To Assign Direct Broadcast Satellite Construction Permit from Advanced Communications Corporation to Tempo DBS, Inc.; Application for Modification of Direct Broadcast Satellite Service Construction Permit (File Nos. DBS-94-11EXT, DBS-94-15ACP, DBS-94-16MP).

Pursuant to today's action, the Commission affirms the International Bureau's ("Bureau") determination that Advanced Communications Corporation ("ACC") failed to meet its due diligence obligation of proceeding expeditiously with the construction and launch of its direct broadcast satellite ("DBS") system.<sup>1</sup> As a result, the channels and orbital locations previously assigned to ACC will revert to the public for reassignment. Further, the Commission has chosen to initiate a rule making to establish a new methodology by deciding upon mutually exclusive applications for the reassignment of DBS channels and orbital positions. As a result of my disagreement with the Commission's due diligence findings in this case, I feel compelled to dissent from today's decision.

In the past when reviewing due diligence efforts by DBS permittees, the Commission has heretofore granted extensions to several permittees in an effort to encourage the delivery of DBS service to the public. To that end, over the years, the Commission has exercised greater flexibility when reviewing the due diligence criteria for various DBS permittees, even though these somewhat relaxed expectations may have proven unacceptable for other video programming providers in the marketplace. It would therefore, in my opinion, seem entirely unreasonable, and indeed, irresponsible, for the Commission to disregard its primary objective--to encourage competition amongst DBS providers in order to enhance consumer choice--by forestalling yet another viable and prepared DBS competitor from entering the marketplace in the immediate future.

The Commission's due diligence requirements have two components. First, the Commission requires that a DBS permittee

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<sup>1</sup> Advanced Communications Corp., 77 Rad. Reg. 2d (P&F) 1160 (DA 95-944, April 27, 1995).

begin construction or complete contracting for construction of the satellite station within one year of the grant of its construction permit. Secondly, the permittee must begin operation of the satellite station within six (6) years of the grant of its permit, unless otherwise determined by the Commission.<sup>2</sup>

In denying ACC's request for an extension, the Bureau concluded that, from its assessment of the totality of the circumstances, ACC had made little progress in the construction, launch and initiation of a DBS system in the past decade. The record indicates that in 1984, the Commission granted ACC's application for authority to construct and launch a DBS system, subject to its fulfillment of the Commission's due diligence requirements. In October 1986, the Commission found that ACC had complied with the first due diligence component by contracting for the construction of its first two DBS satellites. As a result, the Commission granted ACC's request for sixteen (16) channels at each of two orbital locations. In addition, ACC requested additional channels at these locations as part of its modification application. The Commission reserved, but did not assign, eleven (11) additional pairs of channels for ACC conditioned upon ACC's satisfaction of the first prong of due diligence. In February 1990, Advanced applied for a four year extension of time to construct and operate its DBS system. The Commission granted this request in April 1991 (extending the deadline to December 7, 1994), and assigned ACC nineteen (19) additional channels. Importantly, as the record indicates, ACC did not receive its final channel assignments until April 1991. Therefore, I believe it is imperative that we focus our review on ACC's actions subsequent to that date.

Despite ACC's efforts in developing its DBS system, to wit: ACC's failed negotiations for a joint venture with another DBS permittee, Echostar Satellite Corporation ("Echostar") as well as its contractual agreement with Tempo DBS, Inc. ("Tempo")<sup>3</sup> for the construction and launch of a satellite, the Bureau concluded that these actions did not amount to the actual construction of a DBS satellite or arrangement for the launch and operation of DBS service. I am puzzled as to why the Bureau determined to apply a different set of criteria for ascertaining due diligence than were used for other permittees with respect to the launch of service in reaching its finding that ACC had not met the due diligence requirements.

I do not believe that ACC's efforts are patently

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<sup>2</sup> See 47 C.F.R. § 100.19(b).

<sup>3</sup> Tempo DBS is an affiliate of Tele-Communications, Inc. ("TCI").

distinguishable from the efforts made by those permittees in cases in which the Commission either granted an extension request or a transfer of control application. For example, in July 1991, United States Satellite Broadcasting, Inc. ("USSB") filed an extension request and a minor modification of its construction permit concerning its authorization to operate a DBS satellite on five (5) channels at a specific orbital location. In its minor modification application, USSB stated that it had entered into an agreement with another entity, Hughes Communications Galaxy, Inc., ("Hughes"), to purchase a payload of five (5) transponders. Significantly, these transponders were not on one of USSB's constructed and launched satellites, but on one of Hughes' satellites, to be located at the same orbital location as USSB's channels. As a result, USSB sought authority to implement its five (5) channel service by utilizing five (5) transponders on one of Hughes' satellites rather than constructing and launching a separate five-channel GE Astro-Space satellite as previously proposed and approved.<sup>4</sup> In addition, USSB sought to modify the technical specifications of its authorization to conform to the specifications of the Hughes satellite. It should be noted that USSB's DBS system was required to be in operation by December 1992, while Hughes' system was not required to be in operation until December 1994. As a result, USSB requested that its completion date be reconciled with that of Hughes. In that case, the Commission applied an analysis that led to the conclusion that the ultimate goal of service to the public would be advanced by a grant of USSB's request for extension of time.<sup>5</sup>

In this Order, the Commission also concludes that ACC's due diligence efforts were different from those of Directsat Corporation ("Directsat").<sup>6</sup> I am not persuaded by the Commission's findings. Directsat received its DBS construction permit in August 1989. The Commission determined that Directsat had satisfied the first due diligence requirement in November 1993 and accordingly assigned it ten (10) channels. Only five months later, Directsat sought approval for transfer of control of its permit to Echostar's parent company. Interestingly, Echostar held eleven (11) channels at the same location as those held by Directsat. The Commission granted that authorization in

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<sup>4</sup> See In re Applications of United States Broadcasting Company, Inc., 7 FCC Rcd 7247, 7249 (1992).

<sup>5</sup> Id. at 7250.

<sup>6</sup> See In re Application of Directsat Corporation and Echostar Communications Corporation, 10 FCC Rcd 88 (1994).

November 1994.<sup>7</sup>

It appears that the Commission credits Directsat for negotiating and consummating a transaction with Echostar in a much more expeditious fashion than ACC. While I acknowledge that an uncertain business situation, or an unfavorable business climate in general have not been adequate explanations for failure to meet a construction timetable,<sup>8</sup> I do believe that, under these circumstances, the Commission must remain cognizant about the practicalities of the marketplace. A period of lengthy negotiations does not necessarily denote a clear intention to delay. Indeed, negotiations between Echostar and ACC failed within one (1) year of the grant of ACC's April 1991 extension. Clearly, the negotiations between ACC and Echostar involved a substantial transaction that finally resulted in protracted litigation. As evidenced by the record, both parties proceeded to conduct negotiations with other parties. Unfortunately for ACC, such events transpired near the expiration of its construction permit. On the other hand, we note that Directsat immediately consummated a deal with Echostar. What the Commission fails to acknowledge is that Directsat and Echostar had the same orbital location and thus derived the benefit of economic efficiencies. On the other hand, the Commission also fails to note that negotiations between Tempo and ACC advanced to the point where Tempo began to commence construction of its satellites to accommodate the 110° orbital location.<sup>9</sup>

Although the Commission in the instant Order seeks to elaborate on various differences between ACC's and USSB's and Directsat's actions, I am not wholly persuaded that the distinctions are as obvious as espoused. In my view, a review and analysis of the Gordian knot of issues in this case will reveal certain distinctions. For instance, one may argue that the public would have also benefited from the sale of ACC's permit to Tempo by increasing the choice of DBS providers. Therefore, I do not believe that ACC's efforts are substantially incongruent with those of USSB and Directsat so as to warrant a finding of no due diligence and the revocation of ACC's permit.

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<sup>7</sup> It should also be noted that Directsat was permitted to profit from its sale of the permit. Because of my unwillingness to support our finding of no due diligence here, I am persuaded that ACC should have been afforded the same opportunity.

<sup>8</sup> See In re Applications of United States Broadcasting Company, Inc., 3 FCC Rcd 6858, 6859 (1988).

<sup>9</sup> I make this observation only for purposes of demonstrating an intention by the parties to proceed with a DBS system without undue delay.

By comparison with the other pertinent instances, I am not convinced that ACC did not satisfy the due diligence requirements. Unfortunately, I believe that Commission precedent in this area is murky enough so as to elicit persuasive arguments in this case for both sides. Based on the public policy concerns, however, it is clear that the Commission, in the past, gave DBS permittees greater flexibility, based on the fact that DBS service was a relatively fledgling industry in which there were very few players and in the interest of making DBS service available to the public. As a result, until such time as the Commission had established and clearly stated a definitive and inflexible approach to the due diligence standard, I believe the Commission should have used a similar basis for determining ACC's due diligence compliance. As a consequence, I would have approved an assignment of ACC's permit to Tempo.

#### REASSIGNMENT OF CHANNELS

The Commission has announced that it intends to initiate an expedited rulemaking proceeding to establish a new methodology for reassigning DBS channels and orbital positions. Based on the assumption that auctions will be used to reassign the reverted channels, the Commission has proposed to hold the DBS auction within the next three (3) months. Based on the Commission's past experiences with auctions and the complexities involved in developing acceptable service and auction rules, I firmly believe that such a timetable is wholly unrealistic. Moreover, I am convinced that today's decision as well as any rules promulgated for auctions in this service will be subject to judicial challenge that will considerably delay additional DBS service to the public.

The Commission has, on prior occasions, indicated that one of its primary goals in the DBS area is to promote the prompt initiation of DBS service. Although I am loathe to prejudge a rulemaking for reassignment of the reverted channels, I am skeptical about the Commission's timetable for establishing a new methodology for the reassignment of DBS channels that will not further delay service to the public. Therefore, I will review the comments for the rulemaking which will be initiated in the immediate term with great interest.

Separate Statement  
of  
Commissioner Susan Ness

Re: *Advanced Communications Corporation*

By our actions today, the Commission upholds the requirement of due diligence in satellite construction by cancelling the Direct Broadcast Satellite (DBS) permit of Advanced Communications Corporation (Advanced) and expresses its preliminary view that auctions should be used to reassign DBS channels and orbital positions -- a solution that is simple and, above all, fairest to all parties.

Failure to Meet Due Diligence

Today's ruling affirms the determination by the International Bureau of lack of due diligence by Advanced. This result is compelled by the evidence before us. In 1991 the Commission granted Advanced's first request for a four-year extension of time to construct a DBS system, but warned that future extension requests for DBS permits would require a showing of concrete progress. I have combed the record, seeking supporting documentation for the proposition that Advanced heeded the Commission's clear warning in 1991. Regrettably, I have found no credible evidence. Advanced never even began construction of a satellite -- much less commenced DBS operations -- during the four additional years for which the Commission had extended Advanced's initial six-year permit.

In its 1991 order, the Commission stated that "continued reliance on experimentation, technological developments and changed plans will not necessarily justify an extension of a DBS authorization." This admonition applied to all construction permits for which an extension might be sought after 1991. The message should have been especially clear to any party contemplating a request for a second extension. Nonetheless, Advanced relies upon technological developments and changed plans to justify its extension request. An applicant cannot claim it has met every milestone and deadline in a contract for satellite construction, when every meaningful milestone and deadline repeatedly is pushed into the future by contract amendment.

The facts recounted in the Memorandum Opinion and Order establish conclusively, in my mind, the lack of due diligence on the part of Advanced.

Disposition of Returned DBS Orbital Assignments and Channels

Once the factual issue of due diligence is resolved, the more difficult issue becomes the disposition of Advanced's DBS channels and orbital locations. This requires the Commission to weigh a complex array of competing considerations.

Some argued that, notwithstanding a finding of lack of due diligence, the Commission should allow Advanced to transfer its construction permit to a party of its own selection. Others argued that the channels should be publicly auctioned by the Commission to allow all interested parties the opportunity to participate. I have weighed these alternatives carefully but have not been persuaded that the public interest would be served by allowing Advanced to transfer its construction permit to Tempo DBS, Inc. (Tempo).

In particular, I have evaluated claims that allowing the transfer to Tempo will expedite the availability of an alternative supplier of DBS service, that cancelling the construction permit will disrupt business plans of a number of parties, and that recapture and auction of the channels would cause an entrepreneur who showed great vision and contributed significantly to the development of DBS to be left empty-handed. These arguments certainly have some merit. But ultimately I find that they are outweighed by the need for credible enforcement of our rules and even-handed treatment of potential DBS suppliers.

I have determined that the lack of due diligence requires us to cancel Advanced's permit. I do not believe that a licensee who has clearly failed to comply with Commission rules should be given the right to choose the party to receive its permit, particularly where the demand for the commercially valuable spectrum at issue — twenty-seven full CONUS DBS channels — far exceeds the supply. Tempo's progress toward construction of a satellite for its assigned DBS channels at a different orbital location is not a substitute for Advanced's failures. I believe that the better approach is to make prompt preparations to offer the opportunity to construct and operate a DBS satellite from Advanced's orbital locations to all interested parties.

### Conclusion

Although I do not subscribe to the notion that auctions are the best solution in every circumstance, in this instance an auction may be the quickest and fairest means of distributing the channels to those who value them the most. Advanced and Tempo will be free, of course, to bid at an auction. It is my intention to move expeditiously to establish a new method for reassigning DBS channels so that all prospective bidders will have an opportunity to compete. In my judgment, no other approach comports as well with our mandate to serve the public interest.

SEPARATE STATEMENT OF  
COMMISSIONER RACHELLE B. CHONG

*Re: Advanced Communications Corporation, File Nos. DBS-94-11EXT, et al.*

I write separately in this matter to set forth my reasons for our decision. This was a perplexing case that required particularly painstaking analysis. There were many legal and factual issues to resolve, and many legitimate interests to balance. I firmly believe that the result that the majority has reached is correct as a matter of law, is fair to all interested parties, and will encourage the swift delivery of additional Direct Broadcast Satellite (DBS) service to consumers. For these reasons, I support the decision.

#### Due Diligence

I fully support the portion of this decision that concludes that Advanced Communications Corporation ("Advanced") did not meet our due diligence requirements. Section 1 of the Communications Act of 1934 charges the Commission with the job of ensuring United States citizens a "rapid, efficient, Nation-wide, and world-wide wire and radio communication service."<sup>1</sup> The warehousing of spectrum by our licensees does not serve to encourage an efficient use of the scarce and valuable public airwaves. The Commission has repeatedly expressed our commitment to discourage spectrum warehousing by methods including enforcement of our due diligence rules.

The Commission's rules at the inception of DBS service were designed to foster this fledgling service. Despite some flexibility given to DBS permittees in the early years, however, the Commission did impose a two-part due diligence requirement to which exceptions would be allowed only in the "most extraordinary circumstances."<sup>2</sup> In seven cases, the Commission has enforced its due diligence requirements as to the first prong of the due diligence rule. The instant case implicates the second prong of our due diligence requirement which goes to construction and launch of the DBS system.

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<sup>1</sup> 47 U.S.C. § 151 (emphasis added).

<sup>2</sup> Processing Procedures Regarding the Direct Broadcast Satellite Service, 95 FCC 2d 250, 254 (1983) ("[W]e presently believe that only a showing of the most extraordinary circumstances would warrant consideration of any request by a . . . permittee for an extension of the due diligence requirement beyond July 17, 1984.").

The decision sets out in detail all the public statements in which the Commission made clear to all DBS licensees that sufficient progress towards the construction, launch and initiation of a DBS system was required to meet our due diligence rules. In my view, Advanced knew, or should have known, from the Commission's rules and these statements that a DBS permittee was required to make reasonable progress toward construction and launch of its DBS system in order to maintain its authorization.

Upon careful review of the record in this case, it is apparent to me that, while Advanced did make some effort to promote the DBS concept and participate in legislative, regulatory and publicity efforts to promote DBS development, it was not making adequate efforts to actually construct, launch and initiate its DBS system. It is the latter and not the former that our rules require. Thus, it is my belief that the due diligence finding in the decision was correct under both our rules and caselaw.

## Remedy

Having concluded that Advanced did not meet its due diligence obligation, the next issue became how best to proceed. In my view, when a DBS permittee fails to meet its due diligence requirements, the appropriate remedy is for the government to recover the channels and orbital slots assigned to that permittee and make them available to others who are committed to using them to serve the public interest. To do otherwise would allow permittees to improperly warehouse spectrum. Again, given the increasing demand for spectrum, a conscientious Commission simply should not allow spectrum to lie fallow.

We recognize in this order that our method of reassigning these channels should take account of the *current* state of the DBS industry and our regulatory authority. With this in mind, I find the reassignment method set forth in our 1989 Continental decision<sup>3</sup> unsatisfactory. Much has changed since the Commission adopted that order six years ago. The DBS industry has moved well beyond its nascent stage with two DBS providers in the sky. Moreover, the development of digital technology has expanded the potential uses for this spectrum. The record in this proceeding further demonstrated that there are many entities who stand ready, willing and able to take these channels and bring DBS service to the public swiftly.

Further, in 1993, Congress granted this agency authority to choose licensees through auctions. We have successfully used auctions to grant licenses in other services. We have found that auctions are an efficient and effective means of licensing that brings service to the public quickly by those who have the financial wherewithal to provide service in the

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<sup>3</sup> Continental Satellite Corp., 4 FCC Rcd 6292 (1989), partial recon. denied, 5 FCC Rcd 7421 (1990). In Continental, the FCC stated that it would distribute any recovered channels among other permittees, up to the number of channels requested in their applications. 4 FCC Rcd at 6299.

marketplace. The auction approach also produces a tangible monetary benefit for the American public for the use of the public resource by the licensee. Such benefits should not be overlooked.

Given these changes, I believe that it is incumbent on the FCC to consider carefully how best to reassign the channels recovered from Advanced. While I recognize that some argue that there could be additional delay associated with recovery of the spectrum and reassigning the channels, I believe that the delay can be minimized by the commitment we make to act quickly. Though a difficult decision, it is my view that this is the correct and fairest decision.