FCC 95-443

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

In the Matter of	)	
	)	IB Docket No. 95-168
Revision of Rules and Policies for the	)	PP Docket No. 93-253
Direct Broadcast Satellite Service	)	

NOTICE OF PROPOSED RULEMAKING

Adopted: October 27, 1995 Released: October 30, 1995

Comment Date: November 20, 1995
Reply Comment Date: November 30, 1995

By the Commission: Commissioner Quello concurring; Commissioner Barrett dissenting in part and concurring in part and issuing a separate statement; Commissioner Chong issuing a separate statement.

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I. INTRODUCTION

1. Less than two weeks ago, in our Advanced Order,[1] the Commission reclaimed for the public 51 channels at two orbital locations that had been assigned to Advanced Communications Corporation ("ACC") for use in the Direct Broadcast Satellite ("DBS") service. With this Notice of Proposed Rulemaking ("NPRM"), we begin the process of devising and implementing a method for reassigning those channels on an expedited schedule.

2. As a result of our Advanced Order, we address for the first time reassigning DBS orbital/channel resources that have been returned to the public. In our 1989 Continental decision, we stated that existing DBS permittees would have first right to reassigned DBS channels and associated orbital locations in the event that such channels reverted to the public due to cancellation or surrender of a DBS construction permit.[2] In this NPRM, we reach the tentative conclusion, based on developments in the six years since Continental was decided, that such a reassignment method no longer serves the public interest.

3. Accordingly, this NPRM proposes new rules for reassigning DBS resources. We note that DBS resources are unique among satellite services in that spectrum at particular orbital locations has been allocated to the United States by international treaty.[3] We tentatively conclude that the Commission can and should use competitive bidding when we have received mutually exclusive applications for reassignment of DBS orbital/channel resources. Specifically, we propose to auction two large blocks of channels that are now available due to cancellation of ACC's DBS construction permit. We seek comment on both the proposed use of auctions in this service and the proposed auction rules.

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1 Advanced Communications Corp., FCC 95-428 (adopted Oct. 16, 1995)("Advanced Order").

2 Continental Satellite Corp., 4 FCC Rcd 6292, 6299 (1989), partial recon. denied, 5 FCC Rcd 7421 (1990).

3 See ¶ 18, *infra*.

4. In this NPRM, we also propose new DBS service rules. In particular, we propose rules that would: (1) impose performance criteria intended to ensure that these resources are utilized in a timely manner; (2) guard against potential anticompetitive conduct by DBS providers; and (3) ensure timely DBS service to Alaska and Hawaii. We also request comment on our existing policy governing the extent to which DBS resources may be put to alternative uses. We introduce these rules in order 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. In addition, the proposed service rules better define the DBS assets that we propose to open for competitive bidding. We seek comment on these proposed service rules as well.

II. BACKGROUND

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.[4] Pursuant to the Region 2 Plan adopted at the 1983 Regional Administrative Radio Conference ("RARC-83"), the United States has been allocated eight orbital positions from which to transmit satellite signals for DBS service. Thirty-two channels are available for use at each orbital location. With digital compression, each such "channel" can currently provide for the simultaneous carriage of five to seven video programming services, and technological advances can be expected to allow capacity for up to 20 programs per channel by the year 2000.[5]

6. ACC was among the early permittees in the DBS service, receiving its conditional construction permit in 1984.[6] By April 1991, the Commission had assigned to ACC a total of 27 DBS channels at the 110° orbital location and 24 DBS channels at the 148° orbital location.[7]

7. In 1989, during the last round of DBS applications, requests for orbital/channel resources -- including ACC's request -- exceeded the available supply. At that time, the two options available for resolving mutually-exclusive applications -- lotteries and comparative

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4 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.

5 See *Number of Television Programs From One Transponder in the Appendices 30 and 30A Plans*, Document 10-11S/108-E, ITU Radiocommunications Study Group 10/11S (dated Sept. 12, 1995).

6 Satellite Syndicated Systems, Inc., 99 F.C.C.2d 1369, 1387 (1984).

7 See Advanced Order at ¶ 8. ACC never received an orbital assignment for its remaining three western channels. Id. at n. 17.

hearings -- involved complex processing procedures and significant regulatory delay.[8] We resolved the issue in our 1989 order in Continental by granting each application only to the extent that it was possible to award an equal number of channel reservations to each applicant.[9] In that order, we also stated that,

> in the event the permit of any of these applicants, or of any of the current permittees, is surrendered or canceled, the remaining permittees from this group will have the first right to additional allocations, apportioned equally, up to the number requested in their applications.[10]

At that time, we determined that such a reassignment scheme would result in the most prompt disposition of the then-pending applications, and therefore would be preferable to any then-available comparative procedure.[11] In over six years since that decision, we have not had occasion to reassign any surrendered or cancelled DBS channels.

8. In our recent Advanced Order, we held that ACC had failed to meet its obligation to proceed with due diligence toward construction and operation of its DBS system, and accordingly cancelled its construction permit.[12] As a result, the public has reclaimed 51 DBS channels at two orbital locations that are available for reassignment.[13] We must now determine whether to implement for the first time the reassignment methodology we identified six years ago in Continental, or whether the public interest would be better served by allowing the market to reassign reclaimed DBS resources through the recently authorized process of competitive bidding.

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8 Continental, 4 FCC Rcd at 6293.

9 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.

10 Continental, 4 FCC Rcd at 6299.

11 Id.

12 Advanced Order at ¶¶ 25-48.

13 As discussed *infra*, there is also a single channel at the 110° orbital location that has never been assigned to any permittee. See Continental, 4 FCC Rcd at 6304 n.41 (6 channels left unassigned since insufficient to distribute among seven applicants). We intend to add this channel to the 27 reclaimed from ACC to create a block of 28 so that all of the channels at this location will be assigned and available for productive use as soon as possible.

III. METHODOLOGY FOR REASSIGNING DBS RESOURCES

9. At the time we decided Continental, lotteries and comparative hearings were the only options for making orbital/channel assignments where there were mutually exclusive applications.[14] Moreover, at that time, no DBS satellite had yet been built, much less launched or put into operation. Thus, in 1989, the Commission had only a limited range of options and no operational history upon which to base public interest determinations as to the future of DBS service.

10. Circumstances have changed in significant ways since 1989. In the six years that have passed, DBS service is available from two permittees (DIRECTV and USSB) operating from a single orbital location. The systems operating from that location have proven the feasibility of digital compression and provision of full-CONUS service.[15] Two other permittees (EchoStar and Directsat), now jointly held,[16] should soon begin full-CONUS service from another orbital location. Not all permittees have made similar progress, however. ACC made little progress toward building its system, and accordingly lost its permit. We also note that no permittee has begun actual construction of a satellite for use in its western orbital position.[17] Progress has been measured as permittees have awaited technological developments and negotiated for mergers, buyouts, and joint operations in an effort to aggregate sufficient channels to ensure a viable and competitive system.

11. The history of the DBS service, especially in the six years since Continental was decided, has led us to the tentative conclusion that the method for reassigning reclaimed channels that we set forth in that order no longer serves the public interest, and that a new methodology should be adopted. We are currently of the view that the Continental reassignment scheme should be abandoned, and that reclaimed DBS 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 we propose to decide mutually exclusive applications by auction.

12. Were we to reassign the DBS channels reclaimed in the Advanced Order using the methodology outlined in Continental, we would divide 51 channels at two orbital locations -- divided into 24 east/west pairs with three eastern channels remaining -- among six permittees. It is our belief that this would result in too few channels divided among six

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14 Continental, 4 FCC Rcd at 6293.

15 Signals from DBS satellites that cover the entire continental United States are referred to as "full-CONUS" signals; those that cover less of the continental United States are referred to as "half-CONUS" signals.

16 See Directsat Corp., 10 FCC Rcd 88 (1995).

17 See, e.g., Semi-Annual Reports filed by Continental (June 19, 1995), DBSC (July 13, 1995), Directsat (June 20, 1995), Dominion (February 26, 1995), EchoStar (June 20, 1995), Tempo Satellite (May 22, 1995), and USSB (April 25, 1994).

permittees to provide sufficient capacity to operate a viable system by any single permittee at either location and thus would not facilitate service to the public as we had hoped. For example, one existing DBS permittee, Tempo Satellite, has indicated that even the 11 paired channels it has been assigned at the 119° orbital location "are not sufficient for a competitive system."[18] EchoStar has combined with Directsat to control a total of 21 channels at each of two orbital locations. And, although USSB has been able to operate a system using five channels, it has done so by striking a deal with a single permittee (DIRECTV) that held the remaining 27 channels at the same orbital location. In order to realize the same benefits from launching a service utilizing all available channels at the 110° or 148° orbital locations, each permittee would either have to come to an agreement with all five of the other permittees or agree to sell its channels to another permittee.

13. The history of the DBS service to date demonstrates that our policy of assigning a relatively small number of channels to each permittee is outmoded. The first DBS systems were conceived as systems employing fewer than ten channels, and were authorized as such.[19] Changes in technology and in the DBS industry have created an environment in which smaller systems are not independently viable. Consequently, we have seen permittees negotiating to achieve joint operations or to acquire and aggregate additional channels. This process can be a time-consuming and not always successful choice,[20] which is further complicated by the time required for Commission consideration of such transactions.[21] As a result, only one DBS orbital position is currently in use even though the service has been authorized for over a decade.

14. In the Advanced Order, we identified three important policy goals for the DBS service: (1) efficient use of a valuable public spectrum resource (DBS channels); (2) promotion of DBS as a competitor to cable television systems; and (3) prompt delivery of DBS service to the public.[22] In considering how best to award DBS channels, we add to this list two public interest factors identified by Congress when it gave the Commission authority to auction licenses: "recovery for the public of a portion of the value of the public spectrum

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18/ See letter from Richard E. Wiley to Hon. Reed E. Hundt at 2 (dated August 15, 1995).

19/ See CBS, Inc., 92 F.C.C.2d 64 (1982)(DBS applicants requesting permits for systems using from three to ten channels).

20/ For example, EchoStar negotiated for over three years before finally abandoning its efforts to merge with ACC or acquire its channels. See Advanced Order at ¶ 43.

21/ The Commission must approve any assignment or transfer of control before such a transaction can be consummated. See 47 U.S.C. § 310(d).

22/ See Advanced Order at ¶ 67.

resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource."[23/]

15. The reassignment policy set forth in Continental does not serve our goals. The Continental reassignment policy would require us to make piecemeal assignments of the reclaimed channels, and thus could delay service to the public while the parties attempted to reaggregate the channels into a viable and competitive block. Such delay would diminish the number of DBS operators available to compete with cable and would squander the valuable DBS spectrum. In addition, these permittees would not be required to compensate the public for the valuable and much sought after public DBS resources they received.

16. By contrast, auction procedures are designed to assign scarce resources to those who value them most highly and can make the most efficient use of them. Moreover, if we were to auction these two blocks of channels on January 18, 1996, each auction winner would be able to obtain its construction permit more rapidly and proceed immediately toward construction and operation of its system without having to negotiate with other permittees, aggregate sufficient channel capacity, or engage in several rounds of administrative processing. Expedition of service to the public would be further enhanced when coupled with proposed due diligence requirements.[24/]

17. The Commission's view of what is in the public interest may change, either with or without a change in circumstances. When such a change in view results in a change in policy, the Commission "must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored."[25/] We believe that the reasons discussed in this section provide a sound basis for the deliberate change in policy we are contemplating. We request comment on this overall conclusion, and on the bases for it discussed in this section.

IV. NATURE OF DBS SERVICE

18. In order to place our discussion in this NPRM into proper context, it is helpful to describe the nature of DBS service itself. Under the International Telecommunication Union ("ITU") Region 2 Plan for the Broadcast Satellite Service ("BSS Plan"), adopted at RARC-83, the United States has been allocated 32 channels (covering spectrum from 12.2 to

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23/ See 47 U.S.C. § 309(j)(3)(C).

24/ See ¶ 27, *infra*.

25/ Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971).

12.7 GHz) at each of eight orbital locations from which to provide domestic DBS service.[26] This method of spectrum allocation at identified orbital locations is virtually unique in the satellite services.[27] A separate ITU feeder-link plan assigns frequencies for transmitting radio signals from BSS earth station facilities to BSS satellites in the 17.3-17.8 GHz band.[28]

19. The BSS Plan specifies technical parameters for each orbital location. However, DBS systems operating from the orbital locations allocated to the United States may operate in a manner that does not adhere strictly to the technical parameters of the overall BSS Plan by requesting a modification to include their non-standard broadcast satellite systems. For example, the existing DBS operations of DIRECTV and USSB vary from the BSS Plan to the extent that they transmit signals on a full-CONUS rather than half-CONUS basis, employ digital rather than FM modulation, and operate at lower power and with smaller receiving dishes than are specified in the BSS Plan. Any such deviations from the BSS Plan, however, are undertaken at the operator's risk until the BSS Plan is formally modified and the modifications are notified to the ITU. Thus, non-standard systems must not cause harmful interference to systems that comply with the BSS Plan, and operate subject to any interference caused by standard systems.[29]

20. The BSS Plan may be modified to incorporate the specifications of a non-standard system by submitting such system to the ITU under its modification procedure. The ITU will approve the modification if the non-standard system meets the requirements of Annex 1 of Appendix 30 and Annex 1 of Appendix 30A or can be successfully coordinated with other services and affected domestic and foreign systems in the BSS Plan.[30] Once

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[26] Region 2 encompasses North and South America. The BSS Plan is contained in Appendix 30 (ORB 85) of the ITU Radio Regulations. It assigns DBS orbital positions and channels to nations in Regions 1 (Europe, Russia, and Africa), 2, and 3 (Asia, Australia, the Pacific) and establishes international DBS interference protection parameters. A copy of the Radio Regulations is available for review in the International Bureau Public Reference Room, 2000 M Street, N.W., Room 100, Washington, D.C. Copies may also be obtained from the ITU, Radiocommunication Bureau, at Place des Nations, 1211 Geneva 20, Switzerland (tel. 41-22-730-30-5009).

[27] The ITU Radio Regulations, Appendix 30B (Orb-88), contain a plan for the fixed-satellite service ("FSS"), in which each administration is allocated FSS spectrum and a single orbital location for its use. Orbital locations for all other satellite services, including all but that single FSS location, are not allocated to specific administrations, but rather are available upon application to the ITU. Thus, for all practical purposes, DBS is the only service in which all orbital/channel resources have been allocated to the United States by international agreement.

[28] ITU Radio Regulations, Appendix 30A (Orb-88).

[29] See, e.g., Hughes Communications Galaxy, Inc., 8 FCC Rcd 8116, 8117 n.9 (1993)("Pursuant to Appendix 30, the ITU must be provided with technical information regarding the permittees' proposed operation, and that body must confirm that such proposed operation has complied with the parameters established by RARC-83, as amended.")

[30] ITU Radio Regulations, Annex 1 to Appendix 30 (Orb 85); Appendix 30A, Annex 1 (Orb-88).

modified, the BSS Plan would incorporate such a non-standard system, and it would receive the same protection from interference as any other system in the BSS Plan.

21. We point out that seeking modification under the BSS Plan entails some measure of risk and of delay for the applicant. Procedures for modifying the BSS Plan can be time-consuming: for example, approval may be delayed if the requested modification affects other services or foreign BSS assignments. Until the modification is completed, a DBS system seeking modification must operate with no guarantee of successful coordination and inclusion in the BSS Plan.

22. In light of these considerations, we remind potential applicants that any DBS licenses awarded by auction or other means will authorize operations in accordance with the parameters specified in the BSS Plan (*e.g.*, FM modulation, one meter receive dishes, half-CONUS coverage, and higher power), and will not authorize non-standard operations except on a non-interference basis pending successful modification of the BSS Plan. Moreover, future licensees and existing permittees are reminded that until the Region 2 BSS Plan is modified to include the technical parameters of such operations, non-standard satellites must not cause harmful interference to, and will not receive protection from, other assignments that are in conformance with the BSS Plan.[31/]

V. PROPOSED SERVICE RULES

23. When the Commission inaugurated the DBS service in 1982, it promulgated a total of nine "interim" rules to govern that service.[32/] At that time, the Commission could not have foreseen the technological advances that the service has experienced, nor did it have an opportunity to fashion its rules based on experience with the actual operation of the service. We believe the time has come to update our "interim" DBS service rules to bring them into line with the current state of the service.

24. *International Service Issues.* Direct Broadcast Satellite Corporation ("DBSC"), a current DBS permittee, has requested authorization to provide international service using excess capacity on its DBS satellites.[33/] In a September 1995 Notice of Proposed Rulemaking regarding the use of U.S.-licensed satellites for the provision of international services

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31/ See, e.g., Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, 5 FCC Rcd 179, 183 (1990)(domestic satellite operators expected to resolve potential interference problems through good faith efforts at coordination).

32/ See Inquiry Into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites for the Period Following the 1983 Regional Administrative Radio Conference, 90 F.C.C.2d 676 (1982)("DBS Interim Service Order"), recon. denied, 53 R.R.2d 1637 (1983).

33/ The Commission determined that DBSC's original request to provide international service would be treated as a Motion for Declaratory Ruling. Public Notice, Report No. DBS/PN 94-16, Mimeo No. 44904 (Sept. 27, 1994).

("Transborder/Separate Systems"), we have proposed to permit all U.S.-licensed FSS satellite operators to provide both domestic and international services, on a co-primary basis.[34] We also asked whether we should extend this treatment to other U.S. satellite services, including DBS. Further, we asked whether, and under what conditions, to permit non-U.S.-licensed space stations to provide domestic service within the United States.[35] We expect to address issues related to the authority to provide domestic and international service by U.S. and foreign DBS licensees in the context of that proceeding. In light of the possibility that we will permit U.S. DBS licensees to provide international service, and our discussion in this order of the permissible non-standard uses of DBS channels,[36] we request comment on whether the U.S. has the authority to auction permits which may include the provision of international service. We emphasize, however, that even if we permit U.S. DBS licensees to provide international service, as a matter of policy, licensees may do so only after successfully modifying the BSS Plan to include the proposed international DBS service and receiving approval from the foreign country or countries receiving the transmissions.[37] Should auction procedures for domestic DBS permits be adopted, prospective bidders should take these international factors into consideration when preparing their bids.

A. Due Diligence Milestones

25. We propose to award new, initial DBS construction permits on a conditional basis, subject to cancellation where such permittees do not meet specific milestones for construction and operation of DBS systems. A new DBS permittee would become a licensee upon successful completion of milestones for construction and operation of a DBS system, as set forth below. We tentatively conclude that revised milestones for construction and operation will prevent unnecessary delays in the commencement of construction and operation of DBS systems. Such delays are no longer warranted in an era of proven operation and rapid growth in the DBS service. We seek comment on the proposals.

26. Under existing due diligence rules and policies applicable to the DBS service, each DBS permittee must submit a contract for satellite construction within one year of grant of its authorization, in the manner and with the accompanying documentation prescribed in those rules and policies,[38] and must also complete launch and operation of its system within

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34. See Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems, 10 FCC Rcd 7789, 7793 (1995).

35. Id. at 7797.

36. See ¶¶ 28-32, *infra*.

37. See ITU Radio Regulations, Chapter VII, Article 30, 2674.

38. 47 C.F.R. § 100.19(a); DBS Interim Service Order, 90 F.C.C.2d at 719 (completion of satellite construction contract in one year); CBS, Inc., 98 F.C.C.2d. 1056 (1983)(no unresolved contingencies in satellite construction contract); Tempo Enterprises, Inc., 1 FCC Rcd 20, 21 (1986)("Tempo I")(essential

six years after receipt of its authorization.[39] The facts underlying our Advanced Order, which led us to cancel ACC's DBS permit for failure to make sufficient progress toward construction and operation of its DBS system.[40] indicate that existing due diligence obligations may not be sufficient to ensure consistent and purposeful progress by DBS permittees. For example, after more than a decade as a DBS permittee, including one four-year extension of its permit, ACC had not begun actual construction of a single satellite at the time we cancelled its permit.[41] Such delays in bringing systems into operation deny the public the benefits of competition both within the DBS market and among other multichannel video programming distributors ("MVPDs") that each additional DBS operator provides.

27. Accordingly, we propose to amend our due diligence rules to add specific construction and operational milestones, for those who receive construction permits after the effective date of this rule. In addition to existing due diligence rules, we propose to require that, within four years of grant of authorization, each such DBS permittee must complete construction of the first satellite in its DBS system, and all satellites in a DBS system must be in operation within six years of grant of its construction permit. Given the existing requirement that each permittee contract for satellite construction within one year, and assuming that the average DBS satellite takes from two to three years to build,[42] four years should be more than sufficient for each permittee subject to the rule to contract for and complete construction of its first satellite. The six-year period for completion of all satellites in a permittee's system matches the six-year term of a DBS construction permit. These milestones will apply to any new construction permits in the service, including those granted by means of competitive bidding and through assignment or transfer of existing construction permits. We believe that the investment made by a successful auction bidder or in a private transaction demonstrates sufficient motivation to ensure rapid development of DBS resources, and that therefore the proposed rule will impose no additional burden on those parties. It will, however, protect against the possibility that someone might be willing to pay fair market value for DBS resources with no intention of actually using them, for the sole purpose of stymieing full development of the service. We will continue to apply existing due diligence requirements and precedent to construction permits already issued, including any extensions

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terms of contract are verified by submission of relevant portions of the document or by sworn statement; specific satellites and their design characteristics are identified, payment terms and construction schedule specified); United States Satellite Broadcasting Co., 3 FCC Rcd 6858, 6861-62 (1988)("USSB I") (regular and specific construction milestones and payment schedules).

39. 47 C.F.R. § 100.19(a).

40. Advanced Order at ¶¶ 28-37.

41. Id. at ¶ 35.

42. See, e.g., EchoStar Semi-Annual Report, File No. DBS-88-01 (dated July 29, 1994)(27.5 month construction schedule); USSB Semi-Annual Report, File No. DBS-84-07 (dated April 25, 1994)(36 month construction schedule).

thereof, so long as those permits are not assigned or transferred. We seek comment on the proposed due diligence requirements.

B. Use of DBS Capacity

28. The channels and orbital positions allocated to the United States under the ITU Radio Regulations, Appendices 30 and 30A, are designated for use in the BSS service. This service is defined as a "radiocommunication service in which signals transmitted or retransmitted by space stations are intended for direct reception by the general public."[43] This is also the definition of DBS service adopted in the Commission's Rules.[44] Thus, the terms "DBS service" and "BSS service" are interchangeable. Under the Region 2 BSS Plan, resources allocated for DBS service "may also be used for transmission in the fixed-satellite service" so long as certain interference parameters are met, but those resources must be used "principally for the broadcasting-satellite service [BSS]."[45]

29. The Commission has twice implemented these international rules in addressing the issue of the extent to which a permittee may use its assigned channels for non-DBS services -- first in its 1986 USSB decision[46] and again in its 1991 Potential Uses of DBS decision.[47] Through those orders, we have established a policy requiring each licensee to begin DBS operations before the end of its first license term, but allowing otherwise unrestricted non-DBS use during that term.[48] After expiration of the first license term, a DBS operator may continue to provide non-DBS service only on those transponders on which it also provided DBS service, and only up to half of the use of each transponder each day.[49] The Commission based this policy on its desire (1) to ensure that DBS service would remain

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43. ITU Radio Reg. 37, Chapter 1. For purposes of this definition, "direct reception" encompasses both individual reception and community reception. Id.

44. See 47 C.F.R. § 100.3.

45. ITU Radio Reg. 846, Article 8. Fixed-satellite service differs from BSS in several respects: it is used primarily for transmissions between fixed earth stations rather than directly to the public; it is not constrained by planned channel and orbital assignments to countries, like BSS; and FSS interference protection is coordinated on a case-by-case basis between countries rather than by predetermined interference levels, such as those used to protect each orbital location in the BSS Plan. See generally Assignment of Orbital Locations to Space Stations in the Domestic Fixed Satellite Service, 84 F.C.C.2d 584 (1981)(setting forth orbital assignment policies).

46. United States Satellite Broadcasting Co., 1 FCC Rcd 977 (1986)("USSB").

47. Potential Uses of Certain Orbital Allocations by Operators in the Direct Broadcast Satellite Service, 6 FCC Rcd 2581 (1991) ("Potential Uses of DBS").

48. USSB, 1 FCC Rcd at 979; Potential Uses of DBS, 6 FCC Rcd at 2581-82.

49. Id.

the primary use of the assigned channels, promoting the viability of DBS while at the same time permitting the maximum flexibility consistent with the allocation of those channels "principally" for DBS service; and (2) to encourage permittees to provide full services with the smallest amount of spectrum possible, furthering the Commission's long-standing goal of increasing spectrum efficiency.[50]

30. In LSSB and Potential Uses of DBS, the Commission imposed *temporal* requirements for DBS service upon each transponder. This approach may unintentionally inhibit the ability of DBS operators to determine the most effective transponder configuration for delivery of DBS and alternative services. It might be more appropriate instead to cast requirements for DBS service in terms of *capacity*, such that at least fifty percent of the total number of channels that an operator has been assigned at a given orbital location must be used to provide domestic DBS service. This approach could allow operators to continue meeting the temporal requirements formerly imposed -- since those would be subsumed within the capacity requirements -- but would provide additional flexibility and allow operators to configure their systems as they deem most compatible with their business plans. We anticipate that DBS spectrum would continue to be used primarily to deliver DBS service to the American public, but DBS operators would be afforded the maximum flexibility within these limits to make optimal use of DBS spectrum.[51] We seek comments on whether our restriction on the use of DBS channels should be restated in terms of capacity rather than time. We also invite comment on whether and how to formulate any such rule in order to better account for the flexibility of digital transmission and compression.

31. We remind existing and potential licensees that non-conforming uses of DBS channels must also be limited to satellite services only. When the Commission inaugurated domestic DBS service, we found that continued terrestrial use of DBS frequency bands for terrestrial services would be inconsistent with their use for the new direct-to-home satellite service.[52] Accordingly, our rules for DBS service phased out terrestrial use of frequency bands now allocated to DBS service. We continue to believe that the 12.2-12.7 GHz band cannot accommodate the effective use of the band for both terrestrial and satellite service, and therefore intend to limit use of these frequencies to satellite services.

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50 Id.

51 At present, there is at least one application for ancillary use pending. DBSC's proposal for international use of DBS resources allocated to the United States is discussed at ¶ 24, *supra*. See also Geostar Positioning Corp., 4 FCC Rcd 4538 (1989)(Commission has authorized non-conforming use of fixed-satellite service operations authorized on a non-interference basis in frequency bands allocated to fixed-satellite service).

52 "OFS" (operational fixed service, terrestrial microwave) operators were required to vacate the DBS band by September 1988 or assume a secondary user status at that time, including strict noninterference to DBS systems. Direct Broadcast Satellite Service, 90 F.C.C.2d at 702.

32. In addition, potential DBS permittees should bear in mind the other use restrictions that apply to the DBS service. For example, Section 25 of the 1992 Cable Act mandates that the Commission adopt rules imposing public interest requirements upon each "provider of DBS service" including, at a minimum, the political programming requirements set forth in Sections 312(a)(7) and 315 of the Communications Act.[53] In addition, Section 25 also directs the Commission to require each DBS operator providing video programming to reserve four to seven percent of its total channel capacity exclusively for noncommercial, educational, or informational programming and make it available to national educational programming suppliers upon reasonable prices, terms, and conditions as determined by the Commission.[54] Pursuant to the requirements of Section 25, the Commission has commenced a rulemaking proceeding "to impose, on providers of direct broadcast satellite service, public interest or other requirements for providing video programming."[55] After that rulemaking was initiated, a United States District Court struck down the noncommercial carriage obligations of Section 25, but the decision has been stayed pending appeal.[56] The rulemaking proceeding to implement Section 25 also remains pending. All DBS licensees will be required to comply with these statutory provisions, and the rules implementing them, if the statute is ultimately upheld on appeal and following adoption of final rules.

C. Pro-Competitive Rules and Policies

1. Spectrum Aggregation Limitations

33. The goal of providing prompt service to the public is by no means the only public interest issue implicated in this proceeding. Promoting competition is likewise an important part of our public interest mandate.[57] It appears that it may now be prudent and appropriate to adopt specific rules applicable to DBS operators in order to promote competition. In particular, we are concerned that allowing an entity to control an unlimited number of full-CONUS DBS channels, particularly where such an entity is affiliated with another MVPD, could result in a lessening of competition among DBS providers and in the

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53 Section 312(a)(7) requires broadcast stations to afford reasonable access for federal candidates to their facilities, or to permit federal candidates to purchase "reasonable amounts of time." See 47 U.S.C. § 312(a)(7). Section 315(a) provides that, if a broadcast licensee permits any legally qualified candidate to use its station, the licensee must afford equal opportunities to all other such candidates in the use of the station.

54 47 U.S.C. § 335(b).

55 47 U.S.C. § 335(a); see also Direct Broadcast Satellite Public Service Obligations, 8 FCC Rcd 1589 (1993).

56 See Daniels Cablevision, Inc. v. United States, 835 F. Supp. 1 (D.D.C. 1993), appeals pending sub nom. Time Warner Entertainment Co. v FCC, No. 93-5349 and consolidated cases (D.C.Cir.).

57 For example, the Commission has sought to promote DBS as a competitor to cable television. See, e.g., Tempo Satellite, Inc., 7 FCC Rcd 2728, 2731 (1992)("Tempo II").

broader market for the distribution of multichannel video programming.[58] We have adopted limits on spectrum aggregation to promote diversity and competition in other services in which excessive aggregation by licensees could preclude entry by other service providers and thus confer excessive market power on incumbents.[59] We believe that similar limits on aggregation of channels in the DBS service may also be warranted.

34. Our competitive analysis begins with an analysis of the relevant markets in which competition may be affected.[60] We believe that the market in which MVPDs compete -- the market for the delivery of multichannel video programming -- is an appropriate "product market" in which to determine the competitive effect of having DBS resources under the control of the provider of another type of multichannel video distribution service. In addition, separate consideration of competition among DBS providers is likely important. It would appear that the nature of the competitive rivalry will differ as between the services of DBS systems and other MVPDs, which are likely imperfect substitutes even though they may compete in the same relevant market.[61] Moreover, we believe our rules should address competitive issues relating to the use of DBS spectrum to provide the wholesale distribution of DBS services to cable operators and other MVPDs. We also

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58 The Communications Act refers to a service that is capable of constraining the pricing of cable system operators as a "multichannel video programming distributor" ("MVPD"), that is, "a person . . . who makes available for purchase, by subscribers or customers, multiple channels of video programming. See 47 U.S.C. § 522(12). Thus, the Act explicitly contemplates a market comprised of distributors that offer multichannel video programming on a subscription basis. See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 9 FCC Rcd 7442, 7465-66 (1994) ("1994 Cable Competition Report"). In addition to cable operators (which include direct competitors known as "overbuilders"), Multichannel, Multipoint Distribution Service ("MMDS") operators, DBS operators, and television receive-only (*i.e.*, home satellite dish) program distributors are specifically included within the statutory definition of an MVPD. See 47 U.S.C. § 522(12). In addition, the Commission has subsequently determined that video dial tone ("VDT") and satellite master antenna television ("SMATV") systems should also be considered MVPDs. See Implementation of Sections of the 1992 Cable Act -- Rate Regulation, 8 FCC Rcd 5631, 5650-51 (1993).

59 See Implementation of Sections 3(n) and 332 of the Communications Act - Regulatory Treatment of Mobile Services, 9 F.C.C. Rcd. 7988, 8100-8110 (1994); 900 MHz Second Report and Order, 10 FCC Rcd 6884, 6909-10 (1995).

60 See, e.g., United States v. Continental Can Co., 378 U.S. 441 (1964); United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586 (1957); Craig O. McCaw, 9 FCC Rcd 5836 (1994), aff'd sub nom. SBC Communications, Inc. v. FCC, 56 F.3d 1484 (D.C. Cir. 1995).

61 Currently, multichannel video programming is delivered by various technologies, each of which varies somewhat in terms of cost and quality. Thus, consumers may not view each of these technologies as perfect substitutes for each other. However, the attributes of these technologies are similar enough, from a consumer's perspective, that separate product markets for each of the technologies is not warranted. 1994 Cable Competition Report, 9 FCC Rcd at 7462-68. In the future, use of a multichannel video programming distribution market is likely to become increasingly appropriate because as digital encoding becomes more widely deployed, the differences among the technologies may be reduced. Id.

tentatively conclude that the effect of DBS competition in the broader MVPD market will principally be felt in essentially local markets. Failure of DBS systems to provide competition to other MVPD systems will be felt particularly in those markets where a DBS operator may be affiliated with a non-DBS MVPD.[62] Finally, we believe that cross-ownership between DBS operators and other MVPDs may present opportunities for anticompetitive strategic conduct that potentially has adverse effects at the firm or national level.[63] We seek comment on our definition and analysis of the relevant market.

35. *Effect of Concentration on Competition Among MVPDs.* In the proceeding that led to the Advanced Order, several parties opposed the proposed assignment of channels from ACC to Tempo DBS (a wholly owned subsidiary of cable operator Tele-Communications, Inc. ("TCI")) on the ground that allowing TCI-affiliated entities to control those 27 full-CONUS channels of DBS spectrum in addition to the 11 full-CONUS channels they already held, and to use those DBS resources either to transmit programming from a consortium of the largest cable operators and/or as a "headend in the sky" for use by other cable operators, could result in a lessening of competition among DBS providers and in the broader market served by other MVPDs.[64] Those parties argued that a cable-affiliated DBS provider cannot be expected to compete vigorously with cable systems, and that such an entity would have the incentive and ability to engage in anticompetitive strategic conduct impeding other DBS providers who *are* competing with cable systems.

36. The extent of rivalry in a market may be affected by the number of firms and their respective market shares. In general, as markets become increasingly concentrated, firms have increased opportunities to coordinate their conduct tacitly or overtly, thereby limiting competition and increasing rates of return.[65] As we found in the 1994 Cable Competition Report, while MVPDs using technologies other than cable are emerging, local markets for the distribution of video programming remain highly concentrated, with cable systems continuing to have market power.[66] At present, therefore, cable operator acquisition of resources that are essential inputs of non-cable distribution technologies gives us pause to

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62 The relevant "geographic market" is defined as the geographic area in which buyers can practically turn for alternative sources of supply, or in which there are sellers who act to restrain the prices charged to those buyers. See United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 359 (1963).

63 For a discussion of strategic conduct to deter competitive entry, see 1994 Cable Competition Report, 9 FCC Rcd at 7551-54.

64 See, e.g., Oppositions filed by DIRECTV (Opp. at 7), EchoStar (Opp. at 23-27), and MCI (Opp. at 23) in Advanced Communications Corp., File Nos. DBS-94-11EXT, DBS-94-15ACP, and DBS-94-16MP ("ACC Proceeding").

65 See, e.g., United States Department of Justice & Federal Trade Commission, *Horizontal Merger Guidelines*, 4 Trade Reg. Rep. (CCH) ¶ 13,104 (1992) ("*Merger Guidelines*").

66 See 1994 Cable Competition Report, 9 FCC Rcd at 7449-50.

the extent it may have the effect of further concentrating this market, and further enhancing cable operator market power.[67] Indeed, we have consistently sought to promote effective competition to the services provided by cable systems, and we have encouraged the development of the DBS spectrum in precisely that context.[68] We have declined, however, to adopt a cable/DBS cross ownership ban.[69] We believe that it now makes sense to revisit the extent to which cable operators may hold DBS permits or make use of DBS facilities. In addition, as other MVPDs using different technologies continue to develop, a similar concern may arise with respect to their use of DBS resources as well.

37. DBS licensees or operators that are affiliated with cable operators or other MVPDs may not have the same incentive as DBS service providers without such affiliations to offer DBS services that compete with other MVPDs for subscribers. The affiliated operators may have an incentive to minimize competition from any DBS resources they controlled, and instead to coordinate their DBS activities with those of their other systems to maximize their joint profits. For example, in the absence of additional unaffiliated DBS services, an MVPD might attempt to differentiate its DBS services from the services of its other systems rather than vigorously compete head-to-head with them on the basis of price and quality.[70] If so, then ownership of DBS channels by an entity affiliated with another MVPD could adversely affect competition in those areas where that MVPD operates. On the other hand, given the presence of other full-CONUS DBS providers, the likely cost structure of the DBS industry, and the imposition of appropriate conduct-related conditions, it may be unlikely that a DBS licensee or operator affiliated with a cable operator or another MVPD would be able to sustain a long-term strategy of avoiding head-to-head price competition.

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67 See, e.g., Rulemaking to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Service, CC Docket No. 92-297, ¶ 105 (July 28, 1995).

68 See, e.g., 1994 Cable Competition Report, 9 FCC Rcd at 7466; Tempo II, 7 FCC Rcd at 2730.

69 Continental, 4 FCC Rcd at 6299. At the time, we concluded that concerns over potential anticompetitive behavior by TCI and its subsidiary were not sufficient to justify a bar on their entry into DBS. Instead, we place several conditions on the permit we issued with the aim of increasing the incentives for Tempo Satellite to provide competitive DBS services in areas served by TCI-affiliated systems. Tempo II, 7 FCC Rcd at 2731.

70 All else being equal, firms that offer products with dissimilar attributes are less likely to compete with each other on the basis of price. Given that to some degree, firms in the video distribution market can choose the attributes of the product they offer, choosing dissimilar attributes may allow firms to decrease the amount of price competition in the industry. See, e.g., A Shaked and J. Sutton, "Relaxing Price Competition Through Product Differentiation," *Review of Economic Studies* (1982) at 3-13. This is especially true to the extent that the firms can commit to their choice of attributes, since this credibly signals their willingness to pursue a non-price competition or product differentiation strategy. See D. Fudenberg and Jean Tirole, "The Fat Cat Effect, the Puppy Dog Ploy and the Lean and Hungry Look," *American Economic Review* (1984) at 361-368 (discussion of how actions by firms can be used to signal whether they are likely to compete aggressively or not).

38. We previously considered the effect on rivalry among MVPDs presented by a cable-affiliated entity's control over the use of DBS spectrum in the context of Tempo Satellite's application to become a DBS permittee. At that time, opponents expressed the concern that "TCI's extensive cable system holdings, coupled with its earth station (satellite uplink) facilities and its interests in at least twelve cable programmers, would result in undue concentration of control in the video services marketplace if a DBS system were added to its holdings."[71] We rejected this argument, concluding that concerns over potential anticompetitive behavior by TCI and its subsidiary were not sufficient to justify a bar on their entry into DBS.[72] Instead, we placed several conditions on the permit we issued with the aim of increasing the incentives for Tempo Satellite to provide competitive DBS services in areas served by TCI-affiliated systems.[73]

39. We propose to maintain the balance struck in Tempo II. We do believe, however, that developments in the market for the delivery of video programming require us to consider further the extent to which affiliation of MVPDs with DBS operators may affect the development of competition. In particular, it now appears possible that entities affiliated with a single MVPD (and hence, with each other) could seek to control or use DBS channel assignments at more than one of the locations capable of full-CONUS transmission. This increased level of concentration could magnify the potential that competition would be adversely affected. Accordingly, we propose to place limits on the control or use of DBS channel assignments by entities affiliated with non-DBS MVPDs.

40. Of the eight orbital locations that have been allocated to the United States for DBS service, only the four eastern locations -- with a total of 128 channels -- are capable of full-CONUS service.[74] We propose that any DBS licensee or operator affiliated with another MVPD be permitted to control or use DBS channel assignments at only one of the orbital locations capable of full-CONUS transmission. This limitation would ensure that no non-DBS MVPD could control or use more than one-quarter of the DBS resources capable of full-CONUS service. It would, however, permit a DBS licensee or operator affiliated with a cable operator or other MVPD to fully develop a competitive service, which is consistent with our determination in Tempo II. We are unaware of any existing DBS permittee having channel assignments that conflict with the proposed limitation. In addition, this limitation does not prevent any permittee from aggregating all of the channels available at any single orbital position. It is clear that a viable service is possible using all channels available at a single

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71 Continental, 4 FCC Rcd at 6298.

72 Id. at 6299.

73 In granting Tempo Satellite's application to become a DBS permittee, we imposed two conditions that required, *inter alia*, that Tempo Satellite not offer its DBS service primarily as an ancillary service to the services of affiliated cable systems, or provide its DBS service to subscribers of those systems under different terms than were being offered to non-subscribers. Tempo II, 7 FCC Rcd at 2731.

74 See ¶ 44, *infra*.

full-CONUS location. The two existing DBS operators are each experiencing rapid growth of their DBS service subscriber base, operating DBS systems that offer non-duplicative programming using all of the channels at the 101° orbital location. We seek comment on the proposed aggregation limitation and its basis. We also ask whether, given our tentative economic analysis, our proposed spectrum limitation should differentiate between cable operators and other MVPDs, whether a more stringent limitation should be placed on cable operators seeking to acquire DBS licenses or to operate a DBS service, and whether such a limitation should be related to the size of the MVPD involved.

41. *Competition Among DBS Operators.* We are also concerned about concentration among DBS operators. The United States has been allocated a total of only 256 channels at eight orbital locations from which to provide domestic DBS service. Given the relative scarcity of these resources, excessive channel accumulation by one or more DBS operators would necessarily limit the resources available for their DBS competitors. Such concentration could have a deleterious effect on intra-DBS competition by limiting the number and viability of additional operators. At the same time, however, we recognize that concentration at some level may be necessary to allow the coordinated use of sufficient channels for a robust DBS system.

42. Accordingly, in order to strike a proper balance between the benefits and concerns associated with increased concentration among DBS operators, we propose to limit the aggregation of DBS channel assignments to a total of 32 at any combination of the orbital locations capable of full-CONUS service. We have chosen to set the limit at 32 so as to allow any permittee to aggregate all of the channels available at any single orbital position -- which, as discussed above, has proven adequate for a robust DBS service. We note that none of the existing DBS permittees has channel assignments that conflict with the proposed limitation.[75] We seek comment on the proposed aggregation limitation. We also seek comment on whether we should impose a limitation on an operator owning a significant number of channels at each of multiple full-CONUS orbital locations -- *e.g.*, prohibiting a DBS permittee or licensee holding more than 16 channels at one full-CONUS orbital location from holding channels at any other full-CONUS location. In particular, would there be opportunities to reduce competition through operations at multiple locations?

43. Any permittee or licensee that acquires control over channels in excess of these proposed spectrum limitations would be given ninety (90) days from the date of Commission approval of such acquisition in which to (1) surrender to the Commission its excess channels, or (2) file with the Commission a transfer or assignment application in order to divest sufficient channels to bring the applicant into compliance with all applicable spectrum caps. This ninety-day divestiture period is consistent with the divestiture period established in other

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[75] The following permittees have the number of channels indicated assigned at one or more of the four full-CONUS orbital locations: DIRECTV (27), EchoStar/Directsat (22), Tempo Satellite (11), DBSC (11), Continental (11), USSB (8), and Dominion (8).

services.[76] We seek comment on this proposal, including whether the amount of time allowed for divestiture of excess channels is sufficient.

44. *Scope of the Limitations on Control or Use of DBS Spectrum.* We are aware of no serious dispute as to the full-CONUS capabilities of the channels located at the 101°, 110°, and 119° orbital locations.[77] For purposes of the spectrum limitation, we propose to include the 61.5° orbital location as being capable of full-CONUS service. Satellites operating from that location can also achieve full-CONUS coverage, although customers on the edges of their transmission area might have to use larger receiving dishes to receive the signal.[78] We believe that applying the spectrum cap to these four locations will ensure that there is sufficient channel capacity for a minimum of four full-CONUS DBS providers.[79]

45. It seems that safeguards necessary to ensure competitive access to full-CONUS channels may not be appropriate for non-full-CONUS channels at the four western orbital locations. DBS systems operating at those locations -- which cannot provide service to some or all of the major population centers on the East Coast -- probably cannot match the economies of scale in domestic service achieved by full-CONUS operators such as USSB and DIRECTV. Accordingly, we propose to exempt channels at those locations from the spectrum limitation rule. We recognize that this proposal represents a limited departure from our longstanding position that channels at all eight DBS orbital locations are generally considered to be of equal value,[80] in the sense that the rule proposes to afford disparate treatment to eastern as opposed to western orbital locations solely for the purpose of these spectrum aggregation limitations. We believe that the proven feasibility of full-CONUS service from eastern locations justifies this limited exception to the general presumption of equality.

46. In order to maintain the integrity of the channel aggregation limits, it may be necessary to count against the spectrum limitations all channels held by DBS operators that share some level of common ownership or control. Otherwise, a single entity or a group of

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[76] See 47 C.F.R. §§ 20.6(e), 24.204(f), and 24.833.

[77] See, e.g., Continental, 4 FCC Rcd at 6293 ("Given the transmission and reception technology available [in 1989] and in the foreseeable future, three of the domestic DBS locations, 101°W, 110°W, and 119°W, are suitable for delivering DBS service to any part of the continental United States").

[78] See, e.g., technical documentation submitted on October 2, 1995, by Intraspace Construction on behalf of Continental Satellite Corporation, pursuant to order in Continental Satellite Corp., DA 95-1978 (Sept. 15, 1995)(describing and supporting full-CONUS service from the 61.5° orbital location).

[79] Assuming that DBS operators would break even with three million subscribers each, estimates for future DBS subscribership suggests that the MVPD market could support from one to seven DBS services. *Between the Lines: DBS Disagreements Emerge*, Cablevision, Nov. 14, 1994 at 6.

[80] See, e.g., 47 C.F.R. § 100.13(b)("The Commission shall generally consider all frequencies and orbital positions to be of equal value"); Continental, 4 FCC Rcd at 6294 (reaffirming policy).

entities operating in concert could hold an interest in a number of permittees, and thereby control, or have the power to control, the operations of any number of DBS providers. Such a possibility presents a threat to the competition we seek to encourage in the DBS service.

47. Because of our concerns that entities could engage in anticompetitive conduct not only through control of DBS channels, but also through use of such channels, we believe it appropriate to apply spectrum limits not only on DBS permittees and licensees, but also to DBS operators. Accordingly, we propose to define a DBS operator as any person or group of persons who provides services using DBS channels and directly or through one or more affiliates owns an attributable interest in such satellite system; or who otherwise controls or is responsible for, through any arrangement, the management and operation of such a satellite system.

48. For purposes of implementing the spectrum limits, we propose to attribute both controlling interests and any interest of five percent or more. As in the context of the Commission's rules in other communications services, including other video distribution services, "control" means not only majority equity ownership, but includes any general partnership interest, or any means of actual working control over the operation of the licensee, in whatever manner exercised. We propose to rely on existing case law for making control determinations where such issues arise.[81] The five percent attribution threshold for purposes of the spectrum limitations is also consistent with the ownership threshold we apply to other licensees.[82] More specifically, we propose to adopt rules that attribute to the holder any interest of five percent or more, whether voting or nonvoting, and all partnership interests, whether general or limited. In addition, we propose to adopt attribution rules that (1) attribute any interest of ten percent or more held by an institutional investor or investment company, rather than a five percent interest; (2) employ a multiplier for determining attribution of interests held through intervening entities; (3) provide for attribution of interests held in trust; (4) attribute the positional interests of officers and directors; (5) attribute limited partner interests based not only upon equity but also upon percentages of distributions of profits and losses; and (6) provide for attribution based upon certain management agreements and joint marketing agreements. We seek comment on whether other positional interests should be deemed cognizable interests for purposes of application of the spectrum limitations. Consistent with other Commission attribution rules, we do not propose at this time to attribute debt or unexercised convertible interests or insulated limited partnership interests to their holders. We seek comment on these proposals.

81/ See e.g., WWIZ, Inc., 36 F.C.C. 561 (1964), aff'd sub nom. Lorain Journal Co. v. FCC, 351 F. 2d 824 (D.C. Cir., 1965), cert. denied, 383 U.S. 967 (1966).

82/ See, e.g., Review of the Commission's Regulations Governing Attribution of Broadcast Interests, FCC 94-324 (released, Jan. 12, 1995); Amendment of the Commission's Rules to Establish New Personal Communications Services, 9 FCC Rcd 4957 (1994); Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities, 97 F.C.C. 2d 997 (1984), recon. granted in part, 58 R.R.2d 604 (1985), clarification, 1 FCC Rcd 802 (1986).

49. With respect to what constitutes an affiliate for purposes of the spectrum limitations rules, we propose to identify any individual or entity as an affiliate of a licensee, permittee or operator, or of a person holding an attributable interest in a licensee, permittee or operator, if such individual or entity: (i) directly or indirectly controls or has the power to control the licensee, permittee or operator; or (ii) is directly or indirectly controlled by the licensee, permittee or operator; or (iii) is directly or indirectly controlled by a third party or parties that also has the power to control the licensee, permittee or operator. We seek comment on whether the definition of an affiliate should also include individuals or entities that have an identity of interest with the licensee, permittee or operator, as that concept is currently defined in the broadband PCS competitive bidding rules.[83/]

50. Again, we note that -- to our knowledge -- none of the affiliations among current DBS permittees runs afoul of the proposed limitation even under this attribution rule. We request comments on these proposals for implementing spectrum aggregation limitations, on the propriety of attribution for purposes of applying those limitations, and on the level at which such attribution should be made for this purpose.

51. In order to further its goals of promoting competition and "encourag[ing] the larger and more effective use of radio in the public interest,"[84/] the Commission is continually examining alternatives that could expand the resources available for commercial usage.[85/] Consistent with that ongoing analysis, the Commission has been assessing the potential for expanding opportunities for entry by additional players into the DBS market. The BSS Plan currently allocates channels at only eight orbital locations for use for DBS service to the United States. The BSS Plan, however, contains a modification procedure that permits other systems to be added at other orbital positions upon a showing that the proposed satellite meets specified technical requirements. These requirements are designed to ensure that the new operations would not affect other United States BSS operators or the BSS systems of other countries.

52. The staff's preliminary assessment indicates that, under the BSS Plan's modification procedures, it may be possible to accommodate additional DBS satellites to serve the United States at orbital locations other than the eight currently specified in the BSS Plan. If so, we intend to apply to the ITU to have the BSS Plan modified to secure an allocation to the United States of these additional DBS resources. The ITU modification

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83/ See 47 C.F.R. § 24.720(l).

84/ See 47 U.S.C. § 303(g).

85/ See Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, 7 FCC Rcd 6886, 6886-89 (1992)(increased development of new electronic devices and applications necessitates spectrum redevelopment for emerging technologies); Petition for Rulemaking to Amend Television Table of Assignments to Add New VHF Stations in the Top 100 Markets, 63 F.C.C.2d 840, 860 (1977)(addition of "drop-in" channels to existing television allocation plan allows greater efficiency and intensity of spectrum use).

process can be expected to take at least a year, and possibly much longer, before any proposed DBS orbital locations are added to the BSS Plan and receive all of the concomitant protections from interference. In addition, the DBS industry and the Commission would have to develop sharing criteria for these new locations *vis-a-vis* existing DBS operators.[86]

53. At this point, there are only eight orbital locations available for DBS service to the United States. Thus, our proposed rules are designed to serve the public interest under that scenario. The spectrum cap we propose today may have to be reconsidered should the BSS Plan ultimately be modified to include additional DBS orbital locations. We do not, however, intend to fashion rules for some speculative future state of affairs. Nor do we intend to allow the potential for additional international allocations of DBS resources to delay reassignment of the DBS channels now available at the 110° and 148° orbital locations. Any channels that become available at additional orbital locations could be included in a future proceeding, avoiding any unnecessary delays in DBS service to the public from orbital locations already allocated for service to the United States.

2. Conduct Rules to Protect Competition

54. The foregoing proposed service rules are *structural* solutions designed to promote competition by preventing the potential for undue concentration in the market for the distribution of multichannel video programming and the potential for excessive concentration among DBS operators. At this time we also wish to consider *conduct* limitations on the use of the DBS channels and orbital locations to encourage, to the maximum extent possible, rivalry among MVPDs.

55. *Marketing Limitations.* In addition to the spectrum caps discussed above, we propose that an additional condition be applied to other DBS operators that are affiliated with non-DBS MVPDs. In particular, we are concerned that a DBS operator that is affiliated with a non-DBS MVPD might seek to maximize its joint profits in areas served by the affiliated MVPD by offering the DBS services as an adjunct to the services offered by that MVPD. This concern would be particularly appropriate were the DBS operator to enter into an arrangement whereby the non-DBS MVPD would be the exclusive distributor of the DBS services within its service area. Accordingly, to ensure that the fullest use is made of the available channels to provide DBS services that compete with incumbent MVPDs, we first propose that the conditions imposed on TCI and its affiliates in Tempo II be extended to apply to all DBS operators that are affiliated with non-DBS MVPDs.[87]

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86. Other aspects of DBS service may be affected if new orbital locations, spaced more closely to existing orbital locations, are added to the BSS Plan, including limitations on the size and pointing accuracy of DBS receiving dishes.

87. See footnote 73, *supra.*

56. In addition, we propose that no DBS operator shall sell, lease, or otherwise provide transponder capacity to any entity that enters into an arrangement with an MVPD granting that MVPD the exclusive right to distribute DBS services within, or adjacent to, its service area. We also propose that no DBS operator shall enter into any such agreement with an entity that engages in conduct that is tantamount to granting that operator such exclusive distribution rights. These provisions, like the license condition imposed on Tempo Satellite and extended above, should serve to increase the opportunity for DBS services to be offered to consumers in competition with the video programming services offered by other MVPDs, in particular, in the service areas of MVPDs affiliated with DBS operators or that receive wholesale DBS service. We request comments on these proposed rules.

57. *Access to Programming.* Opponents of the proposed assignment of ACC's construction permit to Tempo DBS in the Advanced Order proceeding raised the concern that Primestar and/or Tempo DBS might seek to gain a competitive advantage over other DBS operators by using various vertical foreclosure strategies to limit access to or raise the price of programming.[88] Such strategies would potentially involve: (1) the actual control that Primestar's constituent partners have over the distribution of programming in which they have ownership interests (*i.e.*, vertical integration); and (2) the ability of the Primestar partners to extract concessions from unaffiliated programmers by virtue of the fact that these partners are affiliated with cable systems that serve a total of approximately 60 percent of the cable subscribers nationwide. We seek comment on whether these types of concerns should lead the Commission to impose service rules on DBS licensees designed to ensure that competing providers are not denied access to programming.

58. In providing comment on this issue, we ask commenters to take note of the program access and program carriage provisions of the 1992 Cable Act, which were enacted in order to promote entry into local distribution markets through limits on strategic vertical restraints between vertically-integrated cable operators and programmers. This congressional policy is embodied in Section 628 of the Communications Act.[89] These provisions place limitations on the conduct of MVPDs and vertically integrated firms distributing satellite programming, so as to foster competitive entry by competing distribution technologies. In general, the rules prohibit unfair methods of competition and limit discriminatory conduct, including the use of exclusive contracts.[90] In addition, under the program carriage provision of the Communications Act[91] and the Commission's program carriage rules,[92] competing

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88 See, e.g., Oppositions filed by DIRECTV (Opp. at 7-9) and EchoStar (Opp. at 40-42) in the ACC Proceeding.

89 See 47 U.S.C. § 548. The Commission's implementation of this policy is embodied in its program access rules. See 47 C.F.R. § 76.1000(b).

90 47 U.S.C. § 548.

91 47 U.S.C. § 536.

distributors have standing to challenge refusals to deal and other arrangements which are the result of coercive activity.

59. In enacting these statutory provisions, Congress expressed its concern that potential competitors to incumbent cable operators often face unfair obstacles in attempting to gain access to the programming they need in order to provide a viable and competitive multichannel alternative to the public. Specifically, Congress was concerned with expanding the availability of programming and eliminating unjustified discrimination in the price charged to non-cable technologies. Congress found that vertically-integrated program suppliers have the incentive and ability to favor their affiliated cable operators over other MVPDs.[93] Thus, Congress sought through these provisions to break the "stranglehold" over programming created by vertical relationships in the cable industry, in the hope that this would lead to a more balanced competitive environment in the multichannel video programming marketplace.[94] Direct broadcast satellites were among the technologies that are to be fostered through the program access provisions of the 1992 Cable Act.[95] On the other hand, Congress also recognized that exclusive programming contracts and cost-justified differences in prices can enhance competition among MVPDs and sought to ensure that such pro-competitive programming arrangements were not unduly circumscribed by the rules it directed the Commission to develop.

60. We have previously addressed the application of the exclusivity provisions of the program access rules to exclusive contracts between a DBS operator that did not own the programming involved and that itself was not affiliated with a cable operator.[96] However, we have never had occasion to consider the vertical foreclosure issues presented by common

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[92] 47 C.F.R. §§ 76.1300-.1302.

[93] 1992 Cable Act § 2(a)(5), P.L. 102-385, § 2(a)(5), 106 Stat. 1460 (Oct. 2, 1992).

[94] See 138 Cong. Rec. H6540 (daily ed. July 23, 1992) (statement of Rep. Eckart in support of the Tauzin amendment).

[95] H.R. Rep. No. 628, 102d Cong., 1st Sess. at 165-66 (additional views of Messrs. Tauzin, Harris, Cooper, Synar, Eckart, Bruce, Slattery, Boucher, Hall, Holloway, Upton and Hastert).

[96] In December 1994, the Commission released an Order on reconsideration of the *First Report and Order* in the program access docket, denying a petition to include exclusive contracts between USSB and vertically-integrated MVPDs within the *per se* prohibition of Section 628(c)(2)(C). See Implementation of the Cable Television Consumer Protection and Competition Act of 1992, 10 FCC Rcd 3105 (1994). On the basis of the findings and the legislative history of the 1992 Cable Act, which was focused on concerns over exclusive arrangements of cable operators, as well as the language of the provision, and the fact that the exclusivity arrangements were limited to a single orbital slot, the Commission denied the petition. Id. at 3121-27. The Commission, however, noted that in declining to broaden its rules, it did not preclude the petitioner or any other aggrieved party from seeking relief from such contracts through other appropriate provisions of the 1992 Cable Act.

ownership among DBS operators, other MVPDs, and program vendors. Specifically, we believe that it is critical for competition to ensure that a DBS operator affiliated with another MVPD, program supplier, or both, does not use exclusive contracts with vertically-integrated programming services or other discriminatory conduct to disadvantage its competitors in the provision of retail DBS service, or coerce unaffiliated programmers to deal with that operator on discriminatory terms and conditions. Accordingly, we seek comment whether the existing program access and program carriage rules described above adequately address these concerns.

61. We have not previously addressed the vertical foreclosure issues presented by the proposed wholesale use of DBS resources to provide digital programming directly to cable operators and other MVPDs. The wholesale provision of digitized programming through a DBS-like service such as TCI's planned "Headend in the Sky" ("HITS") service offers the potential for substantially increased efficiency in the operation of cable, MMDS, and SMATV systems.[97] Among the likely sources of such efficiencies are reduced costs associated with smaller headend facilities and cooperation in the expensive process of digitally-encoding programming, which should allow MVPDs to offer a substantially increased range of programming to subscribers. Consumers would likely benefit from the realization of these efficiencies. It appears likely that it will be efficient to provide wholesale services with the same facilities that are being used to provide retail DBS services to subscribers because it appears that the average cost of using those facilities may decline as greater numbers of subscribers are served. Such increased efficiency would provide a DBS operator with an important cost advantage over competing DBS systems if its facilities were used to provide HITS service, and if programmers (even if only those with which it is affiliated) withheld permission for DBS competitors to do the same.

62. Because of the magnitude of the potential harm from vertical foreclosure for the wholesale distribution of programming, we believe that it is in the public interest for us to ensure that DBS channels and orbital locations are not used by any entity in a manner that inhibits progress toward a competitive market for the delivery of video programming. Accordingly, we seek comment concerning an appropriate mechanism for ensuring that the wholesale distribution of HITS service does not become a vehicle for diminished competition among DBS providers. In particular, we seek comment on the extent to which the existing program access and program carriage rules apply to wholesale DBS service. In addition, we seek comments on whether we should adopt rules that require wholesale DBS services provided to cable operators using DBS licenses be provided to competing MVPDs on nondiscriminatory terms and conditions.

63. *Other Concerns.* We also note that in the proceeding that led to the Advanced Order, commenters raised a number of other concerns about potential strategic conduct that could arise from cable-affiliated ownership of full-CONUS DBS spectrum. Those

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97. Others have also indicated their interest in providing wholesale DBS service. See, e.g., EchoStar and Directsat's Consolidated Opposition at 41, filed in the ACC Proceeding.

commenters argued that cable-affiliated ownership of full-CONUS DBS spectrum should be prohibited, or in the alternative, that several remedial conditions be imposed.[98] We seek comment here on the extent to which those and related concerns are implicated by the proposed auction of DBS spectrum, and if so, whether additional DBS service rules might be appropriate to address the concerns.

3. East/West Paired Assignments

64. In Continental, the Commission determined that DBS channels would be assigned only in east/west pairs, with eastern half-CONUS service permitted only from the four eastern orbital locations and western half-CONUS service permitted only from the four western orbital locations.[99] This policy was based primarily upon the desire to ensure that all DBS spectrum resources be used as intensely as possible, since use of channels at eastern orbital locations for both eastern and western half-CONUS service could result in underutilization of channels at the western orbital locations.[100] In addition, the feasibility of full-CONUS service had not yet been demonstrated, strengthening the concern that underutilization of DBS resources could result in reduced service to the American public.[101]

65. We believe that progress in the DBS service since Continental was issued has rendered this policy unnecessary. Full-CONUS service has been proven to be a viable and highly profitable commodity, and when combined with the spectrum cap proposed above ensures that a minimum of four DBS providers will be able to provide service to the entire United States. Moreover, with digital compression, these full-CONUS channels can provide many times the number of programs possible in 1989. With sufficient service and competition thus ensured, there may no longer be a public policy rationale for requiring that DBS permittees continue to hold, transfer, or assign their channels in east/west pairs. While permittees would free to continue to respect the paired assignments, there does not appear to be any reason why the Commission should mandate such a practice -- especially if the western orbital locations can be used for innovative or niche services to the western United States, or perhaps eventually for international services to the Pacific Rim nations.[102] New entrants to the service, as well as existing permittees, would be free to assess for themselves the viability of service from non-paired channels and conduct themselves accordingly.

98/ See, e.g., Letter from Philip L. Malet to Scott Blake Harris (dated July 13, 1995) and Letter from Gary M. Epstein to Scott Blake Harris (dated July 14, 1995) filed in the ACC Proceeding.

99/ Continental, 4 FCC Rcd at 6292.

100/ Id. at 6293.

101/ Id. at 6293-94.

102/ See ¶ 24, *supra*.

66. We recognize that some permittees were forced to reconfigure their channel assignments based on the east/west pairing policy.[103] However, by the end of this year, all existing permittees will have received their paired assignments,[104] completing the process we began in Continental. From that point forward, we propose to promote greater flexibility in the service by no longer requiring that permittees maintain east/west pairings of channel assignments. We seek comment on this proposed change in current policy.

D. Service to Alaska and Hawaii

67. In 1991, prior to the initiation of DBS service by any permittee, the Commission found that it would be premature to impose specific requirements for service from western DBS orbital locations to states outside the contiguous United States.[105] The Commission stated that industry plans were insufficiently clear to permit us to determine whether there is a need to mandate specific service requirements for those areas, and opined that such requirements could foreclose future developments in the provision of DBS service.[106] However, the Commission emphasized its commitment to ensuring that DBS service is truly nationwide, and promised that it "would not hesitate to revisit this issue" should it appear, as DBS develops, that Alaska and Hawaii will not be adequately served.[107] In this connection, we note that the State of Hawaii has recently urged the Commission to require service to Hawaii.[108]

68. The two DBS services currently in operation serve only the contiguous United States.[109] Of the permittees in a position to launch a satellite in within the next two years, only Tempo Satellite has requested modification of its permit to construct a satellite with the

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103/ See, e.g., Continental, 4 FCC Rcd at 6294.

104/ Dominion must file technical information to support its request for channels at the 166° orbital location by December 4, 1995. See Dominion Video Satellite, Inc., DA 95-1978 (Sept. 15, 1995). Once the staff has processed Dominion's due diligence showing, it will be able to process EchoStar's showing with respect to its western orbital location -- the final pending request for channel assignments.

105/ Potential Uses of DBS, 6 FCC Rcd at 2582-83.

106/ Id.

107/ Id. at 2583.

108/ Comments of the State of Hawaii, pp. 1-3, filed in CS Docket No. 95-61 on July 28, 1995.

109/ It has recently been reported that customers in Alaska are able to receive DIRECTV's transmissions using receiving dishes ranging from about 4 to 8 feet in diameter, depending on the location. See *Communications Daily* (Oct. 17, 1995).

configuration necessary to serve Alaska and Hawaii from its eastern satellite.[110] But Tempo has recently indicated that it might not launch its satellite for service from the 119° orbital location.[111] Neither EchoStar nor Directsat has configured the satellites they intend to launch over the next year to serve Alaska or Hawaii, although they do propose such service from their western orbital locations at some time in the future.[112] Unfortunately, semi-annual reports filed by DBS permittees indicate that none have begun construction on satellites to be launched to their western orbital positions. Thus, it is unclear whether any permittee will provide service to these states in the near future.

69. In view of the maturation of the DBS industry and the lack of certainty that DBS service will be provided outside the contiguous United States in the near future, we believe it is now appropriate to revisit our earlier decision to forego requirements that DBS operators provide service to Alaska and Hawaii. As we consider allowing new competitors to enter the DBS service and existing permittees complete their systems, it is important that service to these geographic areas be included in any future plans for DBS service. Such requirements have long been imposed on other domestic satellite operators.[113] It appears that similar requirements may be necessary for DBS operators to achieve our goal of truly nationwide DBS service.

70. We propose to require that new permittees provide service to Alaska and Hawaii where such service is technically feasible from the assigned orbital location.[114] We further propose to condition the retention of channels assigned to current permittees at western orbital locations on provision of such service. An existing DBS permittee could satisfy this requirement in either of two ways. First, it could begin DBS operations serving these areas from its western orbital locations. Alternatively, it could design and initiate operations from satellites capable of serving these areas from its eastern orbital location. If it does neither, it would lose its channel assignments at the western orbital location so that those

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[110] See Application for Modification, DBS-93-02MP (July 26, 1993); Public Notice, Report No. DBS/PN 93-03, Mimeo No. 34211.

[111] See footnote 18, *supra*.

[112] EchoStar/Directsat Consolidated Response to Oppositions to Requests for Extension, DBS File Nos. 129-SAT-EXT-95 and 131-SAT-EXT-95 (filed Aug. 25, 1995).

[113] 47 C.F.R. § 25.114(c)(15).

[114] As noted in footnote 109, *supra*, DIRECTV has subscribers in the Alaska, which DIRECTV serves from its satellites at the 101° orbital location. Tempo Satellite has submitted technical materials in support of its proposal to modify its construction permit to configure its satellite for service to both Alaska and Hawaii from the 119° orbital location, and it proposed to provide the same service using ACC's channels at 110°. See footnote 110, *supra*.

DBS resources can be reassigned to someone willing to make fuller use of them by providing service to areas currently under- or unserved by DBS. We seek comment on this proposal.[115]

E. License Term

71. Our interim rules provide for five year license terms for DBS systems.[116] The Communications Act of 1934, as amended, provides for a maximum term of 10 years for non-broadcast radio licenses.[117] Space stations in the fixed satellite service have a license term of ten years.[118] Technological evolution has resulted in the development of DBS satellites that may have useful lives in excess of ten years.[119] We therefore propose to extend the license term for non-broadcast DBS satellites from five years to ten years for all licenses issued after final adoption of the proposed rule. Licenses for broadcast use of DBS resources will continue to be limited to five years.[120] We believe that a longer license term will encourage investment and innovation in the DBS service by ensuring a longer time horizon in which to execute a business plan. We seek comment on this proposal.

VI. PROPOSED AUCTIONING OF DBS PERMITS

72. In the Second Report and Order in our Competitive Bidding proceeding, we identified a number of services that henceforth would be subject to competitive bidding,[121] but we deferred consideration of whether DBS licenses should be auctionable "until the nature

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115/ See 900 MHz Second R&O, 10 FCC Rcd at 6906 (loading requirements for incumbent users) The Commission stated that incumbents who do not take advantage of the capacity made available to them should not be entitled to retain spectrum that it has not used for the term of its license, and that such policies will prevent spectrum warehousing.

116/ See 47 C.F.R. § 100.17.

117/ 47 U.S.C. § 307(c). The Communications Act limits television broadcast licenses to a maximum of five years and radio broadcast licenses to a maximum of seven years; all other classes of station are limited to a maximum of ten years. Id. A DBS provider offering a subscription service is not considered to be a broadcast licensee. See Subscription Video, 1 FCC Rcd 1001, 1005-06 (1987).

118/ 47 C.F.R. § 25.120(a).

119/ Technical specifications for DIRECTV's third satellite indicate that it is expected to have a useful life of eighteen years. See, e.g., Letter from Hughes Communications Galaxy, Inc. to William F. Caton, Secretary (dated May 22, 1995) (includes technical specifications for transmissions over an eighteen year period).

120/ 47 U.S.C. § 307(c).

121/ Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348 (1994)("Second R&O"). See also 47 C.F.R. § 1.2102.

of that service becomes clearer."[122] We now believe that the nature of DBS service has become sufficiently clear for us to resolve this question. Two DBS providers -- DIRECTV and USSB -- have commenced providing service to subscribers, and at least two permittees -- EchoStar and Directsat -- are planning to initiate service in the near future. Moreover, other entities such as MCI Telecommunications Corporation ("MCI") and certain regional Bell Operating Companies ("RBOCs") have expressed interest in providing DBS service.[123] Thus, we believe that adequate information is available regarding the nature of both existing and planned operations to determine the auctionability of DBS.

A. Authority to Conduct Auctions

73. The first issue we address is whether the Commission has the authority to use auctions as a means of awarding DBS construction permits, as well as whether auctions in this service would be consistent with statutory objectives. The Commission is authorized by Section 309(j) of the Communications Act to employ auctions to choose among mutually exclusive applications for initial licenses or construction permits.[124] Under Section 309(j), in order to employ auctions for a particular service, the Commission must determine that "the principal use of [the] spectrum will involve, or is reasonably likely to involve, the licensee receiving compensation from subscribers."[125] To employ auctions, the Commission also must find that the use of competitive bidding will promote certain statutory objectives.[126] These objectives are:

> (A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;
>
> (B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide

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122 Second R&O, 9 FCC Rcd at 2352 n.11.

123 Indeed, MCI has announced its intention to bid on the spectrum reclaimed from ACC at 110° if the Commission adopts competitive bidding rules for DBS. MCI has further stated that it would make an opening bid of $175 million for this spectrum. See Letter from Gerald H. Taylor, President of MCI, to Hon. Reed E. Hundt (dated Oct. 10, 1995). Five RBOCs (Ameritech, Bell Atlantic, Bell South, Nynex and Southwestern Bell) have applied for waivers of the Modified Final Judgment, United States v. American Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983), to allow them to enter the DBS business. *Communications Daily* (Oct. 3, 1995).

124 47 U.S.C. § 309(j)(1).

125 47 U.S.C. § 309(j)(2)(A).

126 47 U.S.C. § 309(j)(2)(B).

variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;

(C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource: and

(D) efficient and intensive use of the electromagnetic spectrum.[127]

74. In considering whether the criteria of Section 309(j) are met, we first examine whether the DBS construction permits to be issued for the spectrum reclaimed from ACC -- or for spectrum that may be reclaimed in the future -- are "initial" within the meaning of the statute. We think it is clear that they are. ACC's construction permit has been cancelled, and any construction permit awarded to another party for the subject spectrum will be a newly issued permit. Moreover, if we look to the legislative history of Section 309(j) for guidance as to what Congress intended by specifying that auctionable licenses must be "initial," we find that Congress wished only to preclude the use of competitive bidding for license renewals and modifications.[128] In our view, there is nothing in the language of Section 309(j) itself or its legislative history that would suggest that Congress intended to prohibit the auctioning of new licenses or construction permits for reclaimed spectrum. Thus, we tentatively conclude that the construction permits available for the spectrum reclaimed from ACC, as well as any construction permits or licenses that may become available for reclaimed DBS spectrum in the future, should be deemed initial within the meaning of Section 309(j).

75. With respect to the requirement of mutual exclusivity, we believe that it is highly likely that mutual exclusivity will exist among applications for the spectrum reclaimed from ACC. More than one entity has expressed interest in the spectrum currently available at 110°.[129] Moreover, given the relative scarcity of DBS channels generally -- with only 32 channels at each of eight orbital locations -- we believe that there will likely be more overall demand for channels in the future than can be satisfied by the channels that become available for application. We therefore anticipate that in most cases in which DBS spectrum becomes available, we will receive mutually exclusive applications. Moreover, as we have indicated previously, we believe that it is appropriate to schedule an auction in cases where mutual exclusivity is likely to exist. If it then turns out that only one application is filed for a particular construction permit, we will cancel the auction and process that application.[130] We

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127. 47 U.S.C. § 309(j)(3)(A)-(D).

128. H.R. Rep. No. 111, 103d Cong., 1st Sess., at 253 (1993).

129. MCI's interest in this spectrum has already been mentioned. See footnote 123, *supra*. TCI's interest in this spectrum is evidenced by its purchase agreements with ACC. See Advanced Order at ¶ 40 & n.79.

130. See Second R&O, 9 FCC Rcd at 2376.

further note that, pursuant to Section 309(j)(6)(E),[131] we have sought means of avoiding mutual exclusivity in the DBS service that would be consistent with the objectives of the statute, and we tentatively conclude that there are no means of doing so. We recognize that, for various technical or economic reasons, an application seeking channels at a particular orbital location may not conflict with an application for channels at a different location, especially one offering significantly different geographic coverage. However, the channels at a given orbital location are for the most part interchangeable. In light of these circumstances, we are inclined to consider mutual exclusivity to occur only when the number of DBS channels sought at a given orbital location exceeds the number available there. We request comment on these tentative conclusions, and we ask in particular that interested parties suggest possible alternative criteria for identifying mutually exclusive applications for DBS channels.

76. We turn next to the question of whether the principal use of DBS spectrum is reasonably likely to involve the licensee receiving compensation from subscribers. As we have stated previously, auctions are authorized if at least a majority of the use of the spectrum is likely to be for subscription-based services.[132] We look to classes of licenses and permits rather than individual licenses.[133] As noted above, two DBS licensees have already begun providing service to the public, and both operate on a subscription basis. Moreover, all other permittees planning to launch satellites and initiate service in the near future also plan to offer subscription-based service. For example, Echostar proposes to offer 65 channels of digital video programming, audio programming, and data service to subscribers.[134] Directsat similarly plans to offer 60 channels of video programming, audio programming, and data service to subscribers.[135] In light of these circumstances, we tentatively conclude that DBS is likely to be primarily, if not entirely, a subscription-based service in the foreseeable future, and that the principal use requirement of Section 309(j)(2) is satisfied.

77. We also tentatively conclude that using competitive bidding as a means of awarding construction permits for DBS spectrum that has become available or becomes available in the future will promote the objectives of Section 309(j)(3). More than any other method of awarding construction permits, auctions are likely to foster the rapid deployment of new technologies and products by putting spectrum in the hands of those who value it most highly. It is also our view that, by promoting the rapid deployment of DBS, auctions will

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131. 47 U.S.C. § 309(j)(6)(E).

132. Second R&O, 9 FCC Rcd at 2354.

133. Id.

134. See EchoStar Satellite Corporation, Request for Additional Time to Construct and Launch a Direct Broadcast Satellite System, File No. 131-SAT-EXT-95 (filed July 26, 1995), at 8-9.

135. See Directsat Corporation, Request for Additional Time to Construct and Launch a Direct Broadcast Satellite System, File No. 130-SAT-EXT-95 (filed July 28, 1995), at 7-9.

serve Congress' goal of bringing new services to rural areas where homes may not be passed by cable television. Because DBS does not require the infrastructure that cable does, it offers video services to sparsely populated or remote locations. It also offers service in competition with cable in areas where both cable and DBS are available, thus furthering Congress' objective of promoting competition. In addition, unlike the reassignment policy set forth in Continental,[136] auctions will result in recovering for the public a portion of the value of DBS spectrum. Finally, the rapid award of DBS licenses by auction will promote efficient use of DBS spectrum.[137]

B. Competitive Bidding Design

78. Having tentatively concluded that DBS construction permits should henceforth be subject to competitive bidding, we propose below an auction design for this service. In the Second R&O, we indicated that we would tailor the design of each auction to fit the characteristics of the authorizations to be awarded,[138] and we established criteria for selecting the auction design most appropriate for each particular service. In general, we indicated that the auction procedures chosen for each service should be those that will best promote the policy objectives identified by Congress in Section 309(j). We further concluded in the Second R&O that in most cases these goals will best be achieved by designing auctions that award authorizations to the parties that value them most highly. As we explained, such parties are most likely to deploy new technologies and services rapidly, and to promote the development of competition for the provision of those and other services.[139] In addition, we indicated in the Second R&O that, to best meet our goals, it would be important in designing auctions to (1) take into account any value interdependency among licenses to be auctioned, so that licenses can be aggregated efficiently; (2) award licenses to the appropriate parties rapidly, so that consumers will benefit from the competition brought about by new suppliers as soon as possible; and (3) avoid bidding procedures that are overly complex and costly in relation to the task to be accomplished.[140]

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136 See ¶ 7, *supra*.

137 In the Advanced Order, we set out a timetable for expeditiously reassigning ACC's DBS channels. See Advanced Order at ¶ 3.

138 Second R&O, 9 FCC Rcd at 2367.

139 Id. at 2360.

140 See id. at 2361.

79. We propose to auction two permits for the construction of satellites to use the DBS channels currently available at the 110° and 148° orbital locations.[141] It appears from the configuration of current DBS systems that channels are most effectively utilized when they are available in a substantial quantity at a given orbital location, and that the more channels a DBS operator has at a particular location, the greater its capacity to offer competitive DBS service. Maintaining the available channels in blocks should ensure that the winner of either block will have sufficient capacity to proceed with rapid deployment of a robust DBS service. We therefore have tentatively decided not to divide the available blocks of channels into smaller parcels, or to auction each channel individually. Thus, the construction permit for spectrum at 110° would be for a block of 28 channels -- the 27 channels reclaimed from ACC and the one channel that has never been assigned -- and the construction permit for spectrum at 148° would be for the block of 24 channels reclaimed from ACC. We seek comment on our proposal, and on whether these channels should be offered in a different configuration.

80. In setting forth the advantages and disadvantages of various competitive bidding designs in the Second R&O, we concluded that simultaneous multiple round bidding would be our preferred method of conducting auctions,[142] but we also indicated that this method might not be appropriate for all licenses. Thus, we explained that "[t]he less the interdependence among licenses, the less the benefit to auctioning them simultaneously. Because simultaneous auctions are more costly and complex to run, we may choose a sequential auction design when there is little interdependence among individual licenses or groups of licenses."[143] We tentatively conclude that, indeed, there would be little to gain by conducting simultaneous auctions of the construction permits for the DBS spectrum reclaimed from ACC. The channels at 110° are capable of full-CONUS service, which allows a DBS operator using them to provide service to the entire United States. The channels at 148° are capable of only half-CONUS service, without coverage to the easternmost part of the United States. Thus, channels at 110° and at 148° are not likely to be close substitutes in the near term. Moreover, there is no evidence of synergies between the channels at the two orbital locations, especially given our proposal to abandon the requirement that channels be maintained in east/west pairs.[144] We therefore propose to award the construction permits for the channels currently available at 110° and 148° by means of a sequential auction, with the channels at one orbital location being offered immediately after the other. We seek comment

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141 A separate ITU feeder link plan allocates frequencies for transmitting radio signals from a DBS operator's ground facilities to a DBS satellite ("uplink") and from the DBS satellite to the United States, Puerto Rico and the Virgin Islands ("downlink"). See ITU Radio Regulations, Appendix 30A (Orb-88). The construction permits available for auction would include authority to transmit pursuant to these allocations in accordance with the BSS Plan.

142 Second R&O, 9 FCC Rcd at 2366.

143 Id. at 2367.

144 See ¶ 65, *supra*.

on this proposal, and we also ask interested parties to comment on whether there are foreseeable circumstances in which simultaneous auctions of DBS permits would be more appropriate than sequential auctions.

81. If we decide to employ sequential auctions, we must decide whether single round or multiple round bidding is more appropriate for the DBS construction permits to be awarded. Single round sealed bidding would be a simple method of awarding DBS construction permits, and the cost of such an auction would be low for both the Commission and auction participants. However, we are inclined to think that sealed bidding would be inappropriate for DBS construction permits, because the value of these permits is likely to be very high and at the same time may be somewhat uncertain. In a sealed bid auction, bidders would have to guess about the value that other bidders place on the construction permits to be awarded, and there is a substantial risk that the party who values a permit most highly may not submit the winning bid. Moreover, multiple round bidding may result in more aggressive bidding because it may provide more information about the value of the permit. With better information, bidders have less incentive to shade their bids downward in order to avoid the "winner's curse," that is, the tendency for the winner to be the bidder who most overestimates the value of the item being auctioned.[145/] We therefore tentatively conclude that a multiple round auction would be preferable to sealed bidding, and we believe that sequential multiple round auctions need not be costly for either the Commission or auction participants. We recognize, however, that where there are few bidders for a particular construction permit, which is likely to be the case with DBS, there is a risk of collusion among those bidders and that single round (sealed) bidding is less susceptible to such collusion. With sealed bidding, the gain from cheating on a collusive arrangement is greater because the other parties cannot retaliate immediately, as they could in a multiple round auction. Thus, while we tentatively conclude that multiple round bidding would be the best method of auctioning the channels reclaimed from ACC, we request comment on the various advantages and disadvantages of single round and multiple round bidding as a method of auctioning DBS permits in the future.

82. If we adopt multiple round bidding as our method of auctioning DBS construction permits, we must further decide whether bidding should be oral or electronic. We tentatively conclude that oral outcry would be the best method of submitting bids in the case of DBS, and we tentatively conclude that this method should be used for the channels reclaimed from ACC. An oral outcry auction has the advantage of being simple and rapid, and it avoids the additional complications associated with electronic filing. On the other hand, in an oral outcry auction bids are normally made continuously, with no intervals between rounds, and it is possible that this could cause problems for bidders who need time to arrange for additional financing in the course of the auction in the event bidding goes higher than anticipated. Given that only two permits will be available for auction at this time, and further given that bids for these permits are likely to be very high, it may be that only those who already have access to substantial assets upon which to draw will be inclined to

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[145/] See Second R&O, 9 FCC Rcd at 2362.

participate in the auction process. We note, however, that the auctioneer could be given discretion to determine the pace of an oral outcry auction. We ask for comment on these issues.

83. We also seek comment on whether a combined sealed bid-oral outcry auction may be appropriate with respect to the channels at the 110° and 148° orbital locations. Under this auction method, applicants would submit a sealed bid in the first round, and the highest bidders in this round would then compete in future rounds in an oral outcry auction. This method of auctioning the reclaimed ACC channels may help reduce the risk of collusion while retaining the benefits of a multiple round auction.

C. Bidding Procedures

84. *Sequencing.* If we ultimately decide to auction available DBS construction permits sequentially, as we have proposed, we will have to establish the specific sequence in which permits are auctioned. We stated in the Second R&O that in general the highest value licenses should be auctioned first because the greater the value of the license, the greater the cost to the public of delaying licensing.[146] Because it is unlikely that more than a few DBS construction permits will ever be available at the same time, and because we anticipate that DBS auctions can be conducted rapidly, there may be no need for concern about the sequencing of auctions causing a delay in the issuing of available permits. Nonetheless, we propose to auction the 28 channels available at 110° first, because all of the information available to us -- including TCI's efforts to acquire the permit for these channels and MCI's announcement that it would open bidding for them at $175 million -- indicates that these channels have the highest value of those currently available. We think that bidders will not wish to bid on the channels available at 148° until they have had the opportunity to bid on the channels at 110°. We seek comment on our proposal to auction the construction permit for 28 channels at 110° first, as well as any general principles interested parties may wish to suggest for determining the sequence of future DBS auctions that may be held.

85. *Bid Increments.* If we decide to use multiple round auctions for DBS construction permits, we must also determine how bid increments will be established. A bid increment is the amount or percentage by which a bid must be raised above the previous round's high bid in order to be accepted as a valid bid in the current round. Imposing a minimum bid increment speeds the progress of the auction and helps to ensure that it concludes within a reasonable period. If we employ oral outcry bidding as proposed, we believe the auctioneer should have discretion to establish bid increments -- and raise or lower them in the course of an auction -- consistent with directions provided by the Commission. In our view, such discretion on the part of the auctioneer would contribute to the efficient conduct of an oral outcry auction. We request comment on this tentative conclusion, and we

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146 Id. at 2368.

solicit suggestions as to how bid increments should be determined in the event bids are submitted electronically.

86. *Minimum Opening Bid.* We propose to establish a minimum opening bid for the 28 channels available at 110°, both to help ensure that the auction proceeds quickly and to increase the likelihood that the public receives fair market value for the spectrum, especially if there are few bidders and a potential for collusion. We seek comment on this proposal. In addition, we ask interested parties to suggest the appropriate level of a minimum opening bid for the permit for these channels.[147] Should we also have a minimum opening bid for the 24 channels at 148° and, if so, how should we determine the amount of that bid? Finally, we request comment on whether minimum opening bids should be required for other DBS construction permits that may become available in the future, and, if so, how we should set the levels of such minimum bids.[148]

D. Procedural and Payment Issues

87. The Second R&O established procedural and payment rules for FCC auctions generally,[149] and we propose to apply these rules to DBS along with certain modifications proposed below. In keeping with the Second R&O and our previous practice, we also propose to retain discretion to implement or modify certain procedures that will be announced by Public Notice prior to particular DBS auctions, including rules governing the timing of application and payment requirements as well as any activity rules and stopping rules that may be appropriate. We seek comment on these proposals.

88. *Pre-Auction Application Procedures.* Under the rules established in the Second R&O, applicants are required to file a short-form application prior to the auction in which they wish to participate, in accordance with the Public Notice specifying a filing deadline for such applications. The short-form application we propose to use for DBS auctions (FCC Form 175) appears in Appendix A. We request comment on this form as well as the applicability to DBS of the short-form application procedures set forth in the Second R&O.[150] Those commenters who believe that either the form or the procedures should be modified for DBS auctions should provide a detailed explanation of the nature of and reasons for their suggested changes. In addition, we believe that, although we have previously provided for the electronic filing of short-form applications, it would be more appropriate to allow only

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147 As noted above, MCI has stated that it would, if given the opportunity, open the bidding for these channels at $175 million. See footnote 123, *supra.*

148 We note that we required minimum opening bids in our narrowband PCS auctions. FCC Auctions, Personal Communications Service (National Narrowband) Bidder's Information Package (auction date, July 25, 1994), at 6.

149 See Second R&O, 9 FCC Rcd at 2375-84.

150 Id. at 2375-77.

manual filing of such applications for the auctions proposed for the available spectrum at 110° and 148°. Given that there will likely be a small number of participants in these auctions, we think there will be no need to establish electronic filing procedures and systems, and we also believe manual filing will be simpler. We ask for comment on this tentative conclusion.

89. *Permittee Qualifications.* As explained above, we are proposing certain spectrum aggregation limits in this NPRM.[151] We believe that entities that would exceed these limits as a result of successful bidding in our proposed auctions should be given sufficient time to divest themselves of the number of channels necessary to comply with the proposed limits. Accordingly, we propose to allow a period of ninety (90) days following the date of grant of a construction permit won through an auction for the auction winner to either surrender to the Commission its excess channels or file with the Commission an application the grant of which would divest sufficient channels to come within the proposed spectrum caps.[152]

90. *Upfront Payment.* There are several advantages to requiring the submission of an upfront payment prior to DBS auctions. Such a requirement would help to ensure that only serious, qualified bidders participate, and it would deter the filing of speculative applications. In addition, an upfront payment provides the Commission with a source of available funds from which it can satisfy any bid withdrawal and default payments that are incurred by an auction participant. We therefore propose to require an upfront payment in all DBS auctions, and we seek comment on how the size of the payment should be determined.

91. Would it be appropriate, for example, to establish an upfront payment of five percent of the spectrum's estimated value? If commenters agree with this approach, they should discuss how the Commission should estimate the value of the spectrum to be auctioned. In addition, if parties interested in bidding on the 28 channels at 110° are also interested in the 24 available channels at 148°, should a single upfront payment qualify them to bid on both channel blocks? If not, what is the appropriate amount of an upfront payment for each of the two channel blocks in question? Or should only the winner of the first permit be required to submit an additional upfront payment if it wishes to bid on the second permit? In addition, how should we determine the appropriate level of upfront payments for DBS channels that become available in the future? Is an upfront payment of approximately five percent of the estimated value of the permit appropriate in all cases?

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151 See ¶¶ 33-53, *supra.*

152 See ¶ 43, *supra.* Similar limitations on spectrum aggregation were placed on PCS license holders. To allow for compliance with PCS spectrum aggregation limitations, SMR licensees, cellular licensees, and PCS licensees holding more spectrum than they are entitled to hold were given 90 days from final grant of a PCS license to divest. See 47 C.F.R. § 20.6(e); 47 C.F.R. § 24.204(f); 47 C.F.R. § 24.833.

92. With respect to the procedure to be used for collecting upfront payments, we propose to require that prospective bidders deposit their payments in our lock-box bank by wire transfer or cashier's check by a date certain that would allow the Commission sufficient time to verify the availability of the funds before the commencement of the auction. We tentatively conclude that such a procedure will be simple to administer and will minimize the risk of defaults that could force the re-auctioning of spectrum. In light of the fact that re-auctioning could cause delays in service provision, and the public has already been waiting for the initiation of service on most DBS channels for more than a decade, we find it is of the utmost importance to protect against defaults in DBS auctions. We also find that requiring an upfront payment prior to the opening of each DBS auction can help promote this goal. We seek comment on this proposal, as well as any alternative collection methods commenters may wish to suggest.

93. *Payment for Construction Permits Awarded by Competitive Bidding.* To help ensure that auction winners are able to pay the full amount of their bids, we decided generally in the Second R&O that every winning bidder in an auction must tender a down payment sufficient to bring its total deposit up to 20 percent of its winning bid.[153/] We also concluded that full payment of the remainder of the winning bid should be paid in a lump sum.[154/] Thus, we indicated that, unless we specified otherwise, auction winners would be required to make full payment of the balance of their winning bids within five business days following award of their authorization, and the grant would be conditioned on this payment.[155/] In the case of DBS auctions, we propose to require that every auction winner submit to the Commission an amount sufficient to bring its total deposit up to 20 percent of its winning bid within 10 business days of the announcement of winning bidders. A down payment in the amount of 20 percent of the winning bid would help ensure that auction winners have the necessary financial capabilities to complete payment for the construction permit and pay for the costs of constructing a DBS system and protect against possible default, while at the same time not being unduly onerous. We further propose to require winning bidders to file information in conformance with Part 100 of the Commission's Rules within 10 business days of the announcement of winning bidders. This existing application procedure, which is necessarily flexible for the satellite service, constitutes the "long-form application" process referred to in our general auction rules and the Second R&O. Along with filing information in conformance with Part 100 of the Commission's Rules, the winning bidder would also be required to file a signed statement describing its efforts to date and future plans to come into compliance with our proposed spectrum caps.[156/]

153/ Second R&O, 9 FCC Rcd at 2381.

154/ We have made an exception to this rule for "designated entities," which, in the context of FCC auctions, refers to small businesses, rural telephone companies, and businesses owned by women and minorities. See id. at 2388.

155/ Id. at 2382.

156/ See ¶ 43, *supra.*

94. After reviewing a winning bidder's information supplied in conformance with Part 100 and determining that the bidder was qualified to be a permittee, and after verifying receipt of the bidder's 20 percent down payment, the Commission would announce the application's acceptance for filing, thus triggering the filing window for petitions to deny. If, pursuant to Section 309(d) of the Communications Act, the Commission dismissed or denied any and all petitions to deny, the Commission or the International Bureau would issue an announcement to this effect, and the winning bidder would then have five business days to submit the balance of its winning bid. If the bidder did so, the permit would be granted subject to a condition that the licensee come into compliance with our proposed spectrum caps within 90 days of the final grant. If the bidder failed to submit the balance of the winning bid or the permit was otherwise denied, we would assess a default payment as discussed below and re-auction the permit. We request comment on these proposals, and we ask in particular whether 10 business days is the appropriate amount of time to give winning bidders to submit a 20 percent down payment and whether five business days is the appropriate amount of time to give winning bidders to pay the balance of a DBS bid.

95. *Bid Withdrawal, Default and Disqualification.* We have previously explained that it is important not only to deter insincere or speculative bidding in auctions, but also to provide an incentive for bidders wishing to withdraw their bids to do so before bidding ceases. In the Second R&O, we observed that it is appropriate to create such an incentive because a withdrawal that occurs after an auction closes (default) is likely to be more harmful than one that occurs before closing.[157] We noted, for example, that default reduces the likelihood that licenses will be assigned to those who value them most and also imposes additional costs on the Commission. In keeping with our conclusions regarding payments for bid withdrawals, defaults, and disqualifications in the Second R&O,[158] we make the following proposals:

96. If we decide to use open outcry auctions for DBS, we believe it will be unnecessary to impose a monetary payment for withdrawing a bid during the course of bidding on a particular permit (that is, immediately after bidding has concluded for an individual permit and before bidding has begun on any other permit), because such a withdrawal would not affect auction participants' decisions regarding how much to bid for other permits, as would be the case in simultaneous auctions. In addition, any delay caused by the withdrawal of a bid in an open outcry auction would be minimal, and we also recognize that mistaken bids are more likely in an open outcry auction than when bids are submitted electronically or in writing. We therefore propose to rely on default payments to deter insincere bidding and to provide an incentive for bidders wishing to withdraw their bids

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157 Second R&O, 9 FCC Rcd at 2374.

158 See id. at 2373-75, 2382-83.

to do so before bidding ceases.[159] Under this proposal, a default payment would be assessed if a bidder fails to pay the full amount of its down payment or the balance of its winning bid in a timely manner, or is disqualified after the close of an auction. We further propose that the amount of such a default payment should be equal to the difference between the defaulting auction winner's "winning" bid and the amount of the winning bid the next time the license is offered for auction by the Commission, if the latter bid is lower. In addition, we propose that the defaulting auction winner would be assessed a payment of three percent of the subsequent winning bid or three percent of its own "winning" bid, whichever is less. Such an additional payment would serve to ensure that a cost is imposed on a winning party for defaulting, and that the Commission is compensated for the cost of re-auctioning the license. We request comment on this proposal, and we would like to know in particular whether the proposed three percent penalty is a sufficient deterrent to insincere bidding.

97. If we decide to use single round, sealed bid auctions for DBS, we propose to assess no payments for withdrawing a bid (1) before the bids are opened, or (2) after the bids are opened but before the high bidder has been notified. In either of these two situations, the Commission can quickly offer the license to the next highest bidder, and little harm will have been done. However, if a high bidder defaults after being notified, it is likely that the licensing process will be delayed. Therefore, in keeping with the Second R&O, we propose to assess a payment equal to the difference between the high bid and the next highest bid on any party that defaults after being notified that it has submitted the high bid in a sealed bid DBS auction. Because there is no need to create an incentive for bidders to withdraw during the course of an auction when there is only one bidding round, and because the Commission should be able to avoid the costs of re-auctioning when a high bidder in a sealed bid auction defaults, we see no need for the additional three percent payment requirement we have proposed in the case of oral outcry auctions.[160] We request comment on these proposals.

E. Regulatory Safeguards

98. *Transfer Disclosure Provisions.* In authorizing spectrum auctions, Congress expressed concern over the possibility that licenses would be issued for bids that fall short of market value.[161] In order to accumulate data to evaluate whether this is occurring, we decided in the Second R&O to impose a transfer disclosure requirement on licenses awarded by auction, and we stated that we would give particular scrutiny to auction winners who have

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[159] However, the Commission would retain discretion to bar a bidder who withdraws a bid from continued participation in the bidding for the same license or other licenses offered in the same auction.

[160] See Second R&O, 9 FCC Rcd at 2374-75.

[161] See H.R. Rep. No. 111, *supra*, at 257. Indeed, Congress directed that we take steps to prevent unjust enrichment due to trafficking in licenses obtained through competitive bidding, 47 U.S.C. § 309(j)(4)(E). Such unjust enrichment was thought likely to be a potential problem where participation in auctions is limited to ensure designated entities an opportunity to participate. See Second R&O, 9 FCC Rcd at 2385.

not yet begun to offer service to subscribers and who seek approval of a transfer of control or assignment of their licenses within three years of the initial license grant.[162] We propose to apply a similar transfer disclosure requirement to DBS, but we are inclined to extend it to six years, which is consistent with the deadline proposed above for the construction of all satellites in a DBS system.[163] Thus, we propose that any entity that acquires a DBS license through competitive bidding, and seeks to transfer that license within six years of the initial license grant, should be required to file, together with its application for FCC consent to the transfer, the associated contracts for sale, option agreements, management agreements, or other documents disclosing the total consideration received in return for the transfer of its license. The information should include not only a monetary purchase price, but also any future, contingent, in-kind, or other consideration (*e.g.*, management or consulting contracts either with or without an option to purchase; below market financing). As we have previously stated, we believe that such a filing requirement would not be a burden on licensees because the documents to be submitted to the Commission would be prepared in any event.[164] Moreover, any competitive concerns raised by the possible disclosure of sensitive information can be addressed by the provisions in Sections 0.457 and 0.459 of our Rules, 47 C.F.R. §§ 0.457 & 0.459, providing for the nondisclosure of information. We seek comment on this proposal.

99. *Performance Requirements.* Congress has also directed that the Commission, in implementing auction procedures, "include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services."[165] In the Second R&O, we decided that it is unnecessary and undesirable to impose performance requirements on auctionable services beyond those already provided in our service rules.[166] We have proposed above, as part of our DBS service rules, a number of performance rules which we think are sufficient to achieve the goals identified by the statute, and we have proposed that licenses be conditioned on fulfillment of these requirements. We therefore tentatively conclude that it is unnecessary to adopt any further performance rules in connection with our proposed auction procedures, and we seek comment on this tentative conclusion.

100. *Rules Prohibiting Collusion.* In the Second R&O, we adopted rules prohibiting collusive conduct in connection with competitive bidding, explaining that these

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162 Second R&O, 9 FCC Rcd at 2385-86.

163 See ¶ 27, *supra.*

164 Second R&O, 9 FCC Rcd at 2386.

165 47 U.S.C. § 309(j)(4)(B).

166 Second R&O, 9 FCC Rcd at 2386.

rules, which are codified at 47 C.F.R. § 1.2105, would enhance the competitiveness of both the auction process and the structure of post-auction markets.[167] Under these rules, bidders are required to identify on their short-form applications any parties with whom they have entered into any consortium arrangements, joint ventures, partnerships or other agreements or understandings which relate in any way to the competitive bidding process. Bidders are also required to certify on their short-form applications that they have not entered into any explicit or implicit agreements, arrangements or understandings of any kind with any parties, other than those identified, regarding the amount of their bid, bidding strategies or the particular properties on which they will or will not bid. We propose to apply these same rules to DBS auctions.

101. In addition, consistent with other provisions of 47 C.F.R. § 1.2105, we propose to require winning bidders to submit a detailed explanation of the terms and conditions and parties involved in any bidding consortia, joint venture, partnership or other agreement or arrangement they have entered into relating to the competitive bidding process prior to the close of bidding. All such arrangements must have been entered into prior to the filing of short-form applications. We further propose that after short-form applications are filed, and prior to the time the winning bidder has submitted its lump-sum payment of the balance of its bid, all applicants should be prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies with other applicants for licenses serving the same or overlapping geographical areas, unless such bidders are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application. As we explained in the Second R&O, we believe that such requirements are not unduly burdensome and are appropriate to deter bidders from engaging in anticompetitive behavior. Such measures also serve to facilitate the identification and investigation of any suspect bidding behavior. As we also noted in the Second R&O, allegations of collusion in a petition to deny may be investigated by the Commission or referred to the U.S. Department of Justice for investigation. Bidders who are found to have violated the antitrust laws or the Commission's Rules while participating in an auction may be subject to forfeiture of their down payment or their full bid amount, as well as revocation of their license, and may be prohibited from participating in future auctions.[168]

102. At the same time, we believe it would be appropriate to apply to DBS the exceptions to our collusion rules adopted subsequent to the Second R&O. Thus, we propose to allow applicants to (1) modify their short-form applications to reflect formation of consortia or changes in ownership at any time before or during an auction, provided that such changes do not result in a change in control of the applicant, and provided that the parties forming consortia or entering into ownership agreements have not applied for licenses for channels that may be used to cover the same or overlapping geographical areas: and (2) make agreements to bid jointly for licenses after the filing of short-form applications, provided that

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167 Id. at 2387.

168 Id. at 2388.

the parties to the agreement have not applied for licenses that may be used to serve the same or overlapping geographical areas. We further propose to allow a holder of a non-controlling attributable interest in an entity submitting a short-form application to acquire an ownership interest in, form a consortium with, or enter into a joint bidding arrangement with other applicants for licenses that may be used to serve the same or overlapping geographical areas after the filing of short-form applications, provided that (1) the attributable interest holder certifies to the Commission that it has not communicated and will not communicate with any party concerning the bids or bidding strategies of more than one of the applicants in which it holds an attributable interest, or with which it has a consortium or joint bidding arrangement, and which have applied for licenses that may be used to serve the same or overlapping geographical areas, and (2) the arrangements do not result in any change in control of an applicant.[169] We request comment on whether these proposed rules prohibiting collusive bidding arrangements are appropriately tailored for DBS auctions.

F. Designated Entities

103. Section 309(j) of the Communications Act provides that, when promulgating competitive bidding regulations, the Commission must "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services."[170] To implement the statute's provisions concerning these "designated entities," the Commission has identified several possible mechanisms, including installment payments, bidding credits and spectrum set-asides, to choose from when establishing competitive bidding procedures for particular services.[171]

104. In the Second R&O, we also indicated that special measures for designated entities may not be appropriate in all circumstances. We stated, for example, that installment payments should not be available for all spectrum auctions. Rather, to allow us to match such measures with eligible recipients (*i.e.*, small businesses), we said that installment payments would be available only for certain licenses that do not involve the largest spectrum blocks and service areas. We did not want to delay service to the public by encouraging undercapitalized firms to receive licenses for facilities which they lack the resources adequately to finance.[172] We also indicated that, in service-specific rules, we might determine

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169 See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Memorandum Opinion and Order*, 9 FCC Rcd 7684, 7687-89 (1994); 47 C.F.R. § 1.2105(c)(2)-(4).

170 47 U.S.C. § 309(j)(4)(D). See also 47 U.S.C. §§ 309(j)(3)(B) & (j)(4)(A).

171 See Second R&O, 9 FCC Rcd at 2388-98.

172 Id. at 2390 (citing 47 U.S.C. § 309(j)(3)(A)). In addition, the legislative history explaining the designated entity provisions of the auction statute states that "the characteristics of some services are inherently national in scope, and are therefore ill-suited for small businesses." H.R. Rep. No. 111, *supra*, at 254.

that bidding credits are necessary to provide designated entities the opportunity to bid successfully for a license. This determination, we stated, would "rest in whole or in part on our assessment of the available opportunities in, and characteristics of, a specific spectrum-based service."[173]

105. We note further that, as discussed above, Section 309(j)(3) also requires the Commission to promote economic opportunity and competition and ensure that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including designated entities.[174] The statute, however, directs the Commission, in specifying auction procedures, to pursue other objectives, including "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays" and the promotion of "efficient and intensive use of the electromagnetic spectrum."[175]

106. The Commission has recognized that the huge costs involved in implementing satellite proposals have been a significant obstacle to new entrants in the field of satellite-based services.[176] These high costs have often led to unsuccessful and prolonged attempts to obtain financing while service to the public is delayed and other qualified applicants are precluded from participating.[177] In light of the above discussion and the Commission's previous determinations concerning the extremely high implementation costs of satellite services, we tentatively conclude that we will make no special provisions for designated entities for the DBS spectrum reclaimed from ACC.[178] We note that expedient implementation of DBS service at the two orbital locations in question may indirectly benefit

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173/ Second R&O, 9 FCC Rcd at 2391.

174/ 47 U.S.C. § 309(j)(3)(B).

175/ 47 U.S.C. § 309(j)(3)(A), (D).

176/ Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, Notice of Proposed Rulemaking, IB Docket No. 95-91, FCC 95-229, 60 Fed. Reg. 35,616 (released June 15, 1995) at ¶ 88 ("DARS NPRM"). See also Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands, 9 FCC Rcd 5936, 5969-70 (1994).

177/ DARS NPRM at ¶ 88.

178/ Regarding the cost of DBS, Tempo Satellite states that it has spent nearly $250 million on the construction of two satellites for use at either the 110° or the 119° orbital location. See Application for Review of Tempo DBS, Inc. at 3 (dated May 24, 1995), filed in the Advanced Proceeding. EchoComm Communication Corporation, parent company of EchoStar, has raised $323.3 million to finance the DBS systems of EchoStar and Directsat (each system will include at least two satellites). See Request of EchoStar Satellite Corporation for Additional Time to Construct and Launch a Direct Broadcast Satellite System at 5 (dated July 28, 1995), File No. DBS-88-01.

designated entities by providing new opportunities for programming and equipment supplied by designated entities. We seek comment on this tentative conclusion. We also seek comment on whether special provisions should be made for designated entities in future DBS auctions. Finally, we request comment on whether future auctions of smaller blocks of DBS spectrum or technological advances in the delivery of DBS service might reduce capital requirement barriers for designated entities.

VII. CONCLUSION

107. Based on the considerations discussed above, we conclude that the proposals set forth in this NPRM will best serve the public interest in competitive, efficient, rapid, and intense use of DBS resources. We seek comment on all aspects of the proposed service and auction rules and anticipate an extensive record on which to base decisions on final regulations and policies.

VIII. PROCEDURAL MATTERS

108. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. See generally 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

109. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in Appendix B. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the main body of the NPRM, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis.

110. *Initial Paperwork Reduction Act of 1995 Analysis.* This NPRM contains either a proposed or modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget ("OMB") to take this opportunity to comment on the information collections contained in this NPRM, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as other comments on this NPRM; OMB comments are due 60 days from the date of publication of this NPRM in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

111. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before November 20, 1995 and reply comments on or before November 30, 1995. To file formally in this proceeding, parties must file an original and five copies of all comments, reply comments, and supporting documents. If parties want each Commissioner to receive a personal copy of their submissions, they must file an original plus nine copies. Parties should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Reference Center of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554, Room 239. For further information, contact Bill Wiltshire or Suzanne Hutchings at (202) 418-0420 or Diane Conley at (202) 418-0660.

112. Written comments by the public on the proposed and/or modified information collections are due on or before November 20, 1995. Written comments must be submitted by the Office of Management and Budget on the proposed and/or modified information collections on or before 60 days after the date of publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, D.C. 20554, or via the Internet to dconway@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 17th Street, N.W., Washington, D.C. 20503 or via the Internet to fain_t@al.eop.gov.

IX. ORDERING CLAUSES

113. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 4(i), 4(j), 7, and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 157, and 309(j), NOTICE IS HEREBY GIVEN of the proposed amendments to Part 100 of the Commission's Rules, 47 C.F.R. Part 100, in accordance with the proposals in this Notice of Proposed Rulemaking, and that COMMENT IS SOUGHT regarding such proposals.

114. IT IS FURTHER ORDERED that the Secretary shall send a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.*

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Proposed Short Form Application
FCC Form 175

Federal Communications Commission
Washington, D. C. 20554

Application to Participate in an FCC Auction

Read Instructions on Back Before Completing

Special Use				
FCC Use Only				

OMB Approval 3060-0600
Expires 9/30/98
Estimated Average Burden
Per Response: 45 Minutes

1. Applicant

8. Applicant Classification: ☐ Individual ☐ Partnership ☐ Trust ☐ Corporation ☐ Other _____

2. Mail Address (No P.O. Boxes)

9. Financial Eligibility (if applicable)
☐ Gross revenues do not exceed the maximum dollar amount specified in the FCC rules governing the auctionable service.
☐ Total Assets (if applicable) do not exceed maximum dollar amount specified in the FCC Rules governing the auctionable service.

10. Applicant Status:
☐ Small Business
_____ % Bidding Credit Eligibility
Installment Payment Plan Type _____
☐ Rural telephone company
☐ Minority owned business
☐ Woman owned business
☐ None of the above

3. City 4. State 5. ZIP Code

6. Auction Number 7. FCC Account Number

11. Markets and Frequency Blocks/Channels for which you want to bid. If more than 5 markets, use supplemental form FCC 175-S.

	Market No. ALL ☐	Frequency Block/Channel No. Enter Frequency Block/Channel Number(s) or Letter(s) or Check All ALL ☐										
(a)												
(b)												
(c)												
(d)												
(e)												

☐ Check here if supplemental forms 175-S are attached. Indicate number of supplemental forms 175-S attached: _____

☐ Check here if exhibits are attached. Indicate number of supplemental exhibits attached: _____

12. Person(s) authorized to make or withdraw a bid (Typed/Printed Name)

(a)	(b)	(c)

Certification: I certify the following:

(1) that the applicant is legally, technically, financially and otherwise qualified pursuant to 308(b) of the Communications Act and the Commission's Rules and is in compliance with the foreign ownership provisions contained in Section 310 of the Communications Act.

(2) that the applicant is the real party in interest in this application and that there are no agreements or understandings other than those specified in this application (see Instructions for certification), which provide that someone other than the applicant shall have an interest in the license.

(3) that the applicant is aware that, if upon Commission inspection, this application is shown to be defective, the application may be dismissed without further consideration, and certain fees forfeited. Other penalties may also apply.

(4) that the applicant has not entered into and will not enter into any explicit or implicit agreements or understandings of any kind with parties not identified in this application regarding the amount to be bid, bidding strategies or the particular license on which the applicant or other parties will or will not bid.

(5) that the applicant, or any party to this application, is not subject to a denial of federal benefits pursuant to Section 5301 of the Anti-Drug Abuse Act of 1988.

(6) that, if financial eligibility block or applicant status is claimed in block 9 or 10, the applicant is eligible for any special provisions set forth in the Commission's Rules applicable to this auction and consents to audits, as set forth in the Commission's Rules, to verify such status.

(7) that the applicant is and will, during the pendency of its application(s), remain in compliance with any service specific qualifications applicable to the licenses on which the applicant intends to bid including, but not limited to, financial qualifications.

I declare, under penalties of perjury, that I am an authorized representative of the above-named applicant for the license(s) specified above, that I have read the instructions and the foregoing certification and all matters and things stated in this application and attachments, including exhibits, are true and correct.

Typed/Printed Name of Person Certifying	Title of Person Certifying	Date
	Contact Person	Telephone No.
Signature of Person Certifying (Blue Ink ONLY)	E-mail address	FAX No.

Willful false statements made on this form are punishable by fine and/or imprisonment (U.S. Code, Title 18, Section 1001), and/or revocation of any station license or construction permit (U.S. Code, Title 47, Section 312(a)(1)), and/or forfeiture (U.S. Code, Title 47, Section 503).

FCC 175
October 1995

APPENDIX B
Initial Regulatory Flexibility Analysis

A. Reason for Action

This rulemaking proceeding is being initiated to obtain comment on the proposed modifications to the licensing and service rules for the Direct Broadcast Satellite (DBS) service. The *Notice of Proposed Rulemaking* also seeks comment on the proposed rules for competitive bidding in the DBS service based on Section 309(j) of the Communications Act, 47 U.S.C. § 309(j), which authorizes the Commission to use auctions to select among mutually exclusive applications for authorizations under certain circumstances.

B. Objectives

The Commission seeks to update the "interim" rules established for the DBS service more than a decade ago, in order to ensure more efficient and rapid use of DBS resources, to promote effective competition and prevent anticompetitive behavior, and to reflect developments in DBS service and technology since the original rules were promulgated. The Commission also seeks to establish rules for competitive bidding, to be used to assign construction permits for available DBS channels.

C. Legal Basis

The proposed action is authorized under Sections 1, 4(i), 4(j), 7, and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 157, and 309(j).

D. Reporting, Recordkeeping and Other Compliance Requirements

The action proposed in this *Notice of Proposed Rulemaking* would affect those applying to participate in auctions of DBS construction permits. We propose to require that those seeking to participate in such auctions provide certain information to identify themselves and their authorized representatives. These applicants would be required to comply with proposed requirements to file a report approved for use by applicants for other auctions conducted by the Commission (FCC Form 175), but this is not estimated to be a significant economic burden for these entities.

E. Federal Rules that Overlap, Duplicate or Conflict with These Requirements

None.

F. Description, Potential Impact and Number of Small Entities Involved

Small businesses that do not have the financial ability to become DBS licensees, because of the high implementation costs associated with satellite services, could become

involved in producing programming for DBS providers, especially in niche markets not now served by traditional broadcasting or cable. Opportunities for leasing satellite time from DBS satellite licensees to provide service could also be available to small businesses as well as opportunities in equipment design and manufacturing.

G. Any significant Alternatives Minimizing the Impact on Small Entities Consistent With the Stated Objectives

This Notice solicits comments on any suggested alternatives to achieve Commission objectives.

STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

DISSENTING IN PART AND CONCURRING IN PART

RE: Revision of Rules and Policies for the Direct Broadcast Satellite Service

Today, the Commission issues a Notice of Proposed Rulemaking ("NPRM") to devise and implement a method for reassigning the 51 direct broadcast satellite (DBS) channels reclaimed pursuant to the decision in Advanced Communications Corporation as well future DBS channels.[1] The Commission proposes, among other things, to auction the 28 channels at the 110° orbital location as well as the 24 channels at the 148° orbital location.[2] As a result of my determination in the Advanced Order, I am compelled to dissent with respect to the reassignment of the 51 channels that were held by Advanced Communications Corporation (ACC) and for which ACC sought Commission approval for transfer to Tempo DBS, Inc. ("Tempo"). Further, I concur with respect to the Commission's decision to auction future DBS channels for reasons which I will set forth herein.

In the Advanced Order, I dissented to the Commission's decision as it related to ACC because I firmly believed then, as I do now, that given our ambiguous precedent with regard to due diligence criteria for DBS, ACC should have been deemed in compliance with the Commission's due diligence standards. Moreover, I would have favored the transfer of ACC's permit to Tempo in order to expeditiously introduce a new DBS competitor into the marketplace. Further, while I believe that the Commission is making an effort to expedite this proceeding in order to hold auctions in the near term, I remain skeptical about the feasibility of such a schedule that does not take into account the potential disruption resulting from litigation. Finally, having concluded that auctions are not warranted for the 51 channels, I believe it pointless to establish an auction for a single channel.

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[1] Advanced Communications Corp., FCC 95-428 (adopted October 16, 1995) ("Advanced Order").

[2] I note that while the Commission intends to auction 28 channels at the 110° orbital location, the Commission had only assigned 27 channels to ACC. There is a single channel at the 110° orbital location that has never been assigned to any permittee.

However, I concur in the Commission's decision to establish auction rules for these 52 DBS channels as well as for future auctions of DBS spectrum. I believe that there are significant issues the Commission seeks to address through this expedited rulemaking that will take time to review, and ultimately, to resolve for future DBS auctions. First, I am concerned that the Commission not revisit issues, such as our program access rules, that should be reviewed, and if appropriate, modified in an independent proceeding. While the Commission acknowledges that it has not previously had occasion to consider the vertical foreclosure issues presented by common ownership among DBS operators, other multichannel video programming distributors, and program vendors, I would hope that we will not use this proceeding to conduct a wholesale review of our program access rules. Moreover, the contentious nature of prior proceedings dealing with our program access rules provides evidence that careful review of the rules is critical.

I am also concerned about the Commission's proposed ninety (90) day divestiture period for those permittees or licensees that acquire control of channels in excess of the Commission's proposed limit.[3] If an entity exceeds this limit, it will be given ninety (90) days from the date of Commission grant of license in which to either surrender its excess channels to the Commission or file a transfer or assignment application in order to divest sufficient channels to bring it into compliance with the applicable spectrum cap. If adopted, I believe that this provision may lead to a "fire sale" scenario in which an entity would be placed in a disadvantageous negotiating position in order to sell its permits rather than surrender its permits to the Commission and be subject to significant losses, particularly if the number of relinquished channels would not result in a viable service. Moreover, I believe that the Commission must acknowledge and remain cognizant that these permittees have complied with our due diligence requirements and that there is the potential for inequities if these same permittees are faced with the choice of losing their channels or selling their channels at a loss because of a possible modification of our rules.

While the Commission anticipates that DBS spectrum would continue to be used primarily to deliver DBS service to the public, it indicates that DBS operators would be afforded maximum flexibility, within certain limits, to make optimal use of the

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[3] The Commission has proposed limiting the aggregation of DBS channel assignments to a total of thirty two (32) channels at any combination of orbital locations capable of full-CONUS service.

DBS spectrum. While I share beliefs about increasing spectrum efficiency, I encourage the Commission not to act without fully understanding the implications of flexible use with respect to this or any other service.

In proposing to establish a minimum opening bid, the Commission acknowledges that one party has indicated that it would, if given the opportunity through the competitive bidding process, submit an initial bid at $175 million.[4] The Commission seeks comment on the appropriate amount for a minimum opening bid. I trust that the Commission will not base its determination as to the appropriate valuation of a minimum opening bid solely on the recitations of one party that sought to persuade the Commission to conduct auctions for the DBS channels reclaimed from ACC.[5] While the proposed opening bid is enticing, it is neither binding, formally a part of this record nor, in my mind, a true indicator of the potential market value for the spectrum. As a result, I trust that the Commission will not be blinded by this entity's salvo without considering fully the potential for manipulation of the Commission's decision making process in this as well as future proceedings if such a proposed opening bid is adopted.

Finally, I wish to emphasize the Commission's continued obligation under Section 309(j) to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services."[6] The Commission has recognized that the substantial costs involved in implementing satellite proposals have been a significant obstacle to new entrants in the field of satellite-based services.[7] Despite these high costs (which undoubtedly will be apparent for future services as well), I firmly believe that it is not out of the question that a consortia of small businesses may be able to

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[4] See letter from Gerald H. Taylor, President and Chief Operating Officer of MCI to Hon. Reed E. Hundt (dated October 10, 1995).

[5] I also note that prior to rendering a decision in the Advanced Order, one of my colleagues asked me whether this alleged opening bid would persuade me that auctioning the 27 channels was appropriate. Clearly, based on my position in the Advanced Order, my response was a resounding "no".

[6] 47 U.S.C. §§ 309(j)(4)(D), 309(j)(3)(B), and 309(j)(4)(A).

[7] I also believe that the Commission's proposal to auction two (2) blocks of spectrum at 110° and 148° necessarily reduces the number of DBS competitors.

participate in these auctions if the Commission adopts measures, such as bidding credits and installment payments for small businesses.[8] I will closely scrutinize the comments with respect to designated entities to determine the methods of inclusion that are most appropriate in the DBS arena..

[8] While I would like to see measures established for minority and women-owned businesses, I recognize that the Commission must move cautiously in this area. However, I also recognize that significant delay in undertaking the appropriate studies for satisfying a strict scrutiny standard translates into lost opportunities as new service entrants for these groups.

SEPARATE STATEMENT OF

COMMISSIONER RACHELLE B. CHONG

Re: *Revision of Rules and Policies for the Direct Broadcast Satellite Service, IB Docket No. 95-443, PP Docket No. 93-253.*

I write separately in this matter to encourage commenters to provide input on the scope of the regulatory proposals regarding competition set forth in this item. As I have stated before, I believe that minimal regulation is generally best, especially when there is competition in a market. It is my hope that our final rules for this service will reflect our overarching goal for the video services market – vibrant competition with minimal government intervention.