

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
United States Satellite Broadcasting Co., Inc.
Transferor
and
DIRECTV Enterprises, Inc.
Transferee
For Consent to Transfer of Control of the
USSB II, Inc. Authorization to Operate a
Direct Broadcast Satellite System Using
Five Channels at the 101° W.L. Orbital
Location; Authorization to Construct,
Launch, and Operate a Direct Broadcast
Satellite System Using Three Channels
at the 110° W.L. Orbital Location; and the
Related Earth Registration (Call Sign E930437)
In the Matter of
United States Satellite Broadcasting Co., Inc.
Application for Additional Time to Construct
and Launch a Direct Broadcast Satellite at the
110° W.L. Orbital Location

File Nos.: DBS-81-07
DBS-81-07(II)
IBFS File Nos.: SAT-T/C-19981217-00098
SES-T/C-19981217-01876
File No.: 45-SAT-EXT-97
IBFS File No.: SAT-MOD-19970226-00020

ORDER AND AUTHORIZATION

Adopted: April 1, 1999

Released: April 1, 1999

By the Acting Chief, International Bureau:

I. Introduction

1. By this Order, we grant the joint application of United States Satellite Broadcasting Co., Inc. ("USSB") and DIRECTV Enterprises, Inc. ("DIRECTV") for consent to transfer control of USSB's direct broadcast satellite ("DBS") authorizations and the related earth station registration (Call

Sign E930437) from USSB to DIRECTV.¹ We find, conditioned on service using the three DBS channels at 110° W.L. being implemented by December 31, 1999, that grant of this application is in the public interest and will allow DIRECTV to compete more effectively in multichannel video programming distribution ("MVPD") markets. Pursuant to our authority under Section 1.3 of the Commission's Rules,² we also waive the due diligence requirement of Section 100.19(a) of the Rules³ and, therefore, dismiss USSB's application for additional time to construct and launch a DBS system using three channels at the 110° W.L. orbit location.⁴

II. Background

2. USSB received its initial permit to construct and launch a DBS system in 1982.⁵ In 1990, the Commission assigned USSB five channels at the 101° W.L. orbit location.⁶ In 1985, Hughes Communications Galaxy, Inc. ("Hughes"), DIRECTV's predecessor-in-interest,⁷ was assigned 27 channels at 101° W.L. In December 1993, DIRECTV and USSB, as joint owners, launched the nation's first DBS satellite into the 101° W.L. orbit location. Since June 1994, USSB has provided service to consumers using five transponders on this satellite while DIRECTV has provided service

¹ Application of United States Satellite Broadcasting Co., Inc., and DIRECTV Enterprises, Inc., File Nos. DBS-81-07 and DBS-81-07(II), IBFS File Nos.: SAT-T/C-19981217-00098 and SES-T/C-19981217-01876 (Dec. 17, 1998) ("Joint Transfer Application"). DIRECTV submitted a separate application to transfer control of two transmit/receive earth stations (Call Signs E930485 and E950153) from USSB to DIRECTV. That application was previously granted by the Satellite and Radiocommunication Division. USSB II, Inc., Consent to Transfer Control, File No. SES-T/C-19981217-01925 (March 15, 1999). *See also* Public Notice, Report No. SES-00061 (March 17, 1999).

² 47 C.F.R § 1.3.

³ 47 U.S.C. § 100.19(a).

⁴ Application of USSB II, File No. 45-SAT-EXT-97, IBFS File No.: SAT-MOD-19970226-00020 (Feb. 26, 1997) ("USSB Extension Application").

⁵ *CBS, Inc., For Authority to Establish Interim Direct Broadcast Satellite Systems*, Memorandum Opinion and Order, 92 FCC 2d 64 (1982) ("*CBS I*"). *CBS Inc., For Modification of Construction Permit to Establish Interim Direct Broadcast Satellite Systems*, Memorandum Opinion and Order, 99 FCC 2d 564 (1984) ("*CBS II*") made initial assignment of channels. USSB subsequently requested and was granted a modification to this assignment of channels. *United States Satellite Broadcasting Company, Inc.*, Memorandum Opinion and Order, 5 FCC Rcd 7576 (1990) ("*USSB II*").

⁶ *USSB II* modified USSB's original construction permit to its DBS system and instead authorized operation on channels 23, 25, 27, 29, and 31 at 101° W.L., channels 28, 30, and 32 at 110° W.L., and channels 18, 20, 22, 24, 26, 28, 30, and 32 at 148° W.L.

⁷ In June 1995, the Commission authorized the pro forma assignment of all licenses and facilities associated with DIRECTV's DBS system from Hughes to DIRECTV. Joint Transfer Application at 7.

from 27 transponders.⁸ Both companies use the same subscriber receiving equipment and offer a joint program guide, but use separate billing and customer service systems.⁹

3. In addition to its channels at 101° W.L., USSB was assigned three DBS channels at 110° W.L.¹⁰ In 1988, the Commission granted USSB an extension of time in which to commence DBS service from this orbit location.¹¹ The Commission granted another extension in 1992, allowing USSB until December 4, 1997 to initiate service from 110° W.L.¹² In February 1997, USSB filed a request for an extension of an additional two years, until December 1999, to implement these channel assignments.¹³ This request has been pending. As described below, it is the subject of the waiver granted in this Order and is dismissed.

4. USSB and DIRECTV assert that grant of their proposed application will strengthen DIRECTV's competitive position in the MVPD market and will facilitate provision of service to "underserved communities."¹⁴ No "petitions to deny" were filed. Three parties filed comments stating that grant of the Joint Transfer Application would reduce competition among satellite distributors.¹⁵

III. Discussion

5. The applications before us raise two primary issues. The first issue is whether the Commission should grant the proposed transfer of USSB's DBS authorizations to DIRECTV. The second issue concerns the resolution of USSB's pending request for extension of time to commence operation of its three DBS channels at 110° W.L., in order to determine whether these channels are available to be transferred to DIRECTV.

⁸ Each transponder is capable of carrying one "DBS channel," which in turn can deliver five to seven streams of different programming (the equivalent of five to seven television channels). DIRECTV also provides service from other DBS satellites collocated at 101° W.L.

⁹ Joint Transfer Application at 10, *supra* n. 1.

¹⁰ *USSB II*, *supra* n. 5.

¹¹ *United States Satellite Broadcasting Co., Inc., For Extension of Time to Construct Direct Broadcast Satellite Systems*, Memorandum Opinion and Order, 3 FCC Rcd 6858 (1988) ("*USSB I*").

¹² *United States Satellite Broadcasting Company, Inc., For Modification of Construction Permit for Direct Broadcast Satellite System and For Extension of Time to Construct Direct Broadcast Satellite System*, Memorandum Opinion and Order, 7 FCC Rcd 7247 (1992) ("*USSB III*").

¹³ USSB Extension Application, *supra* n. 5. On June 23, 1998, USSB relinquished its assignment for eight DBS channels at the 148° W.L. orbit location. Public Notice, Report No. SPB-131 (July 14, 1998).

¹⁴ Joint Transfer Application at 12, *supra* n. 1.

¹⁵ Comments of Thomas Duncan (December 28, 1998); Comments of Robert French (January 10, 1999); Comments of Duke Ramsey (received by email, January 29, 1999). Mr. Duncan's and Mr. French's comments were contained in complaints regarding DIRECTV's billing policies.

A. USSB/DIRECTV's Request for Transfer

6. On December 14, 1998, Hughes Electronics Corporation announced it had reached an agreement to acquire all of the assets of USSB. To complete this transaction, Hughes proposes to transfer the stock of USSB II, a wholly-owned subsidiary of USSB (and the entity that holds the licenses under consideration in this proceeding) to DIRECTV, a wholly-owned subsidiary of Hughes. On December 17, 1998, USSB and DIRECTV filed a joint application requesting Commission consent to transfer control of USSB II's DBS and related earth station registration to DIRECTV.¹⁶ The parties propose to transfer USSB II's authorizations for five DBS channels at the 101° W.L. orbit location, three DBS channels at the 110° W.L. orbit location, and the related receive-only earth station registration, call sign E930437.

7. The applicants state that grant of the Joint Transfer Application would serve the public interest by strengthening the competitive position of DIRECTV in the MVPD market.¹⁷ With respect to the transfer of channels at 101° W.L., they state that the grant will allow DIRECTV to "eliminate the redundant operations and customer confusion that are inherent by-products of providing DBS service from the same satellite through two independent entities."¹⁸ In addition, they assert that the transfer will not threaten competition because DIRECTV and USSB offer complementary, not competitive services.¹⁹ With regard to the channels at 110° W.L., DIRECTV states that it plans to move one of its current DIRECTV satellites from 101° W.L. (DBS-I) to 110° W.L. and offer Spanish language programming from that location.²⁰ It also states that the company plans to launch a replacement satellite into 101° W.L. DIRECTV asserts that the three channels at 110° W.L. will be in use by the Fall of 1999, providing service to an "underserved" segment of the country's population.²¹

8. The applicable legal standard for evaluating this transaction is Section 310(d) of the Communications Act.²² Under Section 310(d), we must find that the proposed transfer serves the public interest, convenience, and necessity. To make this finding, we must weigh the potential public interest harms against the potential public interest benefits, considering both its competitive effects and other public interest benefits and harms.²³ At a minimum, this analysis requires that the transfer not

¹⁶ Joint Transfer Application, *supra* n. 1.

¹⁷ *Id.* at 9.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 13.

²¹ *Id.*

²² 47 U.S.C. § 310(d).

²³ *Application for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Southern New England Telecommunications Corporation to SBC Communications, Inc.*, Memorandum Opinion and Order, CC Docket No. 98-25, 13 FCC Rcd 21292 (1998) at ¶ 13; *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom*

interfere with the objectives of the Communications Act.²⁴ Also, this analysis necessarily includes an evaluation of the possible competitive effects of the transfer.²⁵ As the Commission recently explained, "[O]ur public interest analysis is not, however, limited by traditional antitrust principles. . . . It also encompasses the broad aims of the Communications Act. . . . To apply our public interest test, then, we must determine whether the merger violates our rules, or would otherwise frustrate our implementation or enforcement of the Communications Act and federal communications policy. That policy is, of course, shaped by Congress and deeply rooted in a preference for competitive processes and outcomes."²⁶

9. Consistent with this precedent, in the first part of the analysis of the competitive effects of the proposed transfer, we identify the relevant product markets.²⁷ Next, we consider whether the transfer is likely to result in anti-competitive effects or has other potential harmful public interest effects.²⁸

10. The Commission, in its annual assessment of the video marketplace, has considered DIRECTV and USSB as competing in two product markets.²⁹ First, DIRECTV and USSB compete with each other and other distributors of video programming to a consumer's home for the acquisition of programming (the "programming market"). Second, DIRECTV and USSB compete with each other and other multichannel video program distributors in the delivery of multiple channels of video programming to a consumer's home (the multichannel video program distribution or "MVPD" market).

11. Next, we define the geographic scope of each product market. First, as to the "programming market," the Commission has considered this market to be national or regional in scope

Inc., Memorandum Opinion and Order, CC Docket No. 97-211, FCC 98-225, 13 Communications Reg. (P&F) 4771 (1998) ("*WorldCom-MCI Order*") at ¶¶ 8-14.

²⁴ *WorldCom-MCI Order* at ¶ 9, *supra* n. 23.

²⁵ *Id.* at ¶ 12.

²⁶ *Application for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Telecommunications, Inc. to AT&T Corp.*, Memorandum Opinion and Order, CS Docket No. 98-178, FCC 99-24 (released February 18, 1999) ("*TCI/AT&T Order*") at ¶ 14.

²⁷ *NYNEX Corp. and Bell Atlantic Corp. for Consent to Transfer Control of NYNEX Corp. and its Subsidiaries*, Memorandum Opinion and Order, File No. NSD-L-96-10, 12 FCC Rcd 19985 (1997) ("*Bell Atlantic-NYNEX*") at ¶ 37; *Teleport Communications Group Inc. and AT&T Corp. for Consent to Transfer Control of Corporations Holding Point-to-Point Microwave Licenses and Authorizations to Provide International Facilities Based and Resold Communications Services*, Memorandum Opinion and Order, CC Docket No. 98-24, 13 FCC Rcd 15236 (1998) ("*AT&T-Teleport Order*") at ¶ 15. Each product market is defined by a geographic component.

²⁸ *TCI/AT&T Order* at ¶ 17, *supra* n. 26.

²⁹ *Fourth Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Report, CS Docket No. 97-141, 13 FCC Rcd 1034 (1998) ("*1997 Cable Competition Report*") at Section III.

depending upon whether or not the programmer wishes to reach a national or regional audience.³⁰ Because DIRECTV and USSB generally distribute programming to a national audience, they typically obtain programming from programmers wishing to reach a national audience. Thus, we view DIRECTV and USSB as competing in the national programming market. Second, as to the MVPD market, we note that the Commission has found that the relevant geographic market for assessing MVPD competition is a local area. The scope of the local area is defined by the overlap of the "footprints" of the various service providers in that area.³¹ Because DIRECTV and USSB distribute programming to consumers across the United States, they compete in each of the local MVPD markets.

12. We now analyze the proposed transfer's potential effects on competition in the national programming market. Under this analysis, if one entity has sufficient market power to exclude others from being able to obtain programming, or to force others to obtain programming at discriminatory prices, then this entity could seriously undermine competition in both the supply of programming and its distribution.³² We do not view the merger of DIRECTV and USSB as harming competition in this market. While we do not have data on DIRECTV's and USSB's purchases of video programming, as of June 1998, there were approximately 98 million households with a television set ("TV households") in the United States, and DIRECTV had approximately 4.3 million subscribers and USSB had approximately 2 million subscribers.³³ These figures suggest that DIRECTV and USSB combined would not serve a sufficient number of TV households to enable them to exercise market power in the purchase of programming in the national programming market.³⁴

13. Concerning the geographic MVPD markets in which DIRECTV and USSB compete,

³⁰ *Fifth Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Report, CS Docket No. 98-102, FCC 98-335 (released December 23, 1998) ("*1998 Cable Competition Report*") at ¶ 125.

³¹ *See Third Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Report, CS Dkt. No. 96-133, 12 FCC Rcd 4358 (1997) ("*1996 Cable Competition Report*") at ¶ 115. The "footprint" of a service provider is determined by the geographic reach of the provider. For example, the geographic footprint of a cable operator is determined by the location of the homes that an operator passes with their cable and thus can serve.

³² *See TCI/AT&T Order* at ¶¶ 31-40, *supra* n. 26, for a discussion of these concerns in the MVPD market. The *Cable Television Consumer Protection and Competition Act of 1992*, Pub. L. No. 102-385, 106 Stat. 1460-1, § 2(a)5 (1992) ("*1992 Cable Act*") contains program access protections.

³³ The national TV household estimate is from the *Fifth Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Dkt. No. 98-102, FCC 98-335 (released Dec. 23, 1998) ("*1998 Cable Competition Report*") at C-1. *See* Greg Tarr, *DIRECTV Buys USSB, Gains 200,000 Subs, Twice*, Dec. 21, 1998, at Vol 13, No. 29, p. 1 (for DIRECTV and USSB estimates).

³⁴ This analysis is consistent with the Commission emphasis in its annual assessments of the video marketplace on whether or not distributors of video programming possess sufficient market power in the distribution market so as to confer on them the ability to exercise market power in the programming market. *See, e.g. 1997 Cable Competition Report* at ¶ 125, *supra* n. 29. *See also TCI/AT&T Order*, *supra* n. 26, at ¶¶ 31-42 (similar analysis in the context of an acquisition of a MVPD).

we were unable to obtain data on DIRECTV and USSB subscribership at the local level; the only data available to us is national data.³⁵ Consequently, we are not able to evaluate the competitive effects of their proposed transaction in each of the relevant local MVPD markets. Nevertheless, we do not believe that DIRECTV's acquisition of USSB's DBS licenses will enable DIRECTV to exercise significant market power in all of the markets in which it competes for two reasons.³⁶ First, the *1998 Cable Competition Report* notes that USSB's offerings are typically viewed by consumers as complementary to DIRECTV's offerings.³⁷ As of the announcement date of the proposed transaction, 1.8 million of USSB's approximately 2 million subscribers also subscribed to DIRECTV's service.³⁸ Thus, DIRECTV would gain only about 200,000 consumers by acquiring USSB. Therefore, after acquiring USSB, DIRECTV would have, at most, approximately 5.94% of the 76.6 million subscribers in the national MVPD market. This change, which would be less than 1%, would be too insignificant to raise competitive concerns under the DOJ/FTC merger guidelines.³⁹ We view this national analysis as descriptive of the average effect of the proposed merger across local MVPD markets.

14. Second, according to the *1998 Cable Competition Report*, as of June, 1998, 68.8% of homes passed by cable subscribe to basic cable services.⁴⁰ Consequently, cable operators have a

³⁵ SkyTrends collects geographically disaggregated data for DBS operators under the auspices of the Satellite Broadcasting & Communications Association. By letter of December 3, 1998, the International Bureau inquired about the availability of this data for purposes of this analysis. SkyTrends responded that it was unable to provide the data because some DBS operators would not permit it to make the data available to the Bureau.

³⁶ Market power is "the ability profitably to maintain prices above competitive levels for a significant period of time." U.S. Department of Justice/Federal Trade Commission's *Horizontal Merger Guidelines* (issued April 2, 1992, as revised April 8, 1997) ("*DOJ/FTC Merger Guidelines*") at 2.

³⁷ See *1998 Cable Competition Report* at n. 268, *supra* n. 33.

³⁸ See Greg Tarr, *DIRECTV Buys USSB, Gains 200,000 Subs*, *Twice*, Dec. 21, 1998, at Vol 13, No. 29, p. 1 (for DIRECTV and USSB estimates).

³⁹ The *DOJ/FTC Merger Guidelines* consider the change in a market's Herfindahl-Hirschman Index ("HHI") as an indicator of whether or not a merger is likely to raise significant competitive concerns. The Commission has used this indicator in determining whether or not a communications merger would raise significant competitive concerns. See, e.g., *WorldCom/MCI Order*, *supra* n. 3. The Herfindahl-Hirschman Index for a market is the sum of the squares of each competitor's market share. Our estimates are based upon subscriber data used for Table C-3 of the *1998 Cable Competition Report*, *supra* n. 33, and assume that 200,000 subscribers of DIRECTV's count could be ascribed to USSB solely. Based upon these data, we estimate the change in the HHI from DIRECTV's acquisition of USSB to be approximately 0.2%. Thus, the change in this market's HHI does not raise concern based on the DOJ/FTC guidelines.

⁴⁰ *1998 Cable Competition Report* at Table B-1, *supra* n. 33. Based on state level reported in the National Cable Television Association's *Cable Television Developments, Fall 98/Winter 99* at page 12, we note that the number of home passed that subscribe to cable ranges from 38.45% (District of Columbia) to 98.24% (New Hampshire). (We excluded Rhode Island and Vermont from our computations due to incomplete data for those states.)

substantial share of TV households across many of the regions of the United States in which DIRECTV and USSB also compete. Further, based on available data, only 3.4% of U.S. TV households are not passed by a cable system.⁴¹ Thus, for most U.S. TV households, DIRECTV must potentially compete with at least one cable operator that likely will have a significant share of the local MVPD market.

15. The next part of our competitive analysis focuses on the effect that the proposed Joint Transfer Application, if granted, would have on potential competition in the product markets at issue here -- the national programming market and the local MVPD markets. The key competitive issue is whether or not allowing DIRECTV to acquire an additional eight full-CONUS DBS channels might prevent entry by another potential MVPD provider and thereby lessen competition in any of the relevant product markets in which it competes.⁴²

16. Because this transaction only involves a total of eight DBS channels at two different orbital locations, five at 101° W.L. and three at 110° W.L., we do not believe that grant of the Joint Transfer Application would be likely to preclude entry into the relevant product markets by another MVPD entrant. Further, existing competitors in local MVPD markets are investing heavily in additional capacity. Cable operators, for instance, have invested large amounts to increase their capacity to deliver more programming and other services to consumers.⁴³ This has meant that for DBS operators to compete with cable operators, they also must acquire additional capacity to provide similar services.⁴⁴

17. Thus, we find that the grant of this application would allow DIRECTV to become a stronger competitor in the MVPD market, which we believe would further the overall public interest in

⁴¹ Based upon estimates developed in Paul Kagan Associates, Inc., *Marketing New Media* (November 16, 1998), of 98,920,000 television households, 95,520,000 of these households are passed by a cable system. Kagan's estimates were taken from *Cable Television Developments: Fall 1998/Winter 1999*, National Cable Television Association at 1.

⁴² Currently, of the 256 authorized DBS channels, 96 are full-CONUS channels. Of these 96 channels, DIRECTV currently has authorization for 27 channels. If transfer of USSB's authorization to DIRECTV were permitted, DIRECTV would then have 35 channels, or approximately 36% of the authorized full-CONUS DBS channels. A full-CONUS DBS orbit location is capable of serving the 48 contiguous United States. The full-CONUS DBS orbital slots allocated to the United States include 101° W.L., 110° W.L., and 119° W.L. In the *Revision of Rules and Policies for the Direct Broadcast Satellite Service*, Report and Order, 11 FCC Rcd 9712 (1995) ("*DBS Auction Order*"), the Commission prohibited any entity that, at that time, had a license at a full-CONUS location from bidding on the 110° W.L. slot in the 1996 auction. That rule, designed for that particular auction, was meant to prevent any one entity from having attributable interests in more than one of the three DBS full-CONUS locations. *Id.* at ¶ 5.

⁴³ *1998 Cable Competition Report* at Section II.A.5, *supra* n. 33 (discussion of cable operators investments in capacity to provide broadband services).

⁴⁴ DOJ made the same point in its complaint against Primestar. *United States of America v. PrimeStar, Inc.*, No. 1: 98CV01193, 1998 U.S. Dist. (filed D.C. May 12, 1998). If Congress passes a bill to reform the Satellite Home Viewer Act that imposes must-carry obligations on DBS operators, then DBS operators would need more capacity.

increasing the strength of competitive alternatives to cable within the MVPD market.

B. USSB Request for Additional Time

18. As part of the proposed transaction, DIRECTV would acquire the three channels that USSB is assigned to at the 110° W.L. orbital location.⁴⁵ USSB has not yet implemented service at these channels. USSB received its initial assignment for these channels in 1984.⁴⁶ In 1988, the Commission granted USSB an extension of time within which to commence service at this location, from December 3, 1988 to December 4, 1992.⁴⁷ In 1992, USSB received a second extension of five years, extending USSB's operation deadline from December 4, 1992 to December 4, 1997.⁴⁸ The Mass Media Bureau noted that this second extension was justified due to the considerable effort and money expended -- a financial commitment of over twenty-three million dollars --, the progress attained, USSB's overall contribution to the development of DBS, and the compelling interest of service to the public.⁴⁹ On February 26, 1997, USSB filed a request for additional time, from December 12, 1997 to December 12, 1999, to implement its authorization to construct and launch a satellite using three DBS channels at the 110° W.L. orbit location.⁵⁰ No party filed comments or opposed this request. We address this request here in order to determine whether USSB can transfer its assignment of these DBS channels to DIRECTV.

19. Section 100.19 of the Commission's rules,⁵¹ requires that an entity receiving a DBS authorization proceed with "due diligence" in implementing its authorization, unless the Commission determines otherwise after a "proper showing."⁵² An application for transfer of control, however,

⁴⁵ Joint Transfer Application at 2, *supra* n. 1.

⁴⁶ *CBS I* at ¶ 22, *supra* n. 5.

⁴⁷ *USSB I*, *supra* n. 11. The extension grant also applied to USSB's permit for five DBS channels at the 101° W.L. orbit location.

⁴⁸ *USSB III*, *supra* n. 12. Concurrently, USSB contracted with Hughes Communications Galaxy, Inc. ("Hughes") for the use of five transponders on Hughes' DBS satellite at 101° W.L. The Mass Media Bureau noted that in order for USSB to use the five transponders, its launch date must be adjusted to coincide with that of the Hughes launch. Hughes' DBS system was not required to be operational until December 7, 1994.

⁴⁹ *Id.* at ¶ 16. The Mass Media Bureau also noted that operation on Hughes' transponders would enable USSB to provide video compression and HDTV. These services would increase the number of channels available to DBS viewers and improve the quality of the picture received. The Mass Media Bureau stated that these advancements and improvements would serve the "ultimate goal of service to the public." *Id.*

⁵⁰ Public Notice, Report No. SPB-77 (March 5, 1997).

⁵¹ 47 C.F.R. § 100.19.

⁵² 47 C.F.R. § 100.19(c).

cannot justify an extension of the due diligence deadlines.⁵³ The due diligence requirement has two prongs. The first prong requires a permittee to either begin construction or complete a contract for construction within one year of receiving a construction permit.⁵⁴ USSB has complied with this requirement. The second prong requires the permittee to begin operation within six years of receiving that permit.⁵⁵ Although we find that USSB has not met the second prong of the due diligence rule within the requisite time, on our own motion, we find that it is in the public interest to waive Section 100.19(a) of the rule.⁵⁶

20. Commission rules allow for waiver where good cause is shown.⁵⁷ In regard to the Commission's waiver standard, the United States Court of Appeals has stated that granting a waiver of a particular rule may be appropriate if unique circumstances support a finding that strict adherence would not be in the public interest and where a grant would not undermine the underlying policy objectives of the rule in question.⁵⁸ As the court stated, though "an agency may discharge its responsibilities by promulgating rules of general application which, in the overall perspective, establish the 'public interest' for a broad range of situations, [this] does not relieve it of an obligation to seek out the 'public interest' in particular, individualized cases."⁵⁹ We believe that the public interest is served by granting a waiver of the Commission's DBS due diligence requirement under these unique circumstances. We also conclude that the underlying policy objectives of the due diligence rule are not compromised by this waiver. However, we condition grant of the Joint Transfer Application on DIRECTV's commencing service from 110° W.L. orbit location, using the three DBS channels, by December 31, 1999.⁶⁰ If DIRECTV fails to commence service by this time, the Commission will reclaim these channels by cancelling DIRECTV's authorization.

21. First, we find that this situation presents unique and unusual circumstances that justify a waiver. As an experienced DBS operator and pioneer, USSB has demonstrated a genuine commitment and progress in the implementation of its DBS service. The efforts of USSB in bringing its DBS authorization at 101° W.L. into productive use almost five years ago is well established and commendable. Those efforts, which included making financial arrangements, contracting with DBS home receiving equipment suppliers, and making significant monetary investments, have helped it develop a valuable history and expertise in the DBS industry. USSB has continued to apply the same type of effort to bring its three channels at 110° W.L. into productive use. Prior to the announcement of the proposed transfer of control to DIRECTV, its efforts included its continued compliance with the

⁵³ *Id.*

⁵⁴ See 47 C.F.R. § 100.19(a).

⁵⁵ *Id.*

⁵⁶ 47 C.F.R. § 1.3.

⁵⁷ *Id.*

⁵⁸ *Wait Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) ("*Wait Radio*").

⁵⁹ *Id.*

⁶⁰ See Joint Transfer Application at 6, *supra* n. 1.

construction contract with Lockheed Martin Corporation ("Lockheed Martin") -- which was placed on an accelerated schedule at the time of its application for additional time.⁶¹ USSB continued to make monthly payments on the construction contract; payments to date total \$7.6 million.⁶² It also has expended efforts to negotiate launch vehicle services with Arianespace. Moreover, USSB continues to oversee its previously established broadcast centers, handles program distribution agreements with programmers, administers its subscriber services center, markets its DBS service to the public, and generally promotes its DBS service, as it has done over the past decade.

22. Nevertheless, as described in the record, USSB has encountered significant difficulties in implementing its DBS service at the 110° W.L. orbit location, which have made it difficult for USSB to strictly comply with our due diligence rule. We believe, however, that USSB has made reasonable attempts to overcome these difficulties. The primary difficulty is the fact that for nine years, USSB has had only three DBS channels at the 110° W.L. orbit location. It is commercially difficult to finance and construct a satellite designed with so few authorized channels. We note, that the issue of a minimal channel assignment at any particular DBS orbit location was not addressed when the due diligence rule was originally formulated. The Commission, however, now recognizes that an assignment of a small number of channels can be a serious difficulty.⁶³ In particular, the Commission has stated that "[f]our channels may not provide sufficient capacity to operate a viable system, [and] such piecemeal assignment of channels could render the potentially full-CONUS orbital location at 110° W.L. unusable by any single permittee."⁶⁴ USSB resolved a similar problem at the 101° W.L. orbit location by purchasing an equity interest in DIRECTV's satellite there and by implementing a complementary service.

⁶¹ United States Satellite Broadcasting Company Semi-Annual Report (March 27, 1998) ("USSB March 1998 Semi-Annual Report") at 1; USSB Semi-Annual Report (August 26, 1997) at 1; and USSB Semi-Annual Report (filed February 3, 1997). USSB states that it has entered into a contract agreement with Lockheed Martin for an highly-accelerated construction schedule for its three channel satellite at 110° W.L. and that pursuant to that agreement, USSB made a two million dollar payment to Lockheed Martin. USSB states that it has been actively negotiating with Arianespace for the launch of the 110° W.L. satellite. Although these contractual arrangements suggest that USSB has complied with the first part of the due diligence requirement, the Commission held in *Advanced I* that "[t]he fact that Advanced continues to have a binding construction contract, or that it has made all payments required by this contract does not excuse its failure to meet the second part of its due diligence requirement -- operation of its direct broadcast satellite system." *Advanced Communications Corp.*, 10 FCC Rcd 13337 (Int'l Bur. 1995) ("*Advanced I*"), *aff'd Advanced Communications Corp.*, 11 FCC Rcd 3399 (1995) ("*Advanced II*"), *aff'd Advanced Communications Corp. v. FCC*, 84 F.3d 1452 (D.C. Cir. 1996) *cert. denied, Advanced Communications Corp. v. FCC*, 117 S.Ct. 718 (1997).

⁶² USSB March 1998 Semi-Annual Report at 1, *supra* n. 61.

⁶³ *Revision of Rules and Policies for Direct Broadcast Satellite Service*, Report and Order, 11 FCC Rcd 9712 (1995) (Commission acknowledges that for a DBS system to be competitive and viable it must offer many channels of service). See also *USSB I* at ¶ 12, *supra* n. 11, (where the Commission noted that "[w]hile these potential difficulties may have been perceived, they were obviously not fully accounted for when the due diligence rule was set for DBS. ").

⁶⁴ *Advanced II* at ¶ 70, *supra* n. 62 (addressing whether or not reclaimed channels should be allocated pro rata or aggregated for reassignment).

23. As the record demonstrates, USSB has made consistent attempts over the past several years to achieve a similar contractual sharing-type arrangement for its authorization at 110° W.L., but has been unsuccessful. USSB asserts that its attempts to negotiate a sharing agreement have been made uniquely difficult by several factors. First, it contends that the failure of Advanced Communications Corp. ("ACC") to proceed with due diligence in the construction and launch of its DBS system and the Commission's subsequent denial of ACC's proposal to sell its DBS authorization to Tempo Satellite, Inc., led to what was, in effect, a lost opportunity for USSB to negotiate a sharing agreement. Adding to the delay, ACC's reclaimed channels were subsequently auctioned to MCI.⁶⁵ USSB asserts that, although MCI was originally receptive to a sharing proposal, it ultimately chose not to negotiate. USSB, therefore, states that it then proceeded to expeditiously complete construction and launch of its own DBS satellite.

24. We acknowledge the unique difficulties that USSB has encountered in attempting to negotiate a sharing arrangement at 110° W.L. The minimal channels it has been assigned at this location has hampered its implementation of a DBS service at 110° W.L.⁶⁶ In addition, we find that a waiver will not undermine the policies underlying Section 100.19. The primary purpose of our DBS due diligence requirement is to prevent warehousing of "substantial blocks of spectrum and valuable orbital positions."⁶⁷ In this case, USSB has neither a substantial block of spectrum nor control of a valuable orbital location. Given that USSB's current assignment at the 110° W.L. orbit location contains only three DBS channels, a waiver would not undermine our warehousing policy, which is the basis of the due diligence rule. We further note that no party, including any satellite company that conceivably could provide DBS service at 110° W.L., opposed the extension request or commented on it.

25. Further, the Commission has asserted that a primary goal in initiating DBS service is to provide competition to distributors like cable operators, improve service to remote areas, encourage innovative new programming, and expedite the delivery of DBS service to the public.⁶⁸ Here, DIRECTV asserts that it will expeditiously initiate DBS service from the 110° W.L. orbit location within a few months from grant of the Joint Transfer Application. Specifically, the parties assert that DBS service from the 110° W.L. orbit location is imminent -- by the fall of this year.⁶⁹ A grant of additional time here satisfies our policy objectives of expeditious delivery of service to U.S. consumers. It is doubtful that the Commission could adopt any alternative plan, for example, reclaiming these channels and auctioning them, that would result in service to consumers any sooner, utilizing the three DBS frequency channels at 110° W.L. In order to assure that consumer service is in fact implemented expeditiously, we condition the Joint Transfer Application, with respect to the three channels at 110° W.L., on the requirement that DIRECTV commence service from the 110° W.L.

⁶⁵ After the auction, the channel assignments at 110° W.L. included: 28 DBS channels for MCI, three DBS channels for USSB, and one DBS channel for EchoStar Satellite Corporation.

⁶⁶ See, e.g., *Advanced II* at ¶ 70, *supra* n. 62.

⁶⁷ *CBS I* at ¶ 119, *supra* n. 5.

⁶⁸ *Advanced II* at ¶¶ 3 and 5, *supra* n. 62.

⁶⁹ Joint Transfer Application at 6, *supra* n. 1.

orbit location by December 31, 1999.⁷⁰ If DIRECTV fails to commence service by this time, the Commission will reclaim these channels and cancel DIRECTV's authorization for these three channels at 110° W.L.

26. The facts before us show that, overall, USSB has made a real and measurable commitment to providing a DBS service, and in particular from the 110° W.L. orbital location. Its proposed transaction with DIRECTV is not simply the transfer of bare DBS authorizations but, instead, the transfer of an entire, ongoing business, which includes five operating channels at 101° W.L., an authorization for three channels at 110° W.L., and three earth stations. This situation is clearly different from that of ACC, which was attempting to transfer bare licenses, and nothing else.⁷¹ USSB has made steady progress in implementing its complete DBS service, including operating DBS channels. In contrast, ACC's situation was characterized as "extended inaction and apparent lack of commitment."⁷² USSB, as noted above, continued its efforts, including making significant investments in its system.⁷³ Even with the advantage of a prime orbital location with enough channels to implement a viable and productive DBS service, ACC failed to demonstrate "concrete progress" toward launch and operation.⁷⁴ Instead, ACC chose to concentrate its efforts on negotiating a merger or a transfer in lieu of building a DBS business.⁷⁵ Its primary goal, unlike USSB's, was to secure a windfall from the authorization of valuable spectrum awarded to it, at virtually no cost.

27. The unique circumstances here justify our decision to grant USSB a waiver of our due diligence rules. The facts before us show that USSB has continued to make significant efforts toward the implementation of DBS service at 110° W.L. in the face of significant difficulties. Further, we find that the policy objectives of the due diligence rule are not undermined by the grant of a waiver. In particular, with the accompanying grant of the application to transfer the licenses to DIRECTV, the public interest will be served by the swift initiation of DBS service from the 110° W.L. orbit location.

IV. Conclusion

28. Accordingly, for the reasons stated above, we find that it is in the public interest to grant the Joint Transfer Application of DIRECTV and USSB for consent to transfer control of USSB's DBS authorizations to DIRECTV, subject to the condition that, with respect to the three channels at 110° W.L., DIRECTV commence service from that orbit location by December 31, 1999. We also find that it is in the public interest to waive the due diligence requirement of Section 100.19(a) with

⁷⁰ *Id.*

⁷¹ *Advanced II* at ¶ 36, *supra* n. 62 (Advanced had "extended inaction and apparent lack of commitment." It was "not 'much closer to the threshold of providing service than any non-permittee,' and thus has no claim to comparative advantage that justify an extension.").

⁷² *See USSB I* at ¶ 16, *supra* n. 11.

⁷³ *Advanced II* at ¶¶ 47-53, *supra* n. 62.

⁷⁴ *Id.* at ¶ 44.

⁷⁵ *Id.* at ¶ 50.

regard to USSB's pending application for additional time to construct and launch a Direct Broadcast Satellite at 110° W.L. and dismiss it.

V. Ordering Clauses

29. Accordingly, IT IS ORDERED, pursuant to Section 0.261 of the Commission's rules on delegated authority, 47 C.F.R. § 0.261, that the application for consent to transfer of control, Files Nos. DBS-81-07 and DBS-81-07(II), IBFS File Nos. SAT-T/C-19981217-00098 and SES-T/C-19981217-01876, filed by United States Satellite Broadcasting Company, Inc., and DIRECTV Enterprises, Inc. IS GRANTED, SUBJECT TO THE CONDITION that, with respect to the three channels at 110° W.L., DIRECTV Enterprises, Inc., initiate service using these three channels by December 31, 1999.

30. IT IS FURTHER ORDERED, pursuant to Section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, that the due diligence requirement of Section 100.19(a) of the Commission's rules, 47 C.F.R. § 100.19(a), with respect to the United States Satellite Broadcasting Company, Inc.'s application for additional time, File No. 45-SAT-EXT-97, IBFS File No. SAT-MOD-19970226-00020, IS WAIVED.

31. IT IS FURTHER ORDERED that the United States Satellite Broadcasting Company, Inc.'s application for additional time, File No. 45-SAT-EXT-97, IBFS File No. SAT-MOD-19970226-00020, IS DISMISSED.

32. IT FURTHER ORDERED THAT this Order is effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Roderick K. Porter
Acting Chief, International Bureau