

**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)	

REPORT AND ORDER

Adopted: December 14, 1995

Released: December 15, 1995

By the Commission: Commissioners Quello and Barrett concurring in part and dissenting in part and issuing separate statements.

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I. INTRODUCTION

1. With this Report and Order, we adopt new rules and policies for the Direct Broadcast Satellite ("DBS") service that are designed to better reflect the realities of the service as it has evolved to date than do the existing "interim" rules and policies that were formulated in a different regulatory environment and without the benefit of experience with actual operation of a DBS licensee.

2. We initiated this proceeding on October 30, 1995, when we issued a Notice of Proposed Rulemaking ("NPRM") to revise the rules and policies for the DBS service.^{1/} Our action was precipitated by our recent decision to cancel the DBS construction permit of Advanced Communications Corporation ("ACC") for failure to meet its obligation to proceed with due diligence toward construction and operation of its DBS system.^{2/} We tentatively concluded that the method we had previously stated would be used to reassign recovered DBS resources no longer serves the public interest, and accordingly proposed to use competitive bidding when the Commission has received mutually exclusive applications for reassignment of such DBS resources. Specifically, we proposed to auction two large blocks of channels that are currently available at two orbital locations.

^{1/} See Revision of Rules and Policies for the Direct Broadcast Satellite Service, Notice of Proposed Rulemaking , FCC 95-443, IB Docket No. 95-168, PP Docket No. 93-253 (released Oct. 30, 1995).

^{2/} Advanced Communications Corp., FCC 95-428 (adopted Oct. 16, 1995)("Advanced Order").

3. In addition, the NPRM proposed new service rules that would: (1) impose performance criteria intended to ensure that DBS 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 requested comment on our existing policy governing the extent to which DBS resources may be put to alternative uses.

4. In response to the NPRM, the Commission received 27 initial comments and 24 reply comments from entities representing many sectors of the communications industry^{3/}. Many of our proposed service rules enjoyed broadbased support. Others, especially those relating to competition issues, elicited spirited debate. For example, the comments indicate the large division between the views of existing DBS permittees and those seeking to enter the service, as well as between those who own other multichannel video programming distributors ("MVPDs"), such as cable operators, and those who do not.

5. In light of the comments submitted in this proceeding, we have decided to adopt a number of the rules we proposed. After considering the range of suggestions for rules to protect competition, however, we have decided to adopt a single one-time rule specifically designed to promote and protect competition: no person with an attributable interest in channels at a full-CONUS location shall acquire an attributable interest in the channels currently available at the 110° orbital location without divesting its existing interest in full-CONUS channels at another location within twelve months of such acquisition. Under this rule, a person currently holding an attributable interest in channels at one of the three orbital locations capable of full-CONUS service would be allowed to bid for the channels currently available at 110°, but if successful would have to divest its current full-CONUS channels within one year. This rule is intended to ensure that, for the time being, each full-CONUS orbital location will have an operator that is independent of and competitive with the other full-CONUS operators. Since this rule expires upon completion of the auction process, the Commission will be free to reevaluate this "one location" approach in the course of considering future transactions in the DBS service that are subject to our approval.

6. We have also concluded that the public interest is no longer served by the *pro rata* methodology established in Continental for reassigning reclaimed DBS channels. Although a number of current permittees object to this change in policy as unjustified, unfair, and even unconstitutional, we believe that the public interest would be served by adopting rules that will result in efficient and expedited DBS service from the channels currently available.

7. We have concluded that the Commission has the authority to award DBS construction permits by means of competitive bidding, and that the use of competitive bidding to assign DBS spectrum will promote the rapid deployment of DBS service and the efficient use of DBS spectrum more effectively than any other assignment method. We have decided to award

^{3/} Appendix A contains a list of those parties who submitted comments and reply comments in this proceeding. The commenters will be referred to herein by the abbreviations noted in that appendix.

construction permits for the channels available at 110° and 148° by means of a sequential multiple round electronic auction, and we adopt rules to implement this auction. At the same time, we recognize that other auction designs could be suitable for DBS under certain circumstances in the future, and we therefore also adopt rules to provide for these auction designs.

II. ADOPTION OF NEW SERVICE AND ONE-TIME AUCTION RULES

A. Performance Objectives

8. The NPRM tentatively concluded that combining existing due diligence requirements with additional milestones for construction and operation of DBS systems by new permittees will prevent unnecessary delays in the commencement of service. Accordingly, the NPRM proposed rules to add two additional performance criteria for those receiving DBS construction permits after the effective date of the proposed rule: (1) completion of construction of the first satellite in a DBS system within four years of authorization; and (2) launch and operation of all satellites in a DBS system within six years of authorization.^{4/}

9. The comments reveal a great deal of support for tightened performance objectives to ensure the timely development of the DBS service. A number of commenters support the rule as proposed,^{5/} while Primestar and Tempo advocate stronger rules that would apply to existing permittees as well as new entrants in light of the slow pace of construction in the service to date. DBSC opposes as unfair the imposition of additional requirements upon existing permittees.^{6/} Primestar also proposes to shorten the contracting period from one year to six months, require the first satellite to be built within three and a half years rather than four years, and require all satellites to be in operation in five rather than six years from authorization.^{7/} Tempo supports the four-year first satellite construction period, but encourages a stronger mechanism for enforcement than has been implemented to date.^{8/}

10. We will adopt the performance objectives as proposed in the NPRM. We believe that these new objectives, combined with existing due diligence requirements,^{9/} will ensure consistent and purposeful progress toward construction and operation of DBS systems by those receiving permits after the effective date of this rule. These performance requirements will apply

^{4/} See NPRM at ¶¶ 25-27.

^{5/} See, e.g., BellSouth Comments at 2-3; DIRECTV Comments at 23; GE Americom Comments at 20; MCI Comments at 7.

^{6/} DBSC Comments at 15.

^{7/} See Primestar Comments at 12-13.

^{8/} See Tempo Comments at 31.

^{9/} See 47 C.F.R. § 100.19.

to any person who acquires a permit through the competitive bidding process, and thus further the congressional goals of preventing warehousing of spectrum and encouraging investment in and rapid deployment of new services.^{10/} We decline to apply the rule to existing permittees, however. Of the eight current DBS permittees, two (DIRECTV and USSB) have already built and launched satellites, and three more (Tempo, EchoStar, and Directsat) have nearly completed construction of at least one satellite. Two others (Continental and DBSC) were recently granted permit extensions based on their demonstrated commitment to and capability of providing DBS service in an expedited manner.^{11/} The remaining permittee (Dominion) was determined to have met the first prong of our due diligence requirements and granted orbital/channel assignments only four months ago.^{12/} Under these circumstances, we believe it would be inappropriate to apply the new rules to existing permittees.

11. In addition, we decline to accelerate the milestones as proposed by Tempo. Of the five new permittees that entered the DBS service as a result of our Continental proceeding, only one -- EchoStar -- submitted its contractual due diligence showing within six months, although Tempo Satellite submitted its showing in just over six months.^{13/} Although their order in the assignment queue was to be determined by the speed of their due diligence filings, the other three permittees took up to the full year allowed in the regulations to make their submissions. New entrants, having paid for their channels at auction, would have a demonstrable incentive to accelerate their progress toward operation in order to recoup their investment as quickly as possible. We do not, however, find it necessary to allow them less time to contract for satellite construction than has been required by prior permittees. Since the contracting period remains one year, and even Tempo does not dispute the three year interval between contracting and completion of the first satellite, we also will not shorten the construction periods. We will, however, monitor semi-annual reports more closely in the future to identify any permittee that appears to be falling behind schedule so that we can address the situation in a timely manner.

^{10/} See 47 U.S.C. § 309(j)(4)(B).

^{11/} Permit extensions granted to two permittees who only recently received their channel assignments have been tied to compliance with their respective construction contracts, both of which provide for operational systems within four years. See Continental Satellite Corp., DA 95-2347 (Int'l Bureau, released Nov. 21, 1995); Direct Broadcasting Satellite Corp., DA 95-2439 (Int'l Bureau, released Dec. 8, 1995).

^{12/} See Dominion Video Satellite, Inc., DA 95-1734 (Int'l Bureau, released Aug. 7, 1995).

^{13/} See Continental Satellite Corp., 4 FCC Rcd 6292 (1989), partial recon. denied, 5 FCC Rcd 7421 (1990). The Continental order was released on August 15, 1989. EchoStar filed its due diligence showing on February 8, 1990; Tempo Satellite on February 22, 1990; Directsat on March 21, 1990; DBSC on April 3, 1990; and Continental on August 14, 1990.

B. Use of DBS Capacity

12. As explained in the NPRM,^{14/} the channels and orbital locations allocated to the United States under the ITU Radio Regulations, Appendices 30 and 30A, are designated for use in the Broadcast Satellite Service ("BSS"). 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."^{15/} This is also the definition of DBS service adopted in the Commission's Rules.^{16/} 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 BSS service.^{17/}

13. The NPRM requested comment on the Commission's existing policy for non-conforming uses of DBS resources. That policy requires each DBS licensee to begin DBS operations before the end of its first five-year license term, but allows otherwise unrestricted use of the spectrum during that term. After expiration of the first term, a DBS operator may continue to provide non-DBS service only on those transponders on which it also provides DBS service, and only up to half of the use of each transponder each day.^{18/}

14. The commenters generally favored making the restrictions on use of DBS resources a function of capacity instead of time.^{19/} DIRECTV argues that the capacity-based approach will enable licensees to better tailor new program offerings to public demand, while MCI, DOJ, and USSB see the proposal as promoting efficiency as well as technological advancement and thus optimizing use of satellite capacity. Hawaii believes that the greater flexibility would encourage development of western DBS orbital locations, speeding service to areas currently unserved or underserved.

15. Only Primestar, Tempo, and GE Americom oppose reformulating the rule in terms of capacity, arguing that additional flexibility in use of DBS spectrum would undermine the Commission's commitment to DBS service and in effect work a reallocation of DBS spectrum to

^{14/} See NPRM at ¶ 28.

^{15/} ITU Radio Reg. 37, Chapter 1. For purposes of this definition, "direct reception" encompasses both individual reception and community reception. Id.

^{16/} See 47 C.F.R. § 100.3.

^{17/} ITU Radio Reg. 846, Article 8.

^{18/} See NPRM at ¶¶ 29-30 (discussing United States Satellite Broadcasting Co., 1 FCC Rcd 977 (1986) and Potential Uses of DBS, 6 FCC Rcd 2581 (1991)).

^{19/} See DBSC Comments at 15; DIRECTV Comments at 24; Hawaii Comments at 5-6; MCI Comments at 7-8; NRTC Comments at 10; DOJ Comments at 19; USSB Comments at 2.

other services.^{20/} We believe that this opposition is based on a misapprehension of the effect that reformulating the rule would have. Whether stated in temporal or capacity terms, our restrictions ensure that DBS channels will be used principally for DBS service. The capacity-based restrictions maintain all other parameters of the current temporally-based restrictions, and thus do not decrease the amount of DBS service that licensees must provide in absolute terms. Rather, capacity-based restrictions allow licensees more flexibility in how they will configure their satellites as a matter of technical efficiency in complying with the limitations we have imposed.

16. We expect that DBS service will be the most economically efficient and profitable use of DBS resources, and we retain our commitment to promoting this service as an important competitor in the MVPD market. Moreover, as the Commission stated when it first adopted its use restrictions, DBS use will be encouraged by the fact that only those individual channels providing DBS service for a substantial portion of the day will be entitled to protection from interference, and then only during the time of DBS operation.^{21/} We do not see any reason to phrase our policies in terms that are more restrictive than necessary to achieve their ends.

17. Accordingly, we will restate our policy restricting the use of DBS resources as a function of capacity rather than time. Since we have decided to lengthen the term of a non-broadcast DBS license from five years to ten years,^{22/} we will require that each licensee initiate DBS service within five years of licensure, rather than within the term of its first license. Thus, the new policy will be that a DBS licensee must begin DBS operations within five years of receipt of its license, but may otherwise make unrestricted use of the spectrum during that time. After that five year period, such a licensee may continue to provide non-DBS service so long as at least half of its total capacity at a given orbital location is used for DBS service.

18. We will not, however, implement MCI's suggestion that this capacity restriction be assessed over a thirty-day period. We believe that DBS service should be an important part of a licensee's operations each and every day, and that such a manner of operation carries out the spirit of the international allocation of these resources to the United States for DBS use. As required under our prior policy, DBS operators must notify the Commission of the initiation of a non-DBS service and describe the service offering.^{23/} We also will retain the requirement that a DBS operator which provides non-DBS service demonstrate to the Commission the substantiality of its DBS service -- in terms of hours and specific times devoted to DBS service -- in order to receive protection for its DBS transmissions.^{24/}

^{20/} See GE Americom Comments at 20-21; Primestar Comments at 15-17; Tempo Comments at 32-33.

^{21/} USSB, 1 FCC Rcd at 979.

^{22/} See ¶ 130, *infra*.

^{23/} USSB, 1 FCC Rcd at 979.

^{24/} *Id.* at 980 n.10.

19. The NPRM also referred to the possibility that, as a result of a separate proceeding, operators using DBS channels and orbital locations may be permitted to provide both domestic and international service. In light of that possibility, and the discussion of the permissible non-standard uses of DBS channels, the NPRM requested comment on whether the U.S. has the authority to auction permits which may include the provision of international service.^{25/}

20. While commenters generally support the provision of international DBS service by United States licensees,^{26/} some commenters caution against deciding this issue in this proceeding. Others suggest that allowing international service would make conducting an auction unwise.^{27/} We will not resolve the international service issue in this proceeding. It is more properly addressed in the ongoing proceeding reviewing the regulatory distinction we now draw between domestic and international satellite service generally.^{28/} Because this issue may be resolved before the auction, however, we must address the relationship between auctions and international service.

21. We do not agree that allowing DBS operators the option of providing international service would make auctions unwarranted or unwise. Our DBS permits and licenses authorize the use of orbital locations and frequencies specifically assigned to the United States. There is no reason why these limited orbital and spectrum resources cannot be auctioned for the benefit of the United States. Moreover, even if we decide to permit international service, our DBS licenses will constitute final authorization for domestic service only. Those who wish to provide international service will still need to request that we notify the ITU, coordinate with any affected foreign administrations, and comply with any other United States treaty requirements.^{29/}

22. In addition, we again remind potential DBS permittees of 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 Section

^{25/} See NPRM at ¶ 32.

^{26/} See, e.g., Hawaii Comments at 5; Primestar Comments at 10; Tempo Comments at 28.

^{27/} See, e.g., DIRECTV Comments at 22; GE Americom Comments at 19-20; Lockheed Martin Comments at 9; MCI Comments at 6; and PanAmSat Comments at 4.

^{28/} See NPRM at ¶ 24 (discussing Transborder/Separate Systems proceeding).

^{29/} With respect to DIRECTV's request for clarification as to whether consent of the receiving country is required prior to beginning international DBS transmissions, the impact of any United States treaty requirements or a foreign country's requirements on the provision of international DBS service will be addressed in the context of the Transborder/Separate Systems proceeding.

312(a)(7) and 315 of the Communications Act.^{30/} 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.^{31/} 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 and other requirements for providing video programming."^{32/} 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.^{33/} 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. Rules and Policies Designed to Promote Competition

23. As we stated in the NPRM, 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.^{34/} In addition, in order to satisfy our obligations under Title III of the Communications Act, we "seriously consider[] the antitrust consequences of a proposal and weigh[] those consequences with other public interest factors."^{35/} As the United States Supreme Court has long recognized, "[t]here can be no doubt that competition is a relevant factor in weighing the public interest."^{36/}

^{30/} 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. Id. at § 315(a).

^{31/} 47 U.S.C. § 335(b).

^{32/} Id. at § 335(a); see also Direct Broadcast Satellite Public Service Obligations, 8 FCC Rcd 1589 (1993).

^{33/} 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.).

^{34/} NPRM at ¶ 36. See also Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992, 9 FCC Rcd 7442, 7466 (1994) ("1994 Competition Report"); Tempo Satellite, Inc., 7 FCC Rcd 2728, 2730 (1992) ("Tempo II") ("We have long anticipated that the DBS service, along with other multichannel video technologies, will provide an effective, competitive alternative to cable television").

^{35/} FCC v. RCA Communications, Inc., 346 U.S. 86, 88 (1953).

^{36/} Id. at 94. See also United States v. FCC, 652 F.2d 72, 81-82 (D.C. Cir. 1980) (competitive considerations are an important element of the "public interest" standard which governs federal agency decisions).

24. The NPRM proposed certain rules intended to prevent strategic use of DBS resources for anticompetitive purposes, and also requested comment on whether additional steps were necessary to achieve the desired goal of fostering competition in markets for the delivery of video programming. Two of the rules proposed were structural in that they placed limits on the number of full-CONUS DBS channels a single entity could use, while the other proposed rules were aimed at preventing specific types of potentially anticompetitive conduct. The NPRM also requested comments upon the sufficiency of existing rules to deal with competition-related issues.

25. As discussed more fully below, a number of commenters assert in response to these proposals and inquiries that the current record does not support the adoption of additional pro-competitive rules.^{37/} In support of that position, several parties have cited to Cincinnati Bell Telephone Co. v. FCC,^{38/} a recent decision in which the United States Court of Appeals for the Sixth Circuit remanded to the Commission for further consideration an attribution standard applicable to cellular/PCS cross ownership and the eligibility of cellular licensees to hold PCS licenses in their service areas. The court based its remand of the cellular attribution standard on its conclusion that, in adopting the rule, the Commission had failed to support its predictive judgment as to the rule's necessity with sufficient statistical data or an economic theory, and had failed to explain why it had declined to adopt less restrictive measures to achieve the same ends.^{39/} Based upon this decision, these commenters argue that the lack of any demonstrated anticompetitive behavior of the type identified by the Commission in the NPRM precludes the promulgation of rules to address competitive concerns.^{40/}

26. We believe these commenters have overread the significance of Cincinnati Bell, particularly as it would apply in the context of this rulemaking proceeding. As explained by DOJ, any rule designed to curtail future industry concentration must be based in part upon a prediction as to what would occur in the absence of the rule.^{41/} Where factual determinations underlying a rule are "primarily of a judgmental or predictive nature," the Supreme Court recognizes that "complete factual support in the record for the Commission's judgment or prediction is not possible or required; a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency."^{42/} The Court has specifically

^{37/} See, e.g., Primestar Comments at 8-8, 17-20; Tempo Comments at 2-3.

^{38/} Docket Nos. 94-3701/4113, 95-3023/3238/3315 (slip op., 6th Cir., decided Nov. 9, 1995).

^{39/} Cincinnati Bell, slip op. at 11-13.

^{40/} See, e.g., Continental Cablevision Comments at 10-14; Primestar Comments at 25-30; Tempo Comments at 22-23; Time Warner Comments at 15-16; Primestar Reply at 4.

^{41/} See DOJ Reply at 2.

^{42/} FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 813-14 (1978).

reiterated that predictions as to the probable conduct of licensees and the functioning of the market are within the institutional competence of the Commission.^{43/}

27. As the evidence discussed extensively below demonstrates, there is more than ample evidence of concentration in markets for the delivery of video programming, which could give rise to competitive concerns under a variety of recognized economic theories. To use DOJ's characterization, these markets are, at present, essentially a series of local monopolies controlled by cable television systems.^{44/} Congress acted on similar concerns when it adopted program access and carriage laws to protect potential competitors to incumbent cable operators from obstacles that interfered with competitors' access to programming needed to provide viable and competitive multichannel alternatives to the public.^{45/} In fact, in 1992, Congress considered a cable/DBS cross ownership ban, but did not adopt one based upon "the fact that there [were] no DBS systems operating in the United States at [that] time," and further expressed the expectation that the Commission would "exercise its existing authority to adopt such limitations should it be determined that such limitations would serve the public interest."^{46/} Moreover, DOJ and forty state attorneys general were sufficiently concerned about anticompetitive actions by Primestar and its cable partners that they brought civil antitrust complaints, which resulted in two consent decrees that constrain the conduct of the country's largest cable operators and Primestar itself.^{47/} Although we have granted a single DBS permit for eleven full-CONUS channels to a wholly-owned subsidiary of Tele-Communications, Inc. ("TCI"), the nation's largest cable system operator, we did so recognizing "that legitimate competitive concerns do exist regarding the relationship between TEMPO's proposed DBS service and TCI's cable service," and only after imposing conditions we deemed necessary to ensure that competition to cable "is fostered, not hindered."^{48/}

28. As discussed more fully below, there are three orbital locations that we believe to be capable of full-CONUS service -- 101°, 110°, and 119°. We believe that the auction rule we implement today is necessary given the scarcity of full-CONUS DBS spectrum and the impact that concentration of this spectrum might have on the overall MVPD market. Under this one-time

^{43/} FCC v. WNCN Listeners Guild, 450 U.S. 582, 594-95 (1981).

^{44/} See DOJ Comments at 2; EchoStar Reply at 23-24; see also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Second Annual Report*, FCC 95-491 (adopted Dec. 7, 1995) ("1995 Competition Report") at ¶¶ 5, 9.

^{45/} See 1992 Cable Act § 2(a)(5), P.L. 102-385, § 2(a)(5), 106 Stat. 1460 (Oct. 2, 1992); 138 Cong. Rec. H6540 (daily ed. July 23, 1992)(statement of Rep. Eckart in support of the Tauzin amendment).

^{46/} See H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 82 (1992); EchoStar Reply at 13-14.

^{47/} See United States v. Primestar Partners, L.P., 1994-1 Trade Cas. (CCH) ¶ 70,562 (S.D.N.Y. 1994); New York ex rel. Abrams v. Primestar Partners, L.P., 1993-2 Trade Cas. (CCH) ¶ 74,403 (S.D.N.Y. 1993).

^{48/} Tempo II, 7 FCC Rcd at 2730, 2731.

auction rule, a party currently holding an attributable interest in full-CONUS channels at one location may bid at auction for channels currently available at the 11th location, but if successful must divest its existing full-CONUS channels at any other location within twelve months.

29. Like Congress, we believe that competition should be favored over regulation wherever possible.^{49/} The DBS service is in its early stages, and the ultimate structure of the industry is presently far from clear. However, we believe that reducing concentration of full-CONUS DBS resources will promote rivalry among all MVPDs in a way that would benefit consumer welfare. This one-time auction rule will essentially ensure that each of the three full-CONUS DBS orbital locations will initially be controlled by entities that do not share interests with DBS operators at the other two orbital locations. We believe that this will permit the development of fully competitive DBS services. Increased competition among DBS systems is likely to improve market performance for the nearly four million television households in the United States that are unable to receive cable services. In addition, competition involving several full-CONUS DBS operators should also constrain a cable-affiliated DBS operator from positioning its services in a manner that avoids competition with cable systems. Moreover, in our view, under the current record, the competition among MVPDs resulting from the presence of an additional full-CONUS DBS system will serve the public interest. This is a reasonable response to current market conditions, but does not dictate a particular vision of DBS industry structure beyond the near term.

30. We acknowledge, however, that many of the comments we address below raise substantial competitive issues, which we have seriously considered. At this time, balancing the competitive concerns against other public interest concerns -- such as expedition of service and allowing the market to maximize efficient use of public resources -- we believe that the single, temporary structural rule discussed above should be adequate. In addition, we believe that this rule will address most of the concerns that were raised in the NPRM and in the comments that have been filed in this proceeding.

31. In sum, given current market conditions, it would not serve the public interest to allow an entity to acquire an interest in the full-CONUS 28 channels being auctioned and to continue to hold an interest in channels at another full-CONUS orbital location. On the other hand, we do not believe that the public interest would be furthered by freezing this industry structure through a rule permanently precluding future channel combinations at multiple full-CONUS locations. Thus, the rule we adopt leaves us free to evaluate future transactions on a case-by-case basis under our Title III authority.^{50/} In addition, we continue to have rulemaking authority to remedy anticompetitive conduct and we will consider additional rules if experience indicates that they are required.

^{49/} See, e.g., 47 U.S.C. § 543(a)(2)(if the Commission finds that a cable system is subject to effective competition, the rates for that system are not subject to regulation).

^{50/} See 47 U.S.C. § 310(d).

1. *The State of Competition Among MVPDs and the Role of DBS Rivalry*

32. *Comments.* Many commenters express concerns about concentration in markets for the delivery of video programming. DOJ argues that in a concentrated market, firms have an incentive to engage in a joint profit maximization strategy that may lead to higher profits but may harm consumer welfare.^{51/} DIRECTV and others contend that these markets are concentrated, that cable operators have market power, and that the Commission should, therefore, limit the ability of large cable operators to acquire scarce DBS resources.^{52/}

33. On the other hand, several commenters claim that the markets for the delivery of video programming are currently competitive.^{53/} In particular, Continental Cablevision argues that there are 5.8 million non-cable MVPD subscribers, and that this figure is projected to expand 300 percent within five years.^{54/} Continental and others also claim that entry from other distribution media, and in particular telephone company entry, into video markets is on the horizon and promises to provide significant competition to cable systems.^{55/} Continental, Primestar, Tempo, and Time Warner also argue that providers of or applicants for medium-powered or FSS services should be considered potential competitors in the market.^{56/}

34. Based on their perception of competitive markets, several parties contend that any regulation of competition in the DBS service is inappropriate. Primestar and others state that such competition obviates the need for any restriction in the use of full-CONUS channels, and argues that the Commission recently came to the same conclusion in authorizing the merger of EchoStar and Directsat.^{57/} GE Americom argues that there is no support in the record for the proposed limitations on DBS spectrum aggregation, that DBS subscribership is growing, and that existing federal and state antitrust laws and the 1992 Cable Act provide sufficient protection for competition.^{58/} As additional evidence that markets for the delivery of video programming are competitive and need no further regulation, Time Warner cites the Commission's recent decision

^{51/} DOJ Comments at 5-6.

^{52/} DIRECTV Comments at 9, 14; NYNEX Comments at 2-3; *see also* Hausman Statement at ¶¶ 6, 13-16 (attached to DIRECTV Comments).

^{53/} See, e.g., NCTA Comments at 5; Time Warner Comments at 7-9.

^{54/} Continental Cablevision Comments at 14.

^{55/} Id. at 14-16; NCTA Comments at 8; Time Warner Comments at 6-9.

^{56/} Continental Cablevision Comments at 10-12; Time Warner Comments at 4-6; Primestar Reply at 7; Tempo Reply at 7-8.

^{57/} See Primestar Comments at 23 (citing Directsat Corp., 10 FCC Rcd 88, 89 (1995)); Tempo Reply at 1; Time Warner Reply at 1-2.

^{58/} GE Americom Comments at 5-7.

to solicit comments regarding whether the deployment of a video dial tone ("VDT") system in Dover Township, Delaware was sufficient competition to justify removal of pricing restrictions on cable operators.^{59/}

35. Several commenters make a number of arguments based upon product differentiation between DBS and cable services. Dr. Hausman argues that DIRECTV will not engage in coordinated interaction with cable systems even if it were to expand its service to two full-CONUS orbital locations because, "[a]s a matter of economics, coordinated interaction is extremely unlikely in differentiated product markets."^{60/} Continental argues that market forces are driving competitors to price differentiated products in combined packages, and that the Commission should reject the desire to "compartmentalize and homogenize video services."^{61/} Time Warner makes a similar argument, writing that "homogenization of the MVPD product will only detract from the programming options which DBS operators and other MVPDs would offer to the competitive mix."^{62/} Indeed, Time Warner attributes the success of DIRECTV and USSB in part to their ability to offer unique programming such as out-of-market sports, and encourages the Commission to leave MVPDs free to differentiate based on quality, type, and mix of services.^{63/} Several parties point out that the Commission, in approving USSB's use of exclusive DBS distribution contracts, approved of product differentiation as an appropriate competitive strategy in DBS services.^{64/}

36. *Market Structure.* The comments reflect general agreement with our conclusion that the market for the delivery of video programming -- the market in which MVPDs compete -- is the relevant product market.^{65/} Similarly, the commenters appear to agree that the effects of competition among MVPDs are felt most strongly at the local level -- in local markets for the delivery of video programming.^{66/} Accordingly, we have conducted our analysis based on these conclusions and will proceed without further discussion of these definitional issues.

^{59/} Dover Waiver Order, FCC 95-455 (Nov. 6, 1995); Time Warner Comments at 6-9.

^{60/} Hausman Statement at ¶ 21 (attached to DIRECTV Comments).

^{61/} Continental Cablevision Comments at 19-20.

^{62/} Time Warner Comments at 15-17.

^{63/} Id. at 15-17.

^{64/} Implementation of Sections 12 & 19 of the 1992 Cable Act, 10 FCC Rcd 3105, 3121-22 (1994). Primestar Comments at 30-31 (exclusivity agreements are "universally recognized method of differentiating among competitors" and exclusivity may expand consumer choice, result in more efficient use of spectrum, create demand for programming and lead to development of more programming); NCTA Comments at 11-12.

^{65/} See, e.g., DIRECTV Comments at 7; DOJ Comments at 1-3; NCTA Comments at 8; Primestar Comments at 18 n.41; MCI Reply at 11.

^{66/} See, e.g., DOJ Comments at 2; EchoStar/Directsat Reply at 17.

37. We have recently found that local markets for providing multichannel video programming remain highly concentrated and that cable systems remain the primary providers of video programming.^{67/} Despite the growth in subscribership to DBS and Multichannel Multipoint Distribution Service ("MMDS") in the last year, the combined national market share of non-cable MVPDs at the end of September 1995 was less than nine percent.^{68/} In addition, the average household in the United States today can only choose from among at most a few MVPDs -- a cable system, DIRECTV/USSB, Primestar, and perhaps an MMDS system.^{69/} We also note that home satellite dish ("HSD") users have been able to receive multiple channels of video programming for a number of years and yet this option for consumers does not appear to have constrained cable systems' exercise of market power.^{70/}

38. Significant barriers delaying entry of new competitors in markets for the delivery of video programming remain.^{71/} With respect to DBS services, the availability of spectrum is currently greatly limited. As discussed in the NPRM, under the ITU's BSS Plan, the United States has been allocated thirty-two channels at each of eight orbital locations in Region 2 (encompassing North and South America) from which to provide domestic DBS service.^{72/} Orbital locations not allocated to the United States are not currently available to provide service to subscribers in the United States.^{73/} Although we agree with Tempo that our analysis of market participation should be forward looking,^{74/} we decline to make public interest determinations based upon speculation that the international plan may be modified to make additional locations available.

^{67/} 1995 Competition Report at ¶¶ 5, 194.

^{68/} 1995 Competition Report at ¶¶ 5, 194, App. G, Tbl. 1.

^{69/} Id. at ¶¶ 132-33 and App. G, Tbl. 1. Television households in MDUs would appear to have generally even fewer choices, with many of them being served by only a SMATV or cable system.

^{70/} Id. at ¶¶ 65-67. C-band service to HSD users does not appear to be an alternative to cable for most subscribers, given the size of the receiving dish required. Id. at ¶ 66.

^{71/} Id. at ¶¶ 57, 205-14.

^{72/} See NPRM at ¶ 18. The BSS Plan also 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"). A DBS license includes authority to transmit pursuant to these allocations in accordance with the BSS Plan.

^{73/} The Commission is currently considering issues raised by applying for additional orbital locations and permitting foreign-licensed DBS operators to provide service to subscribers in the United States. NPRM at ¶ 24.

^{74/} See Tempo Reply at 8-9.

39. *The Nature of DBS Service and Current DBS Providers.* The most important limiting factors for a DBS service provider are its orbital location (literally, the longitude in which its satellites might be positioned), the bandwidth of spectrum it may utilize from that orbital location, and compression technology (the amount of digital information that may be carried through that bandwidth). Based on technology available today and the economics associated with the operation of a DBS system that appear to prevail in the industry at this time, we conclude that there are only three orbital locations -- 101°, 110°, and 119° -- from which it is feasible for a DBS operator to offer full-CONUS service. We tentatively concluded in the NPRM that full-CONUS service could also be provided from the 61.5° orbital location. Almost all of the commenters that addressed the issue, however, disagreed with that tentative conclusion.^{75/} Based on those comments and our reexamination of the facts, we conclude that the 61.5° orbital location should not be deemed to be capable of supporting full-CONUS service at this time. An operator serving customers in the western United States from 61.5° would face interference from tall objects that an operator from the other three locations would not face due to their better look angles. Even if much of this interference could be overcome by the use of larger receiving dishes, an operator at 61.5° would be at a qualitative disadvantage in attracting customers who could receive service from an operator at one of the three full-CONUS locations without compromising on the quality of reception or the unobtrusiveness of the satellite dish.

40. Several firms currently hold permits or licenses for full-CONUS radio frequency (RF) channels. DIRECTV and USSB provide service that together uses all 32 channels at the 101° orbital location. DIRECTV had approximately 600,000 subscribers by June 1995,^{76/} and projects that it will have 1.5 million subscribing households by the end of 1995, and 10 million by the end of 2000.^{77/} USSB supplies services to subscribers using the same 18-inch dishes that are used to receive DIRECTV's services. Because these two services offer mutually exclusive programming, a customer must subscribe to both services in order to receive a full package similar to that offered by cable systems. As a result, nearly all subscribers to one service also subscribe to the other,^{78/} and they can be viewed as offering complementary as opposed to competitive services.

41. EchoStar and its affiliate, Directsat, plan to offer approximately 126 channels of programming using 21 channels at the 119° orbital location over the next year. EchoStar's first satellite is scheduled to be launched by the end of 1995.^{79/} Tempo holds a permit for the other 11 channels at the 119° orbital location. This Report and Order implements a plan to auction 28

^{75/} See ¶ 78, *infra*.

^{76/} DIRECTV Comments at 5.

^{77/} 1995 Competition Report at ¶ 51.

^{78/} Id.

^{79/} Id. at ¶ 52.

channels at the 110° location. Directsat has been assigned one channel at 110° and USSB holds the other three channels at this location.

42. Although not currently using BSS frequencies, Primestar, a joint venture of six of the largest cable system operators and GE Americom,^{80/} currently provides DBS-like video programming using frequencies in the Fixed Satellite Service ("FSS").^{81/} Primestar's programming is similar to the programming of DIRECTV and USSB, but subscribers must use receiving dishes that are more than twice as large as the DIRECTV/USSB dishes. Moreover, Primestar has less than one-half the channel capacity of DIRECTV and USSB combined. Primestar reports that it has over 800,000 subscribers.^{82/} It has argued, however, that it needs to migrate to the high-powered DBS spectrum in order to remain competitive, and it projects that its subscribership will grow to 3-4 million by the year 2000 if it can migrate to high-power DBS channels.^{83/}

43. AlphaStar, a Canadian firm, is reportedly scheduled to offer service to the continental United States with approximately 90 channels of digital video programming services.^{84/} AlphaStar reportedly has leased fourteen transponders on an AT&T Telstar Ku-band satellite that was launched in the fall of 1995, and to begin offering service to subscribers in early 1996.^{85/} The company currently owns an uplinking facility in Canada. The new service would apparently transmit programming over FSS frequencies to subscribers who purchase or lease AlphaStar's twenty-four inch dishes.^{86/} AlphaStar thus will be using dishes that are larger than the eighteen inch dishes used by DIRECTV/USSB subscribers. On the whole, it appears that AlphaStar's services will share many characteristics with the services currently offered by Primestar. We note that Primestar has stated that it needs to migrate to high-power DBS channels to remain competitive. Thus, the likely competitive impact of AlphaStar's entry into markets in the United States is unclear.

^{80/} The cable companies are Comcast, Continental Cablevision, Cox Communications, TCI, Newhouse Broadcasting and Time Warner. E.g., Primestar Comments at 18 n.40. Newhouse and Time Warner have entered into a joint venture whereby Time Warner has a controlling interest and operational control over the cable systems in which Newhouse has an ownership interest. 1994 Competition Report, 9 FCC Rcd at 7587.

^{81/} 1995 Competition Report at ¶ 51.

^{82/} Primestar Reply at 8.

^{83/} Primestar Comments at 4.

^{84/} Satellite and International, Comm. Daily, Aug. 22, 1995, at 8; Direct-to-Home: Industry at a Glance, SkyTRENDS, Sept. 1995, at 9.

^{85/} AlphaStar Digital Television, AlphaStar Moving Closer to Service Commencement with On-Time Activation of AT&T's 402R Satellite, Canada NewsWire, Nov. 28, 1995.

^{86/} Id.

44. The recent growth of DIRECTV/USSB and Primestar has demonstrated the viability of DBS or DBS-like technology to distribute strongly competitive video programming services. If there is one thing commenters agree upon in this docket, it is that DBS systems have at least the potential to be formidable competitor in markets for the delivery of video programming.^{87/} As DOJ points out, the potential of DBS as a "tool for competition in the MVPD market is critically important" -- yet, the number of DBS firms is necessarily limited by the number of full-CONUS orbital locations.^{88/} As a result, we believe that we have the obligation to prevent the undue accumulation of full-CONUS DBS spectrum by any one firm and to encourage additional DBS entry by other firms as long as markets for the delivery of video programming remain highly concentrated. In the short term, we believe that entry by additional full-CONUS DBS providers would bring more vigorous competition among MVPDs generally, and in particular, among DBS and cable providers. Such increased competition is clearly in the public interest.

45. *The Nature of Competition Among MVPDs and The Role of Rivalry Among DBS Providers.* While the Commission continues to believe that the multichannel video programming distribution market is the relevant market in which the various services compete, we recognize that MVPDs use different distribution technologies that can each be described by a unique set of attributes, which can be similar to or significantly different from the attributes of a typical cable system. For example, products within this market can differ from each other in terms of the number of channels, quality of reception, and types of programming offered. Demand for the services of different MVPDs is a function of consumer preferences for the different attributes of each distribution system.^{89/}

46. All other things being equal, firms that offer services with dissimilar attributes are likely to attempt to position their services in a manner that will minimize competition between their services and those offered by rivals. Such a product differentiation strategy is naturally substantially more difficult to accomplish in less concentrated markets because there are more firms. Markets for the delivery of video programming, however, are highly concentrated and, to a certain extent, MVPDs can choose the attributes of the services they offer, which may allow them to decrease the amount of price competition in the industry.^{90/} This is especially true to the extent that the firms can commit to their choice of attributes, since this credibly signals their willingness

^{87/} See, e.g., DIRECTV Comments at 6-7; DOJ Comments at 3; USSB Comments at 1; MCI Comments at 10; Viacom Comments at 3; Primestar Comments at 21-22; Owen Nov. 22, 1994 Declaration at ¶ 11 (attached to Tempo Comments); NCTA Comments at 7-8.

^{88/} DOJ Comments at 4; see also MCI Comments at 12-13.

^{89/} 1995 Competition Report at ¶ 134. For example, the distribution of consumer preferences and income have important consequences for product differentiation strategies. For a general discussion, see Stephen Martin, Advanced Industrial Economics, Ch. 10.

^{90/} See, e.g., Avner Shaked & John Sutton, Relaxing Price Competition Through Product Differentiation, 49 Rev. Econ. Stud. 1, 3-13 (1982).

to pursue this strategy.^{91/} For example, one MVPD may decide to specialize in the offering of sports programming. Such a strategy could differentiate its services from those offered by most cable systems, which typically provide a variety of programming, including some sports. By differentiating its services, the MVPD might reduce the extent of competition between its services and those offered by cable systems and other MVPDs.

47. DBS services have attributes that are different from the attributes of other MVPDs' services, particularly those offered by cable systems. For example, DBS subscribers can currently receive substantially more channels than are offered by other MVPDs, can obtain unique programming not available elsewhere, receive digital as opposed to analog programming, and receive programming through small satellite dishes instead of wires, or larger receiving antennas.^{92/} Finally, DBS services are, by nature, nationally provided and, therefore, DBS providers are likely less able than other MVPDs to air local broadcast signals and otherwise respond to differing local market characteristics.

48. It appears that the services offered by DBS providers are currently positioned as higher-quality, higher-priced options targeted at those consumers that live outside cable markets or have strong preferences for niche programming, a large number of channels, and/or digital quality video signals.^{93/} This product differentiation appears to be borne out in evidence submitted by DIRECTV. Its expert, Dr. Jerry Hausman, cites evidence that sixty percent of DIRECTV's subscribers that were cable subscribers prior to purchasing a DSS system cancelled their cable service, twenty percent reduced their cable service, and the remaining twenty percent kept their service at the same level.^{94/} Accordingly, it is reasonable to conclude that approximately sixty percent of those subscribers essentially view DIRECTV as highly substitutable for cable (i.e., they cancelled all cable service after subscribing), twenty percent view DIRECTV's service as a substitute for some, but not all, cable service offerings, and twenty percent view DIRECTV's service as a complementary or even separate product from cable service. While we note Dr. Hausman's statement that "it is quite clear that DBS *will be* a substitute, not a complement, for cable television" due to programming overlap,^{95/} the evidence of *current* market performance indicates that DBS and cable are at present differentiated products.

^{91/} For a discussion of how actions by firms can be used to signal whether they are likely to compete aggressively or not, see Drew Fudenberg & Jean Tirole, The Fat Cat Effect, the Puppy Dog Ploy and the Lean and Hungry Look, 74 Am. Econ. Rev. 361 (1984).

^{92/} DOJ Comments at 3-4 (DBS's smaller dish superior to FSS); NCTA Comments at 7; see also 1995 Competition Report at ¶¶53, 58, 65.

^{93/} 1995 Competition Report at ¶ 137.

^{94/} DIRECTV Comments at 7; Hausman Statement at ¶¶ 13-16.

^{95/} Hausman December 1994 Aff. at ¶ 21 (emphasis added).

49. Additional full-CONUS DBS service providers, however, will likely find it difficult to differentiate substantially their services from those of the incumbent DBS operators. As a result, competition among DBS operators is likely to be enhanced by the entry of additional DBS operators that are not connected with current providers, and this price competition will translate into price competition with cable operators.^{96/} Therefore, the apportionment of full-CONUS locations is critical in our efforts to foster a deconcentrated market structure at this time.

50. As additional full-CONUS DBS entry occurs, DBS operators' incentive to compete with each other and other MVPDs will be reinforced by the cost structure of satellite technology. Satellite-based video distribution systems are characterized by substantial setup costs that are effectively sunk upon entry, and low marginal costs arising from the public-good nature of the DBS signal.^{97/} Where the cost of adding additional subscribers is low and the fixed costs necessary to enter the market are incurred up front, a firm has an incentive to lower price in response to competition, expanding output in order to lower unit costs.^{98/} To maximize the output effect of a lower price, the firm might position its services as closer substitutes for its rivals' services.^{99/} As services become more substitutable, the motivation to increase profit by cutting price becomes stronger. Through the interaction of these incentives, therefore, DBS operators that are unable to avoid competition with other MVPDs are likely to enter into vigorous competition with those MVPDs.

51. Not only is it important to promote the entry of an additional DBS provider, it is also important to prevent each full-CONUS DBS operator from influencing the development of competitive services at the other full-CONUS orbital locations. For example, EchoStar and Directsat argue that their current service plans, which would use only 21 channels on 119

^{96/} The relationship between product differentiation and price competition is consistent with empirical evidence on competition in the cable industry. Numerous economic studies of the cable television industry show that basic cable rates in markets where two rival cable systems compete for customers are over 20 percent less than prices in monopoly cable markets. They generally appear to provide programming choices that are very similar to the ones provided by incumbent cable systems and try to draw customers away by offering lower prices. Alternatively, where a cable systems faces direct competition from a MMDS system basic cable prices are, on average, less than 10 percent below monopoly cable prices. See George S. Ford, Fragmented Duopoly: An Empirical Analysis of the Cable Television Industry (Presented at the 1994 Telecommunications Policy Research Conference). Thus, while rival cable operators are often unable to substantially differentiate their services, rival cable and MMDS systems appear to have pursued a competitive strategy based on a certain degree of price competition mixed with product differentiation.

^{97/} The DBS signal is non-depletable and non-rival in consumption. In other words, one consumer's reception of the signal does not affect any other individual's reception.

^{98/} For a discussion of behavior by firms in the industries with fixed costs, see Jean Tirole, The Theory of Industrial Organization 305-60 (1988).

^{99/} See, e.g., Stephen Martin, Advanced Industrial Economics 35-40 (1993).

location "will be considerably less competitive" than a 32-channel system.^{100/} Therefore, even holding 11 channels at a location, as Tempo does at 119°, can have a significant impact on the full-CONUS service available from that location. Operation of each full-CONUS DBS orbital location by an independent provider will limit the ability of all DBS providers and cable systems to engage in strategic product differentiation in an attempt to create, maintain, or exercise market power in markets for the delivery of video programming.

2. *Spectrum Aggregation Limitations*

52. In the NPRM, we expressed the concern that allowing an entity to control too much of the DBS spectrum capable of full-CONUS service could result in a lessening of competition among DBS providers and in the broader market for the distribution of multichannel video programming.^{101/} We tentatively concluded that: (1) DBS service 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; (2) the effect of DBS competition in the broader MVPD market will principally be felt in essentially local markets; and (3) 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.^{102/}

53. Accordingly, we proposed in the NPRM two separate limitations on the aggregation of full-CONUS DBS channels. One proposal would limit aggregation of channels by *any* DBS licensee, permittee, or operator to a total of 32 at any combination of those full-CONUS orbital locations, and further sought comment on whether the Commission should impose a limitation on ownership or use of a significant number of channels at each of multiple full-CONUS orbital locations.^{103/} The other proposal would provide that any DBS licensee or operator affiliated with a non-DBS MVPD would be permitted to control or use DBS channel assignments at only one full-CONUS orbital location, and sought comment on whether the proposed spectrum limitations should be related to the size of the MVPD involved and whether such limitations should differentiate between cable operators and other MVPDs.^{104/}

54. As discussed in detail below, we have decided instead to adopt a single spectrum aggregation rule that prohibits a party from acquiring at the upcoming auction an attributable interest in channels at a second full-CONUS location. We believe this one-time auction rule will encourage the entry of another full-CONUS DBS service, and will essentially ensure that each of

^{100/} EchoStar/Direcstsat Comments at 36.

^{101/} See NPRM at ¶ 33.

^{102/} Id. at ¶¶ 33-34.

^{103/} Id. at ¶ 42.

^{104/} Id. at ¶ 40.

the three full-CONUS DBS orbital locations will initially be controlled by entities that do not share interests with DBS operators at the other two locations. We also believe that the likely increase in rivalry among MVPDs as a result of this additional entry will serve the public interest while avoiding any unnecessary regulatory intrusion.

a. Intra-DBS Spectrum Limitations

55. The above discussion demonstrates that MVPD markets are highly concentrated and that competition among competing distribution media in these markets is likely to involve product differentiation strategies rather than competition. Based on this analysis of current conditions in the MVPD market, the Commission has determined that preventing undue concentration at the three full-CONUS locations at this time would be an important step in promoting vigorous competition among MVPDs, and in particular, between DBS and cable systems. This section discusses the various proposals in the NPRM concerning aggregation of full-CONUS RF channels and explains our decision to limit firms operating at one full-CONUS location from acquiring at auction an interest in RF channels at any other full-CONUS location without divesting its prior interest. We believe that by taking this opportunity to encourage entry by a new full-CONUS operator we will best promote competition among MVPDs, and at the same time leave licensees and the Commission the flexibility to consider a different configuration in the future if warranted by then-prevailing market conditions.

56. *Comments.* Several commenters favor measures to avoid undue concentration of full-CONUS DBS RF channels such as the one we have adopted.^{105/} PanAmSat argues that such concentration would inhibit the growth of competition in the MVPD market.^{106/} MCI contends that the Commission should not allow as few as two entities to control all three full-CONUS locations if it expects DBS to provide effective competition to entrenched cable monopolies.^{107/} BellSouth agrees that an intra-DBS cap will allow DBS providers to offer a competitive mix of services to consumers without risking undue concentration.^{108/} DOJ also raises the concern that an entity with channels at more than one full-CONUS location would be in a position to reach mutual accommodations with others holding channels at that location, and thus could exert substantial influence over the use of several otherwise competitive DBS systems.^{109/}

^{105/} See, e.g., CTA Comments at 14-15; USSB Comments at 7; Viacom Comments at 5.

^{106/} PanAmSat Comments at 2.

^{107/} MCI Reply at 15.

^{108/} BellSouth Comments at 3.

^{109/} DOJ Comments at 19.

57. Primestar and NCTA argue that if the Commission imposes DBS spectrum aggregation rules, competitive equity dictates that the same cap apply to all participants.^{110/} Tempo states that it would be "irrational" to apply a rule only to cable-affiliated DBS permittees and claims that there is no evidence indicating that "control of channels at multiple orbital locations is a concern unique to MVPD-affiliated DBS operators."^{111/}

58. DIRECTV opposes any structural rule, arguing that structural regulation is unnecessary because the Commission, in the future, may be able to accommodate more DBS satellites and providers beyond the current eight locations allocated by international agreement.^{112/} Continental argues that the conduct rules imposed on Primestar in consent decrees are sufficient to allay competitive concerns should it begin offering service using DBS spectrum, and that further structural rules are unnecessary, as the DOJ and state attorneys general declined to impose any.^{113/}

59. DIRECTV, among others, has raised a number of arguments against the sort of intra-DBS aggregation limitation we have decided to adopt. These commenters argue that the Commission should not be concerned about intra-DBS competition, but rather should focus on those whose power in the MVPD market make anticompetitive conduct more likely. In particular, DIRECTV and Dr. Hausman argue that only firms that have market power should be excluded from participating in an auction or expanding their DBS capacity.^{114/} Dr. Hausman states that "[u]nder a market-oriented auction framework, the acquisition of the DBS spectrum by DIRECTV should only be prohibited if DIRECTV could exercise market power arising from the spectrum acquisition."^{115/} Dr. Hausman and DIRECTV argue that DIRECTV, with only a small share of the MVPD market, cannot engage in the exercise of market power, and that any rule limiting its expansion is arbitrary and ill-advised.^{116/} DIRECTV and Dr. Hausman also argue that DBS has competitive importance in the MVPD market and has the potential to provide

^{110/} Primestar Comments at 22-23; NCTA Comments at 9 n. 20.

^{111/} Tempo Comments at 14-15.

^{112/} DIRECTV Comments at 8 n.16. Time Warner raises a similar argument. Time Warner Comments at 4-6.

^{113/} Continental Comments at 18.

^{114/} DIRECTV Comments at 7; Hausman Statement at ¶¶ 20-21.

^{115/} Hausman Statement at ¶ 20.

^{116/} Hausman Statement at ¶¶ 22-23; DIRECTV Comments at 2-3, 7-8.

competition to cable.^{117/} EchoStar/Directsat and Time Warner agree that any spectrum limitations should apply only to firms with market power in the MVPD market.^{118/}

60. DIRECTV also argues that a one-location rule would severely limit its ability to expand its bandwidth and channel capacity, as it would limit its system to a maximum of 32 RF channels. DIRECTV believes that an "integrated DBS service could be provided from two orbital locations" through the use of a dual-beam customer antenna similar to those already in use in Japan for simultaneous access to BSS and FSS satellites at different locations.^{119/} It states that DBS faces channel capacity limitations compared to cable, which may soon be able to offer 500 channels, as DBS is limited to a particular portion of the radio frequency spectrum and thus would be "severely constrained" in competing against cable by a radio spectrum cap.^{120/} EchoStar/Directsat similarly argues that the Commission should refrain from imposing an artificial cap on independent DBS operators and that the market should be allowed to decide the most efficient allocation of channels among non-dominant MVPDs, and that any cap would be second-guessing the market.^{121/} PanAmSat notes that Hughes Communications, Inc. -- a corporate affiliate of DIRECTV -- argued *in favor of* a cap on orbital locations in the FSS service when Hughes was a new entrant, rather than the incumbent as it is in DBS.^{122/}

61. *Discussion.* In light of our analysis of the MVPD market, we believe that the spectrum aggregation limitations proposed in the NPRM are not sufficiently focused on achieving our goal of encouraging the emergence of an additional full-CONUS DBS competitor unrelated to existing DBS full-CONUS providers. Limiting DBS ownership to 32 full-CONUS channels would not prevent a party from acquiring channels at more than one full-CONUS location and thereby impairing independent development and use of those locations. Moreover, such a service rule would in effect dictate the structure of the MVPD marketplace in the future, even as that marketplace is undergoing dynamic change.

62. On the other hand, the full-CONUS DBS spectrum to be auctioned is currently a scarce public resource, and markets for the delivery of video programming are likely to remain concentrated for several years. As a result, we believe that the public interest is best served by

^{117/} DIRECTV Comments at 7-8; Hausman Statement at ¶¶ 13-16.

^{118/} See EchoStar/Directsat Comments at 43-45; Time Warner Comments at 18-19.

^{119/} DIRECTV Comments at 11 n.21.

^{120/} DIRECTV Comments at 8-10; Hausman Statement at ¶ 19.

^{121/} EchoStar/Directsat Comments at 41-43.

^{122/} PanAmSat Comments at 3 (citing Assignment of Orbital Locations to Space Stations in the Domestic Fixed Satellite Service, 84 F.C.C.2d 584, 591 (1981)("To continue the competitive development of the domestic satellite market, Hughes asserts that existing carriers should be limited to three orbital locations so that new entrants can be accommodated"))).

encouraging the entry of a new full-CONUS DBS service that has the incentive to fully compete with full-CONUS DBS operators at other orbital locations. We have, therefore, decided to adopt a spectrum allocation rule applicable only to the upcoming auction that will prohibit any person with an attributable interest in DBS channels at one full-CONUS orbital location from acquiring an attributable interest in the full-CONUS channels now available at 110° without divesting its prior interest. This rule will allow a new and viable full-CONUS operator to enter the DBS market with a robust 28-channel capacity. In addition, this auction rule will address the concern we share with DOJ that a single party acquiring channels at more than one full-CONUS orbital location would be in a position to exert influence over the use of otherwise competitive systems at multiple locations.^{123/}

63. We are also aware that two existing permittees hold attributable interests in channels at more than one full-CONUS location: Directsat has been assigned ten channels at 119° and one channel at 110°, while USSB holds five channels at 101° and three channels at 110°. We do not believe that the channels held by USSB and Directsat will unduly restrict development of the 28 other channels available for auction at 110°, since DIRECTV has demonstrated the viability of a 27-channel system. However, if either USSB or Directsat acquires an attributable interest in additional channels at 110° at the upcoming auction, it will be required to divest its channels at its other full-CONUS location.

64. We believe that the auction rule we adopt today, combined with the Commission's case-by-case authority to review subsequent transfers of DBS channels,^{124/} is more than sufficient to foster competitive rivalry between independent DBS operators, cable-affiliated DBS operators, cable systems, and other MVPDs. Contrary to the argument presented by Dr. Hausman and DIRECTV, we believe that this rule limiting for the moment the expansion of current DBS operators is not arbitrary or ill-advised, but instead serves the public interest. Our concern is not that a DBS firm might obtain market power; rather, our goal is to foster rivalry among MVPDs by promoting rivalry within the DBS service. The one-time auction rule is designed to ensure that there is an opportunity for the quickest possible entry by an additional full-CONUS DBS system in order to increase the possibility of vigorous rivalry among MVPDs. As a result, we reject the arguments against placing a restriction on DBS operators that are not affiliated with cable systems.

65. We share many commenters' reluctance for regulation of the DBS service, which is why we have sought to implement the least intrusive rule possible to further the goals articulated above of fostering competitive rivalry among MVPDs. The auction rule is, we believe, the least intrusive means of achieving these goals. It is sufficient to provide auction participants with the necessary certainty concerning outcomes, yet preserves the industry's ability to respond to change and our ability to review future transactions on a flexible case-by-case basis.

^{123/} DOJ Comments at 19.

^{124/} 47 U.S.C. § 310(d).

66. We do not believe that DIRECTV, EchoStar, or other DBS providers, limited to one full-CONUS location in the near term, will be faced with channel capacity problems that would cause them not to be able to compete effectively with cable. With digital compression, even a 21-channel system is able to provide over 120 video programming channels. As discussed in the 1995 Competition Report, the vast majority of cable systems have fewer than 54 channels.^{125/} Although we recognize that cable systems are likely to deploy digital technology, a substantial increase in the channel capacity of the average cable system is not imminent. In addition, as discussed below, it is not clear that it is currently feasible for DBS operators to increase capacity by combining channels at two or more orbital locations. In any case, we believe that the public interest benefits provided by ensuring at this point in time that there are separate DBS providers at each of the full-CONUS locations outweigh the temporary restriction on expansion of DIRECTV's operations.

67. It also appears that DBS systems may be currently unable as a technical matter to combine signals from more than one orbital location in a single service offering. The receiving equipment currently being used by DIRECTV/USSB, and the equipment to be used by EchoStar/Directsat when it initiates service, cannot be used to receive signals simultaneously from more than one orbital location. In its comments, DIRECTV suggested that this problem could be overcome, and cited the use of satellite dishes in Japan to simultaneously receive signals sent via BSS and FSS frequencies.^{126/} This example does not, however, address the more fundamental problem that the same frequencies are used to transmit DBS programming at each and every orbital location. Therefore, transmitting signals simultaneously from multiple orbital locations would likely require subscribers to use additional equipment to avoid interference problems. DIRECTV has not presented any evidence demonstrating that it would be feasible to deploy service in such a manner.

68. We also find unpersuasive DIRECTV's other arguments against intra-DBS spectrum caps. For example, DIRECTV states that a spectrum cap is not warranted given the other handicaps DBS faces, such as local zoning, terrestrial interference, restrictive covenants, and inability to offer local broadcast signals.^{127/} In the 1995 Competition Report, we recognized and discussed these limitations.^{128/} However, the existence of these limitations does not justify Commission action to ensure the success of any particular business venture. DIRECTV further argues that a structural rule is not necessary because the Commission may in the future be able to accommodate more DBS satellites and providers beyond the current eight locations allocated by

^{125/} See 1995 Competition Report at App. B, Tbl. 3.

^{126/} DIRECTV Comments at 11 n.21.

^{127/} DIRECTV Comments at 10.

^{128/} See 1995 Competition Report at ¶¶ 58, 66-67.

international agreement.^{129/} It is likely that the international allocation of additional orbital locations capable of full-CONUS service would obviate the need for the one-location rule. Those locations are not now available, however; in the event they do become available, we will analyze transactions, including those involving the new locations, based on the state of competition at that time. In any event, DIRECTV's arguments are largely inapplicable to a rule of limited duration such as the one we have chosen to adopt.

69. A number of commenters support our suggestion in the NPRM for a rule that would limit concentration of DBS resources by preventing a person with a certain number of full-CONUS channels -- perhaps more than 16 -- from aggregating any additional channels at another full-CONUS location.^{130/} We choose not to implement this approach because, as EchoStar points out, the control of even a small number of channels at a full-CONUS location by a DBS operator that predominately offers service from another full-CONUS location can impact the development of a full-CONUS location by limiting channel capacity available to other providers operating there. While the proposal would to some degree limit channel holdings across a number of full-CONUS locations, it would not foster the development of another independent DBS provider as efficiently as does the rule we have adopted. Allowing a third entrant into the full-CONUS DBS market; it achieves what we believe to be a desirable pro-competitive result under current market conditions without dictating future DBS market structure.

b. MVPD/DBS Spectrum Limitations

70. The NPRM also proposed that the Commission implement a service rule that would limit non-DBS MVPDs from acquiring DBS channels at more than one full-CONUS location. To a certain extent, this proposal is mooted by our decision to limit *all* firms from acquiring channels at multiple full-CONUS locations through the auction process. However, since a number of parties raised particularized concerns about cable participation in the DBS industry, we feel it necessary to address those concerns.

71. *Comments.* While DIRECTV and others argue that independent DBS providers' lack of market power makes any intra-DBS spectrum limitations unnecessary, they also assert that the ability of other MVPDs *with* market power -- namely, large cable operators -- to use DBS resources for anticompetitive conduct justifies the imposition of spectrum limitations upon such MVPDs.^{131/} MCI believes that the Commission should limit DBS spectrum aggregation by large cable companies, defined as those with an aggregate national subscribership of 1,000,000 or more households or a market penetration of 50.1 percent or more of the television households in any

^{129/} DIRECTV Comments at 8 n.16. See also Time Warner Comments at 4-6.

^{130/} See, e.g., MCI Comments at 12-13; CTA Comments at 14-15; USSB Comments at 7-8.

^{131/} See, e.g., DIRECTV Comments at 6-8; MCI Comments at 11-12; NRTC Comments at 5; NYNEX Comments at 2-6.

area that it is licensed to serve, because of their power in the MVPD market.^{132/} EchoStar/Directsat asserts that since cable interests dominate the MVPD market, they should only be allowed to acquire the 16 full-CONUS channels necessary to provide sufficient capacity to allow Primestar to migrate to high-power DBS service.^{133/}

72. Cox argues that if a one-location cap is placed on all DBS providers, it is hard to see how limiting cable participation in DBS any further provides any additional pro-competitive benefits.^{134/} Tempo, Cox, Primestar and NCTA argue that as long as there is viable competition from non-affiliated DBS providers, a cable-affiliated DBS provider would have no incentive or ability to operate in a non-competitive manner.^{135/} Primestar also argues that an MVPD/DBS limitation would skew the marketplace with an artificial restraint that would decrease the value of DBS spectrum for non-DBS MVPDs and thereby decrease the value of spectrum to be auctioned.^{136/}

73. *Discussion.* We share the concern that cable-affiliated MVPDs with market power could use DBS resources, including those soon to be available at auction, for coordinated conduct that would not maximize competition in the MVPD market and would therefore fail to give the public the benefits that flow from vigorous competition. On balance, however, we believe that the rule we have decided to adopt obviates the need for a separate spectrum restriction on non-DBS MVPDs. Even if a cable-affiliated MVPD with market power were to acquire the permit for the full-CONUS channels available at 110°, two other full-CONUS locations -- largely occupied by independent DBS providers -- would remain.^{137/} The presence of these other providers severely constrains the strategic activities of an MVPD-DBS combination, since even if it chooses not to make full use of its DBS channels, consumers will have at least two other competitive sources for DBS service from which to choose. Moreover, we have recognized that cable-affiliated MVPDs bring certain positive attributes as DBS permittees.^{138/}

^{132/} See MCI Comments at 10-12.

^{133/} See EchoStar/Directsat Comments at 41-44.

^{134/} Cox Comments at 5-6.

^{135/} Cox Comments at 6-7; Primestar Comments at 20-21; NCTA Comments at 8-9; Tempo Comments at 11-13 (citing Owen Declarations).

^{136/} See Primestar Reply at 16-17.

^{137/} In addition, Tempo is nearing completion of satellites for its eleven-channel system at 119°.

^{138/} See Continental, 4 FCC Rcd at 6299 ("Tempo's participation could well accelerate the initiation of DBS service by bringing valuable marketplace experience and presence and possibly enhancing access to programming").

74. Allowing cable participation in DBS is consistent with the policy established in Tempo II. We also believe that it is not necessary to reverse Tempo II and exclude a cable-affiliated DBS operator from the opportunity to control or use DBS spectrum at one of the three full-CONUS orbital locations.^{139/} TCI and Tempo have already invested substantial resources in the creation of a DBS system, which is at least partially attributable to reliance on our decision in Tempo II not to prohibit cable/DBS cross ownership. Moreover, a cable/DBS limitation would be under-inclusive; it is necessary at this time to restrict channels available to *each* market participant and not just a cable-affiliated provider because the incentives discussed above are present without regard to the degree of affiliation with cable system operators. Therefore, a more restrictive limitation on cable participation does not appear likely to add significantly to the promotion of competition.

75. DOJ points out that, even under a permanent one-location rule, the three DBS locations capable of full-CONUS service could be controlled by three large cable-affiliated operators.^{140/} DOJ argues that even if a cable-affiliated DBS provider faced competition from two independent DBS providers, the incentives of the cable-affiliated DBS provider would be to restrain output and set higher prices, and that this could well reduce the incentives of the other two firms to compete vigorously: "[t]hose [independent DBS] firms would recognize that they can now set higher prices as well and not lose business to their cable/DBS competitor."^{141/} DOJ also argues that a cable/DBS firm would have an incentive to raise its *cable* prices because its DBS system would capture at least some of the cable customers who switched to DBS as a result of the price increase.^{142/} Tempo and its expert, Dr. Bruce Owen, dispute this scenario, arguing that the two independent DBS firms would be more likely to "free ride" by maintaining or lowering prices in order to gain market share.^{143/} DOJ further contends that a cable-affiliated DBS operator has an incentive to provide lower-quality programming, to raise the costs of independent DBS firms by negotiating less aggressively over price with programming suppliers and thereby creating an unduly high "floor" price, and in any event would be attempting to "meet, not beat" its competitors.^{144/}

76. At present, four firms unrelated to any cable system operators are either already in operation, or soon will be, at full-CONUS locations -- DIRECTV and USSB at 101° and EchoStar and Directsat at 119°. Thus, at present the only full-CONUS channels that appear to be

^{139/} See DIRECTV Comments at 13.

^{140/} See DOJ Comments at 7.

^{141/} DOJ Comments at 6-7.

^{142/} See DOJ Reply at 6-7.

^{143/} See Tempo Reply at 13; Owen Supp. Decl. at ¶ 10.

^{144/} See DOJ Reply at 7-10; see also DIRECTV Reply at 5 n.8; EchoStar/Directsat Reply at 17-19 (discussing Primestar's strategy).

available for acquisition by an entity that is related to a cable-affiliated MVPD are those to be auctioned at the 110° orbital location. We do recognize that, in the future, one or more of the current unaffiliated full-CONUS DBS operators may seek to assign or transfer control over its license to a cable-affiliated MVPD. The Commission has authority under Title III to approve, reject, or condition the assignment or transfer of DBS channels to other firms^{145/} and in the event a cable firm or consortium desires to acquire any additional channels, the competitive effect of that transfer in the MVPD market will be a significant issue in that transaction, as it was in approving Tempo's application. Because such a transaction would require Commission approval, we would be in a position to assess the competitive landscape if and when such a transaction was proposed, and to grant, deny, or condition authorization as appropriate under the circumstances at that time. Thus, as advocated by EchoStar/Directsat and DBSC among others, we will be able to monitor DBS channel aggregation on a case-by-case basis and retain the flexibility to take appropriate action under the circumstances.^{146/}

c. Orbital Locations Covered by Spectrum Limitations.

77. For purposes of implementing the proposed spectrum aggregation limitations, the NPRM proposed to consider four orbital locations -- 61.5°, 101°, 110°, and 119° -- to be capable of full-CONUS service. The NPRM tentatively concluded that applying the spectrum cap to these four orbital locations will ensure that there is sufficient channel capacity for a minimum of four full-CONUS DBS providers. It also concluded that channels at the other four DBS orbital locations, which are not capable of full-CONUS service, probably cannot match the economies of scale in domestic service achieved by full-CONUS operators, and thus should be exempt from the proposed spectrum limitations.^{147/}

78. A clear majority of the parties that commented on this proposal agreed that the 61.5° location should not be considered to be a full-CONUS orbital location. Continental Satellite, whose submission on planned service from its channels at 61.5° was part of the basis for deeming that location to be full-CONUS,^{148/} states that its submission shows only that its satellite beam is *capable* of covering the entire United States, not that it expects to provide full-CONUS service from that location. In fact, Continental Satellite states that it will not be able to serve the West Coast from the 61.5° orbital location since the poor look angle from its satellite into that region allows buildings, trees, and other tall impediments to interfere with the DBS signal.^{149/}

^{145/} See 47 U.S.C. § 310(d).

^{146/} See, e.g., DBSC Comments at 15; EchoStar/Directsat Comments at 41-43.

^{147/} See NPRM at ¶¶ 44-45.

^{148/} Id. at footnote 78.

^{149/} See Continental Satellite Comments at 13-14.

EchoStar/Directsat agrees that 61.5° is not suitable for full-CONUS service.^{150/} Primestar argues that the technical issues are at least unsettled, and that further study would be required before concluding that full-CONUS service is possible from that location.^{151/} Tempo proposes that the Commission reserve the channels currently available at 148° for paired use with channels at 61.5° to ensure full-CONUS capability for permittees at the latter location.^{152/} Only MCI contends that the 61.5° orbital location should be included in a spectrum limitation despite the limitations involved in providing service from that location.^{153/}

79. As mentioned above, we agree that the 61.5° orbital location should not be included with the other three full-CONUS locations. While it still appears that nationwide service from that location is a technical possibility, as a practical matter such service would not be comparable to service from 101°, 110°, or 119° for the reasons advanced by Continental Satellite. Accordingly, for purposes of implementing the spectrum aggregation limitations we have chosen to adopt, we will only consider three orbital locations -- 101°, 110°, and 119° -- to be capable of full-CONUS service. We have twice previously considered and rejected Tempo's proposal to reserve channels at the 148° orbital location for use in conjunction with channels at 61.5°. ^{154/} Moreover, as discussed below, we have now decided to eliminate the east/west pairing scheme for DBS channels.^{155/} We see no reason to revisit the issue at this time.

d. Mechanism for Divestiture.

80. The NPRM proposed that any permittee or licensee that acquires an attributable interest in channels in excess of the proposed spectrum limitations be given ninety days from the date of Commission approval of such acquisition in which to either surrender to the Commission its excess channels, or 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 limitations.^{156/}

81. Primestar and Tempo assert that ninety days is an unreasonable and inadequate period in which to require divestiture that will force permittees to sell DBS authorizations in a

^{150/} See EchoStar/Directsat Comments at 47.

^{151/} See Primestar Comments at 23 n.50.

^{152/} See Tempo Comments at 34-37.

^{153/} MCI Reply at 15 n.37.

^{154/} See Tempo Satellite, Inc., 7 FCC Rcd 6597, 6598 (1992); Advanced Communications Corp., 6 FCC Rcd 6977, 6978 (1991).

^{155/} See ¶ 124, *infra*.

^{156/} See NPRM at ¶ 43.

"fire sale" atmosphere. They instead propose that we allow 18 months as we have done in the broadcast context.^{157/} DOJ suggests a twelve month period in which to complete divestiture.^{158/} MCI, on the other hand, argues that ninety days is a reasonable divestiture period and that the apparent interest of prospective investors belies any fear that divestiture would require a "fire sale" by the permittee, who in any event did not pay for the spectrum it would be divesting.^{159/} EchoStar/Directsat also supports the spirit of the rule, but proposes that a dominant MVPD be required to return its excess channels to the public rather than assign or transfer them to another party, since such an MVPD would have an incentive to place those channels with anyone other than the party who could most efficiently use them to compete.^{160/}

82. We agree with MCI that the number of parties interested in entering the DBS service or expanding their existing capacity should make for a competitive sales environment,^{161/} especially since the only channels subject to divestiture are those capable of full-CONUS service. Even those advocating a longer divestiture period recognize that the DBS service is in a stage of rapid development and evolution.^{162/} At this point, the proposed 18 month divestiture period is longer than any DBS licensee has been in operation. The divestiture rule must result in timely movement of channels to those who can use them from those who no longer can. Allowing more than a year for such a transition would be inconsistent with the rapid development of the DBS service.

83. On the other hand, we recognize that building and operating a competitive, national DBS system requires the commitment of hundreds of millions of dollars. A transaction that implicates funding of that magnitude may reasonably be expected to take several months to negotiate. Accordingly, we believe it appropriate to allow twelve months for divestiture of DBS channels if necessary as a result of the auction rule we have adopted. That period should be sufficient to allow an orderly divestiture, and strikes a proper balance between the time necessary for negotiation and the desire to ensure that spectrum not remain idle in this vibrant industry. We do not believe that 18 months are necessary for this purpose.^{163/} Accordingly, we will require any

^{157/} See Primestar Comments at 23-24; Tempo Comments at 16-18.

^{158/} DOJ Comments at 10.

^{159/} See MCI Comments at 14-15.

^{160/} See EchoStar/Directsat Comments at 45.

^{161/} See MCI Comments at 14-15.

^{162/} See, e.g., Primestar Comments at 16; Tempo Comments at 17.

^{163/} Compare *Stockholders of CBS, Inc.*, FCC 95-469 at ¶ 46 (released Nov. 22, 1995) (granting temporary waiver of ownership rules for 12 months rather than 18 months, since that will still provide "ample time to locate potential purchasers and to negotiate purchase agreements for the stations to be divested" as a result of merger of CBS and Westinghouse).

party who acquires full-CONUS channels at a second location in the upcoming auction to come into compliance within twelve months by filing applications necessary to divest excess channels at one location.

84. Although a party may surrender channels to the Commission in order to comply with the one-location rule, we will not *require* it do so. Such an approach would deny permittees and licensees the opportunity to recoup the investment of time and money that was necessary to remain in due diligence under our rules. When we receive an application from the successful auction bidders, any party will have the opportunity to argue that the proposed transaction should not be authorized due to its anticompetitive effect, and we will be in a position to assess the issue and take appropriate action at that time. We do not believe that a blanket rule would serve the public interest.

e. Attribution Rules

85. For purposes of implementing the spectrum aggregation limitations, the NPRM proposed to attribute both controlling interests and any interest of five percent or more in a DBS permittee, licensee, or operator. The NPRM proposed 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 satellite system.^{164/} The NPRM proposed to rely on existing case law for making control determinations where such issues arise. Specifically, the NPRM proposed 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, the NPRM proposed 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, joint marketing agreements, and status as a DBS "operator."^{165/}

86. The NPRM also proposed 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: (1) directly or indirectly controls or has the power to control the licensee, permittee, or operator; (2) is directly or indirectly controlled by the licensee, permittee, or operator; or (3) is directly or indirectly controlled by a third party or parties

^{164/} See NPRM at ¶ 47.

^{165/} Id. at ¶¶ 47-48.

that also has the power to control the licensee, permittee, or operator.^{166/} The NPRM also sought comment on whether the definition of an affiliate should include individuals or entities that have an identity of interest with the licensee, permittee, or operator.

87. The comments we received generally criticize the proposed rules as unduly restrictive. At least one comment urged us to postpone adoption of attribution rules until a fuller record can be developed.^{167/} GE Americom argues that overbroad rules will deprive the DBS market of capital and satellite operating experience, and as a result will slow the initiation of service while raising its cost.^{168/} Primestar and Tempo argue that the proposed rules are unreasonably harsh and that the Commission has failed to offer a sufficient justification for their imposition.^{169/} Tempo also expresses a preference for a narrow control test for determining attributable interests, rather than establishing the threshold at a five percent interest.^{170/} Time Warner questions why the rules for DBS should be more restrictive than those for any other video delivery media, including broadcast and cable.^{171/} Even MCI, which generally supports the attribution rules, cautions against rules that would unduly restrict joint ventures that might have beneficial competitive effects.^{172/} DIRECTV and Tempo express concern about the impact of the attribution rules in the context of the proposed cross-ownership limitation.^{173/}

88. We note initially that these comments were submitted in the context of proposed spectrum aggregation limitations that would have restricted ownership of DBS resources by non-DBS MVPDs, and would have erected a 32-channel cap on intra-DBS ownership applicable to all future transactions. In view of our decision not to adopt such rules, our attribution rules will not restrict the ability of a non-DBS MVPD to invest in a system operating at any one of the full-CONUS locations, and will not rule out investments by existing full-CONUS operators in the future. Therefore, concerns raised over the impact of attribution criteria are largely moot. However, attribution rules are necessary at this juncture to implement the auction spectrum rule and ensure that any person that acquires an interest in the full-CONUS channels now available for

^{166/} Id. at ¶ 49.

^{167/} See GE Americom Comments at 10-11.

^{168/} See GE Americom Comments at 6-11; see also Tempo Comments at 18.

^{169/} See Primestar Comments at 24; Tempo Comments at 18-19, Reply at 22. See also Time Warner Comments at 19-20.

^{170/} See Tempo DBS Comments at 18-19, Reply Comments at 22-23.

^{171/} See Time Warner Comments at 19-21.

^{172/} See MCI Comments at 14-15.

^{173/} See Tempo Comments at 13; Direct TV Reply at 8; but see EchoStar/DirectSat Reply at 21-23.

auction will be truly independent of all other licensees and permittees holding full-CONUS channel assignments, and therefore in a position to provide vigorous competition to them.

89. The attribution rules proposed in the NPRM were formulated to implement ongoing service rules, rather than a one-time auction rule. The proposed rules were designed to attribute both ownership interests and non-ownership interests that would nonetheless give one entity significant influence over the operation of another entity's DBS system. Thus, we included within the ambit of those rules certain management and joint marketing agreements that confer operational control, as well as DBS "operators" whose use of or control over DBS channels warranted attribution.

90. The auction rule we adopt is much more limited in scope, and accordingly, we adopt more limited attribution rules that are better suited to a one-time auction rule. In adopting attribution rules to accomplish the goal of facilitating the entry of another full-CONUS DBS operator, we have drawn almost exclusively from similar rules applicable in the broadcast service.^{174/} We believe these rules will implement the one-time spectrum limitation in the least intrusive fashion consistent with our underlying concerns, while not unnecessarily disrupting existing arrangements within the industry.

91. Our two primary areas of concern are control and influence. These two concerns have long driven attribution policies with regard to ownership restrictions in the mass media context,^{175/} and we believe that these concerns are also appropriate in the context of DBS. Experience has shown that control can be conferred or exercised over management, operation, decision making and market conduct in the absence of ownership interests that confer *de jure* control. Accordingly, as with virtually all of the attribution rules in existence throughout our various telecommunications regulations, and as proposed in the NPRM, "control" will be defined to include not only majority equity ownership, but also any general partnership interest, or any means of actual working control over the operation of the licensee or permittee in whatever manner exercised. Existing Commission precedent will govern case-by-case "control" determinations when such issues arise.^{176/}

92. As with other Commission attribution rules, concerns rest not solely with control but also with an ability to influence. An entity with a significant interest in two full-CONUS DBS licensees or permittees operating from different orbital locations could be able to influence the behavior of one or both of them, and would have an incentive to modify conduct to maximize joint profits or returns. We seek in our attribution rules to ensure that no party can hold interests

^{174/} See 47 C.F.R. § 73.3555 Note 1.

^{175/} See Review of the Commission's Regulations Governing Attribution of Broadcast Interests, 10 FCC Rcd 3606 (1995).

^{176/} See e.g., WWIZ, Inc., 36 FCC 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).

at more than one full-CONUS location that might provide it the incentive and ability to exercise such influence.

93. Accordingly, we conclude that in applying the auction spectrum rule adopted herein, interests will be attributed to their holders and deemed cognizable under criteria similar to those used in the context of the broadcast, newspaper and cable television ownership rules.^{177/} Thus, we will attribute the following interests: (1) any voting interest of five percent or more; (2) any general partnership interest and direct ownership interest; (3) any limited partnership interest, unless the limited partnership agreement provides for insulation of the limited partner's interest and the limited partner in fact is insulated from and has no material involvement, either directly or indirectly, in the management or operation of the DBS activities of the partnership; and (4) officers and directors. The legal and policy justifications for those rules have been thoroughly discussed in prior Commission orders, and need not be reiterated here.^{178/} As with the broadcast attribution rules, the attribution threshold for institutional investors is ten percent, and a multiplier will be used to calculate interests held through successive and multiple layers of ownership.^{179/}

94. We do not adopt a single majority shareholder exception to the attribution standard because we do not believe it is consistent with the underlying purpose of the spectrum limitation to permit a person with a cognizable interest in one full-CONUS DBS licensee or permittee to acquire a large minority interest in another full-CONUS DBS licensee or permittee that has a single majority shareholder. The rule we have adopted is based on the pro-competitive effect of encouraging the development of three full-CONUS systems that are truly independent of and competitive with each other. Significant shared interests among these entities would diminish their independence and their incentive to compete rather than coordinate their activities. Thus, a single majority shareholder exception would conflict with the underlying rationale of the rule.

95. As noted above, the commenters generally assert that we should not adopt any attribution rules, or at most that we adopt liberal attribution rules that only attribute controlling interests.^{180/} These commenters assert that more restrictive rules are unwarranted because DBS is

^{177/} See 47 C.F.R. § 73.3555, Note 1.

^{178/} We incorporate by reference the discussion of attribution criteria in decision such as Telephone Company-Cable Television Cross-Ownership Rules, 10 FCC Rcd 244 (1994); and 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), clarified, 1 FCC Rcd 802 (1986). Our ongoing rulemaking proceeding to ascertain whether to revise the broadcast-related attribution rules does not undermine the continuing validity of the existing rules. See Review of the Commission's Regulations Governing Attribution of Broadcast Interests, 10 FCC Rcd 3606 (1995).

^{179/} See 47 C.F.R. § 73.3555, Note 1(c) and 1(d).

^{180/} See e.g., Tempo Comments at 18-19, Reply at 22-23; GE Comments at 7-11. Most of the commenters merely assert that we failed to adequately justify our proposed attribution rules, and did not proffer alternative or counter arguments in support of other attribution rules. See Primestar Comments at 24; Tempo Comments at

a nascent industry in which the need for capital, financing, experience and expertise is particularly crucial to success. These comments suggest that the adoption of rules that attribute less than controlling interests may impact the ability of a new DBS licensee to obtain financing, capital, technical experience and expertise from a firm that is already invested or involved in the DBS industry. We are not unsympathetic to this argument. However, the rule we have adopted will only restrict the sharing of resources among full-CONUS DBS licensees and permittees operating at different orbital locations. Our underlying policy goal is to ensure a minimum of three independent providers of DBS service to the American consumer. We have long recognized that non-controlling interests of even as little as five percent can confer an ability to influence the management, decision-making, control and market conduct of a company. We have thoroughly explained in numerous proceedings why we believe that influence, in addition to actual *de jure* control, is a critical component to determining attributable interests in media that involve the dissemination and distribution of ideas,^{181/} and we herein incorporate by reference our prior discussions of the justifications for this approach.

96. GE Americom asserts that we should confine attribution of non-controlling interests to those that are directly involved in the video programming distribution business themselves. GE Americom contends that our expressed concern is to prevent the concentration of control of programming distribution, and therefore any rule that limits an entity's ability to control more than one full-CONUS DBS orbital location is overreaching -- because according to GE Americom we are not concerned about the carrier, but about programming distributors. GE Americom is correct that we are concerned about ensuring competition among programmers. However, we are also concerned about ensuring competition in the DBS industry and believe three independent full-CONUS DBS licensees is the best means of ensuring competition. We agree with USSB that even a licensee that simply provides DBS satellite capacity to others has the power to select the programmers allowed to use that capacity, and therefore should be subject to spectrum limitations.^{182/} The rule GE Americom proposes would undermine our rule by allowing entities to hold multiple interests inconsistent with the development of truly independent full-CONUS systems. Other than merely stating its position, GE Americom does not provide support for its argument or state why we should depart from our traditional methods for examining attribution.^{183/} Accordingly, absent a compelling supportive argument, and in light of the reasons delineated above in support of our auction spectrum limitation, we decline to depart from our traditional attribution approach as GE Americom suggests.

18-19; Time Warner Comments at 19-20.

^{181/} See footnote 178, *supra*.

^{182/} See USSB Reply at 8.

^{183/} While the Commission permits parties to seek to obtain non-attribution rulings for officers or directors of parent entities if a party can establish that the individual in question has no role whatsoever and no ability to influence the media related activities of the subsidiary entity, GE has cited no instance in which the Commission has held equity ownership interests non-attributable under similar circumstances.

97. Ameritech expresses concern that a five percent attribution threshold would be unduly restrictive if applied in the aggregate --*i.e.*, if an entity holding a three percent interest in each of two DBS permittees would exceed the five percent threshold.^{184/} As with all of our attribution rules, each ownership interest stands alone.^{185/} Aggregation otherwise exists only in the case of successive multiplication of interests within a succession of interrelated interests. Thus, Ameritech's concerns are unwarranted.

3. *Conduct Rules*

98. In addition to the structural solutions designed to promote competition by preventing the potential for undue concentration of DBS resources, the NPRM also proposed conduct limitations on the use of DBS channels and orbital locations to encourage, to the maximum extent possible, rivalry among MVPDs and to protect against the potential for anticompetitive strategic conduct. Specifically, we proposed to (1) extend the conditions imposed on Tempo Satellite, an existing DBS permittee that is wholly owned by a cable operator, to all MVPD providers that own DBS resources, so that DBS services will not be offered primarily as ancillary services, or be provided to other MVPDs under different terms than are being offered to non-subscribers; and (2) prevent a DBS operator from selling, leasing, or otherwise providing 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.^{186/} The NPRM also requested comment whether our existing program access and program carriage rules adequately address vertical foreclosure concerns arising from integration among DBS operators, other MVPDs, and program vendors, especially in connection with "headend in the sky" distribution from DBS satellites.^{187/}

99. *Comments.* The comments address all aspects of the proposed conduct rules -- some favoring the proposed conduct rules, some opposing them, and some proposing their own conduct rules. Primestar, Tempo and cable system operators are generally opposed to the proposed conduct rules. They contend that additional rules are unnecessary in light of increasing competition in the DBS service and existing legal safeguards -- the antitrust laws and two consent

^{184/} Ameritech Comments at 4.

^{185/} A company can have any number of shareholders holding less than 5% interests and not run afoul of any ownership rule, with one exception -- under the alien ownership limitations of Section 310 of the Communications Act, certain licensees may, in the aggregate, have a maximum of 25% of its equity held by aliens. See also 47 C.F.R. § 100.11 (1995) (DBS service rule on foreign ownership).

^{186/} See NPRM at ¶¶ 55-56.

^{187/} Id. at ¶¶ 57-62.

decrees under which Primestar and its cable partners operate.^{188/} Several parties argue that there is no reason to extend the Tempo II conditions to all MVPDs, since there is no indication that Primestar has been marketed as ancillary to cable service or provided to non-cable-subscribers on discriminatory terms, or that its cable owners have in any way engaged in any anticompetitive conduct aimed at other DBS operators.^{189/} These commenters also argue that the competitive nature of the market for the delivery of video programming will constrain any potential anticompetitive conduct and that the proposed rules would merely serve to limit flexibility during the developmental stages of the DBS service when flexibility is most necessary.^{190/} Finally, many parties argue that there is no basis for rewriting the program access rules, since there is no evidence that vertically integrated programmers have discriminated against DBS operators or that large MVPDs could prevent unaffiliated programmers from dealing with competing DBS systems.^{191/}

100. Others parties see the issues quite differently. DIRECTV asserts that the proposed marketing rules are necessary, reasonable, and serve the public interest, but do not go far enough since they do not expressly prohibit cross-subsidization.^{192/} In addition, DIRECTV proposed that the Commission adopt the conditions it previously proposed in the Advanced Order proceeding, which include a number of conduct and regulatory measures that have been applied to common carriers, such as structural separation and review of cost allocation.^{193/} MCI favors the proposed rule that would prohibit exclusive marketing agreements for areas in or adjacent to an MVPD's service area, but only if it is limited to prohibiting such agreements with affiliated MVPDs since otherwise the rule would unduly restrain legitimate means for distribution of service between DBS operators and unaffiliated programmers.^{194/} NRTC strongly supports conduct limitations, but argues that they should apply only to cable operators since application to other, non-dominant

^{188/} See Continental Cablevision Comments at 19; Cox Comments at 8-9; GE Americom Comments at 6; NCTA Comments at 2-3; Primestar Comments at 25-28; Tempo Comments at 19-20; Time Warner Comments at 6, 12-13; Tempo Reply at 24-41; Primestar Reply at 14-16.

^{189/} See Continental Cablevision Comments at 19-20; NCTA Comments at 2-3, 10-11; Primestar Comments at 27-28; Tempo Comments at 21; Time Warner Comments at 6; Primestar Reply at 8; Tempo Reply at 9-11. In addition, BellSouth argues that such conduct should not be prohibited in the first place. See BellSouth Comments at 5-6.

^{190/} See, e.g., Continental Cablevision Comments at 1-2; NCTA Comments at 2-4; Tempo Comments at 8-10; Time Warner Comments at 3.

^{191/} See Continental Cablevision Comments at 17-18; Cox Comments at 10; NCTA Comments at 11-13; Primestar Comments at 29-30; Tempo Comments at 13-16.

^{192/} See DIRECTV Comments at 18-19.

^{193/} Id. at 20-21 and Attachment 2.

^{194/} See MCI Comments at 18.

MVPDs would unduly restrict capital available to DBS systems, and thereby perpetuate cable's dominance.^{195/}

101. Both DIRECTV and EchoStar/Direcstare contend that the program access rules are inadequate in two respects.^{196/} First, they assert that existing rules do not prevent programmers from invoking illusory cost differentials or economies of scale as a basis for price discrimination. Second, they argue that the rules should be extended to apply to unaffiliated programmers as well those that are vertically integrated, a position with which BellSouth and NRTC also agree.^{197/} USSB opposes the latter proposal, arguing that the current rules would be triggered "if a DBS operator affiliated with a cable operator were to engage in anticompetitive programming practices" and that these rules are sufficient to remedy such conduct.^{198/} DBSC states that the proposed conduct rules would ensure that no one can dominate the DBS industry through manipulation of programming availability.^{199/} Ameritech favors any rules that remove unfair obstacles to programming access, and would even apply the proposals to the broadcast service.^{200/}

102. DIRECTV argues that a structural rule would be insufficient to ameliorate the concerns about cable participation in DBS service, and that conduct rules should be imposed upon cable activities in DBS instead. In particular, DIRECTV argues that the Commission should ensure strict conduct rules and ensure that DIRECTV and other current DBS providers be allowed to participate in the auction of the block of channels at 110 to ensure that the public realizes the full value of the spectrum.^{201/} It also argues that allowing cable-affiliated firms to participate in the auction would go well beyond the decision in *Tempo II* and it would essentially allow the cable-affiliated entities to control three times the current amount of full-CONUS spectrum assigned to Tempo alone.^{202/}

103. *Discussion.* We believe that the temporary structural rule we are adopting in this order will go a long way to promote rivalry among DBS systems and encourage the development of competition in markets for the delivery of video programming. Several parties support our

^{195/} See NRTC Comments at 3-5.

^{196/} See DIRECTV Comments at 18-21; EchoStar/Direcstare Comments at 48-54.

^{197/} See BellSouth Comments at -9; NRTC Comments at 6-9.

^{198/} USSB Reply at 8-9; USSB Comments at 9-10.

^{199/} See DBSC Comments at 15.

^{200/} See Ameritech Comments at 5-6.

^{201/} DIRECTV Comments at 12-13.

^{202/} *Id.* at 15-16.

conclusion that a structural approach may better serve the public interest than do conduct rules. DOJ makes the case that conduct rules "may actually be more intrusive than is necessary to achieve the goal of vigorous MVPD competition."^{203/} A structural solution is also superior because any conduct rule "cannot anticipate all forms of economically inefficient behavior by firms whose returns will be maximized by such behavior."^{204/} ASN, an independent satellite programming vendor, seems to agree with DOJ about the need for structural rules, and argues that "fair access" and conduct rules, such as those advocated by DIRECTV, EchoStar and others, are healthy in theory but administratively difficult to enforce because they are subject to interpretation and bound to contain ambiguities or uncertainties that can only be resolved in lengthy and costly litigation.^{205/} In fact, it is often difficult for anyone to detect a product differentiation strategy undertaken for the purpose of minimizing competition in this market, because it is difficult to assess the nature and quality of video programming. As a result, it would be even more difficult to fashion an appropriate and minimally restrictive remedy for such conduct.

104. Accordingly, we will refrain from adopting conduct rules at this stage in the development of the DBS industry. As noted by GE Americom, conduct rules "are not cost free . . . [and if] unnecessary restrictions are adopted here, they can raise the cost of DBS for consumers, and chill the full development of this innovative service."^{206/} Whether due to the relative novelty of the service or the existence of two comprehensive consent decrees already in place, there is little direct evidence of anticompetitive behavior specific to the DBS context. As the contours of the service emerge with greater clarity -- and as the consent decrees expire over the period from 1997 to 1999^{207/} -- we intend to remain vigilant against any vertical foreclosure or other anticompetitive strategies that may arise. For now, we agree with Tempo that the Commission need not adopt conduct rules, mindful that we remain free to initiate a later proceeding if warranted by market conditions.^{208/} Indeed, to a large extent, the concerns raised in the NPRM and addressed in the comments

105. With regard to the proposed extension of the Tempo II conduct rules and marketing restrictions, we believe that more competitive markets and vigorous DBS rivalry that should be fostered by our temporary structural rule will alleviate the competitive concerns we set forth in the NPRM. As discussed above, competitive rivalry among DBS firms, even where one

^{203/} DOJ Comments at 8-9.

^{204/} Id. at 9.

^{205/} See ASN Comments at 8.

^{206/} GE Americom Reply at 3.

^{207/} See Continental Cablevision Comments at 18; Tempo Comments at 20.

^{208/} See Tempo Reply at 31.

of those firms is affiliated with a cable operator, will cause pressures for price competition and should lead to vigorous competition between cable and DBS systems. Given the market structure set in motion by our structural rule, we do not believe it necessary to adopt at this time rules ensuring that DBS services are not offered as "ancillary" to cable services. Similarly, we do not find a compelling need at this time for adopting rules designed to ensure that a cable-affiliated DBS operator will compete against other DBS providers for subscribers in cabled areas, or for determining that all joint marketing arrangements between DBS operators and other MVPDs will *a fortiori* reduce competition. We adopted those rules in Tempo II due to the stated intentions of Tempo to engage in such activities.^{209/} Since we issued that decision, DBS has become an operational service with a significant subscriber base. As a result, we do not believe that the concerns justifying the Tempo II conditions are present, given that the structural rule we adopt should foster a competitive DBS and MVPD environment, and, therefore, hereby decline to extend the Tempo II conditions to other DBS operators, and to rescind them with regard to Tempo. Should Tempo or any other DBS operator engage in such activities, contrary to our expectations, we can reimpose such rules.

106. We also decline to consider at this time the manner in which our program access rules apply to the conduct of DBS operators affiliated with cable operators or other MVPDs, or whether the rules should be extended to programmers that are not vertically integrated with a cable operator. As we recognized in our 1995 Competition Report, vertical restraints can often have pro-competitive effects, though they can also be used strategically in a way that can deter competitive entry.^{210/} In the absence of record evidence that shows that protections beyond those already provided by our program access rules are necessary to protect against anticompetitive abuses, we hesitate to adopt a rule that may bring within its sweep legitimate and efficient business relationships. We do reaffirm the importance of program access to our efforts to create conditions for MVPD entry, and will continue to monitor this area closely.

107. Both USSB and MCI argue that the existing program access rules are sufficient to accomplish their purpose.^{211/} In addition, as noted by Primestar, there is no evidence in this record that exclusive agreements or other discriminatory conduct favoring a cable-affiliated DBS operator currently pose any anticompetitive concern.^{212/} Although DIRECTV has been in operation for over a year, and EchoStar, which is scheduled to launch its first DBS satellite in late December, presumably has made arrangements for programming to be carried on its system,

^{209/} Tempo II, 7 FCC Rcd at 2730-31.

^{210/} 1995 Competition Report at ¶ 158.

^{211/} See MCI Comments at 19-21; USSB Comments at 9-10.

^{212/} See Primestar Comments at 25-27, 30-31. We believe that NRTC's allegations in this docket are too general for us to address the issue. Should NRTC or any other party bring a complaint based on substantiated evidence of a program access violation, we will address the matter based on that record.

neither has filed a complaint under the existing program access rules. In fact, only twenty program access cases have been filed with the Commission, none of which allege discriminatory conduct against a DBS operator.^{213/}

108. Additional prudential considerations also counsel against adopting further program access protections at this time. First, the extent to which affiliation between DBS system operators and programmers may develop is unclear. Second, exclusivity arrangements favoring Primestar -- currently the only operational DBS-like service that is cable affiliated -- are, in large measure, presently circumscribed by the Primestar consent decrees, and it is unclear to what extent such arrangements will be of concern after the decrees sunset. Finally, a DBS operator who believes it has been injured by an exclusivity arrangement or other discriminatory conduct that favors a cable-related DBS entity -- including alleged price discrimination based on illusory cost differentials or scale economies -- may seek appropriate relief before the Commission, whether by way of a program access complaint or otherwise.

109. We also note that several parties argue that the program access rules should be altered to switch the burden of proof or award damages.^{214/} We decline to adopt these proposals for the foregoing reasons in addition to the fact that these proposals apply to the program access rules generally and not to DBS service in particular.

4. *"Headend In The Sky" Service*

110. *Comments.* The comments addressing access issues related to service to MVPDs such as the "Headend in the Sky" ("HITS") service proposed by TCI raise a number of important issues. For example, it appears likely that a number of parties may be interested in using DBS facilities to provide HITS service.^{215/} The comments also reflect a concern that a vertically-integrated programmer might discriminate in favor of an affiliated DBS provider, even if other

^{213/} The Commission did deny a petition for reconsideration of its report and order adopting the program access rules, which sought to include exclusive contracts between non-cable affiliated DBS operators and vertically-integrated programmers, such as the arrangement between USSB and HBO, within the per se prohibition of Section 628(c)(2)(C) of the Communications Act, 47 U.S.C. § 548(c)(2).

Implementation of Sections 12 & 19 of the 1992 Cable Act, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 3105, 3121-22 (1994). The Commission did note, however, that the petitioner or any other aggrieved party is not precluded from seeking relief from the effects of such contracts through under other provisions of the program access rules.

^{214/} EchoStar/Directsat Comments at 51-54; NRTC Comments at 6-9.

^{215/} See DIRECTV Comments at 21-22; EchoStar/Directsat Comments at 55-56; Primestar Comments at 31-34; Tempo Comments at 25-27.

DBS providers offered more favorable terms and conditions for HITS service.^{216/} On the other hand, Primestar argues that the Commission should not be concerned about the potential effect of HITS service on competition among DBS operators and MVPDs because HITS service is not yet operational, there is no experience or data regarding the service, there are no examples of anticompetitive activity, and there is no support for concerns that the proposed HITS service would pose a significant advantage to a DBS operator.^{217/}

111. DOJ presents a comprehensive analysis of the HITS service and argues for Commission regulation of that service. It notes that HITS service may be valuable to MVPDs, but argues that the potential that it could be used to develop market power exists for several reasons: (1) there are barriers to entry in a HITS market due to expensive technology and other large up-front costs; (2) the number of firms capable of providing the service "is severely limited by the small number of available DBS satellite slots;" and (3) a substantial first-mover advantage may be conferred on a small number of DBS operators because of the possibility that deployment of different encryption technologies would "tend to lock MVPDs into their initial wholesale DBS provider"; HITS customers may therefore be likely to prefer a more established DBS provider than an upstart, to avoid stranded costs.^{218/} Given the foregoing, DOJ predicts that there is "a substantial likelihood that the market for wholesale DBS service will be served by a monopolist for the immediate future. Moreover, according to DOJ, even if other firms eventually enter, the market is likely to be very highly concentrated."^{219/} As a result, DOJ argues that a HITS provider affiliated with a firm with market power in markets for the delivery of video programming may threaten competition through the use of vertical foreclosure strategies.^{220/}

112. Tempo and Primestar, which have proposed to provide HITS service, contend that such service is not, as characterized in the NPRM, "wholesale DBS service" and therefore is not subject to the program access rules. They base their argument on the fact that, as currently planned, the DBS operator would only provide authorization and transport service for two parties (a wholesale programmer and a retail distribution service) that have an agreement to which the

^{216/} See BellSouth Comments at 9-10; DIRECTV Comments at 21-22; EchoStar/Direcstsat Comments at 55-56; NRTC Comments at 8-9; Justice Comments at 12-16; MCI Reply at 20; NYNEX reply at 8-10.

^{217/} Primestar Comments at 32.

^{218/} DOJ Comments at 10-14.

^{219/} Id. at 14-15.

^{220/} Id. at 15-18.

operator is not a party.^{221/} In addition, like CATA,^{222/} Tempo and Primestar assert that the Commission has no experience with such a service and that there is no indication that any party would engage in anticompetitive behavior in providing it. They also join GE Americom^{223/} in arguing that attempting to bring HITS service within the ambit of a program access-type regime would be inappropriate since it would apply to parties *other than* DBS operators.

113. Tempo also disputes DOJ's characterization and analysis of HITS, noting that HITS service need not operate in the DBS band, and that TCI intends to launch HITS service with a combination of Ka-band and C-band FSS satellites.^{224/} Tempo also argues that the authorization code, a signal that allows the decryption of the scrambled programming feed, can be transmitted out-of-band by a number of other means.^{225/} Tempo points out that a number of programmers, including HBO, already offer digitally compressed signals, and that many video programmers will decide to compress signal transmission in their existing satellite transponders.^{226/} Tempo introduced evidence that another satellite provider, TVN Entertainment, recently announced the launch of a digital delivery system for cable systems.^{227/} As a result, Tempo argues that DBS locations or spectrum cannot be viewed as a scarce resource for providing HITS services and, therefore, that there are no significant barriers to entry in the provision of HITS service.^{228/} For similar reasons, General Instrument Corporation also urges the Commission to reject the DOJ analysis, arguing that it is grounded in baseless and theoretical concerns.^{229/}

114. Among independent DBS providers, DIRECTV notes that it has *no per se* objection to the development of HITS distribution so long as independent DBS operators have a "real opportunity" to provide these services and the Commission adopts and implements

^{221/} See Primestar Comments at 31-34; Tempo Comments at 25-27. Consequently, these parties assert that the program access rules applicable to "wholesale distribution for sale of satellite cable programming" does not apply to a DBS operator providing HITS service. See 47 C.F.R. § 1000(i).

^{222/} See CATA Comments at 4-5.

^{223/} See GE Americom Reply at 7-9.

^{224/} Tempo Comments at 27 n. 50; Tempo Reply at 37-40; Owen Nov. 1995 Affidavit, submitted with Tempo Reply, at ¶¶ 12-15.

^{225/} Tempo Reply at 37-38.

^{226/} Tempo Reply at 37.

^{227/} Tempo Reply at 39.

^{228/} Tempo Reply at 39-40.

^{229/} GIC Reply at 6-10.

"appropriate competitive conditions and cross-subsidization restraints.^{230/} EchoStar states that it is "intensely interested in providing wholesale services" and that the service offers opportunity to generate two revenue streams from the same facility. However, EchoStar/Directsat notes concerns that cable systems might tend to favor receiving HITS service from a cable-affiliated DBS operator, and therefore urges the Commission to clarify that the program access rules apply to DBS services and require the disclosure of contracts between cable operators and affiliated satellite providers.^{231/}

115. Programmers generally give mixed reactions to the Commission's proposals and the HITS service. Viacom and ASN request that the Commission regulate the HITS service.^{232/} HBO flatly opposes any attempt by the Commission to regulate the provision of HITS service, arguing that in doing so, "the Commission effectively would regulate the means and technologies through which programmers digitize, encrypt and distribute their programming to cable operators" and other MVPDs.^{233/}

116. *Discussion.* Cable, MMDS, and SMATV systems currently receive their programming through their own headend facilities, which among other things, consist of several satellite dishes and receiving equipment. In addition, they typically negotiate their programming contracts with individual programmers through buying groups or as multisystem operations. As a result, it appears that a service that provided most of the available programming, and provided it in a digital format that could be passed through to subscribers, could offer substantial efficiencies for many MVPDs.

117. The record reflects that one way that a HITS-like service might be deployed by a DBS operator is through use of its DBS satellite, authorization center, and encryption facility to transmit to MVPDs the same signals that are received by DBS retail subscribers. To the extent that the average cost of using those facilities is likely to decline as greater numbers of subscribers are served, providing HITS-like services over DBS facilities might provide such an operator with an important cost advantage over a competing DBS operator who was unable to provide such services, if, for example, programmers refuse to authorize MVPDs to receive programming services from the competing operator's DBS satellites. If this scenario develops, only the DBS

^{230/} DIRECTV Comments at 21-22; *see also* Hausman Nov. 95 Aff. at ¶ 31.

^{231/} EchoStar/Directsat also notes that there may already be contracts between programmers and cable operators that "are less restrictive with respect to the provision of HITS-type service than the contracts that EchoStar and DirectSat have been able to secure." EchoStar/Directsat Comments at 55-56.

^{232/} Viacom Comments at 5-6 (urging that the Commission ensure that proprietary digital technology is not used anticompetitively to create a gatekeeper between consumers and programmers); ASN Comments at 6-8 (provision of HITS service by a cable-affiliated DBS firm could harm independent programmers because that firm could impose draconian conditions upon independents seeking access to DBS channels).

^{233/} HBO Reply at 1-2. HBO argues that mandating that programmers transport and authorize distribution of their services to MVPDs through all DBS operators would compromise security and quality. HBO Reply at 2-3.

operator whose programming stream was also serving MVPDs would be able to spread the fixed costs of its DBS service over a large base of subscribers by recovering a substantial portion of those costs from the purchasers of the HITS service. This cost advantage could substantially reduce rivalry among DBS operators and MVPDs, especially if that cost advantage is the result of a vertical foreclosure strategy.

118. However, there is no evidence before us of firms presently supplying HITS-like service, and the actual characteristics of such a service remain unclear. Accordingly, we have never before addressed the vertical foreclosure issues presented by the proposed HITS services. As stated in the NPRM, we believe that a HITS-type service can actually promote the competitive position of DBS providers. As discussed above, other DBS operators and permittees have indicated that they too will offer HITS-like service if the DBS channels and orbital locations at issue here are so used, which should benefit consumers. We continue to believe, however, that the benefits of this service cannot materialize if vertical foreclosure strategies are used to limit the ability of unaffiliated DBS operators to provide programming streams to MVPDs. Nonetheless, resolution of these issues is not necessary to the proceeding at hand. Accordingly, we agree with those commenters that advise us that it would be imprudent for this Commission to consider rules governing HITS service absent a better understanding of the nature of HITS service.

5. *Other Concerns About DBS-Related Conduct*

119. ASN argues that the Commission need not follow a monolithic DBS model of vertically-integrated full-service DBS operators at separate orbital locations, and that we should set aside ten percent of the channels at the auction for independent programmers, because it would cultivate independent programmers, offer individualized programming choices at the wholesale level, create programming niches, and foster partnerships, alliances and distribution models.^{234/} MCI, on the other hand, opposes such proposals, arguing that the standards are unclear, and that any such rules are likely to result in an inefficient allocation of DBS resources.^{235/}

120. We do not believe it necessary to restrict the participants in the auction as ASN suggests. In an environment of competitive rivalry between DBS firms, cable systems, and other MVPDs, which we believe our structural rule will foster, an independent programmer providing a programming service or niche programming desired by consumers in the free market will have ample opportunity to sell its offerings to these competing providers.

121. The Commission has chosen to adopt a single structural rule that temporarily limits full-CONUS spectrum aggregation, and to rely upon this limitation and our continuing authority to review transactions under Title III rather than upon conduct rules to safeguard competition by

^{234/} ASN Comments at 8-12.

^{235/} MCI Reply at 19.

ensuring the conditions necessary for development of three separate full-CONUS DBS services. The Commission also has the authority under Title III to, in the future, regulate by rule the use of DBS radio frequencies if that use is inconsistent with the public interest.

122. However, we emphasize that we remain committed to fostering a vibrant DBS service in which DBS systems have the opportunity to offer vigorous rivalry to cable systems and other MVPDs. While we believe that the auction rule we are adopting today will guard against diminished rivalry among DBS providers and MVPDs, we recognize that periodic reviews will be necessary to ensure that the benefits of independent programming sources (*i.e.*, those outside the distribution business) are available to the public. We are statutorily charged with conducting an annual review of competition in the MVPD market.^{236/} We also have procedures for accepting and investigating complaints of program access and carriage violations.^{237/} We intend to use these and other tools to keep a watchful eye on developments in this service to ensure that DBS systems have a chance to be competitive MVPDs.

6. *East/West Paired Assignments*

123. The NPRM tentatively concluded that progress in the DBS service since Continental was issued has rendered unnecessary the policy, developed in that decision, of assigning DBS channels 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.^{238/} The Commission adopted this pairing scheme in order to assure service to the entire United States from at least 128 channels at a time when full-CONUS service was untested.^{239/} At the time, however, the Commission noted that the same number of channels would serve the entire United States if three eastern locations provide full-CONUS service and the other one (61.5°) provides service in tandem with channels at any western location.^{240/}

124. All parties commenting on the proposal agree that the general pairing requirement is no longer technically required or justified as a matter of policy.^{241/} As noted above, however, Tempo proposes that the Commission facilitate additional DBS service by pairing the channels at 61.5° with those now available at 148°, thus combining the half-CONUS channels with the best

^{236/} See 47 U.S.C. § 548(g).

^{237/} 47 C.F.R. § 76.1003.

^{238/} See NPRM at ¶ 65.

^{239/} Continental, 4 FCC Rcd at 6293 and 6302 n.6.

^{240/} Id. at 6302 n.10.

^{241/} See DIRECTV Comments at 25; EchoStar/Directsat Comments at 57; MCI Comments at 22-23; USSB Comments at 10.

technical attributes for service to the United States.^{242/} Permittees with channels assignments at the 61.5° orbital location already have western channels assignments at locations other than 148, and the channels currently available at the latter location are insufficient to pair with all of those at the former location.^{243/} If those permittees wish to provide a full-CONUS service from two half-CONUS locations, they are therefore already able to do so. Accordingly, we will not require permittees and licensees to retain their assigned channels in east/west pairs.

D. Service to Alaska and Hawaii

125. In view of the increasing 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, the NPRM proposed: (1) to require that all new permittees provide service to Alaska and Hawaii if such service is technically feasible from their orbital locations; and (2) to condition the retention of channels assigned to current permittees at western orbital locations on provision of such service, from either or both of their assigned orbital locations.^{244/}

126. This proposal also received near unanimous support, although with some variations. DIRECTV, MCI, NRTC, and the State of Alaska favor adopting the rule as proposed in order to achieve the important goal of bringing service to important underserved regions.^{245/} DIRECTV especially supports phrasing the rule in terms of service that is "technically feasible" rather than "technically possible," since that will allow the Commission to take into account weight and power resources for such service, the size or receiving dish required, and technical limitations imposed by the Commission and the ITU. BellSouth similarly supports application of the rule in a manner that accounts for practical and economic limitations of satellite programming delivery.^{246/} The State of Hawaii, Primestar, and Tempo support the rule, but propose that the requirement of service to Alaska and Hawaii be extended to both *new and existing* permittees.^{247/} USSB asserts that the rule is unnecessary since progress in DBS will soon bring service to Alaska and Hawaii, but that if a rule is adopted it should apply only to new entrants and only where feasible.^{248/}

^{242/} See Tempo Comments at 34-37.

^{243/} USSB has been assigned eight channels at the 148° location. DBSC, Continental, and Dominion have been assigned eleven, eleven, and eight channels, respectively, at the 61.5° location. Thus, there are six fewer channels available at 148° than necessary to pair with all those assigned at 61.5°.

^{244/} See NPRM at ¶ 70.

^{245/} See DIRECTV Comments at 25-26; MCI Comments at 23-24; NRTC Comments at 10; Alaska Reply at 1.

^{246/} See BellSouth Comments at 10.

^{247/} See Hawaii Comments at 6-7; Primestar Comments at 24; Tempo Comments at 38.

^{248/} See USSB Comments at 10-11.

127. We will adopt the rule as proposed in the NPRM. We do not believe that applying the first prong of this rule to existing permittees would be appropriate. All permittees currently have channels assigned at both eastern and western orbital locations. The rule as proposed requires that they serve Alaska and Hawaii from either or both of those locations, or else forfeit their western assignments. Two licensees (DIRECTV and USSB) are currently operating from their eastern location, and another (EchoStar/Directsat) will begin operations from its eastern location next year. None of these parties has designed satellites capable of providing full service to Alaska and Hawaii from those eastern orbital locations. We will not adopt a rule that would immediately place the only operational systems in violation of our regulations. Nor will we exempt them from a rule that would impose significant requirements on all those who have yet to complete satellite construction.

128. As to the definition of "technically feasible," we note that Tempo's applications to modify its satellites have already demonstrated that service to Alaska and Hawaii from both 110 and 119° is technically feasible and economically reasonable. In addition, it is clear that all four western locations offer appropriate platforms for such service. Thus, any party acquiring channels at any of these six orbital locations should anticipate providing such service. We have not yet had occasion to assess the feasibility of such service from the 101° or 61.5° orbital locations. Any party acquiring channels at these locations that desires not to provide service to Alaska or Hawaii will bear the burden of showing that such service is not feasible as a technical matter, or that while technically feasible such service would require so many compromises in satellite design and operation as to make it economically unreasonable.^{249/}

E. License Term

129. The NPRM proposed to increase the term of a non-broadcast DBS license from five years to ten years, the maximum allowed under the Communications Act, which better reflects the useful life of a DBS satellite and is consistent with the current proposal for extending the term of satellite licenses in other services.^{250/}

130. This proposal received unanimous support from the commenters.^{251/} They agreed that extending the license term will help to reduce the burden of regulation on DBS licensees and the burden of oversight on the Commission, and will encourage investment and innovation in the service. Accordingly we will adopt the rule as proposed. USSB requests that we clarify the definition of "non-broadcast" use of DBS as referring to the primary use of the satellite, since a DBS operator may transmit a limited number of non-scrambled signals, carrying promotional

^{249/} Thus, if service to Alaska is feasible but service to Hawaii is not, the permittee will not be excused from providing service to Alaska.

^{250/} See NPRM at ¶ 71.

^{251/} See CTA Comments at 15-16; DBSC Comments at 15; DIRECTV Comments at 26; EchoStar/Directsat Comments at 57; MCI Comments at 24; USSB Comments at 11-12.

materials for the operator's services and other such materials, but should not therefore be rendered a "broadcast" service.^{252/} Based on USSB's description, we would not consider such transmissions, constituting a de minimis portion of an operator's transmissions, to change its classification. We are, however, wary of crafting any general rule that allows a non-broadcast licensee to provide essentially broadcast service. To the extent any DBS provider has questions as to the effect of such unscrambled transmissions, it should describe the nature and extent of those transmissions to the Commission in either a licensing or declaratory ruling context in order to receive a definitive ruling.

III. ADOPTION OF A NEW METHODOLOGY FOR REASSIGNING DBS RESOURCES

131. Over six years ago, in the Continental decision, the Commission stated that existing DBS permittees would have first right to additional channel assignments upon surrender or cancellation of a DBS construction permit.^{253/} The NPRM tentatively concluded that this reassignment policy, adopted in an era before Congress explicitly authorized the Commission's use of auctions and well before any DBS system actually went into operation, no longer serves the public interest, and therefore should be abandoned.^{254/}

132. A majority of the commenters agree that the Continental reassignment policy is outmoded, would cause significant delays in DBS service as permittees sought to reaggregate and reshuffle channels, and would not serve the public interest, and they therefore support the use of auctions to reassign DBS channels.^{255/} DIRECTV, which stands to receive additional channels under the Continental approach, nonetheless supports the use of auctions in the special circumstances of this case as an appropriate means of reassigning channels in the most rapid and efficient manner, so long as it and other independent DBS operators can participate in the auction.^{256/}

133. Five current permittees, each of which would receive additional channels free of charge under Continental, oppose adoption of a new reassignment approach.^{257/} They argue that

^{252/} See USSB Comments at 11.

^{253/} Continental, 4 FCC Rcd at 6299.

^{254/} See NPRM at ¶¶ 9-17.

^{255/} See Cox Comments at 3; CTA Comments at 2; DIRECTV Comments at 4-5; GE Americom Comments at 16-17; MCI Comments at 2-4; PanAmSat Comments at 4; PrimeStar Comments at 9; NRTC Reply at 2.

^{256/} See DIRECTV Comments at 4-5.

^{257/} See Continental Satellite Comments at 3-10; DBSC Comments at 3-14; EchoStar/Direcstar Comments at 4-31; Tempo Comments at 5-7. ACC, whose former channels would be auctioned, also opposes the use of auctions. See ACC Comments at 2-6.

the Commission's resolution of conflicting applications in Continental gave each of them a legal and/or equitable right to receive additional channels that become available due to cancellation of a DBS permit, and that the Commission cannot and should not take away rights upon which these permittees have relied in making substantial investment in their respective DBS systems. They note that five of the eight existing permittees expect to launch satellites -- with capacity built in for additional channels -- by 1997, and argue that those permittees are therefore in the best position to put the available channels to use in the most expedited manner. EchoStar/Directsat also contends that allowing new entrants to compete at auction for ACC's channels would reopen the Continental processing round, and thus deprive these permittees of their protected status as timely applicants.

134. We remain convinced that the *pro rata* distribution of reclaimed channels to existing permittees no longer serves the public interest. We base this conclusion on the history of the DBS service, especially in the six years since Continental was decided. Our historic policy of assigning a relatively small number of channels to each permittee was based upon a conception of DBS service that has not been put into practice. There are currently only two DBS providers in operation: DIRECTV, with 27 channels, and USSB, whose five-channel system uses transponders on one of DIRECTV's satellites. EchoStar/Directsat, which recently combined to control a total of 21 channels, expects to launch its first satellite by the end of the year. The move toward consolidation of channels is understandable, given that DBS systems must compete in the MVPD market with cable systems that are promising a 500-channel service in the future. Even using advanced methods of digital compression, DBS licensees with a small number of channels face capacity limitations that may hamper their ability to compete effectively in that market. In fact, Tempo Satellite has indicated that the eleven channels it has been assigned "are not sufficient for a competitive system."^{258/}

135. Cancellation of ACC's construction permit reclaimed 27 eastern and 24 western DBS channels. Even if we were to combine these reclaimed channels with those channels that have never been assigned to any permittee -- channels that are not subject to a claim under Continental -- we would have a total of 30 eastern channels at two orbital locations and 30 western channels at three orbital locations available for assignment. Under Continental, these channels would be divided *pro rata* to assign five pairs of channels at these locations to each of the six permittees that received fewer channels than requested in Continental.^{259/} The result would be a piecemeal assignment of the 28 full-CONUS channels available at the 110 orbital location among six permittees. In order to aggregate sufficient channels to support a viable DBS service,

^{258/} See Letter from Richard E. Wiley to Hon. Reed E. Hundt at 2 (dated August 15, 1995).

^{259/} The channel reservations made in Continental were 5 paired channels fewer than had been requested by EchoStar, Directsat, Tempo, DBSC, and DIRECTV, respectively, and 5 paired and 8 full-CONUS channels fewer than had been requested by Continental Satellite. Continental, 4 FCC Rcd at 6295-97. Thus, the outstanding channel requests total 30 eastern channels, 30 western channels, and 8 full-CONUS channels. Only 27 eastern and 24 western channels are available due to cancellation of ACC's permit -- the only channels to which these permittees have a claim under Continental.

these permittees would have to negotiate some form of agreement for joint operations from 110, or else work out a system of channel swaps to consolidate assignments. The process necessary in either case is often a time consuming one that is not always successful,^{260/} which is further complicated by the time required for Commission consideration and approval of the resulting transactions. Moreover, because the number of parties receiving additional channels is limited, there is no guarantee that those channels would go to the person who values them most highly and who can put them to the most efficient use to the benefit of American consumers. Such a result would conflict with our goals for the DBS service, as they would impede prompt delivery of service to the public and thwart efficient use of valuable spectrum resources as a much-needed competitor in the MVPD market.^{261/}

136. By contrast, the competitive bidding procedures we adopt today are specifically designed and intended to assign scarce resources to those who value them most highly and can make the most efficient use of them. By offering the available channels in two large blocks, we obviate the need for reaggregation and allow the auction winners to proceed directly to acquisition or construction of satellites and operation of their systems without having to negotiate with other permittees or engage in several rounds of administrative processing. Since we intend to hold this auction in January 1996, and to apply performance requirements to ensure due diligence,^{262/} we believe that the method we have chosen to replace Continental is better suited to achieving expedited service from the channels available than is the existing policy.

137. As a general matter, the arguments against adoption of a new assignment methodology are based on the misconception that the Commission cannot or should not change settled rules or policies if doing so would have a detrimental impact on those it regulates. On the contrary, the Commission enjoys wide latitude when using rulemaking to change its own policies and the manner by which those policies are implemented.^{263/} If the Commission is to function effectively, it must have the flexibility to amend its rules and regulations in light of its experience.^{264/} In fact, "the Commission should be alert to the consequences of its policies and should stand ready to alter its rule if necessary to serve the public interest more fully."^{265/}

^{260/} 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.

^{261/} See NPRM at ¶ 14.

^{262/} See ¶ 10, *supra*.

^{263/} See, e.g., Rainbow Broadcasting Co. v. FCC, 949 F.2d 405, 409 (D.C. Cir. 1991).

^{264/} See Florida Cellular Mobil Communications Corp. v. FCC, 28 F.3d 191, 196 (D.C. Cir. 1994), cert. denied, 115 S. Ct. 1357 (1995).

^{265/} FCC v. WNCN Listeners Guild, 450 U.S. 582, 603 (1981). See also National Broadcasting Co. v. United States, 319 U.S. 190, 225 (1943) ("If time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with

Otherwise, its policies and regulations would be perpetually dictated by rationales that were appropriate at the time of adoption but may no longer serve the public interest. This is especially true given that technological, commercial, and societal aspects of communications media are in constant flux.^{266/} Accordingly, the Commission reevaluates its regulatory standards over time, and such periodic examination of the continued vitality of regulatory approaches should not be discouraged.^{267/}

138. EchoStar/Direcstsat and DBSC argue that failure to honor the Continental reassignment methodology would violate their Fifth Amendment rights, both as an arbitrary and capricious denial of rights to additional channels and as a "taking" without just compensation of that valuable right.^{268/} The first step in both due process and takings analyses is to determine whether there is a protected property right at issue.^{269/} The permittees have cited two such interests: (1) the right to distribution *pro rata* of additional DBS channels recovered by the Commission; and (2) the right to use additional transponders built at great expense in order to accommodate the expected distribution of channels. Neither of these supposed "rights" rises to the level necessary to support a due process or takings violation.

139. While existing permittees do have a claim under Continental of first rights to reclaimed DBS channels, this right (and any related expectation) is not *aproperty right* for constitutional purposes. Each DBS permittee has a conditional construction permit for a specified term of years. Section 301 of the Communications Act clearly states that its purpose is, among other things, to "maintain the control of the United States over all the channels of radio transmission" and to provide for licensing the use of such channels, but *not* the ownership thereof, "and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license."^{270/} Section 304 of the Act similarly provides that no station license may be granted until the licensee has "waived any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise."^{271/} In addition, the Commission may modify any station license or construction permit if in its judgment such action will promote the

its statutory obligations").

^{266/} See Rainbow Broadcasting Co., 949 F.2d at 409 (citing FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940)).

^{267/} See Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413, 1425 (D.C. Cir. 1983).

^{268/} See EchoStar/Direcstsat Comments at 21-30; DBSC Comments at 13-14.

^{269/} See, e.g., Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41, 54-55 (1986); FHA v. The Darlington, Inc., 358 U.S. 84, 91 (1958).

^{270/} See 47 U.S.C. § 301.

^{271/} Id. at § 304.

public interest, convenience, and necessity, and, as noted above, such modification may appropriately be accomplished through notice and comment rulemaking.^{272/} Where, as here, the government retains at all times the power to alter rights it has created, the exercise of that retained power is not considered a "taking" for Fifth Amendment purposes.^{273/} Enforceable rights sufficient to support a due process claim cannot arise in an area voluntarily entered into and one which, from the start, is subject to such pervasive government control.^{274/} Accordingly, these permittees' claims to additional channels does not enjoy constitutional protection.

140. EchoStar/Directsat and DBSC also cite their investment in additional satellite transponders as evidence of their investment-backed expectation that rights under Continental would be honored. Courts have rejected attempts to support "the curious proposition that investment-backed expectations can give rise to a constitutionally protected property interest."^{275/} The cases upon which the permittees rely do not support a contrary result.^{276/} As explained by the Court of Appeals for the Ninth Circuit, such cases are

authority for the proposition that *once a constitutionally protected property interest is established*, then a reasonable investment-backed expectation is one of several factors to be taken into account "when determining whether a governmental action has

^{272/} See, e.g., Committee for Effective Cellular Rules v. FCC, 53 F.3d 1309, 1316 (D.C. Cir. 1995)(FCC properly acted within its rulemaking authority in adopting changes in cellular geographic service areas even though they will result in modification of existing licenses); Upjohn Co. v. FDA, 811 F.2d 1583, 1585 (D.C. Cir. 1987)("FDA was entitled . . . to diminish . . . entitlements under such licenses by means of notice-and-comment rulemaking"); WBEN, Inc. v. FCC, 396 F.2d 601, 618 (2d Cir.)(upholding exercise of FCC rulemaking authority without license modification hearings even though rule "result[ed] in increasing interference during the life of . . . present licenses"), cert. denied, 393 U.S. 914 (1968). See also 47 U.S.C. § 316 (the Commission may modify any license or permit it has issued if such action will promote the public interest, convenience, and necessity).

^{273/} See Democratic Central Comm. v. Washington Metro. Area Transit Comm'n 38 F.3d 603, 606-07 (D.C. Cir. 1994).

^{274/} See Bowen, 477 U.S. at 55; Mitchell Arms, Inc. v. United States, 7 F.3d 212, 216 (Fed. Cir. 1993), cert. denied, 114 S. Ct. 2100 (1994)(party who had voluntarily entered the firearms import business placed himself in a heavily regulated arena, and any expectation flowing from permit "could not be said to be a property right protected under the Fifth Amendment"); General Tel. Co. of the Southwest v. U.S., 449 F.2d 846, 864 (5th Cir. 1971)("The property of regulated industries is held subject to such limitations as may reasonably be imposed upon it in the public interest"); Black Hills Video Corp. v. FCC, 399 F.2d 65, 69-70 (8th Cir. 1968)(rules requiring cable systems to use their system capacity to carry the programs of local broadcast stations were not a constitutional "taking" because cable systems "are under the Communications Act subject to reasonable regulation related to the Act's objectives").

^{275/} Peterson v. Department of Interior, 899 F.2d 799, 813 (9th Cir.), cert. denied, 498 U.S. 1003 (1990).

^{276/} See, e.g., Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984); Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211 (1986).

gone beyond 'regulation' and effects a 'taking.'" Whether a "taking" has occurred is the second step of the inquiry. Here we do not reach that step because the [appellant has] *failed to survive the first step, which is establishing that a property right exists.*^{277/}

Here too, these permittee have failed to identify any property right that is entitled to the due process and takings clause protection they claim.

141. EchoStar/Directsat and DBSC have each been authorized to construct satellites using particular channels. To the extent they have configured their satellites to use additional channels, they have exceeded that authorization. It would be curious indeed if such unauthorized action could create a constitutionally protected right. Moreover, given that virtually all available DBS channels have been either requested or actually assigned for some time, no permittee could reasonably expect that channels recovered by the Commission would be available for reassignment *at the orbital position of that license.*^{278/} We also reject the argument that additional transponders that the permittees have built into their satellites will be wasted unless the Commission assigns additional DBS channels to use them. Satellite technology allows for use of those transponders to provide service from the channels already assigned. For example, the satellites used by DIRECTV employ switchable transponders, allowing DIRECTV to match the number of operating transponders with available power. Thus, it can use more transponders at lower power (16 channels at 120 watts) or fewer transponders at higher power (8 channels at 240 watts). The latter configuration provides the operator greater programming capacity, since the additional power allows greater compression. DIRECTV currently operates two of its satellites at the 101° orbital location in this high-power mode.^{279/}

142. We recognize that the Commission's action in Continental gave these permittees a claim to any channels that became available due to cancellation of another's permit, and that from this claim arose expectations upon which the permittees acted. We do not lightly disappoint those permittees' claims and expectations. It is our judgment, however, that the public interest in abandoning the Continental reassignment methodology discussed at length above outweighs the private interests of these parties. In the circumstances, the Commission may reassign available channels in a manner that better serves the public interest, convenience, and necessity, even if doing so has a detrimental impact on some individual parties.

^{277/} Peterson, 899 F.2d at 813 (emphasis added; citation omitted).

^{278/} For example, the last channels available at the 119° orbital location were assigned in November 1993. All three permittees holding those channel assignments -- EchoStar, Directsat, and Tempo -- have apparently been proceeding with due diligence toward construction and operation of their respective DBS systems.

^{279/} See Hughes Communications Galaxy, Inc., DA 95-979 (May 1, 1995)(authorizing operation at high power). DBSC apparently has a satellite with similar capabilities. See DBSC Reply at 6 n.6.

143. Nor do we believe that the use of a new methodology to reassign DBS channels in the future constitutes an impermissible retroactive rulemaking. "It is often the case that a business will undertake a certain course of conduct based on the current law, and will then find its expectations frustrated when the law changes. This has never been thought to constitute retroactive rulemaking, and indeed most economic regulation would be unworkable if all laws disrupting prior expectations were deemed suspect.^{280/} The use of a new methodology to reassign reclaimed channels applies to those currently available and those that may become available in the future. While this action modifies existing permits in a way that disrupts the permittees' expectations, it does not make past behavior unlawful or otherwise impose a penalty for past actions and thus does not have an impermissible retroactive effect.^{281/}

144. No more availing is the argument that abandoning Continental impermissibly reopens the last DBS processing round to new applicants and thereby deprives existing permittees of their protected status as timely applicants. Today we adopt a rule that modifies construction permits awarded in that processing round by removing claims on additional channels under certain conditions. We have taken this step because, as discussed in detail above, such action better serves the public interest. While this may be analogous to reopening the prior processing window in that spectrum awarded in that round will now be available to entities that were previously cut off from applying for it, it is nonetheless distinguishable.

145. Even assuming, *arguendo*, that we were reopening the Continental processing round, the Commission is free to do so where the public interest justifies doing so. The cases cited by these commenters stand only for the proposition that the Commission has valid reasons for strictly enforcing its cut-off rules, and does not abuse its discretion if it chooses not to waive those rules for a non-complying applicant.^{282/} In fact, one of the cited cases states that

timely applicants have no "vested right against challenge from untimely competitors," in the sense of precluding the FCC from ever granting a cut-off waiver, but they certainly have an equitable

^{280/} Chemical Waste Management, Inc. v. EPA, 869 F.2d 1526, 1536 (D.C. Cir. 1989). See also Langdraf v. USI Film Prods., 114 S. Ct. 1483, 1499 (1994)("A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment . . . or upsets expectations based in prior law" (citations omitted)).

^{281/} See, e.g., Langdraf, 114 S. Ct. at 1498 (retroactive law takes away or impairs vested rights, creates a new obligation, imposes a new duty, or attaches a new disability with respect to transactions already past); Bowen v. Georgetown University Hospital, 488 U.S. 204, 219-20 (1988)(Scalia, J., concurring) (retroactive rules alter the past legal consequences of past actions; rules that do not change what the law was in the past may still have "secondary" retroactivity, but are permissible if reasonable); Miller v. Florida, 482 U.S. 423, 430 (1987)("A law is retrospective if it 'changes the legal consequences of acts completed before its effective date'").

^{282/} See Florida Institute of Technology v. FCC, 952 F.2d 549, 553-54 (D.C. Cir. 1992); Coalition for the Preservation of Hispanic Broadcasting v. FCC, 893 F.2d 1349, 1359 (D.C. Cir. 1990), aff'd in part and vacated in part, 931 F.2d 73 (D.C. Cir.)(*en banc*), cert. denied, 502 U.S. 907 (1991).

interest whose weight it is "manifestly within the Commission's discretion to consider."^{283/}

As discussed above, we have considered those equities, and have determined that the public interest in expedited and competitive DBS service outweighs them in this instance. Since the public's interest in having licenses issued and service provided without undue delay is the basis for cut-off rules in the first instance,^{284/} we find our decision all the more appropriate. We also note that Ashbacker and its progeny^{285/} in no way limit our discretion to modify a construction permit by rule to provide for reassignment of spectrum in the public interest regardless of whether or not our action is viewed as opening an existing processing window.

146. In further support of their argument, these commenters cite to a case in which the Commission chose as a matter of its equitable discretion not to use auctions (as opposed to lotteries) to award MDS licenses for applications filed before we received auction authority.^{286/} That case is inapposite.^{287/} The Commission had not there decided through rulemaking that the public interest would best be served by making spectrum available for competing applicants. Rather, that case presented the question of how to assign spectrum for which applications had been filed prior to the Commission's receipt of auction authority. While that case, like this one, did involve the balancing of various public interest and equitable reliance factors, it does not stand for the proposition that equitable interests of particular entities outweigh the public interest in auctions in all contexts.

147. Section 309(j)(6)(E) of the Communications Act provides that nothing in our auction authority shall "be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings."^{288/} Even if simply reassigning the available channels on *apro rata* basis could be

^{283/} Florida Institute of Technology, 952 F.2d at 554 (quoting City of Angels Broadcasting, Inc. v. FCC, 745 F.2d 656, 663 n.7 (D.C. Cir. 1984)).

^{284/} Id.

^{285/} See Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1954); see also Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551, 1555 (D.C. Cir. 1987); Multi-State Communications, Inc. v. FCC, 728 F.2d 1519, 1525-26 (D.C. Cir.), cert. denied, 469 U.S. 1017 (1984).

^{286/} See, e.g., EchoStar/Direcstsat Comments at 14-17.

^{287/} See Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service 10 FCC Rcd 9589, 9633 (1995) ("There is no doubt that we have the authority under the statute to use auctions to dispose of these previously filed applications for MDS station licenses, if using auctions satisfied the Section 309(j)(3) factors. Rather, the question before us here is not whether we *may* utilize an auction, but whether we *should*.").

^{288/} See 47 U.S.C. § 309(j)(6)(E).

used to avoid mutual exclusivity, doing so would defeat the overall goals of auction statute itself for the reasons discussed in detail above.^{289/} Some existing permittees assert, however, that the Commission could use the Continental methodology to reassign channels in a way that would avoid mutual exclusivity while also rearranging channel assignments into a more rational plan.^{290/} They have submitted various ways in which existing channel assignments could be rearranged and available channels awarded in a consensual process.^{291/} Unfortunately, no two permittees have yet submitted the same proposal, nor does any one proposal appear to enjoy support of all permittees who would be affected by it. We do not think that it would serve the public interest to continue this effort, and see no practical way to force reordering of assignments without increasing the disturbance of settled expectations that the permittees claim to enjoy. Moreover, if in fact these permittees can make the most expeditious and efficient use of the available channels and can voluntarily agree on a method of reordering assignments, they are free to form a bidding consortium and then divide up the channels as they see fit, achieving their aims while also recovering for the public some of the value of the spectrum resource.

148. Lastly, these permittees argue that litigation over many aspects of the available DBS channels, including the method of their reassignment, can be expected to delay any auction and decrease the price received by the public.^{292/} While the prospect of litigation may, in appropriate circumstances, tip the balance between two comparable alternatives, if the Commission were to base its estimates of likely efficiency and expedition of service upon delays inherent in litigation, it would give anyone opposed to a rule the incentive to threaten litigation, and the system would quickly become unmanageable. We believe that the service and auction rules we adopt today are within our authority to adopt and are well designed to serve the public interest.

149. ACC proposes that it should be able to recoup its DBS expenditures from the proceeds of any auction of its former channels.^{293/} We do not believe that ACC is entitled to any such compensation, since it could have avoided the loss of its DBS permit had it complied with applicable due diligence rules.^{294/} Even if this were not the case, however, we would be unable to adopt this proposal since the auction statute specifically provides that, with limited exceptions not

^{289/} See ¶¶ 136-38, *supra*; 47 U.S.C. § 309(j)(3).

^{290/} See, e.g., Continental Satellite Comments at 8-10 and n.17; DBSC Comments at 5-6; EchoStar/Directsat Comments at 32-35.

^{291/} See Continental Satellite Comments at 7; DBSC Comments, Attachment; Letter from Philip A. Malet to William F. Caton in the Advanced Order proceeding, File Nos. DBS-94-11EXT/15ACP/16MP (dated June 14, 1995).

^{292/} See, e.g., Continental Satellite Comments at 8; DBSC Comments at 8; EchoStar/Directsat Comments at 18..

^{293/} See ACC Comments at 10-16.

^{294/} See Advanced Order at ¶ 2.

applicable here, all proceeds from the use of a competitive bidding system must be deposited in the United States Treasury.^{295/}

150. We also reject the proposal that we impose a spectrum fee on existing permittees to place them in a comparable competitive position with those who must acquire their permits through auction.^{296/} It would be unfair to impose this burden on those permittees who had sufficient foresight to enter the service and the willingness to make the investment necessary to comply with the applicable due diligence obligations before others saw DBS's potential. And, as USSB notes, auction participants can take into account any competitive advantages or disadvantages associated with the channels available when formulating their bids at auction.^{297/}

151. A number of commenters express concern that an auction in the DBS context might be seen as precedent for auctions in other satellite services, but would support the auction proposal so long as it is limited to the unique circumstances presented by the international allocation of DBS channels and orbital locations.^{298/} In the NPRM, we discussed the characteristics of the DBS service that make it unique, principally the international allocation to the United States of both orbital locations and channels.^{299/} It is those characteristics upon which we rely in determining that auctions are appropriate for this particular satellite service. We are aware that other satellite services, which do not have similar international allocations of resources, present different and very complex issues with respect to the use of auctions. The Commission is in the process of considering those issues,^{300/} and will be able to address them in the appropriate context. Those issues, however, are not now before us. Thus, our decision to use auctions in the DBS context is dependent upon the unique nature of the service, and in no way stands for the proposition that their use in other satellite services would also be appropriate.

152. Primestar and Tempo request that we make clear to all auction participants that appeals of our Advanced Order are ongoing and any award of a DBS construction permit through auction is taken subject to judicial reversal.^{301/} This is a familiar aspect of any Commission action that is currently under appeal. In the unlikely event that a court either overturns our Advanced Order and ACC's construction permit with its associated orbital/channel authorizations is

^{295/} See 47 U.S.C. § 309(j)(8)(A).

^{296/} See Continental Cablevision Comments at 21-22.

^{297/} See USSB Reply at 10.

^{298/} See DIRECTV Comments at 5; GE Americom Comments at 3-4; Lockheed Martin Comments at 8-9; PanAmSat Comments at 4.

^{299/} See NPRM at ¶¶ 18-22.

^{300/} See Public Notice, "Roundtable Date Set on Satellite Licensing Policies," Report No. SPB-31 (Nov. 21, 1995).

^{301/} See Primestar Comments at 38; Tempo Comments at 39.

ultimately reinstated, or overturns this rulemaking and the Continental reassignment methodology is ultimately maintained, we would rescind any permit awarded through the auction process, and move with all deliberate speed to refund money paid up to that point. Participants in the auction are hereby put on notice of this possibility, and should be willing to facilitate that process if it becomes necessary.

IV. ADOPTION OF RULES FOR AUCTIONING DBS PERMITS

A. Authority to Conduct Auctions

153. *The NPRM.* The Commission has authority under Section 309(j) of the Communications Act of 1934, as amended (the "Communications Act"), to employ auctions to choose among mutually exclusive applications for initial licenses or construction permits where the principal use of the spectrum is likely to involve the licensee receiving compensation from subscribers.^{302/} In the NPRM, we tentatively concluded that the Commission has authority under Section 309(j) to use competitive bidding to award construction permits for the DBS spectrum reclaimed from ACC as well as other available DBS spectrum, and that the use of auctions in the DBS service would be consistent with statutory objectives. Thus, we tentatively concluded that construction permits available for reclaimed DBS spectrum are "initial" within the meaning of Section 309(j); that it is likely that mutual exclusivity will exist among applications for the DBS channels reclaimed from ACC as well as other DBS channels that may become available in the future; and that the "principal use" requirement of Section 309(j) is satisfied because DBS is likely to be primarily a subscription-based service. We tentatively concluded that using competitive bidding to award DBS authorizations would promote the objectives of Section 309(j) because, more than any other method of awarding construction permits, auctions are likely to foster the rapid deployment of new technologies and products and the efficient use of spectrum by putting spectrum in the hands of those who value it most highly. As we also explained, auctions will serve Congress' goal of bringing new services to rural areas where homes may not be passed by cable television, and the rapid deployment of DBS service in competition with cable will further Congress' objective of promoting competition. Unlike the reassignment policy set forth in Continental,^{303/} or other available methods of assigning spectrum, such as comparative hearings, auctions will promote the statutory goal of recovering for the public a portion of the value of DBS spectrum.

154. With respect to the issue of mutual exclusivity, we explained in the NPRM that, pursuant to Section 309(j)(6)(E), we had sought means of avoiding mutual exclusivity in the DBS

^{302/} 47 U.S.C. § 309(j).

^{303/} See ¶ 131, *supra*.

service and tentatively concluded that there are no means of doing so that are consistent with the objectives of Section 309(j). We also proposed to consider mutual exclusivity to occur only when the number of DBS channels sought at a given orbital location exceeds the number available there.

155. *Comments.* The vast majority of commenters do not question the Commission's authority to use competitive bidding to award DBS authorizations, and commenters such as Primestar and MCI agree with our tentative conclusion that we do have such authority.^{304/} However, ACC argues that our proposed auction procedures exceed the Commission's statutory authority because DBS is not by definition a subscription service. According to ACC, competitive bidding will force DBS permittees to offer all-subscription service in order to recover the costs of competitive bidding and the Commission, by proposing to award construction permits through auctions, has chosen to sacrifice the free educational services that DBS operators would have otherwise provided.^{305/} EchoStar/Directsat argues in its comments that the Commission lacks authority to reassign ACC's spectrum by competitive bidding because we have ignored our statutory duty to try to avoid mutual exclusivity, which it asserts could be accomplished by applying Continental.^{306/} DBSC contends that the construction permits to be issued for the reclaimed ACC channels will not be "initial" under Section 309(j) because DBSC and others have the right under current Commission policy to acquire these channels through a modification of their permits.^{307/} MCI, on the other hand, argues that the principal use of DBS spectrum will involve the licensee receiving compensation from subscribers, that no one can seriously doubt that there will be mutually exclusive applications for the spectrum reclaimed from ACC, and that the authorizations to be issued for the spectrum reclaimed from ACC are "initial" under Section 309(j).^{308/}

156. ACC, EchoStar/Directsat, Continental Satellite, and DBSC assert that the objectives of Section 309(j) would not be served by the use of competitive bidding in the DBS service. They argue that auctions would not promote the development and rapid deployment of new technologies, products or services, and would in fact delay the deployment of services. ACC states that the auction winner will not be required to complete its first satellite until at least January 2000, and that further delay is almost certain due to court proceedings, whereas ACC's plan to assign its construction permit to Tempo would have resulted in a new DBS service

^{304/} Primestar Comments at 34-35; MCI Comments at 24-26.

^{305/} ACC Comments at 3, 8-9.

^{306/} EchoStar/Directsat Comments at 30-31 and Reply Comments at 1-2. See also DBSC Comments at 4-8 and Reply Comments at 8; Primestar Comments at 34-35 and Reply Comments at 19.

^{307/} DBSC Comments at 9-10.

^{308/} MCI Comments at 24-25.

becoming available shortly after the spring of 1996.^{309/} ACC also asserts, *inter alia*, that the Commission's proposed use of competitive bidding would not promote the statutory objective of disseminating licenses among a wide variety of applicants, and that the Commission has ignored Congress' mandate to offer small businesses the opportunity to participate in DBS.^{310/} EchoStar/Direcstsat contends that it is doubtful that any portion of the value of DBS spectrum would be recovered for the public through competitive bidding, arguing that there is a real possibility that the cost of paying for the spectrum would be passed on to the public through higher rates.^{311/} Although it believes the Commission has the authority to conduct DBS auctions, Primestar questions whether auctioning the channels reclaimed from ACC is consistent with statutory policies favoring the rapid deployment of services without administrative and judicial delay.^{312/} DBSC, while it disputes that prevention of unjust enrichment is an objective of Section 309(j), argues that transfer of ACC's channels to eligible DBS operators does not unjustly enrich them because they have invested in the development of the industry.^{313/} EchoStar/Direcstsat argues that an auction of channels at 110° will unjustly enrich DBS operators DIRECTV/USSB because they obtained full-CONUS channels for free.^{314/} In contrast, MCI argues that auctioning the DBS channels at issue here is fully consistent with the statutory goals of recovering for the public a portion of the value of spectrum, promoting efficient and intensive use of spectrum, and fostering the rapid development and deployment of services.^{315/}

157. *Discussion.* Those parties who argue that the Commission lacks authority to use auctions to award construction permits for reclaimed DBS spectrum are unpersuasive. As we stated in the NPRM with respect to the "principal use" requirement of Section 309(j), auctions are authorized if at least a majority of the use of the spectrum is likely to be for subscription-based services, and we look to classes of licenses and permits rather than individual licenses in making this determination.^{316/} Given that both DBS licensees now providing service to the public operate on a subscription basis, and all other permittees planning to initiate service in the near future also plan to offer subscription-based service, we think it is a reasonable assumption that a majority of

^{309/} ACC Comments at 3, 6-7. See also EchoStar/Direcstsat Comments at 32-37 and Reply Comments at 6-8; Continental Satellite Comments at 2, 10; DBSC Comments at 7-9 and Reply Comments at 4-5, 7.

^{310/} ACC Comments at 4, 10. See also Continental Satellite Comments at 11; DBSC Reply Comments at 7-8.

^{311/} EchoStar/Direcstsat Comments at 31-32, 38-39. See also DBSC Comments at 12 and Continental Satellite Comments at 2.

^{312/} Primestar Comments at 34-35.

^{313/} DBSC Comments at 10.

^{314/} EchoStar/Direcstsat Comments at 19-20 and Reply Comments at 12.

^{315/} MCI Comments at 26.

^{316/} NPRM at ¶ 76 (citing Implementation of Section 309(j) of the Communications Act -- Competitive Bidding Second Report and Order, 9 FCC Rcd 2348, 2354 (1994) ("Second R&O")).

the use of the spectrum is likely to involve the licensee receiving compensation from subscribers. Moreover, given that these operations and plans were in place before the Commission proposed to use competitive bidding in the DBS service, we do not agree with ACC's claim that competitive bidding will force DBS permittees to offer all-subscription service. Our "principal use" determination does not in any way preclude DBS licensees from providing any amount of non-subscription service, and they are not precluded from recovering auction costs, as well as the substantial costs of construction, launch, and operation from sources other than subscribers, such as advertising.

158. We do not accept EchoStar/Directsat's claim that we could have avoided mutual exclusivity by applying Continental because, as we have explained, we have determined that the spectrum reassignment policy in Continental would delay the development of DBS service and would squander valuable spectrum and thus would not be in the public interest. We also point out as we did in the NPRM that in any case where we have scheduled an auction and it turns out that only one application is filed for a particular construction permit, we will cancel the auction and process that application.^{317/} As we proposed in the NPRM, we will consider mutual exclusivity to exist only when the number of DBS channels sought at a given orbital location exceeds the number available there.

159. We also do not agree with DBSC's contention that existing permittees have the right to acquire channels reclaimed from ACC by modifying their permits and that the construction permits to be issued for these channels therefore will not be "initial" under Section 309(j). As noted in the NPRM, Congress, by specifying that auctionable licenses must be "initial," intended only to preclude the use of competitive bidding for license renewals and modifications.^{318/} As explained above, we have withdrawn from existing permittees the ability to modify their permits pursuant to Continental. Moreover, ACC's permits have been cancelled and therefore cannot be modified.^{319/} Thus, any construction permits awarded for reclaimed channels will be new permits for the channels in question.

160. We turn now to commenters' arguments regarding whether competitive bidding will promote the objectives of Section 309(j). ACC's contention that the development of DBS service would be delayed if we auctioned the reclaimed frequencies at 110° and 148° is entirely speculative. There is no reason to assume that it will take the auction winner until at least January 2000 to complete a first satellite. The auction winner may be an entity that has already begun construction or even launched a satellite. Even if it has not, it may be in a position to do so expeditiously. Paying for spectrum provides incentives for permittees to construct quickly in order to obtain a return on their investment. Indeed, an auction is likely to promote the rapid

^{317/} See NPRM at ¶ 75 (citing Second R&O, 9 FCC Rcd at 2376).

^{318/} See NPRM at ¶ 74 (citing H.R. Rep. No. 103-111, 103d Cong., 1st Sess., at 253 (1993)).

^{319/} See ¶¶ 142-43, 149, *supra*.

deployment of service because those parties that are in the best position to deploy technologies and services are also likely to be the highest bidders.

161. With respect to the possibility of delay caused by court proceedings, a point raised by both ACC and Primestar, we do not believe that it would be appropriate to refrain from conducting auctions where we believe they would serve the public policy objectives of Section 309(j) simply because of the pending appeal of the Advanced Order and other legal challenges that might be filed and where we also believe those cases will ultimately be resolved in the Commission's favor. In addition, the objective of avoiding administrative and judicial delay is only one factor that must be weighed in light of the statute's other objectives and the other available alternatives to resolving the mutually exclusive applications we will receive for the reclaimed channels. In this regard, the only available alternative for issuing licenses would be comparative hearings.^{320/} Our experience with both auctions and comparative hearings clearly indicates that auctions will more likely result in less administrative and judicial delay.^{321/}

162. In response to ACC's assertion that our proposed use of competitive bidding in the DBS service would not promote the statutory objective of disseminating licenses among a wide variety of applicants, including "designated entities," we observe again that this is one of a number of objectives Congress wished to promote through spectrum auctions and each objective must be considered with all others.^{322/} As discussed more fully below, we have concluded that, because of the extremely high implementation costs associated with satellite-based services, no special provisions should be made for small businesses and other designated entities in an auction of the spectrum available at 110° and 148°.^{323/} This does not mean, however, that we have ignored Congress' mandate to offer designated entities the opportunity to participate in competitive bidding, nor does it mean that designated entities will be unable to participate in the DBS industry or that auctions of DBS spectrum will not promote many of the objectives of Section 309(j). Indeed, the legislative history of the designated entity provisions shows that Congress did not necessarily intend for special measures in services such as DBS: "The characteristics of some

^{320/} Lotteries are not an available alternative to resolving mutually exclusive applications in DBS. See 47 U.S.C. § 309(i)(1)(B); see also 1993 Budget Act, Pub. L. No. 103-66, § 6002(e).

^{321/} See, e.g., Second R&O, 9 FCC Rcd at 2358.

^{322/} See 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. 35,166 (released June 15, 1995) at ¶ 107.

^{323/} As noted in the NPRM with respect to 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.

services are inherently national in scope, and are therefore ill-suited for small businesses.^{324/} Moreover, the abandonment of our Continental policy opens the DBS industry to a wide range of potential new entrants. Judging by the comments in favor of auctioning DBS spectrum submitted by such entities as MCI and CTA, a minority-owned aerospace company, it appears that there will be a "wide variety" of applicants for this spectrum in the future. We also anticipate that a wide variety of businesses will be involved in various sectors of this industry as non-licensed operators, programmers, and equipment suppliers.

163. The possibility that auction costs will be passed on to consumers does not necessarily lead to the conclusion that DBS auctions will not serve the statutory objective of recovering a portion of the value of DBS spectrum for the public. Auction and other costs may be passed on to consumers by providers of any service subject to competitive bidding.^{325/} Nonetheless, in giving the Commission auction authority, Congress clearly perceived that auctions would compensate the public for at least a portion of the spectrum awarded, and this is just as true of DBS as it is of any auctionable service. It should also be pointed out that auction winners will be constrained from charging rates that are higher than those of competitors that have not paid for the spectrum assigned to them, and that rational operators will charge the market price for services in any event.

164. Another facet of the statutory objective of compensating the public for spectrum licenses or permits is the avoidance of unjust enrichment to licensees. DBSC argues that this is only an objective of auction design and assumes that an auction is to be held. We disagree. Section 309(j)(3) states that "[i]n identifying classes of licenses and permits to be issued by competitive bidding, in specifying eligibility and other characteristics of such licenses and permits, and in designing the methodologies for use under this subsection" the Commission shall promote, among other objectives, "avoidance of unjust enrichment through methods employed to award uses" of the spectrum. The statute requires us to consider the avoidance of unjust enrichment in choosing whether to auction DBS spectrum. DBSC goes on to argue that an auction of DBS spectrum does not promote avoidance of unjust enrichment because eligible DBS operators that would have received channels under Continental have developed the DBS industry at great cost. Conversely, EchoStar/Directsat argues that current DBS operators DIRECTV/USSB will be unjustly enriched because they paid nothing for DBS channels. These arguments, however, ignore the fact that DBS channels have significant value to any entity possessing the right to use them. Transfer of these channels to operators that have already developed service using their current channels would be a windfall to those operators. Auctioning them would ensure that the ultimate holder of these channels paid their market value to the U.S. Treasury and was not unjustly enriched.

^{324/} H.R. Rep. No. 111, *supra*, at 254.

^{325/} See ¶ 157, *supra*.

165. In sum, we conclude that the Commission has the authority to award DBS construction permits, for reclaimed or other available spectrum, by means of competitive bidding. We further conclude that the use of competitive bidding to assign DBS spectrum will promote the rapid deployment of DBS service and the efficient use of DBS spectrum more effectively than any other assignment method. We will therefore award construction permits for the channels available at 110° and 148°, as well as DBS construction permits that become available in the future, by means of competitive bidding. In reaching these conclusions, we emphasize that we wish to encourage DBS operators to provide free services for schools, libraries, and other institutions serving the public that may not have the financial resources to pay for DBS services, and we do not believe that the use of competitive bidding should preclude the provision of such free services, which can be provided without incurring additional buildout costs. As we also noted in the NPRM, subscription-based DBS is subject to a statutory public interest requirement to reserve capacity for noncommercial, educational, or informational programming found in Section 335 of the Communications Act.^{326/}

B. Competitive Bidding Design

166. *The NPRM.* In the NPRM, we proposed to auction two permits for the construction of satellites to use the DBS channels currently available at the 110° and 148° orbital locations. We tentatively decided not to divide the available blocks of channels into smaller parcels, or to auction each channel individually, because the configuration of current DBS systems indicates that channels are most effectively utilized when they are available in a substantial quantity at a given orbital location.

167. We also proposed in the NPRM 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, because we tentatively concluded that there would be little to gain by conducting simultaneous auctions of the two construction permits. We explained that the channels at 110° and at 148° are not likely to be close substitutes in the near term, nor did we find evidence of synergies between the channels at the two orbital locations. We further tentatively concluded that multiple round bidding would be the best method of auctioning the channels reclaimed from ACC, and that oral outcry would be the best method of submitting bids. However, we sought comment on whether an oral outcry auction could pose problems for bidders that need time between bidding rounds to arrange for additional financing if bidding goes higher than anticipated. We also requested comment on whether a combined sealed bid-oral outcry auction might be appropriate for the channels available at 110° and 148° to help reduce the risk of collusion while retaining the benefits of a multiple round auction.

^{326/} 47 U.S.C. § 335. But see NPRM at ¶ 32 (discussing court challenges to this provision).

168. *Comments.* Most commenters who discuss our proposal to auction one permit for the DBS channels available at the 110° and one permit for the channels available at 148° support this proposal.^{327/} However, CTA recommends dividing the channels at 110° into two blocks of 14, and the channels at 148° into two blocks of 12. According to CTA, a ten-channel block is more than adequate to support a viable DBS system given the development of digital compression techniques, and vigorous DBS service can also be established using small satellite technology with fewer than half of the 32 channels allocated to an orbital slot. CTA also points out that dividing an orbital slot's channel allocation into thirds or halves would create the possibility of more competitors at each orbital location.^{328/} ASN proposes that the Commission set aside, at the 110° and 148° locations as well as in any future DBS auction, 10 percent of the channel capacity at each orbital location for "independents," DBS programmers or distributors who have no market power through a nationwide cable system or other multichannel video distribution system. According to ASN, cable-affiliated DBS distributors have numerous incentives to restrict the scope of DBS product, program, and service offerings, and exclusive operation of a full-CONUS orbital location by a cable-affiliated DBS operator would prevent or at least slow the development of new DBS offerings. ASN believes that its proposed spectrum set-aside for independents would have sufficient capacity to support an economically viable product.^{329/}

169. In its reply comments, MCI argues against CTA's suggestion that the channels at 110° and 148° be divided into smaller blocks, stating that CTA's claim that 14 DBS channels could support "upwards of 280 programming channels" by the end of the decade is based upon nothing more than its expectation of vast advances in video compression by the year 2000. According to MCI, CTA's proposal, if implemented, would place those entering the DBS market prior to the year 2000 at a tremendous disadvantage because it would effectively preclude aggregation of more than 14 channels by any bidder. MCI states that, if it is awarded the reclaimed DBS channels, it expects to have satellites in operation well before the end of the decade.^{330/} MCI also opposes ASN's proposal to set aside 10 percent of the spectrum for independent programmers, arguing that it would necessitate delay in the auction and lead to fragmentation of the spectrum block and that the proposal lacks sufficient details.^{331/}

170. Most commenters express no opinion regarding our proposal to use sequential oral outcry bidding for DBS, although Primestar and DIRECTV voice support for this auction

^{327/} See Primestar Comments at 35; Kennedy-Wilson Comments at 1; MCI Comments at 4-5.

^{328/} CTA Comments at 3-6.

^{329/} ASN Comments at 8-12.

^{330/} MCI Reply Comments at 21.

^{331/} Id.

design.^{332/} MCI also generally supports our proposal and recommends a "structured open-outcry auction."^{333/} This auction design is described in a paper submitted by MCI and prepared by University of Maryland game theorist and economist Lawrence M. Ausubel. Under this methodology, oral bidding would be conducted in five-minute increments. A bidder would place a bid, which would then be recorded on a board at the front of the bidding room. The bidder would then have one minute, to be timed by an official timer visible to all bidders, to withdraw that bid without penalty. Any bidder withdrawing its bid subsequent to this one-minute grace period would be subject to the Commission's standard withdrawal payment and would be disqualified from further bidding on the same construction permit. At the conclusion of the one-minute withdrawal period, a five-minute time period, signifying the start of the new bid submission period, would begin. At any time during this time period, any bidder would be free to announce a new bid. New bids would be dictated by predetermined increments. For example, incremental bids of \$5 million could be required for bids up to \$200 million, followed by increments of \$10 million for bids between \$200 and \$400 million, followed by increments of \$20 million for any bids beyond \$400 million. Once a bid is recorded on the board, any new bid must follow the required bidding sequence, and no jump bids would be accepted. The auctioneer would not retain discretion to change the predetermined bid increment during the course of the auction. If a default or a bid withdrawal occurs outside of the one-minute bid withdrawal period, the Commission would retain the discretion to re-auction the license that same day. To prevent a bidder from strategically delaying the close of the auction, the Commission would retain the discretion to limit the number of times that a bidder may re-bid on a construction permit and then withdraw the bid during the permitted one-minute withdrawal period.^{334/} MCI claims that its proposed oral-outcry structure would be straightforward to implement, would serve the goal of maximizing the availability of information to bidders, and would encourage aggressive bidding by creating a simple and predictable environment for bidders to operate in, thus making higher revenues likely.

171. GE Americom states that our proposed auction procedures appear reasonable for the unique purpose of auctioning the channels reclaimed from ACC but asserts that other procedures -- which it does not specify -- would probably achieve a fairer and more efficient result in future DBS auctions. GE Americom asks that we limit any auction procedures adopted here to the auction of the channels available at 110° and 148°.^{335/} We note also that Continental Satellite

^{332/} Primestar Comments at 35. Primestar believes that the Commission should not have reclaimed the spectrum at 110° and 148° from ACC. However, Primestar supports our proposed auction design in the event this spectrum is auctioned. DIRECTV supports this design provided that it is not precluded from bidding by spectrum caps. DIRECTV Comments at 27.

^{333/} MCI Comments at 27.

^{334/} MCI Comments, Ausubel Paper at 2-4.

^{335/} GE Americom Comments at 21-22 and Reply Comments at 2.

claims that our proposed auction methodology is unworkable, but its only support of this claim is the fact that we have asked for comment on the various aspects of this methodology.^{336/}

172. CTA and Kennedy-Wilson, an auction contractor and consultant, recommend that we use simultaneous multiple round bidding instead of our proposed sequential auction. CTA states that bidding on individual channels or small channel blocks in a simultaneous auction would allow market forces to determine the value of spectrum and the appropriate aggregation of channels. According to CTA, DBS channels are highly interdependent within each orbital slot. CTA also argues that bidding on individual channels or small parcels in a simultaneous auction would increase revenues by increasing the number of bidders and forcing up the price to acquire all channels, and that this auction design would have the advantage of allowing smaller entities to participate in the auction and still allow larger entities to aggregate all channels available at a given orbital location.^{337/} Kennedy-Wilson recommends a simultaneous oral outcry auction offering the two channel blocks proposed in the NPRM, stating that this auction design would allow bidders to adjust their bids as they acquire information regarding the relative value of each block. According to Kennedy-Wilson, it is probable that some bidders for one block will also be interested in bidding for the other block, and a bidder primarily interested in the second block might prematurely drop out of the bidding for the first block if it lacks information about the ultimate price of the second block.^{338/} Kennedy-Wilson also proposes that bidders be allowed to submit bids either orally or electronically, suggesting that electronic bids could be displayed electronically on site and announced orally. Kennedy-Wilson suggests that we allow both telephone bids and computer bidding.^{339/}

173. In its reply comments, MCI continues to support sequential auctions with the higher value block of channels offered first, stating that this is a simpler method than a simultaneous oral auction.^{340/} According to MCI, no telephonic or electronic bidding should be employed. In its reply comments, Primestar generally supports MCI's proposal to employ an oral outcry auction including a one-minute penalty-free withdrawal period following each bid and a five-minute period to submit new bids. Primestar suggests that when a bid is withdrawn, the bidding should revert to the previous high bid and if no new bid is announced, then the auction would conclude at that bid.^{341/}

^{336/} Continental Satellite Comments at 11-13.

^{337/} CTA Comments at 6-8.

^{338/} Kennedy-Wilson Comments at 1-2.

^{339/} Kennedy-Wilson Comments at 2-3.

^{340/} MCI Reply Comments at 22.

^{341/} Primestar Reply Comments at 20.

174. In response to our request for comment on whether bidders in an oral outcry auction would need time between bidding rounds to arrange for additional financing, Primestar argues that there should be short intervals (Primestar suggests 15 to 30 minutes in its comments and 30 minutes in its reply comments) at predetermined stages to allow bidders to assess the bidding and confer with their principals.^{342/} Kennedy-Wilson, however, expresses concern about giving bidders time to react to ascending pricing. Kennedy-Wilson proposes a closing rule that would allow each eligible bidder one opportunity to suspend closure of the auction by requesting a break in lieu of bidding. Kennedy-Wilson suggests that the duration of such a break should be one hour.^{343/} In its reply comments, MCI contends that, to prevent opportunities for collusion and to expedite the auction, breaks should be prohibited. MCI states that entities that are serious about bidding for the permits being offered should be able to send a representative to the auction site, that there should be no need to consult with principals or to arrange for additional funding, and that the auction should be conducted and completed in one day.^{344/}

175. In response to our request for comment on whether a combined sealed bid-oral outcry auction would be appropriate for DBS, Primestar and MCI state that this method should not be used because it limits bidders' access to information and thus is not consistent with aggressive bidding.^{345/} Kennedy-Wilson also recommends against a combined sealed bid-oral outcry procedure, arguing that nothing would be gained by this auction format, that otherwise qualified bidders might be disqualified, and that such an auction design might have the effect of reducing the amount bid.^{346/}

176. *Discussion.* Little opposition was expressed with regard to our proposal to auction the DBS channels available at the 110° and 148° orbital locations in two blocks. Moreover, the trend in the industry has been to aggregate large blocks of spectrum, and we believe that large channel blocks are needed to create a viable service at this time. As we noted in the NPRM, Tempo Satellite has indicated that the 11 paired channels it has been assigned at the 119° orbital location "are not sufficient for a competitive system."^{347/} EchoStar has combined with Directsat to control a total of 21 channels at each of two orbital locations, and USSB has been able to operate using five channels by striking a deal with DIRECTV, which held the remaining 27 channels at the same orbital location. We also note that there is no prohibition against disaggregating channels in the post-auction aftermarket once they are acquired.

^{342/} Primestar Comments at 36 and Reply Comments at 20-21.

^{343/} Kennedy-Wilson Comments at 2.

^{344/} MCI Reply Comments at 22-23.

^{345/} Primestar Comments at 35 n.79; MCI Comments at 28.

^{346/} Kennedy-Wilson Comments at 3.

^{347/} See letter from Richard E. Wiley to Hon. Reed E. Hundt at 2 (dated August 15, 1995).

Moreover, small entities have the option of forming groups to bid for spectrum and then dividing the channels among themselves after the auction. Therefore, we will implement our proposal and will auction one construction permit for a block of 28 channels at 110° -- the 27 channels reclaimed from ACC and one channel that has never been assigned -- and one construction permit for the block of 24 channels at 148° that were reclaimed from ACC. As explained in the NPRM, 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"). The construction permits available for auction include authority to transmit pursuant to these allocations in accordance with the BSS Plan.^{348/}

177. We recognize that there may be legitimate arguments for auctioning spectrum in smaller blocks, particularly in the future as digital compression technology is further developed. There may also be opportunities for niche services to develop once DBS service is generally established. Therefore, in the future we may auction DBS spectrum either channel by channel or in small blocks. However, for the reasons stated above, we believe that designating two permits for auction for the channels at 110° and 148° will best serve the public interest and the objectives of Section 309(j)(4)(B), especially the promotion of investment in and rapid deployment of this new service.

178. We conclude that a sequential multiple round electronic auction would be the best method of awarding construction permits for the channels available at 110° and 148°. We are persuaded by the comments of MCI that we should provide the auction with more structure, but we believe that the best way to provide such structure is through electronic bidding, and not by imposing restrictions on the auctioneer in an oral auction. The primary benefit of additional structure is the reduced risk of bidders making errors in submitting bids. Erroneous bids are occasionally entered in rapidly moving oral auctions. Based on our experience with PCS auctions, we believe that such errors are far less likely with electronic bidding than in a traditional oral auction. Given the absence of erroneous bid submissions with electronic bidding, we believe there is no need to adopt MCI's proposal of providing a one-minute bid withdrawal period in an oral auction.

179. We see three additional benefits to multiple round electronic bidding. First, electronic bidding with discrete bidding rounds provides bidders more time to analyze previous bids, confer with decision makers, and refine their bidding strategy than a continuous oral auction. Moreover, time-outs can be better tailored to the needs of individual bidders. If, as Kennedy-Wilson proposes, the Commission were to provide each bidder with the right to call a one hour time-out in an oral auction, the entire auction would be stopped whenever a time-out is called. In contrast, with electronic bidding in discrete rounds, bidders can be provided with waivers that will allow them to sit out rounds without losing eligibility while other bidders continue to bid, and without the auction closing. Second, a multiple round electronic auction with the activity rule

^{348/} See ITU Radio Regulations, Appendix 30A (Orb-88).

discussed below will provide bidders more information about other bidders' valuations. The activity rule requires bidders to be active in every round (or use one of a limited number of waivers) to maintain their bidding eligibility. Thus, absent the use of waivers, all bidders willing to acquire a construction permit at each announced price will be observable. Providing this information may enable bidders to refine their estimates of the permit value, thereby reducing the tendency of bidders for permits with uncertain value to shade down their bids to avoid the "winner's curse." Third, given the Commission's experience with electronic auctions, such an auction is likely to be easier for the FCC to implement than an oral auction with novel features, such as those proposed by MCI. Because of the Commission's discretion to adjust the length of bidding rounds in an electronic auction and the other auction design features described below, we expect the auction to proceed rapidly.

180. We will provide for electronic bidding at an FCC auction site because of the anticipated rapid auction pace. We do not anticipate allowing telephone bids and remote electronic bidding, as suggested by Kennedy-Wilson, but the Wireless Telecommunications Bureau will announce by Public Notice whether such bidding will be permitted. In the event telephone bids and remote electronic bidding are not allowed, all bidders will be required to have an authorized bidding representative at the auction site. Because no commenter has made the case that there is significant interdependence between the channels available at 110° and those available at 148°, we do not believe simultaneous bidding is necessary. Hence, we shall auction the channels at 110° and the channels at 148° separately. We may auction one channel block immediately after the other, but we also reserve the discretion to hold two separate auctions for the two blocks.

181. Although we will not use simultaneous multiple round bidding, oral outcry bidding, sealed bidding, or a combined sealed bid-oral outcry auction, to reassign the spectrum reclaimed from ACC, we recognize that such auction designs could be suitable for DBS under certain circumstances and we reserve discretion to employ such auction designs for DBS in the future. We therefore adopt rules to provide for these auction designs, and we retain discretion to modify by Public Notice the procedures pertaining to these auction methods. As we have done in previous auctions, we also delegate to the Wireless Telecommunications Bureau the authority to implement and modify auction procedures -- including the general design and timing of an auction, the number of authorizations to be offered in any one auction, the manner of submitting bids, and procedures such as minimum opening bids and bid increments, activity and stopping rules, and application and payment requirements -- and to announce such procedures by Public Notice.

C. Bidding Procedures

182. *Sequencing.* We proposed in the NPRM to auction the 28 channels available at 110° first. As we explained, all of the information available to us indicated that these channels have the highest value of those currently available, and we thought that bidders would not wish to bid on the channels available at 148° until they had had the opportunity to bid on the channels at

110°. We also sought comment on any general principles interested parties might wish to suggest for determining the sequence of future DBS auctions that may be held. None of the commenters suggested that we offer the channels available at 148° before the channels at 110°, and the comments clearly reveal that there is more interest in these channels than in the channels available at 148°. We will therefore implement our proposal to auction the 28 channels available at 110° first. As noted above, we reserve the discretion to hold two separate auctions for the channels available at 110° and the channels at 148°, rather than auctioning the channels at 148° immediately after the channels at 110°. We will determine the sequence of future DBS auctions in keeping with our general finding that 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.^{349/} In the event that we need to assign separate blocks of channels that we believe to be interdependent, we may choose to utilize a simultaneous multiple round auction.

183. *Bid Increments and Tie Bids.* In the NPRM, we tentatively concluded that, if we employed oral outcry bidding, 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. We stated our view that such discretion on the part of the auctioneer would contribute to the efficient conduct of an oral outcry auction. We also solicited suggestions as to how bid increments should be determined in the event bids are submitted electronically. According to Kennedy-Wilson, bid increments are most crucial at the conclusion of an auction and must be low enough at that time to withstand a legal challenge from bidders who want to make bids above the high bid but below the bid increment. Kennedy-Wilson suggests that the auctioneer be given the discretion to set the amount of bid increments subject to a minimum increment of 1 percent rounded down to the nearest \$100,000 or \$1 million, whichever is less.^{350/} Primestar suggests in its comments that bid increments of \$5 million would be sufficient to ensure that full value of the spectrum is received and that the auction proceeds to an expeditious conclusion.^{351/} In its reply comments, however, Primestar supports Kennedy-Wilson's proposal of granting the auctioneer the discretion to set bid increments subject to a minimum of 1 percent rounded down to the nearest \$100,000 or \$1 million, whichever is less. Primestar disagrees with MCI's proposal of having bid increments increase as the bidding amounts increase. Primestar believes that this method runs counter to the Commission's goal of maximizing the value of the spectrum because at higher overall bidding levels, bidders may be willing to pay \$1 million more but not \$20 million more.^{352/}

184. We conclude that the Commission should have discretion to establish, raise and lower minimum bid increments in the course of the auction. We believe that this discretion over

^{349/} See Second R&O, 9 FCC Rcd at 2368.

^{350/} Kennedy-Wilson Comments at 3.

^{351/} Primestar Comments at 37.

^{352/} Primestar Reply Comments at 21.

minimum bid increments is necessary to ensure that the Commission can efficiently control the pace of the auction. We anticipate using larger percentage minimum bid increments early in the auction and reducing the minimum increment percentage as bidding activity falls. In light of MCI's comments, we also believe that the efficiency of the auction may be enhanced by limiting jump bidding, *i.e.*, bidding above the minimum accepted bids. Therefore, we will also retain the discretion to establish and change maximum bid increments in the course of the auction. Where a tie bid occurs, the high bidder will be determined by the order in which the bids were received by the Commission.

185. *Minimum Opening Bid.* We proposed in the NPRM 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. We asked interested parties to suggest the appropriate level of a minimum opening bid for the permit for these channels, and to comment on whether we should have a minimum opening bid for the 24 channels at 148° and for other DBS construction permits that may become available in the future. Primestar states that the minimum opening bid should be the same as the upfront payment, which should be based on the value of the channels being auctioned. Primestar suggests the amount of \$10 million for the channels available at 110°, stating that this is approximately 25 percent of the amount ACC would have received for these channels through its proposed transaction with Tempo and Primestar.^{353/} MCI suggests that the minimum opening bid for the 28 channels available at 110° should be \$175 million, and reiterates its commitment to making this opening bid.^{354/} Kennedy-Wilson, on the other hand, states that there is nothing to be gained by setting a minimum opening bid, unless the Commission is convinced that there is a high probability of bidder collusion, and it therefore recommends not setting one.^{355/}

186. We continue to believe that it would be useful to have a minimum opening bid for the channels at 110° to help move the auction along and to increase the likelihood that the public receives fair market value for the spectrum. We will therefore establish a minimum opening bid for this spectrum, the amount of which will be announced by the Wireless Telecommunications Bureau by Public Notice. The Wireless Telecommunications Bureau and the International Bureau will determine the amount of the minimum opening bid using all available information and taking into consideration the uncertainty as to the value of the spectrum. No commenter has suggested a minimum opening bid for the channels available at 148°, but it appears that their value is substantially lower than the value of the channels at 110°. Therefore, we will not set a minimum bid for the channels at 148°. As our PCS auction experience shows, a minimum opening bid is not an absolute prerequisite for a successful, efficient auction. Because no parties have commented on whether we should have minimum opening bids for future DBS auctions, we

^{353/} Primestar Comments at 37.

^{354/} MCI Comments at 28.

^{355/} Kennedy-Wilson Comments at 3-4.

reserve discretion to decide this issue with respect to individual auctions as circumstances warrant.

187. *Activity Rules.* To maximize the amount of information generated during the course of an auction and to ensure that the auction closes in a reasonable amount of time, we will require a bidder to be active in each round of the auction or use an activity rule waiver, as defined below. To be active in the current round, a bidder must submit an acceptable bid in the current round or have the high bid from the previous round. A bidder who is not active in a round and has no remaining activity rule waivers will no longer be eligible to bid on the construction permit being auctioned. However, as discussed below, in the event of a bid withdrawal, the eligibility of all bidders who have not withdrawn will be restored.

188. *Activity Rule Waivers.* To make allowance for unusual circumstances that might delay a bidder's bid preparation or submission in a particular round, we will provide bidders with a limited number of waivers of the above-described activity rule. We believe that some waiver procedure is needed because the Commission does not wish to end a bidder's participation due to an accidental act or circumstances not under the bidder's control.^{356/} We will provide bidders with five activity rule waivers that may be used in any round during the course of the auction.^{357/} A waiver will preserve eligibility in the next round.^{358/} Waivers may be applied automatically by the Commission or invoked proactively by bidders. If a bidder is not active in a round, a waiver will be applied automatically. An automatic waiver applied in a round in which there are no new valid bids will not keep the auction open. A proactive activity rule waiver is a waiver invoked by a bidder during the bid submission period.^{359/} If a bidder submits a proactive waiver in a round in which no other bidding activity occurs, the auction will remain open.

189. The Commission will retain the discretion to issue additional waivers during the course of an auction for circumstances beyond a bidder's control or in the event of a bid withdrawal, as discussed below. We will also retain the flexibility to adjust by Public Notice prior to an auction the number of waivers permitted.

190. *Stopping Rules.* A stopping rule specifies when an auction is over. The auction will close after one round passes in which no new valid bids or proactive activity rule waivers are submitted. The Commission retains the discretion, however, to keep the auction open even if no new valid bids and no proactive waivers are submitted. In the event that the Commission exercises this discretion, the effect will be the same as if a bidder had submitted a proactive

^{356/} See Second R&O, 9 FCC Rcd at 2372.

^{357/} See id. at 2373.

^{358/} An activity rule waiver cannot be used to correct an error in the amount bid.

^{359/} Thus, a "proactive" waiver, as distinguished from the automatic waiver described above, is one requested by the bidder.

waiver. This will help ensure that the auction is completed within a reasonable period of time, because it will enable the Commission to utilize larger bid increments, which speed the pace of the auction, without risking premature closing of the auction.^{360/}

D. Procedural and Payment Issues

191. We proposed in the NPRM to apply our general procedural and payment rules for auctions to the DBS service, along with certain modifications. In keeping with our previous practice, we also proposed to retain discretion to implement or modify certain procedures that would 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 received no comments opposing this general proposal, nor did we receive any comments disagreeing with our proposed application procedures or our proposed down payment and final payment requirements. We therefore adopt these procedures and requirements as proposed in the NPRM, except that, as explained below, we will allow more time than was proposed for winning bidders to file information in conformance with Part 100 of the Commission's Rules. As indicated above, we also delegate authority to the Wireless Telecommunications Bureau to implement or modify application and payment procedures, and to announce such procedures by Public Notice.^{361/} We received a number of comments regarding the issues of upfront payments and procedures dealing with bid withdrawal, default and disqualification, and these issues are discussed separately below.

192. *Application Procedures, Permittee Qualifications, and Payment for Construction Permits Awarded by Competitive Bidding.* As we proposed in the NPRM, applicants for DBS auctions will be required to file a short-form application, FCC Form 175, prior to the auction in which they wish to participate. Filing deadlines will be announced by Public Notice. If administratively feasible, we will allow electronic filing of FCC Form 175 for the auction of spectrum available at 110° and 148°, and will announce filing procedures by Public Notice. For subsequent DBS auctions, we will also announce by Public Notice how such forms should be filed.

193. As discussed below, we will require every DBS auction participant to submit to the Commission an upfront payment prior to commencement of the auction. In addition, each auction winner will be required to submit 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. Winning bidders also will be required to file information in conformance with Part 100 of the Commission's Rules. This procedure will constitute the "long-form application" process referred to in our general auction rules. Although we proposed in the NPRM to require winning bidders

^{360/} See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding Memorandum Opinion and Order, 9 FCC Rcd 7684, 7685 (1994).

^{361/} See ¶ 181, *supra*.

to file this information within 10 business days of the announcement of winning bidders, we believe that this would not be a reasonable deadline in light of the amount and type of information that must be submitted. We will therefore require that winning bidders file this information with the Commission within 30 days of the announcement of winning bidders. Winning bidders must submit, as part of this post-auction application process, a signed statement describing their efforts to date and future plans to come into compliance with any applicable spectrum limitations, if they are not already in compliance.

194. After reviewing a winning bidder's information supplied in conformance with Part 100 and determining that the bidder is qualified to be a permittee, and after verifying receipt of the bidder's 20 percent down payment, the Commission will 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 dismisses or denies any and all petitions to deny, the Commission will issue an announcement to this effect, and the winning bidder will then have five business days to submit the balance of its winning bid. If the bidder does so, the permit will be granted subject to a condition, if necessary, that the permittee come into compliance with any applicable spectrum limitations within 12 months of the final grant. The permittee may come into compliance with this spectrum cap by either surrendering to the Commission its excess channels or filing an application that would result in divestiture of the excess channels. If the bidder fails to submit the balance of the winning bid or the permit is otherwise denied, we will assess a default payment as set forth below and re-auction the permit.

195. *Upfront Payment.* In the NPRM we proposed to require an upfront payment in all DBS auctions to help ensure that only serious, qualified bidders participate. We sought comment on how the size of an upfront payment should be determined and asked whether it would be appropriate to establish an upfront payment of roughly five percent of the spectrum's estimated value. In addition, we asked how the value of spectrum should be estimated. With respect to the collection of upfront payments, we proposed that prospective bidders deposit their payments in the Commission's lock-box bank by a date certain that would allow the Commission sufficient time to verify the availability of the funds before the start of the auction. Kennedy-Wilson agrees that there should be a substantial upfront payment for all auctions and recommends that we set the amount of this payment at \$15 million per license. According to Kennedy-Wilson, this amount is large enough to ensure that only serious, qualified bidders participate, but not so onerous as to discourage participation. Kennedy-Wilson does not recommend establishing an upfront payment as a percentage of the estimated value of the spectrum being auctioned, stating that this method of calculation could inadvertently set an upper limit on bidding.^{362/} Similarly, MCI agrees that we must require an upfront payment in order to ensure that only serious, qualified bidders are allowed to participate in our auctions, but states that we should not base the amount on the estimated value of the spectrum. According to MCI, this method of calculation would not be productive because estimates of the value of the spectrum may vary widely. MCI recommends requiring a payment equal to 10 percent of a minimum opening bid. Using its own opening bid of \$175

^{362/} Kennedy-Wilson Comments at 4.

million as a basis for this calculation, MCI suggests that the upfront payment for the 28 channels at 110° should be \$17.5 million.^{363/} As noted above, Primestar believes that the upfront payment should be based on the value of the channels being auctioned, and suggests the amount of \$10 million for the channels available at 110°, stating that this is approximately 25 percent of the amount ACC would have received for these channels through its proposed transaction with Tempo and Primestar.^{364/} Kennedy-Wilson agrees with our proposed procedures for collecting upfront payments and recommends that we require payments to be deposited no more than five business days prior to the start of an auction.^{365/}

196. Our approach to upfront payments varies from auction to auction depending on a balancing of the goal of encouraging bidders to submit serious bids with the desire to simplify the bidding process and minimize implementation costs imposed on bidders.^{366/} In the Second Report and Order in our Competitive Bidding proceeding, we outlined a rationale for setting upfront payments at roughly five percent of the estimated value of a winning bid.^{367/} We note that, a year ago, Tempo would have paid ACC \$45 million for its channels at 110° and 148°. In view of the proposed \$175 million bid for the channels at 110° and in the absence of any specific expression of interest in bidding on the 148° channels, it seems clear that the channels at 110° are more valuable than those at 148°. Moreover, we strongly believe that the value of the channels has increased over the past year. These considerations lead us to set an upfront payment of \$10 million for the channels at 110° and \$2 million for the channels at 148°. The \$10 million figure is well above five percent of \$45 million (it is actually 22.2 percent). This reflects a balancing of the assumed increase in value of the spectrum with the fact that the channels at 110° and 148° were included in the Tempo-ACC arrangement.

197. The magnitude of the upfront payment also reflects our concern that, if we set the upfront payment too low, there is a risk of encouraging insincere bidding. Moreover, a \$10 million payment should not be an excessive burden for bidders because it will not be held for a significant amount of time. Additionally, \$10 million is the lowest of the three specific upfront payment suggestions in the comments.^{368/} With respect to procedures for collecting upfront payments, we specify that we will accept only wire transfers in the case of the auction of the channels available at 110° and 148°.

^{363/} MCI Comments at 26-27.

^{364/} Primestar Comments at 37.

^{365/} Kennedy-Wilson Comments at 4.

^{366/} Second R&O, 9 FCC Rcd at 2378.

^{367/} Id. at 2379.

^{368/} We also note that the spectrum appears to be worth at least \$175 million, and \$10 million is roughly five percent of this amount.

198. *Bid Withdrawal, Default and Disqualification.* We stated in the NPRM that, if we employed open outcry auctions for DBS, we believed it would 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, and any delay caused by the withdrawal of a bid in an open outcry auction would be minimal. In light of these circumstances, we proposed to rely on default payments to deter insincere bidding and provide an incentive for bidders wishing to withdraw their bids to do so before bidding ceases. Kennedy-Wilson supports our proposal with respect to assessing payments against defaulting winning bidders.^{369/} MCI and Kennedy-Wilson believe, however, that we should impose a penalty for withdrawing a bid in the course of an auction.^{370/} MCI emphasizes that the lack of any withdrawal penalty invites bidders to engage in predatory bidding *i.e.*, bidding up their rival bidders without having to account for the consequences of placing the winning bid.^{371/} Primestar states in its comments that our proposed bid withdrawal and default payments are adequate,^{372/} but in its reply comments concurs with MCI and Kennedy-Wilson regarding the importance of providing for substantial penalties for bid withdrawals made outside of the penalty-free period. Primestar supports MCI's proposal requiring that a bidder immediately be disqualified and subject to the standard bid withdrawal monetary payment upon withdrawing its bid outside of the penalty-free period.^{373/}

199. We will adopt a monetary payment for withdrawing a bid during the course of bidding. Comments advocating such a payment are primarily concerned with insincere bids. We conclude that such insincere bidding could reduce the efficiency of the auction and that the threat of disqualifying a bidder from further participation in the auction may not be a sufficient deterrent, especially if a bidder does not sincerely seek a construction permit but is seeking only to raise its rival's costs. Pursuant to these rules, any bidder who withdraws a high bid during an auction before the Commission declares bidding closed will be required to reimburse the Commission in the amount of the difference between its high bid and the amount of the winning bid the next time the construction permit is offered by the Commission, if this subsequent winning bid is lower than

^{369/} Kennedy-Wilson Comments at 4-5.

^{370/} MCI Comments at 27; Kennedy-Wilson Comments at 4-5.

^{371/} MCI Comments, Ausubel Paper at 5-7.

^{372/} Primestar Comments at 37-38.

^{373/} Primestar Reply Comments at 20.

the withdrawn bid.^{374/} No withdrawal payment will be assessed if the subsequent winning bid exceeds the withdrawn bid.

200. To prevent multiple withdrawals by the same party, the Commission will bar a bidder who withdraws a bid from continued participation in the auction of the withdrawn construction permit. Once a bidder has withdrawn, the bid withdrawal payment mechanism no longer provides a deterrent to subsequent withdrawals at bids below the initially withdrawn bid because such withdrawals would not increase the total withdrawal payment for which the bidder is liable. Moreover, a bidder who has withdrawn would have an incentive to reenter the auction and strategically bid up the price at which another bidder can acquire the construction permit in order to reduce its bid withdrawal payment. Finally, in the case of an auction for a single item, there is no offsetting efficiency gain to permitting reentry into an auction by a bidder who has withdrawn, because no new information becomes available during the course of the auction about prices of other items which may be substitutes for or complements of the withdrawn item.

201. In the event of a bid withdrawal, the Commission will reoffer the permit in the next round. The offer price will be the highest price at or above which bids were made in previous rounds by three or more bidders. The Commission may at its discretion reduce this price in subsequent rounds if it receives no bids at this price. Prior to restarting the auction, the Commission will also restore the eligibility of all bidders who have not withdrawn. If no eligibility were restored it is possible, given the activity rules, that no bidders would be eligible to bid when a permit is reoffered after a bid withdrawal. Restoring eligibility of all but those who withdrew will ensure the maximum number of sincere bidders for the permit when the auction is restarted. After a withdrawal the Commission will also issue each eligible bidder one activity rule waiver in addition to any remaining waivers to provide additional time for bid preparation and to avoid accidental disqualification.

202. A default payment will be assessed if a winning bidder fails to pay the full amount of its 20 percent down payment or the balance of its winning bid in a timely manner, or is disqualified after the close of an auction. The amount of this default payment will be equal to the difference between the defaulting auction winner's "winning" bid and the amount of the winning bid the next time the construction permit is offered for auction by the Commission, if the latter bid is lower. In addition, the defaulting auction winner will be required to submit a payment of three percent of the subsequent winning bid or three percent of its own "winning" bid, whichever is less.

^{374/} If a construction permit is reoffered by auction, the "winning bid" refers to the high bid in the auction in which the permit is reoffered. If a construction permit is reoffered in the same auction, the winning bid refers to the high bid amount, made subsequent to the withdrawal, in that auction. If the subsequent high bidder also withdraws its bid, that bidder will be required to pay an amount equal to the difference between its withdrawn bid and the amount of the subsequent winning bid the next time the permit is offered by the Commission. If a permit which is the subject of withdrawal or default is not re-auctioned, but is instead offered to the highest losing bidders in the initial auction, the "winning bid" refers to the bid of the highest bidder who accepts the offer. Losing bidders would not be required to accept the offer, i.e., they may decline without penalty.

203. If withdrawal, default or disqualification involves gross misconduct, misrepresentation or bad faith by an applicant, we retain the option to declare the applicant and its principals ineligible to bid in future auctions, or take any other action we deem necessary, including institution of proceedings to revoke any existing licenses held by the applicant.^{375/}

E. Regulatory Safeguards

204. *Transfer Disclosure Provisions.* In order to accumulate data to evaluate whether DBS authorizations are being issued for bids that fall short of market value -- a potential problem of concern to Congress^{376/} -- we proposed in the NPRM 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. Having received no comments in opposition, we adopt this requirement as proposed in the NPRM. Thus, the information submitted 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 will not be a burden on licensees, which will have to prepare the documents to be submitted to the Commission in any event,^{377/} and 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.

205. *Performance Requirements.* In implementing auction procedures, the Commission is required under Section 309(j) to include performance requirements "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."^{378/} We tentatively concluded in the NPRM that the performance requirements proposed as part of our DBS service rules would be sufficient to achieve these statutory goals, and that it would be unnecessary to adopt any further performance rules in connection with auction procedures. None of the commenters in this proceeding disagree with this assessment, and we conclude that only those performance requirements adopted as part of our DBS service rules are needed, particularly since DBS licenses will be conditioned on fulfillment of these requirements.

^{375/} See Second R&O, 9 FCC Rcd at 2383.

^{376/} See NPRM at ¶ 98 (citing H.R. Rep. No. 111, *supra*, at 257).

^{377/} See NPRM at ¶ 98; Second R&O, 9 FCC Rcd at 2385-86.

^{378/} 47 U.S.C. § 309(j)(4)(B).

206. *Rules Prohibiting Collusion.* The Commission's rules prohibiting collusive conduct in connection with competitive bidding are codified at 47 C.F.R. § 1.2105. In the NPRM we proposed to apply these rules to DBS auctions, modifying them slightly to allow for the fact that DBS service areas are not precisely defined and are to a large extent overlapping. Thus, instead of being designed to prohibit collusion only among bidders wishing to serve the same geographic areas, our proposed rules also prohibit collusion among bidders wishing to serve overlapping geographic areas. We received no comments critical of our proposal, and we therefore adopt the anti-collusion rules set forth in the NPRM with one modification, as explained below.

207. 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. If parties agree in principle on all material terms, those parties must be identified on the short-form application under Section 1.2105(c), even if the agreement has not been reduced to writing.^{379/} Only at such level of agreement can it be fairly stated that the parties have entered into a bidding consortium or other joint bidding arrangement. If the parties have not agreed in principle by the filing deadline, an applicant would not include the names of those parties on its application, and may not continue negotiations with those parties.^{380/} 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.

208. In addition, winning bidders are required 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. Such arrangements must have been entered into prior to the filing of short-form applications as provided herein. In the NPRM we proposed that after short-form applications are filed, and prior to the time the winning bidder has submitted 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 construction permits that may be used to serve the same or overlapping geographic areas, unless such bidders are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application. We adopt this prohibition, but extend it only until the winning bidder has submitted its 20 percent down payment, and not until the winning bidder has submitted the balance of its bid. It is consistent with our rules for other services to extend this prohibition only until submission of the down payment, and we think it is unnecessary to extend it to submission of

^{379/} Public Notice, Wireless Telecommunications Bureau Clarifies Spectrum Auction Anti-Collusion Rules, DA 95-2244, Oct. 26, 1995 ("Public Notice, Oct. 26, 1995"), at 2.

^{380/} Id.

the balance of the bid. Even when an applicant has withdrawn its application after the short-form filing deadline, the applicant may not enter into a bidding agreement with another applicant bidding on the same or overlapping geographic areas from which the first applicant withdrew.^{381/} In addition, once the short-form application has been filed, a party with an attributable interest in one bidder may not acquire a controlling interest in another bidder bidding for construction permits in any of the same or overlapping geographic areas.^{382/}

209. DBS applicants may (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 construction permits for channels that may be used to cover the same or overlapping geographic areas; and (2) make agreements to bid jointly for construction permits after the filing of short-form applications, provided that the parties to the agreement have not applied for construction permits that may be used to serve the same or overlapping geographic areas. In addition, the holder of a non-controlling attributable interest in an entity submitting a short-form application may acquire an ownership interest in, form a consortium with, or enter into a joint bidding arrangement with other applicants for construction permits that may be used to serve the same or overlapping geographic 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 construction permits that may be used to serve the same or overlapping geographic areas, and (2) the arrangements do not result in any change in control of an applicant. The attribution rules applicable to the auction of the spectrum available at 110° and 148° are set forth in Appendix C. If other DBS spectrum is auctioned in the future, the Commission may adopt different attribution rules for auction applicants.

210. In adopting these rules, we also remind potential bidders for DBS construction permits that 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.

^{381/} Implementation of Section 309(j) of the Communications Act -- Competitive Bidding Fourth Memorandum Opinion and Order, 9 FCC Rcd 6858, 6867 (1994).

^{382/} Public Notice, Oct. 26, 1995, at 2

F. Designated Entities

211. *The NPRM.* Because of the extremely high implementation costs associated with satellite-based services, we tentatively concluded in the NPRM that no special provisions should be made for designated entities -- *i.e.*, small businesses, rural telephone companies, and businesses owned by members of minority groups and women -- for the channels currently available at 110 and 148°. We noted that the expeditious implementation of DBS service at the two orbital locations in question might indirectly benefit designated entities by providing new opportunities for them to supply programming and equipment. We also sought comment on whether special provisions should be made for designated entities in future DBS auctions, and requested 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.

212. *Comments.* DBSC argues against auctioning the channels reclaimed from ACC on the grounds that an auction would deny DBS channels to a small business such as DBSC and make it more difficult for it to compete with larger entities having access to greater resources.^{383/} DBSC does not argue for designated entity preferences. As discussed above, ASN, which also does not frame its recommendations in terms of designated entities, urges us to set aside 10 percent of available DBS spectrum for "independents," programmers or distributors who have no market power through a nationwide cable system or other multichannel video distribution system. ASN cautions the Commission that it should not limit the DBS industry to a predetermined economic model -- that of a large, monolithic vertically integrated DBS operator, and suggests that its set-aside proposal will help cultivate independent sources of content, create programming mixes that may appeal to niche or underserved markets, offer individualized programming choices at the wholesale level, and encourage entrepreneurial partnerships and alliances to bring high-powered television and other signals to consumers.^{384/} ASN further argues that because an independent would occupy only 10 percent of the capacity of a DBS orbital location, the financial criteria that it must meet would be proportionally reduced, thereby allaying the Commission's concern that acquisition of DBS licenses by undercapitalized firms could delay DBS service to the public.^{385/} At the same time, ASN states in its reply comments that its proposed set-aside would give independent programmers and distributors secure rights to channel capacity they need to attract financing.^{386/}

213. CTA urges us to adopt designated entity provisions, citing itself as proof that designated entities are in a position to develop competitive DBS systems. CTA specifically urges us to create a set-aside of one 14-channel block at 110° and one 12-channel block at 148° for

^{383/} DBSC Comments at 11.

^{384/} ASN Comments at 11-12.

^{385/} Id. at 10.

^{386/} ASN Reply Comments at 14-15.

designated entities, to give bidding credits to designated entities, and to permit installment payments for designated entities. CTA further argues that DBS is a content-based, broadcast-type service, and that the Commission cannot ignore its Congressional mandate to offer opportunities to minorities to enter broadcasting. According to CTA, the history of discrimination against women and minorities in broadcasting make it likely that designated entity preferences would be upheld under the strict scrutiny standard of judicial review now applicable to federal race-based preference programs. CTA states that we should at a minimum adopt a small business/entrepreneur preference.^{387/} Communications Scientific International states that small and minority-owned businesses are contributing to the DBS industry, not necessarily as entities with the ability to launch service, but "in many other 'essential' primary and secondary service provider functions."^{388/} It suggests that we provide auction incentives to companies that elect to team up with small or minority-owned businesses to launch DBS service.^{389/}

214. *Discussion.* Our assertion that the implementation costs associated with satellite-based services are extremely high was not challenged by the commenters. These high costs formed the basis for our tentative conclusion that no designated entity provisions should be made for auctioning channels at 110° and 148°.^{390/} CTA's argument in favor of creating provisions for designated entities flows from its statement that "the Commission needs to balance its goals of providing rapid service to the public with other public interest goals, including the participation of Designated Entities in the electronic mass media fields."^{391/} CTA does not distinguish between the expedited auction of the channels at 110° and 148° and future DBS auctions. We believe that the public interest goals of an immediate auction of the channels at 110° and 148° versus future auctions differ and may not require the same approach to designated entity participation.

215. As we have stated, competition in the delivery of DBS service requires auction rules that will allow expedient assignment of the channels at 110° and 148°. Given the fact that these channels offer enough capacity to provide full DBS service in competition with current video providers, auction rules that put these two construction permits in the hands of entities that can quickly provide competition are in the public interest. Moreover, we are not convinced that a 10 percent set-aside for independents would support a viable DBS service, at least at the current stage of development of the DBS industry.

^{387/} CTA Comments at 10-13.

^{388/} Undocketed letter from Russell T. Thomas, President & CEO, Communications Scientific International, to William Caton, Secretary, FCC (November 30, 1995). In the interest of a complete record, this letter, sent within the time period for filing reply comments, will be considered an informal reply comment.

^{389/} Id.

^{390/} See footnote 323, *supra*.

^{391/} CTA Comments at 9-10.

216. Commenters that identify themselves as a small or minority-owned business do not express an interest in obtaining all the channels available at either 110° or 148°. Instead, they argue for their interest in providing service with no more than half of the channels available at an orbital location. No commenters assert that small businesses could attract the capital necessary to provide service on all the channels available at either 110° or 148°. ^{392/}

217. Accordingly, we will not adopt special provisions for designated entities in the DBS auction for the channels at 110° and 148°, and we will not set aside spectrum in this auction for "independents" as suggested by ASN. Communications Scientific International's statement that small and minority businesses are developing services for the DBS industry confirms our belief that a wide variety of businesses will be involved in the DBS industry. We do not have a record before us, however, sufficient to support adoption of its suggestion that we provide incentives to encourage companies to team up with small and minority-owned businesses. However, designated entity provisions for future DBS auctions may be appropriate, particularly if we auction spectrum in small blocks.

V. CONCLUSION AND ORDERING CLAUSES

218. For the foregoing reasons, we adopt the rules attached hereto as Appendices B and C. We believe that these rules will allow the DBS service to proceed from its current nascent stage to the next level at which it will provide true rivalry in the MVPD market and will achieve this aim on an expedited basis.

219. The analysis required pursuant to Section 608 of the Regulatory Flexibility Act, 5 U.S.C. § 608, is contained in Appendix D. This order contains new or modified information collections subject to the Paperwork Reduction Act of 1995 ("PRA"), Pub. L. No. 104-13, which were proposed in the NPRM and submitted to the Office of Management and Budget ("OMB") for approval. We received no comments on the proposed information collections, and adopt them as originally proposed. The effective date of the new and modified rules adopted herein falls after the deadline for OMB action under the PRA.

220. Accordingly, IT IS ORDERED that Part 100 of the Commission's Rules IS AMENDED as specified in Appendix B.

221. IT IS FURTHER ORDERED that the rules set forth in Appendix C will be implemented in connection with the auction of the construction permits for the use of 28 DBS channels at the 110° orbital location and 24 channels at the 148° orbital location.

222. IT IS FURTHER ORDERED that the amendments to Part 100 adopted herein and the one-time auction rules set forth in Appendix C WILL BECOME EFFECTIVE thirty (30) days after publication in the Federal Register. This action is taken pursuant to Sections 1, 4(i), 4(j), 7,

^{392/} See ¶¶ 212-13, *supra*.

and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 157, and 309(j).

223. IT IS FURTHER ORDERED that, pursuant to 47 U.S.C. § 155(c), the Chief, Wireless Telecommunications Bureau, IS GRANTED DELEGATED AUTHORITY to implement and modify auction procedures in the DBS service, including the general design and timing of an auction, the number of authorizations to be offered in an auction, the manner of submitting bids, minimum opening bids and bid increments, activity and stopping rules, and application and payment requirements, and to announce such procedures by Public Notice.

224. IT IS FURTHER ORDERED that condition (a) placed on the construction permit of Tempo Satellite, Inc. in Tempo Satellite, Inc., 7 FCC Rcd 2728, 2732 (1992), which imposed certain marketing restrictions, IS RESCINDED.

225. IT IS FURTHER ORDERED that the proceeding in IB Docket No. 95-168 is hereby TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

List of Parties Filing Comments

Advanced Communications Corporation ("ACC")
American Satellite Network, Inc. ("ASN")
Ameritech Corporation
BellSouth Corporation
Cable Telecommunications Association ("CATA")
Continental Cablevision, Inc.
Continental Satellite Corporation
Cox Enterprises, Inc. ("Cox")
CTA Incorporated
Direct Broadcasting Satellite Corporation ("DBSC")
DIRECTV, Inc.
EchoStar Satellite Corporation/Directsat Corporation ("EchoStar/Directsat")
GE American Communications, Inc. ("GE Americom")
State of Hawaii
Kennedy-Wilson International
Lockheed Martin Corporation
MCI Telecommunications Corporation
National Cable Television Association, Inc. ("NCTA")
National Rural Telecommunications Cooperative ("NRTC")
NYNEX Corporation
PanAmSat Corporation
Primestar Partners L.P.
Tempo DBS, Inc.
Time Warner Entertainment Company, L.P.
United States Department of Justice ("DOJ")
United States Satellite Broadcasting Company, Inc. ("USSB")
Viacom Inc.

List of Parties Filing Reply Comments

A&E Television Networks
State of Alaska
American Satellite Network, Inc.
Bell Atlantic
BellSouth Corporation
Communications Scientific International
Continental Cablevision, Inc.
Direct Broadcast Satellite Corporation
DIRECTV, Inc.

EchoStar Satellite Corporation/Directsat Corporation
GE American Communications, Inc.
General Instrument Corporation ("GIC")
Home Box Office ("HBO")
Lifetime Entertainment Services
MCI Telecommunications Corporation
National Cable Television Association, Inc.
National Rural Telecommunications Cooperative
NYNEX Corporation
Primestar Partners, L.P.
Tempo DBS, Inc.
Time Warner Entertainment Company, L.P.
United States Department of Justice
United States Satellite Broadcasting Company, Inc.
Viacom Inc.

APPENDIX B

Final Rules and Regulations to be Added to 47 C.F.R. Part 100 of the Commission's Rules

Part 100 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 100 - DIRECT BROADCAST SATELLITE SERVICE

1. The authority citation for Part 100 is revised to read as follows:

Authority: Sections 4, 303, 309, and 554, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§154, 303, 309, and 554, unless otherwise noted.

2. Section 100.17 is amended to read as follows:

§ 100.17 License term.

Licenses for non-broadcast facilities governed by this Part will be issued for a period of ten (10) years. Licenses for broadcast facilities governed by this Part will be issued for a period of five (5) years.

3. Section 100.19 is amended to read as follows:

§ 100.19 Due diligence requirements.

(a) All persons granted DBS authorizations shall proceed with diligence in constructing DBS systems. Permittees shall be required to complete contracting for construction of the satellite station(s) within one year of the grant of the construction permit. The satellite stations shall also be required to be in operation within six years of the construction permit grant.

(b) In addition to the requirements stated in paragraph (a) of this section, all persons who receive new or additional DBS construction permits after [effective date] shall complete construction of the first satellite in their respective DBS systems within four years of the grant of the construction permit. All satellite stations in such a DBS system shall be in operation within six years of the grant of the construction permit.

(c) DBS permittees and licensees shall be required to proceed consistent with all applicable due diligence obligations, unless otherwise determined by the Commission upon proper showing in any particular case. Transfer of control of the construction permit shall not be considered to justify extension of these deadlines.

4. A new Section 100.53 is added to Subpart D to read as follows:

§ 100.53 Geographic service requirements.

- (a) Those holding DBS permits or licenses as of [effective date] must either:
- (1) provide DBS service to Alaska and Hawaii from one or more orbital locations before the expiration of their current authorizations; or
 - (2) relinquish their western DBS orbital/channel assignments at the following orbital locations: 148° W.L., 157° W.L., 166° W.L., and 175° W.L.
- (b) Those acquiring DBS authorizations after [effective date] must provide DBS service to Alaska and Hawaii where such service is technically feasible from the acquired orbital location.

5. A new subpart E consisting of §§ 100.71 through 100.80 is added to Part 100 to read as follows:

Subpart E -- Competitive Bidding Procedures for DBS

Sec.

- 100.71 DBS subject to competitive bidding.
- 100.72 Competitive bidding design for DBS construction permits.
- 100.73 Competitive bidding mechanisms.
- 100.74 Withdrawal, default and disqualification payments.
- 100.75 Bidding application (FCC Form 175 and 175-S Short-form).
- 100.76 Submission of upfront payments and down payments.
- 100.77 Long-form applications.
- 100.78 Grant of construction permit, denial, default, and disqualification.
- 100.79 Prohibition of collusion.
- 100.80 Transfer disclosure.

§ 100.71 DBS subject to competitive bidding.

Mutually exclusive initial applications to provide DBS service are subject to competitive bidding procedures. The general competitive bidding procedures found in Part 1, Subpart Q, will apply unless otherwise provided in this part.

§ 100.72 Competitive bidding design for DBS construction permits.

- (a) The Commission will employ the following competitive bidding designs when choosing from among mutually exclusive initial applications to provide DBS service:
- (1) Single round sealed bid auctions (either sequential or simultaneous);
 - (2) Sequential oral auctions;
 - (3) Combined sealed bid-oral auctions;

- (4) Sequential multiple round electronic auctions; or
- (5) Simultaneous multiple round auctions.

(b) The Wireless Telecommunications Bureau may design and test alternative procedures. The Wireless Telecommunications Bureau will announce by Public Notice before each auction the competitive bidding design to be employed in a particular auction.

(c) The Wireless Telecommunications Bureau may use combinatorial bidding, which would allow bidders to submit all or nothing bids on combinations of construction permits, in addition to bids on individual construction permits. The Commission may require that to be declared the high bid, a combinatorial bid must exceed the sum of the individual bids by a specified amount. Combinatorial bidding may be used with any type of auction design.

(d) The Wireless Telecommunications Bureau may use single combined auctions, which combine bidding for two or more substitutable construction permits and award construction permits to the highest bidders until the available construction permits are exhausted. This technique may be used in conjunction with any type of auction.

§ 100.73 Competitive bidding mechanisms.

(a) Sequencing. In sequential auctions, the Wireless Telecommunications Bureau will generally auction DBS construction permits in order of their estimated value, with the highest value construction permit being auctioned first. The Wireless Telecommunications Bureau may vary the sequence in which DBS construction permits will be auctioned.

(b) Grouping. All DBS channels available for a particular orbital location will be auctioned as a block, unless the Wireless Telecommunications Bureau announces, by Public Notice prior to the auction, an alternative auction scheme. In the event the Wireless Telecommunications Bureau uses either a simultaneous multiple round competitive bidding design or combinatorial bidding, the Wireless Telecommunications Bureau will determine which construction permits will be auctioned simultaneously or in combination.

(c) Bid Increments and Tie Bids. The Wireless Telecommunications Bureau may, by announcement before or during an auction, establish, raise or lower minimum bid increments in dollar or percentage terms. The Wireless Telecommunications Bureau may establish and change maximum bid increments during an auction. The Wireless Telecommunications Bureau may also establish by Public Notice a suggested opening bid or a minimum opening bid on each construction permit. Where a tie bid occurs, the high bidder will be determined by the order in which the bids were received by the Commission.

(d) Stopping Rules. The Wireless Telecommunications Bureau may establish stopping rules before or during multiple round auctions in order to terminate an auction within a reasonable time.

(e) Activity Rules. The Wireless Telecommunications Bureau may establish activity rules which require a minimum amount of bidding activity. In the event that the Wireless Telecommunications Bureau establishes an activity rule in connection with a simultaneous multiple round auction or sequential multiple round electronic auction, each bidder will be automatically granted a certain number of waivers of such rule during the auction.

§ 100.74 Withdrawal, default and disqualification payments.

(a) When the Commission conducts a sequential multiple round electronic auction or simultaneous multiple round auction pursuant to § 100.72, the Wireless Telecommunications Bureau will impose payments on a bidder who withdraws a high bid during the course of the auction, who defaults on payments due, or who is disqualified.

(b) A bidder who withdraws a high bid during the course of such an auction will be assessed a payment equal to the difference between the amount bid and the amount of the winning bid the next time the construction permit is offered for auction by the Commission. No withdrawal payment will be assessed if the subsequent winning bid exceeds the withdrawn bid. This payment amount will be deducted from any upfront payments or down payments that the withdrawing bidder has deposited with the Commission.

(c) If a high bidder defaults or is disqualified after the close of such an auction, the defaulting bidder will be subject to the payment in paragraph (b) of this section plus an additional payment equal to three (3) percent of the subsequent winning bid. If the subsequent winning bid exceeds the defaulting bidder's bid amount, the 3 percent payment will be calculated based on the defaulting bidder's bid amount. These amounts will be deducted from any upfront payments or down payments that the defaulting or disqualified bidder has deposited with the Commission.

(d) When the Commission conducts a sequential multiple round electronic auction, the Wireless Telecommunications Bureau will bar a bidder who withdraws a bid from continued participation in the auction of the withdrawn construction permit. When the Commission conducts any other type of auction, the Wireless Telecommunications Bureau may bar a bidder who withdraws a bid from continued participation in the bidding for the same construction permit or other construction permits offered in the same auction.

(e) When the Commission conducts any type of auction other than those provided for in paragraphs (a), (b), (c), and (d) of this section, the Wireless Telecommunications Bureau may modify the payments to be paid in the event of bid withdrawal, default or disqualification; provided, however, that such payments shall not exceed the payments specified above.

§ 100.75 Bidding application (FCC Form 175 and 175-S Short-form).

All applicants to participate in competitive bidding for DBS construction permits must submit applications on FCC Form 175 pursuant to the provisions of § 1.2105 of this chapter. The Wireless Telecommunications Bureau will issue a Public Notice announcing the availability of DBS construction permits and the date of the auction for those construction permits. This Public Notice also will specify the date on or before which applicants intending to participate in a DBS auction must file their applications in order to be eligible for that auction, and it will contain information necessary for completion of the application as well as other important information such as any upfront payment that must be submitted, and the location where the application must be filed.

§ 100.76 Submission of upfront payments and down payments.

(a) Bidders in DBS auctions will be required to submit an upfront payment in accordance with § 1.2106 of this chapter, the amount of which will be announced by Public Notice prior to each auction.

(b) Winning bidders in a DBS auction must submit a down payment to the Commission in an amount sufficient to bring their total deposits up to 20 percent of their winning bids within ten (10) business days of the announcement of winning bidders.

§ 100.77 Long-form applications.

Each winning bidder will be required to submit the information described in §§ 100.13, 100.21, and 100.51 within thirty (30) days after being notified by Public Notice that it is the winning bidder. Each winner also will be required to file, by the same deadline, a signed statement describing its efforts to date and future plans to come into compliance with any applicable spectrum limitations, if it is not already in compliance. Such information shall be submitted pursuant to the procedures set forth in § 100.13 and any associated Public Notices. Only auction winners will be eligible to file applications for DBS construction permits in the event of mutual exclusivity between applicants filing a short-form application.

§ 100.78 Permit grant, denial, default, and disqualification.

(a) Each winning bidder will be required to pay the balance of its winning bid in a lump sum payment within five (5) business days following Public Notice that the construction permit is ready for grant.

(b) A bidder who withdraws its bid during the course of an auction, defaults on a payment due, or is disqualified, will be subject to the payments specified in § 100.74.

§ 100.79 Prohibition of collusion.

(a) 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.

(b)(1) Except as provided in paragraphs (b)(2), (b)(3) and (b)(4) of this section, after the filing of short-form applications, all applicants are prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies, or discussing or negotiating settlement agreements, with other applicants until after the high bidder submits its down payment, unless such applicants are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application.

(2) Applicants may 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 construction permits that may be used to serve the same or overlapping geographic areas. Such changes will not be considered major modifications of the application.

(3) After the filing of short-form applications, applicants may make agreements to bid jointly for construction permits, provided that the parties to the agreement have not applied for construction permits that may be used to serve the same or overlapping geographic areas.

(4) After the filing of short-form applications, a holder of a non-controlling attributable interest in an entity submitting a short-form application may acquire an ownership interest in, form a consortium with, or enter into a joint bidding arrangement with, other applicants for construction permits that may be used to serve the same or overlapping geographic areas, provided that:

(i) 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 construction permits that may be used to serve the same or overlapping geographic areas; and

(ii) The arrangements do not result in any change in control of an applicant.

(5) Applicants must modify their short-form applications to reflect any changes in ownership or in the membership of consortia or joint bidding arrangements.

(c) Winning bidders are required 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. Such arrangements must have been entered into prior to the filing of short-form applications pursuant to paragraphs (a) and (b) of this section.

§ 100.80 Transfer disclosure.

Any entity that acquires a DBS license through competitive bidding, and seeks to transfer that license within six years of the initial license grant, must 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 submitted must include not only a monetary purchase price, but also any future, contingent, in-kind, or other consideration.

APPENDIX C

One-Time Auction Spectrum Limitations

For purposes of the auction of construction permits for use of 28 DBS channels at the 110° orbital location and 24 DBS channels at the 148° orbital location, the following provisions shall apply.

Definitions.

(a) "*Direct Broadcast Satellite Service*" or "*DBS*." A radiocommunication service in which signals transmitted or retransmitted by space stations are intended for direct reception by the general public. In the Direct Broadcast Satellite Service, the term "*direct reception*" shall encompass both individual reception and community reception.

(b) "*Person*." Any individual or entity, including but not limited to a corporation, partnership, association, or joint venture.

(c) "*Full-CONUS orbital location*." The orbital locations at 101° W.L., 110° W.L., and 119° W.L., which have been assigned for use in the Direct Broadcast Satellite Service.

Spectrum Limitation Rule.

No person with an attributable interest in channels at a full-CONUS location shall acquire an attributable interest in the channels currently available at the 110° orbital location without divesting its existing interest in full-CONUS channels at another location within twelve months of such acquisition.

Attribution Rules.

(a) In applying the above-stated rule, ownership and other interests in DBS licensees and permittees will be attributed to their holders and deemed cognizable pursuant to the following criteria:

(1) Except as otherwise provided herein, partnership and direct ownership interests and any voting stock interest amounting to 5% or more of the outstanding voting stock of a corporate DBS licensee or permittee will be cognizable.

(2) Investment companies, as defined in 15 U.S.C. § 80a-3, insurance companies and banks holding stock through their trust departments in trust accounts will be considered to have a cognizable interest only if they hold 10% or more of the outstanding voting stock of a corporate DBS licensee or permittee, or if any of the officers or directors of the DBS licensee or permittee are representatives of the investment company, insurance company, or bank concerned. Holdings by a bank or insurance company will be aggregated if the bank or insurance company has any

right to determine how the stock will be voted. Holdings by investment companies will be aggregated if under common management.

(3) Attribution of ownership interests in a DBS licensee or permittee that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that wherever the ownership percentage for any link in the chain exceeds 50%, it shall not be included for purposes of this multiplication. [For example, if A owns 10% of company X, which owns 60% of company Y, which owns 25% of "Licensee," then X's interest in "Licensee" would be 25% (the same as Y's interest since X's interest in Y exceeds 50%), and A's interest in "Licensee" would be 2.5% (0.10 x 0.25). Under the 5% attribution benchmark, X's interest in "Licensee" would be cognizable, while A's interest would not be cognizable.]

(4) Voting stock interests held in trust shall be attributed to any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will. If the trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the grantor or beneficiary, as appropriate, will be attributed with the stock interests held in trust. An otherwise qualified trust will be ineffective to insulate the grantor or beneficiary from attribution with the trust's assets unless all voting stock interests held by the grantor or beneficiary in the relevant DBS licensee or permittee are subject to said trust.

(5) Holders of non-voting stock shall not be attributed an interest in the issuing entity. Holders of debt and instruments such as warrants, convertible debentures, options or other non-voting interests with rights of conversion to voting interests shall not be attributed unless and until conversion is effected.

(6)(A) A limited partnership interest shall be attributed to a limited partner unless that partner is not materially involved, directly or indirectly, in the management or operation of the media-related activities of the partnership and the licensee or system so certifies.

(B) In order for a licensee or system to make the certification set forth in paragraph (6)(A) of this section, it must verify that the partnership agreement or certificate of limited partnership, with respect to the particular limited partner exempt from attribution, establishes that the exempt limited partner has no material involvement, directly or indirectly, in the management or operation of the media activities of the partnership. The criteria which would assume adequate insulation for purposes of this certification are described in the Memorandum Opinion and Order in MM Docket No. 83-46, FCC 85-252 (released June 24, 1985), as modified on reconsideration in the Memorandum Opinion and Order in MM Docket No. 83-46, FCC 86-410 (released November 28, 1986). Irrespective of the terms of the certificate of limited partnership or partnership agreement, however, no such certification shall be made if the individual or entity making the certification has actual knowledge of any material involvement of the limited partners in the management or operation of the media-related businesses of the partnership.

(7) Officers and directors of a direct broadcast satellite licensee or permittee are considered to have a cognizable interest in the entity with which they are so associated. If any such entity engages in businesses in addition to its primary business of direct broadcast satellite service, it may request the Commission to waive attribution for any officer or director whose

duties and responsibilities are wholly unrelated to its primary business. The officers and directors of a parent company of a direct broadcast satellite licensee or permittee, with an attributable interest in any such subsidiary entity, shall be deemed to have a cognizable interest in the subsidiary unless the duties and responsibilities of the officer or director involved are wholly unrelated to the direct broadcast satellite subsidiary, and a statement properly documenting this fact is submitted to the Commission. The officers and directors of a sister corporation of a direct broadcast satellite licensee or permittee shall not be attributed with ownership of the entity by virtue of such status.

(8) Discrete ownership interests will be aggregated in determining whether or not an interest is cognizable under this section. An individual or entity will be deemed to have a cognizable investment if:

(A) The sum of the interests held by or through "passive investors" is equal to or exceeds 10 percent; or

(B) The sum of the interests other than those held by or through "passive investors" is equal to or exceeds 5 percent; or

(C) The sum of the interests computed under paragraph (8)(A) of this section plus the sum of the interests computed under paragraph (8)(B) of this section is equal to or exceeds 10 percent.

(b) The word "control" as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

(c) In cases where record and beneficial ownership of voting stock is not identical (e.g., bank nominees holding stock as record owners for the benefit of mutual funds, brokerage houses holding stock in street names for the benefit of customers, investment advisors holding stock in their own names for the benefit of clients, and insurance companies holding stock), the party having the right to determine how the stock will be voted will be considered to own it for purposes of these rules.

APPENDIX D

Final Regulatory Flexibility Analysis

Pursuant to Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 603, an initial Regulatory Flexibility Analysis was incorporated in the Notice of Proposed Rulemaking in IB Docket No. 95-168/PP Docket No. 93-253. Written comments on the proposals in the Notice, including the Regulatory Flexibility Analysis, were requested.

A. Need and Purpose of Rules

This rulemaking proceeding modifies the licensing and service rules for the Direct Broadcast Satellite ("DBS") service. It also adopts 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. Our objectives have been to promote efficiency and innovation in the licensing and use of the electromagnetic spectrum, to develop competitive and innovative communications systems, and to promote effective and adaptive regulations.

B. Issues Raised by the Public in Response to the Initial Analysis

No comments were received specifically in response to the Initial Regulatory Flexibility Analysis. We have, however, taken into account all issues raised by the public in response to the proposed rules. In certain instances, we have eliminated or modified rules in response to those comments.

C. Significant Alternatives Considered

We have attempted to balance all the commenters' concerns with our public interest mandate under the Communications Act in order to update the existing "interim" rules in the DBS service. We will continue to examine these rules in an effort to eliminate unnecessary regulations and to minimize significant economic impact on small businesses.