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

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

NOTICE OF PROPOSED RULEMAKING

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

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Appendix A: Proposed Short Form Application: FCC Form 175

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I. INTRODUCTION

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

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

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

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

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

^{3/} See ¶ 18, *infra*.

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

II. BACKGROUND

5. In 1982, we granted the first authorizations for DBS service -- satellite systems that would deliver video programming "direct to home" via backyard receiving dishes.^{4/} Pursuant to the Region 2 Plan adopted at the 1983 Regional Administrative Radio Conference ("RARC-83"), the United States has been allocated eight orbital positions from which to transmit satellite signals for DBS service. Thirty-two channels are available for use at each orbital location. With digital compression, each such "channel" can currently provide for the simultaneous carriage of five to seven video programming services, and technological advances can be expected to allow capacity for up to 20 programs per channel by the year 2000.^{5/}

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

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

^{4/} Direct Broadcast Satellite Service, 90 F.C.C.2d 676 (1982). DBS is a radiocommunication service in which signals from earth are retransmitted by high power, geostationary satellites for direct reception by small, relatively inexpensive earth terminals.

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

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

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

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

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

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

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

^{8/} Continental, 4 FCC Rcd at 6293.

^{9/} We reserved eight paired channels (the total number requested) for USSB and eleven paired channels each for ACC, Continental, EchoStar, Directsat, DBSC, Tempo Satellite, and Hughes/DIRECTV. Id. at 6300-01 and 6304 n.43. These channel reservations were 5 paired channels fewer than had been requested by ACC, EchoStar, Directsat, Tempo Satellite, DBSC, and DIRECTV, respectively, and 5 paired and 8 full-CONUS channels fewer than had been requested by Continental. Id. at 6295-97.

^{10/} Continental, 4 FCC Rcd at 6299.

^{11/} Id.

^{12/} Advanced Order at ¶¶ 25-48.

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

III. METHODOLOGY FOR REASSIGNING DBS RESOURCES

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

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

11. The history of the DBS service, especially in the six years since Continental was decided, has led us to the tentative conclusion that the method for reassigning reclaimed channels that we set forth in that order no longer serves the public interest, and that a new methodology should be adopted. We are currently of the view that the Continental reassignment scheme should be abandoned, and that reclaimed DBS channels (and associated orbital locations) should be subject to a new window for applications for DBS authorizations. This window would be open to new entrants and current permittees alike, and we propose to decide mutually exclusive applications by auction.

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

^{14/} Continental, 4 FCC Rcd at 6293.

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

^{16/} See Directsat Corp., 10 FCC Rcd 88 (1995).

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

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

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

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

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

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

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

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

^{22/} See Advanced Order at ¶ 67.

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

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

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

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

IV. NATURE OF DBS SERVICE

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

^{23/} See 47 U.S.C. § 309(j)(3)(C).

^{24/} See ¶ 27, *infra*.

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

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

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

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

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

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

^{28/} ITU Radio Regulations, Appendix 30A (Orb-88).

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

^{30/} ITU Radio Regulations, Annex 1 to Appendix 30 (Orb 85); Appendix 30A, Annex 1 (Orb-88).

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

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

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

V. PROPOSED SERVICE RULES

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

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

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

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

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

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

A. Due Diligence Milestones

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

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

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

^{35/} Id. at 7797.

^{36/} See ¶¶ 28-32, *infra*.

^{37/} See ITU Radio Regulations, Chapter VII, Article 30, 2674.

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

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

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

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

^{39/} 47 C.F.R. § 100.19(a).

^{40/} Advanced Order at ¶¶ 28-37.

^{41/} Id. at ¶ 35.

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

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

B. Use of DBS Capacity

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

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

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

^{44/} See 47 C.F.R. § 100.3.

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

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

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

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

^{49/} Id.

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

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

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

^{50/} Id.

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

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

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

C. Pro-Competitive Rules and Policies

1. *Spectrum Aggregation Limitations*

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

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

^{54/} 47 U.S.C. § 335(b).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

^{66/} See 1994 Cable Competition Report, 9 FCC Rcd at 7449-50.

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

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

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

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

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

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

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

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

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

^{71/} Continental, 4 FCC Rcd at 6298.

^{72/} Id. at 6299.

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

^{74/} See ¶ 44, *infra*.

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

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

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

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

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

services.^{76/} We seek comment on this proposal, including whether the amount of time allowed for divestiture of excess channels is sufficient.

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

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

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

^{76/} See 47 C.F.R. §§ 20.6(e), 24.204(f), and 24.833.

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

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

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

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

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

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

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

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

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

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

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

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

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

^{83/} See 47 C.F.R. § 24.720(l).

^{84/} See 47 U.S.C. § 303(g).

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

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

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

2. *Conduct Rules to Protect Competition*

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

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

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

^{87/} See footnote 73, *supra*.

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

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

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

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

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

^{90/} 47 U.S.C. § 548.

^{91/} 47 U.S.C. § 536.

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

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

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

^{92/} 47 C.F.R. §§ 76.1300-.1302.

^{93/} 1992 Cable Act § 2(a)(5), P.L. 102-385, § 2(a)(5), 106 Stat. 1460 (Oct. 2, 1992).

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

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

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