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

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

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

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

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

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

3. East/West Paired Assignments

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

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

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

99/ Continental, 4 FCC Rcd at 6292.

100/ Id. at 6293.

101/ Id. at 6293-94.

102/ See ¶ 24, *supra*.

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

D. Service to Alaska and Hawaii

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

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

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

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

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

106/ Id.

107/ Id. at 2583.

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

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

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

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

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

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

111/ See footnote 18, *supra*.

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

113/ 47 C.F.R. § 25.114(c)(15).

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

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

E. License Term

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

VI. PROPOSED AUCTIONING OF DBS PERMITS

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

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

116/ See 47 C.F.R. § 100.17.

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

118/ 47 C.F.R. § 25.120(a).

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

120/ 47 U.S.C. § 307(c).

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

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

A. Authority to Conduct Auctions

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

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

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

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

124/ 47 U.S.C. § 309(j)(1).

125/ 47 U.S.C. § 309(j)(2)(A).

126/ 47 U.S.C. § 309(j)(2)(B).

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

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

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

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

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

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127/ 47 U.S.C. § 309(j)(3)(A)-(D).

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

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

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

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

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

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

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131/ 47 U.S.C. § 309(j)(6)(E).

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

133/ Id.

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

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

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

B. Competitive Bidding Design

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

136/ See ¶ 7, *supra*.

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

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

139/ Id. at 2360.

140/ See id. at 2361.

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

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

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

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

143/ Id. at 2367.

144/ See ¶ 65, *supra*.

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

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

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

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

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

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

C. Bidding Procedures

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

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

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146/ Id. at 2368.

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

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

D. Procedural and Payment Issues

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

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

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

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

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

150/ Id. at 2375-77.

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

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

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

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

151/ See ¶¶ 33-53, *supra.*

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

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

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

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

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

155/ Id. at 2382.

156/ See ¶ 43, *supra*.

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

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

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

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

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

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

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

E. Regulatory Safeguards

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

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

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

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

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

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

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

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

163/ See ¶ 27, *supra.*

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

165/ 47 U.S.C. § 309(j)(4)(B).

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

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

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

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

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[167] Id. at 2387.

[168] Id. at 2388.

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

F. Designated Entities

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

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

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

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

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

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

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

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

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

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

174/ 47 U.S.C. § 309(j)(3)(B).

175/ 47 U.S.C. § 309(j)(3)(A), (D).

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

177/ DARS NPRM at ¶ 88.

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

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

VII. CONCLUSION

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

VIII. PROCEDURAL MATTERS

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

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

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

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

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

IX. ORDERING CLAUSES

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

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

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton

William F. Caton
Acting Secretary

APPENDIX A

Proposed Short Form Application
FCC Form 175

Federal Communications Commission
Washington, D. C. 20554

Application to Participate in an FCC Auction

(Read Instructions on Back Before Completing)

Special Use				
FCC Use Only				

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

1. Applicant

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

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

3. City | 4. State | 5. ZIP Code

6. Auction Number | 7. FCC Account Number

9. Financial Eligibility (If applicable)

☐ Gross revenues do not exceed the maximum dollar amount specified in the FCC rules governing the auctionable service.

☐ Total Assets (if applicable) do not exceed maximum dollar amount specified in the FCC Rules governing the auctionable service.

10. Applicant Status:

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

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

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

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

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

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

(a)	(b)	(c)

Certification: I certify the following:

(1) that the applicant is legally, technically, financially and otherwise qualified pursuant to 308(b) of the Communications Act and the Commission's Rules and is in compliance with the foreign ownership provisions contained in Section 310 of the Communications Act.
(2) that the applicant is the real party in interest in this application and that there are no agreements or understandings other than those specified in this application (see Instructions for certification), which provide that someone other than the applicant shall have an interest in the license.
(3) that the applicant is aware that, if upon Commission inspection, this application is shown to be defective, the application may be dismissed without further consideration, and certain fees forfeited. Other penalties may also apply.
(4) that the applicant has not entered into and will not enter into any explicit or implicit agreements or understandings of any kind with parties not identified in this application regarding the amount to be bid, bidding strategies or the particular license on which the applicant or other parties will or will not bid.
(5) that the applicant, or any party to this application, is not subject to a denial of federal benefits pursuant to Section 5301 of the Anti-Drug Abuse Act of 1988.
(6) that, if financial eligibility block or applicant status is claimed in block 9 or 10, the applicant is eligible for any special provisions set forth in the Commission's Rules applicable to this auction and consents to audits, as set forth in the Commission's Rules, to verify such status.
(7) that the applicant is and will, during the pendency of its application(s), remain in compliance with any service specific qualifications applicable to the licenses on which the applicant intends to bid including, but not limited to, financial qualifications.

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

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

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