providers, impose DBS channel concentration rules, and extend to DBS the program access rules established for cable television by the Cable Act of 1992.[39]

Given that these "competitive" concerns have their origin in the Advanced proceeding, it is apparent that they are directed at PRIMESTAR and Tempo.[40] These concerns are wholly without merit. As its potential competitors have recognized, PRIMESTAR has both the incentive and the ability to compete vigorously both in the DBS arena and in the broader market for the delivery of multichannel video programming services.

The Commission's concerns as expressed in its NPRM are particularly unfounded given the composition of the DBS service.[41] There currently exist two full-power DBS providers, DirecTV and USSB, who have a combined subscriber base of over one million customers. A third DBS permittee, EchoStar, promises to launch its service imminently.[42]

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39 Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. §§ 521 et seq. (1992) ("1992 Cable Act").

40 Tempo is a wholly-owned subsidiary of Tele-Communications, Inc. ("TCI"). PRIMESTAR's partners include affiliates of six cable operators (Comcast Corporation, Continental Cablevision, Inc., Cox Communications, Inc., Newhouse Broadcasting Corporation, TCI and Time Warner Inc.), as well as GE American Communications, Inc.

41 PRIMESTAR agrees with the Commission's determination that the appropriate "product market" for analysis purposes is, at the very least, the "market for delivery of multichannel video programming," NPRM at ¶ 34.

42 Significantly, the Regional Bell Operating Companies ("RBOCs") have taken the first steps toward ensuring that they will be

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Several years before any DBS service had been launched, both Congress and the Commission dismissed the need for ownership or cross-ownership restrictions in the DBS service, determining that existing antitrust laws would provide adequate protection against the potential misuse of market power by cable-affiliated DBS operators. In fact, the Commission, in reserving an orbital slot and channels for a Tempo affiliate over objections to the fact that the Tempo affiliate is owned by TCI, extolled the potential benefits of a cable/DBS partnership, stating that "TEMPO's participation could well accelerate the initiation of DBS by bringing valuable marketplace experience, presence and possibly enhancing access to programming."[43] Moreover, the Commission recognized that such ownership restrictions would disserve the public interest by limiting qualified sources of capital and expertise.[44]

Given that both the Commission and Congress found no need to promote competition through regulation when no DBS

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able to participate in the DBS arena. *Who's Next in DBS Market?*, Satellite Business News, October 11, 1995 at 1 (RBOCs filed a request with the U.S. Justice Department in late September, 1995 that would allow the RBOCs to offer DBS service).

43 Continental, 4 FCC Rcd at 6299.

44 Id. Congress specifically considered, and rejected, DBS cross-ownership restrictions in connection with its adoption of the 1992 Cable Act. H.R. Rep. No. 862, 102d Cong., 2d Sess. 56 (1992), reprinted in 1992 U.S.C.C.A.N. 1231, 1264 (deleting portion of Senate bill requiring adoption of cross-ownership restrictions for DBS systems).

permittee had as yet commenced service, it is completely untenable to suggest that additional regulation is necessary when there are adequate protections in place through direct competition from other DBS providers. In fact, less than one year ago, in evaluating the transfer application of EchoStar/ Directsat, the Commission had cause to revisit its assessment of the DBS service. In granting that application, the Commission stated:

> The basic conditions which led the Commission to believe that multiple ownership restrictions for the DBS service were not necessary still exist, and will continue to exist if the instant transfer of control application is granted . . . proposed DBS operations, other video program delivery services, like cable television, "wireless" cable and over-the-air broadcast will provide sufficient competition to prevent monopolistic pricing or other abuses of market power. **45**

There soon will exist three DBS competitors, none of which is cable-affiliated. There is no need, therefore, for any cable-affiliated DBS operator who enters the arena to be forced to compete with its hands tied behind its back. Moreover, there is no rational basis for the Commission to suggest, as it does in its NPRM, that cable-affiliated operators like PRIMESTAR should be precluded from owning full-CONUS DBS spectrum.**46**

Underlying the Commission's proposals is the notion that PRIMESTAR will endeavor to bring DBS programming only to areas

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45 Directsat Corp., 10 FCC Rcd 88 at ¶ 5.

46 NPRM at ¶ 63.

unserved by cable, thus failing to compete fully as a DBS operator. As stated by Dr. Bruce Owen, economist from Stanford University, in declarations in both the Advanced proceeding and supporting Tempo's comments in this proceeding,[47] even if PRIMESTAR did have the inclination to avoid competition in its owners' cable service areas, effective competition from others now and in the future makes that inclination untenable. If PRIMESTAR failed, for example, to market or price its services competitively in "cabled" areas, it would simply cede its potential market share to another DBS provider, which would hardly prevent erosion of cable's market share to DBS.

To suggest that PRIMESTAR or any other cable-affiliated DBS operator would be willing to cede any of its business to a competitor is nonsensical. PRIMESTAR has every incentive to compete, and in fact is doing so in a manner that is wholly consistent with the Commission's goals. In spite of the competitive disadvantage it suffers by virtue of providing DTH service using medium-power, fixed satellites, which require a larger receiving dish and limit DTH service to fewer channels,[48] PRIMESTAR has kept pace with DirecTV and USSB.

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47 See Consolidated Opposition of Tempo DBS, Inc. In re: Application of Advanced Communications Corporation and Tempo DBS, Inc., File No. DBS-84-01/94-15ACP (filed November 23, 1994) ("Owen Report"); Comments of Tempo DBS, Inc. in IB Docket No. 95-168, PP Docket No. 93-253 (to be filed November 20, 1995) ("Owen Declaration").

48 PRIMESTAR uses 14 transponders and is able to provide 95 video and audio channels to its subscribers. DirecTV, in contrast,
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PRIMESTAR currently serves more than 800,000 subscribers located both inside and outside of cabled areas. PRIMESTAR's partners have committed in excess of $1 billion to implementation of its system in an effort to obtain two to three million subscribers by the year 2000.[49] As PRIMESTAR's potential DBS competitors well know, given the magnitude of their investment, PRIMESTAR's partners simply cannot afford to market PRIMESTAR's services less than aggressively in those areas in which cable systems affiliated with its partners operate.

Thus, given the current state of the competitive DTH/DBS service, there is no basis to support the so-called "pro-competitive" proposals contained in the Commission's NPRM. In this context, PRIMESTAR submits its comments on the specific rules now being advanced by the Commission.

2. If Adopted, Spectrum Aggregation Limitations Should Be Imposed without Regard to Affiliation with a Non-DBS MVPD

For the reasons stated above, PRIMESTAR objects to any proposal to apply stricter standards as concerns spectrum aggregation to DBS operators affiliated with a non-DBS MVPD.

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operates with 27 transponders and is able to offer a DBS service of approximately 175 channels. USSB operates with five DBS transponders and offers a service of 20 channels.

[49] The provision of DBS service is, in fact, a logical extension of the basic business of cable operators, which is the distribution of multichannel video programming. As the Commission aptly recognized in Continental, cable operators bring to the DBS arena a certain expertise regarding the logistical and technical issues associated with programming delivery, as well as a willingness to commit capital.

Although PRIMESTAR is not persuaded that any spectrum aggregation limits are warranted, to the extent the Commission finds it necessary to restrict the number of full-CONUS DBS channels one entity may control,[50] PRIMESTAR submits that a cap of no less than 32 channels applicable to all licensees or operators would be all that is necessary to promote any conceivable Commission concerns regarding DBS diversity and competition.[51] The Commission should impose no limitation on the number of full-CONUS orbital locations at which a DBS operator may hold channels.

The Commission has proposed that, where a DBS permittee somehow obtains an attributable interest in DBS spectrum in excess of whatever aggregation limitations the Commission adopts, the permittee would have a 90-day period in which to divest the excess capacity. PRIMESTAR submits that such a short period is completely unreasonable and inconsistent with other Commission precedent. PRIMESTAR recommends, therefore, that the Commission adopt the 18-month divestiture period typically imposed on broadcasters and other entities to

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50 For purposes of these rules, the Commission proposes that those channels at the 101°, 110°, 119° and 61.5° orbital locations be considered full-CONUS channels. PRIMESTAR submits that while the 61.5° orbital location may be capable of full-CONUS coverage, that technical capability is still unsettled and should be explored further by the Commission.

51 Should PRIMESTAR/Tempo acquire the 27 channels reclaimed from Advanced at 110° W.L. through appeal, or 28 channels at auction, PRIMESTAR has no intention of utilizing more than the full complement of DBS channels at one full-CONUS orbital position.

comply with the Commission's ownership rules. Similarly, PRIMESTAR submits that the attribution standards proposed for the DBS service are unreasonably harsh.[52] Based on the recent Sixth Circuit Decision,[53] it is doubtful, in light of the status of DBS today, that any sustainable justification could be developed to support the proposed stringent attribution standards. Finally, PRIMESTAR believes that the public interest would be served by extension of the requirement to provide service to Alaska and Hawaii, where technically feasible, to all DBS permittees, whether new or existing, thus facilitating the development of a truly nationwide DBS service.

3. The Marketing Limitations Proposed by the Commission Are Unnecessary and Counterproductive

a. Exclusive Distribution Arrangements

In its NPRM, the Commission expresses concern about exclusive marketing arrangements for the distribution of DBS services (i.e., granting an MVPD exclusive rights to distribute DBS services within, or adjacent to, its service area). The Commission suggests that banning such arrangements

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52 For example, there is no sound reason for attribution of non-voting DBS stock interests for purposes of DBS ownership restrictions. See 47 C.F.R. § 73.3555, note 2(a).

53 Cincinnati Bell Tel. Co. v. FCC, Nos. 94-3701/94-4113, 95-3023/95-3238/95-3315 (6th Cir. Nov. 9, 1995) (twenty percent cellular attribution standard adopted by Commission for purposes of PCS ownership bore no relationship to the ability of an entity with a minority interest in a cellular licensee to engage in anti-competitive behavior).

"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."[54] The NPRM does not limit the ban to agreements with MVPDs affiliated with the DBS operator, but the Commission seems to express particular concern where the exclusive arrangement is between such MVPD affiliated entities.

Like so many of the restrictions proposed in the NPRM, the rules suggested here are driven not by the experience of anti-competitive conduct or actual consumer harm, but by speculation about the potential for such harm to occur. The Commission offers no evidence that exclusive distribution arrangements, to the extent they may exist in DBS, have resulted in a diminution of competitive distribution opportunities.

Neither does the Commission articulate the type of competitive harm it fears in the event a DBS operator enters into an exclusive arrangement with an MVPD. The only possible inference is that an MVPD distributor might not be an aggressive marketer of DBS in its other MVPD service area. Such an inclination simply would not be possible, however, in today's competitive environment, where multiple non-MVPD affiliated DBS operators already are present or on the launch pad.[55] Each DBS operator's economic incentive, regardless of

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54 NPRM at ¶ 56.

55 Owen Report at 8-9.

its affiliations, is to maximize its service, and it can be relied upon to exercise its best judgment as to the most advantageous way to do so.

The Commission's apparent intent to proscribe "conduct that is tantamount to granting that operator such exclusive distribution rights"[56] is particularly alarming. A clearer call for harassing litigation from rejected distributors is difficult to imagine. A DBS operator's possible specifications as to the size of a potential distributor, the experience and qualifications of its personnel, the availability of facilities, its agreement to maintain specified levels of inventory, service response times, required levels of capitalization, and the myriad of other factors which may enter into a DBS operator's determination as to which distributors it will utilize may in any specific circumstance be challenged by a rejected distributor as "tantamount to" an exclusive arrangement. The Commission has little expertise in evaluating the reasonableness of criteria such as those identified above and should avoid putting itself in the position of adjudicating such matters, particularly where, as here, there is no need to do so.

For sound business reasons, exclusive distributorships are frequently employed by companies to deliver their services. Maintaining the option to adopt that structure may

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56 NPRM at ¶ 56.

be particularly important in the start-up mode in which DBS finds itself. Such arrangements may be necessary, for example, to induce distributors to make the necessary investments in inventory, personnel and marketing in order to sell the DBS service effectively.[57] The DBS service is in a period of growth and experimentation and requires maximum flexibility in order to refine and develop its services. What DBS does not need is overregulation based on imagined evils.[58]

b. Tempo II Restrictions

The Commission also proposes in the NPRM to impose on DBS operators affiliated with non-DBS MVPDs (i.e., PRIMESTAR), the marketing conditions it imposed on a TCI affiliate's DBS permit in 1992.[59] These conditions preclude Tempo's affiliate from marketing its DBS service to TCI's cable subscribers "exclusively or primarily as an ancillary or supplementary cable service" or to offer its DBS service to TCI's subscribers under different terms and conditions than available to non-subscribers.[60]

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57 As the Commission has itself noted, DirecTV has an exclusive marketing arrangement for rural areas with the National Rural Telecommunications Cooperative. Implementation of the Cable Television Consumer Protection and Competition Act of 1992, 76 RR 2d 1177, 1180 (1994) (hereinafter "Hubbard").

58 In the event the Commission determines to regulate DBS operator/distribution arrangements, PRIMESTAR submits that, as the Commission has proposed, these regulations should apply to all DBS operators regardless of their MVPD affiliations.

59 Tempo Satellite, Inc., 7 FCC Rcd 2728 (1992) ("Tempo II").

60 Id. at 2731.

The Commission no longer needs to consider whether such restrictions are necessary on a purely theoretical basis, as it did in the Tempo II decision. PRIMESTAR, DirecTV and USSB are operating in head-to-head competition. There is no indication that PRIMESTAR or any of its partners have limited the marketing of PRIMESTAR's services to the partners' cable subscribers or treated the service "exclusively or primarily as an ancillary or supplementary" service to cable. Similarly there is no evidence of any discrimination in favor of or against cable subscribers in the provision of PRIMESTAR's service. As PRIMESTAR has noted, the presence of unaffiliated competitors such as DirecTV and USSB effectively eliminates the possibility of the evils the Commission fears. Indeed, the major restraint on PRIMESTAR's competitiveness comes not from situations posited by the Commission, but from technological considerations which require PRIMESTAR to use a larger receiving dish and to offer fewer channels of programming until it is able to use DBS satellites. There is, accordingly, no need for the proposed restrictions and no record basis for their imposition.

4. Extension of the Program Access Rules to DBS Is Unnecessary

Despite the fact that, less than a year ago, the Commission considered and declined to apply aspects of its "program access rules" to arrangements between DBS operators and vertically integrated cable programmers, and despite the

fact that there is no evidence of abuses today, the Commission voices fears: 1) that PRIMESTAR's partners' ownership interests in various programming services might enable them to deny those services to competing DBS operators; and 2) that PRIMESTAR's partners might seek to obtain concessions in favor of PRIMESTAR from unaffiliated programmers because the partners, in the aggregate, serve a large number of cable subscribers.[61] After referring to the policies which it found to underlie the program access section of the 1992 Cable Act, the Commission's NPRM concludes:

> 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.[62]

Here, again, the Commission appears to be formulating a regulatory scheme to combat competitive conditions which do not now exist and in the absence of any evidence that they are likely ever to exist in a way that would significantly impair competition. The fact is that PRIMESTAR's DBS competitors have access to programming owned by PRIMESTAR's partners and are offering that programming to their subscribers.[63] There

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61 NPRM at ¶ 57.

62 NPRM at ¶ 60.

63 The Commission found "no evidence . . . that non-cable exclusive contracts . . . are either harmful to the develop-

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is, moreover, absolutely no indication that any leverage has been asserted upon unaffiliated programmers to discriminate against PRIMESTAR's DBS competitors. Indeed, such leverage would be almost impossible to exert since the cable operators who are owners of PRIMESTAR do not and could not negotiate with program suppliers as a group.

The program access rules already regulate access to programming by all MVPDs from programmers vertically integrated with cable operators. The fact that these vertically integrated programmers may have non-exclusive license agreements with PRIMESTAR does not change the scope or effect of the current rules. The fact that there have been few complaints under the rules is testament to the fact that access is not a problem. Given that the rules already address the conduct that the Commission wishes to foreclose, and in the absence of <u>any</u> evidence that a problem exists, there is no reason to overregulate a developing service such as DBS.

With respect to exclusive programming arrangements, the Commission should recognize, as it has on several occasions, that valid business reasons may support a decision to obtain or grant exclusivity for certain programming.[64] Exclusive programming contracts are a universally recognized method of differentiating among competitors. Exclusivity for DBS

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ment of competition, 'unfair' or 'deceptive' or have negative effects on consumers." <u>Hubbard</u>, 76 RR 2d at 1187 (1994).

[64] <u>Hubbard</u>, 76 RR 2d at 1185.

operators may expand consumer choice and result in more efficient use of the spectrum.[65] By creating demand, it also may lead to the development of more programming. Exclusivity may thus benefit both business and the public.[66]

5. Restrictions on Wholesale Distribution of Programming Are Unnecessary

Further proposed regulations to combat imagined anti-competitive conduct are found in the Commission's treatment of what it characterizes as "the wholesale use of DBS resources."[67] The Commission's concerns are apparently a reaction to the Headend In The Sky ("HITS") proposal originated by TCI.

As an initial matter, HITS is not a "wholesale DBS service." The HITS concept provides transport and authorization of digitally compressed programming services to programmers and MVPDs.[68] HITS especially would benefit small cable operators that may be unable to improve their existing

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65 Id. at 1187.

66 Although PRIMESTAR believes that the benefits of exclusivity are meaningful, it should be noted that the PRIMESTAR Consent Decrees with the United States and with the various States filed in the Southern District of New York address access by DBS operators to programing vendors controlled by PRIMESTAR's partners. United States v. PRIMESTAR Partners, 1194-1 Trade Cas. (CCH) ¶ 70.562 (S.D.N.Y. 1994); State of New York ex rel. Abrams v. PRIMESTAR Partners L.P., 1993-2 Trade Cas. (CCH) ¶ 70.403 (S.D.N.Y. 1993). While PRIMESTAR did not then and does not now believe that such restraints are necessary or warranted, the existence of the Consent Decrees is a fact that the Commission cannot ignore.

67 NPRM at ¶ 61.

68 Owen Declaration at 3.

distribution systems either because of technical limitations or cost.[69] There is nothing unique about the technology needed to provide this service, and any DBS operator would be able to do so, should it determine that the market is viable and worth the capital investment.[70]

Despite the fact (1) that HITS is not an operational service; (2) that there is no experience or data with respect to how it will operate; (3) that there are no examples of anti-competitive activity related to the proposed service; and (4) that there is no support for the Commission's assumption that offering such a service would be a significant economic advantage for a DBS operator, the Commission nevertheless proposes to adopt regulations: (A) requiring programmers to make their programming available to all DBS operators for "wholesale" delivery;[71] and (B) requiring DBS operators to make this distribution service available to all competing MVPDs [72] PRIMESTAR submits that this is overregulation at its height.

In contrast to the high level of concern expressed by the Commission in formulating its proposal that programmers

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69 See Application for Review of The Cable Telecommunications Association In the Matter of Advanced Communications Corporation, File Nos. DBS-11EXT, DBS-94-16MP, DBS-94-15ACP (filed May 22, 1995).

70 As noted by the Commission, other prospective DBS operators have expressed an interest in providing this service. NPRM at ¶ 61, n.97.

71 Id. at ¶ 61.

72 Id. at ¶ 62.

authorize all DBS providers to engage in "wholesale" distribution (e.g., wholesale distribution could confer upon a DBS operator an "important cost advantage"),[73] PRIMESTAR does not regard the wholesale distribution of programming to small cable systems as a major component of the DBS business, albeit a valuable service to those currently with less satisfactory means of obtaining programming services. PRIMESTAR, accordingly, believes no rule is needed at this time to force programmers to deal with all DBS operators.[74]

With respect to the second question raised by the Commission, no jurisdiction exists to authorize the Commission to require a "wholesale" DBS distributor (as opposed to a programming vendor) to make its service available to every competing MVPD. Section 628 of the Communications Act of 1934, as amended, 47 U.S.C. § 628, and the rules implementing it (47 C.F.R. §§ 76.1001 et seq.) apply to "satellite cable programming vendors," meaning entities engaged in "the production, creation or wholesale distribution for sale of satellite cable programming." 47 U.S.C. § 628(h)(2). The statute and the Commission's rules do not apply to a party offering a transport and authorization service.[75] Under HITS, MVPDs must contract

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73 Id. at ¶ 61.

74 If the Commission nevertheless determines to adopt rules applicable to "wholesale DBS," those rules should apply to all DBS operators and video programmers, not just to those affiliated with MVPDs.

75 47 U.S.C. § 628(c)(2)(C).

directly with the programming service vendor to obtain the rights to carry programming available for distribution via HITS. A DBS operator providing a HITS type service, therefore, would not fall within the definition of "satellite cable programming vendor" subject to the Commission's jurisdiction.[76]

In any event, the Commission's proposal to require DBS operators to provide "wholesale" service to all competing MVPDs is a wholly unwarranted intrusion into legitimate business relationships and unsupported by any suggestion of anti-competitive problems. If serious competitive problems having a substantial impact on the public actually develop in the future, the question can be revisited when the facts and the effect on competition can be ascertained.

IV. PROPOSED AUCTIONING OF DBS PERMITS

A. Authority for Auction

PRIMESTAR does not quarrel with the Commission's authority to conduct an auction of DBS frequencies. PRIMESTAR does question, however, whether an auction of the Advanced channels is consistent with the policies embedded in the Act favoring "the development and rapid deployment of new technologies, products and services . . . without administrative and judicial delay;"[77] and the Commission's

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76 47 C.F.R. § 76.1000(i).

77 47 U.S.C. § 309(j)(3)(A).

obligation to resolve or avoid mutually exclusive situations wherever possible[78] which, obviously, would result in the "rapid deployment" of new service. In the case of the Advanced frequencies, by reclaiming these orbital slots and channels rather than granting an extension and the assignment, the Commission needlessly created a mutually exclusive environment, which inevitably will result in years of delay unless PRIMESTAR and Tempo prevail quickly in court or at auction.

B. The Commission Should Use a Multiple Round, Oral Auction Procedure To Auction DBS Spectrum

To the extent the channels at 110° and 148° are available for auction, PRIMESTAR concurs that they should be offered in two blocks with the channels at 148° being offered immediately after the more valuable channels at 110°. PRIMESTAR also concurs that a multiple round, oral auction would be a satisfactory means through which to offer this spectrum.[79] For the reasons stated in the Commission's NPRM, this method would provide sufficient information about the value of the permit and avoid the complications associated

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78 47 U.S.C. § 309(j)(6)(E).

79 At ¶ 83 of the NPRM the Commission seeks comment on the appropriateness of using a combined sealed bid/oral outcry auction. PRIMESTAR submits that this method should not be employed because it runs contrary to the Commission's stated desire to have full disclosure of bids and an aggressive bidding process.

with electronic filing.[80] PRIMESTAR believes, however, that the Commission should provide for some short, predetermined intervals (perhaps 15 to 30 minutes) at predetermined stages during the auction to allow bidders to assess the bidding and to confer with principals, if necessary. For example, the breaks could be scheduled when predetermined increments are reached during the process. Under this scenario, the auction would commence and bidding would proceed without breaks until the bidding exceeded the opening bid by, for example, $25 million. After a short break, bidding would resume until another $25 million increment was reached, etc. Because there is likely to be a small number of bidders, the process, as described above, could be conducted expeditiously. All bidders should be required to identify themselves and their principals. In addition, each party placing a bid, and the amount of the bid, shall be disclosed at each stage of the bidding process.

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80 PRIMESTAR urges the Commission, prior to the auction, to act on all pending requests for extensions of DBS construction permits. Directsat Corporation, Application for Additional Time To Construct and Launch Its Direct Broadcast Satellite System, File No. 131-SAT-EXT-95, filed July 28, 1995; Direct Broadcast Satellite Corporation, Request for Additional Time To Construct and Launch Its Direct Broadcast Satellites and for Expedited Action, File No. 126-SAT-EXT-95, filed July 17, 1995; EchoStar Satellite Corporation, Application for Additional Time To Construct and Launch Its Direct Broadcast Satellite System, File No. 129-SAT-EXT-95, filed July 26, 1995. If these requests are denied, which the logic of the Advanced Order would require, the availability of additional DBS resources could affect the value of the 110° W.L. and 148° W.L. channels.

C. Bid Increments

PRIMESTAR submits that minimum bid increments in the amount of $5 million dollars will be sufficient to ensure the Commission receives the full value of the spectrum offered at auction and that the auction proceeds to a conclusion expeditiously.

D. Upfront Payment/Minimum Bid

PRIMESTAR believes it necessary to require a substantial upfront payment to ensure that only serious, qualified bidders participate in the auction for these spectrum resources. To that end, PRIMESTAR suggests the establishment of an upfront payment for the channels at 110° W.L. based on the value of these channels, arrived at in the only arms length negotiation regarding use of that spectrum to date -- the Advanced/Tempo/PRIMESTAR arrangement. PRIMESTAR suggests that an upfront payment of $10 million, approximately 25% of the $45 million Advanced was to receive, should be sufficient to ensure to some extent against bidders who are financially unqualified. PRIMESTAR believes that the minimum opening bid should equal the required upfront payment.

E. Bid Withdrawal, Default and Disqualification

PRIMESTAR concurs with the Commission's belief that in order to deter insincere or speculative bidding, and to ensure that bidders wishing to withdraw their bids do so before bidding ceases, it is necessary to provide for default payments and penalties. PRIMESTAR believes that those

proposed in the Commission's Notice are adequate to achieve their stated purposes.

F. Other

PRIMESTAR cautions the Commission that whatever rules it adopts concerning the auction of the DBS resources formerly assigned to Advanced, those rules necessarily must consider the appeal of the Advanced Order currently pending before the D.C. Circuit. Specifically, given the reality that the Court is unlikely to resolve the issues before it on appeal prior to the proposed January 18, 1996 auction date, the Commission must provide that, if PRIMESTAR or Tempo is the high bidder at auction and Advanced/Tempo/PRIMESTAR are successful at appeal, any monies paid by PRIMESTAR or Tempo to the Commission in consideration of the Advanced orbital slots and frequencies would be immediately refunded to PRIMESTAR or Tempo. Similarly, should an entity other than PRIMESTAR or Tempo be successful in acquiring the 28 channels at 110° W.L. at auction, and the Commission authorizes that entity to construct a DBS system during the pendency of the appeal, the Commission must put that entity on notice that it is constructing at its own risk. If PRIMESTAR/Tempo/Advanced are successful on appeal, the frequencies purchased at the auction would revert back to Advanced, and the high bidder at auction would be entitled to a refund of the auction price.

V. CONCLUSION

The Commission has had a long standing commitment to nurture what it determined would be a valuable service for the American public -- DBS. Now that the "new era" of DBS has begun, an era in which DBS has proven to be a viable service, the Commission cannot abandon that commitment, nor impose on the DBS service undue regulation that would delay service to the public and impede competition. PRIMESTAR respectfully submits, therefore, that the Commission should continue to impose minimal regulation on the DBS service and adopt the proposals set forth herein to the extent indicated by PRIMESTAR.

Respectfully submitted,

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