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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

NOV 20 1995

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

COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION

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SUMMARY

MCI agrees with the Commission's tentative conclusion, set forth in the NPRM, that the DBS channel reallocation procedure established in the Continental decision should not be applied to the channels reclaimed from Advanced Communications Corporation (ACC). In place of the Continental procedure, the Commission should employ spectrum auctions, which will better achieve the Commission's DBS objectives, including the efficient use of spectrum and the prompt initiation of service.

The Commission already possesses all statutory authority required to use competitive bidding (auctions) for the award of DBS licenses for the spectrum reclaimed from ACC. Because the DBS orbital resources at issue here have been allocated under the ITU's Region 2 BSS Plan for domestic use within the United States, there is no need to consider the broader implications raised by auctioning of international satellite "slots" before proceeding with the auction contemplated in the NPRM.

MCI supports the majority of the Commission's proposals for adjusting the DBS service rules. MCI recommends several minor modifications, including a more precise definition of the Multichannel Video Program Distributors (MVPDs) covered by the proposed cross-ownership restrictions.

The Commission should not seek additional BSS allocations at this time. Any near-term changes to the ITU Region 2 BSS Plan could undermine both the policy assumptions supporting the auction of domestic DBS spectrum and the technical and economic assumptions supporting the growth of the DBS industry. Instead of seeking

additional BSS allocations, the Commission should commit to making no changes which would alter the technical assumptions underlying the current DBS allocation, at least through the first generation of satellites.

MCI reiterates its commitment to open the bidding on the 28 channels available at 110° W.L. at $175 million. MCI believes that this amount is the appropriate minimum bid for the channels at 110° W.L. MCI expresses no opinion on the appropriate opening bid for the 24 channels available at 148° W.L. except that it would expect that such a bid would be proportionately lower than the bid required at 110° W.L.

MCI recommends that the Commission require applicants to submit an upfront payment equal to ten percent of the minimum opening bid, rather than an amount based on the estimated value of the spectrum. Estimates of the value of the spectrum may vary widely, and an upfront payment equal to ten percent of the minimum opening bid -- for the 110° W.L. spectrum, $17.5 million -- should be sufficient to achieve the Commission's objective of ensuring that only serious, qualified bidders participate in the auction. An upfront payment of $17.5 million should not be so large as to deter any qualified entity from seeking to participate in the auction.

MCI proposes that a "structured open-outcry auction" be utilized in the upcoming DBS auction. MCI's auction consultant, Lawrence M. Ausubel, a game theorist and Professor of Economics at the University of Maryland, generally supports the proposed open-outcry format, but strongly recommends the addition of a substantial bid withdrawal penalty.

Professor Ausubel proposes a set of rules for a "structured open-outcry auction." Principal features of the "structured open-outcry auction" include the enforcement of the FCC's standard bid withdrawal penalty, the clear identification of all bids, the elimination of jump-bidding and the rejection of auctioneer discretion over bid increments and other aspects of the auction. The auction should be conducted sequentially, with the 110° license awarded before the 148° license. The combined sealed-bid/oral-outcry auction (discussed in the NPRM at ¶83) should not be employed, as it may result in elimination of the bidder who values the license most highly before the oral-outcry phase of the auction begins.

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Direct Broadcast Satellite Service	)	PP Docket No. 93-253

COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION

MCI Telecommunications Corporation (MCI), pursuant to Section 1.415 of the Commission's Rules, hereby submits its comments in the above-captioned proceeding. Notice of Proposed Rulemaking, FCC 95-443 (released October 30, 1995) (NPRM). In the NPRM, the Commission proposes new rules for the reassignment of resources for the provision of Direct Broadcast Satellite service (DBS).[1/] Specifically, the Commission proposes the auctioning of reclaimed DBS orbital/channel resources. MCI strongly supports this proposal.

In the NPRM, the Commission also solicits comments concerning new DBS service rules, including whether additional due diligence milestones should be adopted, the extent to which DBS resources may be put to alternative uses, and the implementation of competitive safeguards. As discussed more fully below, MCI supports the Commission's proposed adjustments to the DBS service rules with minor modifications.

1/ Recently, the Commission reclaimed 51 channels at two orbital locations that had been assigned to Advanced Communications Corporation (ACC) for DBS use. Advanced Communications Corp, FCC 95-428 (adopted October 16, 1995)("Advanced Order"). The NPRM addresses the reassignment of these DBS resources to the public. NPRM, at ¶ 1.

I. INTRODUCTION AND STATEMENT OF INTEREST

MCI, the nation's second-largest interexchange carrier, is rapidly evolving from its traditional role as a provider of long-distance telephone services into a broader-based competitor with businesses across the telecommunications industry, including the distribution of entertainment and information to individuals, businesses, and educational institutions. As MCI stated during the proceedings leading up to the initiation of the NPRM, it has been exploring actively alternative means for delivering broadband services to homes, offices, and schools. The 28 available DBS channels at the 110° W.L. orbital location are well-suited for these purposes. These channels constitute a valuable public resource that will permit MCI to offer a variety of innovative broadband services. Accordingly, as it has already declared in the proceedings concerning ACC's failure to meet its due diligence obligations, MCI intends to be a bidder for these reclaimed channels.

II. DISCUSSION

A. The Commission Has Correctly Concluded That The Channel Reallocation Procedure Articulated In The Continental Decision Is Ill-Suited To The Current DBS Environment.

1. The Continental Assignment Procedure Was Premised On Several Now Disproved Assumptions Concerning DBS, Including The Assumption That Viable Service Could Be Implemented Using A Relatively Small Number of Channels.

In Continental, the Commission concluded that mutually-exclusive applications for DBS resources would be avoided by assigning a limited number of channels to each DBS

applicant on a proportional basis and giving each permittee "the first right to addition al allocations, apportioned equally, up to the number requested in their applications" for any surrendered or canceled permits. Continental Satellite Corp., 4 FCC Rcd 6292, 6299 (1989), partial recon. denied, 5 FCC Rcd 7421 (1990). This method of reassigning surrendered or canceled channels was premised on the assumption that a DBS system employing fewer than ten channels would be commercially viable. NPRM, at ¶13.

As the Commission has observed, there are now six permittees requesting orbital/spectrum resources from the 51 channels reclaimed from ACC -- requests which, under the Continental reassignment procedure, would result in allotting fewer than five paired channels to each remaining permittee. NPRM, at ¶12. However, as the Commission describes in the NPRM, it has now been demonstrated that small systems employing ten or fewer channels "are not independently viable." NPRM, at ¶13. Tempo Satellite, for example, claims it cannot operate a viable DBS system using 11 paired channels, and therefore proposed to purchase ACC as a means of acquiring a larger channel allotment. NPRM, at ¶12. Further, both USSB and EchoStar have entered into agreements, or merged with other DBS permittees, in order to assemble a sufficient number of channels to provide a competitive service. Id.

Given these circumstances, the Commission has correctly concluded that use of the Continental process to reassign the channels reclaimed from ACC would be unlikely to result in any single permittee being able to construct and operate a system without first concluding negotiations with other parties to reaggregate channels into a viable and competitive block. NPRM, at ¶15. As the Commission has also observed, the trading of "odd lot" channel assignments has heretofore not been effective in aggregation of channels.

Specifically, the Commission has noted that the process of reaggregating channels by negotiation and administrative process can be both time-consuming and complex, causing further delay in the implementation of DBS service. NPRM, at ¶13.[2/]

In light of these concerns, and as a direct result of the changes in technology and in the competitive dynamics of the DBS industry since the Continental decision, MCI agrees that the Commission should abandon its channel reassignment methodology in favor of a policy more aligned with the current DBS environment. In particular, procedures for reassigning DBS resources should be designed to achieve the Commission's goals: efficient use of the DBS resource and prompt delivery of competitive DBS service to the public.

2. By Using Auctions To Assign The Channels Reclaimed From ACC, The Commission Can Allow The Channels At Each Available Orbital Location To Transfer Together, Promoting Efficient Use Of The Spectrum.

As the Commission has concluded, the use of the Continental reassignment procedure no longer serves the Commission's DBS goals. Piecemeal reassignment of reclaimed channels would neither promote efficient use of spectrum nor expedite delivery of DBS service.

In lieu of this outmoded methodology, the Commission proposes in its NPRM to use auctions to assign the 51 channels reclaimed from ACC for the benefit of the public. In particular, the Commission proposes to auction the available DBS channels at the 110° and 148° W.L. orbital locations in two blocks: a block of 28 channels at 110° W.L. and one block

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2/ For example, as noted by the Commission, EchoStar negotiated (unsuccessfully) for more than three years to merge with ACC or acquire its channels. NPRM, at n.20.

of 24 channels at 148°W.L. NPRM, at ¶8 & n.13.[3] Assigning these channels in this way is consistent with the Commission's stated goal of encouraging rapid service implementation, as it will alleviate the need for auction winners to reaggregate channels into viable and competitive blocks -- a task that the Commission has repeatedly observed has resulted in significant implementation delays. More importantly, auctioning the spectrum in competitively-sized blocks will maximize the prices paid at auction. Auction winners who have paid a substantial sum to secure licenses will be unlikely to allow the spectrum to remain idle. Systems will be built rapidly and service offered quickly. As the Commission has noted, "auction procedures are designed to assign scarce resources to those who value them most highly and can make the most efficient use of them." NPRM, at ¶16. Rapid service implementation will result in additional near-term competition to cable, realizing one of the Commission's long-standing goals for the DBS service.

Finally, auctions will promote the Commission's statutorily mandated goal of recovering a significant portion of the value of the spectrum. Section 309(j) of the Communications Act of 1934, as amended, states that the Commission "shall seek to promote the . . . recovery for the public of a portion of the value of the public spectrum resource made available for commercial use".[4] Indeed, as the Commission properly noted in its NPRM, MCI itself has stated that it would make an opening bid of $175 million for the 110° W.L. channels.

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[3] At the 110° W.L. orbital location, ACC's 27 channels would be combined with a single channel that remains unassigned. NPRM, at ¶79.

[4] 47 U.S.C. § 309(j).

In sum, MCI urges the Commission to move forward with the reassignment of DBS resources by competitive bidding because this method will assure the rapid implementation of DBS service and will satisfy the Commission's statutory objectives.

B. The Commission Has Proposed Necessary Adjustments To The DBS Service Rules, Which Should Be Adopted With Minor Modifications.

1. There Is No Need To Consider Possible International Impact Of Assigning DBS Channels Via Competitive Bidding Because The Channels Currently Available For Reassignment Are Part Of A BSS Allotment Plan Explicitly Premised On U.S. Domestic Use Only.

In the NPRM, the Commission raises the issue "whether the U.S. has the authority to auction permits which may include the provision of international service." NPRM, at ¶24. Selling rights to orbital resources in other satellite services, where those resources are not specifically allocated for use by a particular country, implicates many thorny issues, including questions of international comity and reciprocal entry, that are best left to resolution in other proceedings. Fortunately, these difficult issues are not raised in the case of the existing allocations for the Broadcasting Satellite Service ("BSS"), where particular orbital locations have already been earmarked for the U.S. and other countries in an ITU allocation table.[5/] With respect to the orbital locations at 110° W.L. and 148° W.L., it is a settled matter that these BSS allocations are designated for U.S. use, and it is therefore proper for the United States government to employ auctions to assign these domestic resources to U.S. licensees.

5/ See International Telecommunication Union, Radio Regulations, Appendices 30 and 30A.

2. The Commission Should Adopt Its Proposed Due Diligence Milestones; They Will Provide Further Protection Against Warehousing.

The Commission's current due diligence milestones require a permittee to begin construction or complete contracting for the construction of a satellite station within one year of the grant of its construction permit and to bring its satellite station into operation within six years of the construction permit grant.[6/] The Commission's revised milestone schedule would place one additional requirement on all new DBS construction permittees -- to complete construction of the first satellite for the DBS system within four years of the grant of authorization. NPRM, at ¶27.

MCI agrees with the Commission that such a milestone schedule will ensure that new permittees move forward with their construction and launch commitments without imposing an onerous burden on new permittees. NPRM, at ¶¶25, 27. This additional milestone will also deter permittees from stockpiling or "warehousing" scarce DBS orbital locations "with no intention of actually using them, for the sole purpose of stymieing full development of the service." NPRM, at ¶27. Warehousing can hinder the timely availability of services to the public by blocking "entry by other entities willing and able to proceed immediately with the construction and launch of their satellite systems." MCI Communications Corporation, 2 FCC Rcd 233 (1987). For these reasons, MCI believes the proposed milestone schedule is the best way to ensure that permittees proceed with construction and launch of their systems in a timely manner.

6/ 47 C.F.R. § 100.19(b).

3. The Use Of DBS Capacity Should Not Be Unduly Constrained By Regulation.

In the NPRM, the Commission notes that the terms "Broadcast Satellite Service" (as used in ITU Radio Regulations) and "Direct Broadcast Satellite Service" (as used in Part 100 of the Commission's Rules) are "interchangeable" and that both are defined as "a radiocommunication service in which signals transmitted or retransmitted by space stations are intended for direct reception by the general public." NPRM, at ¶29. The Commission proposes to afford maximum flexibility to DBS operators, authorizing other satellite services (e.g., fixed satellite services), provided that the spectrum be used "principally" for DBS service. NPRM, at ¶¶30-31. The Commission currently employs a temporal standard, applied to the use of each transponder on a daily basis, in measuring compliance with the principal use requirement. In the NPRM, the Commission seeks comments on whether DBS operators should be permitted to use "percentage of capacity" as an alternative measure. Under such a formulation, one half of the total capacity at any given orbital location could be used to offer non-DBS services. NPRM, at ¶30. MCI supports the adoption of the proposed alternative measure of minimum DBS service requirements based on capacity. By permitting DBS operators to use up to one-half of their systems' capacity (or time) for non-DBS services, the Commission will encourage flexibility in configuring DBS systems, and this will promote optimal use of the spectrum.

MCI recommends that the Commission permit DBS licensees to average their use of capacity or time over a 30 day period, rather than on a daily basis. Averaging the use of DBS capacity or time over a 30 day period will permit DBS operators to experiment with various service offerings and to gauge customer demand while adhering to the Commission's

primary goal of promoting the steady growth of DBS service. The Commission has previously acknowledged that as long as minimum DBS service requirements are observed, "flexibility of use remains an important touchstone for fostering the provision of DBS service."[7]

In addition, MCI recommends that the Commission apply the principal use requirement (50% of capacity or time) to subsequent license terms and satellite generations. Applying a more restrictive rule at a later stage, after service relationships with customers have developed and solidified, would be very disruptive to consumers who have come to rely on and demand the variety of useful applications offered by DBS operators. It is not known whether, and to what extent, DBS customers will differ from non-DBS customers, or whether customers' demands will make it economically feasible to "package" several different services. In light of these uncertainties, imposition of more stringent principal use requirements on subsequent license terms or satellite generations pose a threat of disruption of service relations with the DBS customer base. Fears of this result would likely have a negative effect on the value of the spectrum at the time of auction. From the DBS provider's perspective, the potential for future economic loss combined with severed customer relations significantly diminishes the present value of the spectrum.

Accordingly, MCI urges the Commission to adopt the proposal to permit DBS operators to employ up to 50% of either capacity or time for the rendition of non-DBS services, to allow measurement to be averaged over thirty days, and to make this principal use standard applicable to all subsequent DBS license terms and generations of DBS satellites.

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[7] United States Satellite Broadcasting Company, Inc., 1 FCC Rcd 977, 979 (1986).

4. The Need To Protect Against Potential Concentration Of Market Power Supports Adoption Of DBS Channel Caps And Cross-Ownership Rules, And The Commission Should Adopt Its Proposals In These Areas With Minor Modifications.

As the Commission emphasizes in the NPRM, one of the most important public interest goals to be served by DBS is bolstering competition in the market served by multi-channel video programming distributors (MVPDs). NPRM, at ¶33. Currently, although there are a variety of different MVPD technologies, cable television is the dominant means of transmitting multiple channels of video programming, reaching more than 60 million households nationally in 1994.[8/] It is for this reason that the Commission has sought to foster other types of video delivery systems, including DBS, various types of "wireless cable" technologies and telephone company video dialtone services. In view of the state of the MPVD market and the Commission's established pro-competitive policies, it is appropriate for the Commission to adopt in this proceeding measures that will both prevent the undue concentration of market power and affirmatively promote the development of DBS as a robust competitor to more established terrestrial video program distribution technologies.

a. The Commission Should Adopt Limits On The Use Of DBS Spectrum To Restrict Cross-Ownership By Certain Non-DBS MVPDs.

As one means of discharging its mandate to promote competition, the Commission has proposed that any DBS licensee or operator affiliated with another non-DBS MVPD should be permitted to control or use DBS channel assignments at only one of the orbital locations that is capable of full-CONUS service. NPRM, at ¶40. MCI believes that

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8/ See Cable Television Developments, Spring 1995 at 2 (NCTA 1995) (citing A.C. Nielsen Company figures).

the general theory of this limitation is sound, but that given the wide disparity in market power among different types of MVPDs, the Commission should refine the limit to take into account the degree of market dominance of the affiliated non-DBS MVPD. The mere fact that an entity has an interest in some other provider of video programming does not in itself give it either the incentive or the ability to engage in anti-competitive conduct.

First, in view of the fact that MVPDs may have very different technical capabilities and limitations, the Commission should more precisely define the type of MVPD that is covered by its cross-ownership restriction. For example, even within the dominant cable medium, there still exist systems with channel capacities of twelve or less. Some wireless cable (Multichannel Multipoint Distribution Service) and Satellite Master Antenna Television systems may also have similar capacity limitations. MCI believes that those holding interests in these sorts of low capacity MVPDs should not be constrained in their ability to invest in the DBS industry. Accordingly, the limit on holding authorizations for full-CONUS DBS channels should apply only to DBS licensees and operators with an affiliated non-DBS MVPD that provides programming on more than 12 standard NTSC video channels.

Second, whether a DBS license/operator affiliated with a non-DBS MVPD is covered by the limitation should also be specifically governed by the market power that the non-DBS MVPD possesses. An appropriately crafted standard would effectively apply in the initial stages mostly to affiliations with cable multiple system operators (MSOs), but would not be limited to this service and would be broad enough in scope to apply to affiliations with any non-DBS MVPD that gains sufficient market power. MCI suggests that the Commission limit a DBS licensee or operator to holding channels at only one full-CONUS orbital location only when its affiliated non-DBS MVPD (or non-DBS MVPDs) achieves an aggregate national

subscribership of 1,000,000 or more households, or has a market penetration of 50.1% or more of the television households in any area that it is licensed to serve. Such a formulation would permit the Commission to premise market power on both the national reach of an MVPD provider and its degree of local control within specific markets, much as it has historically limited ownership of television broadcast stations on both the national and local levels.[9]

If such a standard is adopted, the Commission would need to specify a period of time within which a DBS licensee/operator with DBS channels at more than one full-CONUS location -- whose affiliated non-DBS MVPD subsequently reaches the defined level of subscribership or market penetration -- would be required to come into compliance with the limit. MCI believes that it is reasonable to set a twelve month period for relinquishing excess channels held over the limit where the application of the limit results not from volitional action by the licensee, but merely by operation of law due to the growth and success of the licensee's affiliated non-DBS MVPD.

b. To Promote Competition, The Commission Should Adopt Channel Caps For DBS Licensees/Operators.

The Commission also expresses concern in the NPRM that the limited number of DBS channels available for U.S. use might result in reduced competition unless a limit is placed on the number of channels that any one operator/licensee can control. NPRM, at ¶41. MCI agrees with the Commission's analysis. Particularly in view of the fact that only three orbital locations can provide full-CONUS service using existing state-of-the-art DBS

technology,[10] it is appropriate for the Commission to restrict a single DBS operator/licensee (together with those with attributable interests) to a maximum of 32 full-CONUS channels, whether or not these channels are aggregated at one orbital position. Such a requirement will restrict undue concentration in the service, while at the same time promoting efficient aggregation of channels for provision of national service.

In order to discourage anticompetitive conduct, however, the Commission should also adopt its suggested rule prohibiting an operator/licensee that holds a majority of the channels at one full-CONUS location from holding additional capacity at any other full-CONUS location. Such a rule would prevent a DBS provider from establishing a fully-competitive service using most of the channels at one location, and then acquiring control, either directly or through an affiliate, of a sufficient number of channels at another location to block any potential rival from acquiring enough channels at the second location to offer a viable competitive service.

For DBS permittees exceeding the spectrum/channel caps following an auction, the Commission has proposed a ninety-day divestiture window within which a licensee exceeding the limit would be required to transfer channels owned in excess of the limits. See NPRM, at ¶43. MCI agrees with the Commission that this is a reasonable timetable within which to expect a winning bidder to come into compliance. Successful auction participants finding themselves in such a situation will have plenty of advance opportunity to prepare for

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[10] The fourth eastern orbital location at 61.5° W.L., while apparently capable of reaching all of CONUS with a DBS signal, would, on the edges of the coverage area, require larger diameter receive dishes than the 18-24" diameter dishes that can be served from the other eastern orbital locations. NPRM, at ¶44 and n.78.

such a contingency, just as existing cellular service providers seeking new PCS spectrum did with respect to the spectrum caps in that service.[11/]

Additionally, there is little danger that an entity that finds itself temporarily over the cap will find itself forced into a "fire sale" scenario in which it is compelled to sell channels at a "loss." There is no reason to believe that there will be a shortage of prospective purchasers of DBS spectrum in the aftermath of a successful DBS auction. More significantly, the spectrum subject to mandatory divestiture is likely to be sold at prices that reflect the auction results. That would be advantageous for the divesting spectrum owners, who acquired their spectrum rights without payment of any fees to the U.S. Treasury. Their investment in the business, therefore, is probably limited to out-of-pocket application and system development expenses. The return on their investment may be substantial. To the extent that a current DBS operator is unwilling to assume the risk that it might incur a "loss" in selling excess channels, it can avoid that risk by not bidding in the DBS auction. For all these reasons, a ninety day divestiture deadline for spectrum in excess of the proposed caps is entirely reasonable and should be adopted.

Finally, the Commission has proposed various attribution and affiliation rules that would govern when investors and others involved in the operation of DBS operators would be considered to have in "interest" in the licensee. MCI generally endorses these provisions, but cautions that the Commission should avoid rules that would unreasonably restrict joint

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[11/] It is reasonable to prescribe a shorter deadline for post-auction divestiture of channels in excess of those permitted under spectrum caps than for divestiture of spectrum held in excess of the limits in the proposed cross-ownership rules. See Section B.4.a, above. In the former case, acquisition of spectrum is the result of a successful bid at auction; in the latter, a party may exceed the limit as the result of a merger or other event beyond the direct control of the DBS operator.

venture arrangements between or among DBS systems and programming services. Particular program services are often jointly owned by several companies that compete vigorously in other areas. For example, Court TV includes among its owners both the National Broadcasting Company and several major cable MSOs. On the other hand, NBC also operates the Consumer News and Business Channel (CNBC), which is the most significant competitor of the Cable News Network (CNN), in which several of the MSO investors in Court TV have significant interests. The nature of these shifting programming alliances strongly indicates that the Commission should be concerned primarily with direct control of DBS authorizations rather than attenuated connections that may result from various joint venture and co-ownership arrangements. Indeed, regulations that are too broadly written could result in a confusing tangle of ownership limitations that would discourage significant investment in the DBS industry.

c. The Commission Should Not Seek Additional BSS Allocations At This Time, As Such A Step Would Alter Both The Policy Assumptions Supporting The Auction Of DBS Spectrum And The Technical And Economic Assumptions Supporting The Growth Of The DBS Industry.

Having noted the limited DBS spectrum that is currently available for use by current U.S. licensees, the Commission indicates in the NPRM that it "has been assessing the potential for expanding opportunities for entry by additional players into the DBS market," specifically including the possibility of the FCC applying to the ITU to reserve additional DBS orbital locations for U.S. use. NPRM, at ¶¶51-52. The current allocation of eight orbital locations for U.S. domestic use serves as the legal basis for auctioning DBS resources (See Section B.1, above); this allocation also serves as the basis for the technical and economic

assumptions that are currently driving the growth and viability of the DBS industry. The United States should proceed with great caution in seeking any additional DBS orbital locations in the future and, in the interim, should preserve the integrity of the current BSS Allocation Plan through the first generation of DBS satellites.

As the Commission implicitly acknowledges in the NPRM, there is a direct relationship between the assumptions of the current ITU Region 2 BSS plan and the technology that is now being employed to provide DBS service. For example, precipitous changes to add additional systems could hamper the ability of existing and proposed first generation systems to provide service using small, unobtrusive receive earth stations. NPRM, at ¶52, n.86. Such a change would obviously have a catastrophic impact not only upon the ability of DBS providers to continue to offer high quality service but, just as significantly, upon consumers who have already made very substantial investments to purchase DBS-receive equipment. Recent purchases of customer premises equipment has been based on the current technical environment, and have doubtlessly been founded on assumptions that the 18-24" satellite dish would have a lifetime of a dozen years or more. These purchasers should not now be disadvantaged by abrupt changes in the existing plan.

Finally, the Commission cannot ignore the impact that a proposal to change the DBS spectrum plan would have on the currently proposed auction of the reclaimed ACC spectrum. Permitting any change in the BSS allocation table during the initial generation of DBS satellites would substantially alter significant operational and economic assumptions concerning the use of the spectrum. These changes, in turn, would adversely impact the currently perceived value of the spectrum in the auction now proposed.

For all these reasons, the Commission should not seek the near-term allocation of additional orbital locations to the United States for DBS use. Instead, the Commission should commit to maintaining the present technical assumptions underlying the DBS allocation plan, at least through the first generation of satellites.

5. The Commission Should Implement Conduct Rules To Protect Competition, But Should Be Cautious In Adopting Competition Safeguards, So As Not To Stifle Legitimate Business Relationships.

a. Certain Marketing Limitations Should Be Imposed On DBS Operators Affiliated With Non-DBS MVPDs.

The Commission is justifiably concerned that affiliations between DBS operators and non-DBS MVPDs could impede competition by creating incentives for DBS operators to offer DBS only as an adjunct to the services offered by that MVPD. As the Commission correctly concludes, such affiliations could undermine competition between MVPDs and cause an underutilization of scarce DBS channels, thus hindering the ability of DBS to compete effectively with cable. NPRM, at ¶55. MCI further supports the Commission's proposal to impose on all such DBS operators the Tempo II restrictions prohibiting both discriminatory pricing and the provision of DBS service to subscribers of the affiliated MVPD as ancillary or supplementary to that MVPD's service.[12/] MCI believes that these restrictions will be adequate to ensure that DBS operators compete vigorously with affiliated non-DBS MVPDs and that DBS capacity will be utilized to the fullest extent possible on a nationwide basis.

12/ See generally, Tempo Satellite, Inc., 7 FCC Rcd 2728, 2731 (1992).

b. The Commission Should Not Impose Marketing Limitations Between DBS Operators And Non-Affiliated MVPDs, The Effect Of Which Will Stifle Legitimate Business Relationships.

MCI opposes the Commission's proposal to extend these marketing limitations to prohibit DBS operators from entering into exclusive distribution agreements, directly or indirectly, with unaffiliated non-DBS MVPDs. NPRM, at ¶56. The Commission contends that these restrictions will encourage competition between DBS operators and non-DBS MVPDs. Id. The Commission apparently believes that exclusive distribution agreements might provide DBS operators a disincentive to market DBS vigorously and independently, and could encourage them to rely instead on the marketing efforts of the non-DBS MVPDs.

The Commission's apparent concern is misplaced. Absent any affiliation between the DBS operators and the non-DBS MVPD that could give rise to anticompetitive conduct, there is no justifiable public interest reason to restrict DBS operators' independent business decisions concerning the distribution of DBS services, including decisions to enter into exclusive distribution agreements. DBS remains an emerging video distribution technology, which the Commission is endeavoring to promote as a competitor to traditional cable television. By unduly restraining the means by which DBS operators distribute their services, the Commission would be imposing on DBS operators competitive inefficiencies to which other non-cable MVPDs generally are not subject. Rather than promoting competition between MVPDs and fostering the development of DBS, goals the Commission has pledged to achieve, (NPRM, at ¶¶14, 54) these proposed rules will repress both.

c. The Program Access And Program Carriage Rules Will Be Adequate To Prevent Anticompetitive Practices By DBS Operators Without Additional FCC Regulation.

The program access provisions contained in Section 628(b) of the Communications Act of 1934, as amended, (the Act)[13/] will effectively constrain the ability of DBS operators to utilize exclusive contracts with vertically integrated programming services to achieve anticompetitive advantages over other DBS operators. This subsection prohibits, inter alia, all satellite broadcast programming vendors, and all satellite cable programming vendors in which a cable operator has an attributable interest, from engaging in any unfair methods of competition or unfair or deceptive behavior "the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers."[14/]

The Commission itself has recognized its considerable authority under this subsection, describing it as "a clear repository of Commission jurisdiction to adopt additional rules or to take additional actions to accomplish the statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast programming."[15/] Specifically, the Commission has stated that "where future contracts cause a restriction in the availability of programming to alternative

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13/ 47 U.S.C. § 548(b).

14/ Id.

15/ Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992--Development of Competition and Diversity in Video Programming Distribution and Carriage, 8 FCC Rcd 3359, 3374 (1993) ("First Report and Order").