

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Revision of Rules and Policies)
for the Direct Broadcast)
Satellite Service)

IB Docket No. 95-168
PP Docket No. 93-253

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To: The Commission

COMMENTS OF TEMPO DBS, INC.

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November 20, 1995

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COMMENTS OF TEMPO DBS, INC.

TEMPO DBS, Inc. ("TEMPO"), the proposed assignee of the channels that the Commission would auction pursuant to procedures described in the above-captioned notice of proposed rulemaking ("NPRM"), reaffirms its position that the revocation of the DBS permit of Advanced Communications Corporation ("ACC") was arbitrary, capricious, an abuse of discretion, and contrary to Commission precedent.¹ TEMPO firmly believes that the Advanced Order will be reversed on appeal and that no rules for DBS auctions are necessary. If the Commission nonetheless proceeds with this rulemaking, however, it should consider the following comments and, in any event, condition any rules and auction awards on the outcome of TEMPO's pending appeal.

¹ On November 3, 1995, TEMPO filed a Notice of Appeal of the Commission's decision in Advanced Communications Corp., FCC-95-428 (rel. Oct. 18, 1995) ("Advanced Order").

I. SUMMARY

In the wake of the Advanced Order, which derailed a new DBS service only months away from launch, the FCC proposes not only to auction the spectrum taken from ACC, but to impose a myriad of new unnecessary regulations for the DBS service. The Commission reaches its tentative position to adopt the new rules despite a competitive DBS environment and a dearth of empirical or theoretical justification.

When the Commission authorized the DBS service over thirteen years ago, it specifically found that minimal regulation "will allow operators the flexibility to experiment with service offerings to find those that the public needs and wants, and to experiment with technical and organizational characteristics."² Nothing has been alleged or asserted that justifies the Commission's proposed dramatic departure from its longstanding approach. In fact, the present environment -- which consists of two vigorous DBS providers (DIRECTV and USSB), the anticipated arrival of a third (EchoStar Satellite Corporation/Directsat Corporation), and numerous other multichannel video programming distributors ("MVPDs") -- makes the imposition of new regulations even more irrational.

Because of the concrete competitive forces shaping the DBS industry, the Commission should not deviate from its time tested method of imposing only minimal regulation. Consistent with Commission and Congressional findings, there is no basis

² Direct Broadcast Satellites, 90 F.C.C.2d 676, 707 (1982).

for a DBS/cable ownership ban. MVPD-affiliated DBS providers have a strong economic incentive to compete aggressively in DBS and would simply cede marketshare if they did not. However, if spectrum or orbital restrictions are nevertheless imposed, the rules must be applied equally to all DBS providers regardless of their affiliation. In addition, the NPRM wholly fails to justify adoption of arbitrarily restrictive divestiture and attribution standards.

With respect to the proposed service rules -- distribution exclusivity and access to programming -- existing anti-trust principles and the two PRIMESTAR consent decrees adequately provide for a robust and competitive DBS environment. Moreover, the Commission's proposal to regulate "wholesale DBS services" is inapposite. TCI's "Headend in the Sky" is merely a transport and authorization service and does not affect the direct operator/programmer licensing relationship. HITS also must compete with alternative methods of performing the same services.

Certain rule changes, however, would facilitate DBS services and should be implemented. U.S. DBS operators should be permitted to provide international service. The Commission also should seek additional spectrum for domestic use and assist U.S. operators with acquiring the rights to use non-U.S. licensed space stations for domestic purposes.

To ensure prompt service, all parties (including existing permittees) must be required to complete satellite construction within four years of grant. The Commission

should actively monitor construction throughout the process and revoke authorizations in the absence of meaningful progress.

Scarce frequencies should be reserved for DBS service. Because of the strong demand for new service, DBS operators must not be allowed to waste up to fifty percent of satellite capacity for non-DBS services. The proposed rule would result in an irrational and inefficient use of spectrum, and should be rejected.

The Commission should maintain its east-west pairing scheme for the permittees at 61.5°W and reserve for them the channels at 148°W, which is the slot best suited for western half-CONUS service. This plan would promote the Commission's goal of maximizing the development of full-CONUS services, and enable other vacated western frequencies to be auctioned.

To ensure that all U.S. citizens receive the benefits of DBS services, all operators (including existing permittees) should be required to provide service to Alaska and Hawaii from technically feasible sites, just as ACC and TEMPO were prepared to do in a few months.

Finally, the Commission must expressly condition the outcome of any reallocation of the 110°W and 148°W frequencies on the appeals of the Advanced Order. Any payment by TEMPO or PRIMESTAR, or by any other bidder successful at auction, must be refundable, and construction by any other party must be undertaken subject to the outcome of the appeals.

II. IF THE COMMISSION HAD DILIGENTLY PROCESSED DBS APPLICATIONS, IMPLEMENTATION OF THE CONTINENTAL POLICY WOULD HAVE RESULTED IN PROMPT SERVICE AT 110°W, AVOIDING THE NEED FOR AUCTIONS.

The Commission seeks comment on its proposal to abandon the reallocation policy it established in Continental Satellite Corp.³ and to auction ACC's DBS spectrum. The Commission tentatively concludes that the scheme it adopted in Continental to avoid mutual exclusivity -- making pro rata allocations and encouraging the combination of assets among permittees -- has not resulted in service and therefore should be changed.⁴ As noted below, however, the Commission itself has frustrated the parties' efforts to explore and consummate beneficial arrangements through its failure to approve transactions that would expedite service and its protracted delays in processing routine applications and due diligence showings.

The Commission ironically abandons its former allocation policy only eleven days after rejecting a marketplace transaction that would have resulted in service next summer -- precisely through the means envisioned in Continental. Thus, by combining assets, TEMPO and ACC would have been able to launch a new service at 110°W that would have offered consumers the first competitive alternative to DIRECTV. Instead of approving the arrangement, which indisputably would have resulted in the speediest

³ 4 FCC Rcd 6292 (1989) ("Continental").

⁴ NPRM at ¶ 13.

provision of DBS service from 110°W, the Commission unjustifiably departed from the methodology of Continental at the very moment its policies were succeeding.

Moreover, few permittees were able to combine resources as proposed in Continental because of the delays in receiving orbital assignments. In Advanced, the Commission expressly recognized that "a permittee without specific assignments is in no position to negotiate with other permittees for joint or coordinated development of their systems."⁵ Yet, requests by permittees for the allocation of specific orbital assignments languished for years. Indeed, one permittee, Continental Satellite Corporation, waited five years for the Commission's staff to process its original due diligence showing, which was granted only one week before its permit expired.⁶ Other permittees, including ACC, TEMPO Satellite, Inc., Direct Broadcast Satellite Corporation, and DirectSat Corporation, endured delays of two to four years for their

⁵ Advanced Order at ¶ 58.

⁶ Continental Satellite Corp., DA 95-1733 (rel. Aug. 7, 1995). The staff stated, "[w]e rightfully require that our permittees proceed with due diligence. Our permittees are entitled to expect that we will do the same. In this instance, we have not. Indeed we may have delayed through inaction [Continental's] progress towards the construction of its system." Id. at ¶ 2.

final orbital allocations.⁷ As a result, only one permittee, DirectSat, was successful in combining its channels with another permittee to create a viable system.⁸

Negotiations among the parties also were stalled by the delays in resolving the dispute over Dominion Video Satellite, Inc.'s ("Dominion") original allocation at 119°W following its cancellation in 1991. Indeed, Dominion's last petition for reconsideration was decided only after the filing of a writ of mandamus with the court of appeals, and even then, a decision disposing of the petition was not issued until almost two months after expiration of most the other parties' permits.⁹ As a result, the uncertainty of the allocations at 119°W, one of the three full-CONUS orbital slots, significantly frustrated the parties' ability to combine resources as intended by Continental. Dominion's delay (and Commission inaction) created a "prejudicial log jam" that "prevented any other DBS permittee behind Dominion in the queue from receiving its orbital/channels assignments and proceeding toward delivery of DBS service."¹⁰

⁷ Advanced Communications Corp., 6 FCC Rcd 2269, recon. denied, 6 FCC Rcd 6977 (1991); TEMPO Satellite, Inc., 7 FCC Rcd 6597 (1992); Direct Broadcast Satellite Corp., 8 FCC Rcd 7959 (1993); Directsat Corp., 8 FCC Rcd 7962 (1993).

⁸ See Application to Approve Merger of Directsat Corporation and EchoStar Communications Corporation, DBS-88-01/88-02/94-08TCP/M, Filed April 7, 1994, at Exhibit No. 1; Directsat Corp., 10 FCC Rcd 89 (1995).

⁹ Dominion Video Satellite, Inc., FCC 95-421 (rel. Oct. 5, 1995) ("Dominion II").

¹⁰ Dominion II at ¶ 13.

In view of years of delay, the Commission had little choice but to conclude that auctions present the best opportunity to reassign expeditiously ACC's channels. Should the Commission therefore proceed with auctions, TEMPO supports the comments of PRIMESTAR with respect to the proposed rules governing the conduct of auctions. Any auction award, however, must be expressly conditioned upon the outcome of the appeals of the Advanced Order. TEMPO offers the following comments with respect to the DBS service rules.

III. THERE IS NO ECONOMIC OR EMPIRICAL BASIS FOR FCC RE-EXAMINATION OF PRIOR DECISIONS REJECTING A DBS-CABLE CROSS-OWNERSHIP RULE OR FOR EXTENSION OF OUTMODED CONDUCT RULES TO CABLE-AFFILIATED DBS OPERATORS.

The Commission should not change its sound policy permitting cable-affiliated firms to compete freely in the DBS business. The NPRM notes that in the past the Commission has declined to adopt a cable/DBS cross-ownership ban upon finding that the alleged competitive concerns were not sufficient to bar cable operators' entry into DBS.¹¹ But the NPRM nonetheless proposes to "revisit the extent to which cable operators may hold DBS permits or make use of DBS facilities," tentatively deciding to maintain the balance struck in Tempo II, which permitted TCI's entry subject to certain conduct rules.¹² TEMPO submits that nothing has changed since the FCC's prior

¹¹ NPRM at ¶ 36 n.69 (citing Continental, 4 FCC Rcd at 6299).

¹² Id. at ¶ 38.

decision that would warrant reconsideration of Tempo II. To the contrary, the MVPD market in which DBS operators compete has become, and will continue to grow, increasingly competitive, reducing any need for an ownership restriction. In this regard, TEMPO concurs with Commissioner Chong that the best way to ensure "vibrant competition" in the DBS industry is through "minimal governmental intervention."¹³

If the FCC nonetheless subjects cable-affiliated DBS operators to an orbital slot (or spectrum aggregation) limit, however, competitive equity dictates that the same restrictions be applied to unaffiliated firms. In this fashion, the FCC will ensure that scarce DBS resources are used to produce fully competitive DBS firms, rather than a separate class of operators capable of providing the public with only inferior price and service offerings.

In any event, it is wholly inappropriate to extend, as the NPRM proposes, the duration and scope of the terms of the PRIMESTAR state and federal consent decrees. The conduct rules of the consent decrees were negotiated long before the launch and DBS industry domination of DIRECTV and USSB. Imposition of these rules would handicap, completely without justification, the efforts of MVPD-affiliated DBS operators to compete effectively in the DBS arena. Finally, the NPRM's proposal to regulate the "wholesale distribution of programming" is entirely unnecessary. Neither TEMPO nor PRIMESTAR intends to wholesale programming. Indeed, TEMPO

¹³ Id., Separate Statement of Commissioner Rachelle B. Chong.

believes that no DBS operator could, even if it so desired, offer programming on a wholesale basis given programmers' inviolate control over the distribution of their product. Accordingly, there is no need for the FCC to adopt rules.

A. Consistent With Previous Congressional and FCC Decisions, Economic Analysis Confirms that a Cross-Ownership Ban is Unwarranted.

Congress and the FCC have both exhaustively examined the issue of cable-affiliated firms participating in the DBS business before and properly concluded that no restrictions are required. In approving TEMPO Satellite, Inc.'s entry into the DBS business in 1992, the Commission found that its entry would produce significant public interest benefits and the growth of the DBS industry.¹⁴ These findings favoring entry by a cable-affiliated firm have been empirically confirmed by PRIMESTAR's rapid growth, tremendous investment in the DBS business, and struggle to provide promptly competitive high-power DBS service to the public. Like the Commission, Congress considered and rejected as unjustified cable/DBS cross-ownership rules. Given the developing nature of the DBS industry, the Conference Committee in 1992 expressly declined to adopt a Senate provision calling for FCC enactment of cross-ownership regulations when ten percent of television households subscribe to direct-to-home satellite services.¹⁵

¹⁴ Continental Satellite Corporation, 4 FCC Rcd at 6229.

¹⁵ Conference Report on S.12, Cable Television Consumer Protection and
(continued...)

Nothing has changed since these determinations not to adopt a ban on the participation of cable-affiliated firms in the DBS business. To the contrary, the dynamic growth of the MVPD market indicates that such restrictions are even less appropriate today. Significantly, the purported "competitive concerns" that serve as the basis for the NPRM's structural and conduct proposals have been discredited by sound economic analysis.¹⁶ The NPRM recounts opponents' arguments against the proposed ACC-TEMPO assignment, even while it appears to recognize the allegations' lack of merit. Fearing the increased competition that would be brought to the market by a fully competitive PRIMESTAR, opponents of the assignment have argued that: (1) a cable-affiliated DBS operator cannot be expected to compete vigorously with cable systems; and (2) an affiliated DBS operator would have the incentive and ability to engage in anticompetitive conduct, such as predatory pricing, that would harm other DBS providers.¹⁷

These speculative and contradictory claims have been soundly refuted by the expert economic analysis of Dr. Bruce Owen in the extensive record developed in the ACC/TEMPO proceeding. Indeed, Dr. Owen's analysis -- which he has reaffirmed for

¹⁵(...continued)
Competition Act, 102d Cong., 2d Sess., 138 Cong. Rec. H8329 (Daily ed. Sept. 14, 1992).

¹⁶ See generally Declaration of Dr. Bruce Owen dated November 22, 1994 ("November 1994 Owen Declaration"); Supplemental Declaration of Dr. Bruce Owen dated January 3, 1995 ("January 1995 Owen Declaration"); Declaration of Dr. Bruce Owen dated November 20, 1995 ("November 1995 Owen Declaration").

¹⁷ NPRM at ¶ 35 (citing Oppositions of DIRECTV, USSB, and MCI).

purposes of this rulemaking -- specifically concluded that: (1) PRIMESTAR (and by implication any cable-affiliated DBS operator) will have the incentive to promote vigorously its DBS service everywhere and could not, even if it so desired, "stifle" DBS;¹⁸ and (2) "it is virtually impossible" that TCI, PRIMESTAR or any other cable-affiliated DBS operator "could profitably engage in anticompetitive or predatory pricing."¹⁹

As the NPRM appears to recognize but nonetheless overlooks, the presence of DBS competitors DIRECTV and USSB -- in addition to an ever growing array of new MVPD competitors -- ensures that TEMPO and PRIMESTAR and any other cable-affiliated DBS operator will have strong incentives to promote their services everywhere, without regard to their investment in cable systems.²⁰ Indeed, if cable-affiliated DBS operators failed to compete aggressively, they would simply cede market share to DIRECTV, USSB and other MVPDs, while failing to prevent any erosion of cable's market share.²¹ This fact alone demonstrates that competitors' "incentives" claims are without merit: because they would stand to benefit if PRIMESTAR failed to compete aggressively, competitors' strenuous objections to the entry of PRIMESTAR

¹⁸ November 1994 Owen Declaration at ¶¶ 18-19; November 1995 Owen Declaration at ¶ 4.

¹⁹ November 1994 Owen Declaration at ¶ 25; November 1995 Owen Declaration at ¶ 4.

²⁰ November 1994 Owen Declaration at ¶ 19.

²¹ Id.

into the full-power DBS business should be disregarded as transparent attempts to shield themselves from vigorous competition.

The economic analysis also confirms that claims of predatory pricing and similar anticompetitive actions on the part of TCI or PRIMESTAR have not been, and indeed cannot be, supported. As a threshold matter, and contrary to the suggestion of the NPRM (at ¶ 61), a DBS operator's ability to lower the price of its service based on its attainment of cost advantages is pro-competitive and pro-consumer. Hence, any regulatory action premised on the threat of such actions is clearly in error. In any event, the cost structure of the DBS business effectively precludes any DBS operator from successfully engaging in predatory pricing. An operator simply could not price below its cost for the long period required to drive out of the market competitors with significant sunk costs, but very low variable costs. Further, the lack of barriers to entry into the MVPD market now and in the future make recoupment of lost profits through supracompetitive prices impossible.²² Hence, allegations of predatory pricing are baseless.

Given the careful economic analysis in the record of this proceeding, FCC adoption of a cross-ownership ban would constitute arbitrary decision-making. Thus, in Cincinnati Bell Tel. Co. et al. v. FCC, the U.S. Court of Appeals for the Sixth Circuit recently remanded to the Commission a decision to enact a cross-ownership

²² November 1994 Owen Declaration at ¶¶ 25-26.

restriction between cellular and personal communications service spectrum because the
FCC:

provided little or no support for its assertions that [c]ellular providers, released from all regulatory shackles and given free reign to roam the wireless communications landscape, might engage in anticompetitive behavior or exert undue market power through, for example, predatory pricing schemes.²³

As in Cincinnati Bell, the record in this proceeding, while inflated with assertions, is short on hard economic or empirical support for those assertions. Accordingly, the Commission has no grounds to reverse its decision in Tempo II to permit cable-affiliated firms to participate in DBS.²⁴

If the Commission nonetheless adopts any spectrum aggregation rule -- whether it pertains to orbital location or channel assignments -- it is imperative that it extend the rule to *all* DBS operators, not just those affiliated with non-DBS MVPDs. Given the Commission's repeated acknowledgment that the DBS industry operates within the economic constraints of the larger MVPD market, a rule that applies only to non-DBS MVPDs clearly is irrational.²⁵ The Commission's stated concern is that DBS

²³ Cincinnati Bell Tel. Co. et al. v. FCC (Civ. Nos. 94-3701/4113; 95-3023/3238/3315) (rel. Nov. 9, 1995) slip op. at 18.

²⁴ There similarly is no justification to prohibit a non-DBS affiliated MVPD from ownership of full-CONUS frequencies.

²⁵ The comments in the ACC/TEMPO proceeding clearly demonstrated that the relevant "market" for purposes of a competitive analysis is the entire MVPD market. See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 9 FCC Rcd 7442, 7467 (1994); "Consolidated Opposition of TEMPO DBS, Inc.," filed Nov. 23, 1994 at 35-38 (citing November 1994 Owen

(continued...)

operators might adversely affect competition through concentration of control of DBS channels at multiple orbital locations. If the proposed rule is to address this concern in a non-arbitrary fashion, it must -- if adopted at all -- include non-affiliated DBS operations within its scope. Otherwise, non-affiliated firms would be free to concentrate control of channels through multiple orbital locations, in contravention of the NPRM's goal.²⁶ In this regard, TEMPO notes that the NPRM does not allege, nor is there evidence indicating, that control of channels at multiple orbital slots is a concern unique to MVPD-affiliated DBS operators.²⁷

- B. If Orbital and Spectrum Limitations Are Adopted, the Commission Should Not Impose the Overly Restrictive Attribution and Divestiture Standards Proposed in the NPRM.

If, despite the lack of economic or public policy rationale, the Commission nevertheless adopts orbital and channel caps, TEMPO strongly urges it to provide DBS

²⁵(...continued)

Declaration at ¶¶ 11-13); Declaration of Jerry A. Hausman, dated Dec. 15, 1994, ¶¶ 10-11, attached to "Consolidated Reply of DIRECTV, Inc.," filed Dec. 16, 1994; "Consolidated Reply of EchoStar Satellite Corporation," filed Dec. 16, 1994, at 15-16.

²⁶ The NPRM proposes to include the 61.5°W orbital location as capable of full-CONUS service for purposes of the spectrum limitation. As discussed *infra* in Section VII, TEMPO believes that full-CONUS service would be competitively and technically disadvantaged from 61.5°W and that this orbital location should, therefore, be paired with the 148°W slot.

²⁷ Furthermore, by impeding the capacity of cable-affiliated DBS operators to compete on an equal basis with non-affiliated firms, the proposed rule would create a separate and weaker class of DBS providers. These operators would be precluded from attaining possible cost economies that could translate into lower prices to consumers and better service. Clearly, such a result would not serve the public interest.

operators a more realistic and fair period of time in which to divest themselves of channels in excess of the cap. Use of a 90-day divestiture period, arguably suitable for the cellular/PCS industry, is inappropriate for DBS because it fails to recognize the unique circumstances in which the industry operates, which warrant a period comparable to the 18 months often permitted in the broadcast industry. Also, TEMPO believes that attribution rules for the proposed limits are not necessary and that a legal and de facto control test is sufficient to give force to any spectrum limits without impairing DBS operators' access to capital.

1. Any FCC-Imposed Time Period for Divestiture of Channels in Excess of the Cap Should Be Based on Broadcast Rather than PCS Precedent.

TEMPO strongly opposes the NPRM's proposed divestiture rule, which would require a permittee or licensee that acquires control over channels in excess of the proposed spectrum limitations within 90 days to either surrender to the FCC its "excess" channels or file for FCC consent to transfer or assign such channels.²⁸ As Commissioner Barrett commented in dissent from the NPRM, 90 days is a woefully inadequate period of time in which to complete the process of divestiture and could lead to "fire sales."²⁹ This needlessly stringent time frame would place permittees and licensees in an untenable position as they attempted to negotiate for the sale of

²⁸ NPRM at ¶ 43.

²⁹ NPRM, Statement of Commissioner Barrett at 2.

channels (acquired at great cost or retained at considerable expense under the due diligence requirements) to avoid their automatic reversion to the Commission. Further, a 90-day divestiture rule would complicate considerably, and even retard, the ability of permittees and licensees to consolidate their channel assignments in accordance with market forces or rules adopted in this proceeding.

The NPRM's nominal rationale for the 90-day period is that it "is consistent with the divestiture period established in other services."³⁰ But the FCC's selection of the PCS rules as a model for DBS, a mass medium, is dubious at best: the cellular spectrum that a PCS licensee divests is more easily sold given the relative maturity and stability of the cellular industry, the ability of carriers easily to incorporate incremental blocks of spectrum into their operations, and the pent up demand for spectrum caused by the duopoly licensing scheme. In contrast, the DBS industry is still rapidly evolving and the marketability of channel assignments depends on firms' relative orbital locations and the market-based need to attain "critical mass."

Given the constraints unique to the DBS industry, a more logical service from which to borrow a divestiture time period is broadcasting. The Commission has on multiple occasions determined that holding broadcast licenses in excess of limits permitted by the multiple ownership rules for periods up to eighteen months is

³⁰ NPRM at ¶ 43.

consistent with the public interest.³¹ Use of a similar time period for DBS, also a medium of mass communication, would ensure that any divestiture takes place in an orderly manner.

2. **The Commission Should Use Only a Legal or De Facto Control Test to Enforce Any Spectrum Aggregation Rules.**

While the FCC has a legitimate interest in ensuring the integrity of any spectrum aggregation limits that it adopts, TEMPO believes that a legal or de facto control test is sufficient to enforce such rules. As the NPRM acknowledges, a control test -- encompassing equity control, general partnership interests, and actual working control of a licensee -- can be easily and certainly administered given the FCC's substantial body of precedent.³² Moreover, because the DBS industry is just now emerging into an MVPD market that is very dynamic and increasingly competitive, an inflexible approach to attribution would block access by DBS providers to the large sums of capital needed to grow their businesses.

The NPRM offers absolutely no explanation for its needlessly stringent proposed attribution rules. Indeed, the proposals bear no relationship to the NPRM's professed goal of limiting the power of a single entity to control a number of permittees such that

³¹ See, e.g., Stauffer Communications, Inc., 10 FCC Rcd 5165 (1995); Viacom, Inc., 9 FCC Rcd 1577 (1994); Midwest Communications, Inc., 7 FCC Rcd 159 (1991); Storer Communications, Inc., 59 R.R.2d 611 (1988).

³² See NPRM at ¶ 48.

competition would be threatened. For example, the NPRM fails to explain how a non-voting interest of five percent or an insulated limited partnership interest would afford an entity any measure of actual control over a permittee. This failure is especially suspect in light of the Sixth Circuit's analysis in Cincinnati Bell Tel. Co. et al. v. FCC, which put the Commission on notice that attribution rules without support in the record are arbitrary and will be remanded to the Commission.³³ Accordingly, TEMPO believes that the Commission should adopt a legal or de facto control test to determine whether interests should be aggregated.³⁴

C. **No Legitimate Grounds Exist for the FCC to Extend Reflexively the Duration and Scope of Competitive Conduct Rules in the PRIMESTAR Consent Decrees.**

The NPRM's proposal to memorialize in the Commission's rules a grab bag of conduct restrictions evidently based on the federal and state PRIMESTAR consent decrees would stunt the development of the DBS industry and the ability of cable-affiliated operators to compete aggressively. As with the proposed structural regulations, the economic justification for extending the reach of existing narrow conduct rules is slim at best. In support of its proposal, the NPRM cites, without any

³³ Cincinnati Bell, slip op. at 7-14 (striking down the Commission's twenty percent cellular attribution standard as arbitrary because it did not bear any relationship to the ability of an entity with a minority interest in a cellular licensee to obtain a PCS license and then engage in anticompetitive behavior).

³⁴ See id., slip op. at 13 (faulting the FCC for not explaining why less restrictive attribution rules were inadequate).

accompanying economic analysis, various concerns, which merely echo the allegations raised by TEMPO's potential DBS competitors in the ACC proceeding, that a DBS operator might seek to maximize the joint profits of its DBS and other MVPD operations in areas served by both facilities.³⁵ Given the nationwide presence of alternative MVPDs such as DIRECTV and USSB, however, an affiliated DBS operator simply cannot afford not to compete fully. The Commission's concern that firms make "the fullest use" of their DBS channels is thus best achieved through unfettered operation of the MVPD market, rather than pell mell extension of consent decree terms. In any event, the antitrust laws are available to address the Commission's concerns, to the extent the concerns have any basis in fact.

Moreover, the NPRM fails to note that "exclusive marketing" has already been considered by the state attorneys general and addressed in the consent decree.³⁶ This narrowly tailored decree was entered into after careful analysis of the relevant issues and, by its terms, expires on October 1, 1997.³⁷ This expiration date reflects that conduct restrictions are not properly extended indefinitely into the future. Reflexive adoption of new rules is particularly inappropriate in a technologically dynamic industry like DBS. Hence, FCC action to extend the terms of the decree now, at a time when two DBS operators with no cable affiliation dominate the DBS industry (and

³⁵ NPRM at ¶ 55.

³⁶ See State of New York ex rel. Abrams v. Primestar Partners, L.P., Trade Regulation Reports ¶ 70, 483 (Nov. 16, 1993) at IV.I.4.

³⁷ Id. at § IX.

a third is anticipated), would be utterly bereft of any empirical foundation. Nor is there a solid theoretical underpinning for the proposed action. The NPRM simply recites only the FCC's unexamined belief -- at odds with economic analysis as set forth above -- that increased regulation will promote competition to MVPDs affiliated with DBS operators or that receive "wholesale DBS service."³⁸ However, if the Commission nevertheless imposes restrictions on distribution exclusivity, the rules adopted must rationally be applicable to all DBS operators, and not just to non-DBS MVPDs.

For similar reasons, TEMPO believes that the conditions imposed on TCI and TEMPO Satellite in the Tempo II decision were not warranted at the time and are even less defensible today in light of the new competitors and modes of entry into the MVPD market. As a matter of competitive equity, however, TEMPO does not oppose the proposal to extend these conditions, to the extent they are maintained, in an even handed manner to all other DBS operators affiliated with non-DBS MVPDs.

Finally, TEMPO submits that FCC extension of its program access rules to cable-affiliated DBS operators is not necessary given the reach of the existing program access rules and the PRIMESTAR state and federal consent decrees. Drawing on the discredited claims of competitors that TCI or PRIMESTAR have the hypothetical ability to "vertically foreclose" access to programming, the NPRM seeks comment on

³⁸ NPRM at ¶ 56. As discussed *infra* at Section II.D, the Commission is mistaken in its evident belief that TCI intends to offer "wholesale programming."

whether the Commission's program access or program carriage rules adequately address this concern.³⁹ At the outset, however, TEMPO questions the need for the FCC to revisit these rules at this juncture, particularly as the issue has little, if any, effect on the marketability of DBS spectrum at auction. The proposed program access rules are particularly inappropriate given that cable-affiliated firms now provide direct-to-home service through PRIMESTAR, yet no evidence of specific harm has been, or could be, alleged by competitors.

The existing program access rules permit MVPDs, including DBS operators, to obtain access to cable-affiliated programming on nondiscriminatory terms. Similarly, the PRIMESTAR state consent decree prevents any PRIMESTAR partner from entering into or enforcing any exclusive programming contract against any Ku band DBS provider.⁴⁰ In addition, the PRIMESTAR federal consent decree generally prohibits the PRIMESTAR partners from restricting the availability of programming to competitors of their cable systems.⁴¹ Furthermore, there is no evidence of complaints from unaffiliated programmers that PRIMESTAR or its partners have attempted to

³⁹ NPRM at ¶ 60.

⁴⁰ See State of New York ex rel. Abrams v. Primestar Partners, L.P., Trade Regulation Reports ¶ 70, 483 (Nov. 16, 1993) at IV.C.1, IV.C.2. Section IV.A.1(g) of the decree provides for a narrow exception to this rule, which allows the continuation of an exclusive distribution agreement for HBO between Time Warner and USSB.

⁴¹ United States v. Primestar Partners L.P., et al. (Civ. Action 93-3913) (S.D.N.Y.) (Competitive Impact Statement (June 9, 1993) at 13).