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

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

**COMMENTS OF ECHOSTAR SATELLITE CORPORATION**
**AND DIRECTSAT CORPORATION**

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**SUMMARY**

EchoStar Satellite Corporation ("EchoStar") and Directsat Corporation ("Directsat") hereby file their joint comments on the proposals contained in the Notice of Proposed Rulemaking ("NPRM") released by the Commission in the above-captioned proceeding. Many of the Commission's proposals deserve unqualified support, while others at least appear to be steps in the right direction. At the same time, largely because of the enormity of the task and the remarkably short deadline imposed on the staff, the NPRM appears to give short shrift to significant rights and equitable interests of the incumbent DBS permittees whose applications are still being processed in the current DBS processing round. The NPRM proposes to disregard these rights by opening the current processing round to new-comers and then auctioning off the recently canceled channels of Advanced Communications Corporation ("Advanced"). Such a disregard of the rights of applicants is unprecedented and runs afoul of the well-established enforcement of the cut-off rule by the Commission and the courts.

The NPRM also gives short shrift to the reliance of incumbent DBS permittees like EchoStar and Directsat on the Commission's Continental decision, which unequivocally

established their right to receive additional channels upon the cancellation of other DBS permits. This disregard of permittees' rights is inconsistent with the Commission's treatment of pre-auction incumbents and violates the takings and due process clauses of the Fifth Amendment.

In the MDS proceeding, the Commission held that it would be unfair to require auctions for applicants that had filed their applications prior to the time that the Commission was given auction authority because those applicants had relied on the expectation that the Commission would apply certain pre-auction methods for resolving mutual exclusivity. DBS permittees have relied not only on an expectation that a pre-auction method for resolving mutual exclusivity would be applied to them, but also on the rights given by the Commission pursuant to Continental. It is neither lawful nor reasonable to ignore these equitable interests while honoring those of other pre-auction applicants. Such disparate treatment would violate the Supreme Court's decision in Jim Beam, whereunder a new rule must be applied in the same way to similarly situated entities.

The proposed elimination of EchoStar's and Directsat's Continental rights would also deprive incumbent DBS permittees of protected property rights in violation of the due process clause of the Constitution and would thoroughly and pervasively take

without compensation EchoStar's and Directsat's right to additional channels protected by the Fifth Amendment. The elimination of the Continental right would similarly expropriate the huge investment made by EchoStar and Directsat in their satellites in reliance upon that right.

Further, the NPRM does not reflect an effort by the Commission to explore alternative means for resolving mutual exclusivity prior to resorting to auctions as required by the 1993 Omnibus Budget Reconciliation Act. In fact, the intelligent application of Continental would resolve mutual exclusivity in the current processing round and ensure a fuller utilization of the DBS spectrum resource in a much shorter time frame than would the Commission's auction proposal. EchoStar and Directsat here set forth one scenario for assigning additional channels that would satisfy the Continental rights of incumbent permittees and result in the full and efficient utilization of all four eastern orbital locations. Conversely, an auction would perpetuate and indeed worsen the fragmentation of the DBS spectrum, leave valuable DBS spectrum fallow and inhibit the provision of viable DBS service to the public.

Accordingly, the Commission can and should resolve mutual exclusivity and avoid the concerns with fragmentation and delay cited in the NPRM by adopting the non-auction method

suggested in these comments. The Commission should afford Continental round permittees the opportunity to negotiate alternative methods for reassigning the Advanced channels consistent with Continental and then act following those discussions. Such a discussion would help identify and refine the various options available to the Commission for resolving mutual exclusivity as required by the Act.

EchoStar and Directsat share the Commission's desire to prevent anti-competitive concentrations and conduct with respect to the provision of DBS service. However, whereas the NPRM proceeds from an entirely justified concern with anti-competitive behavior by dominant distributors of multi-channel programming, it sweeps too broadly by proposing spectrum caps on all DBS providers, whether or not they have market power in the relevant market. Absent market power, such indiscriminate caps would dictate the structure of the market and second-guess market forces, rather than leaving the competitive market to determine that structure. Thus, EchoStar and Directsat support spectrum caps only for DBS providers that have market power in the relevant market or that are affiliated with market dominant entities. As for aggregations involving other DBS permittees, the Commission should evaluate their competitive consequences on a case-by-case basis. In any event, the

Commission should not include the 61.5° W.L. DBS slot in any spectrum cap analysis since that orbital location is not a full-CONUS slot.

Even more important than the structural safeguards proposed by the Commission, are appropriate restrictions on anti-competitive conduct. EchoStar and Directsat agree with the Commission's concerns about pernicious conduct affecting programming availability for all DBS service providers and urge it to impose needed restrictions to ensure a competitive marketplace. Deferring action for a future rulemaking could irreparably harm DBS operators not affiliated with cable television operators or programmers.

Plainly, the existing program access rules are incapable of stopping discriminatory conduct by cable operators and programmers against DBS providers. EchoStar and Directsat provide concrete examples of anti-competitive practices which can be implemented despite the rules, and submit that such behavior can only be curbed by means of the following restrictions: (1) the prohibition on discriminatory pricing of programming should apply to all programmers, whether affiliated with a cable operator or not; and (2) programmers should not be allowed to invoke cost differentials or economies of scale that in fact do

not exist, but rather should bear the burden of proving that such savings exist.

EchoStar and Directsat also share the Commission's concern with vertical foreclosure in the area of wholesale distribution of programming to cable systems and other terrestrial MVPDs. Both EchoStar and Directsat are intensely interested in providing wholesale services. However, they will be incapable of competing on a level playing field unless the Commission compels cable systems to choose their wholesale provider on the basis of efficiency rather than affiliation, and unless contracts between programmers and independent DBS operators impose no more restrictions on HITS-type services than contracts with cable-affiliated operators.

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EchoStar Satellite Corporation ("EchoStar") and DirectSat Corporation ("") hereby file their joint comments on the Notice of Proposed Rulemaking ("NPRM") released by the Commission in the above-captioned proceeding. The NPRM reflects a considerable effort by the Commission to revisit licensing, conduct and service rules for the Direct Broadcast Satellite ("DBS") service that, after a decade of pioneering efforts by bold entrepreneurs such as EchoStar and DirectSat, is beginning to mature and return substantial benefits for the public.

Many of the Commission's proposals deserve unqualified support, while others at least appear to be steps in the right direction. At the same time, largely because of the enormity of the task and the remarkably short deadline the Commission has

imposed on its staff, the NPRM appears to give short shrift to significant rights and equitable interests of the incumbent DBS permittees whose applications are still being processed in the current processing round. EchoStar and DirectSat urge the Commission to pause and reconsider some of the tentative decisions set forth in the NPRM, in particular those relating to the reassignment of the Advanced channels and spectrum caps for DBS permittees.

## I. THE COMMISSION SHOULD NOT REOPEN THE CURRENT DBS PROCESSING ROUND AND ACCEPT NEW APPLICATIONS

### A. The DBS Processing Round Established In 1988 Is Still Open.

The Commission's Rules provide that each application for a DBS system will be placed on public notice, and that "[a] 45 day cut-off period shall also be established for the filing of applications to be considered in conjunction with the original application." 47 C.F.R. § 100.15(b). The Commission's Rules further provide that applications filed before the cut-off date shall be considered to have equal priority with the original application and shall be considered together in the assignment of frequencies and orbital positions. Id.

The current DBS processing round was opened by the Commission's February 23, 1988 Public Notice accepting for filing

the DBS system applications of EchoStar and Continental Satellite Corporation ("Continental"). See Report No. DBS-5A (rel. Feb. 3, 1988). This Public Notice set April 8, 1988 at the cut-off date beyond which no further applications would be considered with the same priority. In response to the Notice, the Commission received additional applications from , Tempo Satellite, Inc. ("Tempo"), Direct Broadcast Satellite Corporation ("DBSC"), Advanced Communications Corporation ("Advanced"), United States Satellite Broadcasting Company, Inc. ("USSB") and Hughes Communications Galaxy, Inc. ("Hughes").

The Commission has not fully disposed of the applications in this 1988 processing round. EchoStar and each applied for two satellites utilizing 16 eastern and 16 western channels. Continental applied for a three-satellite system using 24 eastern and 16 western channels. Tempo applied for two satellites using 16 eastern and 16 western channels. The Commission held that while all of these applicants were fully qualified, the available channels and orbital locations were not sufficient to satisfy the orbit/spectrum requests in the applications. Continental Satellite Corp., 4 FCC Rcd. 6292, 6299 (1989). In order to avoid mutual exclusivity and lengthy comparative hearings, the Commission chose instead: (1) to partially grant all of the applications for as many channels as

could be accommodated on a proportionate basis; and (2) to give these applicants the right to receive additional channels, up to the number requested in their applications, upon the cancellation of any permits.[1/] To date, the Commission has not reallocated any channels among the incumbent permittees. Thus, the Commission's two-stage approach for avoiding mutual exclusivity has not been completed. Until this second step is consummated, the Continental processing round has not closed, and persons who did not file DBS applications by the 1988 cut-off date cannot be given the same status as those applicants that submitted their applications in a timely manner.

### B. The Commission Should Apply Its Cut-Off Rule And Not Accept New DBS Applications Until All Previously Filed Applications Are Completely Processed

The Commission and the courts take cut-off dates seriously and enforce them strictly. The courts have held that one of the key functions of the cut-off rules is to grant timely-filed applicants "protected status" against late-comers. Thus, in City of Angels Broadcasting, Inc. v. FCC, 745 F.2d 656,

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[1/] When granting eastern channels to EchoStar in 1992, the Commission reconfirmed that the Continental round permittees "'will have the first right to additional allocations, apportioned equally up to the number requested in their applications.'" EchoStar Satellite Corp., 7 FCC Rcd. 1765, 1772 (1992) (citation omitted).

663 (D.C. Cir. 1984), the D.C. Circuit stated that the Commission's cut-off rules serve two purposes:

> First, it advances the interest of administrative finality ... . Second, it aids timely broadcast applicants by granting them a 'protected status' that allows them to prepare for what often will be an expensive and time-consuming contest, fully aware of the competitors they will be facing .... [T]he cut-off rule is designed to permit [the Commission] to close the door to new parties so that a choice can be made between timely filed applicants, thereby giving timely filed applicants protection against opportunistic late-comers. (citations omitted)[2/]

It is a well-settled axiom of administrative law that agencies should follow their own rules. See Service v. Dulles, 354 U.S. 363, 388 (1957). Both the courts and the Commission have uniformly held that the Commission may not deviate from its cut-off rules except in the most extraordinary circumstances.[3/]

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[2/] Id. at 663 (citations omitted). See also RKO General, Inc., 89 F.C.C.2d 297, 320 (1982) (in denying request to waive the cut-off rule 14 years after the commencement of the proceedings, the Commission stated that the "cut-off rules c[an] be read as according timely filed applications 'protected status' against any late-comers"). RKO General, Inc., 94 F.C.C.2d 879, 883 (1983) ("an applicant in an adjudicatory proceeding is entitled to a final Commission decision on the merits of its application without consideration of belated challengers").

[3/] See In re Application of Cook, Inc., Memorandum Opinion and Order, 10 FCC Rcd. 160, 161 (1967), appeal dismissed sub nom., Cook, Inc. v. United States, 394 F.2d 84 (7th Cir. 1968) ("[I]t is precisely for the protection of the public interest that the Commission cannot waive its filing rules upon the mere allegation

(continued ...)

In Reuters Limited v. FCC, 781 F.2d 946 (D.C. Cir. 1986), the Commission had deviated from its cut-off rules to accept a misfiled application. In reversing, the D.C. Circuit held:

> [I]t is elementary that an agency must adhere to its own rules and regulations. Ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned, for therein lie the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administrative action. Simply stated, rules are rules and fidelity to the rules which have been properly promulgated, consistent with applicable statutory requirements is required of those to whom Congress has entrusted the regulatory missions of modern life.

Id. at 950-51 (citations omitted).

In denying requests for waiver of the cut-off rule, the Commission has recognized the expense incurred by timely applicants in reliance on the rule. In light of the extensive prehearing preparations and considerable amounts of time and

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3/ (... continued)
of mitigating circumstances. As a procedural obstacle to be complied with, the cut-off rule may indeed seem harsh to tardy applicants, but, for purposes of uniform procedure and impartial treatment, it cannot be waived with each varying fact situation .... Waiver of the rule upon allegations of mitigating circumstances would soon negate all attempts to establish finality in Commission processing procedures."); Bronco Broadcasting Co., 50 F.C.C.2d 529, 533 (1974) ("cut-off procedures are observed in all cases except where unusual and compelling circumstances require otherwise"); Prairie Broadcasting Co., 47 F.C.C.2d 373, 377 (1974) ("cut-off dates prescribed by the rule will be observed in all cases except when unusual and compelling circumstances").

money expended by these applicants, it would be unfair to subject them to the additional burden of facing one more contender at a late date after having made these expenditures in reliance on the cut-off rule limiting the number of applications. Howard Univ., 23 F.C.C.2d 714, 716 (1970).

Thus, the Commission has waived its cut-off rules only in rare circumstances that are not present here: where an applicant has filed a timely request for the waiver of the cut-off date, Denton Channel Two Found., Inc., 85 F.C.C.2d 983, 984 (1981); where the public notice for the cut-off was defective, see Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551, 1560 (D.C. Cir. 1987), Way of Life Television Network, Inc. v. FCC, 593 F.2d 1356 (D.C. Cir. 1979), Salzer v. FCC, 778 F.2d 869, 875 (D.C. Cir. 1985), Ridge Radio Corp. v. FCC, 292 F.2d 770 (D.C. Cir. 1961); where the Commission has failed to follow its own precedent or that precedent is unclear, see Green Country Mobilephone, Inc. v. FCC, 765 F.2d 235 (D.C. Cir. 1985), Radio Athens, Inc., (WATH) v. FCC, 401 F.2d 398 (D.C. Cir. 1968), Dudley Station Corp., 18 F.C.C.2d 898 (1969); where an act of God has prevented a party from filing, Emerald Broadcasting Co., 8 F.C.C.2d 443 (1967), Fidelity Broadcasting Corp., 26 F.C.C.2d 93 (1970); where an inexperienced but diligent public interest group missed the cut-off date trying to determine which channels to

apply for, Alabama Citizens for Responsive Pub. Television, 53 F.C.C.2d 457 (1975); or where the prospective assignee of a financially strapped radio station was allowed an additional 60 days to apply for a license, see Southeast Texas Broadcasting Co., 5 F.C.C.2d 596 (1966). In any event, the rules should not be waived unless "the untimely applicant has demonstrated that it acted with reasonable diligence and thus that its tardiness was attributable to circumstances beyond its control." Florida Inst. of Technology, 952 F.2d 547, 553 (D.C. Cir. 1992) (citations omitted).

None of these circumstances or prerequisites to a waiver is met or even alleged by the Commission or a party. The only late-comer that has declared its interest -- MCI -- has never proffered any reason why it was unable to file an application by the cut-off date. Rather, MCI has apparently decided that, in light of the spectacular success of the first DBS system launched in 1994, it too wants to apply for a DBS system a full 7 years after the 1988 cut-off date. The Commission and the courts have consistently refused to waive the cut-off rule to accommodate such belated opportunistic requests. See City of Angels, 745 F.2d at 663 (court upheld Commission denial of application filed 14 years after cut-off date); RKO, 89

F.C.C.2d at 320 (Commission denied cut-off waiver request filed 14 years after the commencement of the proceedings).

Indeed, the equities present here militate in favor of strict enforcement of the DBS cut-off rule, and against any deviation from it. The applicants in the 1988 processing round not only filed their applications in a timely manner, they also have relied on the fact that the Commission has already chosen a method for resolving mutual exclusivity among their competing interests. More importantly, as will be shown below, many of these applicants have relied on the fact that, pursuant to the assignment method chosen by the Commission, they have been given an express right to receive additional channel assignments. Thus, they have much more than the "legitimate expectation that the cut-off rule will be enforced," which attaches to applicants just by virtue of filing by the cut-off date, see Florida Inst. of Technology, 952 F.2d at 554. As shown below, many of these applicants have incurred substantial expenditures in reliance on enforcement of the cut-off rule and on their Continental rights -- investment in, and construction of, satellite systems.

## II. ECHOSTAR AND DIRECTSAT HAVE JUSTIFIABLY RELIED ON THE COMMISSION'S ENFORCEMENT OF THE CUT-OFF-RULE, ON ITS CONTINUING APPLICATION OF THE METHODOLOGY FOR AVOIDING MUTUAL EXCLUSIVITY AND ON THEIR RIGHT TO RECEIVE ADDITIONAL DBS ASSIGNMENTS

As demonstrated by the attached Verified Statement of Mr. Charles W. Ergen, Chairman and Chief Executive Officer of EchoStar and DirectSat and controlling shareholder of EchoStar's and DirectSat's sole parent, these permittees have each made investments in the tens, and even hundreds, of millions of dollars in reasonable reliance on the Continental decision and the rights they were granted thereunder. Neither EchoStar nor DirectSat would have made these substantial investments but for their expectation of receiving additional DBS channels upon cancellation of other permittees' channel assignments.

First, Mr. Ergen confirms that EchoStar has built a 16-transponder satellite in reliance on its right to receive up to five additional channel assignments -- a total of 16 full-CONUS channels. EchoStar would not have built a 16-transponder satellite had the Commission not given EchoStar this right.[4/] As Mr. Ergen explains, the difference in cost between an 11-transponder and a 16-transponder satellite is in the order of tens of millions of dollars. The added costs of a 16-transponder satellite include additional traveling wave tubes, additional solar panels, batteries and other items, resulting in

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[4/] As explained below, the application of Continental can result in additional channels for EchoStar and DirectSat that are located at the same slot as their current assignments.

additional weight, which in turn dramatically increases the launch costs.

Second, Mr. Ergen explains that in 1992, EchoStar decided to proceed with construction of its DBS system, in which it has now invested hundreds of millions of dollars, on the basis of the expectation that it would receive the additional channels to which it is entitled under Continental. Mr. Ergen adds that the substantial investments made in DirectSat's DBS system after the merger of DirectSat with a subsidiary of EchoStar Communications Corporation were similarly based on this expectation.

Mr. Ergen explains that, without the right to up to five additional channels, he would have had considerable doubt as to whether the DBS system of EchoStar (with only 11 full-CONUS channels) could viably compete against Hughes, which was already assigned 27 full-CONUS channels. A 27-channel full-CONUS system can offer consumers 250% more programming than an 11-channel DBS system.[5/] This disadvantage is further exacerbated by the structure of the agreements between satellite distributors and

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[5/] A similar disadvantage would persist for a 21-channel offering (e.g., the joint systems of EchoStar and DirectSat) compared to a 32-channel offering (the joint offerings of DirecTV and USSB).

important programming vendors, including major studios.[6/] Plainly, in 1992 Mr. Ergen and EchoStar believed that an 11-channel DBS system would not be competitive with other DBS and cable television systems. Absent the right to receive additional channels, Mr. Ergen would have considered whether to proceed with construction of a DBS system based on an entirely different set of assumptions, and would likely have reached a different decision. Indeed, Mr. Ergen and EchoStar had all the more reason to rely on the Continental right when deciding to proceed with construction of EchoStar's system, since that right was reconfirmed by the Commission in the 1992 Order granting EchoStar eastern assignments. EchoStar, 7 FCC Rcd. at 1772.

Besides, Mr. Ergen confirms that he reasonably perceived the promise given by the Commission in Continental as encouraging bold DBS pioneers like him to risk substantial capital in a then highly uncertain venture in order to promote the emergence of competition to cable in the MVPD market. Now that this capital has been invested at great risk and the DBS

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[6/] Studios, for example, typically impose minimum carriage requirements on a substantial portion of the programming they sell. The minimum requirements for the less popular competitive offerings "eat up" a substantially larger portion of an 11 or 21-channel DBS system's capacity than a 27 or 32-channel system. This leaves high capacity DBS systems much greater leeway to program the more popular offerings that are decisive in attracting subscribers.

prospects have become tangible enough that others want to enter the fray, it would be at the very least inequitable to disregard the Commission's promise and the DBS pioneers' reliance on it, and deny them the reward to which the Commission entitled them.

In sum, EchoStar and DirectSat have heavily invested in the DBS industry in reliance on their Continental rights, both in constructing larger 16-transponder satellites, and in deciding to proceed with construction of their systems in the first place.

## III. EQUITABLE CONSIDERATIONS REQUIRE THE COMMISSION TO UPHOLD THE RIGHT OF ECHOSTAR AND DIRECTSAT TO RECEIVE ADDITIONAL CHANNELS UNDER CONTINENTAL

This is not the first time the Commission has considered whether and how to apply its auction authority to persons that incurred expenditures in reliance on a pre-auction method for resolving mutual exclusivity. The distinctive trait of this proceeding is that the pre-auction incumbents have relied on a more tangible expectation than in any other proceeding (an actual express right to receive additional channels), and that they made much more substantial investments in reliance on that expectation (construction of satellite systems versus preparation of applications). It would be irrational and unlawful to disregard the equitable interests of the incumbent DBS permittees

to additional channels under Continental while recognizing the substantially weaker interests of untimely applicants.

### A. The Commission Has Reportedly Avoided Auctions For Parties That Filed Applications Prior To The 1993 Budget Act

In determining the treatment of pre-auction incumbents in an auction environment, the Commission has repeatedly applied an equitable standard.[11] Pursuant to this standard, the Commission has recognized the incumbents' rights and interests by either avoiding auctions or granting a discount from an auction-determined price.

The overriding factor in such a determination has been the extent to which the incumbents have relied upon pre-auction methods when they filed their applications. Accordingly, where the incumbents have relied on pre-auction methods for resolving

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[11] See In the Matter of Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and on the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Report and Order, 10 FCC Rcd. 9589, 9631-9634 (rel. June 30, 1995) ("MDS") (using a balancing of equitable and administrative factors to determine whether a lottery or auction of previously filed MDS applications best serves the public interest); New Personal Communications Services; Pioneer's Preference Review, Memorandum Report and Order on Remand, Gen. Docket No. 90-314, ET Docket No. 93-266, FCC 94-209 at ¶ 16 (rel. Aug. 18, 1994 and effective Sept. 19, 1994) ("PCS Order") ("In making equitable determinations, we must balance the interests of all affected parties and of the public.")

mutual exclusivity, the Commission has chosen not to conduct auctions with respect to their applications. For example, in the MDS proceeding, the Commission stated:

> [W]e believe it would be unfair to require these previously filed applicants to refile their applications and participate in an auction for BTA service areas, as they submitted their applications with the expectation of a site-specific conditional station license. Our decision will ensure that these pending applications will be processed under the rules in effect at the time the applications were filed.

MDS, 10 FCC Rcd. at 9631.

The Commission has also preserved the pre-auction preferential right on which an incumbent has relied even where it has required a payment to obtain a license. In the Broadband PCS proceeding, the Commission refrained from granting pioneer preference recipients free licenses because there was:

> ... no evidence in the record to suggest that such investment and information disclosure would not have been made if the preference recipients had known they would have to pay for a guaranteed license. We believe it is reasonable to conclude that to the extent this investment and disclosure related to Commission rules at all, it related to the expectation of a guaranteed license, not a guaranteed license without payment where other competitors must pay for their licenses.