PCS Order at ¶ 17. Thus, while the Commission required the PCS preference recipients to make a discounted payment, it did nothing to take away the expectation on which it found they had relied, namely the expectation of a guaranteed license. Rather, it honored that expectation.[8/]

EchoStar and DirectSat have likewise relied on the pre-auction method for resolving mutual exclusivity -- the Continental decision -- and they should not now be subject to a competitive bidding process for the additional channels they rightfully deserve without any payment. This is all the more so since a non-auction method for resolving mutual exclusivity has already been applied, resulting in the grant of an explicit right to additional assignments. By contrast, the MDS applicants had merely filed an application with the expectation that the Commission would apply a non-auction method for resolving mutual exclusivity.

Similarly, the proposal to auction the 28 channels at 110° W.L. would completely eradicate EchoStar's and DirectSat's

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[8/] Similarly, in the narrowband PCS proceedings, the Commission required Mobile Telecommunications Technologies Corporation ("Mtel") to make a discounted payment for its license, but recognized that "Mtel, if otherwise qualified, is entitled to the grant of the license under our pioneer preference procedures," and did nothing to remove that entitlement. In re Application of Nationwide Wireless Network Corp., Memorandum and Opinion, 9 FCC Rcd. 3635, 3640 (rel. July 13,, 1994) ("Mtel Order").

preferential right to receive additional channels, whereas the broadband PCS auction did not eliminate the recipients' expectation for a guaranteed license. Indeed, the auctioning of the Advanced assignments would equate EchoStar, DirectSat and the other incumbent permittees with parties outside that processing round. EchoStar and DirectSat have relied on a right not available to those outside their processing round, just as the PCS preference recipients relied on an expectation available only to them. The Commission respected the PCS preference recipients' reliance on their expectation to receive a license and should likewise respect EchoStar's and DirectSat's reliance on Continental.

Indeed, requiring EchoStar and DirectSat to make any payment for additional assignments would render their Continental rights meaningless. The right to receive the additional channels free of charge is an essential element of the Continental right, and therefore also an inextricable part of the expectation on which EchoStar and DirectSat relied. In addition, any kind of required payment for these additional channels (whether by auction or not) would automatically unjustly enrich Hughes, which has gained access to 27 eastern channels free of charge, at the expense of other DBS permittees.

B. The Commission Has Considered The Factor Of Delays As Another Significant Factor In Its Equitable Test

Where the conduct of auctions would result in delays in the provision of the service because pre-auction incumbents would assert their rights in appellate proceedings, the Commission has considered the prospect of such delays as an equitable factor against auctions. See MDS, 10 FCC Rcd. at 9630. Here, EchoStar and DirectSat, and possibly other incumbents, would feel compelled to resort to the courts of appeals in order to assert their Continental right and their constitutional protections. Even setting aside the delays associated with litigation, EchoStar and DirectSat will show below that the application of Continental will result in the provision of viable DBS service much more expeditiously than an auction would.

C. The Equitable Considerations For DBS Permittees Are Much Stronger Than In The Case Of Incumbent Applicants In The MMDS And PCS Proceedings

EchoStar and DirectSat are incumbent permittees who have been given an explicit right to receive additional DBS channels. By contrast, the previously filed MDS applicants whose interests were protected by the Commission had not been given any such right by the Commission, but had merely filed pre-auction applications with the expectation that their applications would

be processed by a method other than auctions. As explained above, the right of a DBS permittee to receive additional channels as a result of the application of a method for resolving mutual exclusivity, is entitled to much greater protection than the mere expectation of an applicant that a certain method will be applied in processing its application.

Furthermore, as discussed above in connection with the Commission's cut-off rule, EchoStar and DirectSat have substantially relied on their Continental rights; investing hundreds of millions of dollars in building satellites. In contrast, the previously filed MDS applicants merely expended funds to have their applications prepared and filed. Despite the relatively modest size of such an "investment," the Commission agreed with the MDS applicants that it would be "terribly inequitable" to force them into a "bidding process to secure [MDS] authorization for which it has already expended a substantial amount of funds." MDS, 10 FCC Rcd. at 9632.

Lastly, the concern with unjust enrichment, which was an important factor in favor of requiring payment by PCS pioneers in lieu of participation in an auction, see PCS Order at ¶ 13, militates against auctions here. Indeed, the only way to avoid unjust enrichment in this case is by not conducting an auction of the DBS channels. Such an auction would permanently secure an

unjust enrichment of Hughes/USSB, which has been provided with free access to 32 channels of full-CONUS DBS spectrum. In contrast, access to a comparable number of channels at 110° W.L. would be subject to competitive bidding.

IV. THE PROPOSED AUCTION OF DBS CHANNELS WOULD CONSTITUTE AN IMPERMISSIBLE RETROACTIVE APPLICATION OF NEW RULES ON INCUMBENT PERMITTEES

The unprecedented retroactive application of the Commission's conditional auction authority to incumbent DBS permittees would violate the Supreme Court's jurisprudence prohibiting the selective retroactive application of new rules.[9/] See James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1971). Under Jim Beam, courts and agencies alike must apply a new rule in the same way to similarly situated entities, see id., 501 U.S. at 537, 540, 544. Here the new rule is the Commission's 1993 auction authority, and all entities that relied on pre-auction methods for resolving mutual exclusivity are similarly situated for purposes of that new rule. Since the Commission has decided in the MDS proceeding not to submit to auctions those previously filed applicants that relied on pre-auction methods, it can not

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[9/] Of course, EchoStar and DirectSat do not concede that the Commission's auction authority extends to the circumstances present in this case, see below.

subject permittees such as EchoStar and DirectSat to auctions, since they have relied on a right granted to them as a result of a pre-auction processing method.[10/]

V. THE COMMISSION'S AUCTION PROPOSAL WOULD VIOLATE THE CONSTITUTIONAL RIGHTS OF ECHOSTAR AND DIRECTSAT

The Fifth Amendment of the Constitution prohibits the taking of private property without just compensation. The Commission's proposed auctioning of the Advanced assignments would amount to just such an unconstitutional taking of a property right of EchoStar and DirectSat in at least two respects. First, the auctioning of Advanced channels in lieu of applying Continental constitutes an extremely pernicious example of a regulatory taking, as it will deprive EchoStar and DirectSat of the economically viable use of at least five transponders on their satellites. Second, the rights given to DBS permittees under Continental also constitutes a property right protected by the Fifth Amendment. It is clear that an auction of the 110° W.L. slot would thoroughly eliminate without compensation the right of EchoStar and DirectSat to additional channels upon cancellation of Advanced's permit.

[10/] In fact, as explained above, EchoStar and DirectSat are at least one better than previously filed MDS applicants, and they are even more similarly situated with prior lottery winners.

A. The Commission's Proposal Would Expropriate Echostar's And Direcsat's Satellites

Regulatory takings analysis seeks to determine when a particular regulation goes "too far" and effects a taking. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). To determine whether a regulation amounts to a taking, the focus of the inquiry is whether the regulation "does not substantially advance legitimate state interests" or whether the owner of property is denied "economically viable use" of the property. See Agins v. City of Tiburon, 447 U.S. 255, 260 (1980). To make this determination courts balance three factors: the economic impact of the regulation on the claimant, the extent to which the regulation has interfered with distinct investment-backed expectations; and the character of the governmental action. See Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211 (1986) (quoting Penn Central Transp. Co. v. New York, 438 U.S. 104 (1978)). Accord Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

Of these factors, interference with investment-backed expectations is dispositive. See Ruckelhaus v. Monsanto Co., 476 U.S. 986, 1005 (1984). Courts will find an unconstitutional taking wherever regulatory action has deprived a property holder

of a particular use of its property and the holder has invested in reliance on the expectation of such use.[11]

The "economic impact" factor alone may also be determinative. See Florida Rock Indus., Inc. v. United States, 18 F.3d 1560, 1564 (Fed. Cir. 1994), cert. denied, 115 S. Ct. 898 (1995). Indeed, if a regulation categorically prohibits all economically beneficial use of land -- destroying its economic value for private ownership -- then the regulation has an effect equivalent to a permanent physical occupation, and thus amounts to a physical taking of property. Id. at 1564-65, 1568 (emphasis in original). In Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), the Supreme Court found a taking concluding that the landowner was called upon "to sacrifice all economically beneficial uses in the name of the common good."

As demonstrated above and in the Verified Statement of Mr. Ergen, EchoStar and DirectSat have built 16-transponder

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[11] See Monsanto, 467 U.S. at 1010-12 (regulatory taking of trade secret data where agency's actions frustrated investment-backed expectation that data would not be disclosed); United Nuclear Corp. v. United States, 912 F.2d 1432, 1436 (Fed. Cir. 1990) ("The fact that United agreed that the leases would be subject to future regulation does not indicate that United fairly can be said to have anticipated that the Secretary would apply a new policy requiring tribal approval of mining plans to leases entered into almost six years earlier, in reliance on which United had expended $5 million.").

satellites in reliance on their Continental rights to receive additional channels. The Commission's proposal to auction the Advanced channels and effectively overrule Continental would deprive both permittees of all economically beneficial use -- indeed of all physical use -- of five transponders on each satellite. Thus, the Commission's proposal would amount to a permanent physical invasion and taking of those costly transponders. The Commission's proposed action would also interfere with the reasonable expectation of EchoStar and DirectSat that they would gain access to additional channels and thus become a viable competitor to cable television systems and other DBS licensees. EchoStar and DirectSat have invested several hundreds of millions of dollars in reliance on that expectation, making the proposed action an impermissible taking under Penn Central and its progeny.

B. The Proposed Auction Would Amount To A Taking Of Echostar's And Direcsat's Continental Rights Without Just Compensation

In addition to effecting a regulatory taking of a portion of EchoStar's and DirecSat's satellites, the Commission's proposed action would take EchoStar's and DirecSat's Continental rights themselves without just compensation. The courts have recognized the property status of regulatory permits and licenses

similar to a DBS construction permit. See, e.g., A.A. Profiles, Inc. v. City of Ft. Lauderdale, 850 F.2d 1483, 1488 (11th Cir. 1988) (development permit is property where the property owner makes investments and relies on the permit on his detriment), cert. denied, 490 U.S. 1020 (1989); Scott v. Greenville County, 716 F.2d 1409 (4th Cir. 1983); Wheeler v. City of Pleasant Grove, 664 F.2d 99 (5th Cir. 1981), cert. denied, 456 U.S. 973 (1982); Villas of Lake Jackson, Ltd. v. Leon County, 796 F. Supp. 1477, 1488 (N.D. Fla. 1992) (A.A. Profiles "clearly holds that a development permit duly issued by a Florida local government is a species of property for due process and taking clause purposes, especially if the property owner has taken actions in reliance upon the permit to his detriment").

Further, is the property status of a DBS construction permit is not affected by the fact that it may be conditional. Thus, a conditional reversionary interest in land becomes a possessory property right upon the satisfaction of the condition. See Presault v. United States, 66 F.3d 1167 (Fed. Cir. Sept. 14, 1995). Further, a conditional DBS permit is, based on Commission's decisions, a valuable right that can be bought and sold, and whose value is directly related to the number of channel assignments it encompasses. By the same token, the right to receive additional channels upon the cancellation of another

permittee's channel assignments is no less of a property right than the conditional permit itself.

The sole condition attaching to EchoStar's and DirecSat's right to additional channels -- the cancellation of another permit -- has been met by the Commission's decision in Advanced, and this right is now perfected into an unconditional one. Compare id. (reversionary interest was contingent on regulatory approval of the abandonment of the rights-of-way over the land; court held that, since the agency disapproved of the abandonment, the condition to the right was not satisfied and the property right was delayed so there was no taking).

Nor is the value and status of the Continental right affected by Section 304 of the Communications Act, which merely requires applicants to waive claims to the use of the spectrum as against the regulatory powers of the United States. The courts have emphasized that such a limited waiver does not render rights acquired pursuant to a license or permit a "non-protected interest, defeasible at will," as this would "throw considerable doubt on the Commission's well-known recognition of a renewal expectancy that leads applicants to vie for licenses which, if awarded, will require a significant expenditure of resources." See Orange Park Florida TV, Inc. v. FCC, 811 F.2d 664, 674 n.19

(D.C. Cir. 1987). The D.C. Circuit has similarly described such rights as follows:

> [T]he right under a license for a definite term to conduct a broadcasting business requiring -- as it does -- substantial investment is more than a mere privilege or gratuity. A broadcasting license is a thing of value to the person to whom it is issued and a business conducted under it may be the subject of injury.

L.B. Wilson, Inc. v. FCC, 170 F.2d 793, 798 (D.C. Cir. 1948).

By auctioning the proposed DBS channel assignments, the Commission would expropriate EchoStar's and DirecSat's Continental rights in their totality. The Commission's proposal would thus effect a more thorough and pervasive type of taking than the regulatory imposition by an agency of restrictions on only some viable uses of a property right.

C. THE COMMISSION'S PROPOSAL TO AUCTION DBS CHANNELS WOULD VIOLATE THE DUE PROCESS CLAUSE OF THE CONSTITUTION

Any regulatory action that would deprive EchoStar and DirectSat of their protected property right to additional channels would violate the due process clause of the Fifth Amendment. The due process clause provides that no person shall be deprived of life, liberty, or property without due process of law. A claim based on substantive due process must be based on a deprivation of an underlying protected life, liberty, or property

interest. See, e.g., Reserve, Ltd. v. Town of Longboat Key, 17 F.3d 1374 (11th Cir. 1994), cert. denied, 115 S. Ct. 729 (1995). A substantive due process claim is made upon a showing that a person's deprivation of life, liberty, or property was irrational and due to arbitrary and capricious actions. See Exxon Corp. v. Maryland, 437 U.S. 117 (1978); Reserve, Ltd., 17 F.3d at 1379-80. The Fifth Amendment is violated when the Commission's actions in denying EchoStar and DirectSat its Continental rights would be arbitrary and capricious and would lack any rational basis.

As demonstrated above, EchoStar and DirectSat have property interests for purposes of a takings claim analysis. A fortiori, EchoStar and DirectSat have cognizable property interests for purposes of a substantive due process analysis. Indeed, courts have emphasized that the term "property" as used in the due process clause is broader than the term as used in the takings clause.[12/] The Supreme Court has also held that property for purposes of the due process clause extends "well beyond

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[12/] See Scott v. Greenville County, 716 F.2d 1409, 1421 (4th Cir. 1983) (entitlement to permit issuance was property protected under the due process clause but not for purposes of the Fifth Amendment takings doctrine); Bello v. Walker, 840 F.2d 1124 (3d Cir.), cert. denied, 488 U.S. 868 (1988) (denial of building permit was cognizable due process claim but not takings claim); C&M Group, Inc. v. New Britain Township, Civ. Action No. 90-4375, 1991 U.S. Dist. LEXIS 2239, at *6 n.1 (E.D. Pa. Feb. 14, 1991) (property in the due process clause is broader than private property in the takings clause).

actual ownership of real estate, chattels, or money." Board of Regents v. Roth, 408 U.S. 564, 571 (1972).[13]

It is also well-settled that licenses or permits, once issued, are property interests that entitle the owner to the protection of the due process clause. See, e.g., Bell v. Burson, 402 U.S. 535 (1971) (involving motorist's license). Even the expected issuance of a permit is a protected property interest entitled to protection under the due process clause. See, e.g., Scott v. Greenville County, 716 F.2d at 1418 (plaintiff "enjoyed an entitlement to the issuance of a permit upon presentation of an application and plans showing a use expressly permitted under the then-current zoning ordinance"). Here, EchoStar and DirectSat have reasonably relied not merely on the expectation that they will be issued a permit upon filing a compliant application, but also on the expectation that an already granted conditional right will not be taken away from them once the condition is satisfied.

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[13] Property interests, for example, encompass entitlement to welfare benefits or continued employment for tenured professors. Roth, 408 U.S. at 576. The Supreme Court has held that to have "a property interest in a benefit, a person ... must, instead, have a legitimate claim of entitlement to it." Id. at 577.

The arbitrary and capricious denial of a permit violates the substantive due process requirement.[14/] In this case, the revocation of EchoStar's and DirectSat's conditional right to additional DBS channels under Continental once the sole condition on which it rested is satisfied would be arbitrary and capricious. In eliminating this right, the Commission would be waiving its cut-off rules despite the absence of any circumstances that could justify a waiver, and would be putting a current group of applicants permittees on the same footing as potential future applicants. Such an unprecedented waiver would be clearly targeted to disadvantage the incumbent permittees in violation of the due process clause.

VI. UNDER THE 1993 OMNIBUS BUDGET RECONCILIATION ACT ("OBRA"), THE COMMISSION LACKS THE AUTHORITY TO RE-ASSIGN ADVANCED'S CHANNELS BY COMPETITIVE BIDDING

The OBRA makes clear that the grant of auction authority does not absolve the Commission of its duty to seek to process applications that may be mutually exclusive by

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[14/] See Littlefield v. City of Afton, 785 F.2d 596 (8th Cir. 1986) (summarizing law in the federal circuits holding denial of permit states substantive due process claim); Scott v. Greenville, 716 F.2d at 1420 (government action of moratorium on approving building permits targeted at plaintiff); Bello v. Walker, 840 F.2d at 1129 (council members' denial of permit motivated by personal reasons other than merits of application).

alternative methods other than through competitive bidding.[15] In the NPRM, the Commission ignores this requirement in its haste to conduct an auction. Indeed, rather than trying to resolve mutual exclusivity pursuant to its statutory duty, through the NPRM the Commission appears to be taking the unprecedented and clearly inappropriate steps of affirmatively going out of its way to create mutual exclusivity by reopening the current DBS processing round. In fact, mutual exclusivity can be avoided by applying the Continental order.

Importantly, the proposed auction would not promote any of the OBRA statutory objectives -- development and rapid deployment of new technologies, enhancement of economic opportunity and competition, recovery for the public of a portion of the value of the public spectrum, and efficient and intensive use of the spectrum. See 47 U.S.C. § 309(j)(3), NPRM ¶ 73. In fact, as has been shown, an auction would delay the deployment of

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[15] OBRA provides:

> Nothing ... in the use of competitive bidding, shall ... be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings.

47 U.S.C. ¶ 309(j)(6)(E).

new technologies, compromise the accessibility to the American people of DBS service by multiple viable DBS competitors, and foster inefficiencies in the use of the spectrum. By contrast, the application of Continental will demonstrably promote all of those objectives in an expeditious manner. It is also very doubtful that an auction would recover for the public any portion of the value of the spectrum. Instead, any auction payment will ultimately pass-through to the public in the form of higher rates. In sum, the Commission plainly lacks authority to conduct auctions in these circumstances.

A. Application Of Continental Would Avoid Fragmentation Of The DBS Spectrum And Ensure Expeditious DBS Service

The NPRM faults Continental on the mistaken belief that its use would cause fragmentation of the DBS spectrum and delays in the provision of DBS service to the public. See NPRM at ¶ 12. In fact, intelligent application of the methodology set out in Continental will not fragment the spectrum and will ensure the most expeditious provision of viable multi-channel DBS offerings by independent providers of DBS service.

The Commission's fears rest on the erroneous premise that the assignment of additional channels after the cancellation of Advanced's permit must result in the incumbents receiving

small increments of channels at the 110° W.L. slot. See NPRM at ¶ 51 (under Continental the Commission would have to "divide 51 channels at two orbital locations -- divided into 24 east/west pairs with three eastern channels remaining -- among six permittees"). While Continental entitles the incumbent permittees to additional channels upon the cancellation of another's permittee's channels, it is silent on how this reassignment is to be effected. Certainly, Continental does not require that the incumbents be assigned their additional channels at the orbital location occupied by the canceled permittee. Nor does Continental require anywhere that incumbents be assigned the additional channels in east/west pairs.

In fact, an intelligent application of Continental would enable DBS permittees entitled to additional assignments to receive all or most of their promised additional channels and aggregate them with existing assignments at the same orbital location. This result is possible under a number of scenarios. Under one such scenario, EchoStar and DirectSat would receive five additional channels each at 119° W.L. -- the same slot where most of their existing eastern assignments are located, and the one existing channel of DirectSat at 110° W.L. will also be relocated to 119° W.L. Tempo, for its part would receive five

additional channels at 110° W.L. and relocate its 11 existing eastern assignments from 119° W.L. to 110° W.L. for a viable total of 16 channels. Likewise, DirecTV will receive 5 additional channels at 110° W.L. and aggregate them with the three existing assignments of its partner USSB at the same location. Dominion's 8 channel assignments could be moved from 61.5° W.L. to 110° W.L., a position Dominion has previously identified as preferable to 61.5° W.L. This would leave room for DBSC, which has been assigned 11 channels at 61.5%, to receive 5 more channels pursuant to its Continental right, for a total of 16 channels at 61.5° W.L. Likewise, Continental, which also has 11 assignments at 61.5° W.L. would receive five more channels for a total of 16 at the same location.

This scenario would create robust multi-channel DBS offerings, by fully utilizing all available eastern slots and making the most of all DBS satellites whose construction is complete or underway, much more expeditiously than the proposed auction: all of EchoStar, DirectSat and purportedly Tempo stand ready to launch DBS satellites in the 1995-1996 period. EchoStar's first satellite is due to be launched in late December 1995, and DirectSat's first satellite is expected to be launched in the summer of 1996. Further, Tempo's satellite contractor

Loral has purportedly completed construction of two satellites. One of these satellites could exploit Tempo's 16 assignments at 110° W.L., the location for which Tempo has allegedly already optimized the satellite. Meanwhile, DirecTV has already launched (under Special Temporary Authority) and has requested a license to cover a third satellite at 101° W.L.,[16] which can certainly be utilized more fully from the 110° W.L. position. This means that, by the summer of 1996, all 32 channels at 110° W.L. and all 32 channels at 119° W.L. can be fully utilized. At the same time, Continental, which is controlled by Tempo's satellite contractor, will be capable of using its 16 assignments at 61.5° W.L. by launching the second satellite built for Tempo, while DBSC expects to complete construction of its first 16-transponder satellite in 1997 and would make full use of 16 channels at 61.5° W.L. starting at that time. Thus, under this reassignment scenario, all channels of all eastern locations, and all DBS satellites under construction, would be fully utilized by 1997, to the enormous benefit of the public.

Under the auction proposal, on the other hand, service form 110° W.L. will be delayed by the auction process, especially if the auction is stayed, and then again it will

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[16] See Public Notice, No. 60244 (rel. Oct. 18, 1995).

utilize only 28 of 32 channels, while the remaining four channels may never be put to any productive use. Moreover, if the winning bidder does not have a satellite readily available to it, it may take another 3 years or more after the auction before even those 28 channels are utilized. It is thus implementation of the auction proposal, not the reasoned application of Continental, that would force the fragmentation of the 110° W.L. slot into meaningless segments.

Indeed, USSB's three channels at 110° W.L. and DirectSat's orphan channel at 110° W.L. mark the most extreme example of the fragmentation of the DBS spectrum lamented in the NPRM. It is evident that the proposed auction would do nothing to remedy, but would instead perpetuate, that unfortunate and inefficient allocation of spectrum. Similarly, service from 119° W.L. will likely not utilize all 32 channels because Tempo has already asserted that it does not consider an 11-channel satellite as viable. Also, the service of EchoStar and DirectSat, using only 21 rather than 32 channels, will be considerably less competitive than it would be under Continental. DirectSat may never be able to use its solitary channel at 110° W.L. As for DBSC, which plans to launch its eastern satellite in 1997, it will be capable of utilizing only 11 channels and would

be forced to leave 5 transponders on its first satellite idle, whereas it will be able to utilize all 16 transponders if Continental is applied.

Other scenarios for reassigning channels may also be worth considering by the Commission; discussion among the incumbent permittees on the best and most efficient way of applying Continental would greatly help the Commission in analyzing the reassignment options available and determining which one best serves the public interest. Accordingly, the Commission should afford the Continental permittees 90 days to submit to the Commission a report setting forth their joint or separate views on reassigning channels. Such a negotiated solution would certainly fulfill the Commission's statutory duty to explore alternative solutions before resorting to auctions.

B. The Auctioning Of DBS Spectrum Would Handicap U.S. Operations Vis-À-Vis Foreign Providers And Would Set Dangerous Precedent

As a policy matter, auctions would disadvantage U.S. DBS permittees compared to entities leasing transponders from Ku-band satellites, including foreign companies providing high-power multi-channel service to the U.S. by leasing such transponders. They would also handicap U.S. operators vis-a-vis entities using DBS slots allocated to other countries if domestic

service from such slots is allowed. As an example, the Canadian operator Alphastar will be able to provide DBS-like service by leasing transponders on AT&T's high-power 402R satellite, without having to make any payment to the U.S. government.[17] By contrast, U.S. operators, in addition to the hundreds of millions of dollars needed to secure satellite capacity, will have to pay hundreds of millions of dollars for the same right that Alphastar will be exercising free-of-charge. There is simply no justification for the Commission, which should be trying to eliminate handicaps suffered by U.S. operators vis-a-vis foreign competitors, to create such a huge built-in handicap by regulatory fiat.

Further, U.S. actions will also compromise the prospects of international DBS service provided by U.S. licensees, as they will invite auctions or auction-equivalent payments in return for the ability to serve other countries.

Finally, it is at best doubtful whether an auction here would accomplish the statutory objective of recovering for the public a portion of the value of the public spectrum. See 47 U.S.C. ¶ 309(j)(3), NPRM at ¶¶ 73, 77. The NPRM has not

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[17] See In the Matter of Petition for Declaratory Ruling re Transborder Authorization of AT&T Corp. to Provide Canadian Direct-to-Home Satellite Services in the United States, File No. 107-SAT-MISC-95 (rel. Sept. 18, 1995).

considered the very real possibility that the hundreds of millions of dollars payable by a DBS auction winner will simply be passed through to the viewing public in the form of higher rates for DBS service.

C. Competitive Bidding Is An Economically Inefficient Method For Assigning Scarce DBS Resources

The Commission has used auctions when it believes that competitive bidding would be the most efficient method of allocating a scarce resource by assigning it to the user who values it the most.[18/] The auctioning of an asset, however, presupposes a rational "homo economicus" that possesses full information about the asset to be auctioned and can value it on the basis of that information. It is only in these circumstances that the asset is assigned to the person who values it most highly. Absent full information, the greater the risk of inefficiency.

The current uncertainty surrounding the value of the DBS assignments is great for several reasons. First, the Commission has announced in the NPRM that it is engaging in an effort to procure an unspecified number of unidentified new

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[18/] In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Second Report and Order, 9 FCC Rcd. 2348, 2349-50, 2360-61 (rel. Mar. 8, 1994).

orbital slots for DBS assignments to the United State. See NPRM at ¶¶ 51, 52. The auctioning of DBS channels pending such an effort is tantamount to an art auction house auctioning a work by Picasso with the caveat that it may be unique, but it may also be one of an unspecified number of identical copies. Even if a rational buyer decided to participate in such an auction, it would very likely not lead to an informed valuation and an efficiency-enhancing allocation of spectrum resources.

The informed and efficient valuation of DBS resources is also inhibited by the uncertainty over the possibility of service outside the United States. See NPRM at ¶ 24. The right to provide such service could dramatically alter the value of the DBS asset, potentially making rational bidders value western slots as highly as, or even higher than, eastern slots, whereas on the basis of a "domestic service only" assumption the reverse would be the case. Alerting prospective bidders to this uncertainty and saying "caveat emptor," as the NPRM purports to do, does nothing to reduce the uncertainty or remedy the inefficiency that it entails.

VII. SPECTRUM AGGREGATION LIMITATIONS SHOULD ONLY BE IMPOSED ON DBS PERMITTEES THAT ARE, OR ARE AFFILIATED WITH, DOMINANT MULTI-CHANNEL VIDEO PROGRAMMING DISTRIBUTORS

A. Channel Caps