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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

NOV 20 1995

95-168

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

COMMENTS OF DIRECTV, INC.

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In the Matter of	)	
	)	
Revision of the Rules and Policies for	)	IB Docket No. 95-138
the Direct Broadcast Satellite Service	)	PP Docket No. 93-253

COMMENTS OF DIRECTV, INC.

DIRECTV, Inc. ("DIRECTV") hereby submits the following Comments in connection with the above-captioned Notice of Proposed Rulemaking.[1]

I. INTRODUCTION AND SUMMARY

In its recently released Advanced Order,[2] the Commission reclaimed 51 DBS channels at the 110° W.L. and 148° W.L. orbital positions that had been formerly assigned to Advanced Communications Corporation ("ACC"). In this expedited companion proceeding, the Commission has requested comment on the best method of re-allocating ACC's DBS spectrum, and has also decided to undertake a comprehensive review of its DBS service rules in anticipation of a "new era" of DBS service.[3]

DIRECTV below offers comprehensive comment on the proposals raised in the Notice. Perhaps the most fundamental conceptual issue the Commission has raised is the use of competitive bidding for DBS spectrum, which would be the first time the Commission has used this method of license allocation in the satellite area. The Commission has tentatively

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1/ 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, Notice of Proposed Rulemaking (released October 30, 1995) ("Notice").

2/ Advanced Communications Corporation, FCC 95-428, File Nos. DBS-94-11EXT/15ACP/16MP (released October 18, 1995) (the "Advanced Order"), appeal pending Advanced Communications Corp. v. FCC, No. 95-1551 (D.C. Cir.).

3/ Notice at ¶ 4.

determined, after considering the sweeping changes that have taken place in the DBS industry over the past six years, that its former re-assignment methodology for DBS channels, set forth in its 1989 Continental decision, is now obsolete.[4/]

Given the unique circumstances surrounding the Advanced case, DIRECTV does not disagree. Although DIRECTV is on record with the Commission as opposing the general use of competitive bidding with respect to satellite licensing, DIRECTV also acknowledges that the Commission confronts a special situation in this case with respect to the re-assignment of ACC's DBS channels in the wake of ACC's blatant failure to meet FCC due diligence requirements. DIRECTV therefore supports the Commission's efforts to re-deploy the orbit-spectrum resource quickly, and believes that auctions may be an appropriate method of re-allocating ACC's channels in a rapid and efficient manner.

DIRECTV is deeply troubled, however, by several of the Commission's auction implementation and service rule proposals. Of most concern are the Commission's proposed spectrum aggregation limitations, which include a rule limiting the aggregation of DBS channel assignments by a single DBS provider to a total of 32 at any combination of the four orbital locations capable of full-CONUS service.[5/] This limitation would effectively and needlessly bar independent DBS competitors like DIRECTV or Echostar from even entering the auction to bid for ACC's channels. On the other hand, the Commission's proposed rules would permit cable-owned entities like Primestar or Tempo to extend their

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4/ See Continental Satellite Corp., 4 FCC Rcd 6292, 9299 (1989), partial recon. denied, 5 FCC Rcd 7421 (1990); Notice at ¶¶ 9 - 17.

5/ For purposes of the auction analysis, the Commission has proposed that the 61.5°, 101°, 110° and 119° W.L. orbital positions will be treated as full-CONUS coverage locations. Notice at ¶ 44.

multichannel video programming distributor ("MVPD") market power further into DBS and apply for up to 32 full-CONUS DBS channels.

This result makes no sense as a matter of efficiency, economics, fairness or sound public policy. The Commission should impose spectrum aggregation constraints only where the acquisition of such spectrum would lead to or increase a particular MVPD's exercise of market power.[6] While it may be true that DBS is now moving beyond the "pioneering" era, it is still a nascent and emerging service. DIRECTV today serves a little over one million subscribers and possesses less than 1.5% share of the MVPD market. DIRECTV could not possibly exercise market power even if it were successful in acquiring the channels at 110° W.L. at auction.[7]

The same cannot be said of cable providers, who serve over sixty-three million subscribers, and continue to command a 94% share of and exercise dominant market power in the MVPD market. In addition to competing in a market dominated by cable, DIRECTV also faces the added hurdles of finite channel capacity and the legal and technical inability to carry local broadcast signals. See infra. Nevertheless, the Commission's rules have the effect of treating DIRECTV and cable-affiliated providers identically for purposes of re-allocating ACC's spectrum, which is an inappropriate and anticompetitive result.

The Commission's proposed spectrum aggregation rules would treat the companies who exercise market power in the MVPD market more favorably than

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6/ Moreover, and in any event, the Commission should permit cable-affiliated DBS providers to acquire 32 full-CONUS channels only if appropriate conduct rules safeguards are put in place, and if non-cable-affiliated DBS providers like DIRECTV are at least given the fair opportunity to compete with such providers for the acquisition of ACC's spectrum. See infra.

7/ See Statement of Professor Jerry Hausman at ¶¶ 6, 20. Dr. Hausman's statement is attached hereto as Attachment 1.

independent MVPDs by allowing cable-owned entities, which undeniably have market power, to acquire full control of one full-CONUS DBS orbital location while precluding independent DBS providers like DIRECTV, which undeniably has no market power, from doing the same thing. Such a result is antithetical to the goal of promoting MVPD competition. It is also undercuts the public interest benefits of choosing competitive bidding as a spectrum allocation mechanism. Auctions theoretically maximize public interest benefits to consumers by letting the market decide who will be the best and most efficient provider of services. Unless there is reason to fear that a particular competitor will exercise MVPD market power, there is no economic or public interest basis for excluding or limiting the participation of any qualified bidder. In DIRECTV's case, the exercise of MVPD market power is impossible, and therefore DIRECTV should be afforded a fair opportunity to compete.

II. DIRECTV DOES NOT OPPOSE THE USE OF COMPETITIVE BIDDING IN THIS UNIQUE CIRCUMSTANCE, PROVIDED THAT THE COMMISSION DOES NOT PRECLUDE OR PREJUDICE THE PARTICIPATION OF NON-CABLE AFFILIATED DBS PROVIDERS

A. The Use of Auctions With Respect to Satellite-Based Services.

DIRECTV has grave concerns over the general use of competitive bidding in the satellite area, and reiterates here its view that it is premature and unwarranted for the Commission to adopt auctions as a wholesale approach to satellite licensing.[8/] Auctions are one of several licensing mechanisms at the Commission's disposal, and are not necessarily

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8/ See In the Matter of Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Comments of Hughes Communications Galaxy, Inc. and DIRECTV, Inc. (November 10, 1993); Reply Comments of Hughes Communications Galaxy, Inc. and DIRECTV, Inc. (November 30, 1993).

appropriate in all contexts.[9] In the FSS and DBS satellite areas, the Commission traditionally and properly has taken a flexible regulatory approach in licensing satellite spectrum and orbital locations, designed to take into account the special circumstances surrounding the construction, launch and operation of satellite systems. Moreover, the Commission's present group processing and licensing procedures for domestic satellite and DBS applications have a proven track record of efficient and fair allocation of the orbit-spectrum resource that the Commission should not lightly displace.[10]

DIRECTV also acknowledges, however, that the Commission confronts special circumstances in this case with respect to the re-assignment of ACC's DBS channels. As set forth in the Advanced Order, ACC for over a decade warehoused two DBS orbital locations, and the public has nothing to show for it. DIRECTV therefore supports the Commission's efforts to re-deploy the orbit-spectrum resource quickly, and in this unique scenario, auctions may be an appropriate method of doing so.

As always, however, the "devil is in the details." As set forth below, DIRECTV is adamantly opposed to any method of re-assigning ACC's DBS spectrum which, in conjunction with certain implementation rules, operates to preclude DIRECTV and other independent DBS providers from having even the opportunity to bid for additional DBS

9/ See Advanced Order, Separate Statement of Commissioner Susan Ness (noting that auctions are not necessarily "the best solution in every circumstance").

10/ Moreover, international coordination issues and the licensing procedures of foreign countries raise practical valuation problems with respect to the use of competitive bidding for emerging regional or global systems. This will increasingly be a problem, and could unduly restrain the development and competitiveness of DBS/BSS systems as they become increasingly regional or global in nature. See In the Matter of Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by Mobile- Satellite Service, ET Docket No. 95-18, RM-7927, Comments of Hughes Telecommunications and Space Company (May 5, 1995).

channels, while simultaneously offering cable-affiliated entities the opportunity for full-blown expansion into full-CONUS DBS service.

B. The Commission's Proposed Spectrum Aggregation Limitations.

The Commission has proposed two separate spectrum aggregation limitations in the Notice to govern the acquisition of DBS spectrum by existing providers and new entrants. These rules are aimed at two discrete policy concerns.

As noted above, one proposed rule is designed to address a speculative, and in DIRECTV's view unfounded, concern over potential concentration among DBS operators. This rule would effectively preclude DIRECTV and other independent DBS providers from even applying to use ACC's former channels at 110°. The other restriction is intended to address competitive concerns associated with cable-affiliated DBS providers such as Primestar or Tempo. Both proposed limitations are addressed below.

1. The "DBS-Concentration" Limit

The Commission's proposed spectrum cap would limit the aggregation of DBS channel assignments to a total of 32 at any combination of the four orbital locations capable of full-CONUS service.[11/] The stated purpose underlying this proposed restriction would be to preserve "intra-DBS competition." The only reasoning or rationale for this conclusion is the Commission's worry that "excessive channel accumulation by one or more DBS operators would necessarily limit the resources available for their DBS competitors."[12/] This limitation would bar DIRECTV -- which in the short-term is one of the few viable

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11/ Notice at ¶ 42.

12/ Notice at ¶ 41.

competitive threats to cable's MVPD dominance -- from even applying to bid for the DBS spectrum at 110° W.L. (assuming an auction methodology is adopted to re-assign it).

DIRECTV strongly disagrees with the Commission's analysis. As Professor Hausman points out, the Commission should intervene to restrict participation in the auction only if it believes that the outcome will lead to an exercise of market power. It should not engage in industrial policy or show favoritism to certain industry participants.[13/]

The Commission itself has recognized that the relevant "product market" in this proceeding is the market for the delivery of multichannel video programming.[14/] Yet, although the Notice correctly defines the market, it nevertheless proposes a limitation which makes no logical policy sense in view of this market definition. As Dr. Hausman has observes:

> The MVPD market is currently dominated by cable providers. The economic structure of the MVPD market would not permit DIRECTV to exercise market power given the presence of cable TV providers, at least two other DBS providers, direct-to-home (DTH) providers like Primestar and TVRO distributors, as well as emerging technologies such as MMDS and Video Dialtone (VDT). DIRECTV's market share in the MVPD market is at most 1.5%. It could not exercise unilateral market power.

Hausman Statement at ¶ 6.

Thus, the proposed rule should not be adopted. And it is especially troubling that the Commission, committed demonstrably in the past to loosening cable's grip on the MVPD market, would place independent DBS operators under effectively the same structural restriction as cable-affiliated DBS entities. There is no need for this concentration restriction, and the Commission should either expand the aggregation limit for independent

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13/ Hausman Statement at ¶ 5.

14/ See Notice at ¶ 34.

DBS operators to two full-CONUS locations, or eliminate the restriction entirely.

In light of the fact that DIRECTV and other holders of DBS spectrum cannot exercise market power, the Commission's proposed spectrum limitations are arbitrary and ill-advised.[15] Were DIRECTV to acquire an additional full-CONUS location, there would still be two additional full-CONUS DBS locations to provide the "intra-DBS" competition the Commission seeks.[16]

More important, however, if a public interest trade-off is necessary, the Commission's proposal has got the equation backwards. In the relevant market of MVPD services, it makes no sense for the Commission to permit the cable industry, which exercises market power, to acquire one of four full-CONUS locations, reduce independent MVPD competition, and extend its market dominance into an emerging industry segment, but to deny existing independent operators -- who do not exercise market power -- any expansion capability at all.[17] Stated another way, DIRECTV submits that it would be far more in the public interest to preclude cable operators entirely from participating in DBS service -- and thus prevent them from occupying locations and spectrum that would be otherwise used to

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15/ See Cincinnati Bell Telephone Co. v. FCC, Nos. 94-3701/4113; 95-3203/3238/3315 (6th Cir.) (Nov. 9, 1995) (Commission's attribution rules must be rationally related to evidence of potential anticompetitive behavior, particularly where application of standard results in complete ban on participating in spectrum auction).

16/ Hausman Statement at ¶ 6. Moreover, this concern is even more attenuated if the Commission is correct in its assessment that "it may be possible to accommodate additional DBS satellites to serve the United States at orbital locations other than the eight currently specified in the BSS plan." Notice at ¶ 52.

17/ The Commission, however, does not have to make this choice -- it can allow the market to do so. So long as all independent DBS operators are given a fair opportunity to bid for ACC's channels, and so long as significant conditions are imposed on cable-affiliated DBS operators to restrain their ability to leverage their MVPD market power, all parties can bid and the market can decide who values the spectrum more and who will be the most efficient service provider.

compete vigorously against them -- then it would be to preclude independent DBS operators from expanding to more than one location.

There are important reasons why such expansion capability is necessary. First, independent DBS operators who have no market power at all must compete against entrenched cable operators who exercise enormous market power in the programming and distribution areas. Indeed, Congress and the Commission explicitly recognized this issue when Congress adopted and the Commission implemented the program access rules.[18/]

Second, independent DBS operators face a significant channel capacity limitation when compared to the potential capacity of cable-based MVPDs. DBS operators are fundamentally limited to the capacity that can be derived from the radio frequency ("RF") spectrum. Although advanced satellite and video compression technology can further "multiply" the number of video channels carried in each RF channel, such technologies are also available to and utilized by cable operators. Furthermore, cable operators are today

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18/ See, e.g., 1992 Cable Act §2(a), Finding (4) ("The cable industry has become highly concentrated. The potential effects of such concentration are barriers to entry for new programmers and a reduction in the number of media voices available to consumers"); S. Rep. No. 102-92 (accompanying S.12), Senate Comm. on Commerce, Science & Transportation, 102d Cong., 1st Sess. (1991) ("Senate Report") at 1 ("the purpose of this legislation is to promote competition in the multichannel video marketplace" and the FCC is directed "to adopt regulations aimed at curbing the cable operators' and programmers' market power"); Program Access Report and Order, 8 FCC Rcd 3359, 3362 (program access provisions concerned with fact "that potential competitors to incumbent cable operators often face unfair hurdles when attempting to gain access to the programming they need to provide a viable and competitive multichannel alterative to the American public . . . Indeed, various distributors have described numerous situations in which their ability to secure programming has been impaired, either by refusals to sell cable programming by certain vendors, or by discriminatory terms and conditions imposed upon the acquisition of various programming services"). The Commission has also found that cable operators continue to exercise substantial market power today. See 1994 Cable Competition Report, 9 FCC Rcd 7442, 7449 (1994) ("The market for the distribution of multichannel video programming remains heavily concentrated at the local level, and for most households, cable television is the only provider of multichannel video programming. Cable systems continue to have substantial market power at the local distribution level.").

entering the "five hundred television channel world" by expanding their channel capacity even further through the installation of additional coaxial or fiber cable facilities. If DBS operators are saddled with a per se 32 RF-channel limitation on full-CONUS DBS channels, they will be severely constrained in their ability to keep up and compete with cable operators' superior channel capacity.

Furthermore, this arbitrary spectrum limitation is especially unwarranted given the other business and technological hurdles DIRECTV and other DBS operators must overcome. Although cable's market power has been their biggest competitive difficulty, independent DBS operators are also unable, for copyright and channel capacity reasons, to offer local broadcast signals directly to consumers.[19/] In addition, DBS operators must address terrestrial interference concerns, and potential antenna restrictions contained in local zoning ordinances and restrictive covenants -- all of which are obstacles they must overcome as new MVPD entrants.

For all of these reasons, DIRECTV and other independent providers should not be denied the opportunity to acquire additional spectrum to match competition from the incumbent cable monopolists.[20/] Indeed, to rule otherwise would undercut the very theory underlying the Commission's proposal to use auctions as a method of re-allocating ACC's channels. The Commission should impose constraints on market participation and limited

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19/ See In the Matter of Waiver of the Commission's Rules Regulating Rates for Cable Services As Applied to Cable Systems Operating in Dover Township, Ocean County, New Jersey, CUID Nos. NJ0213, NJ0160, Order Requesting Comments (released November 6, 1995) ("Dover Township"), at ¶ 22.

20/ See Hausman Statement at ¶ 19; see also id. at ¶ 24 ("The FCC should recognize that the ability to bid is not a guarantee of a license . . . If DIRECTV is the high bidder for the DBS spectrum, it is because DIRECTV believes it can put the spectrum to the highest value use.").

qualified bidders (and thus auction proceeds) only where the acquisition of additional spectrum would lead to or increase a particular MVPD's exercise of market power. This would not be the case with DIRECTV. As Dr. Hausman observes:

> [I]f DIRECTV is the high bidder for the DBS spectrum, it is because DIRECTV believes it can put the spectrum to the highest value use. Since the outcome will be pro-competitive, the Commission should not restrict DIRECTV's ability to purchase the spectrum. Otherwise, the Commission will decrease economic efficiency by placing restrictions on the market's ability to allocate scarce spectrum resources to their highest value economic use. This anti-competitive regulatory outcome would be a very disappointing reversal of the Commission's recognition of the superiority of a market allocation, rather than a regulatory allocation, of the spectrum.

Hausman Statement at ¶ 27 (emphasis in original).

Independent DBS operators like DIRECTV are perhaps the most efficient potential users of ACC's spectrum and are incapable of exercising market power.[21/] Under these circumstances, the Commission should, at a minimum, change the "DBS-concentration" spectrum aggregation limit to allow non-cable-affiliated, independent DBS providers to enter the auction process to compete for and acquire spectrum for more than one full-CONUS location.

2. The General "MVPD-Affiliate" Limitation

In addition to the DBS limitation described above, the Commission also proposes that "any DBS licensee or operator affiliated with another MVPD be permitted to control or use DBS channel assignments at only one of the orbital locations capable of full-

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21/ DIRECTV has determined that an integrated DBS service could be provided from two orbital locations. For example, the 28 channels available at 110° W.L. could be used to expand DIRECTV's current capacity at 101° W.L. A given customer could access all channels seamlessly across all transponders at both orbital locations. A key component of this integrated solution would be a dual-beam customer antenna capable of simultaneous reception from both orbital locations. Suitable antennas are already in use by consumers in Japan for simultaneous access to BSS and FSS satellites at different orbital locations.

CONUS transmission."[22] As the Commission notes, this limitation is directed at ensuring that no non-DBS MVPD, e.g., a cable operator, controls more than one full-CONUS DBS orbital location. The more important and problematic point is that, despite the potential for anti-competitive conduct, the Commission nevertheless proposes to allow the cable industry to bid for and own one of the full-CONUS DBS orbital locations.

First, it is clear that despite the Commission's language, the Commission's proposal goes far beyond the previous "balance struck by Tempo II" with respect to the participation of cable-affiliated providers in DBS. It allows Tempo or other cable-controlled providers like Primestar almost to triple Tempo's existing DBS channel capacity -- from 11 to 32 channels.

The effects of such participation by cable-affiliates in DBS are likely to be anticompetitive unless the Commission imposes appropriate competitive checks and conduct rules. The Commission until now has never addressed the vigorous objections raised by DIRECTV and others in the Advanced proceeding to the acquisition of ACC's spectrum by the cable industry.[23] And DIRECTV continues to believe that allowing the nation's largest cable MSOs through Tempo or Primestar to occupy the orbital position and channel assignments that would otherwise be used by an independent DBS competitor risks depriving

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22/ Notice at ¶ 40.

23/ DIRECTV and Echostar both expressed serious concerns with the anticompetitive effects of the proposed ACC/TEMPO transactions, which would have resulted in TEMPO or PRIMESTAR controlling all of ACC's channels at 110° W.L. See DIRECTV Petition to Deny (Nov. 2, 1992) at 18-25; DIRECTV Consolidated Reply (Dec. 16, 1994) & Attachment 1, Declaration of Professor Jerry A. Hausman (attached hereto); Echostar Petition to Deny at 14-35; Echostar Consolidated Opposition at 15-33 & Attachment 2, Declaration of Roger G. Noll.

the public of significant potential independent competition in the MVPD marketplace, and further enhancing cable operator market power.[24]

Thus, DIRECTV has extreme doubts about allowing the cable industry to acquire full-CONUS DBS slots at all.[25] If, however, the Commission insists upon allowing the cable industry to acquire up to 1/4 of full-CONUS DBS spectrum at auction, it should do so only if two general safeguards are implemented. First, the Commission should ensure that the stringent conduct rules discussed at Section III below are put in place to prevent anticompetitive behavior. Second, the Commission should ensure that the public realizes the full value of the spectrum that may be purchased by such cable-affiliated entities by maximizing the opportunities for all qualified potential bidders to enter the auction and compete, including DIRECTV.

3. The "MVPD-Affiliate" Limitation Shall be Applied to Cable Affiliates Only

Both the spectrum aggregation limitations (Notice at ¶¶ 34-40) and the proposed conduct rules to protect competition (Notice at ¶¶ 54 - 63) refer to DBS operators that are affiliated with "non-DBS MVPDs". Application of these rules and policies to entities other than cable affiliates makes no sense and the Commission should clarify its final rules to make this point explicit.

Read literally, the Commission's prohibitions could sweep well beyond cable operator/DBS affiliates and preclude other more pro-competitive alliances among non-cable-

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24/ See Notice at ¶ 36.

25/ See Notice at ¶ 37 (observing that cable affiliated DBS operators "may have an incentive to minimize competition from any DBS resources they contro[l], and instead to coordinate their DBS activities with those of their other systems to maximize their joint profits").

affiliated MVPDs. This is especially so when combined with the Commission's proposed attribution threshold for implementing its spectrum limits, which would attribute any ownership interests of 5% or more, and could in addition define attributable interests to arise in connection with certain management and joint marketing agreements.[26]

Cable, of course, presents a different profile. Cable, with over 63 million subscribers, has market power. On June 30, 1995, NCTA reported that concentration in the cable industry this year has increased. TCI, the nation's largest MSO, increased its share from 17.67% to 19.50%, while Time Warner Cable has increased its share from 12.2% of cable subscribers to 14.51% of all cable subscribers. NCTA also reported that vertical integration in the cable industry has remained constant. Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Comments of the NCTA (June 30, 1995), at 25-33.[27]

There is no reason, however, for the Commission to implement a sweeping limitation that covers MVPDs beyond cable at this stage of MVPD market development. The Notice itself acknowledges competitive technologies to cable (like DBS, MDS and video dialtone) are today only emerging, and do not have market power in the market for the distribution of video programming now or in the foreseeable future.[28] The Commission also states that it remains committed to the goal of promoting "effective competition to the

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[26] See Notice at ¶ 48.

[27] See also Dover Township at ¶ 17 ("The presence of possible substitutes for the cable operators' CPSTs does not necessarily impose competitive pressure on the cable operators or restrain the rates those operators will charge for their services. Rather, we must determine whether the cable operators continue to wield market power, despite the presence of would be competitors.").

[28] Notice at ¶ 36.

services provided by cable systems," and that it has sought to develop the DBS spectrum in precisely this context.[29]

Given these goals, there is no reason at this point to extend the proposed aggregation limits, attribution rule or conduct rules beyond cable-affiliate arrangements. Alliances among emerging MVPDs -- e.g. wireless cable operators, TVRO providers, telephone or long distance companies and/or existing DBS operators or permittees -- could all yield pro-competitive and pro-consumer results in curbing cable's MVPD market power. The Commission would always have the continuing flexibility to police and impose appropriate safeguards in connection with any particular transaction. At this stage, the Commission should continue to promote all actions that encourage the growth of emerging competition to cable. The proposed limitations should apply only to DBS arrangements involving cable operators -- the only MVPDs who exercise market power.

III. THE COMMISSION MUST IMPLEMENT CONDUCT RULES TO DECREASE THE ABILITY OF CABLE OPERATORS TO ENGAGE IN ANTI-COMPETITIVE CONDUCT

A. Competitive Safeguards.

Although the Notice acknowledges the potential anticompetitive incentives that cable-affiliate DBS operators possess, it proposes to "maintain balance struck in Tempo II."[30] Yet, as mentioned above, the Commission proposes to move far beyond the Tempo II balance to allow cable-affiliated DBS entities to almost triple their present full-CONUS channel capacity. This is a clear proposed "re-calibration" of the Tempo II balance.

29/ Id. at ¶ 36.

30/ Notice at ¶ 39.

DIRECTV and others have detailed on numerous occasions the opportunities for anticompetitive behavior that will be created by allowing cable operators to acquire a full-CONUS DBS orbital position.[31/] If the Commission allows Tempo, Primestar or other cable-affiliated entities to bid for ACC's spectrum at 110° W.L., as the Commission itself recognizes, it must impose significant and meaningful conduct limitations to check anticompetitive behavior.

In 1989, when the Commission considered granting a conditional DBS permit to Tempo, several parties expressed the strong concern that TCI's extensive cable system holdings, coupled with its earth station (satellite uplink) facilities and its interests in at least twelve cable programmers, would result in undue concentration of control in the video services marketplace if a DBS system were added to its holdings.[32/] The Commission ultimately granted Tempo a DBS authorization, but pledged to exercise its continuing oversight to prevent any actions that would be "deleterious to the DBS industry and its customers, or to operators and customers in the other video entertainment services as well."[33/]

In allocating specific channels and orbital assignments to Tempo in July of 1992, the Commission also imposed certain special conditions on Tempo's DBS license. Tempo and related entities (including Primestar) are expressly prohibited, in areas served by TCI-affiliated cable systems (1) from offering or providing DBS service to subscribers of

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31/ See supra note 24. DIRECTV hereby incorporates those filings by reference for purposes of inclusion in the record in this proceeding.

32/ Continental Satellite Corporation, 4 FCC Rcd at 6298.

33/ Id.

TCI-affiliated cable systems exclusively or primarily as an ancillary or supplementary cable service; and (2) from offering or providing DBS service in a manner that would allow subscribers of TCI-affiliated cable systems to receive Tempo's DBS service under terms and conditions different from those offered to consumers who are not subscribers of TCI-affiliated cable systems.[34/] These are the so-called "Tempo II conditions."

The Notice has proposed to retain these conditions and apply them more broadly as service rules to "all DBS operators that are affiliated with non-DBS MVPDs."[35/] These variations of the Tempo II marketing limitations are designed to prevent cable-affiliated DBS providers from maximizing joint profits in areas served by the cable operator by offering its DBS services as an adjunct to the services offered by the affiliated cable operator.[36/]

In addition, the Notice would add a third rule that no DBS operator "shall sell, lease, or otherwise provide transponder capacity to any entity that enters into an arrangement with an MVPD granting that MVPD the exclusive right to distribute DBS services within, or adjacent to, its service area."[37/] The Commission reasons that this condition "should serve to increase the opportunity for DBS services to be offered to consumers in competition with

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34/ Tempo II, 7 FCC Rcd at 2731-32.

35/ Notice at ¶ 55.

36/ Notice at ¶ 55. The Commission has cast this proposal generically as focusing on non-DBS "MVPDs" rather than cable operators. As noted above (Sect. II.B.3.), DIRECTV urges the Commission to make these rules cable-specific, since they make no sense if they are applied to other alternative MVPDs with no market power.

37/ Notice at ¶ 56.

the video programming services offered by other MVPDs, in particular, in the service areas of MVPDs affiliated with DBS operators or that receive wholesale DBS service."[38]

DIRECTV believes that all of the above conditions are necessary, reasonable and serve the public interest. As the Commission (and Congress) has stated time and time again, it is sound public policy to foster competitive alternatives to cable to reduce that industry's market power. If the Commission makes the difficult decision to allow cable to acquire and control one of the four full CONUS DBS orbital slots, it must implement meaningful and significant conduct rules so that competition cannot be strangled at birth. As Professor Hausman observes, "[s]ince the Commission intends to permit dominant cable providers (with 94% of the market) to expand their ownership of DBS spectrum, such rules can decrease the ability of cable providers to engage in anti-competitive actions with respect to DBS."[39] In this regard, the Commission's proposed conduct rules are necessary, but not sufficient -- they do not go far enough.

For example, permitting a cable-controlled entity like Primestar to acquire a full-CONUS DBS location presents a variety of cross-subsidization opportunities, especially when combined with the TCI proposed "Headend-in-the-Sky" ("HITS") distribution service. Primestar's expansion of cable's market power into high-power DBS, together with the HITS revenue stream, could permit the cable industry to engage in significant cross-subsidization of cable and DTH operations, which could enable cable operators to keep DTH prices artificially low and threaten the livelihood of independent DBS competitors.

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[38] Id.

[39] Hausman Statement at ¶ 25.

Similarly, cable-affiliated DBS providers should be required to buy programming as independent entities, and should not be permitted to aggregate their subscribers with those of their cable operator parent companies in order to obtain volume discounts from programmers or equipment suppliers. Otherwise, entities like Primestar, for example, would be able to leverage the enormous buying power of its MSO parents to gain an unfair advantage over the independent DBS industry.[40] Without an express limitation on such conduct, it will undoubtedly occur.[41]

These concerns over anti-competitive behavior and cross-subsidization are not idle speculation. The cable industry has a history of such conduct, and the program access rules are one successful pro-competitive response by Congress and the FCC to address it. DIRECTV has little doubt that cable will continue to exercise market power to the detriment of its competitors and competition if given the opportunity to do so.

The "bottom line" is that the Commission must impose additional safeguards to prevent such anti-competitive behavior. During the Advanced proceeding DIRECTV fully briefed and proposed a list of such necessary conditions, to which the Commission has referred in the Notice.[42] DIRECTV has re-submitted them for the record in this

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40/ As the Notice points out, the PRIMESTAR partner MSOs are affiliated with cable systems that serve approximately 60% of the cable subscribers nationwide. Notice at ¶ 57. Apart from using their monopsony buying power to disadvantage independent DBS providers, the Commission should recognize that permitting the extension of such monopsony power in this fashion also can harm independent programmers, who will be deprived of the opportunity to realize better prices for their product, and over time, will decrease these programmers' incentives to create new programming.

41/ Hausman Statement at ¶¶ 25 - 30.

42/ See Notice at ¶ 63 n.98.

proceeding as Attachment 2, and urges that they be generalized and adopted as a pre-conditions to allowing any cable-affiliated entity to bid for ACC's channels.

B. Access to Programming.

In paragraph 60 of the Notice, the Commission acknowledges how critical the program access rules have been to promoting the emergence of competition to cable. DIRECTV agrees. Without the program access provisions of the 1992 Cable Act, and the Commission's continued vigilance and enforcement of its program access implementing regulations, alternative MVPDs like DIRECTV might not even exist today. Thus, in this and other proceedings, the Commission must not allow the program access rules to be diluted, "interpreted away" or otherwise undercut by vertically integrated cable interests unhappy at the prospect of facing emerging competition.

In addition, however, the Notice also recognizes that the Commission has never considered the vertical foreclosure issues presented by common ownership among DBS operators, other MVPDs and program vendors -- because, until now, there have been no cable-affiliated DBS operators. As Professor Hausman observes, a cable-affiliated DBS provider should not be able to have an exclusive programming contract for DBS transmission with either an affiliated or an unaffiliated programmer. Otherwise, the cable companies could use their acknowledged market power to force an unaffiliated programmer to provide exclusive DBS rights, a result that would create barriers to entry or expansion by DBS operators. Thus, the program access rules should be supplemented to condition the award of any DBS license to a cable-affiliated entity on the DBS licensee not entering into any DBS-exclusive programming agreements.[43/]

43/ See Hausman Statement at ¶ 26.

Other than as supplemented above, the existing program access rules should not be changed. The Commission's program access regime has been a great success, and the Commission should continue to build a strong body of case law to support it through rigorous enforcement of the program access rules.

C. HITS.

The Commission also seeks comment on the vertical foreclosure issues raised by TCI's planned HITS proposal, which would use DBS spectrum on a wholesale distribution basis to increase cable's distribution and penetration. TCI had proposed Primestar as the centerpiece of HITS, which will be available to "every cable operator -- large and small" --in order for such operators to "drive new revenue streams and to remain competitive in the marketplace."[44/] As the Commission recognizes, HITS raises troubling issues, but primarily highlights the degree to which cable-owned DBS providers simply do not have incentives to compete vigorously with their cable parents.

DIRECTV has no per se objection to the HITS distribution mechanism. If DIRECTV and a number of other qualified bidders are able to participate in the auction for ACC's spectrum, and if TCI/Tempo/Primestar is nevertheless successful in winning ACC's license, these entities may be able to provide certain distribution efficiencies using DBS spectrum. The Commission must allow other DBS providers, however, to perform similar distribution operations. As the Notice points out, providing wholesale DBS services with the same facilities used to provide retail DBS services to subscribers may generate efficiencies as the average cost of using those facilities declines with the greater number of subscribers

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44/ See Application for Review of CATA, Attachment, "HITS Completes the Digital Picture," in the Advanced proceeding.

served. So long as independent DBS operators have a real opportunity to access the market and provide such services, and so long as the appropriate competitive conditions and cross-subsidization restraints are adopted and implemented, DIRECTV has no objection to HITS.

IV. OTHER SERVICE RULE ISSUES

A. International Service Issues.

The Commission notes that in September 1995, in partial response to DBSC's request to provide international service using excess DBS capacity, it issued a Notice of Proposed Rulemaking regarding the use of U.S.-licensed satellites for the provision of international services.[45] The Commission has proposed to permit all U.S.-licensed FSS satellite operators to provide both domestic and international services, on a co-primary basis, and has requested comment on whether this treatment should be extended to other satellite services, including DBS.

DIRECTV agrees with and supports the concept of increased flexibility for all satellite operators in providing both domestic and international service.[46] DIRECTV also agrees that the more appropriate forum to decide such issues is the pending Transborder/Separate System docket. However, DIRECTV does want to call to the Commission's attention a troubling statement in Paragraph 24 of the Notice, which DIRECTV respectfully submits is an inaccurate characterization of long-standing U.S. policy. Paragraph 24 states:

> We emphasize, however, that even if we permit U.S. DBS licensees to provide international service, as a matter of policy, it may do so only after successfully modifying the BSS Plan to include the proposed

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45/ Notice at ¶ 24; see Transborder/Separate Systems, 10 FCC Rcd 7789, 7793 (1995).

46/ Comments of DIRECTV, Inc., IB Docket No. 95-41 (June 8, 1995).

> international service and receiving approval from the foreign country or countries receiving the transmissions.

Notice at ¶ 24 (emphasis added) (footnote omitted).[47]

While such a concept may have some validity with respect to the Fixed Service Satellite (FSS) regulatory regime, where the concept of prior approval is premised on the FCC's duty to ensure U.S. government compliance with Intelsat obligations, it has no place in the BSS/DBS regime. To the contrary, the U.S. traditionally has supported a "free flow of information" approach with respect to BSS/DBS where prior consent of the receiving country is not required. DIRECTV requests that the Commission clarify this point.

B. Due Diligence Milestones.

The Commission proposes to tighten its due diligence milestones for newly-issued DBS construction permits, including those granted by means of competitive bidding, as well as for existing permits acquired through assignment and transfer. The Commission would continue to apply existing due diligence requirements and precedent to construction permits already issued.[48]

DIRECTV supports these proposals. They are a sensible accommodation of the Commission's proposed transition into the "new era" of DBS service, and should help to expedite DBS service to the public.

47/ Contrary to the Commission's suggestion at footnote 37 of the Notice, there is nothing in the Region 2 plan adopted at the 1985 Regional Administrative Radio Conference which supports imposing any domestic limitations on DBS/BSS service. See generally, Regulatory Policy Regarding the Direct Broadcast Satellite Service, 94 FCC 2d 741, 744, 752 (1983).

48/ Notice at ¶ 27.