

11/30/95

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D.C. 20554

In the Matter of )

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

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

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**MCI REPLY COMMENTS**

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## SUMMARY

The proposals the Commission set forth in the NPRM for the use of competitive bidding for the award of licenses for DBS channels at 110° West Longitude and 148° West Longitude, as well as the proposed DBS service rule revisions, should be adopted with the minor modifications recommended by MCI.

MCI remains committed to opening bidding on the channels at 110° West Longitude at \$175 million. However, the value of this spectrum can only decline as the Commission and appellate processes drag on and the incumbents' headstart advantage grows. MCI urges the Commission to reaffirm its commitment to an expedited rulemaking and reassignment process. The Commission must also act quickly and decisively to reject efforts to have additional cost burdens or restrictive conditions imposed on the auction winners. Such burdens and limitations will serve only to further accelerate the loss of the spectrum's value and to thin the ranks of prospective bidders.

In a continuing effort to gain access to additional DBS channels at no cost and to forestall entry by a strong competitor, Echostar and Directsat (collectively, Echostar) assert that it is unlawful for the Commission to revisit and abandon the Continental reallocation policy. Echostar's lengthy legal discourse is founded on a number of fundamental misconceptions. First, Echostar imagines that it remains part of an ongoing DBS processing round as a pending applicant, despite the fact that its application was conditionally granted in 1989. Second, Echostar asserts that it had an expectation of receiving additional DBS channels in the future based on an inchoate right to spectrum that might be returned by or reclaimed from other DBS licensees, and that it was entitled to act in reliance on this contingent interest

in constructing a satellite. Third, Echostar maintains that this speculative interest in additional DBS channels rises to the level of a property right protected by the U.S. Constitution. Each of these novel assumptions is wholly unfounded.

In contrast to Echostar's comments, its May 1, 1995 SEC Registration Statement contained a far different (and far more accurate) description of its "rights," as well as the options the Commission has today

...[T]he 27 frequencies formerly allocated to Advanced Communications Corporation ("Advanced") at each of the 110 and 148 degrees West longitude will soon be re-allocated by the FCC. ***While formal rules for re-allocation of these frequencies do not exist***, based on FCC precedent in similar circumstances, ***it is possible*** that those frequencies would be assigned to DBS applicants whose original frequency requests could not be completely filled. ***In that event***, EchoStar and DirectSat would each be entitled to a percentage of the total number of re-allocated frequencies. ***It is, however, also possible that those frequencies will be re-allocated in a different manner, or that they will be auctioned off to the highest bidder.***

The Commission should adopt structural restrictions on DBS Operators/Licensees that are affiliated with non-DBS MVPDs that possess market power. As Tempo recommended (albeit in a different context) in its initial comments, the Commission should adopt rules and policies "consistent with the Justice Department's informed and considered view."

In designing auction procedures for DBS, the Commission should avoid undue complexity and adopt a structured open-outcry approach as recommended by MCI in its initial comments. Such an approach will allow the bidding to be completed within a single day.

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

**MCI REPLY COMMENTS**

MCI Telecommunications Corporation (MCI), pursuant to Section 1.415 of the Commission's Rules, hereby replies to the initial comments of other parties submitted in response to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding. Notice of Proposed Rulemaking, FCC 95-443 (released October 30, 1995) (NPRM). In MCI's Comments, we expressed support for the Commission's proposal to employ auctions to reassign the channels recently reclaimed from Advanced Communications Corporation (ACC) and for the Commission's proposed adjustments to the DBS service rules, with minor modifications.

**I. INTRODUCTION**

In the Memorandum Opinion and Order affirming the Bureau's decision in Advanced Communications Corporation, the Commission outlined an aggressive schedule for the adoption of rules and the award of DBS authorizations for the reclaimed frequencies via auction. The Commission stated that it intended to meet a timetable that would culminate in the new rules becoming effective on January 17, 1996, with channels reassigned (by auction or otherwise) on the following day. MCI remains committed to opening bidding on the channels

at 110° West Longitude at \$175 million. However, MCI cannot emphasize too strongly that the value of this DBS spectrum, to MCI or any other bidder, can only decline as the Commission and appellate processes drag on and the incumbents' headstart advantage grows. Therefore, MCI urges the Commission to reaffirm its commitment to an expedited rulemaking and reassignment process. The Commission must also act quickly and decisively to reject the efforts of those who would have it impose cost burdens (e.g., reimbursement of ACC's "investment") or other restrictions (e.g., a contingent right of reversion in the event Primestar and Tempo prevail on appeal, or channel limits such as those proposed by CTA) on the auction winners. Such burdens and limitations will serve only to further accelerate the loss of the spectrum's value and to thin the ranks of prospective bidders.

## II. DISCUSSION

### A. **The Commission's Out-Dated Reallocation Policy, Adopted In Continental, Did Not Create Any Vested Right To Spectrum.**

In their continuing effort to gain access to additional DBS channels at no cost and to forestall entry by a strong competitor, Echostar and Directsat (collectively, Echostar) assert that it is unlawful for the Commission to revisit and abandon the Continental reallocation policy.<sup>17</sup> Echostar's lengthy legal discourse is founded on a number of fundamental

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<sup>17</sup> Echostar Comments at 2-40; see also Echostar Reply Comments in the ACC proceeding, dated June 16, 1995 at 3. See Continental Satellite Corporation, 4 FCC Rcd 6292 (1989) ("Continental"), recon. denied, 5 FCC Rcd 7421 (1990). In Continental, the Commission addressed several new and amended DBS applications, and stated that if the permit of any of the applicants that were authorized in Continental, or in any of the previous DBS decisions, were to be surrendered or canceled, "the remaining permittees from this group will have the first right to additional allocations, apportioned equally, up to the number requested in their applications." Continental, 4 FCC Rcd at 6299.

misconceptions. First, Echostar imagines that it remains part of an ongoing DBS processing round as a pending applicant, despite the fact that its application was conditionally granted in 1989.<sup>2/</sup> Second, Echostar asserts that it had an expectation of receiving additional DBS channels in the future based on an inchoate right to spectrum that might be returned by or reclaimed from other DBS licensees, and that it was entitled to act in reliance on this contingent interest in constructing a satellite.<sup>3/</sup> Third, Echostar maintains that this speculative interest in additional DBS channels rises to the level of a property right protected by the U.S. Constitution.<sup>4/</sup> Each of these novel assumptions is wholly unfounded.

It is simply not the case that the applications filed by Echostar and others on or before April 8, 1988 remain pending before the Commission. Indeed, these applications were considered and acted upon in the *Continental* decision itself. The processing round closed at that time, and each conditional permittee remained subject to the jurisdiction of the Commission pursuant to the due diligence requirements imposed upon them; none remained an applicant following the grant of its conditional permit. Accordingly, Echostar's assertion that it is part of a class of "applicants" forever subject to "cut-off" protection in perpetuity with respect to channels that may be reclaimed from other DBS permittees does not withstand even the most minimal scrutiny.<sup>5/</sup> The many cases cited by Echostar concerning the waiver of cut-

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<sup>2/</sup> See Echostar Comments at 2-9.

<sup>3/</sup> *Id.* at 9-20.

<sup>4/</sup> *Id.* at 21-30.

<sup>5/</sup> Elsewhere, Echostar attempts to bootstrap this assertion of continuing applicant status into a claim that it is similarly situated with applicants for the Multipoint Distribution Service, where the Commission recently declined to employ auctions to resolve mutual exclusivity among applications that were on file before Congress amended the

off deadlines are simply inapposite.

Nonetheless, building on its initial erroneous assumption, Echostar asserts that it was entitled to expect that it would ultimately receive additional channel assignments and that it was "reasonable" for Echostar (and DirectSat) to spend "millions of dollars in . . . reliance on the Continental decision and the rights they were granted thereunder."<sup>6</sup> Echostar boldly maintains that "[t]he 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."<sup>7</sup> In order to establish its reliance on Continental, Echostar would need to show not only that it expended additional funds on satellite construction in reliance on its expectation of receiving *some* additional channels, but also that it would receive channels in a *specific* orbital location -- 119° West Longitude, where those two satellites will be deployed. Such a demonstration is conspicuously absent from Echostar's comments.

In contrast to Echostar's comments, its May 1, 1995 SEC Registration Statement contained a far different (and, we submit, far more accurate) description of these "rights," as well

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Communications Act to permit the Commission to assign licenses using auctions. 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 in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act - Competitive Bidding, 10 FCC Rcd 9589, 9631-9634 (1995). There the Commission concluded that pending applicants had formulated their proposals in justified reliance that their mutually exclusive applications would be processed using lotteries. Because Echostar is not an applicant, and has no currently pending claim that is mutually exclusive with others, its situation is markedly different than the MDS applicants. There can thus be no legitimate claim that the Commission could be engaged in selective retroactive application of its auction authority. Contra Echostar Comments at 20, citing James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1971).

<sup>6</sup> Echostar Comments at 10.

<sup>7</sup> See Echostar Comments at 17 (emphasis in original).

as the options the Commission has today:

[T]he 27 frequencies formerly allocated to Advanced Communications Corporation ("Advanced") at each of the 110 and 148 degrees West longitude will soon be re-allocated by the FCC. *While formal rules for re-allocation of these frequencies do not exist*, based on FCC precedent in similar circumstances, *it is possible* that those frequencies would be assigned to DBS applicants whose original frequency requests could not be completely filled. *In that event*, EchoStar and DirectSat would each be entitled to a percentage of the total number of re-allocated frequencies. *It is, however, also possible that those frequencies will be re-allocated in a different manner, or that they will be auctioned off to the highest bidder.*

EchoStar Communications Corporation Registration Statement (Form S-1) filed May 1, 1995, Registration No. 33-91276 (hereinafter EchoStar S-1) at 39 (emphasis added).

EchoStar's claim that it has -- since receipt of its orbital and channel assignments in 1992 -  
- made investments that it would not otherwise have made in justifiable reliance on the  
"Continental rights" of EchoStar and Directsat to each receive five additional channels<sup>8</sup> is also  
contradicted by the EchoStar S-1:

EchoStar controls 21 DBS frequencies at 119 degrees West Longitude, one of three orbital slots that provide coverage to the entire continental United States. Of these frequencies, ten were acquired as a result of a merger between EchoStar and DirectSat.

EchoStar S-1 at 39.<sup>9</sup>

Only three orbital slots provide full coverage to the entire continental United States and, therefore, these three slots are considered the most strategic. As of the

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<sup>8</sup> EchoStar Comments at 9-13; see also Verified Statement of Charles W. Ergen.

<sup>9</sup> EchoStar fully disclosed to prospective investors, in several places in its S-1 filing, that although its satellites carried sixteen transponders, the authorizations held by EchoStar and DirectSat were for only 11 and 10 transponders, respectively. See, e.g., "Prospectus Summary" at 7-8 and n. 6. See also, "Programming" at 34, describing plans to offer "65 to 75 channels of programming" on EchoStar I (using, presumably, the eleven odd-numbered transponders assigned to EchoStar) and "60 to 70 additional channels" on EchoStar II (ten even-numbered transponders acquired through the merger with Directsat).

date of this Prospectus, only EchoStar and DirecTv have *licenses* for sufficient frequencies in these strategic orbital slots to provide *comprehensive nationwide DBS service*.

*Id.* at 31 (emphasis added). It is thus evident that Echostar believed that its assigned channels were sufficient to provide a viable service without any additional assignments.<sup>10</sup>

Finally, after describing the DBS assignments to Tempo, DirecTv/USSB and Echostar, Echostar states:

*Twenty-seven frequencies at 110 degrees West Longitude*, one of the most strategic orbital lots [sic] providing full coverage to the continental United States, *are currently not allocated and are expected to be allocated by the FCC in the near future. If one well capitalized entity acquires a large number of these frequencies, another strong competitor will ultimately emerge.*

*Id.* at 46 (emphasis added). Clearly, then, Echostar's real concern -- as revealed in its stock offering prospectus -- is *not* that it will be unable to offer a viable service if it does not receive the additional transponders for which it claims "Continental rights," but rather that the Commission, in reallocating the frequencies formerly held by ACC at 110 degrees, will make it possible for "another strong competitor" to emerge.

As the Commission emphasized in the NPRM, however, providing additional competition in the multichannel video program distribution ("MVPD") market is an important public interest goal that it is charged with promoting. For the sound reasons discussed in the NPRM, the Commission has reasonably reached the tentative conclusion that the reassignment policy articulated in Continental would not facilitate increased competition. See NPRM, at ¶¶9-17. As even Echostar must concede, the Commission may reconsider policies of general

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<sup>10</sup> Reallocation of the reclaimed channels at 110 degrees under the Continental policy would further fragment the spectrum at that location, without necessarily giving Echostar an opportunity to use any of the additional transponders on its two satellites at 119 degrees. Nine channels at that location are held by Tempo.

applicability in either a rulemaking or an adjudicatory proceeding<sup>11</sup>. All that is required is that the agency, when departing from past precedent, provide what the Commission has already set forth in the NPRM -- a "reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored."<sup>12</sup>

Mere reliance on existing policy does not imbue Echostar with any special rights. Specifically, Echostar's creative arguments that abandonment of the reallocation policy adopted in Continental would raise significant takings questions and due process concerns under the Fifth Amendment<sup>13</sup> are without merit and unsupported by the cases cited by Echostar. Because Echostar cannot assert a property right even to the radiofrequency spectrum it is currently assigned, and because its claim to have justifiably relied to its detriment on its "Continental rights" has been exposed as nothing more than a *post hoc* rationalization in support of its effort to foreclose additional competition, it most certainly cannot claim that it would be denied due process if the Commission determines that there is a more effective means of efficiently reallocating DBS frequencies forfeited by another than the one set out in Continental.

First, under the general licensing provisions of the Communications Act, licenses are granted by Federal authority for the use -- not ownership -- of frequencies, and "no such license shall be construed to create any right, beyond the terms, conditions and periods of the license."<sup>14</sup>

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<sup>11/</sup> See SEC v. Chenery Corp., 332 U.S. 194, 202-03 (1947). Indeed, the Continental decision was itself an adjudicatory proceeding.

<sup>12/</sup> NPRM at ¶ 17, quoting Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971).

<sup>13/</sup> Echostar Comments at 21-30.

<sup>14/</sup> 47 U.S.C. § 301. It is a firmly rooted Commission policy that a license "is not an owned asset or vested property interest." See In Re Merkley, 94 F.C.C. 2d 829, 830 (1983),

Further, Section 304 of the Act states that "[n]o license shall be granted by the Commission until the applicant therefore shall have waived any claim to the use of any particular frequency."<sup>15</sup>

Accordingly, while the Continental decision conferred upon Echostar and other existing DBS permittees an inchoate "first right" to additional channels on a "first-come, first-served basis," subject to due diligence requirements, the Commission's reallocation plan and Echostar's DBS authorization do not in any way create an enforceable property right in any newly available frequencies.<sup>16</sup> Sections 301 and 304 of the Act expressly deny a permittee a vested property interest in any channel or frequency, let alone frequencies that it is merely possible for the permittee to obtain.<sup>17</sup> Therefore, the Commission may abandon the reallocation policy set forth in Continental without regard to any Fifth Amendment "takings" claim.

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recon. den., 56 RR 2d 413 (1984) (Merkley), aff'd sub nom. Smith v. Heckler, 776 F.2d 365 (D.C. Cir. 1985); O.D.T. International, 9 FCC Rcd 2575, 2576 & n.5 (citing Merkley for the proposition that the Commission is "invested with exclusive authority" to dispose of licenses).

<sup>15</sup> 47 U.S.C. § 304. See also, In Re Gerald M. Fried, 59 FCC 2d 885, 890 (noting that a licensee is not immune from challenge if its renewal has been deferred for a period of time, as such immunity would create a property right in frequencies not contemplated by Congress and frustrate the Commission's authority to choose between competitors) (emphasis added).

<sup>16</sup> See Continental, 4 FCC Rcd at 6299-6300.

<sup>17</sup> See e.g., Merkley, 94 FCC 2d at 830 (citing, inter alia, to Sections 301 and 304 of the Act to illustrate the Commission's long standing policy that a broadcast license is not a vested property interest). Echostar cannot credibly maintain that the Commission's alteration of its DBS reassignment policy would unlawfully deprive it of the use of transponders on its satellite. Contra Echostar Comments at 23-24. Echostar's decision to include this capacity was clearly at its own risk.

## **B. The Commission Should Expressly Reject Requests To Convene A Settlement Conference**

DBSC, at 4-7, suggests that the existing permittees and applicants should be given an opportunity to meet, under the auspices of the Commission, to seek to reach a consensus, if at all possible, on the disposition of the channels reclaimed from ACC.<sup>18</sup> As explained above, there is no merit to the arguments of DBSC and others that the 1988 processing round is still open, and that only those parties whose initial channel requests were not completely filled have “Continental rights” to the reassigned channels. In any event, the Commission should reject the invitation to convene a settlement conference. Given the contentious history of this proceeding, it is, perhaps, not surprising that the putative claimants are unable to agree the ground rules for such a meeting. In fact DBSC and Continental Satellite, the two principal commenters supporting a settlement effort, do not even agree on the number of eligible participants or whether the available channels should be divided equally. Compare DBSC at note 6, suggesting that there are thirty channels to be divided equally among six applicants with Continental Satellite at note 17, proposing to limit the field to five by excluding DirecTV, limiting the four other applicants to five channels each, and -- conveniently -- award the other ten channels to Continental! Even if the claimants were somehow able to agree on the ground rules, it would also be necessary for the Commission to consider whether mergers and acquisitions among applicants subsequent to the Continental decision (e.g., the merger of Echostar and Directsat and the acquisition of a 40% interest in

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<sup>18/</sup> As revealed in Echostar’s comments, the three affiliated entities -- Echostar, Directsat and DBSC -- have already amassed more than the proposed 32 channel limit in the private market. The Commission should not countenance their efforts to obtain as many as fifteen additional “free” channels -- at the U.S. Treasury’s expense -- through the Continental reassignment process.

DBSC by EchoStar) should result in modifications to the contemplated pro rata division of channels. Any division of the former ACC channels among the claimants would result in a piecemeal reassignment, necessitating "channel swaps" and possibly ownership realignments, which would involve further implementation delays. For all these reasons, there is no assurance that a negotiated settlement would result in more expeditious or efficient use of the spectrum resource. The Commission should not commence an apparently futile effort to permit parties with a long history of animosity to engage in protracted negotiations. Such negotiations would likely result in a further delay of the reassignment of reclaimed channels to those able to put them to productive use. Accordingly, MCI strongly recommends that the Commission affirmatively reject the request for a settlement conference.

**C. The Commission Should Adopt Structural Restrictions On DBS Operators/Licensees That Are Affiliated With Non-DBS MVPDs That Possess Market Power.**

**1. Restraints On Anti-Competitive Conduct In The MVPD Market.**

In its initial comments, MCI endorsed the Commission's proposal to impose limits upon DBS operators affiliated with non-DBS MVPDs with one very important clarification -- that the Commission should impose such restrictions only upon MVPDs that possess substantial market power in the broad MVPD marketplace. MCI's suggested approach has received strong support from a number of disparate commenters.<sup>19</sup> MCI specifically suggested that the limit apply only to those MVPDs that operate systems of twelve or more standard NTSC video channels, and which

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<sup>19</sup> See, e.g., NRTC Comments at 4-5; NYNEX Comments at 2-5; DirecTV Comments at 13-15. As DirecTV notes, DBS alliances "among emerging MVPDs" that lack market power could "yield pro-consumer results in curbing cable's MVPD market power." DirecTV at 15.

meet certain levels of aggregate national subscribership or local market penetration.<sup>20</sup>

Apparently recognizing that the only appropriate focus for any DBS/non-DBS cross-ownership limits is upon MVPDs with the power to distort the market, cable-industry commenters have disingenuously asserted that cable operators generally, and the Primestar partners in particular, do not have the ability to exert anti-competitive power within the DBS marketplace itself.<sup>21</sup> As the Commission emphasized in the NPRM, however, the relevant market is not DBS alone, which serves only a small fraction of video programming consumers, but the market for multi-channel video programming generally.<sup>22</sup>

With respect to the MVPD market as a whole, the Commission has more than ample empirical evidence of the tremendous market power that is wielded by cable MSOs.<sup>23</sup> In adopting the current Cable Act in 1992, Congress found that cable operators possessed "undue market

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<sup>20</sup> See MCI Comments at 10-12.

<sup>21</sup> Although the cable interests acknowledge that DBS is only a small part of the MVPD market, they seek to obscure their own continued dominance of the broader market by emphasizing that DBS is growing rapidly. See Continental Cablevision Comments at 10; NCTA Comments at 5-7; Time Warner Comments at 4-5. This tactic too is disingenuous. Because DBS is in its nascent stage, anything other than "explosive" growth would be tantamount to complete failure. Given the stranglehold that the cable monopolists have had on the distribution of video programming, the existence of any competition is fairly characterized as a significant change -- but it is certainly not one that alters the competitive dynamics of the industry.

<sup>22</sup> See Department of Justice ("DOJ") Comments at 1-4. Indeed, several of the cable-affiliated commenters point out elsewhere that the larger MVPD market is the relevant focus for the Commission's concern. See Continental Cablevision Comments at 5 & 14; NCTA Comments at 8; TEMPO DBS Comments at 14 & n.25.

<sup>23</sup> Even the economic experts retained by the cable industry do not attempt to explain away cable's MVPD market dominance. See TEMPO DBS Comments, Supplemental Declaration of Bruce M. Owen at ¶ 7.

power."<sup>24</sup> Just last year, the Commission concluded in its first annual assessment of competition in the MVPD market that "competitive rivalry in most local [MVPD] markets is largely, often totally, insufficient to constrain the market power of incumbent cable systems,"<sup>25</sup> which at that time controlled approximately 94% of the total MVPD subscribership.<sup>26</sup>

There is also no doubt that many cable operators have consistently exploited their market power to engage in anticompetitive conduct. The Commission concluded last year that cable operators had both a clear incentive and a demonstrated propensity to engage in various types of strategic behavior designed to deter entry by potential rivals.<sup>27</sup> For example, prior to the passage of the 1992 Cable Act, and the program access rules adopted thereunder, a significant number of cable operators were able to stifle potential competitors by controlling access to programming. The Commission found that this practice abated only after corrective regulations were implemented.<sup>28</sup>

Other evidence of efforts to constrain MVPD competition can be found in the comments filed in this proceeding -- including even the comments filed by cable companies themselves. For

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<sup>24</sup> See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992), codified at 47 U.S.C. § 521 *et seq.*

<sup>25</sup> Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 -- Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, 9 FCC Rcd 7442, 7556 (¶ 246) (1994) ("1994 Cable Competition Report").

<sup>26</sup> See id. at 7540 (¶ 201), Table 5.1. See also DOJ Comments at 2-3.

<sup>27</sup> See id. at 7551-54 (¶¶ 229-38). See also DOJ Comments at 5-7.

<sup>28</sup> See id. at 7551 (¶ 231). The Commission also cited other means used to delay entry and increase rivals' costs, including aggressive use of legal process. See id. at 7553-7554 (¶¶ 237-38).

example, after denying that cable operators might differentiate their DBS product in order to avoid competition with their terrestrial facilities. Continental proceeds to describe exactly how it sells Primestar service to customers in its own franchise areas as a differentiated product, based on the digital quality of its pictures or the availability of additional programming "not available on its cable networks because of capacity limitations."<sup>29</sup> Continental's approach seems designed simply to blunt the potential competitive impact of DirecTV on its cable operations, rather than providing a separate competitive alternative to cable service. Clearly, horizontal integration does not produce meaningful competition. Further evidence -- should any be needed -- that major cable TV interests view DBS as more of a threat than an opportunity is found in the infamous TCI "bazooka" campaign. "Bazooka" campaign materials, including a "Satellite Defense Kit," were distributed by TCI to its affiliated cable systems in response to the entry of DirecTV/USSB.

Based on these realities, the Commission should not hesitate to adopt sensible limits to contain the obvious market power and anti-competitive endeavors of the cable industry, or other MVPD entities that may gain such market power in the future. Prior decisions by Congress and the Commission not to ban cable operators from the DBS marketplace provide no justification for failing to adopt such necessary limits here.<sup>30</sup> In fact, in removing cable/DBS cross-ownership restrictions from the 1992 Cable Act, Congress noted that it merely viewed such limits as "premature" (not unnecessary), given the then uncertain state of the DBS business.<sup>31</sup> Congress went on to state that it affirmatively expected that the Commission would exercise its existing

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<sup>29/</sup> Continental Cablevision Comments at 6.

<sup>30/</sup> Contra NCTA Comments at 6; TEMPO DBS Comments at 10.

<sup>31/</sup> See H.R. CONF. REP. NO. 862, 102nd Cong., 2nd Sess. 82 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1231, 1264.

authority to adopt such limits in the future if it determined that such limitations would serve the public interest.<sup>32</sup> The demonstrated tendency of the dominant cable companies to engage in the anticompetitive conduct described above and in the 1994 Cable Competition Report provides strong public interest justification for adopting such limits now.

If the Commission does not impose an outright ban from the market for full-CONUS DBS upon cable operators of a specific size, as suggested by the Department of Justice,<sup>33</sup> it should clearly adopt the more modest limitation proposed by MCI of restricting DBS operators affiliated with non-DBS MVPDs with market power (i.e., cable MSOs) from gaining the right to use channels at more than one eastern orbital slot. As Echostar correctly notes, "holding channels at more than one slot may be used as a strategy for precluding competition."<sup>34</sup> Moreover, any of the proposed limitations are fully consistent with the recent Sixth Circuit decision in the Cincinnati Bell case, where the court specifically found that the Commission had authority "to establish at least some eligibility criteria to promote competition and avoid undue concentration of licenses."<sup>35</sup>

## **2. Limits On Undue Concentration in the DBS Submarket.**

In addition to protecting against anticompetitive conduct in the overall MVPD market, the Commission should not neglect the importance of ensuring that there are diverse providers of

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<sup>32/</sup> Id.

<sup>33/</sup> See DOJ Comments at 9-10.

<sup>34/</sup> Echostar Comments at 44.

<sup>35/</sup> Cincinnati Bell Telephone Co., et al. v. FCC, 1995 FED App. 0326P, slip op. at 14 (6th Cir., November 9, 1995).

video service within the DBS market. Initial commenters representing various interests have urged the Commission to take steps to avoid undue concentration of the eastern orbital locations that can provide national DBS service.<sup>36</sup> In particular, because these scarce resources offer perhaps the only opportunity for near-term high channel capacity competition with entrenched cable monopolies, the Commission should not permit a situation where as few as two entities could control all three full-CONUS locations, regardless of the entities' affiliation, or lack thereof, with a non-DBS MVPD with market power.<sup>37</sup> Imposition of a general 32 channel limit for eastern/full-CONUS orbital location DBS channels, like the FCC's current local and national broadcast television ownership limits,<sup>38</sup> is simply a means of ensuring diversity in DBS, and is not premised on directly limiting the market power of any particular entity.<sup>39</sup>

Moreover, a complement of 32 eastern/full-CONUS channels should be sufficient to provide a fully competitive MVPD service for the foreseeable future.<sup>40</sup> With current technology,

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<sup>36</sup> See, e.g., Bell South Comments at 3; DOJ Comments at 19; PanAmSat Comments at 2-4; USSB Comments at 7-8; Viacom Comments at 5

<sup>37</sup> Although it is not currently clear what level of service can be provided from the 61.5° W.L. orbital location, MCI believes that this location should definitely be subject to the 32 channel limitation in order to serve the Commission's purpose of avoiding undue concentration of DBS resources. A permittee of channels at 61.5° W.L. would thus have the option of either providing service to all of CONUS using these channels alone, or of pairing them with western channels in order to enhance service, but would not be allowed to control a majority of the channels at both 61.5° W.L. and another full-CONUS orbital location. Contra Echostar Comments at 47-48.

<sup>38</sup> See United States v. Storer Broadcasting Co., 351 U.S. 192 (1956).

<sup>39</sup> Contra DirecTV Comments at 8.

<sup>40</sup> A majority of the commenters appear to agree that a DBS operator cannot provide service to Alaska and Hawaii from 61.5° alone. The need for provision of service to these states may warrant at least "permissive" pairing of 61.5° channels with those at a Western orbital location, although it is far from clear that only 148° is suitable for this purpose.

use of 32 transponders would allow an operator to provide between 150 and 200 channels of programming, more than all but a handful of experimental cable systems. Based on current projections of developing technological capability, which suggest that a 20:1 compression ratio may eventually be possible, from 320 to 640 channels could ultimately be available using this capacity, enough to permit DBS to compete with terrestrial cable in a "five hundred television channel world."<sup>41</sup> Should these assumptions prove overly optimistic, or be outstripped by technological development of terrestrial MVPD services, the Commission can easily raise or repeal the limit at a future date.

**D. To The Extent That The Commission Adopts Any Additional Conduct Controls On DBS Operators/Licensees, These Should Be Limited To DBS Operators Affiliated With Non-DBS MVPDs That Possess Market Power.**

As MCI points out in its initial comments, the wide disparity of market power exercised by particular MVPDs demonstrates that any limitations imposed by the Commission on the provision of DBS services, including marketing restrictions, should apply only to MVPDs that exercise sufficient market power to engage in anticompetitive conduct.<sup>42</sup> The Commission itself has recognized that while non-cable MVPDs constitute an emerging form of video distribution, cable operators alone exercise market power. See NPRM, at ¶36. Consistent with the comments filed by the Department of Justice, and other interested parties, the Commission should impose marketing limitations only on DBS operators affiliated with market dominant cable systems, as non-cable MVPDs do not currently exercise sufficient market power to justify additional

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<sup>41</sup> Id. at 10.

<sup>42</sup> MCI Comments at 11.

regulation.<sup>43</sup>

Accordingly, Tempo DBS, Inc.'s suggestion that "equity" dictates the Tempo II restrictions apply to all DBS providers is without merit.<sup>44</sup> The imposition of marketing restrictions on cable-affiliated DBS operators is justified solely by the market power exercised by those entities. Any further extension of these restrictions to DBS operators affiliated with MVPDs without such market power would serve no public policy purpose and would unnecessarily impede the development of the DBS industry as a whole.

Furthermore, the Commission should reject the proposal to exclude from the conduct rules DBS licensees which provide DBS satellite capacity and related telecommunications services, but which do not provide DBS programming services to the public.<sup>45</sup> The cable affiliation of any DBS licensee providing satellite capacity and related services would give rise to the same anticompetitive incentives that exist with respect to cable-affiliated DBS programming distributors. The Commission's proposed definition of "DBS operator" correctly addresses these concerns and, therefore, should be adopted. NPRM, at ¶47.

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<sup>43/</sup> See DOJ Comments at 9; DirecTV comments at 13; NRTC Comments at 9-10.

<sup>44/</sup> TEMPO DBS Comments at 21.

<sup>45/</sup> GE Americom Comments at 11-12. The Commission's rules must be sufficiently broad to capture all dominant MVPD-affiliated DBS licensees and their "affiliates," as broadly defined. Otherwise, creative organizational and business relationships (e.g., those among TCI, the Tempo companies and Primestar) can be used to circumvent the rules. Broad rules are especially important where a DBS licensee enters into a contract to furnish all or a major portion of its capacity to a single program supplier.

**1. The Commission Is Justifiably Concerned That Cable-Affiliated DBS Operators May Use Vertical Foreclosure Strategies To Limit Access To Or Raise The Price Of Video Programming.**

Although MCI believes that the existing program access rules generally should be sufficient to address concerns that DBS operators affiliated with market dominant MVPDs would extract anti-competitive concessions from both affiliated and unaffiliated program vendors,<sup>46</sup> these rules could be supplemented to clarify, or modestly expand, their terms. For example, if cable-affiliated DBS operators use their substantial market power to enter into exclusive contracts with either affiliated or unaffiliated video programmers, alternative DBS operators would be impermissibly denied access to that programming. Such a result not only would hinder the ability of unaffiliated DBS operators to compete effectively with cable-affiliated operators, but also would deny a substantial number of subscribers access to that programming, contrary to the public interest. Therefore, as suggested by DIRECTV, Inc., the Commission may wish to supplement its program access rules to prohibit cable-affiliated DBS operators (at least those with "market power") from entering into any exclusive distribution agreements, either with an affiliated or unaffiliated cable programmer.<sup>47</sup>

Several commenters urge the Commission to modify the program access rules to prohibit both vertically integrated and non-vertically integrated satellite cable program vendors from discriminating in the price, terms or conditions of service when selling video programming to any DBS operator.<sup>48</sup> This modification is unwarranted and contrary to Congress' intent in enacting

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<sup>46</sup> MCI Comments at 19.

<sup>47</sup> DIRECTV Comments at 20.

<sup>48</sup> See BellSouth Comments at 9; EchoStar Comments at 49-50.

the program access provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")<sup>49</sup> The Commission's program access rules accurately reflect congressional concern regarding vertically integrated satellite cable programming vendors, and therefore no justification for modifying those rules exists. Furthermore, as MCI points out in its initial comments, the Commission's program access rules provide aggrieved parties an alternative avenue of relief in the form of an unfair practices complaint.<sup>50</sup> Accordingly, there are no grounds to revise the program access rules in this manner.

Finally, American Satellite Network, Inc. ("ASN") proposes as an alternative to the "fair access" rules that 10% of DBS channels in DBS auctions be set aside for so-called "independents."<sup>51</sup> This recommendation is unworkable as proposed -- indeed it is not at all clear what is proposed. For example, ASN provides no concrete details concerning how such "independents" would be identified. More importantly, such a set-aside would constitute an inefficient allocation of DBS capacity. See NPRM, at ¶13.

## **2. "Wholesale" Distribution of Digitized Programming Directly By Cable-Affiliated DBS Licensees Could Have Anticompetitive Consequences.**

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<sup>49</sup> Pub. L. No. 102-385, 106 Stat 1460 (1992). Specifically, the Commission found that the "1992 Cable Act and its legislative history reflect congressional findings that horizontal concentration in the cable television industry, combined with extensive vertical integration ..., has created an imbalance of power" in the MVPD market. Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, 8 FCC Rcd 3359, 3365-3366 (1993) (emphasis added) (footnotes omitted).

<sup>50</sup> "[W]here future contracts cause a restriction in the availability of programming to alternative distributors and their subscribers, an aggrieved MVPD could seek redress by filing an 'unfair practices' complaint under Section 76.1001 of the Commission's Rules." Memorandum Opinion and Order on Reconsideration of the First Report and Order, 10 FCC Rcd 3105, 3126-3127 (1994) ("USSB Decision").

<sup>51</sup> Comments of American Satellite Network, Inc. at 8-11.

The Department of Justice concludes, and MCI agrees, that wholesale DBS providers with market power could harm competition in the video marketplace if that provider is affiliated with either a programming vendor or an MVPD.<sup>52</sup> The Department of Justice further notes that the first DBS operator to provide wholesale DBS service might secure an unfair advantage over subsequent competitors.<sup>53</sup> For these reasons, the Commission should impose certain regulatory safeguards on the provision of wholesale DBS services. Suggestions that regulation of this proposed service is unnecessary are thus without merit.<sup>54</sup>

Given the need for some regulation, MCI believes that rules proposed by the Department of Justice, which are modeled after the Commission's program carriage rules, should be sufficient to prevent discrimination in the wholesale distribution of digitized programming.

**E. The Commission Should Adopt Auction Procedures Recommended By MCI In Its Initial Comments**

The only party other than MCI to address auction procedures in any detail was Kennedy-Wilson International (KW).<sup>55</sup> KW's comments generally support the Commission's proposals, and are also generally consistent with MCI's comments. For example, in commenting on ¶83 of the NPRM, KW states that there is nothing to be gained from a combined

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<sup>52</sup> DOJ Comments at 10-11.

<sup>53</sup> Id. at 14.

<sup>54</sup> See TEMPO DBS Comments at 25-27; NCTA Comments at 14-15.

<sup>55</sup> DirecTV, Primestar and Tempo expressed general support for the Commission's proposed auction procedures. CTA, while offering few details, proposed an auction incorporating smaller channel blocks and designated entity set-asides. CTA's proposal should be rejected for reasons set forth elsewhere in these reply comments.

sealed-bid/oral-outcry procedure.

### 1. Channels to be Auctioned

CTA Incorporated was the only party recommending that the available channels (28 at 110 degrees West Longitude and 24 at 148 degrees) be offered in smaller blocks. Although CTA claims that its suggested auction format "would allow market forces to determine the value of the spectrum and the appropriate aggregation of channels," its proposal to set aside one-half of the channels at each location for designated entities would effectively preclude aggregation of more than 14 full-CONUS channels by any bidder.<sup>56</sup> CTA's claims that 14 DBS channels will, by the end of the decade, support an offering of "upwards of 280 programming channels" is based upon its expectation that further advances in video compression will be available by the year 2000.<sup>57</sup> MCI, should it be awarded the reclaimed channels, fully expects to have satellites in operation well before the end of this decade. A drastic limitation on the number of channels available at auction to MCI, or to others who plan to enter the DBS market in 1997, 1998, or 1999 -- such as the 14 channel limit proposed by CTA, on the basis of nothing more than its expectation that vast improvements in compression will occur over the next five years -- would place the new entrant at a tremendous disadvantage to DirecTV/USSB (complementary programming on 27/5 channels)

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<sup>56</sup> Another commenter, American Satellite Network, Inc. (ASN) proposes that ten percent of the spectrum be set aside for independent programmers, but offers no details on the definition of an "independent programmer" or how such a set-aside could be accommodated in the proposed auction framework. Adoption of the ASN proposal would necessitate delay in the auction and lead to fragmentation of the spectrum block, albeit to a lesser degree than CTA's proposal. MCI urges rejection of the ASN proposal.

<sup>57</sup> By the time a significant number of cable systems can deliver 500 channels, advanced compression technologies will be available to terrestrial and DBS systems. The Commission should reject the claim by DirecTV (which already holds 27 channels) that it needs to be eligible to bid for and hold two full-CONUS locations to compete in the "500 channel world" as explained elsewhere in these Reply Comments.