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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

NOV 30 1995

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

To: The Commission

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REPLY OF TEMPO DBS, INC.

TEMPO DBS, INC.
David P. Beddow
President
4100 E. Dry Creek Road
Littleton, CO 80122
(303) 486-3800

November 30, 1995

No. of Copies rec'd 0+4
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REPLY OF TEMPO DBS, INC.

TEMPO DBS, Inc. ("TEMPO"), hereby submits its reply comments with respect to the above-captioned notice of proposed rulemaking ("NPRM"). Given the rapid growth of the DBS industry, and the expected emergence of a third DBS provider, now is clearly not the time to abandon the policy of minimal regulatory intervention that has led to this marketplace success.

I. SUMMARY

In its opening comments, TEMPO, with reference to the vibrant state of current and expected competition in direct-to-home ("DTH") satellite service, demonstrated that the Commission should maintain its historical approach of minimal DBS regulation. In its rush to implement auctions, the Commission should refrain from adoption of any restrictive regulations, particularly in light of the impossibly short time periods allotted for development and consideration of the rulemaking record. Indeed, intervening events have made regulation even less necessary today than when the service was first

authorized thirteen years ago. Two independent DBS operators, DIRECTV and USSB, offer service that is growing at an unprecedented rate, and a third, EchoStar, expects to launch its first satellite in December 1995. PRIMESTAR, through aggressive marketing, has likewise rapidly grown its medium power DTH subscriber base to more than 800,000, and AlphaStar expects to commence a new medium power service next month. In addition, the multichannel video programming distributor ("MVPD") market is becoming increasingly competitive, especially with the entry of telephone firms into video delivery.

Despite the dramatic success of existing DBS providers, a number of parties urge the Commission to ignore marketplace realities, and instead, on the basis of mere speculation about how the market may develop, impose a myriad of structural rules on certain DBS providers, or even keep certain companies from competing at all. Thus, although it expressly admits that "*predictions* as to how these markets may evolve are necessarily imperfect, in light of uncertainty about future changes in technology and market forces," the Department of Justice ("DOJ") proposes numerous restrictions, including a complete ban on DBS ownership by certain cable television firms.[1]

There is no basis, however, for a flat ban on ownership. As a threshold matter, the DOJ (and other proponents of increased regulation) have significantly understated the MVPD market -- a prerequisite for determining market power -- by focusing solely

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[1] Comments of United States Department of Justice at 18 (emphasis added) ("DOJ").

on the three full-CONUS DBS slots and excluding all other legitimate sources of competition. Thus, the Department disregards entirely medium power satellites, satellites operating in the high density arc of the FSS band, future DBS slots obtained by the Commission from the ITU (as proposed in the NPRM), international DBS service (as proposed in the NPRM), and unaffiliated cable and other MVPDs. Further, these parties have overlooked the tangible benefits that cable-affiliated DBS providers can provide, and indeed already have provided, to consumers through enhanced service offerings and price competition. The only credible evidence in this proceeding demonstrates that any DBS provider, regardless of affiliation, has every incentive to compete aggressively for subscribers in a vigorous marketplace.

In fact, the overly broad spectrum aggregation limits proposed in the NPRM could likely produce significant competitive harm and deprive the public of valuable service benefits. Should the Commission nevertheless adopt any aggregation limits, competitive equity and rational policy making requires that any rule be applicable to all operators, regardless of affiliation. The Commission should treat the comments by each party arguing for special treatment and exemption from any rule for what they are: self-serving attempts to subvert the regulatory process and gain an unfair competitive advantage.

There similarly is no support in the comments for the far-reaching conduct rules proposed in the NPRM, including TEMPO II, marketing exclusivity, and program access rules. The rise of vibrant DBS operators negates the allegation that without

burdensome restrictions on non-DBS MVPDs, independent providers could not fairly compete. Pleas for additional program access rules ring particularly hollow where existing DBS providers, by carrying not only cable-affiliated but their own exclusive programming as well, are enjoying the fruits of the fastest selling consumer electronic product in history, without the benefit of all the additional rules that competitors so vigorously implore the Commission to impose. In addition, no commenter offers any explanation as to why a cable-affiliated entity poses a threat to program access simply because it becomes a high power DBS provider, when no evidence of harm has been alleged during the years that PRIMESTAR has offered its existing direct-to-home service.

The comments also reflect significant confusion, created by the NPRM, about the nature of TCI's "Headend in the Sky," or HITS. To clarify the obvious misunderstanding, TEMPO provides additional information to demonstrate that, contrary to the comments of the DOJ and others, HITS is not a "wholesale DBS service." HITS merely consists of transport and authorization services, each of which can be provided by a wide variety of technologies. Yet, despite the misapprehension of the service and the mischaracterization of the relevant market (which does not yet even *exist*), the DOJ and others propose various regulatory "remedies" for admittedly speculative harms. The FCC should firmly refuse to constrain by rule a proposed service for a nonexistent market, based solely on conjecture about a dynamic industry.

Finally, the Commission should make no change in its policy of reserving DBS frequencies for DBS services. The demand for DBS is unquestionable, and existing policies provide significant flexibility to encourage investment in the service and promote consumer choices. Thus, there is no reason to adopt the proposal, supported by MCI and others, to impose merely "minimal" DBS service obligations and effectively reallocate the spectrum. (Ironically, MCI also supports cross-ownership limits even as it seeks to reduce competition by limiting the amount of spectrum assigned exclusively for DBS use).

In sum, TEMPO submits that the call for service rules in the NPRM is at best premature. No actual competitive problem has been, or could be, substantiated. Instead of speculating as to how a technologically and commercially dynamic market may develop and imposing sweeping restrictive measures that could hinder free market competition for years, the wiser course is for the Commission to maintain its minimalist regulatory approach. Allowing the market to develop now would not hinder the Commission (or the DOJ) from taking appropriate remedial action in the unlikely event that it is warranted in the future. Thus, the Commission should avoid the potentially devastating consequences brought by an ill-considered decision, especially where the Commission has committed itself to adopting rules to reallocate Advanced Communications Corporation's channels only eight business days after the record in this proceeding is completed.

II. THE RECORD CONFIRMS THAT NO LEGITIMATE GROUNDS EXIST FOR STRUCTURAL OR CONDUCT RULES THAT WOULD PRECLUDE DBS OPERATORS AFFILIATED WITH MVPDS FROM COMPETING AGAINST THE NOW WELL-ESTABLISHED DBS INCUMBENTS.

A. DOJ's Call for a Prohibition on the Acquisition of Channels at Full-CONUS Orbital Slots by Cable-Affiliated Firms Is Premised on a Far Too Narrow Definition of the Relevant Market and on Faulty Theoretical Analysis.

Stripped of its rhetoric, DOJ's argument in favor of banning the most competitive cable firms from participating in DBS is based on nothing but conjecture, speculation, and surmise. Going far beyond the proposed structural regulations on which the Commission sought comment in the NPRM, DOJ argues for an outright ban on the control of full-CONUS DBS channels by a cable firm (or combination of firms) with 10% or more of the nation's cable subscribers.[2] Overstating the concentration of the relevant market, DOJ claims that this approach is necessary because cable firms might have reduced incentives to compete in the DBS business, even though it fails to offer *any* documentary evidence supporting its fear or even to point to any related industries in which the claimed lack of incentives actually led to anticompetitive behavior.[3] Because there is no empirical evidence or credible economic theory to

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[2] DOJ at 8.

[3] *Id.* at 6. *See* Cincinnati Bell Tel. Co. et al. v. FCC (Civ. Nos. 94-3701/4113; 95-3023/3238/3315) (rel. Nov. 9, 1995) slip op. at 12 (before the FCC can preclude a class of competitors from a new service it must provide something in the way of documentary support for its fears of anticompetitive behavior).

support a cable/DBS cross-ownership ban, the Commission should reject the Department's ad hoc proposal.[4]

First, as economist Dr. Bruce Owen states in the attached declaration, "DOJ has greatly exaggerated concentration in the relevant market."[5] In its haste to justify a DBS/cable cross-ownership ban, the Department entirely disregards fixed satellite service ("FSS"), insisting that there are only three orbital locations from which any entity can provide meaningful DTH competition to cable.[6] While it is true that FSS satellites may require a larger receive dish, the growth of PRIMESTAR -- in both cable and non-cable areas -- proves that FSS can be competitive with DBS.[7] The competitive viability of FSS in the MVPD market also is corroborated by the imminent launch of AlphaStar's DTH service, which plans to employ dishes as small as 24 inches.[8]

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[4] Likewise, the Department does not attempt to justify the proposed 10% trigger for the cross-ownership ban (a threshold that corresponds to about 6.5% of all TV households). Its failure to do so is best viewed as a tacit admission that *any* subscriber threshold trigger would *per force* be arbitrary because there is no empirical or theoretical basis for a cross-ownership ban.

[5] Supplemental Declaration of Dr. Bruce M. Owen at ¶ 5 ("Supplemental Owen Declaration").

[6] DOJ at 3-4.

[7] Continental Cablevision noted that approximately 25% of PRIMESTAR's subscribers reside in cable areas. Comments of Continental Cablevision, Inc. at 6-7 ("Continental Cablevision").

[8] Communications Daily, Nov. 6, 1995, at 6.

The Department's definition of the market is further flawed by its failure to take into account expected changes in the competitive landscape.[9] The current and reasonably foreseeable rapid growth in the MVPD market generally is well documented in the record of this proceeding.[10] But more specifically, numerous other DTH operations are possible in the FSS band. In fact, there are as many as four slots available in the high-density (*i.e.*, high power) FSS arc that can be used to provide competitive MVPD service. Finally, as the Commission noted in the NPRM, "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."[11] The

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[9] It is well settled in antitrust case law that assessment of competition in a market must account for reasonably predictable ongoing changes in market conditions, as well as likely entry of additional competitors into the market. *See* United States Department of Justice and Federal Trade Commission, *Merger Guidelines*, 4 Trade Reg. Rep. (CCH) ¶ 13,104 (1992) at §§ 1.521 (changing market conditions); 3 (market entry); *see also* United States v. General Dynamics, 415 U.S. 486, 498 (1974) (the probable competitive effects of an acquisition must be addressed in light of the "structure, history and *probable future*" of the industry in question) (emphasis added). This is especially appropriate where, as here, business, technological and regulatory developments are rapidly transforming the structure and competitive dynamics of the marketplace. In such markets, a freeze-frame analysis of historic market share can present an entirely false and misleading picture of future industry competitiveness. See *id.* at 501-03.

[10] *See, e.g.*, Continental Cablevision at 10-16; Comments of GE Americom Communications, Inc. at 6 ("GE"); Comments of the National Cable Television Association at 5 ("NCTA"); Comments of Time Warner Entertainment Co., L.P. at 4-5 ("Time Warner").

[11] NPRM at ¶ 52. Dr. Owen also notes that (1) non full-CONUS orbital locations are not devoid of competitive significance in the market analysis; and (2) more than three meaningful competitors can use the three full-CONUS slots. Supplemental Owen Declaration at ¶ 5.

DOJ's failure to define correctly the relevant market largely undermines its economic analysis because it assumes scarcity of spectrum and barriers to market entry that simply do not exist.[12]

Even apart from the market definition problem, the theoretical analysis DOJ offers to support a cross-ownership ban is not credible. DOJ argues that a cable firm will have reduced incentives to compete in the DBS industry because it will "wish to protect its monopoly profits in the cable business" by restraining output and engaging in "pricing strategies that are less fully competitive with cable rates."[13]

As a threshold matter, the Department's predictions about the participation of cable firms in the DBS business are belied by the fact that PRIMESTAR has competed

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[12] If DOJ were correct in its assumption that the three full-CONUS orbital locations define the entire relevant market, its proposed cross-ownership ban would raise significant constitutional doubts. The courts have repeatedly indicated that outright bans on speech-related activities usually fail to satisfy First Amendment review, particularly where, as here, less restrictive alternatives are available. *See* Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 129 (1989) (declining to accord deference to Congress in regards to statute banning indecent interstate commercial telephone communications when Congress failed to indicate that less restrictive alternatives were not available); NAACP v. Button, 371 U.S. 415, 438 (1963) ("[b]road prophylactic rules in the area of free expression are suspect"); *see also* Chesapeake and Potomac Tel. Co. v. United States, 42 F.3d 181, 202 (4th Cir. 1994) (quoting Chesapeake and Potomac Tel. Co. v. United States, 830 F. Supp. 909, 928 (E.D. Va. 1993)) ("there is no more Draconian approach to solving the problem of potential anti-competitive practices" than a complete ban on entry). The Court's distaste for overly broad speech restrictions extends to government regulation of broadcasting. *See, e.g.*, FCC v. League of Women Voters, 468 U.S. 364 (1984) (regulation of public television stations failed narrowly tailored requirement because it regulated far more speech than necessary and because government's goal could be fully satisfied by less restrictive means readily available).

[13] DOJ at 6.

aggressively for four years in the DTH arena. During this time, PRIMESTAR has proved itself an able and eager competitor against DIRECTV and USSB. Indeed, despite competitive handicaps associated with medium-power satellites as compared to the high-power satellites used by DIRECTV and USSB, PRIMESTAR currently serves over 800,000 subscribers located both inside and outside of cable areas.[14] Further, the magnitude of the investment in DBS by both TEMPO and PRIMESTAR means that these firms simply cannot afford not to compete. TEMPO already has expended over $250 million for DBS satellite construction[15] and PRIMESTAR's partners have committed in excess of $1 billion to implement a PRIMESTAR DBS system that will attract two to three million subscribers by the year 2000.[16] These immense expenditures squarely contradict the DOJ's theory that cable firms will suppress competition in the DBS arena. Similarly, as DOJ appears to recognize, any cable firm that acquires DBS channels at auction cannot afford to fail to compete.[17] Indeed, as BellSouth commented, "there is little possibility that an entity that has paid potentially hundreds of millions of dollars for DBS spectrum will then simply "warehouse" that

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[14] Comments of PRIMESTAR Partners L.P. at 21-22 ("PRIMESTAR").

[15] "Application for Review of TEMPO DBS, Inc." (filed May 22, 1995) at 3.

[16] PRIMESTAR at 22.

[17] *See* DOJ at 6.

spectrum in the name of protecting its other economic interests."[18] These facts serve as compelling evidence that TEMPO and PRIMESTAR are deeply committed to the success of DBS and that the participation of cable firms in the DBS arena is pro-competitive. Hence, simply put, there is absolutely no factual basis for a cross-ownership ban.

Moreover, the Department's theory fails to account for the fact that any cable-affiliated DBS operator must compete against two (and, in the near future, three) independent DBS operators. As TEMPO explained in its comments, this situation ensures that if a cable-affiliated DBS operator sets its price above other DBS operators, it would simply lose market share while failing to prevent the loss of subscribers from its cable operations to competing DTH services. As Dr. Owen concludes, "even the largest cable operators account individually for less than a quarter of all cable subscribers; it would make little sense for them to lose market share in the seventy five percent or more of the DBS market in order to protect cable profits in their franchise areas."[19]

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[18] Comments of BellSouth Corporation at 7 ("BellSouth"). PRIMESTAR also has made significant technical improvements to its service and has undertaken aggressive marketing initiatives to win new subscribers -- actions that contradict the Department's conjecture that cable-affiliated firms will not vigorously compete in DBS. On July 31, 1994, PRIMESTAR began providing subscribers digital service, a substantial enhancement over its previous analog format. To capitalize fully on this upgrade, PRIMESTAR and its distributors have embarked on a $100 million advertising campaign designed to increase PRIMESTAR market share and increase consumer interest in DBS.

[19] Supplemental Owen Declaration at ¶ 6.

This fact is corroborated by the declaration of Professor Jerry A. Hausman (attached to the comments of DIRECTV), which states that

> about 50% of DIRECTV's subscribers are in areas passed by cable. Of that group, 2/3 were cable subscribers when they purchased their DSS antenna system. Among these cable subscribers, approximately 60% canceled cable after subscribing to DIRECTV.[20]

Hence, the presence of competing independent DBS operators means that even if cable firms had the inclination to suppress DBS competition, they would not have the ability to do so.[21] But more importantly, this competition ensures that cable-affiliated DBS operators have every incentive to compete aggressively on price and service to win former cable subscribers.[22] This competitive constraint obviates the need for any special structural or behavioral regulation of cable-affiliated DBS firms.

DOJ also advances the implausible and ill-defined theory that the incentive for a cable-affiliated DBS operator "to restrain output and set higher prices" would reduce the incentives of the two independent operators, who also would set high prices without losing any business.[23] If this theory had any basis in fact, PRIMESTAR's competitors, DIRECTV and USSB, would have welcomed PRIMESTAR's acquisition of ACC's channels because they would have been able to set higher prices without

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[20] Declaration of Jerry A. Hausman at 6, attached to the Comments of DIRECTV, Inc. ("Hausman Declaration").

[21] Supplemental Owen Declaration at ¶ 7; *see also* November 1994 Owen Declaration at ¶ 19 (attached to the Comments of TEMPO DBS, Inc. in this docket).

[22] Supplemental Owen Declaration at ¶ 8.

[23] DOJ at 6-7.

negatively affecting their subscribership. But these firms strenuously objected to PRIMESTAR's entry into the market for the simple reason that it would dramatically increase competition.

Further, the Department's logic stands established price theory on its head: if PRIMESTAR raised its prices in concert with affiliated cable systems, DIRECTV and USSB, being fringe actors in the MVPD market, would have an incentive to "free ride" by maintaining lower prices and capturing as much market share as possible.[24] Indeed, EchoStar, which has requested FCC launch authority to initiate immediately its independent DBS service, has repeatedly made clear its intent to "focus on price competition."[25] In sum, DOJ's proposed cross-ownership ban is not only devoid of factual support, but premised on the most farfetched of economic theories.

In addition, while DOJ purports to oppose rules that would "prevent transactions that are economically beneficial," its comments and its public interest calculus entirely omit any consideration of the documented consumer benefits from cable's participation in the DBS arena.[26] According to DOJ, a cross-ownership ban is required because the Commission's "proposed behavioral restrictions . . . cannot anticipate all forms of

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[24] See Supplemental Owen Declaration at ¶ 10.

[25] "Request of EchoStar Satellite Corporation for Removal of Conditions, Minor Modification and Issuance of Launch Authority," File No. 15-SAT-MP/LA-96 (dated November 13, 1995) at 7.

[26] DOJ at 9.

economically inefficient behavior" by cable-affiliated DBS operators.[27] But the Department fails to recognize that consumer welfare is harmed, not advanced, by overbroad rules designed to cover every conceivable competitive abuse, especially where, as here, there is a glaring lack of empirical evidence in support of the DOJ's dire predictions.

Indeed, DOJ wholly disregards the fact -- fundamental to the FCC's prior decision not to adopt cable/DBS cross-ownership restrictions -- that restrictions on cable firms' ability to participate in DBS while the industry is still developing disserve the public interest by limiting qualified sources of capital, as well as technical, operational and marketing expertise.[28] For example, PRIMESTAR has always allowed its subscribers to lease, rather than buy, a satellite dish and receiver. In contrast, DIRECTV, until recently, required consumers to pay $700 for a satellite dish and receiver and a $200 installation charge in addition to monthly service charges.[29] In response to PRIMESTAR's offering, however, DIRECTV introduced financing packages that allow consumers to pay the equipment charges over a 48-month period of

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[27] *Id.*

[28] *See* In the Matter of Inquiry into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites for the Period Following the 1983 Regional Administrative Radio Conference, 90 F.C.C.2d 676, 707-08 (1982); *see also* Continental Satellite Corporation, 4 FCC Rcd 6292, 6299 (1989) (cable participation in DBS could positively affect the industry).

[29] *See* Continental Cablevision at 8.

time.[30] Hence, the competition brought to the market by PRIMESTAR has produced tangible price and service benefits for consumers.

TEMPO submits that the Commission should reject DOJ's call for a cable/DBS cross-ownership ban as wholly unwarranted and contrary to the record in this proceeding. As shown above, a ban on the participation of cable firms in the DBS business surely would reduce competition and lessen the documented benefits to consumers from the involvement of cable in the DBS arena. At the same time, an FCC decision to reject a ban (as it has done before) would not diminish in the least the ability of DOJ (or the Commission) to monitor competition as the MVPD market evolves and to take appropriate and measured action -- through operation of the antitrust laws -- if and when there is a legitimate basis for doing so.

B. The Record Demonstrates that Any Spectrum Aggregation Limits Should Apply to All DBS Operators, Regardless of Affiliation with Cable or Other MVPDs.

Commenters offered persuasive evidence that if the Commission determines that any spectrum aggregation rules are necessary, it should apply such rules to all DBS operators in an even-handed manner and without regard to their cable or other MVPD affiliation. The record indicates that this approach is warranted for several reasons. First, independent DBS operators have grown at an explosive rate under the current rules and despite aggressive competition from PRIMESTAR. This demonstrates that

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[30] *Id.*

there is no need for the FCC categorically to handicap the ability of cable-affiliated DBS firms to compete. Second, the record reveals that supporters of restrictions on cable-affiliated DBS firms are simply attempting to disadvantage a strong competitor through the regulatory process and that consumer interests will be best served by subjecting the leading DBS incumbents to increased competition, rather than protecting them. Applying any spectrum aggregation rules uniformly to all DBS operators will maximize competition in the DBS industry.

The comments in this proceeding indicate that there is no basis to impose structural restrictions only on cable-affiliated DBS operators. Indeed, USSB stated that it "has experienced rapid growth" and "has been able to achieve ready market acceptance under" the Commission's existing service rules.[31] If anything, this understates the success of independent DBS firms. As Continental Cablevision noted, the DBS business has grown 104% in the last six months, with DIRECTV experiencing 18.8% growth in the last month alone.[32] Despite its relatively high cost, the DBS dish is the fastest selling consumer electronics product in history.[33] DIRECTV expects to have 10 million subscribers by the year 2000.[34] As DIRECTV's economist points out,

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[31] Comments of United Stated Satellite Broadcasting Company, Inc. at 1-2 ("USSB").

[32] Continental Cablevision at 10; *see also* NCTA at 5; Time Warner at 4; GE at 6.

[33] Continental Cablevision at 10.

[34] Time Warner at 5 (citing comments of DIRECTV in CS Docket No. 95-61 at 5-6 (dated July 3, 1995)).

this phenomenal growth has come at the expense of the cable industry (with 60% of all cable subscribers that purchased DIRECTV's service canceling their cable subscriptions) and has been achieved despite the competitive service provided by PRIMESTAR.[35] Hence, as Time Warner noted, there is no evidence that MSO-affiliated DBS companies have inhibited competition.[36] Accordingly, there is no basis to treat DBS operators affiliated with MVPDs differently than other DBS operators.

As many commenters stated, the Commission would be especially hard pressed to justify ownership restrictions between DBS and other MVPDs given its contrary findings and conclusion in Tempo II.[37] In that decision, the Commission determined that a cable-affiliated firm's participation in the DBS industry -- without the necessity of any structural restrictions -- would advance important public interest goals.[38] Commenters in this proceeding persuasively demonstrated that since Tempo II nothing has changed to warrant the imposition of structural rules on cable-affiliated DBS

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[35] Hausman Declaration at 6. Given this hard data, TEMPO notes that NYNEX's assertion, based on anecdotal evidence, that DBS is not eroding cable's market share is simply mistaken. Comments of NYNEX Corporation at 5 ("NYNEX").

[36] Time Warner at 6.

[37] Tempo Satellite, Inc., 7 FCC Rcd 2728 (1992) ("Tempo II").

[38] *Id.* at 2730.

operators.[39] To the contrary, the DBS business has become more competitive, as detailed above, further reducing the need for any regulation.[40]

For these reasons, a wide range of commenters voiced opposition to spectrum aggregation rules that would apply only to MVPD-affiliated DBS firms. In evident recognition of the entrenched position that DIRECTV and USSB enjoy, USSB supported a spectrum aggregation rule that would apply to DBS operators regardless of their affiliation with non-DBS MVPDs.[41] Similarly, BellSouth commented that the Commission's rules should "expressly provide that the channel aggregation limitation appl[ies] equally to *all* DBS operators, irrespective of whether they are affiliated with non-DBS MVPDs."[42] TEMPO concurs with BellSouth that in the absence of this uniform rule DBS operators without an MVPD affiliation would be unfairly advantaged and the Commission's "overriding" goal of promoting competition within the DBS industry would be thwarted.[43] Cox commented that while "it may be reasonable to limit the number of channels available to *any* DBS operator, regardless of whether or

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[39] *See* Comments of Cable Telecommunications Association at 2 ("CATA"); NCTA at 6; Continental Cablevision at 4.

[40] TEMPO concurs with Continental Cablevision that under Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir.), cert. denied, 403 U.S. 992 (1970), the Commission must provide a *reasoned* analysis for any change in its previous policy. The NPRM does not succeed in meeting this standard.

[41] USSB at 8.

[42] BellSouth at 3 (emphasis added).

[43] *Id.* at 3-4.

not that operator is affiliated with a non-DBS MVPD . . . once this limit is applied, it is hard to see how limiting cable-affiliated DBS providers to a single full-CONUS orbital location provides any additional pro-competitive benefits."[44]

On a related topic, a broad group of commenters concurred that given the swift evolution of the MVPD market there is no basis to differentiate in adopting rules of prospective application between cable operators and other MVPDs for purposes of spectrum aggregation rules. Ameritech joined TEMPO in commenting that the Commission's asserted goal of preventing potential undue concentration of DBS channels cannot rationally be met by restricting only one class of competitor.[45] Rather, Ameritech noted, such a rule "simply would skew the marketplace with an artificial constraint that handicaps only one type of participant."[46] For the same reason, BellSouth opposed subjecting cable-affiliated DBS operators to any DBS structural limitations greater than those applied to non-cable MVPD-affiliated DBS firms.[47] USSB's comments also recognized that there is no principled way of distinguishing between cable operators and other MVPDs.[48] For example, five Bell Operating Companies ("BOCs") have applied for waivers of the Modified Final

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[44] Comments of Cox Enterprises, Inc. at 5 ("Cox").

[45] Comments of Ameritech Corporation at 2-4 ("Ameritech").

[46] *Id.* at 3.

[47] *Id.* at 4-5.

[48] USSB at 6-8 (recommending conduct restrictions for *all* DBS operators affiliated with a non-DBS MVPD).

Judgment to allow them to enter the DBS business. As USSB notes, each of these BOCs has sought authority to provide video dialtone and/or cable service.[49] If the Commission proceeds to apply special regulation to cable-affiliated DBS firms on the basis of its flawed "incentives" rationale, it cannot logically distinguish DBS operators affiliated with other MVPDs (*e.g.*, video dialtone) who face the same incentives relative to their local MVPD operations.

In a transparent attempt to weaken its best competitors, DIRECTV argues that the proposed aggregation limits (as well as the attribution and conduct rules) should be applied only to cable-affiliated DBS operators.[50] The Commission should reject DIRECTV's self-serving argument because it is designed only to handicap an able competitor.[51] Significantly, about 50% of DIRECTV's subscribers are in areas that are not served by cable.[52] DIRECTV's comments -- most notably its opposition to abiding by any spectrum cap -- clearly indicate its desire to keep other competitors out of DBS and to maintain its lock on the half of its market that does not face cable

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[49] *Id.*

[50] Comments of DIRECTV, Inc. at 13-15 ("DIRECTV"); *see also* Comments of National Rural Telecommunications Cooperative at 4-5 ("NRTC").

[51] As CATA observed, "[i]t is clear that other DBS providers want limitations imposed on cable ownership of DBS systems because they do not want competition. They cloak their anti-competitive rhetoric by stressing the notion that cable owned DBS systems will not compete with cable systems. . . . [T]here is absolutely no basis for this proposition." CATA at 4.

[52] Hausman Declaration at 6.

competition. Accordingly, the FCC should view DIRECTV's arguments with a jaundiced eye.

MCI argues that the orbital slot restriction should apply only to DBS operators affiliated with non-DBS MVPDs with market power, which it proposes to define as (1) an aggregate national subscribership of one million or more households or (2) a market penetration of 50.1% or more of the television households in an area in which it is licensed to serve.[53] EchoStar/Directsat also urge the Commission to apply the orbital slot limitation only to "dominant" MVPDs, by which it presumably means (some or all) cable operators. But MCI and EchoStar/Directsat fail to offer any proof or credible economic theory for the underlying premise that cable-affiliated DBS operators will harm competition.[54] The empirical and economic evidence in this proceeding indicates that the participation of cable-affiliated firms will produce consumer price and service benefits. Given this compelling and documented evidence, the Commission should reject competitors' thinly-veiled pleas to impair the ability of cable-affiliated firms to compete.[55]

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[53] Comments of MCI Telecommunications Corporation at 11-12 ("MCI").

[54] *See* Cox at 5-6 (to the extent that the Commission's orbital slot restriction is animated by a concern that cable-affiliated DBS firms will not compete vigorously, the concern is misplaced because the presence of unaffiliated DBS operators ensure that cable-affiliated DBS firms have no incentive or ability to operate in an anticompetitive manner).

[55] Arguing out of an obvious self interest, EchoStar/Directsat arrive at the arbitrary and wholly unsupported conclusion that cable-affiliated DBS operators should be limited to no more than 16 DBS channels in order to avoid anticompetitive behavior.

(continued...)

C. There Is No Support for the Needlessly Restrictive Attribution and Divestiture Standards Proposed in the NPRM.

Attribution. The comments universally recognize that construction and operation of a DBS system is very capital intensive and risky. As a result, any rules adopted by the Commission must ensure that continued investment in this dynamic and increasingly competitive industry is vigorously promoted by avoiding needlessly rigid attribution standards.

As TEMPO and others noted, the Commission's proposed attribution criteria would discourage creative and pro-competitive arrangements by making certain relationships that carry no indicia of control, such as minority equity interests and joint ventures, cognizable for purposes of the proposed service rules.[56] Indeed, the NPRM articulates no public interest rationale for the proposed standards. The NPRM, for example, does not explain how small equity interests or other minor relationships

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[55](...continued)
Comments of EchoStar Satellite Corporation and Directsat Corporation at 41 ("EchoStar/Directsat"). Likewise, EchoStar/Directsat urge the Commission to refrain from imposing a 32 channel cap on DBS permittees "that are neither dominant nor affiliated with a dominant MVPD." *Id.* at 42-43. EchoStar/Directsat urge the Commission, if it imposes the spectrum cap on all DBS operators uniformly, to grandfather the EchoStar/DBSC arrangement, which by virtue of EchoStar's 40% interest in DBSC would exceed both the 32 channel cap and a single orbital location rule. However, EchoStar/Directsat fail to justify any "special interest" deviation from rules designed to achieve the NPRM goal of preventing undue concentration of DBS channels.

[56] Comments of TEMPO DBS, Inc. at 18-19 ("TEMPO"); Ameritech at 4; BellSouth at 3 n.5; GE at 8; MCI at 14-15; and Time Warner at 19-21.

equate to control. In light of the Sixth Circuit's recent decision in Cincinnati Bell Tel. Co. et al. v. FCC, the imposition of standards that bear no relationship to the ability of an entity to control a DBS operator and engage in anti-competitive conduct will not withstand judicial scrutiny. Therefore, in accordance with its large body of relevant case law, the Commission should use a control standard for purposes of assessing attributable interests.[57]

Divestiture. The comments also demonstrate that there is no basis to require a permittee to divest within 90 days an interest in excess of any structural threshold. The proposed divestiture period would indeed lead to "fire sales" of DBS systems, which were acquired at great cost and effort by the permittees.[58]

Rather, only parties with much to gain by a short divestiture window support the Commission's proposal. Thus, MCI, evidently desiring to minimize potential competing bidders, asserts without foundation that there will be plenty of prospective purchasers, or alternatively, that any party concerned about the divestiture period could avoid participating in an auction.[59] EchoStar/Directsat boldly ask the Commission summarily to confiscate excess channels without compensation and make them available

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[57] See TEMPO at 19; GE at 8.

[58] TEMPO at 16-18; PRIMESTAR at 23-24.

[59] MCI at 14. MCI argues that a different divestiture period should be applied depending on whether channels are acquired by auction (90 days) or through growth or acquisition of MVPD systems (12 months). MCI at 12, 13 n.10. Because a 90 day divestiture period for excess channels acquired by any means is groundless, MCI's alleged distinction is rendered moot.