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November 30, 1995

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VIA HAND DELIVERY

William Caton
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, DC 20554

Re: Filing of Reply Comments in IB Docket No. 95-168 and PP Docket No. 93-253

Dear Mr. Caton:

American Satellite Network, Inc., pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415 and 1.419 hereby submits an original and five copies of its Reply Comments for filing in the above-referenced proceeding. A list of other parties to whom the comments were also delivered is attached to the Reply Comments.

Kindly direct any questions regarding this matter to the undersigned at (617) 832-1000.

Respectfully submitted,

Leonard Schneidman

Leonard Schneidman
(by Steven A. Bercu)

Enclosures

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

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

To: The Commission

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REPLY COMMENTS OF AMERICAN SATELLITE NETWORK, INC.

American Satellite Network, Inc.
153 E. 53rd Street
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November 30, 1995

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SUMMARY

American Satellite Network, Inc. ("ASN"), a diversified media and communications company, owns a majority interest in PrimeTime 24, a satellite programmer and distributor. PrimeTime 24 provides broadcast network television programming to persons -- primarily in rural areas -- unable to receive adequate network signals from local network affiliates. PrimeTime 24's sole competitor in this business is an entity wholly owned and directly controlled by the cable industry's largest multi-system operator ("MSO"), Tele-Communications, Inc.

ASN believes that the substantial allocation of DBS channel capacity, particularly at a full-CONUS position, to a cable-affiliated DBS operator poses acute risks. These risks include undue media concentration and the risk that independent programmers and distributors will be frozen out from participation in DBS services. Ultimately, the result to the viewing public will be increased costs for programming services and a decline in programming diversity. This loss of diversity will come primarily at the expense of the unique, creative program services offered by independent programmers, who are inherently more willing to take creative chances than large corporate media conglomerates and their MSO affiliates. Moreover, the harm will disproportionately befall persons in underserved areas, who already tend to pay too much for too little, when it comes to mass media.

The Commission should take strong measures to prevent unchecked domination of DBS orbital locations by large, powerful MSOs, who have historically used the threat of refused carriage in order to force independent programmers to surrender ownership positions in their networks. A few cable industry giants were able to use their financial muscle to gain

control over thousands of cable systems dispersed throughout the 50 states. The large MSOs then used this control in order to exact from a large portion of the best known cable programming services, as a condition of access to distribution, equity interests or similar concessions. Without reasonable access to a means of distribution, it has been extremely difficult for unaffiliated programmers to raise the necessary money to introduce programming in the cable environment. Concern that a few large MSOs were gaining control over cable programming led Congress and the Commission to impose restraints on cable operators, including limits on use of their cable systems to carry programming in which they held an attributable interest.

Cable-affiliated commenters would have the Commission believe that anyone who favors behavioral and structural limits on cable-owned DBS systems is afraid of competition. Nonsense! The only competition ASN fears is *unfair competition*. Those same cable commenters ask the Commission to ignore the Primestar Consent Decrees but offer no coherent denial of the fact that their companies knowingly agreed to cease their anti-competitive practices against DBS programmers and distributors. ASN urges the FCC not to allow large MSOs to dominate U.S. multi-channel video program distributor ("MVPD") markets, particularly DBS, the way they dominate cable.

Having gained control over essential programming, the large MSOs, by their leverage as gatekeepers, are now turning their sights to the only available full-CONUS orbital locations for DBS services. Accordingly, the Commission should, in this proceeding, adopt protections that prevent independent programmers and distributors from being frozen out of DBS and that preserve the diversity of programming sources. The Commission must take

decisive action *now*, before auctions of the last available DBS slots, to preclude combined MSO/DBS operators ("Cable-Owned DBS Entities") from assuming control over DBS in the United States as they have done with cable services.

To preclude these dire consequences, the Commission should impose on DBS operators, particularly cable-owned ones, a percentage limitation on the amount of programming (in which such operators hold an attributable interest) that may be carried on their own DBS systems. The Commission should also impose fair access obligations on DBS operators, particularly those affiliated with other MVPDs, so that they cannot use their substantial market advantages to crush new entrants or competitors with coercive terms or conditions to DBS access.

ASN believes the most effective and complete way to protect independent programmers and distributors is for the Commission to set aside a commercially meaningful portion of DBS spectrum for independent programmers and distributors. It generally takes four to five years for a programmer to recover the substantial investment needed to develop and market a new program service. The only realistic way for independent programmers to secure financing and ultimately reach DBS viewers is to have a slot that they can call their own and have access to on a long-term basis. The surest way for the Commission to ensure programming diversity and to enable independent programmers and distributors to compete and be able to supply DBS services is to set aside specific channel capacity for them.

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

To: The Commission

REPLY COMMENTS OF AMERICAN SATELLITE NETWORK, INC.

American Satellite Network, Inc. ("ASN") hereby submits the following Reply Comments in response to the Commission's October 27, 1995 Notice of Proposed Rulemaking[1] (the "NPRM") seeking comments on the revision of its rules and policies for direct broadcast satellite ("DBS") services.

INTRODUCTION

The Commission has now received comments on its proposed method for reassigning 51 DBS channels that it has reclaimed for the public from Advanced Communications Corporation ("ACC"),[2] as well as comments on its new proposed DBS service rules. In the initial round of comments, all cable-affiliated commenters objected to any proposed

[1]In the Matter of Revision of Rules and Policies for the Direct Broadcast Satellite Service Notice of Proposed Rulemaking, FCC 95-443, Para. 57 (adopted October 27, 1995)("NPRM").

[2]Advanced Communications Corp., FCC 95-428, adopted October 16, 1995 ("Advanced Order").

regulations designed to keep the cable industry from extending its already significant multi-channel video programming distributor ("MVPD") market power to DBS. ASN believes it is imperative that the Commission do exactly that: adopt clear and unambiguous safeguards precluding cable-owned DBS operators from engaging in discriminatory and anti-competitive conduct against DBS operators and program service providers. Also, the comments submitted in this proceeding are wantonly lacking in addressing ways to ensure meaningful participation by independent entities (i.e., those without significant cable holdings) in the emerging DBS industry.

Background

ASN conducts a variety of media- and communications-related businesses, many of which relate to satellite communications. For example, PrimeTime 24, a program packager of which ASN is the primary owner, provides network television programming to white areas, i.e., those households, primarily in rural areas, unable to receive adequate over-the-air broadcast signals from local network television affiliates.

ASN seeks to underscore the threats to competition and harm to the public interest likely to result if powerful MSOs or their affiliates gain unfettered rights to exploit scarce U.S. DBS channel capacity. Media concentration between the cable and DBS layers of television programming and distribution will lead to increased costs and the impoverishing of viewing choices available to the public -- particularly in geographical areas underserved by conventional broadcast television signals. The blow will disproportionately strike at novel and innovative programming introduced by independent programmers and distributors, who are much more oriented to taking creative risks than large MSOs. Programming services of

large MSOs tend to reflect the culture of the corporate media conglomerates with which they are affiliated. As large MSOs consolidate their control over programming, less and less of the innovative and unique programming that does the most for the vibrancy of television as a medium reaches viewers. ASN's antidotes to this seemingly inevitable media concentration -- fair access rules and an independent's spectrum set-aside -- narrowly target the problem, treat fairly the interests of all DBS stakeholders, and promise to enhance the efficiency and diversity of future DBS programming.

I. The Commission's Fears About Media Concentration and the Anti-Competitive Impact of Cable-Owned DBS Operators are Well-Founded.

A. If Primestar Has No Competitive Impact On DBS, Why Have Primestar and Its Cable Owners Entered Into Consent Decrees with the U.S. Department of Justice and the Attorneys General of ***Forty (40)*** *States?*

The cable-affiliated commenters in this proceeding[3] have strenuously protested that behavioral and structural safeguards on cable operators' participation in the DBS industry are either redundant or unnecessary. However, these commenters ask the Commission to ignore the fact that all of them (other than NCTA) entered into Consent Decrees[4] with the U.S. Department of Justice and the Attorneys General of 40 states agreeing not to engage in anti-competitive conduct against competing program services and distributors, including DBS. Further, these commenters would also have the Commission believe their disingenuous

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[3]Primestar Partners L.P., Time Warner Entertainment, Tempo DBS, Advanced Communications Corp., and the National Cable Television Association ("NCTA").

[4]United States v. PRIMESTAR Partners L.P., 1994-1 Trade Cas. (CCH) ¶ 70,562 (S.D.N.Y. 1994); State of New York ex. rel. Abrams v. PRIMESTAR Partners L.P., 1993-2 Trade Cas. (CCH) ¶ 70,403 (S.D.N.Y. 1993).

argument that only those parties intent on preventing competition in DBS services, rather than promoting it, are concerned about cable entry into DBS. Both arguments ignore several salient, and key, facts.

The Primestar Consent Decrees. In 1993 Primestar Partners, L.P. ("Primestar") and numerous other cable entities[5] entered into Consent Decrees with the United States Department of Justice and the Attorneys General of 40 states agreeing, *inter alia*, to the following:

- not to retaliate against or threaten retaliation against any programmer that provides or contemplates providing its programming to competing providers (e.g., DBS);
- not to withhold programming services controlled individually or collectively by the named cable operators from competing distributors;
- not to engage in discriminatory practices against competing distributors (e.g., DBS program packagers and distributors);
- to notify the Consent Decree Liaison States[6] of the cable entities' intent to acquire a high-power DBS license or an interest in one, or commence distribution for any high-power DBS provider of multi-channel video programming; and
- to submit annual reports to the Liaison States with respect to the cable entities' program ownership interests and distribution agreements.

These Consent Decrees are scheduled to expire between October 1997 and the summer of 1998. After that, unless the FCC acts to preclude cable entities' abuse of their

[5]Including Time Warner Cable, Tele-Communications, Inc. ("TCI"), Comcast Corp., Continental Cablevision Inc., Cox Enterprises Inc., GE American Communications, Inc., and Newhouse Broadcasting Corp.

[6]Texas, Pennsylvania, Ohio, New York, Massachusetts, Maryland and California.

significant MVPD market power, the cable entities will once again be free to indulge in anti-competitive conduct against DBS operators and program service providers.

If there were no need to regulate against potential anti-competitive conduct by cable companies offering DBS services, why did the Department of Justice and 40 state Attorneys General seek and obtain Consent Decrees temporarily prohibiting such misconduct? If the Department of Justice and the 40 state Attorneys General were mistaken about the potential for anti-competitive behavior by Primestar in the areas of exclusive affiliation agreements, terms of affiliation agreements, and access to programming, why didn't the Primestar partners litigate the issue in court? The cable industry certainly hasn't shied away from litigation in other contexts.[7] The pending expiration of these Consent Decrees (which are likely to expire before any competing DBS providers are capable of offering services from the orbital slots being proposed for auction) requires Commission action before the auctions so that potential bidders for these two remaining orbital slots are fully informed of their rights and restrictions *before* one or more Cable-Owned DBS Entities enter the DBS marketplace.

Competition in DBS Services. Cable companies and their trade organization claim that DBS is already a competitive service. However, they fail to address the not altogether

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[7]For example, the cable industry has challenged various provisions of The Cable Television Consumer Protection and Competition Act of 1992. See e.g., Daniels Cablevision, Inc. v. U.S. No. 92-2292 (D.D.C. September 16, 1993)(subscriber caps; carriage limits; subscriber notice for premium channel previews; program access; rate regulations, retransmission consent; leased access; public, educational, and governmental channels; DBS service obligations; removal of operator immunity for obscenity on PEG channels; and municipal immunity from civil damages liability arising out of local cable service regulation); and Turner Broadcasting System, Inc. v. FCC, No. 93-44 (U.S. June 27, 1994)(must carry rules).

unlikely possibility of DBS becoming dominated by MSOs, which exercise control over programming. Once these MSOs enter DBS, it will no longer be a competitive service unless the Commission acts. The cable industry is becoming an increasingly concentrated business, with small companies being forced to sell out to larger companies because of the increasing difficulty of competing with the few large players. Should those same few companies also come to dominate the only real alternative to cable for most Americans, DBS, the public will suffer from the loss in programming and distributor choices (i.e., diversity) that inevitably results from only a few conglomerates deciding what the public will see.

This decline in diversity becomes even more disturbing when one shifts vantage from cable programming to the marketplace for ideas and entertainment more generally. The clear trend in the media and entertainment businesses is toward consolidation, convergence and concentration. Recent mergers -- for example those between Disney and Capital Cities/ABC, or between Time-Warner and Turner Broadcasting -- exemplify this trend. We are not far from the day when a few major multinational companies will control what we do and do not read or see. These are most properly private choices to be made by viewers and readers, not wholesale decisions of media titans.

Finally, and most importantly, the cable commenters in this proceeding assert that if other DBS competitors really wanted competition, they would welcome cable entry into DBS rather than fight it. Again, the cable commenters would have the Commission ignore an important fact: *It is not competition that cable's opponents fear, it is unfair competition.* Powerful MSOs control the core programming that anchors the program packages sold to

cable customers. The core programming in DBS services is and will continue to be precisely the same, well known services, in which cable is already so firmly entrenched. Powerful MSOs use this control over core programming to dictate the composition of program packages, knowing that inclusion in a desirable package is absolutely essential to the success of a program service. Powerful MSOs control access to the cable delivery system that reaches most of today's subscription television viewers. Powerful MSOs use their exclusive distribution ability to exact controlling interests or equivalent concessions from would-be independent program sources. These MSOs will not enter DBS as competitors on an equal footing with independents, but as lethal predators who have already shown their willingness and ability to exploit their lock on core programming in order to control the cable industry.

The cable industry has a history of anti-competitive and consumer-unfriendly tactics. That's the primary reason The Cable Television and Consumer Protection Act of 1992 was enacted. ASN welcomes cable participation in the DBS industry. However, that competition must not allow cable to transfer its near-total dominance of multi-channel video program distribution to the still emerging DBS industry.

B. The Commission Must Ensure that the Emerging DBS Industry Fulfills Its Promise as a Truly Competitive Alternative to Cable.

To characterize the DBS marketplace as competitive is to assume the conclusion -- and the assumption is wrong. The DBS marketplace is today in its infancy. As of September 20, 1995, there were fewer than 2,000,000 DBS households[8] as compared to

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[8]Satellite Business News, November 22, 1995, at 1.

upwards of 60,000,000 cable households.[9] Not only do large MSOs enjoy enormous leverage through their control of prominent existing programming, but, by controlling the means of multi-channel video distribution to the vast majority of U.S. households, powerful MSOs will be able to exert considerable control over independent programmers and distributors seeking DBS access for entrepreneurial programming. As observed earlier, by controlling key programming, large MSOs are able to build packages around this programming favorable to themselves. Because access to good packages is the lifeblood for a subscription television service, large MSOs extract major concessions from programmers in exchange for access to packages that include the program services that are must-haves for consumers. There is every reason to believe that large MSOs will, if permitted, utilize this same leverage in the DBS arena to control programming there as well.

A Cable-Owned DBS Entity will thus have both the means to coerce its providers of programming and the vehicle with which to render those means profitable. In the absence of fair access regulations, the public interest will suffer a double blow: First, as the only significant potential competition to cable to appear since the advent of cable more than two decades ago, DBS operators will be incapacitated. Secondly, Cable-Owned DBS Entities will use their rights over a sizeable portion of available DBS channel capacity as a means to cement the servility of video programmers, who will now encounter, between themselves and their viewers, Cable-Owned DBS Entities with leverage over *both* important means of non-broadcast television distribution in this country.

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[9]According to the 1993 Warrent Publishing Television and Cable Factbook (p. F-2), there were 55,000,000 cable subscribers at the beginning of 1993. That number has certainly increased since then.

C. *Fair Access Regulations Have Already Been Found To Be in the Public Interest with Respect to Cable and Are Likewise in the Public Interest for DBS.*

ASN recommended in its earlier Comments that the Commission impose on DBS operators the same 40% channel capacity limit it has adopted for cable operators. ASN noted that existing FCC cable carriage rules[10] have helped maintain fair and equal access for independent cable programmers and distributors.[11] The 40% channel capacity limit was a direct result of the intent of Congress and the Commission's concerns over the ability of cable operators to limit fair access to their delivery systems.[12] These same concerns militate in favor of similar access rules to DBS delivery systems. Without fair access rules Cable-Owned DBS Entities will simply use DBS to extend their control over programmers. It is meaningless to analyze the state of today's DBS marketplace in an attempt to predict the characteristics of that marketplace after entry by a Cable-Owned DBS Entity. Once a Cable-Owned DBS Entity with access to high-powered, full-CONUS DBS channels arrives on the scene, cable operators will no longer be indifferent as to which DBS operator a DBS program service chooses, and the DBS marketplace will be exposed to forces that erode its vitality, competitiveness and independence. Maintaining an open, competitive DBS market requires that program providers (and their sources of funding) be able to rely on stable, long-term, nondiscriminatory access to DBS delivery.

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[10]47 C.F.R. § 76.504.

[11]ASN Comment, at 6.

[12]47 C.F.R. § 76.504 See Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992 -- Horizontal and Vertical Ownership Limits, Second Report and Order, 8 FCC Red 8565, Paragraphs 41-55 (1993).

To help preserve and assure a DBS marketplace that continues to exhibit these desired characteristics, the Commission need merely extend its existing program access rules for cable to DBS. There is no reason to adopt measures any more restrictive than those already in place at the cable level. Fair access rules have helped to allow survival of a number of independent programmers and distributors in non-DBS media, and ASN believes equivalent rules are the minimum step that the Commission must take to assure program diversity in the DBS industry.

D. Antitrust Enforcement Remedies Are Too Little, Too Late, Coming After Potentially Irreparable Harm Has Already Been Inflicted on Independent DBS Program Services.

Without intervention by the Commission above and beyond antitrust protections, independent programmers and distributors who might compete with large MSOs will never get off the ground. Antitrust actions would fail to open this marketplace for the simple reason that there would be no one to bring them. ASN, therefore, believes that reliance on antitrust remedies to police the competitiveness of the DBS marketplace would be a grave misjudgment.

While the Federal Trade Commission ("FTC") and Department of Justice are able to conduct a number of antitrust investigations and enforcement actions each year, that number is limited. The primary mechanism for antitrust enforcement remains private rights of action by parties that sustain antitrust injury. Yet the field of aggrieved plaintiffs available to bring such an action against a Cable-Owned DBS Entity will be severely narrowed by the fact that the essence of the particular threat of vertical foreclosure posed by Cable-Owned DBS

Entities is to prevent such theoretical competitors ever from entering the DBS market in the first place. Therefore, even if it were able to sustain the expense necessary to present its antitrust claims in a private action, a potential independent entrant to the DBS market would face great difficulty marshalling the factual record to support its antitrust claims due to the near impossibility of obtaining financing and other commitments necessary to commence DBS program services in a market dominated by highly concentrated, cable-affiliated entities.

Even if, in the absence of marketplace entry by those who could present a credible antitrust objection to anti-competitive behavior in the DBS industry, the FTC or Department of Justice were to take action, such action would be of little use to independent programmers or distributors. By the time that (i) the DBS marketplace has sufficiently matured that the FTC or Department of Justice is willing to study its competitive characteristics, (ii) one of these agencies conducts an investigation and prepares and brings an enforcement action, (iii) the case works its way through the judicial system, and (iv) a remedy can be fashioned and implemented, the DBS industry will be permanently shaped in many respects, with opportunities for important potential entrants or competitors irrevocably closed-off.

In the absence of intervention by the Commission, Cable-Owned DBS Entities will, long before any antitrust remedy is in sight, consolidate their grip on ownership and control of DBS programming sources. Independent programmers and distributors will gain access to DBS delivery, if at all, only by complying with business terms dictated by a Cable-Owned DBS Entity. Cable-Owned DBS Entities could retaliate against independent programmers or distributors who utilize unaffiliated DBS operators, or who provide program services at prices considered too low by the Cable-Owned DBS Entity, by discriminating against these

independent programmers or distributors at the cable level -- the bulk of the video programming market for the foreseeable future. Such discrimination could unfold across the range of functions performed by cable operators in carriage and delivery of their services: customer service, billing, pay-per-view, authorization/deauthorizaton, promotion and marketing, etc. Of course, the ultimate threat will be wholesale denial of access to cable distribution.

Programming ownership and control over distribution have already become largely concentrated in the cable area, where cable operators have an ownership interest in the best known program services. Once they enter the DBS market, their Cable-Owned DBS Entities will use every means available to weaken their primary competitors at the programming level: broadcast television networks. Thus, Cable-Owned DBS Entities will have a particular incentive to thwart independent programmers or distributors, such as PrimeTime 24, who seek to offer DBS viewing options based on broadcast network television programming. If and when the waves of an antitrust enforcement finally reach the beachhead that cable has established in the DBS area, they would wash across a shore that is devoid of any meaningful broadcast network programming presence.

A Cable-Owned DBS Entity would distort the DBS market well in advance of any antitrust response, acting quickly to achieve several goals simultaneously: weaken DBS operators by refusing or prejudicing their access to key programming; erode the independents' profit margins; use control over DBS distribution to consolidate its portfolio of programming assets; construct DBS programming packages around key program services controlled by the Cable-Owned DBS Entity, so that any independent programmer or

distributor seeking access to packages containing flagship service must accept terms dictated by the Cable-Owned DBS Entity; and freeze independent programmers and distributors out of both cable and DBS distribution by granting preferential treatment to the key programming services in which large MSOs hold an ownership interest. The net result would be a loss of diversity in programming available to the public, and a particular loss of daring, unique and innovative programming that is the stock in trade of independent programmers and distributors.

ASN believes considerations of how best to assure a fair and open marketplace for DBS services to be integral to this proceeding, which will ultimately lead to arrangements that establish rights and interests in pivotal DBS locations and channels available now or in the future. To decide who accedes to control of the spectrum reclaimed from ACC, to establish the process for such an allocation, and to lay out policies for allocation of future DBS locations is in large measure to configure this important, emerging industry. The stakes here include whether independent programmers and distributors will be barred or encouraged, whether programming diversity will be enhanced or jeopardized, and whether the public may absorb unnecessarily high fees due to vertical foreclosure of programming and distribution alternatives. Accordingly ASN recommends that the Commission address the anti-competitive concerns raised in the comments of ASN and others.[13]

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[13]If the Commission should decide, however, to take up anti-competitive issues in a separate proceeding, ASN would expect to be an interested participant in that proceeding as well.

II. ASN's Proposals for Fair Access Rules and an Independent's Spectrum Set-Aside Are Narrowly Targeted Remedies Consistent with the Commission's Congressional Mandate To Facilitate Small Business Participation in the Delivery of New Technologies to the Public

ASN recommended that the Commission either (i) put in place stringent, long-term rules, including a 40% channel capacity limit, to assure access for independent programmers and distributors (defined as those with no attributable ownership in cable systems) or (ii) carve out a clear, meaningful and long-lasting presence in DBS for independent programmers and distributors by setting aside a commercially significant amount of channel capacity at currently and subsequently available DBS locations for independents (defined as DBS programmers or distributors without market power over a nation-wide cable or other multi-channel mode of video distribution). ASN believes that these alternatives, and in particular an independent's spectrum set-aside, will help to assure that large DBS operators do not foreclose small businesses and rural entities from DBS programming and distribution.

ASN believes for several reasons that its second proposal, a competitive set-aside, will ultimately lead to more independent programmers and distributors introducing a richer variety of program services to DBS viewers more quickly and at lower costs. The fair access proposal would help to open the DBS marketplace, but fair access is a lot different from guaranteed access. A new program service might cost $40 to $50 million to introduce. Many cable services do not attract enough subscribers and advertising revenues even to break even until four to five years from introduction; in DBS it could take even longer. Even under a fair access regime, the entrepreneurial programmer is thus confronted with a relatively long time-horizon for recovery of its investment, rights to channel capacity that are sure to be commercially ambiguous at best, and the need to rely on the hospitality of fiercely

competitive MSO programmers who host the delivery system for its programming. How can an independent finance entrepreneurial programming under these conditions? The reality is most would fail to attract adequate capital.

On the other hand, under the set-aside model, independent programmers and distributors could obtain secure rights to adequate DBS channel capacity for the life span of the satellite (a ten year life span would be ample time for a successful service to realize the benefit of its investment), in exchange for sharing pro rata with the satellite's primary occupant(s) in the costs of its construction, launch and maintenance. As masters of their own distribution capacity, independent programmers and distributors would then be on an equal footing with large MSO programmers in their ability to approach potential sources of funding for a new program service with a credible means of access for this programming.

A. ASN's Proposals Are Narrowly Targeted and Based on Facts in the Record.

ASN has proposed protections consistent with and no more restrictive than those the Commission has adopted for other television delivery media. Our proposed fair access rules merely extend regulations already applicable to cable operators at the DBS level, where the case for protecting independent programmers and distributors is at least as strong. Our alternative independent's spectrum set-aside proposal is also consistent with what the Commission has done in other auctions to secure access for designated entities, and thereby ultimately maximize programming diversity for viewers.[14]

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[14]The Commission has recently taken steps to foster participation by small businesses and women- and minority-owned businesses in the Interactive Video and Data Service (See e.g., Third Memorandum Opinion and Order, FCC 94-219 (August 16, 1994)). The

What's more, ASN's proposals will directly counteract the anti-competitive threats identified in ASN's initial comments.[15] Access rules will cap occupancy of cable-affiliated DBS channels by cable-owned programming and thereby limit the damaging effects of concentration between control over both programming and the media for program delivery. A percentage set-aside will accomplish the same result, but through a structural approach that avoids much of the ambiguity inherent in fair access rules and affords independent programmers and distributors a much more stable platform on which to develop, finance, produce and deliver fresh and entrepreneurial DBS program offerings.

B. Even ACC, While Opposing the Commission's Auction Proposal, Agrees that the Proposed DBS Service and Auction Rules Give Short Shrift to Small Businesses.

While objecting to the overall concept of auctions for the DBS spectrum, ACC agrees with ASN and others that any such auctions should accommodate small businesses and independents by guaranteeing such businesses an opportunity to participate in DBS services and thereby ensure that public-interest and congressional goals are met.[16] Without such accommodations, the auctions assume an all-or-nothing character that is unnecessary and that facilitates anti-competitive exploitation of DBS delivery media by cable operators.

Commission's upcoming Broadband PCS C Block Auction also is designed to facilitate small business participation in the PCS industry (See e.g., Sixth Report and Order, FCC 95-301 (July 18, 1995)).

[15]ASN Comment, at 2-5.

[16]ACC Comment, at ii, 10.

Unless the Commission puts in place accommodations such as the proposals by ASN, Cable-Owned DBS Entities will be ideally situated to freeze both independents and small businesses out of DBS. As we noted in our initial comments, Cable-Owned DBS Entities can cripple independent programmers and distributors through denial of access or discriminatory access to their cable systems.[17] Moreover, Cable-Owned DBS Entities, through services such as the proposed Headend in the Sky ("HITS") of Tele-Communications, Inc., can freeze unaffiliated entities out of DBS wholesale distribution.

ASN's proposals will enrich the DBS marketplace by enabling participation of independent or small business programmers and distributors who lend vibrancy to mass communications across all delivery media. These businesses could take advantage of opportunities provided by the Commission's access rules or set-aside to:

- cultivate independent sources of content to preserve a sphere for non-dominant programming that competes with programming attributable to a DBS operator;
- create programming mixes appealing to niche or underserved markets (including white areas); and
- offer individualized menu choices of television programming at the wholesale level that distributors competitive with dominant DBS operators could assemble into appealing program packages at price points favorable to consumers.

[17]ASN Comment, at 3-4.

C. *Primestar's Proposal of a 32-Channel Cap on Spectrum Aggregation Is Insufficient To Promote Diversity and Competition.*

The proposal by Primestar[18] that all DBS operators be subject to a spectrum aggregation limit of 32 full-CONUS channels is insufficient to counteract the anti-competitive effects of vertical integration and media concentration that will result if Cable-Owned DBS Entities obtain unbridled use of scarce, full-CONUS DBS orbital locations. Thirty-two channels, even with today's compression and digitization technologies (which allow transmission of more than six simultaneous video program services per channel), would allow an operator to carry, for example, at least 192 distinct program services. ASN believes that this level of capacity, absent controls such as ASN's two proposals, will allow any Cable-Owned DBS Entity to concentrate its programming assets unduly with its DBS delivery media and thereby constrict the market for DBS program services, as already described in these reply comments and in ASN's initial comments.

CONCLUSION

When powerful MSOs enter the DBS marketplace, they will reconfigure that marketplace. Unless the Commission takes decisive action, their entry will produce serious, anti-competitive effects that harm the industry and the public interest. Notwithstanding the irrelevant observations by cable commenters that the *current* DBS marketplace has emerged as vibrant and competitive, the *future* DBS marketplace would without question see large MSOs use their key programming assets and control over the packages sold to the public in

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[18]Primestar Comment, at iv.

order to freeze out the entrepreneurial, independent programmers and distributors who remain the most promising sources for unique and innovative video programming. As a result, program diversity will rapidly evaporate as large MSOs promote mass-appeal programming bearing the stamp of their respective multi-media conglomerates. The public might or might not like what it sees, but it will know that what it sees and reads was selected by one of a handful of concentrated, vertically integrated, multinational corporations.

To avert this result, the Commission should at the very least carry over to DBS the type of fair access rules that have helped retain a degree of program diversity in the cable arena. ASN recommends, however, that the Commission go a step farther and mandate a competitive set-aside of a commercially meaningful amount of DBS spectrum for independent programmers and distributors (i.e., those without market power over cable or any other multi-channel mode of video distribution). Only through such a set-aside can a critical mass of independent programmers and distributors obtain reliable enough channel capacity for a lengthy enough period of time in order realistically to attract financial commitments from sources of funding adequate to meet the considerable cost of creating and introducing a unique and innovative program service for DBS delivery.

Respectfully submitted,

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Dated: November 30, 1995