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

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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	)	

REPLY COMMENTS OF
PRIMESTAR PARTNERS L.P.

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SUMMARY

Predictably, the complexity of the Commission's Notice of Proposed Rulemaking ("NPRM") regarding amendments to its Direct Broadcast Satellite Service ("DBS") regulations has generated a host of self-serving comments and positions -- many of which are blatant attempts to solidify the current DBS competitive landscape and eliminate, or at least handicap, entities affiliated with cable operators and other non-DBS multichannel video program distributors ("MVPDs") seeking to provide DBS services. At the bottom of all of the rhetoric, however, stands a glaring absence of any evidence to justify the imposition of structural or behavioral restrictions on the participation in DBS by such entities. Thus, the Commission cannot justify any of the structural or behavioral rules proposed in the NPRM.

Rather than rewriting the rules, the Commission should affirm the regulatory structure that has finally brought DBS to the public. Moreover, the Commission should abandon any notion that the DBS service should be diluted by liberal spectrum reallocation policies which threaten to turn DBS into a general telecommunications service.

Although PRIMESTAR submits that the Commission's attempts to auction the DBS resources reclaimed from Advanced Communications Corporation ultimately will be undone by the courts, PRIMESTAR is in general agreement with the auction

methodologies proposed by the Commission to allocate DBS resources lawfully reclaimed or newly created.

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PRIMESTAR Partners L.P. ("PRIMESTAR"), by its attorneys, and pursuant to Section 1.415 of the Commission's rules, 47 C.F.R. § 1.415, hereby files its reply to the comments submitted in response to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.[1]

I. INTRODUCTION/SUMMARY

Collectively, the comments affirm PRIMESTAR's prediction that the Commission's decision to embark upon a substantial rewrite of the rules and policies governing the direct broadcast satellite ("DBS") service would open a Pandora's box of debate. The complex issues that the Commission has raised, and the self-serving positions taken by the parties who wish to smother competition in the DBS service, could well thwart

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1 Revision of Rules and Policies for the Direct Broadcast Satellite Service, Notice of Proposed Rulemaking in IB Docket No. 95-168, PP Docket No. 93-253, FCC 95-445 (released October 30, 1995) ("Notice" or "NPRM").

the Commission's purported goal of expeditiously reassigning the DBS orbital slots and channels reclaimed from Advanced Communications Corporation ("Advanced").[2] Moreover, the NPRM, and the initial comments filed in response thereto, have created considerable uncertainty about the value of the DBS spectrum resources the Commission hopes to auction, especially with respect to entities affiliated with non-DBS multichannel video program distributors ("MVPDs"). Simply put, if the DBS regulatory playing field is to be severely tilted in favor of "independent" DBS applicants, as the Commission has suggested and the incumbents have embraced, then the Commission will stifle the competitive bidding incentive of those entities who, under the proposed rules, could not use the resources they might obtain at auction to provide a service in full competition with numerous non-MVPD-affiliated DBS operators.

In addition to the issues surrounding the rights of MVPD-affiliated entities to participate in DBS, the complexity of the Commission's Notice has engendered battles on a number of other fronts, from the fundamental question of whether the Commission has satisfied the statutory prerequisites for reassigning the Advanced slots and channels through competitive bidding, to the ramifications of auctioning satellite licenses which authorize international service.[3] PRIMESTAR

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

3 The conflicting agendas which become readily apparent upon review of the comments filed in this proceeding are well

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reiterates that, in the interest of ensuring competition in the DBS arena during an ever-narrowing window of opportunity, and expediting service to the public, the Commission must limit its focus to devising a lawful and efficient means of reassigning the DBS resources lawfully reclaimed, and reaffirm rather than rewrite the DBS rules and policies which have fostered, and which will continue to foster, competition among DBS providers and which will bring DBS service to consumers as quickly as possible.[4]

Despite the conclusory claims of those parties motivated to hinder the ability of cable-affiliated entities to compete

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illustrated by the position of EchoStar. EchoStar maintains that, as a matter of law, the Commission must reallocate the orbital slots and channels reclaimed from Advanced to the remaining DBS permittees pursuant to the system established in Continental Satellite Corp., 4 FCC Rcd 6292, 6299 (1989), partial recon. denied, 5 FCC Rcd 7241 (1990) ("Continental"). In asserting that the Continental process will lead to the expeditious use of the Advanced channels, EchoStar overestimates the ease with which Advanced's slots and channels could be equitably redistributed among incumbent permittees. EchoStar suggests that the parties involved might readily agree to a reallocation scheme EchoStar proposes -- one which, self-servingly, would give EchoStar and its subsidiary, Directsat, all 32 channels at the coveted 119° W.L. orbital slot. An allocation proposal that awards EchoStar everything it wants and provides the other permittees with less, can hardly be described as a good faith effort to rapidly reallocate channels under the Continental approach. Should the Commission institute the reallocation scheme set forth in Continental, however, it should equitably distribute the available channels among incumbent permittees without regard to their non-DBS MVPD affiliation.

4 Due to the Commission's error in reclaiming DBS resources from Advanced, any auction of the Advanced orbital slots and channels in all likelihood will be undone by the courts. Thus, PRIMESTAR's comments regarding the auction process for DBS resources in general is without prejudice to its position on appeal of the Advanced Order.

in DBS, the record in this proceeding offers little or no basis upon which the Commission can justify extraordinary reversals in its DBS rules and policies. Specifically, there is no evidence to support the imposition of debilitating behavioral and structural regulations on DBS operators affiliated with non-DBS MVPDs. Neither is there any justification for abandoning the Commission's commitment to nurture DBS in favor of a proposed de facto reallocation of the DBS spectrum, especially at the point when the DBS service is reaching its stride.

Less than one month ago, the United States Court of Appeals for the Sixth Circuit chastised the Commission for adopting rules to govern market behavior by certain applicants based on "predictive judgment." The Court concluded that the "'predictive judgment' as to the possible future behavior of future marketplace entrants is highly suspect, makes little common sense, and the FCC provides to this Court nothing, no statistical data, or even a general economic theory, to support its argument." Cincinnati Bell Telephone Company v. FCC, 1995 W.L. 661022 (6th Cir.) at 5. The holding and logic of the Cincinnati Bell decision and the status of the record in this proceeding, therefore compels the Commission to: (1) eschew its proposals to create DBS/cable cross-ownership rules and to subject non-DBS MVPDs to debilitating constraints in marketing their DBS service; (2) reaffirm that the spectrum allocated to DBS is to be used first and foremost to provide

DBS services; and (3) move toward expeditiously auctioning available DBS resources as described below.

II. STRUCTURAL AND BEHAVIORAL REGULATION OF CABLE-AFFILIATED DBS COMPANIES IS UNWARRANTED AND UNNECESSARY

The complete lack of evidence in this proceeding concerning anticompetitive behavior by cable operators with regard to DBS supports PRIMESTAR's position that the Commission must abandon any proposals that would discriminate against certain potential DBS operators and impose upon them undue regulation -- regulation that would serve only to hinder or preclude their ability to compete in the DBS arena. While certain commenters in this proceeding have embraced the opportunity afforded them by the NPRM to "revisit the extent to which cable operators may hold DBS permits or make use of DBS facilities," their efforts have consisted of nothing more than heaping upon the record unsubstantiated rhetoric about the "potential" for anticompetitive behavior.[5] Not one party has provided empirical evidence in support of its contentions or moved beyond conjecture in its efforts to protect its competitive position by keeping cable-affiliated entities out

[5] USSB, for example, alleges that a DBS operator owned or controlled by a cable TV operator "could not be expected to" vigorously compete with its own cable systems. USSB Comments at 5. Similarly, DIRECTV repeatedly asserts that cable operators "exercise market power," but fails to cite one example how this alleged market power has worked to the detriment of DBS. Moreover, while alleging that there are "opportunities for anticompetitive behavior," DIRECTV cites no instance of actual anticompetitive misconduct. DIRECTV Comments at 16.

of the DBS service altogether, or at least handicapping them to the extent that their competitive positions would be undermined.[6] Simply put, the record contains no legal, factual or policy basis for the Commission to impose cross-ownership structural prohibitions or behavioral restrictions on cable operators who seek to compete in the DBS business.[7]

A. The DBS Arena and the MVPD Marketplace Generally Are Increasingly Competitive

Congress expressly rejected the need for DBS/cable cross ownership rules in crafting the 1992 Cable Act[8] and as recently as 1992, the Commission declined to restrict cable

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6 DIRECTV, for example, "has major doubts about allowing the cable industry to acquire full-CONUS DBS channels at all" because, DIRECTV alleges, cable-affiliates lack the incentive to compete fully. Yet, in an attempt to ensure its ability to acquire more DBS channels, DIRECTV states that it could not exercise market power because of competition from PRIMESTAR, among others. Comments of DIRECTV at 13. If DIRECTV believes that cable-affiliated DBS operators will not compete, it cannot rely on competition from PRIMESTAR to check its own market power.

7 Numerous commenters have recognized the glaring lack of evidence in this regard. Ameritech, for example, states that "[t]he NPRM does not identify any basis for differentiating between cable operators and other MVPDs for purposes of the rules the Commission may adopt .... Ameritech does not believe any legitimate reason exists." Ameritech Comments at 3. Similarly, BellSouth "does not believe that cable operators should be subject to greater DBS affiliation limitations than non-cable MVPDs." BellSouth Comments at 4-5. Continental Cablevision submits that "[t]he NPRM is devoid of any evidence of anticompetitive behavior by a cable operator with regard to DBS." Comments of Continental Cablevision at 7.

8 See H.R. Rep. No. 862, 102d Cong., 2d Sess. 56 (1992) reprinted in 1992 U.S.C.C.A.N. 1231, 1264 (deleting portion of Senate bill requiring adoption of cross-ownership restrictions for DBS systems).

participation in DBS, citing the public interest benefits that would accrue from cable entry and the adequacy of existing protections (including the antitrust laws) to guard against the potential for anticompetitive behavior.[9] Neither the NPRM nor the record in this proceeding evidences any changed circumstance that would counter the conclusion that such restrictions are unwarranted.

In fact, the only thing that has changed since both Congress and the Commission rejected DBS/cable restrictions is that competition in the relevant markets has greatly increased. The DBS business has become increasingly competitive, and a cable-affiliated DTH provider, PRIMESTAR, is responsible for much of the competition. Programmers also offer more services, the number of networks having increased from 77 in 1990, to 99 in 1993,[10] and 137 in September of 1995.[11] Finally, the MVPD market faces increasing competition from MMDS, DBS and imminently, from telcos and others. These realities find substantial support in the record and militate against imposing restrictions on cable-owned DBS systems.[12]

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9 Tempo Satellite, Inc., 7 FCC Rcd 2728 (1992) ("Tempo II").

10 1994 Assessment of the Status of Competition in the Market for Delivery of Video Programming, 9 FCC Rcd 7442, 7568, Table 4.

11 *National Cable Video Networks by Type of Service*, CABLE TELEVISION DEVELOPMENT (National Cable Television Association), Fall 1995, at 6.

12 BellSouth recognizes that cable operators now face the prospect of significant competition from existing and

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As several commenters point out, the DBS service is currently characterized by explosive growth. Two non cable-affiliated companies, DIRECTV and USSB, are providing high-power DBS. EchoStar and AlphaStar, also non-cable affiliates, are poised to launch service in the near future. Five companies, only one of which is a cable affiliate (Tempo), currently hold permits to construct DBS facilities, and the Commission has pledged to strengthen its due diligence rules to ensure that those systems are operational as quickly as possible.

PRIMESTAR's medium-power direct-to-home ("DTH") satellite service has more than 800,000 subscribers, is competing aggressively against all other MVPDs, and in fact now is providing the only meaningful competition to DIRECTV and USSB. PRIMESTAR's success proves that there can be effective and robust competition from a DBS system owned by cable operators, and the absence of <u>any</u> instances of anticompetitive misconduct proves that competition from a cable-owned DBS provider will be fair and fully consistent with the law.

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potential DBS providers, as well as from cable overbuilders and other multichannel services such as wireless cable, video dialtone, LMDS and SMATV. Therefore, "since the marketplace conditions that produced the <u>Tempo II</u> restrictions no longer exist, it is no longer necessary to impose similar restrictions on MVPD-affiliated DBS providers." BellSouth Comments at 6. Similarly, imposition of such restrictions "would effectively award an unjustified advantage to non-affiliated DBS providers and thereby undermine [the Commission's] overriding objective of promoting competition within the DBS industry." <u>Id</u>. at 3-4.

B. The Record Is Devoid of Evidence Demonstrating That Cable Operators Have the Ability or the Incentive To Engage in Anticompetitive Behavior in DBS

The existing, or soon to be, DBS operators (DIRECTV, USSB and EchoStar), which stand to benefit greatly if cable-affiliated DBS operators are forced to operate under competitive constraints, have littered the record with speculative nonsense in an effort to dilute the pro-competitive effect that cable-affiliated entities, with their financial strength and experience, would have on the DBS arena. These competitors readily climb aboard the Commission's "pro-competitive" bandwagon, protesting that cable's entry into the DBS arena will have "anticompetitive" consequences.

The inflammatory statements of these entities regarding imagined anticompetitive behavior by non-DBS MVPD affiliates find no support in the record. The Commission must expose these protestations for what they are -- transparent attempts to protect individual competitive positions by: (1) precluding the entry into high-power DBS of strong potential competitors; or (2) ensuring that such entities are hamstrung by excessive regulation crippling their ability to compete fully.[13]

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13 In a related vein, American Satellite Network, Inc., majority owner of PrimeTime 24, goes so far as to suggest that regulation designed to "prevent unchecked domination" of DBS by cable operators should include a set aside of DBS spectrum for independents as a means to assure access by independent programmers. This proposal is completely self-serving and

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Although not a competitor, the Department of Justice ("DOJ") engages in similar fanciful speculation about the potential for anticompetitive behavior on the part of cable-affiliated DBS operators, and calls for an outright ban on DBS service by cable-affiliated entities. DOJ theorizes that there may exist incentives for cable multiple system operators ("MSOs") to minimize competition from DBS resources they control and instead to coordinate their DBS and cable activities to maximize their "monopoly profits in the cable business."[14]

It is instructive to review the specific instances of anticompetitive behavior the DOJ posits as possible, while it ignores the absence of any such behavior in fact.

First the DOJ suggests that a cable-affiliated DBS operator might offer a "grossly inferior" DBS service to protect its cable interests. There would be no point in deliberately offering an inferior service, however, because other DBS operators would capture the market and have just as much impact on the cable systems affiliated with the "grossly inferior" DBS service. There is no rational basis for

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without basis. Given that the courts already have struck down a similar set aside provision for non-commercial entities which Congress specifically authorized, Daniels Cablevision, Inc. v. United States, 835 F. Supp. 1 (D.D.C. 1993), appeals pending sub nom. Time Warner Entertainment Co. v. FCC, No. 93-5349 and consolidated cases (D.C. Cir.), it is ludicrous to suggest that a spectrum set aside designed to favor a certain group of commercial programmers could withstand statutory or constitutional challenge.

14 DOJ Comments at 6.

assuming that a cable-affiliated DBS operator would adopt such a lose-lose strategy.

DOJ itself suggests that the foregoing scenario is unlikely and offers a more benign alternative where the cable-affiliated DBS operator might not offer programming which competes head-to-head with cable and might price its service less than fully competitive with cable. In positing this scenario, DOJ again ignores the presence of unaffiliated DBS rivals. For a cable-affiliated DBS operator to offer anything other than the best service it can is simply to cede the market to its DBS competitors and create the same illogical lose-lose situation.

Carrying its argument further, DOJ suggests that there may be only three competitive DBS operators and even if only one of them is affiliated with a cable system, "competition with cable will be significantly reduced."[15] Because PRIMESTAR and two DBS competitors are currently operating, one might expect some facts to back up such a hypothesis, but DOJ offers none. Instead, it relies on another competitive scenario where the incentive to a cable-affiliated DBS operator to "restrain output [programming] and set higher prices [to protect its cable operations] could well reduce the incentives of the other two firms to compete vigorously."[16] According to DOJ, the rival firms would

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15 DOJ Comments at 6 (emphasis added).

16 DOJ Comments at 6.

realize that they too could set higher prices without losing business to the cable-affiliated operator. Price leadership is a common phenomenon where competitors are satisfied with their market share and expect all other competitors to follow a price increase by one of their number. This phenomenon conceivably could occur in the DBS industry, although there is no sign of it, but it would be just as likely to occur where none of the competitors was affiliated with cable. In reality, for the foreseeable future, it is much more likely that all DBS competitors will be vying strenuously for market share making the DOJ scenario impossible. It is even more unlikely that the independent DBS operators would base their programming and pricing strategies on protecting an unrelated cable business. DOJ's hypothesis simply makes no sense.

DOJ finally suggests that where a cable operator has local market dominance, a DBS operator affiliated with that cable system could charge higher prices to DBS customers in that market. This scenario assumes, however, that no other DBS operator would be willing to come into the market with a competitive service at a lower price. There is no basis in fact or theory for such an assumption.

In short, the DOJ provides no empirical or theoretical basis for its conclusion that cable operators' participation in DBS should be denied.

The only evidence offered in this proceeding demonstrates overwhelmingly that cable-affiliated DBS operators lack both the ability and the incentive to exercise undue

market power in the DBS arena or to fail to compete vigorously. As PRIMESTAR has shown both in this docket and in the Advanced proceeding, its partners' investments in its DTH service are too substantial and the competition from non-affiliated DBS providers too great for PRIMESTAR to cede willingly any of its market share by failing to market its service aggressively and ubiquitously. Moreover, there is no evidence that PRIMESTAR has taken any of the actions or pursued any of the strategies conjured up by the DOJ and others who seek PRIMESTAR's exclusion from the DBS service to the detriment of DBS consumers.

The paper theorists in this proceeding conveniently ignore the fact that the Commission must base any decision concerning cable/DBS cross ownership on actual experience, not conjecture. PRIMESTAR has been in business for four years without acting in an anticompetitive manner. Despite being handicapped by larger dishes and fewer channels, PRIMESTAR has offered meaningful competition to DIRECTV and USSB and has been a positive factor for consumers. There is simply no evidence of any anticompetitive behavior in the DBS business by PRIMESTAR or any MSO, and neither the Commission nor the commenters in this proceeding has provided any reason why the safeguards currently found in Commission regulations as well as the numerous antitrust and anticompetitive practice remedies available to other government entities are insufficient to maintain the current competitive conditions.

Absent actual evidence of anticompetitive behavior, the Commission should not even consider the structural restrictions contemplated in the NPRM. To the extent it wishes to establish a cap for ownership of DBS channels, it should do so without regard to non-DBS MVPD affiliation.

C. Marketing and Program Access Regulations Would Serve No Identifiable Purpose

Similarly, support for the Commission's proposal to impose behavioral restrictions, specifically marketing limitations and program access regulations, on non-DBS MVPD affiliated DBS providers is based on theory, not actual data.[17] The record offers no evidence that exclusive distribution arrangements exist, or are a problem, or have resulted in a diminution in competitive distribution opportunities. The idea that an MVPD distributor might not be an aggressive marketer of DBS in its non-DBS service area is untenable where it is competing against multiple non-MVPD affiliated DBS providers. As BellSouth aptly recognizes, given the competitive makeup of the DBS arena, where a non-DBS-MVPD-affiliated provider would face unaffiliated DBS competition, as well as competition from other MVPDs, marketing restrictions are particularly unwarranted. In such

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17 The Commission's NPRM does not limit its prohibition on exclusive distribution arrangements to MVPDs affiliated with the DBS operator. As such, the Commission's proposed rules would encompass the exclusive marketing arrangement between DIRECTV and the National Rural Telecommunications Cooperative. If prohibitions on exclusive distribution arrangements are mandated, they should apply equally to DIRECTV.

a competitive environment, a cable-affiliated DBS provider that allows distribution of its service on an exclusive basis, or that offers its DBS service on an ancillary basis would do so because it believed such actions would make it more competitive. Such action would have no adverse effect on competition within the DBS industry or within the market for MVPD services generally. Conversely, allowing a cable-affiliated DBS provider maximum flexibility in marketing its DBS service will enable that provider to respond directly to consumer demand, thereby increasing the number and diversity of choices available to existing and potential DBS subscribers.

Extension of the program access rules is also unjustifiable. DIRECTV and USSB have obtained access to virtually all of the cable programming services in which cable operators have ownership interests. In fact, DIRECTV, which operates without program access restrictions, has negotiated for itself exclusive rights to valuable sports programming that is not available to other DBS operators or to cable customers. Less than one year ago, the Commission considered and declined to apply aspects of its program access rules to arrangements between DBS operators and vertically integrated cable programmers, tacitly acknowledging the numerous efficiencies of vertical integration in the programming

market and the inability of cable operators to exercise undue market power in the DBS arena.[18]

In the absence of record abuses, the imposition of marketing limitations, such as restrictions on exclusive distribution and programming agreements, will serve only to hinder competition among DBS operators and other MVPDs. Such regulations will restrict the ability of DBS providers to differentiate, package and position their program services in the market. This form of mandated homogenization serves no public interest goal.[19]

D. Any Decision By the Commission To Handicap Certain DBS Participants Will Significantly Affect the Value of DBS Spectrum

Should the Commission determine that the purely theoretical arguments advanced by some commenters justify forcing certain DBS providers to operate under substantial constraints, such a decision will considerably affect the

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18 Implementation of the Cable Television Consumer Protection and Competition Act of 1992, 76 RR 2d 1177 (1994).

19 Similarly, the Commission's proposal to place program access or program carriage type regulations on the provision of "wholesale" DBS service such as TCI's proposed "Headend-In-The-Sky" ("HITS") service would serve no identifiable purpose. As the record demonstrates, HITS is not the "wholesale DBS" service the Commission perceives it to be. As Tempo points out, the term "wholesale" wrongly presupposes that TCI would purchase programming and resell it to operators who in turn would retail it to their subscribers. Tempo Comments at 26. To the contrary, HITS is merely a transport and authorization system. Any HITS customer would be required to obtain directly from each programmer the right to distribute to its subscribers any programming it receives through HITS. As TCI would control no operators' access to programming, no competitive concerns are implicated.

value non-DBS MVPD affiliates place upon the spectrum to be made available at auction. As Ameritech points out, any rules which discriminate against cable-affiliated DBS providers would not address an identifiable problem but would "skew that marketplace with an artificial constraint that handicaps only one type of participant."[20] In order to realize the full value of the spectrum resources, the Commission should place all bidders/potential competitors on equal footing and adhere to existing rules and policies which provide sufficient protection against anticompetitive behavior. In this manner, the Commission would curtail substantial uncertainties about the value of the spectrum to be offered and avoid the very real possibility that its proposed auction will be held in abeyance until these issues are fully litigated.

III. USE OF DBS CAPACITY SHOULD BE LIMITED TO THE PROVISION OF DBS SERVICE

Several commenters offer cursory approval of the Commission's proposal to liberalize the flexibility granted DBS permittees in the use of their assigned channels for non-DBS services. None of the commenters, however, explores in-depth the ramifications of such a decision, basing their support solely on the idea that flexibility will allow DBS permittees to find the most optimal use for this spectrum. Predictably, MCI argues most strenuously in favor of

20 Ameritech Comments at 3.

increased flexibility. MCI goes even further than the NPRM, however, proposing that DBS licensees be permitted to average their use of capacity or time for DBS over a thirty day period rather than on a daily basis and that this flexibility be extended to all subsequent DBS license terms and generations of DBS satellites. As such, MCI reveals that the priorities on its agenda include finding spectrum to provide indiscriminate broadband services, not creating a viable and competitive DBS system.

The Commission long ago established that the optimal use of DBS spectrum was for the provision of DBS services and allocated DBS spectrum for that purpose, much to the chagrin of existing terrestrial users who found themselves displaced. The Commission's judgment in this regard has proven sound. As a result of the considerable efforts of a generation of DBS pioneers and the Commission's unfailing commitment, DBS services have garnered overwhelming public acceptance, have experienced explosive growth over the past year, and are poised to raise competition among MVPDs to a new level. Now, just as DBS is on the threshold of fulfilling the Commission's long term vision, the NPRM proposes to pull the rug from under this promising new service.

PRIMESTAR vehemently opposes the wholesale abandonment of the Commission's long-standing policy as proposed in the NPRM. The proposed de facto reallocation of DBS spectrum will serve only to undermine "the development of DBS as an important potential addition to the availability, diversity

and technical enhancement of video programming."[21] The Commission should resist the temptation to make this spectrum attractive to a larger number of bidders, regardless of their intention to provide DBS service. The Commission should continue to require that the spectrum resources allocated to DBS be devoted first and foremost to that service. The temporal flexibility to provide ancillary services afforded DBS permittees during start-up is sufficient to advance the Commission's goals -- any expansion of permissible non-DBS uses simply is unnecessary.

IV. THE COMMISSION MUST ESTABLISH SPECIFIC RULES GOVERNING THE CONDUCT OF THE PROPOSED DBS AUCTIONS

PRIMESTAR reiterates that, while it does not dispute the Commission's authority to auction DBS spectrum, in the case of the Advanced channels, the Commission created a mutually exclusive situation which could have been readily and lawfully resolved by grant of Advanced's extension request and the Advanced/Tempo assignment application. To the extent that DBS channels are available for auction, however, the Commission should establish specific and defined auction procedures to ensure the integrity of the competitive bidding process.

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21 Potential Users of Certain Orbital Allocations by Operators in the Direct Broadcast Satellite Service, 6 FCC Rcd 2581 (1991); see also United States Satellite Broadcasting, 1 FCC Rcd 977 (1986), recon. denied, 2 FCC Rcd 3642 (1987).

Two commenters, MCI and Kennedy-Wilson International, offer proposals regarding conduct of the proposed DBS auction. PRIMESTAR generally supports the proposal offered by MCI, which recommends an oral outcry auction including a one-minute period following each bid to withdraw the bid without penalty and a five minute period within which new bids may be submitted. Where a bid is withdrawn, PRIMESTAR submits that the auctioneer revert to the previous high bid and that the procedures continue from that point. If no new bid is announced within the five-minute bid submission period, the auction would conclude and the winner would be announced.

PRIMESTAR concurs with the belief expressed by both MCI and Kennedy-Wilson that any auction rules adopted by the Commission must provide for substantial penalties for withdrawal of a bid outside of the "no penalty" withdrawal period. PRIMESTAR supports MCI's suggestion that such a withdrawal must immediately disqualify the withdrawing/ defaulting party from all subsequent bidding on the same license, and that the withdrawing/defaulting party be subject to a penalty equal to the difference between the amount bid and the amount of the winning bid the next time the license is offered.

MCI's proposal contains no provision for breaks in the auction, and Kennedy-Wilson recommends a one-time opportunity for each bidder to suspend the proceedings. PRIMESTAR believes that a series of 30 minute breaks as each $25

million increment in the bidding is reached should be adopted to allow bidders to assess the bidding and confer with principals.

Finally, PRIMESTAR questions the reasoning behind MCI's proposal concerning bid increments. Under MCI's proposal, increments would increase from $5 million to $10 million after a $200 million bid is reached and $20 million after a $400 million bid is reached. PRIMESTAR submits that this type of escalating increments runs counter to the Commission's goal of maximizing the value of the spectrum. For example, at very high bidding levels, a bidder might be willing to pay $1 million more, but not $20 million more. The Commission would lose the advantage of getting the "last dollar" for the resources being auctioned. PRIMESTAR supports, therefore, Kennedy-Wilson's proposal that the auctioneer be given discretion to set bid increments subject to a minimum of 1% rounded down to the nearest $100,000 or $1 million, whichever is less, at least with respect to bidding in the later rounds.

V. CONCLUSION

In light of the record in this proceeding, the Commission has no choice but to conclude that theoretical concerns over potential anticompetitive behavior by non-DBS MVPDs entering the DBS arena do not support the erection of behavioral and structural barriers to participation by cable operators or other MVPDs in the DBS service. PRIMESTAR