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FCC 95-507

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

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

REPORT AND ORDER

Adopted: December 14, 1995 Released: December 15, 1995

By the Commission: Commissioners Quello and Barrett concurring in part and dissenting in part and issuing separate statements at a later date.

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I. INTRODUCTION

1. With this Report and Order, we adopt new rules and policies for the Direct Broadcast Satellite ("DBS") service that are designed to better reflect the realities of the service as it has evolved to date than do the existing "interim" rules and policies that were formulated in a different regulatory environment and without the benefit of experience with actual operation of a DBS licensee.

2. We initiated this proceeding on October 30, 1995, when we issued a Notice of Proposed Rulemaking ("NPRM") to revise the rules and policies for the DBS service.[1] Our action was precipitated by our recent decision to cancel the DBS construction permit of Advanced Communications Corporation ("ACC") for failure to meet its obligation to proceed with due diligence toward construction and operation of its DBS system.[2] We tentatively concluded that the method we had previously stated would be used to reassign recovered DBS resources no longer serves the public interest, and accordingly proposed to use competitive bidding when the Commission has received mutually exclusive applications for reassignment of such DBS resources. Specifically, we proposed to auction two large blocks of channels that are currently available at two orbital locations.

3. In addition, the NPRM proposed new service rules that would: (1) impose performance criteria intended to ensure that DBS resources are utilized in a timely manner; (2) guard against potential anticompetitive conduct by DBS providers; and (3) ensure timely

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[1] See Revision of Rules and Policies for the Direct Broadcast Satellite Service, *Notice of Proposed Rulemaking*, FCC 95-443, IB Docket No. 95-168, PP Docket No. 93-253 (released Oct. 30, 1995).

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

DBS service to Alaska and Hawaii. We also requested comment on our existing policy governing the extent to which DBS resources may be put to alternative uses.

4. In response to the NPRM, the Commission received 27 initial comments and 24 reply comments from entities representing many sectors of the communications industry.[3] Many of our proposed service rules enjoyed broadbased support. Others, especially those relating to competition issues, elicited spirited debate. For example, the comments indicate the large division between the views of existing DBS permittees and those seeking to enter the service, as well as between those who own other multichannel video programming distributors ("MVPDs"), such as cable operators, and those who do not.

5. In light of the comments submitted in this proceeding, we have decided to adopt a number of the rules we proposed. After considering the range of suggestions for rules to protect competition, however, we have decided to adopt a single one-time rule specifically designed to promote and protect competition: no person with an attributable interest in channels at a full-CONUS location shall acquire an attributable interest in the channels currently available at the 110° orbital location without divesting its existing interest in full-CONUS channels at another location within twelve months of such acquisition. Under this rule, a person currently holding an attributable interest in channels at one of the three orbital locations capable of full-CONUS service would be allowed to bid for the channels currently available at 110°, but if successful would have to divest its current full-CONUS channels within one year. This rule is intended to ensure that, for the time being, each full-CONUS orbital location will have an operator that is independent of and competitive with the other full-CONUS operators. Since this rule expires upon completion of the auction process, the Commission will be free to reevaluate this "one location" approach in the course of considering future transactions in the DBS service that are subject to our approval.

6. We have also concluded that the public interest is no longer served by the *pro rata* methodology established in Continental for reassigning reclaimed DBS channels. Although a number of current permittees object to this change in policy as unjustified, unfair, and even unconstitutional, we believe that the public interest would be served by adopting rules that will result in efficient and expedited DBS service from the channels currently available.

7. We have concluded that the Commission has the authority to award DBS construction permits by means of competitive bidding, and that the use of competitive bidding to assign DBS spectrum will promote the rapid deployment of DBS service and the efficient use of DBS spectrum more effectively than any other assignment method. We have decided to award construction permits for the channels available at 110° and 148° by means of a sequential multiple round electronic auction, and we adopt rules to implement this auction. At the same time, we recognize that other auction designs could be suitable for DBS under

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[3] Appendix A contains a list of those parties who submitted comments and reply comments in this proceeding. The commenters will be referred to herein by the abbreviations noted in that appendix.

certain circumstances in the future, and we therefore also adopt rules to provide for these auction designs.

II. ADOPTION OF NEW SERVICE AND ONE-TIME AUCTION RULES

A. Performance Objectives

8. The NPRM tentatively concluded that combining existing due diligence requirements with additional milestones for construction and operation of DBS systems by new permittees will prevent unnecessary delays in the commencement of service. Accordingly, the NPRM proposed rules to add two additional performance criteria for those receiving DBS construction permits after the effective date of the proposed rule: (1) completion of construction of the first satellite in a DBS system within four years of authorization; and (2) launch and operation of all satellites in a DBS system within six years of authorization.[4]

9. The comments reveal a great deal of support for tightened performance objectives to ensure the timely development of the DBS service. A number of commenters support the rule as proposed,[5] while Primestar and Tempo advocate stronger rules that would apply to existing permittees as well as new entrants in light of the slow pace of construction in the service to date. DBSC opposes as unfair the imposition of additional requirements upon existing permittees.[6] Primestar also proposes to shorten the contracting period from one year to six months, require the first satellite to be built within three and a half years rather than four years, and require all satellites to be in operation in five rather than six years from authorization.[7] Tempo supports the four-year first satellite construction period, but encourages a stronger mechanism for enforcement than has been implemented to date.[8]

10. We will adopt the performance objectives as proposed in the NPRM. We believe that these new objectives, combined with existing due diligence requirements,[9] will ensure consistent and purposeful progress toward construction and operation of DBS systems by those receiving permits after the effective date of this rule. These performance requirements will apply to any person who acquires a permit through the competitive bidding

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[4] See NPRM at ¶¶ 25-27.

[5] See, e.g., BellSouth Comments at 2-3; DIRECTV Comments at 23; GE Americom Comments at 20; MCI Comments at 7.

[6] DBSC Comments at 15.

[7] See Primestar Comments at 12-13.

[8] See Tempo Comments at 11.

[9] See 47 C.F.R. § 100.19.

process, and thus further the congressional goals of preventing warehousing of spectrum and encouraging investment in and rapid deployment of new services.[10] We decline to apply the rule to existing permittees, however. Of the eight current DBS permittees, two (DIRECTV and USSB) have already built and launched satellites, and three more (Tempo, EchoStar, and Directsat) have nearly completed construction of at least one satellite. Two others (Continental and DBSC) were recently granted permit extensions based on their demonstrated commitment to and capability of providing DBS service in an expedited manner.[11] The remaining permittee (Dominion) was determined to have met the first prong of our due diligence requirements and granted orbital/channel assignments only four months ago.[12] Under these circumstances, we believe it would be inappropriate to apply the new rules to existing permittees.

11. In addition, we decline to accelerate the milestones as proposed by Tempo. Of the five new permittees that entered the DBS service as a result of our Continental proceeding, only one -- EchoStar -- submitted its contractual due diligence showing within six months, although Tempo Satellite submitted its showing in just over six months.[13] Although their order in the assignment queue was to be determined by the speed of their due diligence filings, the other three permittees took up to the full year allowed in the regulations to make their submissions. New entrants, having paid for their channels at auction, would have a demonstrable incentive to accelerate their progress toward operation in order to recoup their investment as quickly as possible. We do not, however, find it necessary to allow them less time to contract for satellite construction than has been required by prior permittees. Since the contracting period remains one year, and even Tempo does not dispute the three year interval between contracting and completion of the first satellite, we also will not shorten the construction periods. We will, however, monitor semi-annual reports more closely in the future to identify any permittee that appears to be falling behind schedule so that we can address the situation in a timely manner.

10/ See 47 U.S.C. § 309(j)(4)(B).

11/ Permit extensions granted to two permittees who only recently received their channel assignments have been tied to compliance with their respective construction contracts, both of which provide for operational systems within four years. See Continental Satellite Corp., DA 95-2347 (Int'l Bureau, released Nov. 21, 1995); Direct Broadcasting Satellite Corp., DA 95-2439 (Int'l Bureau, released Dec. 8, 1995).

12/ See Dominion Video Satellite, Inc., DA 95-1734 (Int'l Bureau, released Aug. 7, 1995).

13/ See Continental Satellite Corp., 4 FCC Rcd 6292 (1989), partial recon. denied, 5 FCC Rcd 7421 (1990). The Continental order was released on August 15, 1989. EchoStar filed its due diligence showing on February 8, 1990; Tempo Satellite on February 22, 1990; Directsat on March 21, 1990; DBSC on April 3, 1990; and Continental on August 14, 1990.

B. Use of DBS Capacity

12. As explained in the NPRM,[14] the channels and orbital locations allocated to the United States under the ITU Radio Regulations, Appendices 30 and 30A, are designated for use in the Broadcast Satellite Service ("BSS"). This service is defined as a "radiocommunication service in which signals transmitted or retransmitted by space stations are intended for direct reception by the general public."[15] This is also the definition of DBS service adopted in the Commission's Rules.[16] Thus, the terms "DBS service" and "BSS service" are interchangeable. Under the Region 2 BSS Plan, resources allocated for DBS service "may also be used for transmission in the fixed-satellite service" so long as certain interference parameters are met, but those resources must be used "principally" for BSS service.[17]

13. The NPRM requested comment on the Commission's existing policy for non-conforming uses of DBS resources. That policy requires each DBS licensee to begin DBS operations before the end of its first five-year license term, but allows otherwise unrestricted use of the spectrum during that term. After expiration of the first term, a DBS operator may continue to provide non-DBS service only on those transponders on which it also provides DBS service, and only up to half of the use of each transponder each day.[18]

14. The commenters generally favored making the restrictions on use of DBS resources a function of capacity instead of time.[19] DIRECTV argues that the capacity-based approach will enable licensees to better tailor new program offerings to public demand, while MCI, DOJ, and USSB see the proposal as promoting efficiency as well as technological advancement and thus optimizing use of satellite capacity. Hawaii believes that the greater flexibility would encourage development of western DBS orbital locations, speeding service to areas currently unserved or underserved.

15. Only Primestar, Tempo, and GE Americom oppose reformulating the rule in terms of capacity, arguing that additional flexibility in use of DBS spectrum would undermine

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14/ See NPRM at ¶ 28.

15/ ITU Radio Reg. 37, Chapter 1. For purposes of this definition, "direct reception" encompasses both individual reception and community reception. Id.

16/ See 47 C.F.R. § 100.3.

17/ ITU Radio Reg. 846, Article 8.

18/ See NPRM at ¶¶ 29-30 (discussing United States Satellite Broadcasting Co., 1 FCC Rcd 977 (1986) and Potential Uses of DBS, 6 FCC Rcd 2581 (1991)).

19/ See DBSC Comments at 15; DIRECTV Comments at 24; Hawaii Comments at 5-6; MCI Comments at 7-8; NRTC Comments at 10; DOJ Comments at 19; USSB Comments at 2.

the Commission's commitment to DBS service and in effect work a reallocation of DBS spectrum to other services.[20] We believe that this opposition is based on a misapprehension of the effect that reformulating the rule would have. Whether stated in temporal or capacity terms, our restrictions ensure that DBS channels will be used principally for DBS service. The capacity-based restrictions maintain all other parameters of the current temporally-based restrictions, and thus do not decrease the amount of DBS service that licensees must provide in absolute terms. Rather, capacity-based restrictions allow licensees more flexibility in how they will configure their satellites as a matter of technical efficiency in complying with the limitations we have imposed.

16. We expect that DBS service will be the most economically efficient and profitable use of DBS resources, and we retain our commitment to promoting this service as an important competitor in the MVPD market. Moreover, as the Commission stated when it first adopted its use restrictions, DBS use will be encouraged by the fact that only those individual channels providing DBS service for a substantial portion of the day will be entitled to protection from interference, and then only during the time of DBS operation.[21] We do not see any reason to phrase our policies in terms that are more restrictive than necessary to achieve their ends.

17. Accordingly, we will restate our policy restricting the use of DBS resources as a function of capacity rather than time. Since we have decided to lengthen the term of a non-broadcast DBS license from five years to ten years,[22] we will require that each licensee initiate DBS service within five years of licensure, rather than within the term of its first license. Thus, the new policy will be that a DBS licensee must begin DBS operations within five years of receipt of its license, but may otherwise make unrestricted use of the spectrum during that time. After that five year period, such a licensee may continue to provide non-DBS service so long as at least half of its total capacity at a given orbital location is used for DBS service.

18. We will not, however, implement MCI's suggestion that this capacity restriction be assessed over a thirty-day period. We believe that DBS service should be an important part of a licensee's operations each and every day, and that such a manner of operation carries out the spirit of the international allocation of these resources to the United States for DBS use. As required under our prior policy, DBS operators must notify the Commission of the initiation of a non-DBS service and describe the service offering.[23] We also will retain the requirement that a DBS operator which provides non-DBS service demonstrate to the

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[20] See GE Americom Comments at 20-21; Primestar Comments at 15-17; Tempo Comments at 32-33.

[21] USSB, 1 FCC Rcd at 979

[22] See ¶ 130, *infra*.

[23] USSB, 1 FCC Rcd at 979

Commission the substantiality of its DBS service -- in terms of hours and specific times devoted to DBS service -- in order to receive protection for its DBS transmissions.[24]

19. The NPRM also referred to the possibility that, as a result of a separate proceeding, operators using DBS channels and orbital locations may be permitted to provide both domestic and international service. In light of that possibility, and the discussion of the permissible non-standard uses of DBS channels, the NPRM requested comment on whether the U.S. has the authority to auction permits which may include the provision of international service.[25]

20. While commenters generally support the provision of international DBS service by United States licensees,[26] some commenters caution against deciding this issue in this proceeding. Others suggest that allowing international service would make conducting an auction unwise.[27] We will not resolve the international service issue in this proceeding. It is more properly addressed in the ongoing proceeding reviewing the regulatory distinction we now draw between domestic and international satellite service generally.[28] Because this issue may be resolved before the auction, however, we must address the relationship between auctions and international service.

21. We do not agree that allowing DBS operators the option of providing international service would make auctions unwarranted or unwise. Our DBS permits and licenses authorize the use of orbital locations and frequencies specifically assigned to the United States. There is no reason why these limited orbital and spectrum resources cannot be auctioned for the benefit of the United States. Moreover, even if we decide to permit international service, our DBS licenses will constitute final authorization for domestic service only. Those who wish to provide international service will still need to request that we notify the ITU, coordinate with any affected foreign administrations, and comply with any other United States treaty requirements.[29]

24/ Id. at 980 n.10.

25/ See NPRM at ¶ 32.

26/ See, e.g., Hawaii Comments at 5; Primestar Comments at 10; Tempo Comments at 28.

27/ See, e.g., DIRECTV Comments at 22; GE Americom Comments at 19-20; Lockheed Martin Comments at 9; MCI Comments at 6; and PanAmSat Comments at 4.

28/ See NPRM at ¶ 24 (discussing Transborder/Separate Systems proceeding).

29/ With respect to DIRECTV's request for clarification as to whether consent of the receiving country is required prior to beginning international DBS transmissions, the impact of any United States treaty requirements or a foreign country's requirements on the provision of international DBS service will be addressed in the context of the Transborder/Separate Systems proceeding.

22. In addition, we again remind potential DBS permittees of the other use restrictions that apply to the DBS service. For example, Section 25 of the 1992 Cable Act mandates that the Commission adopt rules imposing public interest requirements upon each "provider of DBS service" including, at a minimum, the political programming requirements set forth in Section 312(a)(7) and 315 of the Communications Act.[30] In addition, Section 25 also directs the Commission to require each DBS operator providing video programming to reserve four to seven percent of its total channel capacity exclusively for noncommercial, educational, or informational programming and make it available to national educational programming suppliers upon reasonable prices, terms, and conditions as determined by the Commission.[31] Pursuant to the requirements of Section 25, the Commission has commenced a rulemaking proceeding "to impose, on providers of direct broadcast satellite service, public interest and other requirements for providing video programming."[32] After that rulemaking was initiated, a United States District Court struck down the noncommercial carriage obligations of Section 25, but the decision has been stayed pending appeal.[33] The rulemaking proceeding to implement Section 25 also remains pending. All DBS licensees will be required to comply with these statutory provisions, and the rules implementing them, if the statute is ultimately upheld on appeal and following adoption of final rules.

C. Rules and Policies Designed to Promote Competition

23. As we stated in the NPRM, we have consistently sought to promote effective competition to the services provided by cable systems, and we have encouraged the development of the DBS spectrum in precisely that context.[34] In addition, in order to satisfy our obligations under Title III of the Communications Act, we "seriously consider[] the antitrust consequences of a proposal and weigh[] those consequences with other public

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30/ Section 312(a)(7) requires broadcast stations to afford reasonable access for federal candidates to their facilities, or to permit federal candidates to purchase "reasonable amounts of time." See 47 U.S.C. § 312(a)(7). Section 315(a) provides that, if a broadcast licensee permits any legally qualified candidate to use its station, the licensee must afford equal opportunities to all other such candidates in the use of the station. Id. at § 315(a).

31/ 47 U.S.C. § 335(b).

32/ Id. at § 335(a); see also Direct Broadcast Satellite Public Service Obligations, 8 FCC Rcd 1589 (1993).

33/ See 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.).

34/ NPRM at ¶ 36. See also Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992, 9 FCC Rcd 7442, 7466 (1994) ("1994 Competition Report"); Tempo Satellite, Inc., 7 FCC Rcd 2728, 2730 (1992)("Tempo II") ("We have long anticipated that the DBS service, along with other multichannel video technologies, will provide an effective, competitive alternative to cable television").

interest factors."[35] As the United States Supreme Court has long recognized, "[t]here can be no doubt that competition is a relevant factor in weighing the public interest."[36]

24. The NPRM proposed certain rules intended to prevent strategic use of DBS resources for anticompetitive purposes, and also requested comment on whether additional steps were necessary to achieve the desired goal of fostering competition in markets for the delivery of video programming. Two of the rules proposed were structural in that they placed limits on the number of full-CONUS DBS channels a single entity could use, while the other proposed rules were aimed at preventing specific types of potentially anticompetitive conduct. The NPRM also requested comments upon the sufficiency of existing rules to deal with competition-related issues.

25. As discussed more fully below, a number of commenters assert in response to these proposals and inquiries that the current record does not support the adoption of additional pro-competitive rules.[37] In support of that position, several parties have cited to Cincinnati Bell Telephone Co. v. FCC,[38] a recent decision in which the United States Court of Appeals for the Sixth Circuit remanded to the Commission for further consideration an attribution standard applicable to cellular/PCS cross ownership and the eligibility of cellular licensees to hold PCS licenses in their service areas. The court based its remand of the cellular attribution standard on its conclusion that, in adopting the rule, the Commission had failed to support its predictive judgment as to the rule's necessity with sufficient statistical data or an economic theory, and had failed to explain why it had declined to adopt less restrictive measures to achieve the same ends.[39] Based upon this decision, these commenters argue that the lack of any demonstrated anticompetitive behavior of the type identified by the Commission in the NPRM precludes the promulgation of rules to address competitive concerns.[40]

26. We believe these commenters have overread the significance of Cincinnati Bell, particularly as it would apply in the context of this rulemaking proceeding. As explained by DOJ, any rule designed to curtail future industry concentration must be based in part upon a

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35. FCC v. RCA Communications, Inc., 346 U.S. 86, 88 (1953).

36. Id. at 94. See also United States v. FCC, 652 F.2d 72, 81-82 (D.C. Cir. 1980) (competitive considerations are an important element of the "public interest" standard which governs federal agency decisions).

37. See, e.g., Primestar Comments at 8-8, 17-20; Tempo Comments at 2-3.

38. Docket Nos. 94-3701/4113 95-3023/3238/3315 (slip op., 6th Cir., decided Nov. 9, 1995).

39. Cincinnati Bell, slip op. at 11-13.

40. See, e.g., Continental Cablevision Comments at 10-14; Primestar Comments at 25-30; Tempo Comments at 22-23; Time Warner Comments at 15-16; Primestar Reply at 4.

prediction as to what would occur in the absence of the rule.[41] Where factual determinations underlying a rule are "primarily of a judgmental or predictive nature," the Supreme Court recognizes that "complete factual support in the record for the Commission's judgment or prediction is not possible or required; a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency."[42] The Court has specifically reiterated that predictions as to the probable conduct of licensees and the functioning of the market are within the institutional competence of the Commission.[43]

27. As the evidence discussed extensively below demonstrates, there is more than ample evidence of concentration in markets for the delivery of video programming, which could give rise to competitive concerns under a variety of recognized economic theories. To use DOJ's characterization, these markets are, at present, essentially a series of local monopolies controlled by cable television systems.[44] Congress acted on similar concerns when it adopted program access and carriage laws to protect potential competitors to incumbent cable operators from obstacles that interfered with competitors' access to programming needed to provide viable and competitive multichannel alternatives to the public.[45] In fact, in 1992, Congress considered a cable/DBS cross ownership ban, but did not adopt one based upon "the fact that there [were] no DBS systems operating in the United States at [that] time," and further expressed the expectation that the Commission would "exercise its existing authority to adopt such limitations should it be determined that such limitations would serve the public interest."[46] Moreover, DOJ and forty state attorneys general were sufficiently concerned about anticompetitive actions by Primestar and its cable partners that they brought civil antitrust complaints, which resulted in two consent decrees that constrain the conduct of the country's largest cable operators and Primestar itself.[47] Although we have granted a single DBS permit for eleven full-CONUS channels to a wholly-owned subsidiary of Tele-Communications, Inc. ("TCI"), the nation's largest cable system operator, we did so recognizing "that legitimate competitive concerns do exist regarding the

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41/ See DOJ Reply at 2.

42/ FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 813-14 (1978).

43/ FCC v. WNCN Listeners Guild, 450 U.S. 582, 594-95 (1981).

44/ See DOJ Comments at 2; EchoStar Reply at 23-24; see also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Second Annual Report*, FCC 95-491 (adopted Dec. 7, 1995)("1995 Competition Report") at ¶¶ 5, 9.

45/ See 1992 Cable Act § 2(a)(5), P.L. 102-385, § 2(a)(5), 106 Stat. 1460 (Oct. 2, 1992); 138 Cong. Rec. H6540 (daily ed. July 23, 1992)(statement of Rep. Eckart in support of the Tauzin amendment).

46/ See H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 82 (1992); EchoStar Reply at 13-14.

47/ See United States v. Primestar Partners, L.P., 1994-1 Trade Cas. (CCH) ¶ 70,562 (S.D.N.Y. 1994); New York *ex rel.* Abrams v. Primestar Partners, L.P., 1993-2 Trade Cas. (CCH) ¶ 74,403 (S.D.N.Y. 1993).

relationship between TEMPO's proposed DBS service and TCI's cable service," and only after imposing conditions we deemed necessary to ensure that competition to cable "is fostered, not hindered."[48]

28. As discussed more fully below, there are three orbital locations that we believe to be capable of full-CONUS service -- 101°, 110°, and 119°. We believe that the auction rule we implement today is necessary given the scarcity of full-CONUS DBS spectrum and the impact that concentration of this spectrum might have on the overall MVPD market. Under this one-time auction rule, a party currently holding an attributable interest in full-CONUS channels at one location may bid at auction for channels currently available at the 110° location, but if successful must divest its existing full-CONUS channels at any other location within twelve months

29. Like Congress, we believe that competition should be favored over regulation wherever possible.[49] The DBS service is in its early stages, and the ultimate structure of the industry is presently far from clear. However, we believe that reducing concentration of full-CONUS DBS resources will promote rivalry among all MVPDs in a way that would benefit consumer welfare. This one-time auction rule will essentially ensure that each of the three full-CONUS DBS orbital locations will initially be controlled by entities that do not share interests with DBS operators at the other two orbital locations. We believe that this will permit the development of fully competitive DBS services. Increased competition among DBS systems is likely to improve market performance for the nearly four million television households in the United States that are unable to receive cable services. In addition, competition involving several full-CONUS DBS operators should also constrain a cable-affiliated DBS operator from positioning its services in a manner that avoids competition with cable systems. Moreover, in our view, under the current record, the competition among MVPDs resulting from the presence of an additional full-CONUS DBS system will serve the public interest. This is a reasonable response to current market conditions, but does not dictate a particular vision of DBS industry structure beyond the near term.

30. We acknowledge, however, that many of the comments we address below raise substantial competitive issues, which we have seriously considered. At this time, balancing the competitive concerns against other public interest concerns -- such as expedition of service and allowing the market to maximize efficient use of public resources -- we believe that the single, temporary structural rule discussed above should be adequate. In addition, we believe that this rule will address most of the concerns that were raised in the NPRM and in the comments that have been filed in this proceeding.

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[48] Tempo II, 7 FCC Rcd at 2730, 2731.

[49] See, e.g., 47 U.S.C. § 543(a)(2)(if the Commission finds that a cable system is subject to effective competition, the rates for that system are not subject to regulation).

31. In sum, given current market conditions, it would not serve the public interest to allow an entity to acquire an interest in the full-CONUS 28 channels being auctioned and to continue to hold an interest in channels at another full-CONUS orbital location. On the other hand, we do not believe that the public interest would be furthered by freezing this industry structure through a rule permanently precluding future channel combinations at multiple full-CONUS locations. Thus, the rule we adopt leaves us free to evaluate future transactions on a case-by-case basis under our Title III authority.[50] In addition, we continue to have rulemaking authority to remedy anticompetitive conduct and we will consider additional rules if experience indicates that they are required.

1. The State of Competition Among MVPDs and the Role of DBS Rivalry

32. *Comments.* Many commenters express concerns about concentration in markets for the delivery of video programming. DOJ argues that in a concentrated market, firms have an incentive to engage in a joint profit maximization strategy that may lead to higher profits but may harm consumer welfare.[51] DIRECTV and others contend that the these markets are concentrated, that cable operators have market power, and that the Commission should, therefore, limit the ability of large cable operators to acquire scarce DBS resources.[52]

33. On the other hand, several commenters claim that the markets for the delivery of video programming are currently competitive.[53] In particular, Continental Cablevision argues that there are 5.8 million non-cable MVPD subscribers, and that this figure is projected to expand 300 percent within five years.[54] Continental and others also claim that entry from other distribution media, and in particular telephone company entry, into video markets is on the horizon and promises to provide significant competition to cable systems.[55] Continental, Primestar, Tempo, and Time Warner also argue that providers of or applicants for medium-powered or FSS services should be considered potential competitors in the market.[56]

50/ See 47 U.S.C. § 310(d).

51/ DOJ Comments at 5-6.

52/ DIRECTV Comments at 9 14; NYNEX Comments at 2-3; *see also* Hausman Statement at ¶¶ 6, 13-16 (attached to DIRECTV Comments).

53/ See, e.g., NCTA Comments at 5; Time Warner Comments at 7-9.

54/ Continental Cablevision Comments at 14.

55/ Id. at 14-16; NCTA Comments at 8; Time Warner Comments at 6-9.

56/ Continental Cablevision Comments at 10-12; Time Warner Comments at 4-6; Primestar Reply at 7; Tempo Reply at 7-8.

34. Based on their perception of competitive markets, several parties contend that any regulation of competition in the DBS service is inappropriate. Primestar and others state that such competition obviates the need for any restriction in the use of full-CONUS channels, and argues that the Commission recently came to the same conclusion in authorizing the merger of EchoStar and Directsat.[57] GE Americom argues that there is no support in the record for the proposed limitations on DBS spectrum aggregation, that DBS subscribership is growing, and that existing federal and state antitrust laws and the 1992 Cable Act provide sufficient protection for competition.[58] As additional evidence that markets for the delivery of video programming are competitive and need no further regulation, Time Warner cites the Commission's recent decision to solicit comments regarding whether the deployment of a video dial tone ("VDT") system in Dover Township, Delaware was sufficient competition to justify removal of pricing restrictions on cable operators.[59]

35. Several commenters make a number of arguments based upon product differentiation between DBS and cable services. Dr. Hausman argues that DIRECTV will not engage in coordinated interaction with cable systems even if it were to expand its service to two full-CONUS orbital locations because, "[a]s a matter of economics, coordinated interaction is extremely unlikely in differentiated product markets."[60] Continental argues that market forces are driving competitors to price differentiated products in combined packages, and that the Commission should reject the desire to "compartmentalize and homogenize video services."[61] Time Warner makes a similar argument, writing that "homogenization of the MVPD product will only detract from the programming options which DBS operators and other MVPDs would offer to the competitive mix."[62] Indeed, Time Warner attributes the success of DIRECTV and USSB in part to their ability to offer unique programming such as out-of-market sports, and encourages the Commission to leave MVPDs free to differentiate based on quality, type, and mix of services.[63] Several parties point out that the Commission,

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57/ See Primestar Comments at 23 (citing Directsat Corp., 10 FCC Rcd 88, 89 (1995)); Tempo Reply at 1; Time Warner Reply at 1-2.

58/ GE Americom Comments at 5-7.

59/ Dover Waiver Order, FCC 95-455 (Nov. 6, 1995); Time Warner Comments at 6-9.

60/ Hausman Statement at ¶ 21 (attached to DIRECTV Comments).

61/ Continental Cablevision Comments at 19-20.

62/ Time Warner Comments at 15-17.

63/ Id. at 15-17.

in approving USSB's use of exclusive DBS distribution contracts, approved of product differentiation as an appropriate competitive strategy in DBS services.[64]

36. *Market Structure*. The comments reflect general agreement with our conclusion that the market for the delivery of video programming -- the market in which MVPDs compete -- is the relevant product market.[65] Similarly, the commenters appear to agree that the effects of competition among MVPDs are felt most strongly at the local level -- in local markets for the delivery of video programming.[66] Accordingly, we have conducted our analysis based on these conclusions and will proceed without further discussion of these definitional issues.

37. We have recently found that local markets for providing multichannel video programming remain highly concentrated and that cable systems remain the primary providers of video programming.[67] Despite the growth in subscribership to DBS and Multichannel Multipoint Distribution Service ("MMDS") in the last year, the combined national market share of non-cable MVPDs at the end of September 1995 was less than nine percent.[68] In addition, the average household in the United States today can only choose from among at most a few MVPDs -- a cable system, DIRECTV/USSB, Primestar, and perhaps an MMDS system.[69] We also note that home satellite dish ("HSD") users have been able to receive multiple channels of video programming for a number of years and yet this option for consumers does not appear to have constrained cable systems' exercise of market power.[70]

64/ Implementation of Sections 12 & 19 of the 1992 Cable Act, 10 FCC Rcd 3105, 3121-22 (1994). Primestar Comments at 30-31 (exclusivity agreements are "universally recognized method of differentiating among competitors" and exclusivity may expand consumer choice, result in more efficient use of spectrum, create demand for programming and lead to development of more programming); NCTA Comments at 11-12

65/ See, e.g., DIRECTV Comments at 7; DOJ Comments at 1-3; NCTA Comments at 8; Primestar Comments at 18 n.41; MCI Reply at 11.

66/ See, e.g., DOJ Comments at 2; EchoStar/Directsat Reply at 17.

67/ 1995 Competition Report at ¶¶ 5, 194.

68/ 1995 Competition Report at ¶¶ 5, 194, App. G, Tbl. 1.

69/ Id. at ¶¶ 132-33 and App. G, Tbl 1. Television households in MDUs would appear to have generally even fewer choices, with many of them being served by only a SMATV or cable system.

70/ Id. at ¶¶ 65-67. C-band service to HSD users does not appear to be an alternative to cable for most subscribers, given the size of the receiving dish required. Id. at ¶ 66.

38. Significant barriers delaying entry of new competitors in markets for the delivery of video programming remain.[71] With respect to DBS services, the availability of spectrum is currently greatly limited. As discussed in the NPRM, under the ITU's BSS Plan, the United States has been allocated thirty-two channels at each of eight orbital locations in Region 2 (encompassing North and South America) from which to provide domestic DBS service.[72] Orbital locations not allocated to the United States are not currently available to provide service to subscribers in the United States.[73] Although we agree with Tempo that our analysis of market participation should be forward looking,[74] we decline to make public interest determinations based upon speculation that the international plan may be modified to make additional locations available.

39. *The Nature of DBS Service and Current DBS Providers.* The most important limiting factors for a DBS service provider are its orbital location (literally, the longitude in which its satellites might be positioned), the bandwidth of spectrum it may utilize from that orbital location, and compression technology (the amount of digital information that may be carried through that bandwidth). Based on technology available today and the economics associated with the operation of a DBS system that appear to prevail in the industry at this time, we conclude that there are only three orbital locations -- 101°, 110°, and 119° -- from which it is feasible for a DBS operator to offer full-CONUS service. We tentatively concluded in the NPRM that full-CONUS service could also be provided from the 61.5° orbital location. Almost all of the commenters that addressed the issue, however, disagreed with that tentative conclusion.[75] Based on those comments and our reexamination of the facts, we conclude that the 61.5° orbital location should not be deemed to be capable of supporting full-CONUS service at this time. An operator serving customers in the western United States from 61.5° would face interference from tall objects that an operator from the other three locations would not face due to their better look angles. Even if much of this interference could be overcome by the use of larger receiving dishes, an operator at 61.5° would be at a qualitative disadvantage in attracting customers who could receive service from an operator at one of the three full-CONUS locations without compromising on the quality of reception or the unobtrusiveness of the satellite dish.

71/ Id. at ¶¶ 57, 205-14.

72/ See NPRM at ¶ 18. The BSS Plan also allocates frequencies for transmitting radio signals from a DBS operator's ground facilities to a DBS satellite ("uplink") and from the DBS satellite to the United States, Puerto Rico and the Virgin Islands ("downlink"). A DBS license includes authority to transmit pursuant to these allocations in accordance with the BSS Plan.

73/ The Commission is currently considering issues raised by applying for additional orbital locations and permitting foreign-licensed DBS operators to provide service to subscribers in the United States. NPRM at ¶ 24.

74/ See Tempo Reply at 8-9.

75/ See ¶ 78, *infra*.

40. Several firms currently hold permits or licenses for full-CONUS radio frequency (RF) channels. DIRECTV and USSB provide service that together uses all 32 channels at the 101° orbital location. DIRECTV had approximately 600,000 subscribers by June 1995,[76] and projects that it will have 1.5 million subscribing households by the end of 1995, and 10 million by the end of 2000.[77] USSB supplies services to subscribers using the same 18-inch dishes that are used to receive DIRECTV's services. Because these two services offer mutually exclusive programming, a customer must subscribe to both services in order to receive a full package similar to that offered by cable systems. As a result, nearly all subscribers to one service also subscribe to the other,[78] and they can be viewed as offering complementary as opposed to competitive services.

41. EchoStar and its affiliate, Directsat, plan to offer approximately 126 channels of programming using 21 channels at the 119° orbital location over the next year. EchoStar's first satellite is scheduled to be launched by the end of 1995.[79] Tempo holds a permit for the other 11 channels at the 119° orbital location. This Report and Order implements a plan to auction 28 channels at the 110° location. Directsat has been assigned one channel at 110° and USSB holds the other three channels at this location.

42. Although not currently using BSS frequencies, Primestar, a joint venture of six of the largest cable system operators and GE Americom,[80] currently provides DBS-like video programming using frequencies in the Fixed Satellite Service ("FSS").[81] Primestar's programming is similar to the programming of DIRECTV and USSB, but subscribers must use receiving dishes that are more than twice as large as the DIRECTV/USSB dishes. Moreover, Primestar has less than one-half the channel capacity of DIRECTV and USSB combined. Primestar reports that it has over 800,000 subscribers.[82] It has argued, however, that it needs to migrate to the high-powered DBS spectrum in order to remain competitive,

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76/ DIRECTV Comments at 5

77/ 1995 Competition Report at ¶ 51.

78/ Id.

79/ Id. at ¶ 52.

80/ The cable companies are Comcast, Continental Cablevision, Cox Communications, TCI, Newhouse Broadcasting and Time Warner. E.g., Primestar Comments at 18 n.40. Newhouse and Time Warner have entered into a joint venture whereby Time Warner has a controlling interest and operational control over the cable systems in which Newhouse has an ownership interest. 1994 Competition Report, 9 FCC Rcd at 7587.

81/ 1995 Competition Report at ¶ 51.

82/ Primestar Reply at 8.

and it projects that its subscribership will grow to 3-4 million by the year 2000 if it can migrate to high-power DBS channels.[83]

43. AlphaStar, a Canadian firm, is reportedly scheduled to offer service to the continental United States with approximately 90 channels of digital video programming services.[84] AlphaStar reportedly has leased fourteen transponders on an AT&T Telstar Ku-band satellite that was launched in the fall of 1995, and to begin offering service to subscribers in early 1996.[85] The company currently owns an uplinking facility in Canada. The new service would apparently transmit programming over FSS frequencies to subscribers who purchase or lease AlphaStar's twenty-four inch dishes.[86] AlphaStar thus will be using dishes that are larger than the eighteen inch dishes used by DIRECTV/USSB subscribers. On the whole, it appears that AlphaStar's services will share many characteristics with the services currently offered by Primestar. We note that Primestar has stated that it needs to migrate to high-power DBS channels to remain competitive. Thus, the likely competitive impact of AlphaStar's entry into markets in the United States is unclear.

44. The recent growth of DIRECTV/USSB and Primestar has demonstrated the viability of DBS or DBS-like technology to distribute strongly competitive video programming services. If there is one thing commenters agree upon in this docket, it is that DBS systems have at least the potential to be formidable competitor in markets for the delivery of video programming.[87] As DOJ points out, the potential of DBS as a "tool for competition in the MVPD market is critically important" -- yet, the number of DBS firms is necessarily limited by the number of full-CONUS orbital locations.[88] As a result, we believe that we have the obligation to prevent the undue accumulation of full-CONUS DBS spectrum by any one firm and to encourage additional DBS entry by other firms as long as markets for the delivery of video programming remain highly concentrated. In the short term, we believe that entry by additional full-CONUS DBS providers would bring more vigorous competition among MVPDs generally, and in particular, among DBS and cable providers. Such increased competition is clearly in the public interest.

83/ Primestar Comments at 4.

84/ Satellite and International, Comm. Daily, Aug. 22, 1995, at 8; Direct-to-Home: Industry at a Glance, SkyTRENDS, Sept. 1995, at 9.

85/ AlphaStar Digital Television, AlphaStar Moving Closer to Service Commencement with On-Time Activation of AT&T's 402R Satellite, Canada NewsWire, Nov. 28, 1995.

86/ Id.

87/ See, e.g., DIRECTV Comments at 6-7; DOJ Comments at 3; USSB Comments at 1; MCI Comments at 10; Viacom Comments at 3, Primestar Comments at 21-22; Owen Nov. 22, 1994 Declaration at ¶ 11 (attached to Tempo Comments); NCTA Comments at 7-8.

88/ DOJ Comments at 4; see also MCI Comments at 12-13.

45. *The Nature of Competition Among MVPDs and The Role of Rivalry Among DBS Providers.* While the Commission continues to believe that the multichannel video programming distribution market is the relevant market in which the various services compete, we recognize that MVPDs use different distribution technologies that can each be described by a unique set of attributes, which can be similar to or significantly different from the attributes of a typical cable system. For example, products within this market can differ from each other in terms of the number of channels, quality of reception, and types of programming offered. Demand for the services of different MVPDs is a function of consumer preferences for the different attributes of each distribution system.[89]

46. All other things being equal, firms that offer services with dissimilar attributes are likely to attempt to position their services in a manner that will minimize competition between their services and those offered by rivals. Such a product differentiation strategy is naturally substantially more difficult to accomplish in less concentrated markets because there are more firms. Markets for the delivery of video programming, however, are highly concentrated and, to a certain extent, MVPDs can choose the attributes of the services they offer, which may allow them to decrease the amount of price competition in the industry.[90] This is especially true to the extent that the firms can commit to their choice of attributes, since this credibly signals their willingness to pursue this strategy.[91] For example, one MVPD may decide to specialize in the offering of sports programming. Such a strategy could differentiate its services from those offered by most cable systems, which typically provide a variety of programming, including some sports. By differentiating its services, the MVPD might reduce the extent of competition between its services and those offered by cable systems and other MVPDs.

47. DBS services have attributes that are different from the attributes of other MVPDs' services, particularly those offered by cable systems. For example, DBS subscribers can currently receive substantially more channels than are offered by other MVPDs, can obtain unique programming not available elsewhere, receive digital as opposed to analog programming, and receive programming through small satellite dishes instead of wires, or larger receiving antennas.[92] Finally, DBS services are, by nature, nationally provided and,

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[89] 1995 Competition Report at ¶ 134. For example, the distribution of consumer preferences and income have important consequences for product differentiation strategies. For a general discussion, see Stephen Martin, Advanced Industrial Economics, Ch. 10.

[90] See, e.g., Avner Shaked & John Sutton, Relaxing Price Competition Through Product Differentiation, 49 Rev. Econ. Stud. 1, 3-13 (1982).

[91] For a discussion of how actions by firms can be used to signal whether they are likely to compete aggressively or not, see Drew Fudenberg & Jean Tirole, The Fat Cat Effect, the Puppy Dog Ploy and the Lean and Hungry Look, 74 Am. Econ. Rev. 361 (1984).

[92] DOJ Comments at 3-4 (DBS's smaller dish superior to FSS); NCTA Comments at 7; see also 1995 Competition Report at ¶¶53, 58, 65.

therefore, DBS providers are likely less able than other MVPDs to air local broadcast signals and otherwise respond to differing local market characteristics.

48. It appears that the services offered by DBS providers are currently positioned as higher-quality, higher-priced options targeted at those consumers that live outside cable markets or have strong preferences for niche programming, a large number of channels, and/or digital quality video signals.[93] This product differentiation appears to be borne out in evidence submitted by DIRECTV. Its expert, Dr. Jerry Hausman, cites evidence that sixty percent of DIRECTV's subscribers that were cable subscribers prior to purchasing a DSS system cancelled their cable service, twenty percent reduced their cable service, and the remaining twenty percent kept their service at the same level.[94] Accordingly, it is reasonable to conclude that approximately sixty percent of those subscribers essentially view DIRECTV as highly substitutable for cable (i.e., they cancelled all cable service after subscribing), twenty percent view DIRECTV's service as a substitute for some, but not all, cable service offerings, and twenty percent view DIRECTV's service as a complementary or even separate product from cable service. While we note Dr. Hausman's statement that "it is quite clear that DBS *will be* a substitute, not a complement, for cable television" due to programming overlap,[95] the evidence of *current* market performance indicates that DBS and cable are at present differentiated products

49. Additional full-CONUS DBS service providers, however, will likely find it difficult to differentiate substantially their services from those of the incumbent DBS operators. As a result, competition among DBS operators is likely to be enhanced by the entry of additional DBS operators that are not connected with current providers, and this price competition will translate into price competition with cable operators.[96] Therefore, the apportionment of full-CONUS locations is critical in our efforts to foster a deconcentrated market structure at this time.

93/ 1995 Competition Report at ¶ 137.

94/ DIRECTV Comments at 7; Hausman Statement at ¶¶ 13-16.

95/ Hausman December 1994 Aff. at ¶ 21 (emphasis added).

96/ The relationship between product differentiation and price competition is consistent with empirical evidence on competition in the cable industry. Numerous economic studies of the cable television industry show that basic cable rates in markets where two rival cable systems compete for customers are over 20 percent less than prices in monopoly cable markets. They generally appear to provide programming choices that are very similar to the ones provided by incumbent cable systems and try to draw customers away by offering lower prices. Alternatively, where a cable systems faces direct competition from a MMDS system basic cable prices are, on average, less than 10 percent below monopoly cable prices. See George S. Ford, Fragmented Duopoly: An Empirical Analysis of the Cable Television Industry (Presented at the 1994 Telecommunications Policy Research Conference). Thus, while rival cable operators are often unable to substantially differentiate their services, rival cable and MMDS systems appear to have pursued a competitive strategy based on a certain degree of price competition mixed with product differentiation.

50. As additional full-CONUS DBS entry occurs, DBS operators' incentive to compete with each other and other MVPDs will be reinforced by the cost structure of satellite technology. Satellite-based video distribution systems are characterized by substantial setup costs that are effectively sunk upon entry, and low marginal costs arising from the public-good nature of the DBS signal.[97] Where the cost of adding additional subscribers is low and the fixed costs necessary to enter the market are incurred up front, a firm has an incentive to lower price in response to competition, expanding output in order to lower unit costs.[98] To maximize the output effect of a lower price, the firm might position its services as closer substitutes for its rivals' services.[99] As services become more substitutable, the motivation to increase profit by cutting price becomes stronger. Through the interaction of these incentives, therefore, DBS operators that are unable to avoid competition with other MVPDs are likely to enter into vigorous competition with those MVPDs.

51. Not only is it important to promote the entry of an additional DBS provider, it is also important to prevent each full-CONUS DBS operator from influencing the development of competitive services at the other full-CONUS orbital locations. For example, EchoStar and Directsat argue that their current service plans, which would use only 21 channels on 119° location "will be considerably less competitive" than a 32-channel system.[100] Therefore, even holding 11 channels at a location, as Tempo does at 119°, can have a significant impact on the full-CONUS service available from that location. Operation of each full-CONUS DBS orbital location by an independent provider will limit the ability of all DBS providers and cable systems to engage in strategic product differentiation in an attempt to create, maintain, or exercise market power in markets for the delivery of video programming.

2. Spectrum Aggregation Limitations

52. In the NPRM, we expressed the concern that allowing an entity to control too much of the DBS spectrum capable of full-CONUS service could result in a lessening of competition among DBS providers and in the broader market for the distribution of multichannel video programming.[101] We tentatively concluded that: (1) DBS service rules should address competitive issues relating to the use of DBS spectrum to provide the wholesale distribution of DBS services to cable operators and other MVPDs; (2) the effect of

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97/ The DBS signal is non-depletable and non-rival in consumption. In other words, one consumer's reception of the signal does not affect any other individual's reception.

98/ For a discussion of behavior by firms in the industries with fixed costs, see Jean Tirole, The Theory of Industrial Organization 305-60 (1988).

99/ See, e.g., Stephen Martin, Advanced Industrial Economics 35-40 (1993).

100/ EchoStar/Directsat Comments at 36.

101/ See NPRM at ¶ 33.

DBS competition in the broader MVPD market will principally be felt in essentially local markets; and (3) cross-ownership between DBS operators and other MVPDs may present opportunities for anticompetitive strategic conduct that potentially has adverse effects at the firm or national level.[102]

53. Accordingly, we proposed in the NPRM two separate limitations on the aggregation of full-CONUS DBS channels. One proposal would limit aggregation of channels by *any* DBS licensee, permittee, or operator to a total of 32 at any combination of those full-CONUS orbital locations, and further sought comment on whether the Commission should impose a limitation on ownership or use of a significant number of channels at each of multiple full-CONUS orbital locations.[103] The other proposal would provide that any DBS licensee or operator affiliated with a non-DBS MVPD would be permitted to control or use DBS channel assignments at only one full-CONUS orbital location, and sought comment on whether the proposed spectrum limitations should be related to the size of the MVPD involved and whether such limitations should differentiate between cable operators and other MVPDs.[104]

54. As discussed in detail below, we have decided instead to adopt a single spectrum aggregation rule that prohibits a party from acquiring at the upcoming auction an attributable interest in channels at a second full-CONUS location. We believe this one-time auction rule will encourage the entry of another full-CONUS DBS service, and will essentially ensure that each of the three full-CONUS DBS orbital locations will initially be controlled by entities that do not share interests with DBS operators at the other two locations. We also believe that the likely increase in rivalry among MVPDs as a result of this additional entry will serve the public interest while avoiding any unnecessary regulatory intrusion.

a. Intra-DBS Spectrum Limitations

55. The above discussion demonstrates that MVPD markets are highly concentrated and that competition among competing distribution media in these markets is likely to involve product differentiation strategies rather than competition. Based on this analysis of current conditions in the MVPD market, the Commission has determined that preventing undue concentration at the three full-CONUS locations at this time would be an important step in promoting vigorous competition among MVPDs, and in particular, between DBS and cable systems. This section discusses the various proposals in the NPRM concerning aggregation of full-CONUS RF channels and explains our decision to limit firms operating at one full-CONUS location from acquiring at auction an interest in RF channels at any other full-

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102/ Id. at ¶¶ 33-34.

103/ Id. at ¶ 42.

104/ Id. at ¶ 40.

CONUS location without divesting its prior interest. We believe that by taking this opportunity to encourage entry by a new full-CONUS operator we will best promote competition among MVPDs, and at the same time leave licensees and the Commission the flexibility to consider a different configuration in the future if warranted by then-prevailing market conditions.

56. *Comments.* Several commenters favor measures to avoid undue concentration of full-CONUS DBS RF channels such as the one we have adopted.[105] PanAmSat argues that such concentration would inhibit the growth of competition in the MVPD market.[106] MCI contends that the Commission should not allow as few as two entities to control all three full-CONUS locations if it expects DBS to provide effective competition to entrenched cable monopolies.[107] BellSouth agrees that an intra-DBS cap will allow DBS providers to offer a competitive mix of services to consumers without risking undue concentration.[108] DOJ also raises the concern that an entity with channels at more than one full-CONUS location would be in a position to reach mutual accommodations with others holding channels at that location, and thus could exert substantial influence over the use of several otherwise competitive DBS systems.[109]

57. Primestar and NCTA argue that if the Commission imposes DBS spectrum aggregation rules, competitive equity dictates that the same cap apply to all participants.[110] Tempo states that it would be "irrational" to apply a rule only to cable-affiliated DBS permittees and claims that there is no evidence indicating that "control of channels at multiple orbital locations is a concern unique to MVPD-affiliated DBS operators."[111]

58. DIRECTV opposes any structural rule, arguing that structural regulation is unnecessary because the Commission, in the future, may be able to accommodate more DBS satellites and providers beyond the current eight locations allocated by international agreement.[112] Continental argues that the conduct rules imposed on Primestar in consent

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105/ See, e.g., CTA Comments at 14-15; USSB Comments at 7; Viacom Comments at 5.

106/ PanAmSat Comments at 2

107/ MCI Reply at 15.

108/ BellSouth Comments at 3

109/ DOJ Comments at 19.

110/ Primestar Comments at 22-23; NCTA Comments at 9 n. 20.

111/ Tempo Comments at 14-15.

112/ DIRECTV Comments at 8 n.16. Time Warner raises a similar argument. Time Warner Comments at 4-6.

decrees are sufficient to allay competitive concerns should it begin offering service using DBS spectrum, and that further structural rules are unnecessary, as the DOJ and state attorneys general declined to impose any.[113]

59. DIRECTV, among others, has raised a number of arguments against the sort of intra-DBS aggregation limitation we have decided to adopt. These commenters argue that the Commission should not be concerned about intra-DBS competition, but rather should focus on those whose power in the MVPD market make anticompetitive conduct more likely. In particular, DIRECTV and Dr. Hausman argue that only firms that have market power should be excluded from participating in an auction or expanding their DBS capacity.[114] Dr. Hausman states that "[u]nder a market-oriented auction framework, the acquisition of the DBS spectrum by DIRECTV should only be prohibited if DIRECTV could exercise market power arising from the spectrum acquisition."[115] Dr. Hausman and DIRECTV argue that DIRECTV, with only a small share of the MVPD market, cannot engage in the exercise of market power, and that any rule limiting its expansion is arbitrary and ill-advised.[116] DIRECTV and Dr. Hausman also argue that DBS has competitive importance in the MVPD market and has the potential to provide competition to cable.[117] EchoStar/Directsat and Time Warner agree that any spectrum limitations should apply only to firms with market power in the MVPD market.[118]

60. DIRECTV also argues that a one-location rule would severely limit its ability to expand its bandwidth and channel capacity, as it would limit its system to a maximum of 32 RF channels. DIRECTV believes that an "integrated DBS service could be provided from two orbital locations" through the use of a dual-beam customer antenna similar to those already in use in Japan for simultaneous access to BSS and FSS satellites at different locations.[119] It states that DBS faces channel capacity limitations compared to cable, which may soon be able to offer 500 channels, as DBS is limited to a particular portion of the radio frequency spectrum and thus would be "severely constrained" in competing against cable by a radio spectrum cap.[120] EchoStar/Directsat similarly argues that the Commission should

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113/ Continental Comments at 18.

114/ DIRECTV Comments at 7; Hausman Statement at ¶¶ 20-21.

115/ Hausman Statement at ¶ 20

116/ Hausman Statement at ¶¶ 22-23; DIRECTV Comments at 2-3, 7-8.

117/ DIRECTV Comments at 7-8; Hausman Statement at ¶¶ 13-16.

118/ See EchoStar/Directsat Comments at 43-45; Time Warner Comments at 18-19.

119/ DIRECTV Comments at 11 n.21.

120/ DIRECTV Comments at 8-10; Hausman Statement at ¶ 19.

refrain from imposing an artificial cap on independent DBS operators and that the market should be allowed to decide the most efficient allocation of channels among non-dominant MVPDs, and that any cap would be second-guessing the market.[121] PanAmSat notes that Hughes Communications, Inc. -- a corporate affiliate of DIRECTV -- argued *in favor of* a cap on orbital locations in the FSS service when Hughes was a new entrant, rather than the incumbent as it is in DBS.[122]

61. *Discussion.* In light of our analysis of the MVPD market, we believe that the spectrum aggregation limitations proposed in the NPRM are not sufficiently focused on achieving our goal of encouraging the emergence of an additional full-CONUS DBS competitor unrelated to existing DBS full-CONUS providers. Limiting DBS ownership to 32 full-CONUS channels would not prevent a party from acquiring channels at more than one full-CONUS location and thereby impairing independent development and use of those locations. Moreover, such a service rule would in effect dictate the structure of the MVPD marketplace in the future, even as that marketplace is undergoing dynamic change.

62. On the other hand, the full-CONUS DBS spectrum to be auctioned is currently a scarce public resource, and markets for the delivery of video programming are likely to remain concentrated for several years. As a result, we believe that the public interest is best served by encouraging the entry of a new full-CONUS DBS service that has the incentive to fully compete with full-CONUS DBS operators at other orbital locations. We have, therefore, decided to adopt a spectrum allocation rule applicable only to the upcoming auction that will prohibit any person with an attributable interest in DBS channels at one full-CONUS orbital location from acquiring an attributable interest in the full-CONUS channels now available at 110° without divesting its prior interest. This rule will allow a new and viable full-CONUS operator to enter the DBS market with a robust 28-channel capacity. In addition, this auction rule will address the concern we share with DOJ that a single party acquiring channels at more than one full-CONUS orbital location would be in a position to exert influence over the use of otherwise competitive systems at multiple locations.[123]

63. We are also aware that two existing permittees hold attributable interests in channels at more than one full-CONUS location: Directsat has been assigned ten channels at 119° and one channel at 110°, while USSB holds five channels at 101° and three channels at 110°. We do not believe that the channels held by USSB and Directsat will unduly restrict development of the 28 other channels available for auction at 110°, since DIRECTV has

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121/ EchoStar/Directsat Comments at 41-43.

122/ PanAmSat Comments at 3 (citing Assignment of Orbital Locations to Space Stations in the Domestic Fixed Satellite Service, 84 F.C.C.2d 584, 591 (1981)("To continue the competitive development of the domestic satellite market, Hughes asserts that existing carriers should be limited to three orbital locations so that new entrants can be accommodated")).

123/ DOJ Comments at 19.