

127. We will adopt the rule as proposed in the NPRM. We do not believe that applying the first prong of this rule to existing permittees would be appropriate. All permittees currently have channels assigned at both eastern and western orbital locations. The rule as proposed requires that they serve Alaska and Hawaii from either or both of those locations, or else forfeit their western assignments. Two licensees (DIRECTV and USSB) are currently operating from their eastern location, and another (EchoStar/Directsat) will begin operations from its eastern location next year. None of these parties has designed satellites capable of providing full service to Alaska and Hawaii from those eastern orbital locations. We will not adopt a rule that would immediately place the only operational systems in violation of our regulations. Nor will we exempt them from a rule that would impose significant requirements on all those who have yet to complete satellite construction.

128. As to the definition of "technically feasible," we note that Tempo's applications to modify its satellites have already demonstrated that service to Alaska and Hawaii from both 110° and 119° is technically feasible and economically reasonable. In addition, it is clear that all four western locations offer appropriate platforms for such service. Thus, any party acquiring channels at any of these six orbital locations should anticipate providing such service. We have not yet had occasion to assess the feasibility of such service from the 101° or 61.5° orbital locations. Any party acquiring channels at these locations that desires not to provide service to Alaska or Hawaii will bear the burden of showing that such service is not feasible as a technical matter, or that while technically feasible such service would require so many compromises in satellite design and operation as to make it economically unreasonable.<sup>249/</sup>

#### E. License Term

129. The NPRM proposed to increase the term of a non-broadcast DBS license from five years to ten years, the maximum allowed under the Communications Act, which better reflects the useful life of a DBS satellite and is consistent with the current proposal for extending the term of satellite licenses in other services.<sup>250/</sup>

130. This proposal received unanimous support from the commenters.<sup>251/</sup> They agreed that extending the license term will help to reduce the burden of regulation on DBS licensees and the burden of oversight on the Commission, and will encourage investment and innovation in the service. Accordingly we will adopt the rule as proposed. USSB requests that we clarify the definition of "non-broadcast" use of DBS as referring to the primary use of

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<sup>249/</sup> Thus, if service to Alaska is feasible but service to Hawaii is not, the permittee will not be excused from providing service to Alaska.

<sup>250/</sup> See NPRM at ¶ 71.

<sup>251/</sup> See CTA Comments at 15-16; DBSC Comments at 15; DIRECTV Comments at 26; EchoStar/Directsat Comments at 57; MCI Comments at 24; USSB Comments at 11-12.

the satellite, since a DBS operator may transmit a limited number of non-scrambled signals, carrying promotional materials for the operator's services and other such materials, but should not therefore be rendered a "broadcast" service.<sup>252/</sup> Based on USSB's description, we would not consider such transmissions, constituting a de minimis portion of an operator's transmissions, to change its classification. We are, however, wary of crafting any general rule that allows a non-broadcast licensee to provide essentially broadcast service. To the extent any DBS provider has questions as to the effect of such unscrambled transmissions, it should describe the nature and extent of those transmissions to the Commission in either a licensing or declaratory ruling context in order to receive a definitive ruling.

### III. ADOPTION OF A NEW METHODOLOGY FOR REASSIGNING DBS RESOURCES

131. Over six years ago, in the Continental decision, the Commission stated that existing DBS permittees would have first right to additional channel assignments upon surrender or cancellation of a DBS construction permit.<sup>253/</sup> The NPRM tentatively concluded that this reassignment policy, adopted in an era before Congress explicitly authorized the Commission's use of auctions and well before any DBS system actually went into operation, no longer serves the public interest, and therefore should be abandoned.<sup>254/</sup>

132. A majority of the commenters agree that the Continental reassignment policy is outmoded, would cause significant delays in DBS service as permittees sought to reaggregate and reshuffle channels, and would not serve the public interest, and they therefore support the use of auctions to reassign DBS channels.<sup>255/</sup> DIRECTV, which stands to receive additional channels under the Continental approach, nonetheless supports the use of auctions in the special circumstances of this case as an appropriate means of reassigning channels in the most rapid and efficient manner, so long as it and other independent DBS operators can participate in the auction.<sup>256/</sup>

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<sup>252/</sup> See USSB Comments at 11.

<sup>253/</sup> Continental, 4 FCC Rcd at 6299.

<sup>254/</sup> See NPRM at ¶¶ 9-17.

<sup>255/</sup> See Cox Comments at 3; CTA Comments at 2; DIRECTV Comments at 4-5; GE Americom Comments at 16-17; MCI Comments at 2-4; PanAmSat Comments at 4; Primestar Comments at 9; NRTC Reply at 2.

<sup>256/</sup> See DIRECTV Comments at 4-5.

133. Five current permittees, each of which would receive additional channels free of charge under Continental, oppose adoption of a new reassignment approach.<sup>257/</sup> They argue that the Commission's resolution of conflicting applications in Continental gave each of them a legal and/or equitable right to receive additional channels that become available due to cancellation of a DBS permit, and that the Commission cannot and should not take away rights upon which these permittees have relied in making substantial investment in their respective DBS systems. They note that five of the eight existing permittees expect to launch satellites – with capacity built in for additional channels – by 1997, and argue that those permittees are therefore in the best position to put the available channels to use in the most expedited manner. EchoStar/Directsat also contends that allowing new entrants to compete at auction for ACC's channels would reopen the Continental processing round, and thus deprive these permittees of their protected status as timely applicants.

134. We remain convinced that the *pro rata* distribution of reclaimed channels to existing permittees no longer serves the public interest. We base this conclusion on the history of the DBS service, especially in the six years since Continental was decided. Our historic policy of assigning a relatively small number of channels to each permittee was based upon a conception of DBS service that has not been put into practice. There are currently only two DBS providers in operation: DIRECTV, with 27 channels, and USSB, whose five-channel system uses transponders on one of DIRECTV's satellites. EchoStar/Directsat, which recently combined to control a total of 21 channels, expects to launch its first satellite by the end of the year. The move toward consolidation of channels is understandable, given that DBS systems must compete in the MVPD market with cable systems that are promising a 500-channel service in the future. Even using advanced methods of digital compression, DBS licensees with a small number of channels face capacity limitations that may hamper their ability to compete effectively in that market. In fact, Tempo Satellite has indicated that the eleven channels it has been assigned "are not sufficient for a competitive system."<sup>258/</sup>

135. Cancellation of ACC's construction permit reclaimed 27 eastern and 24 western DBS channels. Even if we were to combine these reclaimed channels with those channels that have never been assigned to any permittee – channels that are not subject to a claim under Continental – we would have a total of 30 eastern channels at two orbital locations and 30 western channels at three orbital locations available for assignment. Under Continental, these channels would be divided *pro rata* to assign five pairs of channels at these locations to each of the six permittees that received fewer channels than requested in

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<sup>257/</sup> See Continental Satellite Comments at 3-10; DBSC Comments at 3-14; EchoStar/Directsat Comments at 4-31; Tempo Comments at 5-7. ACC, whose former channels would be auctioned, also opposes the use of auctions. See ACC Comments at 2-6.

<sup>258/</sup> See Letter from Richard E. Wiley to Hon. Reed E. Hundt at 2 (dated August 15, 1995).

Continental.<sup>259/</sup> The result would be a piecemeal assignment of the 28 full-CONUS channels available at the 110° orbital location among six permittees. In order to aggregate sufficient channels to support a viable DBS service, these permittees would have to negotiate some form of agreement for joint operations from 110°, or else work out a system of channel swaps to consolidate assignments. The process necessary in either case is often a time consuming one that is not always successful,<sup>260/</sup> which is further complicated by the time required for Commission consideration and approval of the resulting transactions. Moreover, because the number of parties receiving additional channels is limited, there is no guarantee that those channels would go to the person who values them most highly and who can put them to the most efficient use to the benefit of American consumers. Such a result would conflict with our goals for the DBS service, as they would impede prompt delivery of service to the public and thwart efficient use of valuable spectrum resources as a much-needed competitor in the MVPD market.<sup>261/</sup>

136. By contrast, the competitive bidding procedures we adopt today are specifically designed and intended to assign scarce resources to those who value them most highly and can make the most efficient use of them. By offering the available channels in two large blocks, we obviate the need for reaggregation and allow the auction winners to proceed directly to acquisition or construction of satellites and operation of their systems without having to negotiate with other permittees or engage in several rounds of administrative processing. Since we intend to hold this auction in January 1996, and to apply performance requirements to ensure due diligence,<sup>262/</sup> we believe that the method we have chosen to replace Continental is better suited to achieving expedited service from the channels available than is the existing policy.

137. As a general matter, the arguments against adoption of a new assignment methodology are based on the misconception that the Commission cannot or should not change settled rules or policies if doing so would have a detrimental impact on those it regulates. On the contrary, the Commission enjoys wide latitude when using rulemaking to

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<sup>259/</sup> The channel reservations made in Continental were 5 paired channels fewer than had been requested by EchoStar, Directsat, Tempo, DBSC, and DIRECTV, respectively, and 5 paired and 8 full-CONUS channels fewer than had been requested by Continental Satellite. Continental, 4 FCC Rcd at 6295-97. Thus, the outstanding channel requests total 30 eastern channels, 30 western channels, and 8 full-CONUS channels. Only 27 eastern and 24 western channels are available due to cancellation of ACC's permit – the only channels to which these permittees have a claim under Continental.

<sup>260/</sup> For example, EchoStar negotiated for over three years before finally abandoning its efforts to merge with ACC or acquire its channels. See Advanced Order at ¶ 43.

<sup>261/</sup> See NPRM at ¶ 14.

<sup>262/</sup> See ¶ 10, *supra*.

change its own policies and the manner by which those policies are implemented.<sup>263/</sup> If the Commission is to function effectively, it must have the flexibility to amend its rules and regulations in light of its experience.<sup>264/</sup> In fact, "the Commission should be alert to the consequences of its policies and should stand ready to alter its rule if necessary to serve the public interest more fully."<sup>265/</sup> Otherwise, its policies and regulations would be perpetually dictated by rationales that were appropriate at the time of adoption but may no longer serve the public interest. This is especially true given that technological, commercial, and societal aspects of communications media are in constant flux.<sup>266/</sup> Accordingly, the Commission reevaluates its regulatory standards over time, and such periodic examination of the continued vitality of regulatory approaches should not be discouraged.<sup>267/</sup>

138. EchoStar/Directsat and DBSC argue that failure to honor the Continental reassignment methodology would violate their Fifth Amendment rights, both as an arbitrary and capricious denial of rights to additional channels and as a "taking" without just compensation of that valuable right.<sup>268/</sup> The first step in both due process and takings analyses is to determine whether there is a protected property right at issue.<sup>269/</sup> The permittees have cited two such interests: (1) the right to distribution *pro rata* of additional DBS channels recovered by the Commission; and (2) the right to use additional transponders built at great expense in order to accommodate the expected distribution of channels. Neither of these supposed "rights" rises to the level necessary to support a due process or takings violation.

139. While existing permittees do have a claim under Continental of first rights to reclaimed DBS channels, this right (and any related expectation) is not a *property right* for constitutional purposes. Each DBS permittee has a conditional construction permit for a

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<sup>263/</sup> See, e.g., Rainbow Broadcasting Co. v. FCC, 949 F.2d 405, 409 (D.C. Cir. 1991).

<sup>264/</sup> See Florida Cellular Mobil Communications Corp. v. FCC, 28 F.3d 191, 196 (D.C. Cir. 1994), cert. denied, 115 S. Ct. 1357 (1995).

<sup>265/</sup> FCC v. WNCN Listeners Guild, 450 U.S. 582, 603 (1981). See also National Broadcasting Co. v. United States, 319 U.S. 190, 225 (1943) ("If time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations").

<sup>266/</sup> See Rainbow Broadcasting Co., 949 F.2d at 409 (citing FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940)).

<sup>267/</sup> See Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413, 1425 (D.C. Cir. 1983).

<sup>268/</sup> See EchoStar/Directsat Comments at 21-30; DBSC Comments at 13-14.

<sup>269/</sup> See, e.g., Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41, 54-55 (1986); FHA v. The Darlington, Inc., 358 U.S. 84, 91 (1958).

specified term of years. Section 301 of the Communications Act clearly states that its purpose is, among other things, to "maintain the control of the United States over all the channels of radio transmission" and to provide for licensing the use of such channels, but *not* the ownership thereof, "and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license."<sup>270</sup> Section 304 of the Act similarly provides that no station license may be granted until the licensee has "waived any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise."<sup>271</sup> In addition, the Commission may modify any station license or construction permit if in its judgment such action will promote the public interest, convenience, and necessity, and, as noted above, such modification may appropriately be accomplished through notice and comment rulemaking.<sup>272</sup> Where, as here, the government retains at all times the power to alter rights it has created, the exercise of that retained power is not considered a "taking" for Fifth Amendment purposes.<sup>273</sup> Enforceable rights sufficient to support a due process claim cannot arise in an area voluntarily entered into and one which, from the start, is subject to such pervasive government control.<sup>274</sup> Accordingly, these permittees' claims to additional channels does not enjoy constitutional protection.

140. EchoStar/Directsat and DBSC also cite their investment in additional satellite transponders as evidence of their investment-backed expectation that rights under Continental

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<sup>270</sup> See 47 U.S.C. § 301.

<sup>271</sup> *Id.* at § 304.

<sup>272</sup> See, e.g., Committee for Effective Cellular Rules v. FCC, 53 F.3d 1309, 1316 (D.C. Cir. 1995) (FCC properly acted within its rulemaking authority in adopting changes in cellular geographic service areas even though they will result in modification of existing licenses); Upjohn Co. v. FDA, 811 F.2d 1583, 1585 (D.C. Cir. 1987) ("FDA was entitled . . . to diminish . . . entitlements under such licenses by means of notice-and-comment rulemaking"); WBEN, Inc. v. FCC, 396 F.2d 601, 618 (2d Cir.) (upholding exercise of FCC rulemaking authority without license modification hearings even though rule "result[ed] in increasing interference during the life of . . . present licenses"), *cert. denied*, 393 U.S. 914 (1968). See also 47 U.S.C. § 316 (the Commission may modify any license or permit it has issued if such action will promote the public interest, convenience, and necessity).

<sup>273</sup> See Democratic Central Comm. v. Washington Metro. Area Transit Comm'n, 38 F.3d 603, 606-07 (D.C. Cir. 1994).

<sup>274</sup> See Bowen, 477 U.S. at 55; Mitchell Arms, Inc. v. United States, 7 F.3d 212, 216 (Fed. Cir. 1993), *cert. denied*, 114 S. Ct. 2100 (1994) (party who had voluntarily entered the firearms import business placed himself in a heavily regulated arena, and any expectation flowing from permit "could not be said to be a property right protected under the Fifth Amendment"); General Tel. Co. of the Southwest v. U.S., 449 F.2d 846, 864 (5th Cir. 1971) ("The property of regulated industries is held subject to such limitations as may reasonably be imposed upon it in the public interest"); Black Hills Video Corp. v. FCC, 399 F.2d 65, 69-70 (8th Cir. 1968) (rules requiring cable systems to use their system capacity to carry the programs of local broadcast stations were not a constitutional "taking" because cable systems "are under the Communications Act subject to reasonable regulation related to the Act's objectives").

would be honored. Courts have rejected attempts to support "the curious proposition that investment-backed expectations can give rise to a constitutionally protected property interest."<sup>275/</sup> The cases upon which the permittees rely do not support a contrary result.<sup>276/</sup> As explained by the Court of Appeals for the Ninth Circuit, such cases are

authority for the proposition that *once a constitutionally protected property interest is established*, then a reasonable investment-backed expectation is one of several factors to be taken into account "when determining whether a governmental action has gone beyond 'regulation' and effects a 'taking.'" Whether a "taking" has occurred is the second step of the inquiry. Here we do not reach that step because the [appellant has] *failed to survive the first step, which is establishing that a property right exists.*<sup>277/</sup>

Here too, these permittee have failed to identify any property right that is entitled to the due process and takings clause protection they claim.

141. EchoStar/Directsat and DBSC have each been authorized to construct satellites using particular channels. To the extent they have configured their satellites to use additional channels, they have exceeded that authorization. It would be curious indeed if such unauthorized action could create a constitutionally protected right. Moreover, given that virtually all available DBS channels have been either requested or actually assigned for some time, no permittee could reasonably expect that channels recovered by the Commission would be available for reassignment *at the orbital position of that licensee.*<sup>278/</sup> We also reject the argument that additional transponders that the permittees have built into their satellites will be wasted unless the Commission assigns additional DBS channels to use them. Satellite technology allows for use of those transponders to provide service from the channels already assigned. For example, the satellites used by DIRECTV employ switchable transponders, allowing DIRECTV to match the number of operating transponders with available power. Thus, it can use more transponders at lower power (16 channels at 120 watts) or fewer transponders at higher power (8 channels at 240 watts). The latter configuration provides the operator greater programming capacity, since the additional power allows greater

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<sup>275/</sup> Peterson v. Department of Interior, 899 F.2d 799, 813 (9th Cir.), cert. denied, 498 U.S. 1003 (1990).

<sup>276/</sup> See, e.g., Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984); Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211 (1986).

<sup>277/</sup> Peterson, 899 F.2d at 813 (emphasis added; citation omitted).

<sup>278/</sup> For example, the last channels available at the 119° orbital location were assigned in November 1993. All three permittees holding those channel assignments – EchoStar, Directsat, and Tempo – have apparently been proceeding with due diligence toward construction and operation of their respective DBS systems.

compression. DIRECTV currently operates two of its satellites at the 101° orbital location in this high-power mode.<sup>279/</sup>

142. We recognize that the Commission's action in Continental gave these permittees a claim to any channels that became available due to cancellation of another's permit, and that from this claim arose expectations upon which the permittees acted. We do not lightly disappoint those permittees' claims and expectations. It is our judgment, however, that the public interest in abandoning the Continental reassignment methodology discussed at length above outweighs the private interests of these parties. In the circumstances, the Commission may reassign available channels in a manner that better serves the public interest, convenience, and necessity, even if doing so has a detrimental impact on some individual parties.

143. Nor do we believe that the use of a new methodology to reassign DBS channels in the future constitutes an impermissible retroactive rulemaking. "It is often the case that a business will undertake a certain course of conduct based on the current law, and will then find its expectations frustrated when the law changes. This has never been thought to constitute retroactive rulemaking, and indeed most economic regulation would be unworkable if all laws disrupting prior expectations were deemed suspect."<sup>280/</sup> The use of a new methodology to reassign reclaimed channels applies to those currently available and those that may become available in the future. While this action modifies existing permits in a way that disrupts the permittees' expectations, it does not make past behavior unlawful or otherwise impose a penalty for past actions and thus does not have an impermissible retroactive effect.<sup>281/</sup>

144. No more availing is the argument that abandoning Continental impermissibly reopens the last DBS processing round to new applicants and thereby deprives existing permittees of their protected status as timely applicants. Today we adopt a rule that modifies construction permits awarded in that processing round by removing claims on additional

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<sup>279/</sup> See Hughes Communications Galaxy, Inc., DA 95-979 (May 1, 1995)(authorizing operation at high power). DBSC apparently has a satellite with similar capabilities. See DBSC Reply at 6 n.6.

<sup>280/</sup> Chemical Waste Management, Inc. v. EPA, 869 F.2d 1526, 1536 (D.C. Cir. 1989). See also Langdraf v. USI Film Prods., 114 S. Ct. 1483, 1499 (1994)("A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment . . . or upsets expectations based in prior law" (citations omitted)).

<sup>281/</sup> See, e.g., Langdraf, 114 S. Ct. at 1498 (retroactive law takes away or impairs vested rights, creates a new obligation, imposes a new duty, or attaches a new disability with respect to transactions already past); Bowen v. Georgetown University Hospital, 488 U.S. 204, 219-20 (1988)(Scalia, J., concurring) (retroactive rules alter the past legal consequences of past actions; rules that do not change what the law was in the past may still have "secondary" retroactivity, but are permissible if reasonable); Miller v. Florida, 482 U.S. 423, 430 (1987)("A law is retrospective if it 'changes the legal consequences of acts completed before its effective date'").

channels under certain conditions. We have taken this step because, as discussed in detail above, such action better serves the public interest. While this may be analogous to reopening the prior processing window in that spectrum awarded in that round will now be available to entities that were previously cut off from applying for it, it is nonetheless distinguishable.

145. Even assuming, *arguendo*, that we were reopening the Continental processing round, the Commission is free to do so where the public interest justifies doing so. The cases cited by these commenters stand only for the proposition that the Commission has valid reasons for strictly enforcing its cut-off rules, and does not abuse its discretion if it chooses not to waive those rules for a non-complying applicant.<sup>282/</sup> In fact, one of the cited cases states that

timely applicants have no "vested right against challenge from untimely competitors," in the sense of precluding the FCC from ever granting a cut-off waiver, but they certainly have an equitable interest whose weight it is "manifestly within the Commission's discretion to consider."<sup>283/</sup>

As discussed above, we have considered those equities, and have determined that the public interest in expedited and competitive DBS service outweighs them in this instance. Since the public's interest in having licenses issued and service provided without undue delay is the basis for cut-off rules in the first instance,<sup>284/</sup> we find our decision all the more appropriate. We also note that Ashbacker and its progeny<sup>285/</sup> in no way limit our discretion to modify a construction permit by rule to provide for reassignment of spectrum in the public interest regardless of whether or not our action is viewed as opening an existing processing window.

146. In further support of their argument, these commenters cite to a case in which the Commission chose as a matter of its equitable discretion not to use auctions (as opposed to lotteries) to award MDS licenses for applications filed before we received auction

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<sup>282/</sup> See Florida Institute of Technology v. FCC, 952 F.2d 549, 553-54 (D.C. Cir. 1992); Coalition for the Preservation of Hispanic Broadcasting v. FCC, 893 F.2d 1349, 1359 (D.C. Cir. 1990), aff'd in part and vacated in part, 931 F.2d 73 (D.C. Cir.) (*en banc*), cert. denied, 502 U.S. 907 (1991).

<sup>283/</sup> Florida Institute of Technology, 952 F.2d at 554 (quoting City of Angels Broadcasting, Inc. v. FCC, 745 F.2d 656, 663 n.7 (D.C. Cir. 1984)).

<sup>284/</sup> Id.

<sup>285/</sup> See Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1954); see also Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551, 1555 (D.C. Cir. 1987); Multi-State Communications, Inc. v. FCC, 728 F.2d 1519, 1525-26 (D.C. Cir.), cert. denied, 469 U.S. 1017 (1984).

authority.<sup>286/</sup> That case is inapposite.<sup>287/</sup> The Commission had not there decided through rulemaking that the public interest would best be served by making spectrum available for competing applicants. Rather, that case presented the question of how to assign spectrum for which applications had been filed prior to the Commission's receipt of auction authority. While that case, like this one, did involve the balancing of various public interest and equitable reliance factors, it does not stand for the proposition that equitable interests of particular entities outweigh the public interest in auctions in all contexts.

147. Section 309(j)(6)(E) of the Communications Act provides that nothing in our auction authority shall "be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings."<sup>288/</sup> Even if simply reassigning the available channels on a *pro rata* basis could be used to avoid mutual exclusivity, doing so would defeat the overall goals of auction statute itself for the reasons discussed in detail above.<sup>289/</sup> Some existing permittees assert, however, that the Commission could use the Continental methodology to reassign channels in a way that would avoid mutual exclusivity while also rearranging channel assignments into a more rational plan.<sup>290/</sup> They have submitted various ways in which existing channel assignments could be rearranged and available channels awarded in a consensual process.<sup>291/</sup> Unfortunately, no two permittees have yet submitted the same proposal, nor does any one proposal appear to enjoy support of all permittees who would be affected by it. We do not think that it would serve the public interest to continue this effort, and see no practical way to force reordering of assignments without increasing the disturbance of settled expectations that the permittees claim to enjoy. Moreover, if in fact these permittees can make the most expeditious and efficient use of the available channels and can voluntarily agree on a method of reordering assignments, they are free to form a bidding consortium and then divide up the

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<sup>286/</sup> See, e.g., EchoStar/Direcstsat Comments at 14-17.

<sup>287/</sup> See Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, 10 FCC Rcd 9589, 9633 (1995) ("There is no doubt that we have the authority under the statute to use auctions to dispose of these previously filed applications for MDS station licenses, if using auctions satisfied the Section 309(j)(3) factors. Rather, the question before us here is not whether we *may* utilize an auction, but whether we *should*.").

<sup>288/</sup> See 47 U.S.C. § 309(j)(6)(E).

<sup>289/</sup> See ¶¶ 136-38, *supra*, 47 U.S.C. § 309(j)(3).

<sup>290/</sup> See, e.g., Continental Satellite Comments at 8-10 and n.17; DBSC Comments at 5-6; EchoStar/Direcstsat Comments at 32-35.

<sup>291/</sup> See Continental Satellite Comments at 7; DBSC Comments, Attachment; Letter from Philip A. Malet to William F. Caton in the Advanced Order proceeding, File Nos. DBS-94-11EXT/15ACP/16MP (dated June 14, 1995).

channels as they see fit, achieving their aims while also recovering for the public some of the value of the spectrum resource.

148. Lastly, these permittees argue that litigation over many aspects of the available DBS channels, including the method of their reassignment, can be expected to delay any auction and decrease the price received by the public.<sup>292/</sup> While the prospect of litigation may, in appropriate circumstances, tip the balance between two comparable alternatives, if the Commission were to base its estimates of likely efficiency and expedition of service upon delays inherent in litigation, it would give anyone opposed to a rule the incentive to threaten litigation, and the system would quickly become unmanageable. We believe that the service and auction rules we adopt today are within our authority to adopt and are well designed to serve the public interest.

149. ACC proposes that it should be able to recoup its DBS expenditures from the proceeds of any auction of its former channels.<sup>293/</sup> We do not believe that ACC is entitled to any such compensation, since it could have avoided the loss of its DBS permit had it complied with applicable due diligence rules.<sup>294/</sup> Even if this were not the case, however, we would be unable to adopt this proposal since the auction statute specifically provides that, with limited exceptions not applicable here, all proceeds from the use of a competitive bidding system must be deposited in the United States Treasury.<sup>295/</sup>

150. We also reject the proposal that we impose a spectrum fee on existing permittees to place them in a comparable competitive position with those who must acquire their permits through auction.<sup>296/</sup> It would be unfair to impose this burden on those permittees who had sufficient foresight to enter the service and the willingness to make the investment necessary to comply with the applicable due diligence obligations before others saw DBS's potential. And, as USSB notes, auction participants can take into account any competitive advantages or disadvantages associated with the channels available when formulating their bids at auction.<sup>297/</sup>

151. A number of commenters express concern that an auction in the DBS context might be seen as precedent for auctions in other satellite services, but would support the auction proposal so long as it is limited to the unique circumstances presented by the

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<sup>292/</sup> See, e.g., Continental Satellite Comments at 8; DBSC Comments at 8; EchoStar/Directsat Comments at 18..

<sup>293/</sup> See ACC Comments at 10-16.

<sup>294/</sup> See Advanced Order at ¶ 2.

<sup>295/</sup> See 47 U.S.C. § 309(j)(8)(A).

<sup>296/</sup> See Continental Cablevision Comments at 21-22.

<sup>297/</sup> See USSB Reply at 10.

international allocation of DBS channels and orbital locations.<sup>298/</sup> In the NPRM, we discussed the characteristics of the DBS service that make it unique, principally the international allocation to the United States of both orbital locations and channels.<sup>299/</sup> It is those characteristics upon which we rely in determining that auctions are appropriate for this particular satellite service. We are aware that other satellite services, which do not have similar international allocations of resources, present different and very complex issues with respect to the use of auctions. The Commission is in the process of considering those issues,<sup>300/</sup> and will be able to address them in the appropriate context. Those issues, however, are not now before us. Thus, our decision to use auctions in the DBS context is dependent upon the unique nature of the service, and in no way stands for the proposition that their use in other satellite services would also be appropriate.

152. Primestar and Tempo request that we make clear to all auction participants that appeals of our Advanced Order are ongoing and any award of a DBS construction permit through auction is taken subject to judicial reversal.<sup>301/</sup> This is a familiar aspect of any Commission action that is currently under appeal. In the unlikely event that a court either overturns our Advanced Order and ACC's construction permit with its associated orbital/channel authorizations is ultimately reinstated, or overturns this rulemaking and the Continental reassignment methodology is ultimately maintained, we would rescind any permit awarded through the auction process, and move with all deliberate speed to refund money paid up to that point. Participants in the auction are hereby put on notice of this possibility, and should be willing to facilitate that process if it becomes necessary.

#### IV. ADOPTION OF RULES FOR AUCTIONING DBS PERMITS

##### A. Authority to Conduct Auctions

153. *The NPRM* The Commission has authority under Section 309(j) of the Communications Act of 1934, as amended (the "Communications Act"), to employ auctions to choose among mutually exclusive applications for initial licenses or construction permits where the principal use of the spectrum is likely to involve the licensee receiving compensation from subscribers.<sup>302/</sup> In the NPRM, we tentatively concluded that the Commission has authority under Section 309(j) to use competitive bidding to award

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<sup>298/</sup> See DIRECTV Comments at 5; GE Americom Comments at 3-4; Lockheed Martin Comments at 8-9; PanAmSat Comments at 4.

<sup>299/</sup> See NPRM at ¶¶ 18-22.

<sup>300/</sup> See Public Notice, "Roundtable Date Set on Satellite Licensing Policies," Report No. SPB-31 (Nov. 21, 1995).

<sup>301/</sup> See Primestar Comments at 38; Tempo Comments at 39.

<sup>302/</sup> 47 U.S.C. § 309(j).

construction permits for the DBS spectrum reclaimed from ACC as well as other available DBS spectrum, and that the use of auctions in the DBS service would be consistent with statutory objectives. Thus, we tentatively concluded that construction permits available for reclaimed DBS spectrum are "initial" within the meaning of Section 309(j); that it is likely that mutual exclusivity will exist among applications for the DBS channels reclaimed from ACC as well as other DBS channels that may become available in the future; and that the "principal use" requirement of Section 309(j) is satisfied because DBS is likely to be primarily a subscription-based service. We tentatively concluded that using competitive bidding to award DBS authorizations would promote the objectives of Section 309(j) because, more than any other method of awarding construction permits, auctions are likely to foster the rapid deployment of new technologies and products and the efficient use of spectrum by putting spectrum in the hands of those who value it most highly. As we also explained, auctions will serve Congress' goal of bringing new services to rural areas where homes may not be passed by cable television, and the rapid deployment of DBS service in competition with cable will further Congress' objective of promoting competition. Unlike the reassignment policy set forth in *Continental*,<sup>303/</sup> or other available methods of assigning spectrum, such as comparative hearings, auctions will promote the statutory goal of recovering for the public a portion of the value of DBS spectrum.

154. With respect to the issue of mutual exclusivity, we explained in the *NPRM* that, pursuant to Section 309(j)(6)(E), we had sought means of avoiding mutual exclusivity in the DBS service and tentatively concluded that there are no means of doing so that are consistent with the objectives of Section 309(j). We also proposed to consider mutual exclusivity to occur only when the number of DBS channels sought at a given orbital location exceeds the number available there.

155. *Comments.* The vast majority of commenters do not question the Commission's authority to use competitive bidding to award DBS authorizations, and commenters such as Primestar and MCI agree with our tentative conclusion that we do have such authority.<sup>304/</sup> However, ACC argues that our proposed auction procedures exceed the Commission's statutory authority because DBS is not by definition a subscription service. According to ACC, competitive bidding will force DBS permittees to offer all-subscription service in order to recover the costs of competitive bidding and the Commission, by proposing to award construction permits through auctions, has chosen to sacrifice the free educational services that DBS operators would have otherwise provided.<sup>305/</sup> EchoStar/Directsat argues in its comments that the Commission lacks authority to reassign ACC's spectrum by competitive bidding because we have ignored our statutory duty to try to avoid mutual exclusivity, which

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<sup>303/</sup> See ¶ 131, *supra*.

<sup>304/</sup> Primestar Comments at 34-35; MCI Comments at 24-26.

<sup>305/</sup> ACC Comments at 3, 8-9.

it asserts could be accomplished by applying Continental.<sup>306/</sup> DBSC contends that the construction permits to be issued for the reclaimed ACC channels will not be "initial" under Section 309(j) because DBSC and others have the right under current Commission policy to acquire these channels through a modification of their permits.<sup>307/</sup> MCI, on the other hand, argues that the principal use of DBS spectrum will involve the licensee receiving compensation from subscribers, that no one can seriously doubt that there will be mutually exclusive applications for the spectrum reclaimed from ACC, and that the authorizations to be issued for the spectrum reclaimed from ACC are "initial" under Section 309(j).<sup>308/</sup>

156. ACC, EchoStar/Directsat, Continental Satellite, and DBSC assert that the objectives of Section 309(j) would not be served by the use of competitive bidding in the DBS service. They argue that auctions would not promote the development and rapid deployment of new technologies, products or services, and would in fact delay the deployment of services. ACC states that the auction winner will not be required to complete its first satellite until at least January 2000, and that further delay is almost certain due to court proceedings, whereas ACC's plan to assign its construction permit to Tempo would have resulted in a new DBS service becoming available shortly after the spring of 1996.<sup>309/</sup> ACC also asserts, *inter alia*, that the Commission's proposed use of competitive bidding would not promote the statutory objective of disseminating licenses among a wide variety of applicants, and that the Commission has ignored Congress' mandate to offer small businesses the opportunity to participate in DBS.<sup>310/</sup> EchoStar/Directsat contends that it is doubtful that any portion of the value of DBS spectrum would be recovered for the public through competitive bidding, arguing that there is a real possibility that the cost of paying for the spectrum would be passed on to the public through higher rates.<sup>311/</sup> Although it believes the Commission has the authority to conduct DBS auctions, Primestar questions whether auctioning the channels reclaimed from ACC is consistent with statutory policies favoring the rapid deployment of services without administrative and judicial delay.<sup>312/</sup> DBSC, while it disputes that prevention of unjust enrichment is an objective of Section 309(j), argues that transfer of

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<sup>306/</sup> EchoStar/Directsat Comments at 30-31 and Reply Comments at 1-2. See also DBSC Comments at 4-8 and Reply Comments at 8; Primestar Comments at 34-35 and Reply Comments at 19.

<sup>307/</sup> DBSC Comments at 9-10.

<sup>308/</sup> MCI Comments at 24-25.

<sup>309/</sup> ACC Comments at 3, 6-7. See also EchoStar/Directsat Comments at 32-37 and Reply Comments at 6-8; Continental Satellite Comments at 2, 10; DBSC Comments at 7-9 and Reply Comments at 4-5, 7.

<sup>310/</sup> ACC Comments at 4, 10. See also Continental Satellite Comments at 11; DBSC Reply Comments at 7-8.

<sup>311/</sup> EchoStar/Directsat Comments at 31-32, 38-39. See also DBSC Comments at 12 and Continental Satellite Comments at 2.

<sup>312/</sup> Primestar Comments at 34-35.

ACC's channels to eligible DBS operators does not unjustly enrich them because they have invested in the development of the industry.<sup>313/</sup> EchoStar/Directsat argues that an auction of channels at 110° will unjustly enrich DBS operators DIRECTV/USSB because they obtained full-CONUS channels for free.<sup>314/</sup> In contrast, MCI argues that auctioning the DBS channels at issue here is fully consistent with the statutory goals of recovering for the public a portion of the value of spectrum, promoting efficient and intensive use of spectrum, and fostering the rapid development and deployment of services.<sup>315/</sup>

157. *Discussion.* Those parties who argue that the Commission lacks authority to use auctions to award construction permits for reclaimed DBS spectrum are unpersuasive. As we stated in the NPRM with respect to the "principal use" requirement of Section 309(j), auctions are authorized if at least a majority of the use of the spectrum is likely to be for subscription-based services, and we look to classes of licenses and permits rather than individual licenses in making this determination.<sup>316/</sup> Given that both DBS licensees now providing service to the public operate on a subscription basis, and all other permittees planning to initiate service in the near future also plan to offer subscription-based service, we think it is a reasonable assumption that a majority of the use of the spectrum is likely to involve the licensee receiving compensation from subscribers. Moreover, given that these operations and plans were in place before the Commission proposed to use competitive bidding in the DBS service, we do not agree with ACC's claim that competitive bidding will force DBS permittees to offer all-subscription service. Our "principal use" determination does not in any way preclude DBS licensees from providing any amount of non-subscription service, and they are not precluded from recovering auction costs, as well as the substantial costs of construction, launch, and operation from sources other than subscribers, such as advertising.

158. We do not accept EchoStar/Directsat's claim that we could have avoided mutual exclusivity by applying Continental because, as we have explained, we have determined that the spectrum reassignment policy in Continental would delay the development of DBS service and would squander valuable spectrum and thus would not be in the public interest. We also point out as we did in the NPRM that in any case where we have scheduled an auction and it turns out that only one application is filed for a particular construction permit, we will cancel the auction and process that application.<sup>317/</sup> As we proposed in the

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<sup>313/</sup> DBSC Comments at 10.

<sup>314/</sup> EchoStar/Directsat Comments at 19-20 and Reply Comments at 12.

<sup>315/</sup> MCI Comments at 26.

<sup>316/</sup> NPRM at ¶ 76 (citing Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Second Report and Order, 9 FCC Rcd 2348, 2354 (1994) ("Second R&O")).

<sup>317/</sup> See NPRM at ¶ 75 (citing Second R&O, 9 FCC Rcd at 2376).

NPRM, we will consider mutual exclusivity to exist only when the number of DBS channels sought at a given orbital location exceeds the number available there.

159. We also do not agree with DBSC's contention that existing permittees have the right to acquire channels reclaimed from ACC by modifying their permits and that the construction permits to be issued for these channels therefore will not be "initial" under Section 309(j). As noted in the NPRM, Congress, by specifying that auctionable licenses must be "initial," intended only to preclude the use of competitive bidding for license renewals and modifications.<sup>218/</sup> As explained above, we have withdrawn from existing permittees the ability to modify their permits pursuant to Continental. Moreover, ACC's permits have been cancelled and therefore cannot be modified.<sup>219/</sup> Thus, any construction permits awarded for reclaimed channels will be new permits for the channels in question.

160. We turn now to commenters' arguments regarding whether competitive bidding will promote the objectives of Section 309(j). ACC's contention that the development of DBS service would be delayed if we auctioned the reclaimed frequencies at 110° and 148° is entirely speculative. There is no reason to assume that it will take the auction winner until at least January 2000 to complete a first satellite. The auction winner may be an entity that has already begun construction or even launched a satellite. Even if it has not, it may be in a position to do so expeditiously. Paying for spectrum provides incentives for permittees to construct quickly in order to obtain a return on their investment. Indeed, an auction is likely to promote the rapid deployment of service because those parties that are in the best position to deploy technologies and services are also likely to be the highest bidders.

161. With respect to the possibility of delay caused by court proceedings, a point raised by both ACC and Primestar, we do not believe that it would be appropriate to refrain from conducting auctions where we believe they would serve the public policy objectives of Section 309(j) simply because of the pending appeal of the Advanced Order and other legal challenges that might be filed and where we also believe those cases will ultimately be resolved in the Commission's favor. In addition, the objective of avoiding administrative and judicial delay is only one factor that must be weighed in light of the statute's other objectives and the other available alternatives to resolving the mutually exclusive applications we will receive for the reclaimed channels. In this regard, the only available alternative for issuing licenses would be comparative hearings.<sup>220/</sup> Our experience with both auctions and

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<sup>218/</sup> See NPRM at ¶ 74 (citing H.R. Rep. No. 103-111, 103d Cong., 1st Sess., at 253 (1993)).

<sup>219/</sup> See ¶¶ 142-43, 149, *supra*.

<sup>220/</sup> Lotteries are not an available alternative to resolving mutually exclusive applications in DBS. See 47 U.S.C. § 309(i)(1)(B); see also 1993 Budget Act, Pub. L. No. 103-66, § 6002(e).

comparative hearings clearly indicates that auctions will more likely result in less administrative and judicial delay.<sup>321/</sup>

162. In response to ACC's assertion that our proposed use of competitive bidding in the DBS service would not promote the statutory objective of disseminating licenses among a wide variety of applicants, including "designated entities," we observe again that this is one of a number of objectives Congress wished to promote through spectrum auctions and each objective must be considered with all others.<sup>322/</sup> As discussed more fully below, we have concluded that, because of the extremely high implementation costs associated with satellite-based services, no special provisions should be made for small businesses and other designated entities in an auction of the spectrum available at 110° and 148°.<sup>323/</sup> This does not mean, however, that we have ignored Congress' mandate to offer designated entities the opportunity to participate in competitive bidding, nor does it mean that designated entities will be unable to participate in the DBS industry or that auctions of DBS spectrum will not promote many of the objectives of Section 309(j). Indeed, the legislative history of the designated entity provisions shows that Congress did not necessarily intend for special measures in services such as DBS: "The characteristics of some services are inherently national in scope, and are therefore ill-suited for small businesses."<sup>324/</sup> Moreover, the abandonment of our Continental policy opens the DBS industry to a wide range of potential new entrants. Judging by the comments in favor of auctioning DBS spectrum submitted by such entities as MCI and CTA, a minority-owned aerospace company, it appears that there will be a "wide variety" of applicants for this spectrum in the future. We also anticipate that a wide variety of businesses will be involved in various sectors of this industry as non-licensed operators, programmers, and equipment suppliers.

163. The possibility that auction costs will be passed on to consumers does not necessarily lead to the conclusion that DBS auctions will not serve the statutory objective of recovering a portion of the value of DBS spectrum for the public. Auction and other costs

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<sup>321/</sup> See, e.g., Second R&O, 9 FCC Rcd at 2358.

<sup>322/</sup> See Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, Notice of Proposed Rulemaking, IB Docket No. 95-91, FCC 95-229, 60 Fed. Reg. 35,166 (released June 15, 1995) at ¶ 107.

<sup>323/</sup> As noted in the NPRM with respect to the cost of DBS, Tempo Satellite states that it has spent nearly \$250 million on the construction of two satellites for use at either the 110° or the 119° orbital location. See Application for Review of Tempo DBS, Inc. at 3 (dated May 24, 1995), filed in the Advanced Proceeding. EchoComm Communication Corporation, parent company of EchoStar, has raised \$323.3 million to finance the DBS systems of EchoStar and Directsat (each system will include at least two satellites). See Request of EchoStar Satellite Corporation for Additional Time to Construct and Launch a Direct Broadcast Satellite System at 5 (dated July 28, 1995), File No. DBS-88-01.

<sup>324/</sup> H.R. Rep. No. 111, *supra*, at 254.

may be passed on to consumers by providers of any service subject to competitive bidding.<sup>325/</sup> Nonetheless, in giving the Commission auction authority, Congress clearly perceived that auctions would compensate the public for at least a portion of the spectrum awarded, and this is just as true of DBS as it is of any auctionable service. It should also be pointed out that auction winners will be constrained from charging rates that are higher than those of competitors that have not paid for the spectrum assigned to them, and that rational operators will charge the market price for services in any event.

164. Another facet of the statutory objective of compensating the public for spectrum licenses or permits is the avoidance of unjust enrichment to licensees. DBSC argues that this is only an objective of auction design and assumes that an auction is to be held. We disagree. Section 309(j)(3) states that "[i]n identifying classes of licenses and permits to be issued by competitive bidding, in specifying eligibility and other characteristics of such licenses and permits, and in designing the methodologies for use under this subsection" the Commission shall promote, among other objectives, "avoidance of unjust enrichment through methods employed to award uses" of the spectrum. The statute requires us to consider the avoidance of unjust enrichment in choosing whether to auction DBS spectrum. DBSC goes on to argue that an auction of DBS spectrum does not promote avoidance of unjust enrichment because eligible DBS operators that would have received channels under Continental have developed the DBS industry at great cost. Conversely, EchoStar/Directsat argues that current DBS operators DIRECTV/USSB will be unjustly enriched because they paid nothing for DBS channels. These arguments, however, ignore the fact that DBS channels have significant value to any entity possessing the right to use them. Transfer of these channels to operators that have already developed service using their current channels would be a windfall to those operators. Auctioning them would ensure that the ultimate holder of these channels paid their market value to the U.S. Treasury and was not unjustly enriched.

165. In sum, we conclude that the Commission has the authority to award DBS construction permits, for reclaimed or other available spectrum, by means of competitive bidding. We further conclude 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 will therefore award construction permits for the channels available at 110° and 148°, as well as DBS construction permits that become available in the future, by means of competitive bidding. In reaching these conclusions, we emphasize that we wish to encourage DBS operators to provide free services for schools, libraries, and other institutions serving the public that may not have the financial resources to pay for DBS services, and we do not believe that the use of competitive bidding should preclude the provision of such free services, which can be provided without incurring additional buildout costs. As we also noted in the NPRM, subscription-based DBS is subject

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<sup>325/</sup> See ¶ 157, *supra*.

to a statutory public interest requirement to reserve capacity for noncommercial, educational, or informational programming found in Section 335 of the Communications Act.<sup>326/</sup>

## B. Competitive Bidding Design

166. *The NPRM.* In the NPRM, we proposed to auction two permits for the construction of satellites to use the DBS channels currently available at the 110° and 148° orbital locations. We tentatively decided not to divide the available blocks of channels into smaller parcels, or to auction each channel individually, because the configuration of current DBS systems indicates that channels are most effectively utilized when they are available in a substantial quantity at a given orbital location.

167. We also proposed in the NPRM to award the construction permits for the channels currently available at 110° and 148° by means of a sequential auction, with the channels at one orbital location being offered immediately after the other, because we tentatively concluded that there would be little to gain by conducting simultaneous auctions of the two construction permits. We explained that the channels at 110° and at 148° are not likely to be close substitutes in the near term, nor did we find evidence of synergies between the channels at the two orbital locations. We further tentatively concluded that multiple round bidding would be the best method of auctioning the channels reclaimed from ACC, and that oral outcry would be the best method of submitting bids. However, we sought comment on whether an oral outcry auction could pose problems for bidders that need time between bidding rounds to arrange for additional financing if bidding goes higher than anticipated. We also requested comment on whether a combined sealed bid-oral outcry auction might be appropriate for the channels available at 110° and 148° to help reduce the risk of collusion while retaining the benefits of a multiple round auction.

168. *Comments.* Most commenters who discuss our proposal to auction one permit for the DBS channels available at the 110° and one permit for the channels available at 148° support this proposal.<sup>327/</sup> However, CTA recommends dividing the channels at 110° into two blocks of 14, and the channels at 148° into two blocks of 12. According to CTA, a ten-channel block is more than adequate to support a viable DBS system given the development of digital compression techniques, and vigorous DBS service can also be established using small satellite technology with fewer than half of the 32 channels allocated to an orbital slot. CTA also points out that dividing an orbital slot's channel allocation into thirds or halves would create the possibility of more competitors at each orbital location.<sup>328/</sup> ASN proposes that the Commission set aside, at the 110° and 148° locations as well as in any future DBS auction, 10 percent of the channel capacity at each orbital location for "independents," DBS

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<sup>326/</sup> 47 U.S.C. § 335. *But see* NPRM at ¶ 32 (discussing court challenges to this provision).

<sup>327/</sup> *See* Primestar Comments at 35; Kennedy-Wilson Comments at 1; MCI Comments at 4-5.

<sup>328/</sup> CTA Comments at 3-6.

programmers or distributors who have no market power through a nationwide cable system or other multichannel video distribution system. According to ASN, cable-affiliated DBS distributors have numerous incentives to restrict the scope of DBS product, program, and service offerings, and exclusive operation of a full-CONUS orbital location by a cable-affiliated DBS operator would prevent or at least slow the development of new DBS offerings. ASN believes that its proposed spectrum set-aside for independents would have sufficient capacity to support an economically viable product.<sup>329/</sup>

169. In its reply comments, MCI argues against CTA's suggestion that the channels at 110° and 148° be divided into smaller blocks, stating that CTA's claim that 14 DBS channels could support "upwards of 280 programming channels" by the end of the decade is based upon nothing more than its expectation of vast advances in video compression by the year 2000. According to MCI, CTA's proposal, if implemented, would place those entering the DBS market prior to the year 2000 at a tremendous disadvantage because it would effectively preclude aggregation of more than 14 channels by any bidder. MCI states that, if it is awarded the reclaimed DBS channels, it expects to have satellites in operation well before the end of the decade.<sup>330/</sup> MCI also opposes ASN's proposal to set aside 10 percent of the spectrum for independent programmers, arguing that it would necessitate delay in the auction and lead to fragmentation of the spectrum block and that the proposal lacks sufficient details.<sup>331/</sup>

170. Most commenters express no opinion regarding our proposal to use sequential oral outcry bidding for DBS, although Primestar and DIRECTV voice support for this auction design.<sup>332/</sup> MCI also generally supports our proposal and recommends a "structured open-outcry auction."<sup>333/</sup> This auction design is described in a paper submitted by MCI and prepared by University of Maryland game theorist and economist Lawrence M. Ausubel. Under this methodology, oral bidding would be conducted in five-minute increments. A bidder would place a bid, which would then be recorded on a board at the front of the bidding room. The bidder would then have one minute, to be timed by an official timer visible to all bidders, to withdraw that bid without penalty. Any bidder withdrawing its bid subsequent to this one-minute grace period would be subject to the Commission's standard withdrawal payment and would be disqualified from further bidding on the same construction

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<sup>329/</sup> ASN Comments at 8-12.

<sup>330/</sup> MCI Reply Comments at 21.

<sup>331/</sup> Id.

<sup>332/</sup> Primestar Comments at 35. Primestar believes that the Commission should not have reclaimed the spectrum at 110° and 148° from ACC. However, Primestar supports our proposed auction design in the event this spectrum is auctioned. DIRECTV supports this design provided that it is not precluded from bidding by spectrum caps. DIRECTV Comments at 27.

<sup>333/</sup> MCI Comments at 27.

permit. At the conclusion of the one-minute withdrawal period, a five-minute time period, signifying the start of the new bid submission period, would begin. At any time during this time period, any bidder would be free to announce a new bid. New bids would be dictated by predetermined increments. For example, incremental bids of \$5 million could be required for bids up to \$200 million, followed by increments of \$10 million for bids between \$200 and \$400 million, followed by increments of \$20 million for any bids beyond \$400 million. Once a bid is recorded on the board, any new bid must follow the required bidding sequence, and no jump bids would be accepted. The auctioneer would not retain discretion to change the predetermined bid increment during the course of the auction. If a default or a bid withdrawal occurs outside of the one-minute bid withdrawal period, the Commission would retain the discretion to re-auction the license that same day. To prevent a bidder from strategically delaying the close of the auction, the Commission would retain the discretion to limit the number of times that a bidder may re-bid on a construction permit and then withdraw the bid during the permitted one-minute withdrawal period.<sup>334</sup> MCI claims that its proposed oral-outcry structure would be straightforward to implement, would serve the goal of maximizing the availability of information to bidders, and would encourage aggressive bidding by creating a simple and predictable environment for bidders to operate in, thus making higher revenues likely.

171. GE Americom states that our proposed auction procedures appear reasonable for the unique purpose of auctioning the channels reclaimed from ACC but asserts that other procedures – which it does not specify – would probably achieve a fairer and more efficient result in future DBS auctions. GE Americom asks that we limit any auction procedures adopted here to the auction of the channels available at 110° and 148°.<sup>335</sup> We note also that Continental Satellite claims that our proposed auction methodology is unworkable, but its only support of this claim is the fact that we have asked for comment on the various aspects of this methodology.<sup>336</sup>

172. CTA and Kennedy-Wilson, an auction contractor and consultant, recommend that we use simultaneous multiple round bidding instead of our proposed sequential auction. CTA states that bidding on individual channels or small channel blocks in a simultaneous auction would allow market forces to determine the value of spectrum and the appropriate aggregation of channels. According to CTA, DBS channels are highly interdependent within each orbital slot. CTA also argues that bidding on individual channels or small parcels in a simultaneous auction would increase revenues by increasing the number of bidders and forcing up the price to acquire all channels, and that this auction design would have the advantage of allowing smaller entities to participate in the auction and still allow larger

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<sup>334</sup> MCI Comments, Ausubel Paper at 2-4.

<sup>335</sup> GE Americom Comments at 21-22 and Reply Comments at 2.

<sup>336</sup> Continental Satellite Comments at 11-13.

entities to aggregate all channels available at a given orbital location.<sup>337/</sup> Kennedy-Wilson recommends a simultaneous oral outcry auction offering the two channel blocks proposed in the NPRM, stating that this auction design would allow bidders to adjust their bids as they acquire information regarding the relative value of each block. According to Kennedy-Wilson, it is probable that some bidders for one block will also be interested in bidding for the other block, and a bidder primarily interested in the second block might prematurely drop out of the bidding for the first block if it lacks information about the ultimate price of the second block.<sup>338/</sup> Kennedy-Wilson also proposes that bidders be allowed to submit bids either orally or electronically, suggesting that electronic bids could be displayed electronically on site and announced orally. Kennedy-Wilson suggests that we allow both telephone bids and computer bidding.<sup>339/</sup>

173. In its reply comments, MCI continues to support sequential auctions with the higher value block of channels offered first, stating that this is a simpler method than a simultaneous oral auction.<sup>340/</sup> According to MCI, no telephonic or electronic bidding should be employed. In its reply comments, Primestar generally supports MCI's proposal to employ an oral outcry auction including a one-minute penalty-free withdrawal period following each bid and a five-minute period to submit new bids. Primestar suggests that when a bid is withdrawn, the bidding should revert to the previous high bid and if no new bid is announced, then the auction would conclude at that bid.<sup>341/</sup>

174. In response to our request for comment on whether bidders in an oral outcry auction would need time between bidding rounds to arrange for additional financing, Primestar argues that there should be short intervals (Primestar suggests 15 to 30 minutes in its comments and 30 minutes in its reply comments) at predetermined stages to allow bidders to assess the bidding and confer with their principals.<sup>342/</sup> Kennedy-Wilson, however, expresses concern about giving bidders time to react to ascending pricing. Kennedy-Wilson proposes a closing rule that would allow each eligible bidder one opportunity to suspend closure of the auction by requesting a break in lieu of bidding. Kennedy-Wilson suggests that the duration of such a break should be one hour.<sup>343/</sup> In its reply comments, MCI contends that, to prevent opportunities for collusion and to expedite the auction, breaks should be

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<sup>337/</sup> CTA Comments at 6-8.

<sup>338/</sup> Kennedy-Wilson Comments at 1-2.

<sup>339/</sup> Kennedy-Wilson Comments at 2-3.

<sup>340/</sup> MCI Reply Comments at 22.

<sup>341/</sup> Primestar Reply Comments at 20.

<sup>342/</sup> Primestar Comments at 36 and Reply Comments at 20-21.

<sup>343/</sup> Kennedy-Wilson Comments at 2.

prohibited. MCI states that entities that are serious about bidding for the permits being offered should be able to send a representative to the auction site, that there should be no need to consult with principals or to arrange for additional funding, and that the auction should be conducted and completed in one day.<sup>344/</sup>

175. In response to our request for comment on whether a combined sealed bid-oral outcry auction would be appropriate for DBS, Primestar and MCI state that this method should not be used because it limits bidders' access to information and thus is not consistent with aggressive bidding.<sup>345/</sup> Kennedy-Wilson also recommends against a combined sealed bid-oral outcry procedure, arguing that nothing would be gained by this auction format, that otherwise qualified bidders might be disqualified, and that such an auction design might have the effect of reducing the amount bid.<sup>346/</sup>

176. *Discussion.* Little opposition was expressed with regard to our proposal to auction the DBS channels available at the 110° and 148° orbital locations in two blocks. Moreover, the trend in the industry has been to aggregate large blocks of spectrum, and we believe that large channel blocks are needed to create a viable service at this time. As we noted in the NPRM, Tempo Satellite has indicated that the 11 paired channels it has been assigned at the 119° orbital location "are not sufficient for a competitive system."<sup>347/</sup> EchoStar has combined with Directsat to control a total of 21 channels at each of two orbital locations, and USSB has been able to operate using five channels by striking a deal with DIRECTV, which held the remaining 27 channels at the same orbital location. We also note that there is no prohibition against disaggregating channels in the post-auction aftermarket once they are acquired. Moreover, small entities have the option of forming groups to bid for spectrum and then dividing the channels among themselves after the auction. Therefore, we will implement our proposal and will auction one construction permit for a block of 28 channels at 110° – the 27 channels reclaimed from ACC and one channel that has never been assigned – and one construction permit for the block of 24 channels at 148° that were reclaimed from ACC. As explained in the NPRM, a separate ITU feeder link plan 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"). The construction permits available for auction include authority to transmit pursuant to these allocations in accordance with the BSS Plan.<sup>348/</sup>

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<sup>344/</sup> MCI Reply Comments at 22-23.

<sup>345/</sup> Primestar Comments at 35 n.79; MCI Comments at 28.

<sup>346/</sup> Kennedy-Wilson Comments at 3.

<sup>347/</sup> See letter from Richard E. Wiley to Hon. Reed E. Hundt at 2 (dated August 15, 1995).

<sup>348/</sup> See ITU Radio Regulations, Appendix 30A (Orb-88).

177. We recognize that there may be legitimate arguments for auctioning spectrum in smaller blocks, particularly in the future as digital compression technology is further developed. There may also be opportunities for niche services to develop once DBS service is generally established. Therefore, in the future we may auction DBS spectrum either channel by channel or in small blocks. However, for the reasons stated above, we believe that designating two permits for auction for the channels at 110° and 148° will best serve the public interest and the objectives of Section 309(j)(4)(B), especially the promotion of investment in and rapid deployment of this new service.

178. We conclude that a sequential multiple round electronic auction would be the best method of awarding construction permits for the channels available at 110° and 148°. We are persuaded by the comments of MCI that we should provide the auction with more structure, but we believe that the best way to provide such structure is through electronic bidding, and not by imposing restrictions on the auctioneer in an oral auction. The primary benefit of additional structure is the reduced risk of bidders making errors in submitting bids. Erroneous bids are occasionally entered in rapidly moving oral auctions. Based on our experience with PCS auctions, we believe that such errors are far less likely with electronic bidding than in a traditional oral auction. Given the absence of erroneous bid submissions with electronic bidding, we believe there is no need to adopt MCI's proposal of providing a one-minute bid withdrawal period in an oral auction.

179. We see three additional benefits to multiple round electronic bidding. First, electronic bidding with discrete bidding rounds provides bidders more time to analyze previous bids, confer with decision makers, and refine their bidding strategy than a continuous oral auction. Moreover, time-outs can be better tailored to the needs of individual bidders. If, as Kennedy-Wilson proposes, the Commission were to provide each bidder with the right to call a one hour time-out in an oral auction, the entire auction would be stopped whenever a time-out is called. In contrast, with electronic bidding in discrete rounds, bidders can be provided with waivers that will allow them to sit out rounds without losing eligibility while other bidders continue to bid, and without the auction closing. Second, a multiple round electronic auction with the activity rule discussed below will provide bidders more information about other bidders' valuations. The activity rule requires bidders to be active in every round (or use one of a limited number of waivers) to maintain their bidding eligibility. Thus, absent the use of waivers, all bidders willing to acquire a construction permit at each announced price will be observable. Providing this information may enable bidders to refine their estimates of the permit value, thereby reducing the tendency of bidders for permits with uncertain value to shade down their bids to avoid the "winner's curse." Third, given the Commission's experience with electronic auctions, such an auction is likely to be easier for the FCC to implement than an oral auction with novel features, such as those proposed by MCI. Because of the Commission's discretion to adjust the length of bidding rounds in an electronic auction and the other auction design features described below, we expect the auction to proceed rapidly.

180. We will provide for electronic bidding at an FCC auction site because of the anticipated rapid auction pace. We do not anticipate allowing telephone bids and remote electronic bidding, as suggested by Kennedy-Wilson, but the Wireless Telecommunications Bureau will announce by Public Notice whether such bidding will be permitted. In the event telephone bids and remote electronic bidding are not allowed, all bidders will be required to have an authorized bidding representative at the auction site. Because no commenter has made the case that there is significant interdependence between the channels available at 110° and those available at 148°, we do not believe simultaneous bidding is necessary. Hence, we shall auction the channels at 110° and the channels at 148° separately. We may auction one channel block immediately after the other, but we also reserve the discretion to hold two separate auctions for the two blocks.

181. Although we will not use simultaneous multiple round bidding, oral outcry bidding, sealed bidding, or a combined sealed bid-oral outcry auction, to reassign the spectrum reclaimed from ACC, we recognize that such auction designs could be suitable for DBS under certain circumstances and we reserve discretion to employ such auction designs for DBS in the future. We therefore adopt rules to provide for these auction designs, and we retain discretion to modify by Public Notice the procedures pertaining to these auction methods. As we have done in previous auctions, we also delegate to the Wireless Telecommunications Bureau the authority to implement and modify auction procedures – including the general design and timing of an auction, the number of authorizations to be offered in any one auction, the manner of submitting bids, and procedures such as minimum opening bids and bid increments, activity and stopping rules, and application and payment requirements – and to announce such procedures by Public Notice.

### C. Bidding Procedures

182. *Sequencing.* We proposed in the NPRM to auction the 28 channels available at 110° first. As we explained, all of the information available to us indicated that these channels have the highest value of those currently available, and we thought that bidders would not wish to bid on the channels available at 148° until they had had the opportunity to bid on the channels at 110°. We also sought comment on any general principles interested parties might wish to suggest for determining the sequence of future DBS auctions that may be held. None of the commenters suggested that we offer the channels available at 148° before the channels at 110°, and the comments clearly reveal that there is more interest in these channels than in the channels available at 148°. We will therefore implement our proposal to auction the 28 channels available at 110° first. As noted above, we reserve the discretion to hold two separate auctions for the channels available at 110° and the channels at 148°, rather than auctioning the channels at 148° immediately after the channels at 110°. We will determine the sequence of future DBS auctions in keeping with our general finding that the highest value licenses should be auctioned first because the greater the value of the