

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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| <p>In the Matter of</p> <p>Policies and Rules for the Direct Broadcast Satellite Service</p> | <p>IB Docket No. 98-21</p> |
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NOTICE OF PROPOSED RULEMAKING

Adopted: February 19, 1998

Released: February 26, 1998

Comment Date: April 6, 1998
Reply Comment Date: April 21, 1998

By the Commission: Commissioners Furchtgott-Roth and Powell approving in part; dissenting in part and issuing separate statements.

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I. INTRODUCTION

1. Consistent with our goals of regulating services subject to our jurisdiction in a pro-competitive, common-sense manner, this rulemaking seeks to streamline and simplify the Commission's rules governing the direct broadcast satellite (DBS)¹ service. We propose to eliminate unnecessary and duplicative regulation of this emerging service and seek comment on a number of issues concerning horizontal concentration within the multi-channel video programming distribution (MVPD) market. Today, DBS and the direct-to-home fixed-satellite service (DTH-FSS) provide service to approximately 8.5 million households, offering an alternative to cable television service, which is the dominant MVPD provider.² DBS and DTH-FSS providers serve more subscribers than any type of MVPD other than cable. It has been reported that the domestic and international demand for DBS and DTH-FSS will grow in the future, demonstrating the potential for increased competition to the cable industry and within the MVPD market generally.³ In addition, we have recently licensed entities to provide services in the high-power Ka-band. This next generation of broadband satellite service offers great promise for new and innovative direct-to-home satellite services.⁴ In light of the growth of DBS and DTH-FSS, the promise of new broadband systems, the continuing

¹ DBS is the acronym used in the United States to describe the domestic implementation of the broadcast satellite service (BSS), as it is known internationally.

² Reports indicate that as of February 1998 there are approximately 8.5 million households receiving MVPD satellite delivered service. *Sky Report*, February 1998 at <http://www.skyreport.com/dthsubs.htm> (*Sky Report*). According to the Commission's 1997 Cable Competition Report, in June 1997, there were a total of 73.6 million MVPD households of which there were 64.2 million basic cable subscribers; 7.2 million DBS, DTH-FSS, and C-band subscribers; 1.1 million MMDS subscribers; 1.2 million SMATV subscribers; and 3,000 OVS subscribers. *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming* (Fourth Annual Report), CS Dkt. No. 97-141, FCC 97-423 (rel. January 13, 1998)(1997 Report) at Appendix E, Table E-1.

³ See, e.g., *Satellite News*, February 2, 1998 at 6, citing Report by the Consumer Electronics Manufacturing Association (CEMA).

⁴ See *Assignment of Orbital Locations to Space Stations in the Ka-band*, DA 97-967 (rel. May 9, 1997)(licensees include Hughes Galaxy Communications Galaxy, Motorola, Loral Space, Ka-Star, PanAmSat, Morning Star, EchoStar, VisionStar, GE American Communications, Lockheed Martin, NetSat 28, Comm, and Orion); see also *Teledesic Corporation, Application for Authority to Construct, Launch, and Operate a Low Earth Orbit Satellite System in the Domestic and International Fixed Satellite Service*, 12 FCC Rcd 3154 (1997).

rise in cable rates,⁵ as well as consumer benefits from competition such as more service offerings, better consumer service, and downward pressure on prices, we believe it is particularly important to continue to examine our policies to ensure that they are pro-competitive and deregulatory.

2. The Commission has historically regulated DBS, which is transmitted using frequency bands that are internationally allocated to the broadcast satellite service, and DTH-FSS, which is transmitted using fixed-satellite service (FSS) frequency bands, separately. The Commission rules for the DBS service are codified in Part 100,⁶ while FSS rules, including those applicable to DTH satellite service providers, can be found in Part 25.⁷ Since both DBS and DTH-FSS provide video services directly to the home via satellite, we propose to consolidate, where possible, the DBS service rules with the rules for DTH-FSS and other satellite services under Part 25 and to eliminate in its entirety Part 100. We also propose to move certain DBS-specific Part 100 rules into Part 25⁸ and to eliminate several Part 100 rules which we believe are no longer needed. For instance, we propose to eliminate the Part 100 rules (Sections 100.72-.80) which govern DBS auctions and to conduct DBS auctions under the general auction rules contained in Part 1, subpart Q.⁹ We further propose to amend our Part 25 rules, where necessary, in order to render them applicable, where appropriate, to DBS and DTH-FSS, as well as other satellite services.

3. In proposing to incorporate certain Part 100 rules into Part 25, we highlight several rules of particular importance. We seek comment on our proposal that we move our existing DBS foreign ownership rules from Part 100 to Part 25, and we ask whether the Commission

⁵ The average monthly cable rate rose by approximately 8.5% between July 1996 and July 1997 for cable systems that do not face "effective competition." *Report on Cable Industry Prices*, MM Dkt. No. 92-266, FCC 97-409, (rel. December 15, 1997) at ¶ 28. In contrast, in the same period the overall consumer price index for all items for all urban consumers rose approximately 2.2%. Bureau of Labor Statistics, *Consumer Price Index-All Urban Consumers* at <http://146.142.4.24/cgi-bin/surveymost> (data extracted on January 20, 1998). Hence cable rates rose nearly four times as fast as the consumer price index.

⁶ See *Inquiry into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites for the Period Following the 1983 Regional Administrative Radio Conference* (Report and Order) 90 FCC2d 676 (1982), *recon. denied*, 53 RR2d 1637 (1983)(*DBS Order*).

⁷ The Commission previously streamlined its Part 25 rules in 1996. See *Streamlining the Commission's Rules and Regulations for Satellite Application and Licensing Procedures* (Report and Order), 11 FCC Rcd 21581 (1996)(*Part 25 Streamlining Order*).

⁸ Some Part 25 Rules will not apply to DBS.

⁹ 47 C.F.R. § 1.2101, *et seq.*

should modify these rules. We also seek comment on how we can strengthen our rules regarding the provision of DBS service to Alaska and Hawaii and whether we should adopt geographic service rules for Puerto Rico and other U.S. territories and possessions. Because it is our goal to promote competition in the MVPD market generally, we also seek comment as to whether new rules addressing horizontal concentration in the MVPD market, such as limitations on cable/DBS cross-ownership, are necessary in order to prevent anti-competitive conduct in the MVPD market.¹⁰

II. BACKGROUND

4. *Initiation of Direct-to-Home Service.* The DTH service has its origins in the large direct-to-home satellite antennas which were first introduced in the 1970's for the reception of video programming transmitted via satellite.¹¹ Because these first-generation direct-to-home satellites operated in the C-band frequencies at low power, direct-to-home satellite antennas, or dishes, as they are also known, generally needed to be seven to ten feet in diameter in order to receive the signals being transmitted.¹² The Commission did not require FSS licensees transmitting the programming to obtain special licenses to provide this direct-to-home service. Instead, licensees were and continue to be subject to the existing FSS rules contained in Part 25, which apply whether the satellite is providing video, voice or data

¹⁰ We note that the Commission has pending before it two applications from Primestar Partners. In one application Primestar seeks to acquire control of Tempo Satellite, Inc., currently a subsidiary of TCI Satellite Entertainment, Inc., which holds an authorization for 11 DBS channels at both 119° W.L. and 166° W.L. *Application of TCI Satellite Entertainment, Inc. and Primestar, Inc., for Transfer of Control of Tempo Satellite, Inc.*, File No. 91-SAT-TC-97, file July 18, 1997. As part of the second application, Primestar proposes to acquire certain assets of the News Corp and MCI Telecommunications, Inc., joint venture which includes a DBS license for 28 channels at 110° W.L. *See Application of MCI Telecommunications Corporation and Primestar LHC, Inc., for Consent to Assignment of Direct Broadcast Satellite Authorizations*, File No. 106-SAT-AL-97, August 15, 1997; *see also MCI Telecommunications Corporation, Application for Authority to Construct, Launch and Operate a Direct Broadcast Satellite System at 110° W.L.*, DA 96-1793 (1996). Since Primestar is owned by a group of large cable multi-system operators that also have ownership interests in a number of national cable programming services, those applications raise some of the same issues raised in this general notice. Comments in this proceeding therefore may also be considered in the Primestar proceeding and incorporated into the record of that proceeding.

¹¹ *See Implementation of Section 19 of the 1992 Cable Act (Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming)*(First Report), CS Dkt. No. 94-48, 9 FCC Rcd 7442 (1994)(1994 Report) at ¶ 71.

¹² C-band refers to frequencies in the 3700-4200 MHz and 5425-6426 MHz frequency bands.

services.¹³ More recently, FSS licensees have been using the Ku and extended Ku-bands to provide direct-to-home services enabling subscribers to use a receiving dish approximately one meter in diameter.¹⁴ In 1994, a group of several cable companies (including TCI Satellite, Inc., Time Warner/Newhouse, Cox, MediaOne/U.S. West, Comcast, and GE American Communications) formed Primestar Partners, L.P. to provide DTH-FSS in the Ku-band, and Primestar now provides services to 1.9 million subscribers.¹⁵

5. *Regulatory Treatment of DBS.* The Commission has historically treated DBS differently from other fixed-satellite services and established a separate Part 100 for DBS service rules. This difference in treatment reflects the Commission's original conception of DBS as a broadcast service as well as the unique treatment of DBS under the International Telecommunication Union's World Radio Conference orbital assignment plan.¹⁶ When the Commission adopted the Part 100 rules in 1982, it originally envisioned that DBS would be a broadcast service but left open the possibility that licensees could provide service on a subscription or common carrier basis.¹⁷ The Commission assigned responsibility for regulating DBS to its Mass Media Bureau, along with other broadcast services, while responsibility for regulating FSS, including DTH-FSS, remained with the Common Carrier Bureau.¹⁸ Since the inception of the DBS service, DBS providers have had the choice of being regulated as broadcast, common carrier, or non-broadcast, non-common carrier (*i.e.*,

¹³ 47 U.S.C. § 605(b). In order to receive programming from as many sources as possible, most direct-to-home satellite dishes were designed to track and receive video signals from a number of different satellites. Direct-to-home satellite dish vendors were generally independent distributors who were neither satellite operators nor program producers, and direct-to-home satellite dish users received both unscrambled, free-to-air programming, and scrambled subscription services. Direct-to-home satellite dish use grew rapidly in the late 1980's and early 1990's, especially in rural areas that lacked access to cable, and today there are approximately 2 million C-band subscribers. This figure does not include Primestar which is a Ku-band service that provides an entire programming package to subscribers from a single fixed-satellite. *Sky Report* (Feb. 1998).

¹⁴ The Ku-band frequencies are 11.7 GHz - 12.2 GHz and 14.0 GHz - 14.5 GHz.

¹⁵ *Sky Report* (Feb. 1998). To provide its DTH-FSS service, Primestar leases transponder capacity on an FSS satellite licensed to GE Americom. Primestar is not itself a Commission licensee.

¹⁶ The International Telecommunication Union (ITU) is an intergovernmental organization through which countries coordinate the use of radio frequencies.

¹⁷ *DBS Order* at ¶ 84.

¹⁸ In 1994, when it created the International Bureau, the Commission granted the Bureau authority over all satellite services, including DBS and FSS. 47 C.F.R. § 0.51. See *Amendment of Parts 0, 1, 25, 43, 64 and 73 of the Commission's Rules to Reflect a Reorganization Establishing the International Bureau*, FCC 94-252 (1994).

subscription). To date, all DBS licensees have chosen to be regulated as subscription services, and the Commission's regulatory classification of DBS as a subscription service has been affirmed by the courts.¹⁹

6. Under the ITU's rules, spectrum and orbital locations for the DBS service (known internationally as the Broadcast Satellite Service or BSS) are apportioned on a global basis among all nations through ITU agreements reached at ITU World Radio Conferences. By contrast, orbital locations in the fixed-satellite service are generally selected and notified by national administrations and interference issues are resolved through satellite coordinations. In the early 1980's, ITU members reached agreement on assigning BSS orbital locations among the ITU's member countries. According to the BSS and Feeder Link Plans for North and South America (the ITU's Region 2),²⁰ the United States was assigned eight orbital locations for providing DBS service.²¹ Each of these eight orbital locations is capable of providing 32 analog channels, each with a 24 MHz bandwidth.²² In accordance with Appendices S30 and S30A, DBS orbital assignments to the United States are separated by nine degrees, as opposed to two-degree spacing used to accommodate C and Ku-band FSS assignments. Greater orbital spacing in the DBS service enables subscribers to use earth station antennas that are smaller than those generally employed for C and Ku-band services.²³

¹⁹ *Subscription Video Services* (Report and Order), 2 FCC2d 1001 (1987)(*Subscription Video*), *aff'd.*, National Assoc. for Better Broadcasting v. FCC, 849 F.2d 665 (D.C. Cir. 1988).

²⁰ The Regional Administrative Radio Conference in 1983 (RARC-83) developed and adopted the Region 2 BSS and Feeder Link Plans. It was not until 1985, at the World Administrative Radio Conference (WARC Orb-85), that the Region 2 Plans were ratified internationally and became a part of the ITU's Radio Regulations. The Regions 1 (Europe and Africa) and 3 (Asia-Pacific) BSS Plan became a part of the ITU Radio Regulations in 1977 at the World Broadcasting-Satellite Administrative Radio Conference (WARC-77). The Regions 1 and 3 Feeder Link Plan became a part of the ITU Radio Regulations in 1988 at the World Administrative Radio Conference (WARC Orb-88).

²¹ See Appendix S30 (WRC-97) of the ITU's Radio Regulations (Appendix S30) at 57. The eight U.S. orbital positions, proceeding from east to west (all W.L.), are 61.5°, 101°, 110°, 119°, 148°, 157°, 166°, and 175°.

²² Digital compression provides the ability for operators to carry simultaneously at least seven video programming services per analog DBS channel, and anticipated technological advances are expected to permit capacity for up to 20 programs per analog channel by the year 2000. See *Number of Television Programs From One Transponder in the Appendices S30 and S30A Plans*, Document 10-11S/108-E, ITU Radiocommunications Study Group 10/11S (September 12, 1995).

²³ Earth station antennas with a diameter of 60 cm (18 inches) are commonly employed in the DBS service, whereas earth station antennas employed in the Ku-band DTH-FSS are generally on the order of 0.84 to 1 meter (36 inches) in diameter.

7. In 1982, the Commission established what it described as "interim" DBS service rules in a new Part 100 of its rules and began accepting applications for service.²⁴ In its initial DBS licensing rounds, the Commission did not assign all 32 channels at a particular orbital location to a single licensee. Rather, at the request of the applicants, it assigned from three to ten channels at individual orbital locations and assigned separate channels to several different licensees at the same location.²⁵

8. In 1995, the Commission issued its *DBS Auction Order*, in which it instituted competitive bidding for available DBS channels.²⁶ In that order the Commission also accelerated the due diligence and system implementation requirements by imposing a four-year satellite construction deadline,²⁷ eliminated the east/west channel pairing method of assignment adopted by the Commission in 1989,²⁸ and created DBS geographic service requirements in order to stimulate service to Alaska and Hawaii.²⁹ The new service rules conditioned all DBS licenses awarded after January 1996 on the provision of service to Alaska and Hawaii, "where such service is technically feasible."³⁰ In January 1996, the Commission conducted its first DBS auction for 28 channels at 110° W.L. and 24 channels at 148° W.L.³¹

²⁴ *DBS Order* at ¶ 1; *CBS, Inc.*, 92 FCC2d 64 (1982); *Processing Procedures Regarding the Direct Broadcast Satellite Service*, 95 FCC Rcd 250 (1983).

²⁵ See *CBS, Inc.*, 92 FCC2d 64 (1982).

²⁶ *Revision of Rules and Policies for the Direct Broadcast Satellite Service* (Report and Order), 11 FCC 9712 (1995)(*DBS Auction Order*) at ¶ 165.

²⁷ Previously there were only deadlines for obtaining a satellite construction contract and for final system implementation. *DBS Auction Order* at ¶ 10.

²⁸ The Commission had adopted a rule in 1989 that required channels at the eight orbital locations to be paired, with each licensee being assigned an equivalent number of channels at an eastern orbital location and at a western orbital location. The four eastern positions are: 61.5° W.L., 101° W.L., 110° W.L., and 119° W.L. The four western positions are: 148° W.L., 157° W.L., 166° W.L., and 175° W.L. For example, DBSC was assigned 11 channels at each of the 61.5° W.L. and 175° W.L. locations. R/L DBS was assigned 11 channels at each of the 61.5° W.L. and 166° W.L. locations. The *DBS Auction Order* eliminated this policy. *DBS Auction Order* at ¶ 124.

²⁹ 47 C.F.R. § 100.53.

³⁰ 47 C.F.R. § 100.53(b).

³¹ The channels at the 110° W.L. and 148° W.L. locations became available when the previous assignee, Advanced Communications Corp., failed to meet its due diligence obligations (*i.e.*, failure to initiate construction of satellite within prescribed time periods) for use of its assigned channels at those

9. *Growth of DBS.* DBS service has experienced significant growth since it was first introduced and now reaches over four million subscribers.³² Currently, DirecTV and USSB are offering service to the public from the 101°W.L. orbital location, and EchoStar and its affiliate Directsat offer a competing service from the 119°W.L. orbital location. Two licensees, DBSC (also an affiliate of EchoStar) and Tempo Satellite, Inc. (an affiliate of TCI Satellite Entertainment, Inc.), have launched satellites to the 61.5°W.L. and 119°W.L. orbital locations, respectively, but neither has commenced service as of this date.

10. A chart of the DBS orbital and channel assignments appears below. In addition to highlighting which channels are currently being used for service, the chart also indicates those channels for which permits have expired and/or pending petitions for extension have been filed. A total of 27 channels at four different locations remain unassigned. The Commission has not yet proposed when it will auction these channels.³³ The area within the darkened box represents the three full-CONUS locations (*i.e.*, 101° W.L., 110° W.L., and 119° W.L.) and the status of their corresponding channels.³⁴

locations. *Advanced Communications Corp.*, (M,O&O) 10 FCC Rcd. 13337, 13340 (Int'l Bureau 1995), *aff'd* (M,O&O), 11 FCC Rcd 3399 (1995), *aff'd*, *Advanced Communications Corp. v. FCC*, 84 F.3d 1452 (D.C. Cir. 1996), *cert denied*, 117 S.Ct. 718 (1997). MCI Telecommunications, Corp., won the auction for the channels at the 110°W.L. location by bidding \$682.5 million, and Echostar Satellite Corp., won the auction for the channels at 148°W.L. by bidding \$52.295 million.

³² *Sky Report* (Feb. 1998). This figure does not include DTH-FSS or C-band subscribers.

³³ See *DBS Auction Order* at ¶ 165.

³⁴ The term "full-CONUS" refers to orbital locations capable of serving the entire continental U.S. as a result of the ability to transmit a signal covering the continental U.S. from a single orbital location.

DBS Orbital Channels By Orbital Location

| Permittees /Licensees | Total | 175° | 166° | 157° | 148° | 119° | 110° | 101° | 61.5° |
|-----------------------|-------|-----------------|------|-----------------|----------------|-----------------|----------------|-----------------|-----------------|
| DirectTV | 54 | | | 27 ^x | | | | 27 [†] | |
| USSB | 16 | | | | 8 ^x | | 3 ^x | 5 [†] | |
| EchoStar | 35 | | | | 24 | 11 [†] | | | |
| Directsat | 22 | 11 ^x | | | | 10 [†] | 1 | | |
| DBSC | 22 | 11 ^x | | | | | | | 11 [†] |
| MCI | 28 | | | | | | 28 | | |
| Tempo | 22 | | 11 | | | 11 [†] | | | |
| R/L DBS | 22 | | 11 | | | | | | 11 |
| Dominion | 8 | | | | | | | | 8 ^x |
| Unassigned | 27 | 10 | 10 | 5 | | | | | 2 |

‡ operational

† satellite launched but not yet operational

x permits that have expired and/or for which a request for extension is pending

11. In addition to strong growth in domestic services, direct-to-home providers (including both DBS and DTH-FSS) are rapidly developing services for international transmission. In its 1996 Report and Order revising the policies governing U.S.-licensed satellites, the Commission stated that DBS licensees could use their satellites to provide both domestic and international service without additional approval from the Commission.³⁵ Further, to facilitate the opening of international DBS markets, the United States has reached agreement with Mexico to permit DBS and DTH-FSS satellites licensed by either country to

³⁵ *Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems* (Report and Order), 11 FCC Rcd 2429 (1996)(DISCO I) at ¶ 70 (foreign approval required for international operations, consistent with international treaties). The acronym "DISCO" stands for Domestic International Satellite Consolidation Order.

provide service into each other's territory.³⁶

12. The Commission's recent order implementing the U.S. commitments to the World Trade Organization (WTO) for market access for satellites licensed by foreign countries (*DISCO II*) will also promote international service.³⁷ The *DISCO II* Order notes that the United States has undertaken no commitments with regard to DTH-FSS or DBS and has also taken a most-favored-nation exemption for those services in the WTO Basic Agreement on Telecommunications.³⁸ The order stresses, however, that foreign-licensed satellites providing DBS or DTH-FSS may provide service into the United States so long as the foreign country licensing the satellite in question offers effective competitive opportunities to U.S. satellite providers in its territory.³⁹ Currently, Galaxy Latin America, an affiliate of DirecTV, is using a U.S.-licensed satellite to provide DTH-FSS service to over a dozen Latin American countries. Sky Latin America, an affiliate of NewsCorp. Inc., is providing a competing DTH-FSS service to Latin America using a U.S.-licensed satellite.

III. DISCUSSION

A. Incorporation of DBS Service Rules into Part 25

13. We propose to eliminate Part 100 of our rules and adopt permanent rules in Part 25 to govern DBS.⁴⁰ Consolidating the regulation of all satellite services in one Part will eliminate inconsistencies in our rules, reduce confusion and uncertainty for users, lessen

³⁶ Agreement between the Government of the United States of America and the Government of the United Mexican States Concerning the Transmission and Reception from Satellites for the Provision of Satellite Services to Users in the United States of America and the United Mexican States, April 28, 1996; Protocol Concerning the Transmission and Reception of Signals from Satellites for the Provision of Direct-to-Home Satellite Services in the United States and the United Mexican States, *Public Notice*, DA 96-1880, Rpt. No. SPB-65 (November 13, 1996).

³⁷ *Amendment to the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Services in the United States* (Report and Order), IB Dkt. No. 96-111, CC Dkt. No. 93-23, RM-7931, FCC 97-399 (rel. November 11, 1997)(*DISCO II*). We discuss foreign ownership rules applicable to DBS and DTH-FSS below in Section III.A.

³⁸ The results of the WTO basic telecommunications services negotiations are incorporated into the General Agreement on Trade in Services (GATS) by the Fourth Protocol to the GATS (April 30, 1996), 36 I.L.M. 336 (1997).

³⁹ *DISCO II* at ¶ 98.

⁴⁰ 47 C.F.R. §100.1, *et. seq.* and 47 C.F.R. § 25.101, *et. seq.*, respectively.

regulatory burdens for licensees, and simplify the development of advanced services. In this way, DBS applicants, permittees, and licensees can use the same forms and procedures as other satellite applicants, permittees, and licensees.⁴¹ In addition, we are finding that applications are combining DBS-band satellite functions with the functions of satellite services in other bands at the same or adjacent orbital locations (*e.g.*, hybrid DBS, Ku-band FSS, and Ka-band systems).⁴² By incorporating the satellite service rules into one section of the Commission's rules, we hope to encourage innovative services by simplifying and clarifying the process for complex multi-band, multi-service applications.

14. In April 1997, the International Bureau's Satellite and Radiocommunication Division held a "DBS Roundtable" to solicit public comment on various questions regarding revision of the Commission's DBS rules.⁴³ The comments received subsequent to this Roundtable will be placed and considered in the docket for this proceeding.

15. Our proposal to consolidate the rules for DBS in Part 25 will help us implement Congressional intent more effectively. While the Commission has traditionally regulated DBS and DTH-FSS as separate services, Congress has on several occasions sought to apply statutory provisions to both DBS and DTH-FSS. For instance, in 1992, Congress required satellite service licensees providing video programming in the Ku-band under both Part 100 and Part 25 of the Commission's rules to comply with certain public interest obligations.⁴⁴ And, in 1996, Congress amended the Communications Act of 1934⁴⁵ to grant the Commission

⁴¹ These changes will permit use of FCC Form 312 for DBS and all other satellite services.

⁴² *See, e.g., Application of Hughes Communications Galaxy, Inc., for Authority to Construct, Launch and Operate Galaxy/Spaceway, a Global System of Geostationary Ka band Fixed and Ku band Broadcast Communications Satellites*, File Nos. 174-SAT-P/LA-95 - 181-SAT-P/LA-95 (filed September 29, 1995).

⁴³ *Public Notice*, Rpt. No. IN 97-8, DA 97-616 (rel. Mar. 26, 1997)(the topics identified were procedures, policy matters, and technical matters).

⁴⁴ *See Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Service Obligations* (Notice of Proposed Rulemaking), 8 FCC Rcd 1589 (1993). 47 U.S.C. § 335(b)(5) defines "provider of direct broadcast satellite service" as follows:

- (i) a licensee for Ku-band satellite system under part 100 of title 47 of the Code of Federal Regulations; or
- (ii) any distributor who controls a minimum number of channels (as specified by Commission regulation) using a Ku-band fixed service satellite system for the provision of video programming directly to the home and licensed under part 25 of title 47 of the Code of Federal Regulations.

⁴⁵ Communications Act of 1934, as amended, 47 U.S.C. § 151, *et. seq.* (Communications Act).

exclusive jurisdiction over "direct-to-home satellite services" without making any distinction between DBS and DTH-FSS.⁴⁶ Consolidating the rules for DBS in Part 25 will therefore reflect Congressional intent that DBS and DTH-FSS satellite services be governed in certain aspects by a uniform regulatory scheme and enable us to implement more effectively legislation that applies to both DBS and DTH-FSS.

16. Although we propose to regulate DBS under the same Part 25 rules that apply to other satellite services, we recognize that some characteristics of the DBS service distinguish it from other satellite services.⁴⁷ There are, therefore, certain individual Part 100 rules which we propose to preserve and move to Part 25 but apply uniquely to DBS. These are the DBS definition (Section 100.3), the eligibility and foreign ownership rules (Section 100.11), the license term (Section 100.17), the due diligence requirements (Section 100.19), the technical requirements (Section 100.21), the geographic service requirements (Section 100.53), and the competitive bidding mechanism for mutually exclusive applications (Section 100.71). We propose to add these provisions, except the definition of DBS and the technical requirements, to Part 25 by adding a new Section 25.146 titled, "Licensing Provisions for the Direct Broadcast Satellite Service." By adding Section 25.146 to the subpart that contains the licensing provisions for other satellite services governed by Part 25, we seek to harmonize the regulation of satellite services while maintaining relevant distinctions among those services. We propose to add the definition of DBS and the technical requirements to other sections of Part 25, as explained below.

17. We identify and explain below each of the changes that we propose and the potential effects of those changes on the DBS service. The following chart identifies each Part 100 DBS rule and the action we propose to take.

⁴⁶ 47 U.S.C. § 303(v).

⁴⁷ For example, the orbital positions used for the DBS service are based on ITU orbital and frequency assignment Plans, rather than assignment by national administrations that are coordinated through the ITU process, as with certain FSS bands. In addition, since use of the DBS band is governed by these ITU orbital and frequency assignment Plans and specific technical regulations for BSS, licensees may not be able to enjoy as much spectrum flexibility as might exist in other satellite services.

Incorporating DBS Service Rules into Part 25

| Part 100 Section | Proposed Action | Part 25 Section |
|--|-----------------|---|
| 100.1 (Basis and purpose) | eliminate | Part 25 Authority |
| 100.3 (Definitions) | amend and move | new 25.201 |
| 100.11 (Eligibility and Foreign Ownership) | move | new 25.146(a) |
| 100.13 (Application) | eliminate | covered by Part 25, subpart B |
| 100.15 (Licensing) | eliminate | covered by Part 25, subpart B |
| 100.17 (License term) | amend and move | amend 25.146(b) |
| 100.19 (Due diligence) | move | new 25.146(c) |
| 100.21 (Technical) | amend and move | new 25.146(f) |
| 100.51 (EEO) | move | amend 25.601 |
| 100.53 (Geographic service) | amend and move | new 25.146(d) |
| 100.71 (Competitive Bids) | amend and move | new 25.146(e) |
| 100.72-.79 (Competitive Bidding System Design) | eliminate | covered by auction rules in 1.2101, <i>et. seq.</i> |
| 100.80 (Transfers) | eliminate | covered by 1.1211 and 25.119 |
| Part 25 Cross-reference to Part 100 for DBS | eliminate | eliminate 25.109(b)(DBS cross-reference) |

18. *Basis and purpose § 100.1.* We propose to eliminate Section 100.1, which recites the Commission's statutory authority to regulate radio transmissions and issue radio licenses for the "interim" DBS service.⁴⁸ We propose to eliminate Section 100.1 because Section 303(v) of the Communications Act makes clear that the Commission has exclusive jurisdiction

⁴⁸ 47 U.S.C. § 100.1.

over the regulation of direct-to-home satellite services, including DBS.⁴⁹ We also propose removing Section 25.109(b) which cross-references Part 25 readers to Part 100 for the DBS service rules.⁵⁰ We believe these changes will eliminate outmoded references to interim DBS rules and systems and duplication of descriptions in the Commission's regulatory authority.⁵¹ We seek comment on these proposals.

19. *Definitions § 100.3.* We propose to move the definition of DBS service from Section 100.3 to a new paragraph in Section 25.201. The definition of DBS in Section 100.3 is identical to that which appears in the ITU Radio Regulations.⁵² We propose amending the definition of DBS to include a reference to the frequencies used by the DBS service in order to distinguish application of the DBS rules from the rules for other satellite services in Part 25, including DTH-FSS. We believe that DBS should continue to be defined as a specific service, just as other satellite services are defined separately in Part 25, such as the service rules for the non-voice, non-geostationary mobile-satellite service (Little LEOs) and the fixed-satellite service in the 20/30 GHz bands (Ka-band).⁵³ We seek comment on our proposal to move and amend the current definition of DBS.

20. *Eligibility and Foreign Ownership § 100.11.* Section 100.11 of the Commission's rules addresses foreign ownership limitations relating to DBS and tracks the text of Sections 310(a) and (b) of the Communications Act, which contain limitations on foreign ownership of U.S. radio licenses. Specifically, Section 310(a) prohibits any foreign government from owning any U.S. radio license, and Section 310(b) places specific foreign ownership restrictions on broadcast and common carrier licenses.⁵⁴ Section 100.11(b) incorporates the language from Sections 310(a) and (b) of the Communications Act.⁵⁵ We propose to move

⁴⁹ Telecommunications Act of 1996 (P.L. 104-104, Feb. 8, 1996, 110 Stat. 56) § 205(b). *See also* Part 25 Authority.

⁵⁰ 47 C.F.R. § 25.109(b).

⁵¹ 47 C.F.R. § 100.1(b).

⁵² ITU Radio Regulations, Pt. A, Ch. 1, Article 1, Sec. II (3.18). The ITU Radio Regulations, however, refer to DBS as the Broadcast Satellite Service.

⁵³ 47 C.F.R. §§ 25.142 and 25.145, respectively.

⁵⁴ 47 U.S.C. § 310. The foreign ownership limitations in Section 310(b) also apply to aeronautical en route and aeronautical fixed radio station licenses. 47 U.S.C. § 310(b).

⁵⁵ Section 100.11 provides:

An authorization for operation of a station in the Direct Broadcast Satellite Service shall not be granted

the existing Section 100.11, verbatim, into a new Section 25.146(a), which will apply only to DBS licensees. Our proposal to move Section 100.11 into Part 25 would neither change the foreign ownership rules currently applicable to the DBS service nor create new rules for DTH-FSS. Unlike Part 100, Part 25 does not currently have specific rules limiting foreign ownership. Part 25 licensees, including DTH-FSS licensees, nevertheless remain subject to the statutory limits established in Sections 310(a) and (b). Because the foreign investment limits in Section 310(b) apply to broadcast and common carrier licensees, Part 25 licensees that do not operate as broadcasters or common carriers, as is generally the case, are not subject to the foreign ownership restrictions contained in Section 310(b).

21. The applicability of Section 100.11 to subscription DBS was addressed in 1996 by the International Bureau in its decision relating to the grant of a DBS license to MCI Telecommunications Corporation.⁵⁶ In granting MCI the right to construct, launch and operate a DBS system using 28 channels at 110°W.L., the Bureau held that, because MCI's DBS authority was for subscription (*i.e.*, non-broadcast) video satellite service, Section 310(b) of the Communications Act did not apply.⁵⁷ The Bureau noted that the Commission's intent in adopting Section 100.11 was simply to codify the restrictions of Section 310 of the Communications Act rather than to establish foreign ownership restrictions

to or held by:

- (a) Any alien or the representative of any alien;
- (b) Any foreign government or the representative thereof;
- (c) Any corporation organized under the laws of any foreign government;
- (d) Any corporation of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country;
- (e) Any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representatives thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

⁵⁶ *MCI Telecommunications Corporation, Application for Authority to Construct, Launch and Operate a Direct Broadcast Satellite System at 110°W.L.* (Order), DA 96-1793 (1996) (*MCI Order*). An Application for Review of the Bureau's *MCI Order*, filed by the National Association for Better Broadcasting, is pending before the Commission.

⁵⁷ *MCI Order* at ¶ 27.

independent of those contained in Section 310.⁵⁸ The Bureau therefore held that Section 100.11 does not apply to subscription DBS. In the event that the Commission affirms the Bureau's decision in the *MCI Order*, we seek comment on whether the Commission should modify its DBS eligibility rules such that the foreign ownership limitations currently located in Section 100.11 would apply to subscription DBS providers. In addition, we seek comment on whether foreign ownership limitations similar to those in Section 100.11 should apply to DTH-FSS provided on a subscription basis. We note that the Executive Branch has asked the Commission to conduct a rulemaking on whether and how foreign ownership restrictions should be applied to subscription services offered from U.S.-licensed satellites.⁵⁹

22. *Application requirements § 100.13.* We propose to eliminate the DBS-specific application requirements of Section 100.13. Instead, we propose to adopt the application, processing, and licensing requirements of Part 25 for DBS services, including new FCC Form 312, where applicable.⁶⁰ We also propose not to apply the financial requirements of Section 25.140, that now apply to FSS and other Part 25 satellite services, to DBS applications. The competitive bidding process we use to resolve mutually exclusive DBS applications achieves the same goal as the financial qualifications requirements of Section 25.140, namely, assigning spectrum to those most likely to make efficient use of it.

23. We propose to standardize the DBS application process by eliminating the "narrative" format prescribed in Section 100.13. Instead, we intend to apply the same application procedures to the DBS service that we apply to other satellite services under Part 25, subpart B. Specifically, DBS applicants will be required to provide all relevant information requested by Form 312 for space and earth stations. We also seek comment on whether DBS applicants should supply any additional technical information that is not required by Section 25.114. The Commission must notify the International Telecommunication Union and provide certain information regarding each DBS system prior to implementation at an assigned orbital location.⁶¹ We discuss these information requirements below in Section III.B.

24. *Licensing procedures § 100.15.* The existing Part 100 licensing procedures for DBS systems involve multiple steps, including the 45-day public notice and competing

⁵⁸ *Id.* at ¶ 23.

⁵⁹ See Letter to Hon. Reed E. Hundt, from Amb. Vonya McCann (Dept. of State), Hon. Larry Irving (Dept. of Commerce), and Amb. Jeffrey Lang (USTR), dated May 5, 1997.

⁶⁰ See *Part 25 Streamlining Order* (modifying Part 25 of the Commission's rules and regulations regarding satellite earth and space station licensing and adopting a new application form, FCC Form 312).

⁶¹ See ITU Radio Regulations, Appendix S30, art. 5.

application cut-off periods in Section 100.15. These procedures can delay the DBS licensing process and are unduly burdensome. They are also inconsistent with the Commission's licensing practices for fixed and mobile satellite systems. We therefore propose to eliminate the separate DBS licensing procedures in Section 100.15 and apply existing Part 25 licensing provisions to DBS space and earth station applications.⁶² In addition, we propose to streamline the DBS licensing phase by adopting a one-step licensing process that consolidates the grant of construction permit, authorization of launch, and licensing of space station facilities into a single procedure. We propose that once an authorization is granted we should license the authorized entity through system operation, establishing construction, launch, and system operation deadlines in accordance with our due diligence rules. Based on our experience regulating the DBS service, we believe this will eliminate uncertainty and streamline the DBS application and licensing processes by reducing the number of separate authorizations required from three to one. We also believe eliminating separate authorizations will permit licensees to develop business plans with greater certainty because they will not have to submit applications and seek Commission approval for intermediate implementation milestones. We seek comment on these proposals and whether they permit adequate opportunities for the public to comment on DBS authorizations.

25. *License term § 100.17.* The current license terms for DBS licensees, established under the 1995 *DBS Auction Order*, is ten years for non-broadcast licenses and five years for broadcast.⁶³ Since the issuance of the *DBS Auction Order*, Congress has changed the maximum term for broadcast licenses from five to eight years.⁶⁴ Therefore, to conform our rules to the license terms contained in the Communications Act, we propose to adopt an eight year license for DBS broadcast licensees, although we note that to date no DBS licensee has chosen to be licensed as a broadcaster. We propose to add Section 25.146(b) to include ten-year license terms for non-broadcast DBS and eight-year license terms for broadcast DBS licensees. We seek comment on this proposal.

26. *Due diligence § 100.19.* We propose to move the DBS due diligence rules from Section 100.19 to a new Section 25.146(c). We intend to continue to apply the existing due diligence rules to DBS permittees and licensees. Thus, DBS licensees will continue to submit annual progress reports on system implementation pursuant to existing Section 25.210(l). We request commenters' views on what, if any, further actions we should take to

⁶² See Part 25, Subpart B.

⁶³ The Commission extended DBS license terms in the 1995 *DBS Auction Order* in recognition of the fact that today's satellites enjoy longer in-orbit lifespans than their predecessors. *DBS Auction Order* at ¶ 130.

⁶⁴ 47 U.S.C. § 307(c)(1).

monitor system implementation, including, for example, requiring interim implementation certifications or whether we should eliminate or modify any of the existing due diligence rules. We do not propose applying the DBS due diligence rules to other satellite service licensees. We note that in the past we have not ordinarily adopted general rules regarding satellite construction milestones for other fixed-satellite services in light of the differences in system implementation plans among the many services covered by Part 25. The Commission has, however, used its general licensing authority to condition Part 25 licenses on a service-by-service basis.⁶⁵

27. *Technical requirements § 100.21.* In incorporating the DBS rules into Part 25, we propose to apply many of the general technical requirements for satellite services to DBS service.⁶⁶ We address specific questions related to the technical rules applicable to the DBS service below in Section III.B.⁶⁷

28. *Equal employment opportunities § 100.51.* The Commission first established equal employment opportunity (EEO) rules for the DBS service in 1982 and codified these rules in Section 100.51(a)-(d).⁶⁸ In 1987, the Commission held that the DBS EEO rules "apply only to those DBS entities which would operate as broadcasters."⁶⁹ The effect of this holding was to limit the applicability of the Part 100 EEO rules to DBS operators licensed as broadcasters and render them inapplicable to subscription DBS services. As discussed *supra* in Section II, no DBS operator to date has chosen to be licensed as a broadcaster; all have chosen to be licensed as providers of subscription services.

29. In 1992, Congress instructed the Commission to revise its EEO rules for MVPD providers by enacting Section 22 of the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act).⁷⁰ The Commission fulfilled its mandate by

⁶⁵ More recently, we have adopted specific satellite construction milestone requirements for the satellite digital audio radio service (SDARS) and the fixed-satellite service in the 20/30 GHz Bands (Ka-band). See 47 C.F.R. §§ 25.144(b), 25.145(f), respectively.

⁶⁶ See Part 25, Subparts B, C, and D (Applications and Licenses, Technical Requirements, and Technical Operations).

⁶⁷ See *infra* Section III.B.

⁶⁸ DBS Order at ¶ 102.

⁶⁹ *Subscription Video*. This decision was affirmed in National Assoc. for Better Broadcasting v. FCC, 849 F.2d 665 (D.C. Cir. 1988).

⁷⁰ Pub. L. No. 102-385, 106 Stat. 1460 (1992). 47 U.S.C. § 554.

amending Parts 25 and 100, among others, to render multi-channel DTH-FSS and DBS licensees subject to the revised EEO requirements of Part 76.⁷¹ The two sections added -- Sections 25.601 and 100.51(e) -- contain identical language.⁷² In addition, the Commission specifically included DBS operators within the scope of Part 76's EEO requirements.⁷³ The effect of these provisions is to make both subscription DBS and DTH-FSS providers subject to the Part 76 EEO requirements.

30. DBS broadcasters, on the other hand, continue to be subject to the pre-existing requirements in Section 100.51(a)-(d), which are based on the EEO rules that were applicable to terrestrial broadcasters at the time the section was drafted in 1982.⁷⁴ Since 1982, the Commission has amended the Part 73 EEO requirements applicable to radio and television broadcasters, but it did not amend the DBS EEO provisions of Section 100.51(a)-(d).⁷⁵ In order to apply the same requirements to DBS broadcasters (should a DBS operator choose to be so licensed in the future) as other broadcasters, we propose applying the revised Part 73 EEO Rule to DBS licensees who operate as broadcasters.

31. We therefore propose to eliminate subsections (a)-(d) of Section 100.51 and amend Section 25.601 to require DBS licensees operating as broadcasters to be subject to the broadcast EEO provisions of Part 73. We also propose to eliminate Section 100.53(e) and to amend Section 25.601 to add nonbroadcast DBS to the existing language covering DTH-FSS. We seek comment on this proposal.

32. *Geographic service requirements § 100.53.* In its *DBS Auction Order*, the Commission created geographic service obligations for Alaska and Hawaii. In that order, the Commission adopted DBS service rules requiring DBS licensees granted authorizations after January 19, 1996 to provide service to Alaska and Hawaii upon commencement of operations,

⁷¹ *Implementation of Section 22 of the Cable Television Consumer Protection and Competition Act of 1992: Equal Employment Opportunities* (Report and Order), 8 FCC Rcd 5389 (1993).

⁷² Section 25.601 states that "an entity that uses an owned or leased fixed satellite service facility (operating under this part) to provide more than one channel of video programming directly to the public must comply with the equal employment opportunity requirements set forth in part 76, subchapter E of this chapter, if such entity exercises control (as defined in part 76, subpart E of this chapter) over the video programming it distributes." Section 100.51(e) replaces the words "fixed satellite service" with the word "DBS".

⁷³ 47 C.F.R. § 76.71.

⁷⁴ *DBS Order* at ¶ 102.

⁷⁵ 52 FR 26682, July 16, 1987, as amended at 58 FR 42249, Aug. 9, 1993.

where technically feasible.⁷⁶ The Commission also adopted a rule in the *DBS Auction Order* that requires DBS licensees who were granted their authorizations prior to January 19, 1996, to relinquish their DBS channel assignments at the 175°W.L., 166°W.L., 157°W.L., and 148°W.L. orbital locations (the "western channels") if they do not serve Alaska and Hawaii before the expiration of their current authorizations.⁷⁷ Since January 1996, the Commission has granted authorizations for three DBS service providers -- MCI, EchoStar, and Tempo -- to operate at orbital locations that can serve Alaska and Hawaii and conditioned those licenses on the requirement that the licensees provide service to those states.⁷⁸ All three licensees have made clear to the Commission that they will comply with this condition and provide service to Alaska and Hawaii.

33. We propose to move the DBS geographic service requirements from section 100.53 to a new section 25.146(d). We believe that the provision of service to Alaska and Hawaii will provide important MVPD competition in these markets. Hence, we propose to continue to apply the rule in Section 100.53(b) that all DBS licensees granted authorizations after January 19, 1996 must provide service to Alaska and Hawaii where technically feasible. In addition, we seek to clarify that this rule will apply to licensees who were granted their authorizations prior to January 19, 1996 and who request extensions of time or renewal of their licenses. In the *DBS Auction Order*, we noted that service to Alaska and Hawaii is technically feasible from the 110° W.L. and 119° W.L. orbital locations, as well as the four western orbital locations.⁷⁹ We have not had an occasion yet to rule whether service to Alaska and Hawaii from the 101° W.L. or 61.5° W.L. orbital locations is technically feasible.

34. We note that Section 100.53(b) applies only to Alaska and Hawaii. We seek comment on whether we should adopt similar measures to promote the provision of service to Puerto Rico and other U.S. territories and possessions. Further, the State of Hawaii has asked that we consider adopting an "off-shore states" policy when awarding DBS channels in the eastern orbital positions.⁸⁰ This policy would require licensees of DBS channels at eastern orbital positions to demonstrate that they have provided service to the states of Alaska and Hawaii before they would be eligible to provide service from any eastern DBS channel

⁷⁶ 47 C.F.R. § 100.53(b).

⁷⁷ 47 C.F.R. § 100.53(a).

⁷⁸ See *MCI Communications*, DA 96-2165 (1996) at ¶ 6, *EchoStar*, DA 96-2164 (1996) at ¶ 5, *Tempo Satellite*, DA 97-355 (1997) at ¶¶ 5, 35.

⁷⁹ *DBS Auction Order* at ¶ 128.

⁸⁰ Letter to Chris Murphy, Attorney-Advisor, Satellite Policy Branch, from David Nall, Squire, Sanders & Dempsey, counsel for the State of Hawaii, dated April 23, 1997.

assignments beyond their existing assignments. We seek comment on this proposal and ask if there are other steps the Commission should take to ensure delivery of service to Alaska, Hawaii, and Puerto Rico, as well as other U.S. territories and possessions.

35. While we propose to move Section 100.53(b) to new Section 25.146(d), we propose to delete Section 100.53(a). Section 100.53(a) is unclear and potentially runs counter to the Commission's purposes. We are concerned that Section 100.53(a), which requires licensees to relinquish their western channels if they do not provide service to Alaska or Hawaii before the end of their current authorizations, could be misinterpreted as permitting DBS licensees with eastern orbital locations to maintain their authorizations at western orbital locations, even if they do not provide service from such western channels. The intent of Section 100.53 was to ensure that DBS licensees provide service to Alaska and Hawaii, where it is technically feasible for them to do so. We believe that Section 100.53(b) accomplishes this goal.

36. By contrast, Section 100.53(a) could be interpreted to permit warehousing of western channels by a licensee that is operating from an eastern orbital location. The warehousing of western channels would frustrate the Commission's goals of ensuring efficient use of spectrum resources and promoting service to Alaska and Hawaii. Under one interpretation of Section 100.53(a), an entity holding authorizations for both eastern and western channels might argue that its western channel authorization would remain valid during its ten-year license term for its eastern channels even if it were not using its western channels. Its argument might be that, pursuant to Section 100.53(a), it would not need to relinquish its western channels unless and until its ten-year license expired and it had not provided service to Alaska and Hawaii. If a licensee originally received authorization for eastern and western channels at the same time, such a licensee could, under this interpretation of Section 100.53(a), argue that it could maintain its authorization for its western channels for up to 16 years (6 years to launch and operate its satellite at its eastern channels plus the ten-year operating license term) even if during such time it never used its western channels. This clearly was not the purpose of the original rule. The western channels provide valuable capacity for service to Alaska and Hawaii, and our policies should encourage use of these channels. Even if a licensee does provide service to Alaska or Hawaii from its eastern channels, it serves no purpose to allow such a licensee to warehouse its channels at its western orbital location(s) simply because its eastern channels are serving Alaska and Hawaii. If a licensee fails to put its western channels into service by the expiration of its authorization for these channels, we will reclaim those channels and auction them to an entity that is prepared to put them into use.

37. *Auction rules § 100.71-100.80.* The Commission's authority to select DBS

licensees through competitive bidding is derived from §309(j) of the Communications Act.⁸¹ In its *DBS Auction Order*, consistent with the Communications Act, the Commission determined that mutually exclusive applications to provide DBS service would be subject to competitive bidding.⁸² In December 1997, the Commission revised Part 1 of its rules and established general auction rules (General Auction Rules) that are applicable to all auctionable services, unless the Commission determines otherwise.⁸³ Previously, each service subject to competitive bidding (such as paging, cellular, and DBS) had service-specific auction rules. In establishing the General Auction Rules, the Commission did not amend Part 100. We now propose to eliminate the DBS-specific auction rules in Part 100 and rely on the General Auction Rules in Part 1. We believe that the General Auction Rules provide enough flexibility to allow the Wireless Telecommunications Bureau to design future auctions for the DBS service according to the needs of the service, and we seek comment on whether DBS has service-specific issues that warrant the establishment of rules different from the General Auction Rules.

38. We propose to move Section 100.71, which establishes the auction authority for DBS, to Part 25 and create a new Section 25.146(e). We propose to eliminate all other Part 100 auction rules. In so doing, we propose to amend Section 100.71 as follows:

§ 25.146(e) *DBS Subject to Competitive Bidding.* Mutually exclusive initial applications to provide DBS service are subject to competitive bidding procedures. The general competitive bidding procedures found in part 1, subpart Q of this chapter, will apply unless otherwise provided in this part. Once a winning bidder has made its down payment, the Commission will use the long-form satellite service application (*i.e.*, FCC Form 312) pursuant to the application, processing, and licensing provisions of part 25, subpart B, where applicable. When there is no mutual exclusivity for DBS channels offered for assignment, the Commission will process applications pursuant to the application, processing, and licensing provisions of part 25, subpart B, where applicable.

⁸¹ 47 U.S.C. §309(j).

⁸² 47 C.F.R. § 100.71. The Commission based its decision in the *DBS Auction Order* principally on the unique characteristics of the DBS service, and in particular, the fact that DBS orbital locations are assigned to the United States by the ITU's international BSS plan. *DBS Auction Order* at ¶165. The Commission's authority to auction the DBS channels was upheld in *DirectTV, Inc. v. F.C.C.* in 1997. *DBS Auction Order, aff'd, DirectTV, Inc. v. F.C.C.*, 110 F.3d 816 (D.C.Cir. 1997).

⁸³ The Commission recently modified the General Auction Rules. *Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures* (Report and Order), WT Dkt. No. 97-82, ET Dkt. No. 94-32, FCC 97-413 (rel. december 31, 1997)(*General Auction Rules Order*).

At the same time, we propose to eliminate the Part 100 auction rules (§§100.72 - .80) because we believe they are no longer necessary in light of the Part 1 General Auction Rules and the proposed Section 25.146(e) above. As we stated in the recently released *General Auction Rules Order*, "[o]ur Part 1 rules will apply to all auctionable services, unless we determine that with regard to particular matters the adoption of service-specific rules is warranted."⁸⁴

39. In the *General Auction Rules Order*, the Commission determined that it would evaluate each auctionable service to determine if service-specific rules are required, including whether designated entity provisions are appropriate for particular services.⁸⁵ The Commission has previously explained that the determination of whether a particular service ought to employ designated entity provisions, and if so what type of provisions, would "rest in whole or in part on [its] assessment of the available opportunities in, and characteristics of, a specific spectrum-based service."⁸⁶ We seek comment on whether we should establish designated entity provisions for future DBS auctions and, if so, what designated entity provisions would be appropriate.

40. We note that in the 1995 *DBS Auction Order*, the Commission declined to adopt provisions for designated entities for the auction of the channels at the 110° W.L. and 148° W.L. orbital locations.⁸⁷ The Commission stated, however, that having "designated entity provisions for future DBS auctions may be appropriate, particularly if we auction spectrum in small blocks."⁸⁸ Commenters who favor the adoption of designated entity provisions for DBS should discuss whether we should establish generic designated entity provisions applicable to all future DBS auctions or whether we should adopt designated entity provisions on a case-by-case basis, depending on the number of channels available at a given auction.

⁸⁴ *General Auction Rules Order* at ¶ 5. We also stated that we would "adopt service-specific auction procedures where we find that our general competitive bidding procedures are inappropriate" in response to concerns raised in the proceeding by Hughes Electronic Corporation. *Id.* at ¶ 12.

⁸⁵ *Id.* at ¶ 5.

⁸⁶ See *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding* (Report and Order), 9 FCC Rcd 2348, 2391 (1994).

⁸⁷ *DBS Auction Order* at ¶ 217.

⁸⁸ *Id.*

41. The following chart provides a general comparison, for reference only, of the Part 100 auction rules with the relevant General Auction Rules in Part 1.

Auction Rules Comparison Chart

| | Part 1 | Part 100 |
|---------------------------|------------------|-----------------|
| Auction Design | § 1.2103 | § 100.72 |
| Acct. Mechanism | § 1.2104 | § 100.73 |
| Bidder Eligibility | § 1.2105 | § 100.75 |
| Upfront Payments | § 1.2106 | § 100.76 |
| Winner Licensing | § 1.2107, 8, & 9 | § 100.78 |
| Anti-Collusion | § 1.2105(c) | § 100.79 |
| Default | § 1.2109 | § 100.74, 78 |
| Assign or Transfer | § 1.2111 | § 100.80 |

42. We seek comment on the few differences between the auction rules contained in Parts 1 and 100 and whether these differences should be maintained. For example, the transfer disclosure requirements for Section 100.80 have a six-year disclosure period while the General Auction Rules have a three-year disclosure period in Section 1.2111. We seek comment more generally on whether DBS has service-specific issues that warrant the establishment of rules different from the General Auction Rules.

B. Technical Matters

43. In this section, we seek comment on revisions to our current technical rules for DBS in order to ensure that the rules reflect today's technology and to promote maximum technical flexibility for licensees. Our current technical requirements were adopted in 1982 and were intended only to be interim.⁸⁹ Certain aspects of these interim rules are no longer valid today. For example, Section 100.21 requires DBS systems to operate in accordance with the spectrum sharing criteria and technical characteristics adopted in the Final Acts of the

⁸⁹ DBS Order at ¶ 1.

World Administrative Radio Conference in 1977 (WARC-77).⁹⁰ The ITU Radio Regulations, which the Final Acts of WARC-77 modified, have been amended by subsequent World Radio Conferences, and Section 100.21 therefore no longer reflects the present ITU Radio Regulations. In addition, Section 100.21 was adopted prior to the ITU's adoption of the BSS and Feeder Link Plans applicable to Region 2, which includes North and South America. We propose to create a new Section 25.146(f) that will require DBS licensees to operate in accordance with ITU Radio Regulations, which are codified in Appendices S30 and S30A of the ITU Radio Regulations. We seek comment on this proposal.

44. Appendices S30 and S30A contain the BSS and Feeder Link Plans, as well as provisions for implementing BSS systems. These Appendices also provide a mechanism for implementing systems whose technical parameters differ from the planned assignments. The United States must initiate a modification to the ITU's BSS and Feeder Link Plans if a US-licensed DBS system that uses parameters different than those specified in the BSS and Feeder Link Plans wishes to receive protection from interference internationally or if it proposes to use an orbital location not assigned to the United States in the ITU Plans.⁹¹ If a licensee successfully completes a Plan modification, the actual parameters of the licensee's system will be included in the Plans, and it will be protected both from subsequent modifications to the Plans and from other services sharing the bands. Until a system is included in the Plans, it must not cause harmful interference to, and will not receive protection from, other services or from other assignments that conform with the Plans.

45. Under the ITU Radio Regulations, an administration whose proposed DBS system exceeds the technical limits in Annex 1⁹² to Appendices S30 and S30A, for instance by altering the satellite beam coverage area, must seek the agreement of the administrations whose Plan assignments or other networks are affected by the proposed modification.⁹³ The Commission has received at least one application for a DBS system that does not meet the

⁹⁰ At WARC-77, the BSS Plan for Regions 1 and 3 was created and adopted. The Final Acts of WARC-77 set out the orbital slots and channel assignments for each country in Regions 1 and 3 and discuss the technical parameters used in establishing the BSS Plan (see Annex 8 of the Final Acts). In addition, the Final Acts contain provisions for "modifying" the BSS Plan, *i.e.*, implementing systems using technical parameters that differ from those specified in Annex 8 to the Final Acts. The Final Acts also include interim procedures for implementing BSS space stations in Region 2, prior to the planning of BSS for that Region. Subsequently at WARC-85, updated when the Region 2 Plans were adopted. These updated procedures were not included in our rules.

⁹¹ See ITU Radio Regulations, Appendix S30 and S30A, Article 4.1.

⁹² Annex 1 to Appendices S30 and S30A contains coordination thresholds that must be met by proposed systems or such systems must coordinate with affected systems.

⁹³ See ITU Radio Regulations, Appendix S30 and S30A, Annex 1.