limits specified in Annex 1.[94] In other satellite services, the United States regularly coordinates satellite systems, and we believe that coordination is also appropriate for the DBS service. We believe it will be possible to obtain approval from affected administration(s) for DBS systems proposed by our licensees that exceed the technical limits contained in Annex 1. Accordingly, we propose to delete the current provisions in Section 100.21 which prohibit applicants from exceeding the technical limits in Annex 1 and to consider systems that exceed such limits, if there are reasonable assurances that the agreement of the affected administration(s) can be obtained.[95] We seek comment on this proposal.

46. We also propose to adopt a new Section 25.111(c) that would explicitly state the information that licensees will need to provide if they seek a modification of the current ITU Plans. To initiate a modification of the Plans, the United States must submit to the ITU Radiocommunication Bureau the information requested in Annex 2 to Appendices S30 and S30A of the ITU Radio Regulations.[96] The submission of the transmit and receive, co-polarized and cross-polarized, satellite antenna gain contours should be made electronically, according to the format specified by ITU Circular.[97] To allow the Commission to determine the impact of the proposed system on existing Plan assignments and other services and to fulfill ITU requirements, applicants will have to submit an analysis demonstrating whether they exceed the limits specified in Annex 1 to Appendices S30 and S30A.[98] For tracking, telemetry and control operations for DBS systems, the United States must submit Appendix 4 and Appendix S4 information to advance publish and notify the ITU Radiocommunication Bureau of the frequencies that will be used by the DBS system. The ITU Radiocommunication Bureau requests the electronic submission of Appendix S4 information.[99] We propose to require that DBS applicants submit all the necessary ITU information outlined above and submit the Appendix S4 information in electronic form, and we seek comment on

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[94] *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).

[95] *E.g.*, if it is shown in an FCC application that the effect on the foreign system(s) is negligible.

[96] *See* ITU Radio Regulations, Appendices S30 and S30A, Annex 2 (lists the basic characteristics to be furnished in notices relating to space stations in the broadcasting-satellite service).

[97] *See* ITU's Circular Letter C/58, dated October 21, 1996 (*Circular Letter C/58*).

[98] When attempting to modify the Plans, an Administration must submit to the ITU the names of administrations who are affected by the proposed modification, or state that the limits in Annex 1 are not exceeded. *See* Section 4.3.5.1 of Appendix S30 and Section 4.2.6.1 of Appendix S30A.

[99] *See Circular Letter C/58.*

this proposal.

47. We also seek comment on whether we need to develop regulations to supplement those specified in Appendices S30 and S30A of the ITU Radio Regulations. For example, the DBS systems that operate in the United States use technical parameters that differ from the parameters on which the Region 2 Plans were developed.[100] United States DBS systems use digital modulation techniques instead of analog, have lower downlink effective isotropically radiated power (EIRP), and have extended the original intended service area delineated by the radio frequency beams of the Plans. In addition, the operational DBS systems typically use larger feeder link transmit earth station antennas than described in the Plans and have implemented receive earth station antennas with smaller diameters than assumed during the creation of the Plans.[101] In light of these differing system parameters, which may not have been foreseen during the development of the international Radio Regulations, we seek comment on whether referencing Appendices S30 and S30A in the Commission's rules adequately specifies the technical requirements for DBS systems.

48. *Coordination among licensees at the same orbital location.* The Commission has assigned different DBS channels at the same orbital position to different entities. The close proximity of satellites located at the same orbital location can lead to uplink interference between adjacent channels, especially if the earth station transmit EIRPs are not similar. Appendix S30A states that a space station may be located anywhere within 0.2 degrees of the assigned orbital location,[102] as long as the agreement of other administrations with channel assignments at the same orbital location is obtained. Such provisions do not address the domestic issue of different channels at the same location assigned to different licensees. We often need to coordinate among licensees, and we intend to apply our policy of requiring licensees at the same orbital location to coordinate among themselves to arrive at a mutually acceptable solution to any potential or existing interference between their operations. We seek comment on this issue. In addition, we propose extending to DBS licensees the requirement in Section 25.272(a) that satellite licensees establish a network control center to monitor and coordinate space station activities.[103] We seek comment on this proposal.

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[100] ITU Radio Regulations, Appendices S30 and S30A contain provisions for "modifying" the Plans in order to include systems in the Plan that use different technical parameters.

[101] The Commission has submitted these technical modifications of the Plans to the ITU Radiocommunication Bureau in accordance with Article 4 of Appendices S30 and S30A.

[102] *E.g.*, for the orbital position of 110° W.L., any location between 109.8° W.L. and 110.2° W.L.

[103] *See* proposed modified rule § 25.272. This rules establishes general inter-system coordination procedures.

49. *Interference protection.* We seek comment on whether the implementation of DBS systems with technical parameters substantially different than those anticipated in the BSS Plans could result in harmful interference to other systems. For example, the Region 2 BSS Plan was created assuming receive earth stations with parabolic reflector antennas with diameters of 1 meter with a corresponding half-power beamwidth of 1.7° and the antenna reference pattern specified in Appendix S30 of the ITU Radio Regulations.[104] In the United States, receive earth stations with offset feed antennas as small as 45 centimeters in diameter have been widely implemented. Such receive earth station antennas have a half-power beamwidth of approximately 3.7°. In addition, the ratio between maximum gain and side-lobe discrimination decreases as the antenna dimensions decrease, thus decreasing the overall carrier-to-interference ratio. We are concerned that U.S.-licensed DBS systems receive sufficient interference protection and seek to ensure that subscribers' receive antennas will work effectively in today's and the future's potential radio frequency interference environment. At the 1997 World Radiocommunication Conference (WRC-97),[105] certain administrations supported proposals to protect DBS systems only to the technical parameters on which the Plans were based, including a receive earth station antenna of one meter in diameter, regardless of the parameters actually implemented. These proposals were not adopted by WRC-97, but the same issues may arise again in the future.

50. The Commission is committed to allowing systems to maximize their technical flexibility and service quality and recognizes that earth station receive antenna size is a very important factor to potential consumers of DBS service. We are aware that our technical rules need to take into account the fact that non-U.S. satellite systems using their Plan assignments to serve the U.S. could result in smaller satellite spacing than the current nine degree spacing between U.S. DBS orbital slots. In addition, WRC-97 adopted an allocation for non-geostationary (NGSO)-FSS in the BSS bands at 12 GHz, thereby raising the prospect of sharing between DBS and NGSO-FSS systems.[106] The Commission has received

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[104] The reference pattern used is given in Figure 8 of Annex 5 to Appendix S30.

[105] WRC-97 began October 27, 1997 and ended November 21, 1997.

[106] This includes the 12.2 - 12.7 GHz band in Region 2, 11.7 - 12.5 GHz in Region 1 and 11.7 - 12.2 GHz in Region 3. *See* Final Acts of WRC-97, Geneva, 1997, Footnote S5.487A. Resolution 532 (WRC-97) established provisional power flux density limits to protect GSO BSS systems from NGSO-FSS systems. *See* Final Acts of WRC-97, Geneva, 1997, In addition, the ITU set up a joint task group between several of its study groups (JTG 4-9-11) to review these provisional limits, as well as others to protect the FSS and terrestrial services from NGSO-FSS, in the next two years. The U.S. has established a domestic group (U.S. JTG 4-9-11) to prepare for the international meetings of the JTG 4-9-11. *See Public Notice*, Department of State, issued by Warren Richards (rel. December 15, 1997).

applications for NGSO-FSS satellite systems to operate in these bands.[107] Use of DBS frequencies by NGSO-FSS systems should not have a significant impact on the regulation of DBS and is, therefore, not the focus of this rulemaking. Such issues will be fully considered in future rulemakings. However, commenters and DBS service providers should be aware of and take into consideration the potential for such use in the future.

51. We request comment on whether the Commission should afford interference protection to DBS systems only to the extent that they meet certain receive antenna performance standards. Specifically, we request comment on what type of regulation would be appropriate, such as adopting side-lobe suppression or minimum gain requirements or perhaps requiring the system to have a minimum overall carrier-to-interference ratio. We note that, in implementing its two degree spacing policy with respect to the FSS, the Commission has adopted certain uplink and downlink power density requirements and earth station antenna performance requirements.[108]

52. *Tracking, Telemetry and Control.* The ITU's Radio Regulations do not specifically address tracking, telemetry and control (TT&C) frequencies for DBS systems.[109] A number of applications have requested to use C or Ku-band FSS frequencies for on-station TT&C functions.[110] More recently, applicants have requested to use C or Ku-band frequencies only for emergency or transfer orbit TT&C functions.[111] They have indicated that more world-wide facilities are available for transfer orbit operations in the various FSS bands than the DBS band. Use of FSS frequencies (*e.g.*, C and Ku-band) functions for DBS systems is generally not consistent with the international Table of Frequency Allocations, nor with the Commission's general requirements for performing TT&C functions in the same band as the service band.[112] Further, the use of C and Ku-band FSS allocations for TT&C functions at

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[107] *See Application of SkyBridge L.L.C. for Authority to Launch and Operate The SkyBridge System* (File Nos. 48-SAT-P/LA-97 and 89-SAT-AMEND-97); SkyBridge's *Petition for Rulemaking* (RM No. 9147); *Application of Denali Telecom, LLC for Authority to Launch and Operate the Pentriad Highly Elliptical Orbit Satellite System* (File No. 160-SAT-P/LA-97).

[108] *See* 47 C.F.R §§ 25.134 and 25.209.

[109] *See* § 25.201 (individual definitions for space telecommand, space telemetering, and space tracking).

[110] C-band refers to frequencies in the range 3700 MHz - 4200 MHz and 5925 MHz - 6425 MHz. Ku-band refers to frequencies in the range 11.7 GHz - 12.2 GHz and 14.0 GHz - 14.5 GHz. These frequencies are the primary bands used for FSS services.

[111] *See MCI Order*; *Application of EchoStar DBS Corporation for Authority to Construct, Launch and Operate a Direct Broadcast Satellite System at 148°W.L.*, DA 96-2164 (1996) at ¶ 4.

[112] *See* 47 C.F.R. § 25.202(g).

certain orbital locations is not in conformance with the C and Ku-band tri-lateral agreement between the United States, Canada and Mexico, and could cause harmful interference to U.S. licensees in other services in these FSS bands.[113] We propose requiring that licensees perform TT&C functions in-band in the DBS service band, such as within available guardbands. Applying Section 25.202(g) of the Commission's rules to DBS systems would accomplish this goal. We seek comment on this proposal.

53. *Feeder Link Earth Station Coordination with Terrestrial Services in the U.S.* A portion of the feeder link spectrum in the United States is also shared with terrestrial services, specifically, 17.7 - 17.8 GHz. Currently, there are no FCC rules that explicitly address sharing between these services.[114] In practice, the Commission's policy has been to require that applicants follow the general earth station coordination requirements contained in Part 25.[115] Sharing between terrestrial services and DBS feeder link earth stations has not been a problem in the past, and the limited number of feeder link earth stations facilitates sharing. For coordination between feeder link earth stations and terrestrial stations, we propose to continue to apply the coordination requirements currently in Part 25. These earth station coordination requirements, however, generally apply to commercial operations. U.S. Government coordination may also be required, and this will continue to be conducted through the normal inter-agency process.

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[113] *See* "Trilateral Agreement Regarding Use of The Geostationary Orbit Reached by Canada,Mexico and The United States," *Public Notice*, dated September 2, 1988.

[114] We note that there is an ongoing rulemaking regarding satellite and terrestrial use of these bands throughout the 17.7-20.2 GHz band. *See Routine Licensing of Large Numbers of Small Antenna Earth Stations Operating in the Ka Band* (Petition for Rulemaking), RM No. 9005, filed Dec. 23, 1996.

[115] Feeder links to BSS are in an FSS allocation. It is consistent to regulate BSS feeder link earth stations in the same manner as other FSS earth stations.

C. DBS Ownership

54. *Introduction.* DBS and DTH-FSS combined account for the second largest number of subscribers within the MVPD market, accounting for 9.8%[116] of the market as compared to cable's 87%.[117] Unlike other video service providers such as broadcast television and cable, however, DBS satellite operators and providers have never been subject to national limits on audience or subscriber reach, or cross-ownership restrictions with other MVPDs such as cable systems.[118]

55. When DBS service was first authorized in 1984, the Commission did not impose ownership restrictions on DBS systems.[119] Congress, however, did consider whether to impose a cable/DBS cross-ownership restriction as part of the 1992 Cable Act. Legislation introduced in the Senate included a cable DBS cross-ownership limitation.[120] The House and

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[116] This figure includes 7.2 million subscribers to DBS, DTH-FSS, and C-band reported as of June 1997 data. *1997 Report* at Appendix E, Table E-1.

[117] *Id.*

[118] In contrast, to encourage competition and a diversity of voices, market structure rules have been adopted for many services that distribute video programming to consumers. For example, current rules prohibit the owner of a group of TV stations from serving more than 35 percent of nationwide TV households, 47 C.F.R. § 73.3555; restrict the ownership of more than one TV station in a local area, 47 C.F.R. § 73.3555 ; prohibit the ownership of a TV station whose signal overlaps with a local cable system, 47 C.F.R. § 76.501; prohibit the ownership of a TV station and a local daily newspaper in the same community, 47 C.F. R. § 73.3555; and prohibit the ownership of MMDS (or wireless cable systems) by cable systems in their franchise area, 47 C.F.R. § 21.912. A currently stayed rule prohibits any person from reaching, through owned or attributed cable systems, more than 30% of all homes passed nationwide by cable. 47 C.F.R. § 76.503.

We note, however, that pursuant to the Telecommunications Act of 1996, we recently repealed all national ownership limits on radio broadcast stations and relaxed local radio broadcast station ownership limits. *Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996 (Broadcast Radio Ownership)*(Order), FCC 96-90 (1996). There are also pending rulemaking dockets in which questions have been raised concerning whether the local TV ownership rules should be relaxed. Congress repealed the statutory ban on cable/TV station cross-ownership in 1996. There are no restrictions on DBS/television station cross-ownership.

[119] *DBS Order* at 711-713.

[120] The specific language stated that:

> If ten percent of the households in the United States with television sets subscribe to any one service provided by multichannel video programming distributors directly via satellite to home satellite antennae, the Commission shall promulgate appropriate regulations (A) limiting ownership of any such

Senate Conference decided, however, that, because "there [were] no DBS systems operating in the United States at [the] time, it would [have been] premature to require the adoption of limitations" at that time.[121] The conferees stated that they expected "the Commission to exercise its existing authority to adopt such limitations should it be determined that such limitations would serve the public interest."[122]

56. The sole ownership limitation the Commission has applied to date has been with respect to the auction of the 110° W.L. and the 148° W.L. DBS orbital positions. In the *DBS Auction Order*, the Commission adopted a "one-time" restriction concerning DBS ownership.[123] The rule required divestiture within one year by a successful bidder for the 110° W.L. orbital position of any attributable interest in any channels at either of the other two orbital positions capable of serving the entire continental U.S., the two "full-CONUS" locations (119° W.L. or 101° W.L. orbital locations).[124] The rule was meant to prevent any one entity from having attributable interests in more than one of the three DBS full-CONUS locations.[125] The Commission did not adopt a general cable/DBS cross ownership limitation, but observed in the *DBS Auction Order* that its authority to approve transfers of control of licenses would enable it to address any competitive concerns raised by subsequent proposals by cable affiliated entities to acquire DBS spectrum.[126]

57. The *1997 Competition Report* found that incumbent franchised cable systems continue to be the dominant distributors of multichannel video programming.[127] Although the

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distributor by cable operators and (B) requiring access to such satellite service by unaffiliated video programmers.

H.R. Conf. Rep. No. 102-862, 102d Cong., 2d Sess. (1992).

[121] *Id.*

[122] *Id.*

[123] *DBS Auction Order* at ¶ 28.

[124] *Id.* at ¶ 85-97.

[125] We found that a one-time auction rule would "encourage entry of another full-CONUS DBS service and will essentially ensure that each of the three full-CONUS orbital locations will initially be controlled by entities that do not share interests with DBS operators at the other two locations." *Id.* at ¶ 54.

[126] *Id.* at ¶ 76.

[127] *1997 Report* at ¶ 11.

share of non-cable MVPD subscribers, especially DBS, continues to rise, cable subscribers still account for 87% of all MVPD subscribers nationally, while DBS, the second-largest MVPD, accounts for only 9.8% of national MVPD customers.[128] Moreover, local markets for the delivery of multichannel video programming remain highly concentrated. Vertical integration of national programming services by cable operators has declined slightly, with approximately 40% of national programming services remaining vertically integrated with cable systems.[129] The December 1997 *Report on Cable Industry Prices* found that cable systems that do not face "effective competition" charged higher prices than cable systems that do face effective competition.[130] It found that the average monthly charge for cable system programming services and equipment rose 8.5% between July 1996 and July 1997.[131] Thus, an important issue is whether DBS can act as a sufficient competitive alternative to cable systems to have a restraining effect on cable rates.

58. Given the status of competition in the MVPD market, we seek comment on whether it is preferable to continue to address specific competition and public interest concerns related to DBS ownership on a case-by-case basis, or whether it may now be appropriate to consider adopting rules governing DBS ownership and cross-ownership with other entities.[132] On the one hand, a continued case-by-case approach would maintain our longstanding commitment to a flexible regulatory structure for DBS service, and would not prejudice our ability to address specific cases based on the facts in existence at any particular time. It would also take into account any changes in the structure of the MVPD market. On the other hand, a formal rule may provide greater predictability and consistency and avoid the need to address specific ownership questions on an individual basis in licensing proceedings, with attendant costs to both the applicant and the Commission. We seek comment on these

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[128] *Id.*

[129] *Id.*

[130] *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992* (Report on Cable Industry Prices), MM Dkt. No. 92-266, FCC 97-409 (rel. December 15, 1997) at ¶ 4-5.

[131] *Id.* at ¶ 28. This percentage represents the increase in the average monthly rate for the noncompetitive group of cable systems.

[132] We note that the Commission has before it two applications from Primestar Partners, a group of large cable MSOs that also have ownership interests in a number of national cable programming services. As part of one application, Primestar seeks to acquire control of Tempo, 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. As part of the second application, Primestar proposes to acquire certain assets from MCI which includes a DBS license for 28 channels at 110° W.L.

general considerations, and any specific attributes of DBS which suggest that one approach may be preferable to the other.

59. In order to consider whether it may be desirable for the Commission to adopt any new rules concerning DBS horizontal ownership or cross-ownership, we seek comment on the product and geographic markets in which DBS systems compete. Information on the structure of horizontal ownership can suggest the extent to which there is competition in the provision of program distribution.

60. *Product Market.* We seek comment on the relevant product market[133] in which DBS systems compete for customers, and specifically whether they should be considered to compete in a DBS market, a satellite DTH market, or a more broadly defined MVPD market.[134] We note that we concluded in the *1995 DBS Auction Order* that the relevant product market for DBS systems is the MVPD market.[135] Moreover, the *1997 Competition Report* states that it is appropriate to use an MVPD market definition and the report analyzes an MVPD market in which, among other program distribution providers, cable and DBS compete.[136]

61. Assuming that DBS competes in an MVPD market, what, if any, kinds of DBS ownership patterns raise competitive concerns? Are there any non-ownership relationships, such as leasing arrangements, that ought to raise competitive concerns? Since cable systems currently have the largest share of MVPD viewers,[137] should we be primarily concerned about ownership by cable companies of other MVPD providers such as DBS, and therefore should

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[133] The concept of the relevant market is an antitrust concept and "is an important first step in assessing whether a firm has market power, *i.e.*, 'the power to control market prices and exclude competition.'" Economic theory and antitrust case law "define the relevant product market by analyzing the degree to which products or services are 'reasonably interchangeable by consumers for the same purposes.'" *1994 Report* at ¶¶ 38-40.

[134] In this notice we use the term "DBS" to refer to high power direct to home satellite systems currently regulated under Part 100 of our rules. We note, however, that the *1997 Competition Report* includes medium power fixed satellite service direct-to-home satellite within its definition of DBS. *1997 Report* at ¶ 54.

[135] *DBS Auction Order* at ¶ 36.

[136] *1997 Report* at ¶ 123.

[137] *Id.* at ¶ 4.

we adopt specific restrictions on DBS/cable cross-ownership?[138] If so, what kinds of restrictions would be appropriate? For example, should there be a flat ban on cross-ownership of a DBS system by any cable system? If not, should we impose a rule that limits cross-ownership for cable operators with large market shares? Should such a limit be based on potential subscribers or actual penetration of the commonly owned services?[139]

62. If DBS is considered part of a broader MVPD market, and particularly if the Commission were to adopt a DBS/cable cross-ownership rule, is there a reason to be additionally concerned if any one DBS system controls more than a certain aggregate number of channels or more than a single DBS orbital position, especially a full-CONUS orbital position? For example, is it important that MVPD viewers have the option of choosing among several competing DBS systems?

63. Is it possible, for example, that the operation of several independently owned DBS systems could lead to a decline in the prices charged for DBS installation and service, and thus allow DBS to become a more significant competitor to cable systems? If so, does this suggest that there should be a ban on ownership of more than one DBS full-CONUS orbital position, regardless of whether a DBS operator has any cable or other MVPD interests? Should the three full-CONUS DBS positions allocated to the United States be analyzed differently from DTH-FSS positions that might be capable of reaching the entire continental U.S.? In considering rules regarding the control of DBS full-CONUS positions, how, if at all, should we take account of foreign-licensed satellites that are authorized to provide DBS service into the U.S.?[140]

64. *Geographic Market.* The scope of the geographic market for a service "is defined by the geographic area to which buyers can reasonably turn or from which competing

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[138] It should be noted that the term "cross-ownership" is usually used to describe ownership of firms providing two different but related services or products, *e.g.*, "TV/newspaper cross-ownership." In this Notice we discuss DBS/cable cross-ownership even while noting that DBS and cable both compete in the provision of video distribution services in a broad MVPD market.

[139] In connection with its reconsideration of *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992* (Second Report and Order) in MM Docket No. 92-264, 8 FCC Rcd 8565 (1993), the Commission will consider whether any limitation on the number of national subscribers any cable system can reach should take into account ownership of other MVPD systems.

[140] As noted above, the United States has reached an agreement with Mexico to allow DBS and DTH-FSS satellites licensed by either country to provide service into each other's territory. Also, as stated in the Commission's *DISCO II* order, foreign-licensed satellites will be able to provide DBS and DTH-FSS in the U.S. if the country licensing the satellite in question offers effective competitive opportunities to U.S.-licensed satellites in its home market. *DISCO II* at ¶ 98.

suppliers are likely to sell."[141] The geographic scope of the market for DBS, at least, appears to be national, if not international, because the signals received from an individual DBS system cover all of the continental U.S., in the case of the 3 full-CONUS positions, and most of the U.S in the case of other U.S. assigned orbital locations. As we concluded, however, in our *1995 Competition Report* and reiterated in our *1996* and *1997 Competition Reports*, the relevant geographic scope of the MVPD market for the provision of service to consumers is more appropriately a local market defined by the overlap of the "footprints" of the various service providers.[142] A consumer views video programs at only one location at any given time (whether at home, an office, a hotel or some other public place). From the point of view of consumers, therefore, video programs available in another city have no direct relevance to their viewing choices. To a consumer located in Washington, D.C., the number of competitive services available to that consumer is unaffected by the number of choices available in New York City, New York, or in Des Moines, Iowa. We request comment on this analysis and what effect the limitations imposed by the Satellite Home Viewing Act[143] on DBS providers' marketing efforts have on defining the local geographic market.

65. In summary, we request comment on the appropriate product and geographic markets in which DBS systems compete and whether it would be desirable, as a means of promoting competition in the MVPD market generally, and the DBS market specifically, to adopt explicit DBS ownership restrictions.

IV. CONCLUSION

66. It is our goal to promote competition in the MVPD market generally, and we therefore seek to make DBS and DTH-FSS more competitive services by streamlining and clarifying the rules for all types of direct-to-home system operators. We also seek to implement a common sense regulatory approach by eliminating unnecessary rules and streamlining Commission regulation of the direct-to-home satellite market. At the same time, we seek to promote efficient and expeditious use of spectrum and orbital resources and to create a competitive MVPD marketplace for the benefit of the subscribing community on a national and international basis. It is with these fundamental objectives in mind that we propose the above-stated amendments. We request comment on these issues and proposals, and encourage all interested parties to participate in the resolution of this matter.

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[141] *1994 Report* at ¶ 40.

[142] *1997 Report* at ¶ 124.

[143] Satellite Home Viewing Act, 17 U.S.C. § 119.

V. PROCEDURAL MATTERS

A. *Ex Parte* Presentations

67. This is a non-restricted (*i.e.*, permit-but-disclose) notice-and-comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, 1.1206.

B. Initial Regulatory Flexibility Analysis

68. Pursuant to the Regulatory Flexibility Act of 1990, 5 U.S.C. §§ 601–612, (RFA) as amended by the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847, the Commission's Initial Regulatory Flexibility Analysis with respect to this Notice of Proposed Rulemaking is as follows:

1. Reason for Action: This Notice of Proposed Rulemaking (NPRM) proposes to streamline and harmonize the Commission's direct broadcast satellite (DBS) service rules. We propose to incorporate the DBS rules into Part 25, the satellite communications part of the Commission's rules. We do not envision that the relocation of the DBS service rules will substantially alter the licensing provisions for the DBS service rules under current Part 100. The DBS service was initially developed in 1982 with the promulgation of "interim" rules. *DBS Order*, 90 FCC2d 676 (1982). Since 1994, DBS licensees have begun to provide service into the United States. We believe that the "interim" rules are outmoded with respect to the application and licensing procedures and the technical parameters for existing systems. Consistent with our goals of regulating services subject to our jurisdiction in a common-sense manner and promoting competition, this rulemaking seeks to streamline and simplify the Commission's rules governing the DBS service by applying a unified Form 312 for DBS space and earth stations. For instance, we propose to eliminate the Part 100 rules (Sections 100.72-.80) which govern DBS auctions and to regulate DBS auctions under the General Auction Rules contained in Part 1, subpart Q. In proposing to incorporate certain Part 100 rules into Part 25, we highlight two 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 whether we should modify those rules in the event the Commission affirms the International Bureau's decision in the *MCI Order* and whether similar restrictions should apply to DTH-FSS. We also seek comment on how we can strengthen our rules regarding the provision of DBS service to Alaska and Hawaii. 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 DBS or MVPD markets.

2. Objectives: The objective of this proceeding is to streamline the DBS service rules and harmonize the regulation of the DBS service with other satellite services, where appropriate. While incorporating the DBS rules into Part 25, the location of the other satellite communications service rules, we seek comment on relocation of the foreign ownership rules of Section 100.11; further measures we could take to promote service to Alaska and Hawaii; comments on proposals to update the DBS technical rules; and comment on whether to adopt rules to address issues related to concentration in the multi-channel video programming distribution market. We believe that adoption of the proposed rules will reduce regulatory burdens and, with minimal disruption to existing permittees and licensees, result in the continued development of DBS and other satellite services to the public.

3. Legal Basis: This Notice of Proposed Rulemaking is adopted pursuant to Sections 1, 4(i), 303(r), 303(v), 307, 309(a), 309(j), 310 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 303(r), 303(v), 307, 309(a), 309(j), 310, and 5 U.S.C. Section 553 of the Administrative Procedures Act.

4. Description and Estimate of Small Entities Subject to the Rules: The Commission has not developed a definition of small entities applicable to geostationary or non-geostationary orbit fixed-satellite or direct broadcast satellite service applicants or licensees. Therefore, the applicable definition of small entity is the definition under the Small Business Administration (SBA) rules applicable to Communications Services, Not Elsewhere Classified. This definition provides that a small entity is one with $11.0 million or less in annual receipts.[144] According to Census Bureau data, there are 848 firms that fall under the category of Communications Services, Not Elsewhere Classified which could potentially fall into the DBS category. Of those, approximately 775 reported annual receipts of $11 million or less and qualify as small entities.[145] The rules proposed in this Notice apply only to entities providing DBS service. Small businesses do not have the financial ability to become DBS licensees because of the high implementation costs associated with satellite services. Since this is an established service, however, with limited spectrum and orbital resources for assignment, we estimate that no more than 15 entities will be Commission licensees providing these services. Therefore, because of the high implementation costs and the limited spectrum resources, we do not believe that small entities will be impacted by this rulemaking.

5. Reporting, Recordkeeping, and Other Compliance Requirements: The proposed action in this Notice would affect those entities applying for DBS construction

[144] 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4899.

[145] U.S. Bureau of Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications, Utilities, UC92-S-1, Subject Series, Establishment and Firm Size, Table 2D, Employment Size of Firms: 1992, SIC Code 4899 (issued May 1995).

permits and licenses and those applying to participate in auctions of DBS spectrum in the future. In the case where there is not any mutual exclusivity, applicants will be required to follow the recently streamlined application procedures of Part 25 for space and earth station licenses by submitting the information required by Form 312, where applicable. In the case where there is mutual exclusivity between applicants for DBS authorizations, the competitive bidding rules of Part 1 will be used to determine the licensee. Applicants will have to comply with the requirement to file a short-form (FCC Form 175). Completion of short-form FCC Form 175 to participate in an auction is not estimated to be a significant economic burden for these entities. The action proposed will also affect auction winners in that it will require them to submit a long Form 312 application for authorization. This process will be required by all DBS applicants whether selected through the competitive bidding process or not.

6. Federal Rules that Overlap, Duplicate or Conflict with These Proposed Requirements: None. One of the main objectives of the Notice is to eliminate any existing overlap or duplication of rules between the DBS and other satellite services.

7. Any Significant alternatives minimizing impact on small entities and consistent with stated objectives: In developing the proposals contained in this Notice, we have attempted to minimize the burdens on all entities in order to allow maximum participation in the DBS market while achieving our other objectives. We seek comment on the impact of our proposals on small entities and on any possible alternatives that could minimize the impact of our rules on small entities. In particular, we seek comment on alternatives to the reporting, recordkeeping, and other compliance requirements discussed above.

8. Comments are solicited: Written comments are requested on this Initial Regulatory Flexibility Analysis. These comments must be filed in accordance with the same filing deadlines set for comments on the other issues in this Notice of Proposed Rulemaking, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall send a copy of this Notice to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act.

C. Initial Paperwork Reduction Act of 1995 Analysis

69. This Notice of Proposed Rulemaking contains either a proposed or a modified information collection. As part of our continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to comment on the information collections contained in this Notice, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due April 6, 1998. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the

information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

D. Comment Filing Procedures

70. Comments and reply comments should be captioned using the docket number in this proceeding only. Pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before April 6, 1998 and reply comments on or before April 21, 1998. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. Please note, however, that comments and reply comments may be filed electronically, as described below. If you want each Commissioner to receive a personal copy of your comments, you must file an original and nine copies. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554, with a copy to Christopher J. Murphy of the International Bureau, 2000 M Street, N.W., Suite 500, Washington, D.C. 20554. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Services, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, 1919 M Street, N.W., Room 239, Washington, D.C. Parties are also encouraged to file a copy of all pleadings on a 3.5-inch diskette in WordPerfect 5.1 format.

71. Written comments by the public on the proposed and/or modified information collections are due on or before April 6, 1998. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, DC 20554, or via the Internet to jboley@fcc.gov.

72. For purposes of this proceeding, we hereby waive those provisions of our rules that require formal comments to be filed on paper, and encourage parties to file comments electronically. Electronically filed comments that conform to the guidelines of this section will be considered part of the record in this proceeding and accorded the same treatment as comments filed on paper pursuant to our rules. To file electronic comments in this proceeding, you must use the electronic filing interface available on the FCC's World Wide Web site at <http://dettifoss.fcc.gov:8080/cgi-bin/ws.exe/beta/ecfs/upload.hts>. Further information on the process of submitting comments electronically is available at that location and at <http://www.fcc.gov/e-file/>.

E. Ordering Clauses

73. Accordingly, IT IS ORDERED that, pursuant to the authority contained in Sections 1, 4(i), 303(r), 303(v), 307, 309(a), and 310 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 303(r), 303(v), 307, 309(a), 310, this NOTICE IS HEREBY GIVEN of our intent to adopt the policies set forth in this Notice and that COMMENT IS SOUGHT on all proposals in this Notice.

74. IT IS ORDERED that the Office of Public Affairs, Reference Operations Division, shall send a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et. seq.* (1981).

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary

Appendix A

Proposed Commission Rule Amendments

Proposed Amendments to 47 CFR Part 25 and removal of Part 100 of the Commission's Rules:

1.Remove § 25.109(b).

2.Amend § 25.111 to add paragraph (c) to read as follows:

§ 25.111 Additional information.

* * * * *

(c) In the Direct Broadcast Satellite service, applicants, permittees and licensees shall also provide the Commission with all information it requires in order to modify the Appendix S30 Broadcasting-Satellite Service (BSS) Plans and associated Appendix S30A feeder link Plans, if the system uses technical characteristics differing from those specified in the Appendix S30 BSS Plans, the Appendix S30A feeder link Plans, Annex 5 to Appendix S30 or Annex 3 to Appendix S30A. For such systems, no protection from interference caused by radio stations authorized by other Administrations is guaranteed until the agreement of all affected Administrations is obtained and the modified frequency assignment becomes a part of the Plans. Authorizations for which coordination is not completed and/or for which the necessary agreements under Appendices S30 and S30A have not been obtained may be subject to additional terms and conditions as required to effect coordination or obtain the agreement of other Administrations.

3.Amend § 25.114 to add paragraph (c)(22) to read as follows:

§ 25.114 Applications for space station authorizations.

* * * * *

(22) If the proposed DBS system's technical characteristics differ from those specified in the Appendix S30 BSS Plans, the Appendix S30A feeder link Plans, Annex 5 to Appendix S30 or Annex 3 to Appendix S30A, each applicant shall provide:

(i) the information requested in Annex 2 to Appendices S30 and S30A of the ITU's Radio Regulations. Further, applicants shall provide sufficient technical showing that the proposed system could operate satisfactorily if all assignments in the BSS and feeder link Plans were

implemented.

(ii) analyses of the proposed system with respect to the limits in Annex 1 to Appendices S30 and S30A.

* * * * *

4. Add § 25.146 to subpart B to read as follows:

§ 25.146 Licensing Provisions for the Direct Broadcast Satellite Service.

(a) DBS eligibility and foreign ownership. An authorization for operation of a station in the Direct Broadcast Satellite Service shall not be granted to or held by:

(1) Any alien or the representative of any alien;
(2) Any foreign government or the representative thereof;
(3) Any corporation organized under the laws of any foreign government;
(4) 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;
(5) 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.

(b) License terms. Licenses for non-broadcast DBS facilities will be issued for a period of ten (10) years. Licenses for broadcast DBS facilities will be issued for a period of eight (8) years.

(c) Due diligence. (1) All persons granted DBS authorizations shall proceed with due diligence in constructing DBS systems. Permittees shall be required to complete contracting for construction of the satellite station(s) within one year of the grant of the authorization. The satellite stations shall also be required to be in operation within six years of the authorization grant.
(2) In addition to the requirements stated in paragraph (1) of this section, all persons who receive new or additional DBS authorizations after January 19, 1996 shall complete construction of the first satellite in their respective DBS systems within four year of grant of the authorization. All satellite stations in such a DBS system shall be in operation within six years of the grant of the authorization.
(3) DBS licensees shall be required to proceed consistent with all applicable due diligence

obligations, unless otherwise determined by the Commission upon proper showing in any particular case. Transfer of control of the authorization shall not be considered to justify extension of these deadlines.

(d) Geographic service requirements. Those entities acquiring, extending, or renewing DBS authorizations after January 19, 1996 must provide DBS service to Alaska and Hawaii where such service is technically feasible from the authorized orbital location.

(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.

(f) Technical qualifications. DBS operations must be in accordance with the sharing criteria and technical characteristics contained in Appendices S30 and S30A of the ITU's Radio Regulations. Operation of systems using differing technical characteristics may be permitted, with adequate technical showing, if a request has been made to the ITU to modify the appropriate Plans to include the system's technical parameters. Until the system completes the Appendices S30 and S30A, Article 4, modification procedures and becomes a part of the Plans, the operation cannot cause harmful interference to assignments that conform to the Plans or other services sharing the same frequency bands, nor can it receive protection from assignments that conform with the Plans or other services sharing the same frequency bands.

5. Amend § 25.201 by adding the definition "Direct broadcast satellite service" to read as follows:

§25.201 Definitions.

* * * * *

Direct broadcast satellite service. A radio communication service in which signals transmitted or retransmitted by space stations, using frequencies specified in section 25.202(a)(7), are intended for direct reception by the general public. In the Direct Broadcast Satellite Service the term direct reception shall encompass both individual reception and community reception.

* * * * *

6. Amend § 25.202 to revise the table in paragraph (a)(1) and add paragraph (a)(7) to read as follows:

§ 25.202 Frequencies, frequency tolerance and emission limitations.

* * * * *

Space-to-Earth	Earth-to-Space
3700-4200 MHz[1]	5925-6425 MHz[1]
10.95-11.2 GHz[1]	13.75-14.0 GHz[4]
11.45-11.7 GHz[2]	14.0-14.2 GHz[5]
11.7-12.2 GHz[3]	14.2-14.5 GHz
17.7-19.7 GHz[1]	17.3-17.8 GHz[6]
19.7-20.0 GHz	27.5-29.5 GHz[1]
	29.5-30.0 GHz

* * * * *

[6]Use of this band is limited to feeder links for the Direct Broadcast Satellite service.

* * * * *

(a)(7) The following frequencies are available for use by the Direct Broadcast Satellite service:

12.2 - 12.7 GHz: space-to-Earth.

7. Revise § 25.272 to read as follows:

§ 25.272 General inter-system coordination procedures.

(a) Each space station licensee in the Fixed-Satellite Service or Direct Broadcast Satellite Service shall establish a satellite network control center which will have the responsibility to monitor space-to-Earth transmissions in its system and to coordinate transmissions in its satellite system with those of other systems to prevent harmful interference incidents or, in the event of a harmful interference incident, to identify the source of the interference and correct

the problem promptly.

* * * * *

8. Revise § 25.601 to read as follows:

§ 25.601 Equal employment opportunity requirement.

Notwithstanding other EEO provisions within these rules, an entity that uses an owned or leased fixed-satellite service or direct broadcast 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, subpart 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. Notwithstanding other EEO provisions within these rules, a licensee or permittee of a direct broadcast satellite station licensed as a broadcaster must comply with the equal employment opportunity requirements set forth in part 73.

9. Remove Part 100.

SEPARATE STATEMENT OF COMMISSIONER HAROLD W. FURCHTGOTT-ROTH
DISSENTING IN PART

Re: Policies and Rules for the Direct Broadcast Service -- Notice of Proposed Rulemaking

The rule making proceeding we initiate today has a laudable goal: "to streamline and simplify the Commission's rules governing the direct broadcast satellite service." Despite its deregulatory tone, however, the Commission herein considers adopting new cross-ownership regulations that would be unnecessary and likely would prove burdensome to consumers and industry. Accordingly, I dissent in part.

There is no need for a general rule that has such extremely limited and distant applicability. We will not be presented DBS cross-ownership issues thousands, hundreds, or even tens of times. By virtue of the limited number of DBS orbital slots, such rules could be applied only a handful of times. Adopting a general rule would require us to predict the future and make hypothetical policy judgments; yet a thorough analysis of specific situations as they arise would take little, if any, additional time. To the extent we consider DBS cross-ownership issues, we should do so only on a case-by-case basis.

In addition, we simply should not consider adopting rules that easily could impose significant burdens on consumers and industry in the context of a rulemaking proceeding that "seeks to streamline and simplify the Commission's rules."

* * * * * * *

STATEMENT OF COMMISSIONER MICHAEL K. POWELL APPROVING IN PART, DISSENTING IN PART

Re: Policies and Rules for the Direct Broadcast Satellite Service, IB Docket No. 98-21

I fully support the decision to streamline and simplify the Commission's rules governing the direct broadcast satellite (DBS) service. I believe it should be the constant task of this agency to examine our rules so that we can eliminate those that are not necessary. Because I believe such consolidation will improve our regulation, I am voting to approve that portion of the Notice.

Having said this, there is one disturbing island in this sea of words about deregulation and efficiency. The item invites us to consider imposing more regulation in the form of a DBS/cable cross-ownership rule. On what basis? The answer we are given is a hypothetical string of assumptions that suggest the need for further regulatory action: cable rates are high, DBS is the best potential competitor to cable, cable ownership of DBS systems might substantially reduce competition, so maybe we need a blanket rule banning such combinations. Why so? We are not without authority to examine such horizontal combinations when they are proposed. We can conduct classic antitrust analysis to consider possible anticompetitive effects and we have the public interest standard which we can apply on a case-by-case basis. Additionally, we are not the only agency with power and expertise to act in this area. The Department of Justice has adequate authority and an admirable record in evaluating and blocking anticompetitive combinations.

There might be cause for considering a rule if we were seeing numerous cable/DBS combinations, and if we were seeing anticompetitive effects, and if we saw that our existing powers were insufficient to address these problems. But that is not the case. Moreover, we will have the chance to evaluate competitive issues in the context of the Primestar merger, where we will have the benefit of real facts and a real record on which to think through these issues and to test the adequacy of our existing authority. Although the series of questions proposed in the item appear to be balanced, they have the air of a solution in search of a problem.

It may prove true that horizontal combinations among DBS and cable providers limit competition in the MVPD market. So may many other things such as program access restrictions. Indeed, the issue of MVPD competition presents broader questions that should be evaluated comprehensively and not in tiny pieces scattered here and there among orders that have very little to do with the subject. Rather, that inquiry should be posed in the context of a comprehensive inquiry into ways in which the Commission can promote more competition in that market.

In other circumstances, I might agree with my colleagues that it would be best to initiate a rulemaking proceeding where we can solicit broader input. It is my view, however, because we have a case before us that will provide better information to inform our judgment, that this is not a propitious time to begin this inquiry. I respectfully dissent from this portion of the item.