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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In re	)	
	)	
Policies and Rules for the	)	
Direct Broadcast Satellite Service	)	IB Docket No. 98-21

COMMENTS OF PRIMESTAR, INC.

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COMMENTS OF PRIMESTAR, INC.

PRIMESTAR, Inc., by its attorneys, submit these Comments in the above-referenced proceeding.[1]

I. INTRODUCTION AND SUMMARY.

Since its inception in 1990, PRIMESTAR -- which originally was formed as a partnership and recently rolled up into a corporation -- has been a trailblazer in the DTH satellite industry. PRIMESTAR's medium power DTH-FSS service began in 1990 with an offering of 11 video and 9 audio channels. In fact, PRIMESTAR was the first provider to offer DTH service to dishes that were smaller than the then-standard 10 to 12 feet dishes needed to receive C-band service.

Since 1990, PRIMESTAR has invested substantial sums to remain on the cutting edge of DTH. It has upgraded and expanded its service offerings whenever technological advancements made it possible. In 1994, PRIMESTAR was the first DTH provider to convert its service from analog to digital, which permitted it to compress its signals and offer even more video channels to

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[1] In re Policies and Rules for the Direct Broadcast Satellite Service, Notice of Proposed Rulemaking, IB Docket No. 98-21, FCC 98-26 (February 26, 1998) ("Notice").

consumers. By 1996, PRIMESTAR was providing 95 channels. In 1997, PRIMESTAR transitioned to a new satellite and began offering consumers a total of 160 channels with laser-disc quality video and CD-quality sound.

From its inception, PRIMESTAR also has brought the otherwise expensive DTH service within the reach of most consumers by offering a "nothing to buy" arrangement, whereby consumers rent equipment -- rather than buying it -- and pay for their equipment and service on a monthly basis. In addition, PRIMESTAR has developed an innovative program navigation interface that categorizes programming by subject matter in a user-friendly format.

The value consumers place upon PRIMESTAR's service indicates that its efforts to provide a quality, consumer-friendly service have been successful. PRIMESTAR currently delivers medium power DTH-FSS service to approximately 2.0 million subscribers, and PRIMESTAR's service was recently recognized in the J.D. Power and Associates Second Annual 1997 Cable/Satellite TV Customer Satisfaction Study as the highest ranking provider in the United States of all cable and satellite providers.[2]

As the Commission is aware, PRIMESTAR has an application pending which requests the Commission to approve the assignment of MCI's DBS authorization for 28 transponders at 110 degrees W.L. to PRIMESTAR LHC, Inc., a wholly-owned subsidiary of

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[2] J.D. Power and Associates 1997 Cable/Satellite TV Customer Satisfaction Study(sm). Study based on 10,541 satellite/cable TV subscriber responses.

PRIMESTAR.[3] Thus, PRIMESTAR not only has an interest in this rulemaking as a current provider of DTH-FSS service, but as a potential provider of high power DBS service.

PRIMESTAR supports the Commission's effort to reduce the regulatory burden on DBS licensees through the streamlining proposals detailed in the Notice. PRIMESTAR herein offers a number of suggestions for implementing the Commission's streamlining effort. In particular, the Commission should take this opportunity to affirm the International Bureau's determination that Section 310(b) of the Communications Act is inapplicable to DBS services provided on a subscription basis and to clarify its rules accordingly.

However, in the midst of its streamlining effort, the Commission seeks comment on the need for ownership limitations for the DBS service, particularly cable/DBS cross-ownership limitations. For a number of reasons, the Commission should not use its scarce resources to consider ownership issues in the context of a rulemaking proceeding:

- First, given the limited number of orbital locations and frequencies available for DBS service, the question of

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[3] In addition, PRIMESTAR and one of its shareholders, TCI Satellite Entertainment, Inc., have an application pending requesting the Commission to permit TSAT to transfer control of its subsidiary, TEMPO Satellite, Inc., to PRIMESTAR. TEMPO has a DBS authorization for 11 transponders at 119 and 166 degrees W.L. PRIMESTAR has indicated its willingness to divest the 119 authorization should the Commission require its divestiture as a condition to approval of its application to purchase the 110 authorization and related assets.

cable/DBS cross-ownership simply will not be presented often enough to warrant treatment in a rulemaking proceeding.

- Second, given the infrequent need to consider such issues, proceeding on case-by-case basis allows the Commission to development a detailed record and avoids inhibiting or prohibiting transactions that would serve the public interest based on sweeping generalizations that do not bear up to reasonable investigation. The PRIMESTAR transactions are an example of the merits of proceeding on a case-by-case basis.
- Third, adoption of a cable/DBS cross-ownership prohibition depends on a static understanding of satellite technology. However, satellite technology is very dynamic, and recent proposals suggest that the perceived scarcity of space segment capacity available for DBS service may be illusory.
- Finally, the Commission has considered and declined to adopt a cable/DBS cross-ownership rule as recently as 1995. As the facts underlying that decision have only changed for the better, there is no basis for adoption of such a rule now.

II. THE COMMISSION'S PROPOSED STREAMLINING MODIFICATIONS TO ITS DBS CONSTRUCTION AND SERVICE RULES ARE PRESCIENT.

In its Notice, the Commission proposes eliminating Part 100 and incorporating its DBS rules into Part 25. PRIMESTAR agrees with the Commission that the consolidation of the regulation of all satellite services in one Part will reduce confusion and uncertainty for users, lessen the regulatory burdens for licensees, and simplify the development of advanced services.[4]

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[4] See Notice at ¶ 13.

PRIMESTAR believes the Commission's overarching purpose of its streamlining effort should be to maintain the goal it set out in its initial regulation of DBS, that is to "maintain an open and flexible approach that will allow the business judgments of the individual applicants to shape the character of the services offered."[5] Because of this "open and flexible approach", DBS providers have been permitted to develop their services pursuant to market demands; and as a result, DBS services have been embraced by U.S. consumers faster than any other consumer electronic device.[6] While DBS and DTH-FSS providers have been able to gain an impressive number of subscribers in such a short period of time,[7] DBS and DTH-FSS service is far from mature. Thus, in its effort to streamline its DBS rules, the Commission must not lose sight of its overall goal to provide DBS providers the flexibility needed to continue developing their services to meet consumer demand.

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5 In re 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, 698 (1982).

6 See Katie Schuerholz, "Satellites and Broadcasting: A Glimpse of the Future," Via Satellite (April 1997).

7 Monica Hogan, "Demand Remained Strong for DBS in 1997," Multichannel News, Vol. 19, No. 3, at 33 (Jan. 19, 1998) (DBS providers, including PRIMESTAR, have more than 6 million subscribers in total at the end of 1997.).

III. THE COMMISSION SHOULD NEITHER CONSIDER NOR ADOPT CROSS-OWNERSHIP RULES IN THIS PROCEEDING.

A. Consideration Of Cable/DBS Cross-Ownership In The Context Of A Rulemaking Would Not Serve The Public Interest.

PRIMESTAR applauds the Commission's efforts to streamline and reduce the regulatory burden on DBS licensees, and PRIMESTAR notes that these efforts reflect the primary emphasis of the Notice. However, after proposing many changes to reduce regulatory burdens, the Commission goes on to seek comment as to whether generally applicable DBS ownership rules should be adopted in this proceeding. The general thrust of the Commission's discussion of this subject makes clear that cable-DBS cross-ownership is the primary DBS ownership issue with which it is concerned. Specifically, the Commission asks "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."[8] As pointed out by Commissioner Furchtgott-Roth and Commissioner Powell,[9] it is clearly preferable to consider

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[8] Notice at ¶ 58.

[9] See Notice, "Separate Statement of Commissioner Harold Furchtgott-Roth Dissenting in Part," FCC 98-26 ("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. . . . 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.") See

DBS ownership issues, and particularly cable/DBS cross-ownership issues, in the context of specific ownership proposals, rather than through the adoption of a general rule.

To reach this conclusion, the Commission need proceed no further than an examination of the frequency with which the Commission can reasonably be expected to consider ownership proposals that raise cable/DBS cross-ownership issues. Simply put, there are currently three full-CONUS DBS orbital positions, and only eight DBS orbital locations in total.[10] The channel allocations at two of the full-CONUS locations already are substantially in operation, while the balance of the channel assignments at the third full-CONUS location are the subject of a pending assignment application that directly raises the very issues the Commission discusses in the Notice. The issue of cable/DBS cross-ownership simply will not come up often enough to warrant even the consideration of cable/DBS cross-ownership in the context of a generally applicable rule, much less the adoption of such a rule.[11] In these circumstances, providing increased predictability is of limited utility, and the cost to

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also, Notice, "Statement of Commissioner Michael K. Powell Approving in Part, Dissenting in Part," FCC 98-26.

[10] The number of DBS licensees is similarly finite and small. At present, nine companies hold DBS authorizations, two of which (DBSC and Directsat) are affiliated with a third, EchoStar. Six companies hold full-CONUS channel assignments, two of which are affiliates (EchoStar and Directsat).

[11] If, as PRIMESTAR suggests below, the dynamic nature of satellite technology increases the available space segment capacity for the provision of DBS/DTH services, there simply is no basis for concern as to cable/DBS cross-ownership. See Section III(B), infra.

the Commission and interested parties of proceeding on a case-by-case basis is very low.

Indeed, PRIMESTAR is an excellent example of the merits of proceeding on a case-by-case basis. Over the last nine months, the Commission has accumulated a substantial record on the issues presented by cable operators owning an interest in a DBS provider in the context of PRIMESTAR's application to transfer control of TEMPO Satellite, Inc., which holds an authorization for a DBS service at 119 degrees W.L., and PRIMESTAR's application to acquire the authorization for a DBS service at 110 degrees W.L. presently owned by MCI.[12] Detailed economic analysis and legal arguments have been presented on both sides of the issues presented by these applications. Due to the permit-but-disclose ex parte status of those proceedings, interested parties as well as the applicants have had ample opportunity to refine the issues and arguments with the Commission's staff. The Commission simply will not be able to obtain a better record on the merits of the PRIMESTAR transactions than already exists in the Commission's record for those transactions. Thus, given the fact that few cases will be presented to the Commission and the fact that the record for a particular proceeding will be far more informative

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[12] See Application of TCI Satellite Entertainment, Inc. and PRIMESTAR, Inc. For Transfer of Control of TEMPO Satellite, Inc., File No. 91-SAT-TC-97, and Application of MCI Telecommunications Corporation and PRIMESTAR LHC, Inc. For Consent to Assignment of Direct Broadcast Satellite Authorizations, File No. 106-SAT-AL-97 (collectively the "PRIMESTAR Applications").

and complete than would be possible in a rulemaking, it would be wasteful to examine ownership limitations here.

And, it is important to remember that the PRIMESTAR transactions (and any future DBS transactions raising ownership issues) give context to the consideration of the issues raised by the Commission -- the Commission need not find in the context of a specific application that <u>any</u> interest in a DBS provider above a certain threshold should be prohibited or otherwise restrained. Rather, the Commission need merely satisfy itself that the specific ownership interest presented in a given transaction would serve the public interest. As discussed briefly below, the PRIMESTAR transactions have demonstrated at least that ownership limitations based on intuitive predictions about the future behavior of a certain class of entities have no basis. In these circumstances, cross-ownership limitations of general applicability raise the very significant possibility that ownership interests that would in fact serve the public interest are never even considered, to the detriment of the targeted class of potential owners, consumers, and the public. Continuing the Commission's "longstanding commitment to a flexible regulatory structure for DBS service"[13] will ensure that the Commission will have opportunity to approve transactions that serve the public interest. Proceeding to the adoption of a general rule on DBS ownership will only sacrifice beneficial transactions in the name of "predictability."

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[13] Notice at ¶ 58.

B. Adoption Of A Cable/DBS Cross-Ownership Ban Necessarily Presupposes A Static Rather Than A Dynamic View Of Satellite Technology That Is Entirely Contrary To The Record.

The fundamental precepts of a cable/DBS cross-ownership prohibition would appear to be the following: (i) that DBS is the best available alternative to cable service; (ii) that DBS providers owned by investors with substantial interests in cable systems would not use DBS to compete with those systems; and (iii) that the space segment assets available for DBS are extremely scarce, such that if (i) and (ii) above are true, common ownership of cable systems and a DBS service would restrain competition.[14] As noted above, the record of the PRIMESTAR transactions presently before the Commission clearly indicates that the second precept is false. PRIMESTAR has been and is a service that is as competitive with cable as possible, given the disadvantage it faces by competing with comparatively large, medium power dishes.

Similarly, the third precept necessarily and incorrectly assumes that satellite technology and the availability of space segment spectrum is static rather than dynamic. The advancement of technology and market forces will provide additional solutions to the limited number of DBS orbital positions assigned to the U.S. today. Indeed, several facts already suggest alternative satellite space segment assets that may permit the expansion of current DBS systems as well as increase the number of DBS

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[14] PRIMESTAR notes that while DBS may be the best alternative to cable, it certainly is not the only alternative.

licensees and DTH-FSS services that could become available to consumers.

First, as the Commission recognized in its Notice, "the United States has reached agreement with Mexico to permit DBS and DTH-FSS satellites licensed by either country to provide service into each other's territory."[15] Pursuant to the agreement with Mexico, the Commission recently authorized TELEVISA INTERNATIONAL, LLC to operate receive-only earth stations in the U.S. to receive DTH-FSS service from Mexico's Solidaridad II satellite operating at 113 degrees W.L.[16]

In addition to new DBS and DTH-FSS services from Mexico, changes in U.S. government policy could make Canadian DBS and DTH-FSS service available from satellites licensed by Canada. Two applications already were submitted to the Commission which proposed high power DBS service to U.S. consumers from Canadian orbital positions.[17] Permitting Canadian resources to serve the U.S. certainly would increase the potential number of DBS and DTH-FSS providers and services available to U.S. consumers.

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15 Notice at ¶ 11.

16 See In re TELEVISA INTERNATIONAL, LLC Application for Blanket License for Receive-Only Earth Stations in the Fixed Satellite Service for Direct-to-Home Subscription Television Service, File No. 330-DSE-L-97, Call Sign E970096, Order and Authorization, DA 97-1758 (rel. Aug. 18, 1997).

17 See In re Applications of TELQUEST VENTURES, L.L.C. and WESTERN TELE-COMMUNICATIONS, INC. for a License for a Fixed-Satellite Transmit/Receive Earth Station to Communicate with Transponders on a Canadian DBS Satellite, 11 FCC Rcd. 13943 (1996).

Second, DirecTV has proposed adjusting the spacing between high power DBS orbital positions to 4.5 degrees.[18] If such a policy were adopted by the Commission, it would substantially expand the full-CONUS locations available for DBS service in the Ku-band as well as the opportunities for new providers in the DBS service. Third, the Ka-band may be a source of additional capacity for new providers of DTH satellite service.[19] In fact, due to certain characteristics of the Ka-band, substantially more spectrum (approximately 400 megahertz) is effectively available at any one orbital location as compared to the DBS Ku-band spectrum which could permit expanded DTH services as compared to DBS services.

In light of these possibilities alone, consideration of ownership restrictions on DBS and DTH-FSS providers is extremely suspect. Neither the DBS and DTH-FSS services nor technological advancements are static. Rather, they are changing at a rapid pace. Any attempts by the Commission to place artificial

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[18] DirecTV Enterprises, Inc., Petition for Rulemaking, RM No. 9118 (filed June 5, 1997). The current spacing requirement is 9 degrees. In addition, DirecTV filed an application to expand its DBS system should a 4.5 degree spacing policy be adopted for high power DBS orbital positions. DirecTV Enterprises, Inc., Application for Authority to Construct, Launch and Operate an Expansion System of Direct Broadcast Satellites (filed June 5, 1997).

[19] The Ka-band also may permit current high power DBS providers to expand their systems. For example, EchoStar currently has a license for a Ka-band satellite at 121° W.L.[19] and Hughes' (DirecTV's corporate parent) has a license for a Ka-band satellite at 101° W.L. as well as other convenient orbital locations. See In re Hughes Communications Galaxy, Inc., Application for Authority to Construct, Launch, and Operate a Ka-Band Satellite System in the Fixed-Satellite Service, Order and Authorization, DA 97-971 (rel. May 9, 1997).

limitations on these services will restrict these services' ability to develop as demand requires.

C. The Commission Considered And Rejected A Cable/DBS Cross-Ownership Ban In 1995. The Facts Underlying That Decision Have Only Changed For The Better.

As noted by the Commission, the issue of cable/DBS cross-ownership is not a matter of first impression. The issue has been considered and rejected in licensing proceedings,[20] and was most recently considered and rejected in a rulemaking.[21] The Commission rejected such a limitation in December 1995, stating that its one-time auction rule which restricted the ownership interests a firm could have in more than one full-CONUS orbital position obviated the need for a separate spectrum restriction for cable interests.[22] It also noted that at least two other full-CONUS DBS locations would remain which are "largely occupied by independent DBS providers."[23]

Most importantly, the Commission relied upon its findings in Continental Satellite concerning the benefits of cable participation in DBS.[24] In that decision, the Commission

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20 See In re Application of Continental Satellite Corporation, 4 FCC Rcd. 6292, 6299 (1989) ("Continental Satellite").

21 See In re Revision of Rules and Policies for the Direct Broadcast Satellite Service, 11 FCC Rcd. 9712, 9740 (1995) ("DBS Auction Order").

22 DBS Auction Order at 9740. The one-time auction rule required those holding an attributable interest in another full-CONUS DBS slot to divest their interest if they were successful in bidding for the 110° W.L. authorization.

23 Id.

24 Id. (citing Continental Satellite, 4 FCC Rcd. at 6299).

determined that TEMPO's participation in the DBS industry could accelerate the initiation of DBS service and that TEMPO (at that time wholly-owned by TCI) could bring valuable marketplace experience and presence to DBS.[25] The Commission stated that "existing antitrust law and Commission oversight are sufficient to prevent any conduct that is illegal or deleterious to the DBS industry and its customers, or to operators and customers in the other video entertainment distribution industries as well."[26]

It is important to note that the Commission declined to adopt a cable/DBS cross-ownership prohibition over comments filed by the Department of Justice ("DOJ") urging the Commission to adopt such a rule[27] and that even the DOJ admitted that "PRIMESTAR's lower share of cable subscribers in cabled areas may be partially due to the fact that it uses a medium-power satellite technology that requires a larger dish and that is more attractive in non-cabled areas."[28]

Faced with similar concerns in the context of its pending applications to transfer control of TEMPO and to purchase the MCI authorizations, PRIMESTAR commissioned an economic analysis of PRIMESTAR's penetration, among other issues.[29] The Salop/CRA

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25 See Continental Satellite at 6299.

26 Id.

27 See Comments of the United States Department of Justice, IB Docket No. 95-168, PP Docket No. 93-253 (filed November 20, 1995) ("DOJ Comments"); Reply Comments of the United States Department of Justice, IB Docket No. 95-168, PP Docket No. 93-253 (filed November 30, 1995) ("DOJ Reply Comments").

28 DOJ Reply Comments at 10, n.10.

29 See PRIMESTAR Applications, S.C. Salop, S.M. Besen, E.J. Murdoch, and J.R. Woodbury, An Economic Analysis of

Report presented a multiple regression analysis comparing PRIMESTAR's penetration in areas served by PRIMESTAR affiliated cable operators with PRIMESTAR's penetration in areas served by an unaffiliated cable operator. After controlling for urbanization, population density and other factors, the Salop/CRA Report's analysis of PRIMESTAR's penetration does not indicate a systematic effort by PRIMESTAR to avoid competition with the cable systems owned by its MSO owners. As grudgingly acknowledged in the DOJ Reply Comments, the relatively large dish size required to receive PRIMESTAR's current medium power DTH service substantially inhibits PRIMESTAR from marketing its service effectively in urban and suburban areas.[30] The Salop/CRA Report demonstrates that essentially all of the difference in PRIMESTAR's penetration in cabled areas is explained by variables other than PRIMESTAR's ownership -- chiefly urbanization and population density -- variables that suggest strongly that PRIMESTAR's dish size explains the difference in penetration.

Thus, the DOJ's fears simply have not come to fruition; on the contrary, the Commission's recent rejection of a cable/DBS cross-ownership rule and its prediction that cable participation in DBS could be beneficial was prescient. Both before and in the two years since the adoption of the DBS Auction Order, PRIMESTAR

PRIMESTAR's Competitive Behavior and Incentives, (filed January 7, 1998) ("Salop/CRA Report").

[30] Similarly, the Commission acknowledged in the Notice that "earth station receive antenna size is a very important factor to potential consumers of DBS service." Notice at ¶ 50.

has matured in its ability to program, market, and deliver a DTH satellite service that sets the industry standard. PRIMESTAR was the first DTH provider to use digital compression, which enabled it to expand its programming choices to 77 channels in 1994[31] and to 95 channels in 1996.[32] In fact, in 1995 it received an Emmy Award for Outstanding Achievement in Technological Development in the category of "Pioneering Development of Direct-To-Home Digital Satellite Broadcasting".[33] It recently enhanced its service again by adding another 65 channels for a total of 160 channels.[34]

PRIMESTAR also has been an innovator with respect to the marketing of its service, offering a number of attractive options to consumers. PRIMESTAR was the first DTH operator to offer a "nothing to buy" option in which consumers are not required to purchase expensive reception equipment, and PRIMESTAR remains committed to offering that option with its proposed 110° service. PRIMESTAR developed an innovative programming navigation interface that arranges channels into categories or "clusters" of

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31 The Wall Street Journal, March 22, 1994, at B5; "PRIMESTAR to Offer Digitally Transmitted TV Service," The New York Times, March 23, 1994, at D1.

32 See also Comments of PRIMESTAR Partners L.P., CS Docket No. 95-61, at 2 (filed June 30, 1995).

33 See "PRIMESTAR Lauded by National Academy of Television Arts and Sciences for Technological Advances," PR Newswire, p. 1012PH010, Oct. 12, 1995.

34 "PRIMESTAR Packing More Program Punch (PRIMESTAR announces expansion to 160 channels for its direct broadcast satellite TV service)," Cable World, March 3, 1997, v. 9, n. 9, at 1.

similar programming options.[35] PRIMESTAR has also begun offering its subscribers local weather programming, a category of programming very important to consumers.

Because of these achievements, and despite its medium power disadvantage, PRIMESTAR has surpassed the two million subscriber mark.[36] Indeed, PRIMESTAR's efforts have borne fruit in terms of consumer recognition of the overall value of its service. A recent J.D. Power and Associates report found that PRIMESTAR achieved the highest ranking among cable/satellite providers in terms of customer satisfaction.[37]

In sum, PRIMESTAR's track record demonstrates its commitment to the provision of a high quality, competitive DTH service. The Commission's judgment that cable/DBS cross-ownership restrictions are unnecessary was correct in 1995 and it remains correct today. The Commission should not and must not depart from that judgment here.

IV. THE COMMISSION SHOULD TAKE THIS OPPORTUNITY TO AFFIRM THE INTERNATIONAL BUREAU'S INTERPRETATION OF THE DBS FOREIGN OWNERSHIP RULES.

In its Notice, the Commission requests comments, in the event that it affirms the International Bureau's decision in the

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[35] This innovation was hailed by an analyst with the Carmel Group as a "brilliant" consumer move certain to be copied by competitors. See Dinah Zeiger, "PRIMESTAR Satellite Launch Adds 65 Channels," Denver Business Journal, Apr. 18, 1997, at 13A.

[36] The DBS/DTH-FSS (not including C-Band) industry surpassed the 6 million subscriber mark in 1997. See supra n. 7.

[37] Disclaimer: J.D. Power and Associates 1997 Cable/Satellite TV Customer Satisfaction Study[sm]. Study based on 10,541 satellite/cable TV subscriber responses.

MCI Order,[38] on whether it should modify Section 100.11 of its rules so that the Section 310(b) foreign ownership restrictions would apply to subscription DBS providers and in addition, to DTH-FSS service provided on a subscription basis.[39] Not only does PRIMESTAR support the affirmation of the MCI Order, it believes that DTH-FSS service providers should not be subject to foreign ownership restrictions.

In the MCI Order, the International Bureau followed clear precedent decided by the full Commission. Relying upon the Commission's Subscription Video decision, the International Bureau determined that Section 310(b) and 47 C.F.R. § 100.11 do not apply to DBS providers planning to offer service on a non-common carrier subscription basis.[40]

In Subscription Video, the Commission determined that non-common carrier subscription DBS service was significantly different from broadcasting service and, as a result, would not be subject to the "statutory restrictions applicable to 'broadcasters'."[41] In the MCI Order, the Bureau found that, because the Commission only intended to apply the statutory

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38 See In re Application of MCI Telecommunications Corporation, 11 FCC Rcd. 16275 (rel. Dec. 6, 1996) ("MCI Order").

39 See Notice at ¶ 21.

40 See MCI Order at 16283-86.

41 Subscription Video, 2 FCC Rcd. 1001, 1007 App. B (1987), aff'd. sub nom. National Association for Better Broadcasting v. FCC, 849 F.2d 665 (D.C. Cir. 1988) ("NABB").. Specifically, the Commission noted that Sections 312(a)(7) and 315 would not apply to subscription DBS providers. Nevertheless, Congress has now determined those provisions should specifically apply to all DBS providers, including subscription DBS providers by its enactment of Section 335. See 47 U.S.C. § 335(a).

provisions required by the Communications Act, 47 C.F.R. § 100.11 was intended only to regulate broadcast and common carrier DBS providers, not subscription providers.[42] Thus, the Commission should affirm the Bureau's decision.

Moreover, no valid reason has been submitted which would support the adoption of foreign ownership restrictions on subscription DBS or DTH-FSS providers. Indeed, the existence of a Bilateral Agreement with Mexico whereby Mexican DBS and DTH-FSS providers may serve the U.S. strongly suggests that the application of Section 310(b) to U.S. DBS and DTH-FSS providers should be limited to those situations compelled by statute as the Bureau already determined in the MCI Order.

V. THE COMMISSION'S INCORPORATION OF THE DBS SERVICE RULES WILL PROVIDE EFFICIENCIES FOR THE COMMISSION AND ITS SATELLITE LICENSEES.

As described above, PRIMESTAR supports the Commission's efforts to streamline its satellite service rules into one Part. By doing so, the Commission will create efficiencies that will benefit the Commission and its satellite licensees. Following are PRIMESTAR's comments on the individual DBS rules.

Integration Of DBS Technical Rules With ITU Radio Regulations And Related Appendices. PRIMESTAR believes that the Commission's proposals for integrating its DBS technical rules with the ITU Radio Regulations and Appendices S30 and S30A

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[42] In support, the Bureau also cited the U.S. Court of Appeals for the D.C. Circuit's decision affirming the Commission's Subscription Video decision which recognized that, as a consequence of the Commission's re-classification, the foreign ownership restrictions of § 310 do not apply. MCI Order at 16283-86.

thereto constitute appropriate measures to establish baseline technical parameters, while providing DBS licensees with the flexibility to propose and seek approvals for technical parameters that are inconsistent with the ITU Regulations and Appendices.[43] To the extent parameters that vary from the requirements of Appendices S30 and S30A are approved, those changed parameters should be available to other licensees, upon appropriate application, provided that the subsequent licensees' operations would not increase the levels of interference to other services or orbital assignments.

Coordination among Licensees at Same Orbital Location. Experience has shown that, generally, satellite operators have been able to successfully coordinate their operations in close proximity to avoid interference to each other. Thus, the Commission is correct to propose that licensees of DBS satellites operating at the same orbital location coordinate among themselves. The Commission should make clear, however, that the primary burden of coordination falls upon the newcomer to the orbital location that seeks to deploy a technology that is inconsistent with established operations.[44] Those who have implemented a particular technology and attracted DBS subscribers based upon that technology should not be required to materially modify their operations or accept detrimental interference to

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[43] See Notice at ¶¶ 43-47.

[44] See GE American Communications, Inc., 6 FCC Rcd. 31325 (1991); AT&T, et al, 5 FCC Rcd. 5590, 5591 (1990); Orion Network Systems, Inc., 11 FCC Rcd. 20434, 20438 (1996).

accommodate a new satellite or satellite system with an incompatible technology. Finally, the Commission should make clear that if operators are unable to resolve their coordination issues, the Commission will not hesitate to intervene and resolve the conflict based on its announced coordination principles.[45]

Interference Protection. As the Commission observes, the issue of interference to DBS satellites by proposed non-geostationary satellite systems ("NGSO") is under consideration in separate domestic and international proceedings and is not the subject of this rulemaking. Nevertheless, PRIMESTAR will reiterate is fundamental position (and the position of other DBS operators) that any sharing of DBS spectrum by NGSOs may be permitted only after it is verified through open and credible measures, that such sharing will not have an adverse effect on the service integrity of DBS systems or upon the flexibility of DBS operators to enhance their services and employ new technologies.

PRIMESTAR endorses the Commission's commitment "to allowing systems to maximize their technical flexibility and service quality", as well as the Commission's acknowledgment that "earth station receive antenna size is a very important factor to potential consumers of DBS service."[46] These goals cannot be achieved if existing DBS systems are not protected with respect

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[45] PRIMESTAR concurs with the Commission's proposal to require DBS operators to establish network control centers for monitoring and coordination purposes.

[46] Notice at ¶ 50.

to their current operating parameters or if DBS technology is arbitrarily frozen at certain limits.

The technical parameters of existing U.S. DBS systems are a fact of life. It is impossible, without creating massive technical disruption, to "turn back the clock" to the technical parameters envisioned more than a decade ago and protect the U.S. DBS systems only to those parameters. Thus, the parameters of existing systems set a minimum benchmark that must be honored. In addition, the Commission must project realistic technology changes and service enhancements and avoid setting interference protection criteria that would stifle future DBS development. Finally, PRIMESTAR submits that it is premature to lock in the DBS service to certain receive antenna performance standards. The DBS service and technology are still evolving. DBS can achieve the goals of maximizing technical capability and service quality and affording high levels of consumer satisfaction only if it is not hindered by unwarranted and restrictive technical parameters, including antenna performance standards.

Tracking, Telemetry And Control. PRIMESTAR does not object to the Commission's proposal to require tracking, telemetry and control ("TT&C") operations of DBS satellites to take place in the DBS band, subject to an appropriate transition period for any TT&C operations currently occurring in other bands. In addition, because of the fact that many worldwide TT&C stations used for post-launch and transfer orbit operations of DBS and other satellites do not operate in the DBS frequency band, it may be necessary to permit these operations to continue outside of DBS

frequencies. Thus, the Commission should require TT&C of DBS satellites using DBS frequencies only after the satellites arrive on station.

Definitions § 100.3. PRIMESTAR agrees with the Commission that the definition of DBS service should be modified to reference the specific frequencies used by the DBS service.[47] The DBS service has characteristics that are distinct from other satellite services covered by Part 25 of the rules. The inclusion of a separate definition, modified as proposed, will recognize those distinctions and avoid confusion regarding the possible applicability to DBS of Part 25 rules that are designed for other satellite services.

Due Diligence § 100.19. PRIMESTAR agrees with the Commission on the need for continued application of the due diligence rules to the DBS service, and accordingly, PRIMESTAR supports the transfer of those rules to new Section 25.146(c). Other than assuring consistent application of the due diligence rules to all similarly-situated DBS permittees, PRIMESTAR sees no need to make any changes in the rules or to apply them to other satellite services. In other satellite services, the Commission has concluded that financial qualification standards or construction milestones are more appropriate to assure that permittees move forward with dispatch to implement their systems.[48] In enforcing the DBS due diligence rules, the

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[47] Notice at ¶ 26.

[48] As discussed herein, in assessing due diligence, the Commission should give special consideration to the problems