

includes numerous DBS providers that can compete with each other as well as with other multichannel video programming providers — this Commission should have continued to apply its due diligence requirements in an even-handed and forward-thinking manner. Sadly, this goal will not be achieved. The decision by the majority in this case assumes that, because two DBS providers (including one owned by the largest corporation in America in 1994) launched service from a shared satellite in October of 1994, this service has "arrived." This rationale leads the majority to conclude that extensions of time can be denied, willy nilly, and that recovered spectrum should be auctioned off to anyone with a pocket deep enough to jump onto the DBS bandwagon late in the parade. This result is patently unfair to Advanced and the other DBS licensees and permittees who invested time and money 15 years ago when the possibilities that this service would become viable were minimal, at best. Moreover, this result, despite the ambitious timetable set by the majority, will result in further delays in the initiation of service by new DBS providers.

#### The Commission's Due Diligence Requirement

In ruling on a request for extension of a DBS construction permit, the Commission considers "[t]he totality of the circumstances — those efforts made and those not made, the difficulties encountered and those overcome, the rights of all parties, and the ultimate goal of service to the public." USSE I, 3 FCC Red 6858, 6859 (1988). In short, the Commission must weigh the delay in scheduled implementation of service against the claimed public interest benefits. USSE II, 7 FCC Red 7247, 7249 (Vid. Svc. Div. 1992).

The majority in this case finds that Advanced does not merit an extension because it made little progress toward construction, launch, and initiation of a DBS system, despite passage of "more than a decade, including one four-year extension of time." Majority Op. at para. 2. However, I believe that the efforts of Advanced were fully consistent with Commission precedent, and that the delay in service that will inevitably result from denial of Advanced's extension request will far exceed the minimal delay that would have resulted had Advanced's extension request and application for assignment of its construction permit to Tempo been granted. Had the Advanced/Tempo deal been allowed to proceed, a DBS satellite would likely have been launched in April 1996. One has only to look at the history of decisionmaking at this Agency to realize that it will only be through extreme luck bordering on divine intervention that the unrealistic timetable set forth in the majority decision is likely to be achieved. That decision anticipates that a major change in the policy for the reassignment of recovered channels, adoption of auction rules, and the completion of an auction, can all be finalized within the next three months.

Turning to the due diligence showing of Advanced, it is important to note that the only period relevant to the Commission's decision in this case is the four-year period following the grant of Advanced's first extension request, not the entire ten-year period since Advanced was granted a construction permit. The Commission previously ruled on Advanced's efforts during the initial six-year period following grant of a construction permit and that decision is not before us here. During this six-year period Advanced, like other

DBS providers, failed to commence operation of its system because the Commission's initial six-year construction milestone proved to be unrealistic. As the majority opinion recognizes, provision of DBS service was not feasible for the first six years that Advanced held its permit for the reasons I delineated above: substantial developments in DBS satellite technology, changes in Commission policy regarding channel and orbital assignments, and the Challenger and Ariane launch vehicle failures.

As to Advanced's efforts during the four years since its first extension was granted, it is relevant to note that Advanced did not receive its full complement of frequencies and orbital positions until April of 1991, in a decision that did not become final until November of 1991. The Commission has stated in two recent decisions that it is unrealistic to expect permittees to begin construction until the Commission has awarded them specific orbital slots and channels. See Continental Satellite Corp., 4 FCC Red 6292 (1989), partial recon. denied, 5 FCC Red 7421 (1990); Dominion Video Satellite, Inc., 8 FCC Red 6680 (1993), recon. denied, FCC No. 95-421 (Oct. 5, 1995). Therefore, for the first year of its four-year extension period, Advanced cannot have been expected to have demonstrated progress toward construction.

So we come down to the issue of what Advanced did, or did not do, between 1992 and 1995. In examining Advanced's efforts during this period, one must look to Commission precedent in which other DBS permittees have been granted extensions with showings similar to Advanced's. None of these extension requests were denied. While it cannot be argued that there are no distinctions between the due diligence showings of Advanced and the DBS applicants whose extension requests were granted, painted on a precedential backdrop in which the Commission stated that its regulatory priority was fostering the development of a fledgling service, they constitute distinctions without a difference.

In a decision adopted in January of this year, the Commission approved Directsat's for-profit sale of its construction permit for an unbuilt DBS system to EchoStar. Directsat Corp., 10 FCC Red 88 (1995). The Commission reasoned that for-profit sales of permits can be allowed in the DBS service because of the presence of our due-diligence rules, which suffice to prevent warehousing of spectrum. *Id.* at 89. The Commission thus noted in Directsat Corp. that a significant amount of money had been invested in satellite construction and that construction milestones had been met. At the time the Commission approved the transfer, however, Directsat had expended 0.13% of the contract price for the construction of satellites and the construction phase of its satellites had not even begun. See Directsat Semi-Annual Progress Report, Exhibit E to Contract Modification No. 7, filed August 16, 1994.

Unfortunately, the majority in this case refused to attribute Tempo's investment and construction progress to Advanced, even though the Commission earlier this year had attributed EchoStar's investment and construction progress to Directsat. Moreover, despite waxing eloquent for several pages, the majority fails to adequately explain why Advanced's showing is decisionally less significant than Directsat's in light of Directsat's August 1994

Progress Report. Specifically, the majority fails to note that, at the time their assignment applications were filed, Directsat had expended a mere 0.13% of the contract price and that this constituted due diligence; whereas Advanced's payments on its satellite contract were deficient because they amounted to less than one percent of the contract price. The majority also fails to note that the actual dollar amount expended by Advanced was later specified in a letter filed in the record dated September 19, 1995, as \$7-8 million. The actual dollar amount expended by Directsat prior to its merger with EchoStar, while not set forth in the majority opinion or in Directsat's 1994 Progress Report, is likely significantly less than the amount expended by Advanced.<sup>1</sup>

The majority attempts instead to distinguish the Advanced case from Directsat Corp. by claiming that Directsat requested only a transfer of its construction permit, not an extension of time to construct. Directsat's DBS authorization, however, expired on August 15, 1995, and EchoStar has applied for an extension. That EchoStar would require an extension was apparent at the time Directsat filed its transfer application. Moreover, the Commission in Directsat Corp. felt compelled to comment on Directsat's progress toward construction of its DBS system, a comment that presumably would have been unnecessary had the Commission felt that Directsat's due diligence was irrelevant. The key difference, then, between Directsat and Advanced appears to be the order in which the extension and transfer applications were submitted. This distinction without a difference should not be the key factor in determining the fate of a DBS permittee, and the majority offers no reason why it should be of decisional significance.

In 1991, the Commission granted a second extension of a permittee's construction permit in light of its contract to use satellites provided by a competitor. USSB II, 7 FCC Red at 7251. The Commission based its extension on the fact that the permittee, USSB, had complied with due diligence requirements by contracting to use transponders on a satellite designed, built and launched by DIRECTV. In fact, this Commission has maintained that DBS service will be expedited if DBS permittees "are free to seek Commission approval to combine assignments and resources through merger or buyout." Continental Satellite Corp., 4 FCC Red. at 6299 (1989). Like USSB and Directsat, Advanced heeded the Commission's admonition to proceed diligently by entering into a binding, non-contingent contract with Tempo DBS for delivery of satellites, but the Commission refused to credit Advanced with

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<sup>1</sup>The majority makes much of Advanced's "fail[ure] to specify how much money it actually invested in the construction of its satellites." Majority Op. at para 50. Apparently, the majority is unaware of the September 19, 1995, letter filed by Advanced as part of the record in this proceeding in which it revealed that \$7-8 million was paid toward construction of its satellites. Moreover, it is interesting to note that Commission rules do not require a permittee to reveal the actual amount it has invested in its satellite system; rather the rules require that the permittee reveal what percentage of the satellite cost it has invested. Advanced, like Directsat, fully complied with this requirement in filing its progress report with the Commission.

the construction progress made on the Tempo satellites. Significantly, Tempo DBS's contract to finance Advanced's satellite launch was not contingent on the transfer of channels.

The majority, in distinguishing USSB II and the case involving Advanced, points out that it considers "the lack of ongoing involvement" a key distinction between these two cases. Majority Op. at para. 53. While in USSB II the ongoing involvement of USSB is clear, the "ongoing involvement" is less clear in Directsat Corp., where Directsat transferred control of its DBS authorization to the parent company of Echostar. Is "Directsat" still involved in the DBS business, or is it involved in name only? In my experience, when one company is bought out by another company, the company purchased is either eliminated entirely, or continues in name only under the complete control of the buyer. Again, the majority is, in my view, relying on a distinction without a difference in deciding to deny Advanced's extension request for this reason.

In conclusion, the majority has decided this case without taking full account of the history of this fledgling satellite service. Moreover, the majority has set up a series of tenuous and tortured distinctions without any difference in claiming that Advanced's situation is markedly different from that of other permittees in cases with remarkably similar facts. As a result, the majority gives companies that chose to sit out the hard developmental days of DBS a windfall chance to participate in a gold rush, and leaves one of the pioneers of the DBS service with only a panful of mica. This result squares with neither the law nor with equity, and therefore I dissent.

AFFIDAVIT OF ANDREW C. BARRETT

I, Andrew C Barrett, having personal knowledge of the statements made herein, do state under oath the following:

1. During 1995, I was one of five Commissioners of the Federal Communications Commission ("FCC").
2. On October 16, 1995, in a 3-2 decision, the Commissioners denied the petition of Advanced Communications Corporation ("ACC") for an extension of time in which to construct, launch, and operate a Direct Broadcast Satellite ("DBS") system, in the case *In re Advanced Communications Corporation*, Federal Communications Commission, Nos. DBS-94-11EXT, DBS-94-15ACP, DBS-94-11P, Memorandum Opinion and Order (October 16, 1995) (the "Advanced Order").
3. As a result of the Advanced Order, the channels and orbital locations previously assigned to ACC were reverted to the public for reassignment by auction.
4. I dissented from the decision in the Advanced Order, and a copy of my dissenting opinion is attached hereto. In addition, based on my deliberations with the other Commissioners, at least one of the Commissioners in the majority based his or her decision in the Advanced Order on the expectation of Federal revenues that would result from the reassignment by auction of the channels and orbital locations previously assigned to ACC, which I believe violates 47 U.S.C. § 309(j)(7)(C).



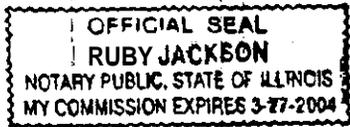
FURTHER THE AFFIANT SAYETH NAUGHT.

*Andrew C. Barrett*

Andrew C. Barrett

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SWORN ) AND SUBSCRIBED before me, a Notary Public, this the 12<sup>th</sup> day of  
October, 2001.



*Ruby Jackson*  
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Notary Public

My Commission expires:

3-27-2004

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DISSENTING STATEMENT

OF

COMMISSIONER ANDREW C.

In Re: Advanced Communications Corporation Application for Extension of Time To Construct, Launch, and Operate a Direct Broadcast Satellite System; Application for Consent To Assign Direct Broadcast Satellite Construction Permit from Advanced Communications Corporation to Tempo DBS, Inc.; Application for Modification of Direct Broadcast Satellite Service Construction Permit (File Nos. DBS-94-11EXT, DBS-94-15ACP, DBS-94-16MF).

Pursuant to today's action; the Commission affirms the International Bureau' ("Bureau") determination that Advanced Communications Corporation ("ACC") failed to wet its due diligence obligation of proceeding expeditiously with the construction and launch of its direct broadcast satellite ("DBS") system.' As a result, the channels and orbital locations previously assigned to ACC will revert to the public for reassignment. Further, the Commission has chosen to initiate a rule making to establish a new methodology by deciding upon mutually exclusive applications for the reassignment of DBS channels and orbital positions. As a result of my disagreement with the Commission's due diligence findings in this case, I feel compelled to dissent from today's decision.

In the past when reviewing due diligence efforts by DBS permittees, the Commission has heretofore granted extensions to several permittees in an effort to encourage the delivery of DBS service to the public. To that end, over the years, the Commission has exercised greater flexibility when reviewing the due diligence criteria for various DBS permittees, even though these somewhat relaxed expectations may have proven unacceptable for other video programming providers in the marketplace.' It would therefore, in my opinion, seem entirely unreasonable, and indeed, irresponsible, for the Commission to disregard its primary objective--to encourage competition amongst DBS providers in order to enhance consumer choice--by forestalling yet another viable and prepared DBS competitor from entering the marketplace in the immediate future.

The Commission's due diligence requirements have two components. First, the Commission requires that a DBS 'permittee

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<sup>1</sup> Advanced Communications Corp., 77 Rad. Reg. 2d (P&F) 1160 (DA 95-944, April 27, 1995).

begin construction or complete contracting for construction of the satellite station within one year of the grant of its construction permit. Secondly, the permittee must begin operation of the satellite station within six (6) years of the grant of its permit, unless otherwise determined by the Commission.'

In denying ACC's request for an extension, the Bureau concluded that, from its assessment of the totality of the circumstances, ACC had made little progress in the construction, launch and initiation of a DBS system in the past decade. The record indicates that in 1984, the Commission granted ACC's application for authority to construct and launch a DBS system, subject to its fulfillment of the Commission's due diligence requirements. In October 1986, the Commission found that ACC had complied with the first due diligence component by contracting for the construction of its first two DBS satellites. As a result, the Commission granted ACC's request for sixteen (16) channels at each of two orbital locations. In addition, ACC requested additional channels at these locations as part of its modification application. The Commission reserved, but did not assign, eleven (11) additional pairs of channels for ACC conditioned upon ACC's satisfaction of the first prong of due diligence. In February 1990, Advanced applied for a four year extension of time to construct and operate its DBS system. The Commission granted this request in April 1991 (extending the deadline to December 7, 1994), and assigned ACC nineteen (19) additional channels. Importantly, as the record indicates, ACC did not receive its final channel assignments until April 1991. Therefore, I believe it is imperative that we focus our review on ACC's actions subsequent to that date.

Despite ACC's efforts in developing its DBS system, to wit: ACC's failed negotiations for a joint venture with another DBS permittee, Echostar Satellite Corporation ("Echostar") as well as its contractual agreement with Tempo DBS, Inc. ("Tempo")<sup>2</sup> for the construction and launch of a satellite, the Bureau concluded that these actions did not amount to the actual construction of a DBS satellite or arrangement for the launch and operation of DBS service. I am puzzled as to why the Bureau determined to apply a different set of criteria for ascertaining due diligence than were used for other permittees with respect to the launch of service in reaching its finding that ACC had not met the due diligence requirements.

I do not believe that ACC's efforts are patently

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<sup>2</sup> See 47 C.F.R. § 100.19(b)

<sup>3</sup> Tempo DBS is an affiliate of Tele-Communications, Inc. ("TCI").

distinguishable from the efforts made by those permittees in cases in which the Commission either granted an extension request or a transfer of control application. For example, in July 1991, United States Satellite Broadcasting, Inc. ("USSB") filed an extension request and a minor modification of its construction permit concerning its authorization to operate a DBS satellite on five (5) channels at a specific orbital location. In its minor modification application, USSB stated that it had entered into an agreement with another entity, Hughes Communications Galaxy, Inc., ("Hughes"), to purchase a payload of five (5) transponders. Significantly, these transponders were not on one of USSB's constructed and launched satellites, but on one of Hughes' satellites, to be located at the same orbital location as USSB's channels. As a result, USSB sought authority to implement its five (5) channel service by utilizing five (5) transponders on one of Hughes' satellites rather than constructing and launching a separate five-channel GE Astro-Space satellite as previously proposed and approved.<sup>4</sup> In addition, USSB sought to modify the technical specifications of its authorization to conform to the specifications of the Hughes satellite. It should be noted that USSB's DBS system was required to be in operation by December 1992, while Hughes' system was not required to be in operation until December 1994. As a result, USSB requested that its completion date be reconciled with that of Hughes. In that case, the Commission applied an analysis that led to the conclusion that the ultimate goal of service to the public would be advanced by a grant of USSB's request for extension of time.<sup>5</sup>

In this Order, the Commission also concludes that ACC's due diligence efforts were different from those of Directsat Corporation ("Directsat").<sup>6</sup> I am not persuaded by the Commission's findings. Directsat received its DBS construction permit in August 1989. The Commission determined that Directsat had satisfied the first due diligence requirement in November 1993 and accordingly assigned it ten (10) channels. Only five months later, Directsat sought approval for transfer of control of its permit to Echostar's parent company. Interestingly, Echostar held eleven (11) channels at the same location as those held by Directsat. The Commission granted that authorization in

<sup>4</sup> See In re Applications of United States Broadcasting Company, Inc., 7 FCC Rcd 7247, 7249 (1992).

<sup>5</sup> Id. at 7250.

<sup>6</sup> See In re Application of Directsat Corporation and Echostar Communications Corporation, 10 FCC Rcd 88 (1994).

November 1994.'

It appears that the Commission credits Directsat for negotiating and consummating a transaction with Echostar in a much more expeditious fashion than ACC, while I am in an uncertain business situation, or an unfavorable business climate in general have not been adequate explanations for failure to meet a construction timetable. I do believe that, under these circumstances, the Commission must remain cognizant about the practicalities of the marketplace. A period of lengthy negotiations does not necessarily denote a clear intention to delay. Indeed, negotiations between Echostar and ACC failed within one (1) year of the grant of ACC's April 1991 extension. Clearly, the negotiations between ACC and Echostar involved a substantial transaction that finally resulted in protracted litigation. As evidenced by the record, both parties proceeded to conduct negotiations with other parties. Unfortunately for ACC, such events transpired near the expiration of its construction permit. On the other hand, we note that Directsat immediately consummated a deal with Echostar. What the Commission fails to acknowledge is that Directsat and Echostar had the same orbital location and thus derived the benefit of economic efficiencies. On the other hand, the Commission also fails to note that negotiations between Tempo and ACC advanced to the point where Tempo began to commence construction of its satellites to accommodate the 110° orbital location.'

Although the Commission in the instant Order seeks to elaborate on various differences between ACC's and USSB's and Directsat's actions, I am not wholly persuaded that the distinctions are as obvious as espoused. In my view, a review and analysis of the Gordian knot of issues in this case will reveal certain distinctions. For instance, one may argue that the public would have also benefited from the sale of ACC's permit to Tempo by increasing the choice of DBS providers. Therefore, I do not believe that ACC's efforts are substantially incongruent with those of USSB and Directsat so as to warrant a finding of no due diligence and the revocation of ACC's permit.

It should also be noted that Directsat was permitted to profit from its sale of the permit. Because of my unwillingness to support our finding of no due diligence here, I am persuaded that ACC should have been afforded the same opportunity.

<sup>1</sup> See In re Applications of United States Broadcasting Company, Inc., 3 FCC Rcd 6858, 6859 (1988).

<sup>2</sup> I make this observation only for purposes of demonstrating an intention by the parties to proceed with a DBS system without undue delay.

By comparison with the other pertinent instances, I am not convinced that ACC did not satisfy the due diligence requirements. Unfortunately, I believe that Commission precedent in this area is murky enough so as to elicit persuasive arguments in this case for both sides. Based on the public policy concerns, however, it is clear that the Commission, in the past, gave DBS permittees greater flexibility, based on the fact that DBS service was a relatively fledgling industry in which there were very few players and in the interest of making DBS service available to the public. As a result, until such time as the Commission had established and clearly stated a definitive and inflexible approach to the due diligence standard, I believe the Commission should have used a similar basis for determining ACC's due diligence compliance. As a consequence, I would have approved an assignment of ACC's permit to Tempo.

#### REASSIGNMENT OF CHANNELS

The Commission has announced that it intends to initiate an expedited rulemaking proceeding to establish a new methodology for reassigning DBS channels and orbital positions. Based on the assumption that auctions will be used to reassign the reverted channels, the Commission has proposed to hold the DBS auction within the next three (3) months. Based on the Commission's past experiences with auctions and the complexities involved in developing acceptable service and auction rules, I firmly believe that such a timetable is wholly unrealistic. Moreover, I am convinced that today's decision as well as any rules promulgated for auctions in this service will be subject to judicial challenge that will considerably delay additional DBS service to the public.

The Commission has, on prior occasions, indicated that one of its primary goals in the DBS area is to promote the prompt initiation of DBS service. Although I am loathe to prejudge a rulemaking for reassignment of the reverted channels, I am skeptical about the Commission's timetable for establishing a new methodology for the reassignment of DBS channels that will not further delay service to the public. Therefore, I will review the comments for the rulemaking which will be initiated in the immediate term with great interest.