

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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| In re |) | |
| |) | |
| TEMPO SATELLITE, INC., Assignor |) | IBFS File No. SAT-ASG-19990127-00014 |
| and DIRECTV ENTERPRISES, INC., Assignee |) | File No. DBS-88-04 |
| |) | |
| Application for Consent to Assign Authorization |) | |
| to Construct, Launch and Operate a Direct |) | |
| Broadcast Satellite System Using 11 Frequencies |) | |
| at the 119° W.L. Orbital Location |) | |
| |) | |
| |) | |
| TCI Satellite Entertainment, Inc., Transferor |) | IBFS File No. SAT-T/C-19970718-00065 |
| and Primestar, Inc., Transferee |) | File No. 91-SAT-TC-97 |
| |) | |
| Application for Transfer of Control |) | |
| of Tempo Satellite, Inc. |) | |
| |) | |
| |) | |
| EchoStar Satellite Corporation and |) | IBFS File Nos. SAT-STA-19970721-00066 |
| Directsat Corporation |) | SAT-STA-19970721-00067 |
| |) | |
| Applications for Special Temporary Authority |) | File Nos. 92-SAT-STA-97 |
| to Operate a Direct Broadcast Satellite System |) | 93-SAT-STA-97 |

ORDER AND AUTHORIZATION

Adopted: May 28, 1999

Released: May 28, 1999

By the Acting Chief, International Bureau:

I. INTRODUCTION

1. By this *Order and Authorization*, we grant Tempo Satellite, Inc. ("Tempo") authority to assign its authorization to construct, launch and operate a direct broadcast satellite ("DBS") system using 11 frequency channels at the 119° W.L. orbital location to DirecTV Enterprises, Inc. ("DirecTV") ("Tempo/DirecTV Application").¹ This grant, which we condition on DirecTV commencing service from

¹ Application of Tempo Satellite, Inc. and DirecTV Enterprises, Inc., IBFS File No. SAT-ASG-19990127-00014 (filed January 27, 1999). Tempo is authorized to operate its DBS satellite at 118.8° W.L. See *Tempo Satellite, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 9200, 9209 (Int'l Bur. 1997) (*Tempo Launch Order*). For simplicity, we refer to this location as "the 119° W.L. orbital location," the nominal location for this assignment for the Region 2 Broadcast Satellite Service allotted by the International Telecommunication Union. See Appendix S30 to the ITU Radio Regulations.

the 119° W.L. orbital location no later than November 28, 1999, will allow DirecTV to compete more effectively with other multichannel video programming distributors ("MVPDs") and provide consumers with improved product offerings.

II. BACKGROUND

2. Only three of the eight DBS orbital locations allotted to the United States by the International Telecommunication Union ("ITU")² are capable of serving customers across the contiguous 48 states (*i.e.*, the continental United States or "CONUS"). These orbital locations, also called "full-CONUS" locations, are 101° W.L., 110° W.L., and 119° W.L.³ The frequency bandwidth allocated for DBS at each of these orbital locations can support 32 analog channels, each with a 24 MHz bandwidth.⁴

3. Currently, three companies (or their affiliates) are authorized to provide service from the 96 full-CONUS orbital channels. DirecTV is authorized to provide DBS service from all 32 channels at the 101° W.L. orbital location and from three channels at the 110° W.L. orbital location, a total of 35 full-CONUS channels.⁵ EchoStar Satellite Corporation ("EchoStar"), through its affiliates, is authorized to provide DBS service from the remaining 29 channels at the 110° W.L. orbital location and from 21 channels at the 119° W.L. orbital location, a total of 50 full-CONUS channels.⁶ By contrast, Tempo is authorized to provide DBS service from only 11 DBS channels located at 119° W.L.⁷ Pursuant to

² The eight U.S. orbital positions, proceeding from east to west (all W.L.), are 61.5°, 101°, 110°, 119°, 148°, 157°, 166°, and 175°. See Appendix S30 to the ITU Radio Regulations, at 57.

³ The Commission has found that it is also technically feasible to serve subscribers in Hawaii and Alaska from the 110° W.L. and 119° W.L. full-CONUS orbital locations. See *Revision of Rules and Policies for the Direct Broadcast Satellite Service*, IB Docket No. 95-168, Report and Order, 11 FCC Rcd 9712, 9762 (1995). DirecTV claims that its proposed replacement satellite, DBS-1R, "will facilitate commencement of DBS service to Hawaii and improved service to Alaska" from the 101° W.L. orbital location. Application of DirecTV Enterprises, Inc. for Authority to Launch and Operate Replacement Satellite DBS-1R for its Direct Broadcast Satellite System, IBFS File No. SAT-LOA-19990331-00035, at 7 & Appendix A (filed March 31, 1999).

⁴ Using digital compression, operators can deliver simultaneously at least seven video programming services per analog DBS channel.

⁵ We recently approved the transfer of control of DBS authorizations from United States Satellite Broadcasting Co., Inc. ("USSB") to DirecTV. See *United States Satellite Broadcasting Co., Inc. and DIRECTV Enterprises, Inc.*, Order and Authorization, DA 99-633 (Int'l Bur., rel. April 1, 1999). DirecTV has no DBS authorizations for use of non-CONUS orbital locations.

⁶ The Commission recently approved the assignment of a DBS authorization at 110° W.L. from MCI Telecommunications Corporation ("MCI") to EchoStar. See *MCI Telecommunications Corporation and EchoStar 110 Corporation*, Order and Authorization, FCC 99-109 (rel. May 19, 1999) (*MCI/EchoStar Order*). In addition, EchoStar, through affiliates, is authorized to provide DBS service from 11 channels at the 61.5° W.L. orbital location, 24 channels at the 148° W.L. orbital location, and 10 channels at the 175° W.L. orbital location.

⁷ Tempo received its initial permit to construct and launch a DBS system on May 1, 1992. *Tempo Satellite, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 2728 (1992) (*Tempo Authorization*). Later that year, the Commission assigned Tempo channels 22-32 at the 119° W.L. orbital location. *Tempo Satellite, Inc.*, Memorandum

authority granted in the *Tempo Launch Order*,⁸ Tempo launched a satellite for location at the 119° W.L. orbital position on March 8, 1997. However, Tempo has not yet begun to provide service to customers, citing technical difficulties with the satellite.⁹

4. Implementation of the 11 DBS channels at 119° W.L. is now the subject of several applications filed with the Commission. On July 18, 1997, Tempo's parent corporation, TCI Satellite Entertainment, Inc. ("TSAT"), filed an application requesting the Commission's consent to transfer control of Tempo, including its 11 assigned DBS channels at the 119° W.L. orbital location, to Primestar, Inc. ("Primestar") ("TSAT/Primestar Application").¹⁰ On the same day, EchoStar and its affiliate, Directsat Corporation ("Directsat") filed a joint application for Special Temporary Authority ("STA") to use Tempo's 11 channels to supplement its own DBS service from its satellite also located at the 119° W.L. orbital location ("EchoStar/Directsat STA Request").¹¹ One month later, MCI and Primestar filed an application seeking the Commission's consent to assign MCI's 28 assigned DBS channels at 110° W.L. to Primestar.¹² Because of the Department of Justice's ("DoJ") antitrust review and subsequent antitrust complaint concerning Primestar's applications,¹³ MCI and Primestar voluntarily withdrew their application relating to 110° W.L.¹⁴ Primestar then filed a letter with the Commission requesting expedited approval of the TSAT/Primestar Application involving Tempo's 11 DBS channels at 119° W.L.¹⁵ MCI sought, and received, Commission consent to assign its 28 assigned DBS channels at 110° W.L. to EchoStar.¹⁶ The TSAT/Primestar Application and the EchoStar/Directsat STA Request are pending.

5. On January 22, 1999, DirecTV's parent corporation, Hughes Electronics Corporation, announced it had reached an agreement with Primestar under which DirecTV would acquire Primestar's

Opinion and Order, 7 FCC Rcd 6597, 6600 (1992).

⁸ *Tempo Launch Order*, 13 FCC Rcd at 9212.

⁹ See Tempo/DirecTV Application at 2. See also *Tempo Satellite, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 11068, 11072 (Int'l Bur. 1998) (*Tempo Extension Order*).

¹⁰ Application of TCI Satellite Entertainment, Inc. and Primestar, Inc., IBFS File No. SAT-T/C-19970718-00065, File No. 91-SAT-TC-97 (filed July 18, 1997). See Public Notice, Report No. SPB-90 (rel. July 23, 1997), *erratum*, Public Notice, Report No. SPB-94 (rel. August 11, 1997).

¹¹ Consolidated Applications for Special Temporary Authority of EchoStar Satellite Corporation and Directsat Corporation, IBFS File Nos. SAT-STA-19970721-00066/00067, File Nos. 92/93-SAT-STA-97 (filed July 18, 1997). See Public Notice, Report No. SPB-91 (July 30, 1997).

¹² Application of MCI Telecommunications Corporation and Primestar LHC, Inc. for Consent to Assignment of Direct Broadcast Satellite Authorizations, File No. 106-SAT-AL-97 (filed August 15, 1997) ("MCI/Primestar Application").

¹³ *United States v. Primestar, Inc.*, No. 1:98CV01193 (D.D.C.) (complaint filed May 12, 1998).

¹⁴ See Public Notice, Report No. SAT-00004 (rel. December 3, 1998).

¹⁵ See Public Notice, Report No. SPB-143 (rel. December 3, 1998).

¹⁶ See *supra* footnote 6.

assets, as well as Primestar's rights to acquire Tempo's assets. Primestar's assets consist of its direct-to-home ("DTH") satellite business, a 160-channel, medium-power MVPD service transmitted to approximately 2.3 million customers.¹⁷ On April 28, 1999, DirecTV completed its acquisition of Primestar's assets.¹⁸ However, since Primestar transmits its DTH service from leased satellite capacity on a fixed satellite at Ku-band, DirecTV's acquisition of Primestar's customers did not require Commission review or approval. Tempo's assets include two satellites (one in orbit at the 119° W.L. orbital location and one not yet launched), as well as its authorization to implement DBS service from the 119° W.L. orbital location over the same 11 DBS channels that are the subject of the TSAT/Primestar Application. On January 27, 1999, the Commission received two related filings: the Tempo/DirecTV Application, for consent to assign Tempo's DBS authorization at 119° W.L. to DirecTV;¹⁹ and a letter, jointly filed by TSAT and Primestar, requesting that the TSAT/Primestar Application be held in abeyance and subsequently dismissed upon approval of the Tempo/DirecTV Application ("Abeyance Request Letter").²⁰

6. Tempo and DirecTV assert that grant of the Tempo/DirecTV Application will provide important benefits to MVPD customers. First, they assert that grant will allow DirecTV to compete more effectively with EchoStar and cable operators.²¹ Second, grant will resolve general concerns regarding Tempo's incentives to use DBS resources to compete with cable, given the cable industry's investments in Tempo.²² Third, grant will spur technical innovation by encouraging the satellite industry to develop small earth stations that can receive and integrate signals from multiple orbital positions, thus expanding programming choices for DBS subscribers, including under-served consumers.²³ Finally, the applicants acknowledge that Tempo is not currently providing DBS service from its 11 DBS channels, and claim that, as a result of Commission approval, DirecTV will be able to offer commercial service from Tempo's satellite at the 119° W.L. orbital location "almost immediately" after consummation of this transaction.²⁴ Indeed, DirecTV estimates that "it will take only a matter of weeks to bring [Tempo]'s in-orbit satellite into commercial service."²⁵

¹⁷ Estimate derived from SkyTrend, http://www.skyreport.com/skyreport/dth_us.htm.

¹⁸ See <http://www.directv.com/news/primestarcompletion.html> for press release.

¹⁹ See Public Notice, Report No. SPB-147 (rel. February 1, 1999) (*Tempo/DirecTV PN*).

²⁰ Letter to Magalie Roman Salas, Secretary, FCC, from Richard E. Wiley, Counsel for TSAT, and Philip L. Verveer, Counsel for Primestar (January 27, 1999). See also Tempo/DirecTV Application at n.4 & Assignee's Public Interest Statement at 6.

²¹ Tempo/DirecTV Application, Assignee's Public Interest Statement at 1-3.

²² *Id.* at 4.

²³ *Id.* at 4-5.

²⁴ *Id.* at 5-6 & Assignor's Public Interest Statement at 1 ("Consummation of the proposed transaction would provide for the *prompt initiation of service* using [Tempo]'s authorized DBS assets.") (emphasis added).

²⁵ *Id.*, Assignee's Public Interest Statement at 4 n.16.

7. Several parties filed petitions to deny or requested imposition of conditions with regard to the Tempo/DirecTV Application.²⁶ EchoStar contends that we should not permit a single operator to use spectrum at all three full-CONUS orbital locations because the technical inefficiencies associated with providing a three-satellite DBS service outweigh any benefit of bolstering competition to cable operators.²⁷ EchoStar also argues that Tempo has been warehousing its 11 channels at 119° W.L., and has not satisfied its due diligence requirements.²⁸ While not opposing the Tempo/DirecTV Application, the Small Cable Business Association ("SCBA") is concerned that concentrating the ownership of all full-CONUS DBS channels between two providers (*i.e.*, EchoStar and DirecTV) adversely affects the public interest, and thus, asks for a conditional grant.²⁹ Specifically, SCBA argues that the only way to ensure long-term competition between DBS and small cable systems is for the Commission to require DBS providers, in this case, DirecTV, to offer a reasonably-priced, digital package of programming that small cable operators can resell to their customers under their own name.³⁰ Finally, while not addressing the merits of the Tempo/DirecTV Application, Media Access Project ("MAP") requests that we dismiss or deny the Tempo/DirecTV Application unless the parties provide the requisite information necessary to analyze the transaction under the citizenship and character requirements for the award of broadcast licenses.³¹

8. Having considered the record developed in this proceeding, and for the reasons discussed below, we conclude that it is in the public interest to approve the Tempo/DirecTV Application, conditioned on DirecTV commencing service from the 119° W.L. orbital location no later than November 28, 1999. In light of this decision, the TSAT/Primestar Application is moot. As a result, and at the parties' request in the Abeyance Request Letter, we dismiss the TSAT/Primestar Application.

²⁶ EchoStar Petition to Deny (filed March 5, 1999) ("EchoStar Petition"); Small Cable Business Association Comments and Request for Conditional Grant (filed March 5, 1999) ("SCBA Request"); Media Access Project Contingent Petition to Dismiss or Deny (filed March 5, 1999, as counsel for Office of Communication, Inc., of the United Church of Christ, Consumers Union, and the National Association for Better Broadcasting) ("MAP Petition"); Tempo Opposition (filed March 19, 1999); DirecTV Opposition and Reply Comments (filed March 19, 1999) ("DirecTV Opposition"); EchoStar Consolidated Reply (filed April 2, 1999) ("EchoStar Reply"). On April 13, 1999, Tempo and DirecTV filed a Joint Response to the EchoStar Reply, seeking leave to file outside the comment period specified in the *Tempo/DirecTV PN*. For good cause shown, we grant Tempo and DirecTV's request, and we will consider their Joint Response in order to ensure a complete record in this proceeding.

²⁷ EchoStar Petition at 2-4; EchoStar Reply at 12-15.

²⁸ EchoStar Petition at 4; EchoStar Reply at 2-12. The due diligence rules for DBS permittees granted construction permits prior to January 19, 1996 are contained in Section 100.19(a) of the Commission's Rules, 47 C.F.R. § 100.19(a), and contain two prongs. The first prong requires a DBS permittee to complete contracting for its satellite(s) within a year of receiving its construction permit. The second prong requires that the satellite station(s) be in operation within six years of the construction permit grant.

²⁹ SCBA Request at 3-5.

³⁰ *Id.* at 5-7.

³¹ MAP Petition at 1-4.

III. DISCUSSION

A. Tempo/DirecTV Application

1. Legal Standard

9. Section 310(d) of the Communications Act, as amended ("Communications Act"), requires a finding that any proposed assignment of license serves the public interest, convenience, and necessity.³² Thus, the central issue before us is whether the public interest is served by allowing DirecTV, a current DBS distributor, to acquire the assets of another potential DBS distributor, Tempo, by acquiring the latter's DBS license. To make this finding, we must weigh any potential public interest harms against any potential public interest benefits, considering competitive effects and other public interest factors.³³ As the Commission recently explained in the *MCI/EchoStar Order*:

[O]ur public interest analysis is not, however, limited by traditional antitrust principles. . . . It also encompasses the broad aims of the Communications Act. . . . To apply our public interest test, then, we must determine whether the [assignment] violates our rules, or would otherwise frustrate our implementation or enforcement of the Communications Act and federal communications policy. That policy is, of course, shaped by Congress and deeply rooted in a preference for competitive processes and outcomes.³⁴

10. Consistent with this precedent, we begin our analysis by identifying the relevant product markets that are affected by the proposed transaction,³⁵ and then we consider the competitive effects of the proposed transaction in these markets. Finally, we consider other issues raised by parties with respect to other public interest factors.

³² 47 U.S.C. § 310(d).

³³ *MCI/EchoStar Order*, FCC 99-109, at ¶ 7 (citing *Southern New England Telecomm. Corp. and SBC Communications, Inc.*, CC Docket No. 98-25, Memorandum Opinion and Order, 13 FCC Rcd 21292, 21298 (1998); *WorldCom, Inc. and MCI Communications Corp.*, CC Docket No. 97-211, Memorandum Opinion and Order, 13 FCC Rcd 18025, 18030 (1998)).

³⁴ *Id.* (quoting *Tele-Communications, Inc. and AT&T Corp.*, CS Docket No. 98-178, Memorandum Opinion and Order, FCC 99-24 at ¶ 14 (rel. February 18, 1999)).

³⁵ *Id.* at ¶ 8 (citing *e.g., Teleport Communications Group, Inc. and AT&T Corp.*, CC Docket No. 98-24, Memorandum Opinion and Order, 13 FCC Rcd 15236, 15245 (1998); *NYNEX Corp. and Bell Atlantic Corp.*, Memorandum Opinion and Order, 12 FCC Rcd 19985, 20008 (1997)). Each product market has a geographic component.

2. Public Interest Determination

a. Relevant Product Markets

11. In its annual assessment of the video marketplace, the Commission has found that DBS operators compete in two product markets.³⁶ First, DBS operators compete with each other and other MVPDs in the distribution of multiple channels of video programming to consumers (the "MVPD market").³⁷ The Commission has found that the relevant geographic market for assessing MVPD competition is a local area. The extent of the local area is defined by the overlap of the service footprints of the various service providers in that area.³⁸ For example, the geographic footprint of a cable franchise operator is determined by the location of the homes within a franchise that an operator passes with its cable and thus can serve.³⁹ As a DBS distributor operating from full-CONUS orbital locations, DirecTV distributes multiple channels of video programming directly to consumers across the United States.⁴⁰ Thus, DirecTV competes in many different local MVPD markets.

12. Second, DBS operators compete with each other and other distributors of video programming for the acquisition of programming (the "programming market").⁴¹ The Commission has found that the relevant programming market for DBS is national in geographic scope, but can be regional if the programmer wishes to reach a more geographically targeted audience.⁴² Because DirecTV distributes video programming to a national audience, DirecTV primarily competes with other companies for the acquisition of programming in the national programming market.

³⁶ *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 97-141, Fourth Annual Report, 13 FCC Rcd 1034 at Section III (1998).

³⁷ *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 98-102, Fifth Annual Report, 13 FCC Rcd 24284, 24287 (1998) (*1998 Cable Competition Report*). DoJ concurs with the Commission's analysis that the relevant product market is the provision of MVPD services. See *MCI/EchoStar Order*, FCC 99-109, at n.29.

³⁸ The "footprint" of a service provider is determined by the provider's geographic reach.

³⁹ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 96-133, Third Annual Report, 12 FCC Rcd 4358, 4418 (1997).

⁴⁰ See <http://www.directv.com/> for a description of DirecTV's current offerings and coverage.

⁴¹ *1998 Cable Competition Report*, 13 FCC Rcd at 24362.

⁴² *Id.* Most programmers produce video programming with the intent of distributing it to a national audience. However, there is some video programming, such as regional sports programming, that is intended for distribution to a regional audience only and so is sold to distributors for that purpose.

b. Competitive Effect of the Proposed Transaction in the Product Markets

13. The MVPD market. DBS distributors generally, and DirecTV specifically, compete with a number of other MVPDs using different transmission media.⁴³ As of December 1998, there were approximately 99.4 million households with a television set ("TV households") in the United States.⁴⁴ Of these TV households, approximately 79.6 million subscribed to the services of some MVPD.⁴⁵ Of this estimated total, cable distributors had 67.01 million subscribers (or 84.2% of the MVPD total), while DBS distributors had 7.8 million subscribers (or 9.8% of the MVPD total).⁴⁶ Thus, aggregating across distributors, cable distributors, rather than DBS distributors, dominate the MVPD market nationally.

14. Examining the market shares of individual distributors presents a picture that is roughly consistent with this aggregate characterization of the MVPD market. As of March 1999, DirecTV had approximately 4.762 million subscribers, a figure that combines DirecTV's subscribers with those recently acquired from USSB.⁴⁷ This subscriber estimate is less than that of the top four cable operators for similar points in time. AT&T Broadband & Internet Services ("AT&T") had 10.923 million subscribers (March 1999), Time Warner Cable had 6.456 million subscribers (February 1999), Comcast Communications ("Comcast") had 5.387 million subscribers (April 1999) and MediaOne Group ("MediaOne") had 5.127 million subscribers (April 1999).⁴⁸ Thus, prior to DirecTV's acquisition of Primestar, DirecTV was apparently the fifth largest MVPD.

15. DirecTV's position as a MVPD is likely to be improved somewhat after its recent acquisition of Primestar, but by how much is unclear.⁴⁹ First, EchoStar began an aggressive campaign to acquire former Primestar's subscribers as soon as DirecTV announced its intention to acquire Primestar. EchoStar created a bonus plan for retailers that convert Primestar subscribers to become EchoStar subscribers, instead of DirecTV subscribers.⁵⁰ Consequently, DirecTV is likely to gain only a portion of Primestar's estimated 2.3 million subscribers. Second, the largest cable multiple system operators ("MSO")

⁴³ Competitors in the MVPD market include cable operators, DBS operators, wireless cable operators (Multichannel Multipoint Distribution Services, Local Multipoint Distribution Services, etc.), Satellite Master Antenna Television Systems, and Local Exchange Carriers. *See 1998 Cable Competition Report*, 13 FCC Rcd at 24292-361 (detailed description and evaluation of the different competitors in the MVPD market).

⁴⁴ Estimate derived from the National Cable Television Association's Year-end Review web pages, http://www.ncta.com/yearend98_6.html.

⁴⁵ *Id.*, http://www.ncta.com/yearend98_6.html and http://www.ncta.com/yearend98_4.html.

⁴⁶ *Id.*

⁴⁷ Estimate derived from SkyTrend, http://www.skyreport.com/skyreport/dth_us.htm.

⁴⁸ *See* http://www.cvmag.com/database/db_topco.htm.

⁴⁹ *See supra* paragraph 5. DirecTV plans to operate Primestar's medium-power DTH business for a period of approximately two years, during which time it will attempt to transition the medium-power customers to its high-power DBS service. Tempo/DirecTV Application at 4 n.6.

⁵⁰ SkyTrends, *99 Annual Report*, at 24.

are currently acquiring additional subscribers through their acquisition of smaller cable MSOs. Pending transactions include: AT&T and Comcast acquiring different parts of MediaOne; Cox Communications purchasing TCA Cable TV and Media General Cable; Adelphia Communications taking over Century Communications and FrontierVision Partners;⁵¹ and, recently announced, Charter Communications' purchases of Falcon Communications and Fanch Communications.⁵² Each of these deals boost the customer base of the purchasing MSO well beyond 5 million subscribers, with AT&T topping 16 million subscribers.⁵³ With this significant consolidation occurring in the cable industry, we do not expect DirecTV's increased subscribership as a result of its acquisition of Primestar to significantly change its position in the MVPD market nationally.

16. However, our analysis also must consider the fact that cable MSOs operate in different local MVPD markets, while DirecTV provides services to most local MVPD markets. Thus, the degree to which cable distributors dominate different local MVPD markets varies across regions of the United States is unclear. There are consumers, such as those living in sparsely populated rural areas, who may be able to purchase only the offerings of DBS distributors because their homes are not served by any other MVPD. We do not have available the more geographically delineated data necessary to ascertain the market position of DBS operators in different local MVPD markets. Nevertheless, we note that approximately 96.6% of U.S. TV households are passed by a cable system.⁵⁴ This estimate suggests that most TV households in the United States have a choice between at least one cable operator and two full-CONUS DBS competitors (*i.e.*, DirecTV and EchoStar). Further, based on nationally aggregated MVPD market estimates, cable operators have far more subscribers on average than do DBS operators as a group.⁵⁵ Thus, we conclude that while DirecTV will likely become the fifth or sixth largest MVPD as a result of its acquisitions of USSB and Primestar, DirecTV will face stiff competition from at least one other MVPD operator in each of the markets in which it competes. Consequently, we believe that DirecTV currently does not possess market power in the distribution of multiple channels of video programming to consumers.

17. Nor do we view the assignment of Tempo's license to DirecTV as conferring on DirecTV an ability to exercise market power in the future in any of the local MVPD markets in which it competes. We make this judgment recognizing that the practical result of granting the proposed assignment is the one SCBA expresses concern over,⁵⁶ *i.e.*, all existing full-CONUS DBS channels will be under the control of DirecTV or EchoStar, the two largest DBS operators. In this regard, short of DirecTV or EchoStar

⁵¹ John M. Higgins, *Top MSOs Own 90% of Subs*, BROADCASTING & CABLE, May 24, 1999, at 34.

⁵² *Charter Becomes 4th Largest MSO with Acquisition of Fanch*, COMM. DAILY, May 28, 1999, at 5.

⁵³ Estimates derived from Higgins, *supra* footnote 51.

⁵⁴ The National Cable Television Association reports in its *Cable Television Developments: Fall 1998/Winter 1999* at 1, that of a total of 98,920,000 television households, 95,520,000 or 96.6% of these households are passed by a cable system. These estimates were taken from Paul Kagan Associates, Inc., *Marketing New Media* (November 16, 1998). A household is "passed" if cable service is sufficiently available to it that it might subscribe to cable service if it chooses.

⁵⁵ See *supra* paragraph 13.

⁵⁶ SCBA Request at 3-5.

selling or leasing significant channel capacity to a third party, grant of the proposed transaction prevents a third domestic DBS operator from using DBS channels at one of the existing full-CONUS orbital locations to provide service to different MVPD markets.

18. Despite this consolidation, it is still possible for another entity in the future to enter the U.S. DBS market and compete with these two DBS operators. Domestically, there is the possibility of a domestic MVPD operator entering different MVPD markets through alternative satellite distribution methods.⁵⁷ Furthermore, as the Commission noted in the *MCI/EchoStar Order*, there is the possibility that foreign DBS operators might enter the U.S. DBS industry.⁵⁸ For example, the United States has reached agreements with Mexico and Argentina to permit DTH satellite services, including DBS, licensed by either country to provide service into each other's territory.⁵⁹ Consequently, the consolidation of domestic full-CONUS capacity into the hands of two domestic DBS operators does not totally foreclose additional entry into the U.S. DBS industry.

19. More importantly, the Commission also noted in the *MCI/EchoStar Order* that because cable operators are increasing their product offerings, DBS operators will have to increase their product offerings to remain competitive.⁶⁰ DBS operators seeking to expand their service offerings will need increased channel capacity. For this reason, we find that DirecTV's acquisition of the Tempo channels will improve its ability to compete with cable operators.

20. The programming market. DBS operators compete with other distributors of video programming to obtain programming to distribute. Like most MVPDs, DirecTV primarily distributes the product of distributors who provide a stream or "channel" of programming by packaging self-produced and/or acquired video programs. Thus, the proposed transaction affects both those who purchase and package video programming as well as those who produce video programs for subsequent distribution.

21. As discussed above, DirecTV does not possess market power in MVPD markets nationally, nor is it likely to acquire such market power as a result of the proposed transaction. Consequently, we do not believe that DirecTV will be able to exercise market power, now or in the future, in acquiring video programming for national distribution as a result of this transaction.

c. Other Competitive Issues

22. Upon consummation of the proposed transaction, DirecTV will be the first entity licensed to provide DBS service from all three full-CONUS locations by adding 11 channels at 119° W.L. to its authorized channels at 110° W.L. and 101° W.L. EchoStar alleges that "while it is clear that DBS

⁵⁷ ING Baring Furman Selz LLC's "Satellite Weekly Research" report of May 25, 1999 indicates that BellSouth Corp. is examining MVPD market entry through a medium power satellite service.

⁵⁸ *MCI/EchoStar Order*, FCC 99-109, at ¶ 21 & n.52.

⁵⁹ See Public Notice, International Bureau Announces Conclusion of U.S.-Mexico Protocol for Direct-to-Home Satellite Services, 12 FCC Rcd 13105 (1996); Public Notice, International Bureau Announces Conclusion of U.S.-Argentina Framework Agreement and Protocol for Direct-to-Home Satellite Services and Fixed-Satellite Services, DA 98-1114 (rel. June 12, 1998).

⁶⁰ *MCI/EchoStar Order*, FCC 99-109, at ¶ 20.

providers should be allowed access to two [full-CONUS] orbital locations to ensure the capacity necessary to compete against cable operators, it is not clear that the Commission should permit, at least for the time being, a single operator to use spectrum at all three orbital locations."⁶¹ Specifically, EchoStar maintains that if DirecTV provides service to customers from all three full-CONUS orbital locations, it would underutilize its satellites (*i.e.*, portions of each satellite's capacity would be unused), and would have to supply each customer with two satellite dishes.⁶² In that regard, EchoStar claims that its own experience suggests consumers are reluctant to install and use two dishes.⁶³ Given these purported economic inefficiencies in DirecTV's business plan, EchoStar raises the possibility that DirecTV's motive for this transaction is to block EchoStar's use of these channels rather than effectively compete in the MVPD market.⁶⁴ We find EchoStar's argument unpersuasive for two reasons. First, EchoStar presumes that DirecTV plans to serve all customers from all three satellites, while DirecTV enumerates many plans for the Tempo frequencies that can just as easily stand on their own in providing competition to MVPD operators.⁶⁵ For those customers that desire to access DirecTV's services from all three full-CONUS satellite locations, DirecTV asserts that it is developing viable technologies that would allow it to serve consumers from a single dish -- to benefit not only DirecTV customers, but the DBS industry as well.⁶⁶ EchoStar presents no compelling reasons to discourage such innovation. Second, the Commission's rules do not prevent a license or orbital position from being assigned simply because a competing licensee argues that implementation of the authorization would be economically inefficient. Indeed, the Commission repeatedly has emphasized that the applicant -- not the Commission -- is in the best position to make these sorts of business judgments.⁶⁷

⁶¹ EchoStar Reply at 12.

⁶² EchoStar Petition at 2-3.

⁶³ *Id.* at 3 n.4.

⁶⁴ *Id.* at 4; EchoStar Reply at 15.

⁶⁵ Upon Commission consent to the proposed assignment, DirecTV can utilize the 11 [Tempo] frequencies . . . to offer additional high-quality entertainment, educational, and informational programming; new product tiers, which may include women's, religious, and family programming; new a la carte channel options; and additional ethnic programming. The additional capacity also will allow [DirecTV] to capitalize on such emerging consumer services as high definition television, data enhanced broadcasting, and interactive service offerings to meet competition from incumbent cable providers that already are offering these new services.

Tempo/DirecTV Application, Assignee's Public Interest Statement at 3.

⁶⁶ *Id.* at 4-5; DirecTV Opposition at 6 & Attachment 1. If DirecTV is successful in developing a single dish capable of receiving programming from three separate locations, then its innovations could allow DBS operators with only non-CONUS satellites to potentially compete more effectively with those that have full-CONUS satellites.

⁶⁷ See, e.g., *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, CC Docket No. 92-297, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 12545, 12608, 12643 (1997); *Inquiry into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites for the Period Following the 1983 Regional Administrative Radio Conference*, Gen. Docket No. 80-603, Notice of Proposed Policy

23. SCBA argues that DBS providers should be required to offer small cable operators (*i.e.*, those unable to support costly upgrades to digital cable) a reasonably-priced, wholesale package of digital video programming that the operator could redistribute under its own identity.⁶⁸ SCBA's argument is based on Primestar orally representing that it would provide small cable operators such a package if the TSAT/Primestar Application were approved.⁶⁹ SCBA further argues that this requirement would serve the public interest by ensuring the "viability of small cable businesses, an action necessary to ensure long-term competition between DBS and small cable in rural America."⁷⁰ We deny SCBA's request for two reasons. First, as the Commission recently stated, "the public interest [] is in insuring robust competition and not in protecting the financial interests of particular firms."⁷¹ Second, SCBA's perceived oral understanding with Primestar has no bearing on the Tempo/DirecTV Application,⁷² nor do we, in any event, adjudicate private contractual matters in such circumstances.⁷³ Consequently, we deny SCBA's request for this condition.

d. Qualification Requirements

24. MAP argues that, in acting upon the Tempo/DirecTV Application, the Commission must apply the citizenship standard set forth in Section 310(b) of the Communications Act,⁷⁴ its DBS-specific iteration at Section 100.11 of the Commission's Rules,⁷⁵ and the character standard set forth in Section 308(b) of the Communications Act.⁷⁶ Therefore, MAP requests that the Commission require Tempo and DirecTV to provide the information necessary for the Commission to apply these requirements to this application.⁷⁷ At its core, the MAP Petition reiterates legal arguments MAP and/or its clients have

Statement and Rulemaking, 86 F.C.C.2d 719, 750 (1981).

⁶⁸ SCBA Request at 5-7.

⁶⁹ *Id.* at 2 & Exhibit A at 3.

⁷⁰ *Id.* at 7.

⁷¹ *MCI/EchoStar Order*, FCC 99-109, at ¶ 25. *See generally id.* at ¶¶ 31-38 (discussing SCBA's claim of potential harm to terrestrial broadcasters and small cable operators presented by the MCI/EchoStar transaction).

⁷² *See also* Tempo Opposition at 4.

⁷³ *See, e.g., MCI/EchoStar Order*, FCC 99-109, at ¶ 30.

⁷⁴ MAP Petition at 1-5 (citing 47 U.S.C. § 310(b)).

⁷⁵ *Id.* at 2 (citing 47 C.F.R. § 100.11).

⁷⁶ *Id.* at 4 (citing 47 U.S.C. § 308(b)).

⁷⁷ *Id.* at 2.

presented in DBS-related proceedings that were pending at the time MAP filed its Petition,⁷⁸ but that the Commission recently has decided.

25. Specifically, in the *MCI MO&O*, the Commission recently affirmed the International Bureau's decision that Section 310(b) of the Communications Act does not apply when licensing non-broadcast, non-common carrier video service providers such as subscription DBS licensees.⁷⁹ Thus, Tempo and DirecTV are not required to submit citizenship information under Section 310(b). With respect to Section 100.11 of the Commission's Rules, we note there is an outstanding Notice of Proposed Rulemaking in which the Commission seeks comment on whether it should modify its DBS eligibility rules "such that the foreign ownership limitations currently located in Section 100.11 would apply to subscription DBS providers."⁸⁰ As the Commission recently stated in the *MCI MO&O*, "the applicability of foreign ownership limits for subscription DBS services is an issue the Commission will resolve in its final decision in the *Part 100* proceeding. We believe that rulemaking proceeding is the appropriate forum to consider a change in our rules."⁸¹ In this case, unlike in the *MCI MO&O*, no specific facts are alleged regarding foreign ownership of the applicants, and therefore, we do not have to reach the issue of whether a waiver of the Commission's rule is appropriate.⁸²

26. In the *MCI MO&O*, the Commission also stated that Section 308(b) character scrutiny is relevant in all licensing determinations.⁸³ Thus, a properly raised character qualification issue would be relevant in ruling on this assignment of license application. However, MAP has not raised any question regarding either Tempo's or DirecTV's character qualifications. As the Commission stated in the *MCI MO&O*: "The Commission customarily presumes that license applicants are trustworthy in the absence of evidence to the contrary, and the presumption need not be explicitly stated in a license order when it has not been called into question."⁸⁴ Therefore, we do not find it necessary to address MAP's request in this proceeding, and dismiss the MAP Petition on those grounds.

⁷⁸ *Id.* at 2-3, incorporating by reference the arguments presented in its clients' Petition to Dismiss or Deny the assignment application of MCI Telecommunications Corporation and EchoStar 110 Corporation, IBFS File No. SAT-ASG-19981202-0093, and its clients' Application for Review of *MCI Telecommunications Corporation*, Order, 11 FCC Rcd 16275 (Int'l Brr. 1996) (*MCI Order*).

⁷⁹ *MCI Telecommunications Corporation*, Memorandum Opinion and Order, FCC 99-110, at ¶¶ 11-14 (rel. May 19, 1999) (*MCI MO&O*), *aff'g* *MCI Order*, 11 FCC Rcd 16275.

⁸⁰ *Policies and Rules for the Direct Broadcast Satellite Service*, IB Docket No. 98-21, Notice of Proposed Rulemaking, 13 FCC Rcd 6907, 6922 (1998) (*Part 100 NPRM*).

⁸¹ *MCI MO&O*, FCC 99-110, at ¶ 21 (citing *Community Television of Southern California v. Gottfried*, 459 U.S. 498, 511 (1983) and *Capital Cities/ABC, Inc. and The Walt Disney Company*, Memorandum Opinion and Order, 11 FCC Rcd 5841, 5888 (1996)).

⁸² *See id.* at ¶ 20.

⁸³ *Id.* at ¶¶ 22-25 (citing the *Tempo Authorization*, 7 FCC Rcd at 2729, as an example of the Commission's evaluation of character qualifications in the subscription DBS context, *i.e.*, prior to issuing Tempo's construction permit).

⁸⁴ *Id.* at ¶ 25.

3. Due Diligence Conditions

27. When both the TSAT/Primestar Application and the MCI/Primestar Application were pending at the Commission, the International Bureau granted Tempo an extension of its May 1, 1998 due diligence deadline for commencing service from its 11 assigned channels at the 119° W.L. orbital location "until six months following the Commission's determination on the [TSAT/Primestar and MCI/Primestar] Applications or decision on any petitions for reconsideration of such determination."⁸⁵ EchoStar challenges the validity of the due diligence deadline extension on several grounds. First, EchoStar argues that Tempo has lost its authorization because the original transaction underlying the extension has been aborted (*i.e.*, no decision was ever reached by the Commission on either the Tempo/Primestar transaction or the MCI/Primestar transaction).⁸⁶ EchoStar therefore contends that Tempo should not be allowed to utilize the Primestar-related extension for the DirecTV transaction.⁸⁷ EchoStar further argues that, because Tempo did not meet its due diligence requirements, "it is not fit to hold the license it intends to assign in order to effectuate such an assignment."⁸⁸ Furthermore, EchoStar alleges that cable-owned Tempo's motive for delaying due diligence is to warehouse DBS spectrum, thus limiting access to this spectrum by cable's DBS competitors. In that regard, EchoStar argues that denying the Tempo/DirecTV Application would be consistent with Commission precedent on DBS spectrum warehousing set in the *Advanced Cancellation Order*.⁸⁹

28. We disagree with EchoStar's interpretation of our actions and Commission precedent. In the *Tempo Extension Order*, the International Bureau specifically stated that the due diligence deadline would resume following "Commission determination" on *both* the TSAT/Primestar Application and the MCI/Primestar Application. Although MCI and Primestar voluntarily withdrew the MCI/Primestar Application in November 1998, the TSAT/Primestar Application has awaited Commission action. Given our determination to dismiss the TSAT/Primestar Application in this *Order*, the due diligence clock begins to run today. Therefore, we deny EchoStar's challenge to the validity of Tempo's authorization, as well as EchoStar's allegation regarding Tempo's fitness to assign its authorization to DirecTV. Finally, this case

⁸⁵ *Tempo Extension Order*, 13 FCC Rcd at 11073, 11075. The Commission granted Tempo its DBS construction permit on May 1, 1992. *Tempo Authorization*, 7 FCC Rcd 2728. Therefore, Tempo's deadline for meeting the second prong of its due diligence was May 1, 1998. See 47 C.F.R. § 100.19(a), described *supra* footnote 28.

⁸⁶ EchoStar Reply at 6.

⁸⁷ *Id.*

⁸⁸ *Id.* at 8-10 (citing *Advanced Communications Corp.*, 11 FCC Rcd 3399 (1995) (*Advanced Cancellation Order*)).

⁸⁹ *Id.* at 10-12. In the *Advanced Cancellation Order*, the Commission found that, despite a decade of authority, including a four-year extension, DBS permittee Advanced Communications Corporation ("Advanced") had not made concrete progress toward commencing operation of a DBS service. The Commission affirmed the International Bureau's decision to cancel Advanced's construction permit for failure to meet due diligence, and the Commission's action was upheld on appeal. See *Advanced Communications Corp. v. FCC*, 84 F.3d 1452 (D.C. Cir. 1996), *cert. denied*, 117 S. Ct. 718 (1997).

is unlike the *Advanced Cancellation Order*, because Tempo, unlike Advanced, has made significant strides toward commencing DBS service.⁹⁰

29. In order to assure prompt implementation of this authorization, and to further the policy objectives of the *Tempo Extension Order*, we condition the grant of the Tempo/DirecTV Application on the requirement that DirecTV commence service from the 119° W.L. orbital location no later than six months from today, November 28, 1999. Given DirecTV's declaration that it "is not requesting, and there will be no need for, any additional due diligence extension at 119° W.L.,"⁹¹ we believe that six months is an adequate amount of time for DirecTV to meet this authorization's due diligence requirements.

B. EchoStar's Request for Special Temporary Authority

30. EchoStar's authorization to use 21 DBS channels at the 119° W.L. orbital location is based on the authorizations to two related entities, EchoStar and Directsat. In March 1996, EchoStar was granted an STA to operate over five of Tempo's channels at 119° W.L. for a six month period, as a "temporary bridge" to make more efficient use of spectrum resources until Directsat's satellite was operational at 119° W.L.⁹² The STA was subject to the condition that EchoStar cease operations upon the launch of Tempo's satellite to the 119° W.L. orbital location.⁹³ In June 1996, EchoStar filed a request for an extension of its STA to operate on Tempo's channels, and Directsat requested an STA to operate its satellite on the remainder of Tempo's channels. On November 26, 1996, the Chief of the Satellite and Radiocommunication Division denied both requests. In doing so, the Division stated that because Directsat had launched its satellite, the original basis for the STA was no longer valid.⁹⁴ On February 24, 1997, we denied EchoStar and Directsat's Consolidated Petition for Reconsideration, stating that granting an STA a few weeks prior to Tempo's satellite launch was not in the public interest.⁹⁵

31. After Tempo launched its satellite and reported technical difficulties, EchoStar and Directsat filed a third request for an STA to use Tempo's 11 channels at the 119° W.L. orbital location to provide EchoStar DBS service.⁹⁶ Specifically, EchoStar and Directsat argue that Tempo's reported technical difficulties are evidence that the frequencies would remain unused in the near term, and that

⁹⁰ See *supra* paragraph 3; see also *Tempo Extension Order*, 13 FCC Rcd at 11072 ("Tempo, unlike Advanced, has not remained idle but has made tangible progress toward implementing service from its assigned frequencies at the 119° W.L. location.").

⁹¹ Tempo/DirecTV Application, Assignee's Public Interest Statement at 6-7; see DirecTV Opposition at 7 ("[U]pon grant of the instant Application, [DirecTV] will utilize a [Tempo] satellite that already is in orbit and capable of providing service almost immediately."). See also *supra* footnotes 24-25 & accompanying text.

⁹² *EchoStar Satellite Corp.*, Order, 11 FCC Rcd 5351, 5352 (Sat. & Radiocom. Div. 1996).

⁹³ *Id.*

⁹⁴ *EchoStar Satellite Corporation*, Order, 11 FCC Rcd 16455, 16457 (Sat. & Radiocom. Div. 1996); *Direcstar Corporation*, Order, 11 FCC Rcd 16460, 16462 (Sat. & Radiocom. Div. 1996).

⁹⁵ *Tempo Launch Order*, 13 FCC Rcd at 9210-11.

⁹⁶ EchoStar/Direcstar STA Request, *supra* footnote 11.

EchoStar/Directsat, with enough capacity on their combined in-orbit satellites to utilize these channels, are situated to put these resources to productive temporary use.⁹⁷ Moreover, they also state that they will "discontinue any use of the channels *on one day's notice* and seven days prior to commencement of service by Tempo."⁹⁸ Tempo opposed EchoStar/Directsat's STA request.⁹⁹

32. Our approval of the Tempo/DirecTV Application today allows DirecTV to follow through with immediately initiating service from the 119° W.L. orbital location.¹⁰⁰ Since we have assurances that the 11 DBS channels in question will be used by the authorized assignee in the very near future, an STA for another licensee to utilize these frequencies is not appropriate. We therefore deny the EchoStar/Directsat STA Request.

IV. CONCLUSION

33. In view of the foregoing, we find that grant of the authorization for 11 DBS channels at the 119° W.L. orbital location to DirecTV will serve the public interest, convenience, and necessity by increasing competition in the MVPD markets to the benefit of U.S. consumers.

V. ORDERING CLAUSES

34. Accordingly, pursuant to authority delegated by Section 0.261 of the Commission's Rules, 47 C.F.R. § 0.261, IT IS ORDERED that the assignment application, IBFS File No. SAT-ASG-19990127-00014, File No. DBS-88-04, filed by Tempo Satellite, Inc. and DirecTV Enterprises, Inc. IS GRANTED, SUBJECT TO THE CONDITION that DirecTV initiate DBS service to customers using channels 22-32 at the 119° W.L. orbital location by November 28, 1999.

35. IT IS FURTHER ORDERED that the Petition to Deny filed by EchoStar Communications Corporation, and the Request for Conditional Grant filed by the Small Cable Business Association ARE DENIED, and the Contingent Petition to Dismiss or Deny filed by Media Access Project IS DISMISSED.

36. IT IS FURTHER ORDERED that the assignment shall be completed within 60 days from the release of this Order and that the Commission shall be notified by letter within 30 days of consummation.

⁹⁷ *Id.* at 2.

⁹⁸ *Id.* at 14 (emphasis in original).

⁹⁹ Petition of Tempo Satellite, Inc. to Dismiss or Deny (filed August 29, 1997). Subsequently, the Commission received the following pleadings: Opposition of EchoStar Satellite Corporation and Directsat Corporation (filed September 11, 1997); Reply of Tempo Satellite, Inc. (filed September 18, 1997).


¹⁰⁰ *See supra* paragraphs 6 & 29.

37. IT IS FURTHER ORDERED that the application for consent to transfer of control, IBFS File No. SAT-T/C-19970718-00065, File No. 91-SAT-TC-97, filed by TCI Satellite Entertainment, Inc. and PRIMESTAR, Inc., IS DISMISSED.

38. IT IS FURTHER ORDERED that the Consolidated Applications for Special Temporary Authority filed by EchoStar Satellite Corporation and Directsat Corporation, IBFS File Nos. SAT-STA-19970721-00066 and SAT-STA-19970721-00067, File Nos. 92-SAT-STA-97 and 93-SAT-STA-97, ARE DENIED.

39. IT IS FURTHER ORDERED that this Order is effective upon release.

FEDERAL COMMUNICATIONS COMMISSION


Roderick K. Porter
Acting Chief, International Bureau