



PUBLIC NOTICE

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**THE COMMISSION REQUESTS FURTHER COMMENT IN PART 100
RULEMAKING PROCEEDING ON NON-CONFORMING USE OF DIRECT
BROADCAST SATELLITE SERVICE SPECTRUM
IB Docket No. 98-21**

Supplemental Comment Date: January 8, 2001
Supplemental Reply Comment Date: January 18, 2001

On February 26, 1998, the Commission released a Notice of Proposed Rulemaking¹ (*Part 100 Notice*) seeking comment on its proposal to integrate the direct broadcast satellite ("DBS") service rules incorporated in Part 100 of the Commission's rules into Part 25 (Satellite Communications) and to streamline and eliminate any unnecessary DBS rules. In addition, the Commission sought comment on its proposal to apply the revised Part 1 general auction rules to DBS and eliminate separate DBS auction rules. By applying the Part 1 and Part 25 application processing and licensing procedures to the DBS service, the Commission seeks to simplify procedures applicable to DBS, eliminate unnecessary paperwork, and harmonize the DBS licensing process with the licensing processes for other satellite services.

The Commission received significant comment on the issues raised in this proceeding. Since that time, however, another issue has arisen as a result of the continuing evolution of the DBS industry. In particular, the public has made inquiries about other potential uses of DBS spectrum. Accordingly, by this Public Notice, the Commission seeks to augment the record in the *Part 100 Notice* on this issue. Specifically, we seek additional comment on the issue of non-conforming uses of DBS spectrum. Under the current policy, a DBS operator must begin DBS operations within five years of receipt of its license, but may otherwise make unrestricted use of the spectrum prior to expiration of the five-year period. After this initial five-year period, a DBS licensee "may continue providing non-DBS service during the remainder of the life of its first satellites (presuming its license is renewed) only on those transponders on which [it] continues to provide DBS service, and that non-DBS use cannot exceed fifty percent of each 24-hour day on any such transponder."² In accordance

¹ See *In re Policies and Rules for the Direct Broadcast Satellite Service*, Notice of Proposed Rulemaking, IB Docket No. 98-21, 13 FCC Rcd. 6907 (1998) (*Part 100 Notice*).

² *Petition of United States Satellite Broadcasting Company, Inc. for Declaratory Ruling Regarding Permissible Uses of the Direct Broadcast Satellite Service*, 1 FCC Rcd 977 (1996 USSB Declaratory Ruling) at ¶ 13. See also *In the Matter of Rules and Policies for the Direct Broadcast Satellite Service*, 11 FCC Rcd

with this policy, the Commission has stated that it would consider continuing "to permit some degree of non-conforming use of DBS satellites during future generations given the circumstances prevailing at that time."³

The Commission established its "non-conforming use" policy in a series of three decisions: 1) *1986 USSB Declaratory Ruling*;⁴ 2) *1991 Potential Uses of DBS Order*;⁵ and (3) *1995 DBS Auction Order*.⁶ This policy, which was adopted when DBS was still in its infancy, was intended to provide DBS operators with a source of early revenues that could, in turn, help operators meet the very high up-front costs of launching a DBS system and reduce the risk of monetary loss if the DBS service proved unsuccessful. The Commission has since recognized that DBS is no longer in its early stages.⁷ Rather, it is an established competitor to cable. Consequently, we question whether the original justification for the non-conforming use policy continues to be valid. In addition, we ask for comment on whether there are now other reasons to continue and perhaps even expand the non-conforming use policy. For example, advances in technology, ability to compete with cable services, and new service offerings, may warrant revisiting this policy.

By this Public Notice, we request comment on non-DBS services. Specifically, we seek comment on whether we should eliminate, relax, or maintain time or other restrictions on satellite uses of DBS spectrum. We seek comment on the appropriateness of such restrictions before and after the initial five years of the license term, particularly at those orbital locations in the western arc that are currently under-utilized. Commenters should address whether permitting flexible use of DBS spectrum will enhance or impede competition in the multi-channel video programming distribution (MVPD) market. Commenters should address the types of non-DBS services likely to be provided, and whether these services could result in corresponding benefits to MVPD or other competition. We also request comment on whether we should limit other uses to the fixed-satellite service (FSS), as permitted by the U.S. Table of Frequency Allocations.⁸ Moreover, if we allow non-conforming uses of DBS spectrum, should we require those services to conform to the interference criteria associated with DBS, the primary service. We note that two DBS licensees are providing full and robust DBS from locations capable of serving the contiguous United States (CONUS), but that locations in the western portion of the orbital arc that are not capable of serving the East Coast are under-utilized. Commenters should address whether a flexible use policy will help ensure that these western locations are used more efficiently. Commenters should address whether we should apply a flexible use policy to all of the orbit locations available for DBS service or only to the western orbital locations.

9712 (*DBS Auction Order*) (1995) at ¶ 17.

³ *USSB Declaratory Ruling*, *supra* n. 2 at ¶ 13.

⁴ *See generally USSB Declaratory Ruling*, *supra* n. 2.

⁵ *In the Matter of Potential Uses of Certain Orbital Allocations by Operators in the Direct Broadcast Satellite Service*, 6 FCC Rcd 2581 (1991)(*1991 Potential Uses of DBS Order*).

⁶ *See DBS Auction Order*, *supra* n. 2 at ¶ 17; *See also In the Matter of Revision of Rules and Policies for the Direct Broadcast Satellite Service*, Notice of Proposed Rulemaking, 11 FCC Rcd 1297 (1995).

⁷ *See e.g. Part 100 Notice*.

⁸ 47 C.F.R. § 2.106.

Commenters should also address whether and to what extent permitting other use of DBS spectrum will impact the Commission's geographic service rules.⁹ Finally, if we apply a flexible use policy to all U.S. orbit locations, should we apply this policy to foreign licensed facilities that are permitted to serve the U.S. (*i.e.* those satellite systems licensed in Argentina and Mexico).¹⁰ Commenters should support their views with concrete analysis and documentation.

Procedural Matters

Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file Supplemental Comments limited to the issues addressed in this Public Notice no later than January 8, 2001 and the Supplemental Reply Comments, no later than January 18, 2001. In view of the pendency of this proceeding, we expect to adhere to the schedule set forth in this Public Notice and do not contemplate granting extensions of time. Comments should reference IB Docket No. 98-21 and should include the FCC number shown on this Public Notice. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS).¹¹ Comments filed through the ECFS can be sent as an electronic file via Internet to <<http://www.fcc.gov/e-file/ecfs.html>>. In completing the transmittal screen, parties responding should include their full name, mailing address, and the applicable docket number, IB Docket 98-21. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking appear in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. All filings must be sent to the Commission's Secretary, Magalie Roman Salas. Office of the Secretary, Federal Communications Commission, 445 12th St., S.W., Rm. TW-A325, Washington, D.C. 20554. One copy of all comments should also be sent to the Commission's copy contractor. Copies of all filings are available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, S.W., Washington, D.C. 20554, telephone 202-857-3800, facsimile 202-857-3805.

In the *Part 100 Notice*, the Commission presented an Initial Regulatory Flexibility Analysis,¹² as required by the Regulatory Flexibility Act (RFA).¹³ If commenters believe that the proposals discussed in this Public Notice require additional RFA analysis, they should include a discussion of these issues in their Supplemental Comments.

⁹ 47 C.F.R. § 100.53.

¹⁰ See Protocol Concerning the Transmission and Reception of Signals from Satellites for the Provision of Direct-to-Home Satellite Services in the United States of America and United Mexican States (November 8, 1996), Article VI; Agreement Between the Government of the Argentine Republic Concerning the Provision of Satellite Facilities and the Transmission and Reception of Signals to and from Satellites for the Provision of Satellite Service to Users in the United States of America and the Republic of Argentina (June 5, 1998), Article VI.

¹¹ See *Electronic Filing of Documents in Rulemaking Proceeding*, 63 Fed. Reg. 24121 (1998).

¹² *Part 100 Notice*, 13 FCC Rcd at 6907.

¹³ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

For *ex parte* purposes, this proceeding continues to be a “permit-but-disclose” proceeding, in accordance with Section 1.1200(a) of the Commission’s rules, and is subject to the requirements set forth in Section 1.1206(b) of the Commission’s rules.

For further information please contact, Selina Khan, International Bureau (202) 418-7282.

Action by the Commission on December 4, 2000.