

**Dissenting Statement of  
Commissioner James H. Quello**

**In the Matter of Advanced Communications Corp.**

In its decision today, the majority has changed the DBS due diligence rules in the middle of the game, unlawfully and unfairly disadvantaging an innocent participant. By a slim majority indicative of the difficult factual, legal and policy issues before us, the Commission has affirmed the International Bureau's finding that Advanced Communications Corp. failed to meet its due diligence obligation in the construction and launch of its DBS system. The result: Advanced's construction permit has been cancelled, its application to assign its DBS construction permit to Tempo has been dismissed as moot, and the channels and orbital locations previously assigned to ACC will likely be auctioned to the highest bidder. The practical public interest result of the majority decision: the future of a small cable operator "headend in the sky" has been jeopardized; the date for the arrival of first-ever DBS service to Alaska and Hawaii is unclear; and additional multichannel video programming competition from another DBS provider will be delayed.

Because this decision demonstrates a lack of understanding of the history of the DBS service, and because it fundamentally misapplies Commission precedent, I respectfully dissent.

**The History of the DBS Service**

I find it interesting that the two dissenters in this case are the two senior Commissioners at this Agency. In my view, this is no coincidence. My colleague and I have experienced firsthand the growing pains of a fifteen-year-old satellite service that many experts and pundits long ago wrote off as a technology that would never make it from the drawing board into the home. This skepticism was not without some foundation, given the substantial developments in DBS satellite technology, changes in Commission policy regarding channel and orbital assignments, and the Challenger and Ariane launch vehicle failures of the late 1980's, all of which necessitated changes in business plans, expenditure of additional funds, and delay. Moreover, my colleague and I have served on this Commission when it bravely refused, despite the dire predictions of these "experts," to abandon an industry that promised to offer subscribers an alternative to cable service.

It is this firsthand experience, together with the fact that the DBS industry is only beginning to become a viable and competitive service, that highlights to me the absurdity of the majority's decision to execute one of the survivors of this brush with marketplace death. As a veteran, this strikes me as somewhat akin to rewarding a survivor of the Charge of the Light Brigade by putting him in front of a firing squad.

Lest we inhibit the viability of a service that still needs relief from undue regulatory constraints that could inhibit its growth -- and by growth I mean the growth of a service that

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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." USSB I, 3 FCC Rcd 6858, 6859 (1988). In short, the Commission must weigh the delay in scheduled implementation of service against the claimed public interest benefits. USSB II, 7 FCC Rcd 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 Rcd 6292 (1989), partial recon. denied, 5 FCC Rcd 7421 (1990); Dominion Video Satellite, Inc., 8 FCC Rcd 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 Rcd 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 Rcd 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 Rcd. 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 reports 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, such "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.