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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of	)	
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Amendment of the Commission's Regulatory Policies to Allow Non-U.S.-Licensed Space Stations to Provide Domestic and International Satellite Service in the United States	)	IB Docket No. 96-111
	)	
and	)	
	)	
Amendment of Section 25.131 of the Commission's Rules and Regulations to Eliminate the Licensing Requirement for Certain International Receive-Only Earth Stations	)	CC Docket No. 93-23 RM-7931
	)	
and	)	
	)	
COMMUNICATIONS SATELLITE CORPORATION Request for Waiver of Section 25.131(j)(1) of the Commission's Rules As It Applies to Services Provided via the Intelsat K Satellite	)	File No. ISP-92-007

MCI COMMENTS

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SUMMARY

MCI strongly supports the objectives of the proposed "ECO-Sat" test and the Commission's effort to establish a clear and consistent set of rules to ensure the fair and efficient use of foreign satellites, while protecting U.S. consumers from deleterious market distortions at home. An ECO-Sat standard that tests whether there are "effective competitive opportunities" for the provision of satellite services in other countries will help ensure that U.S. satellite operators, including MCI, have access to broader geographic markets and a larger base of potential subscribers. The ECO-Sat test will also promote fair and vigorous competition in the provision of satellite services, from which U.S. consumers will reap significant benefits in the form of increased innovation and choice. The NPRM's proposed formalization of principles that have previously been applied on a case-by-case basis will provide the Commission and the industry with a consistent framework within which to review applications for authority to communicate with non-U.S.-licensed satellite systems.

The Commission has correctly identified two markets that should be examined in applying the ECO-Sat test: the "home market," i.e., the market of the administration that coordinates with the ITU (licenses the satellite), and the route markets, i.e., those markets on the route (or routes) served by the satellite. Route market administrations may have both the ability and the incentive to create exclusive arrangements or restrictions that their constituents may leverage to the detriment of U.S. operators and competition in the United States. When the route market is also a home market, there are greater financial ties and political control over the satellite operator, and the risk of competitive distortion is even greater. This is true for bidirectional satellite communications, but it is of equal concern in the case of direct broadcast consumer and home entertainment services. Such barriers can be particularly harmful in the DBS/DTH market because they enable the foreign licensee unfairly to leverage the monopoly it enjoys over its home-

country customer base and offer a greater diversity of services to a broader audience at a lower cost, by contrast with U.S.-licensed satellite system operators.

MCI supports the Commission's proposal to review both de jure and de facto barriers as well as public interest considerations. Prior to obtaining a license, applicants should demonstrate, at a minimum, that no de jure barriers exist, i.e., that no foreign law, regulation or policy regarding orbital slots, spectrum, landing rights, uplink and downlinks to the satellite or satellite services licensing, prohibits or restricts competition by, or access to, foreign satellite operators. As part of the ECO-Sat test, the applicant should make at least a preliminary demonstration that the foreign regulatory regime (particularly if new) will be properly implemented pursuant to a reasonable timetable. Clearly, fairness on paper alone is insufficient protection for U.S. consumers.

Applicants seeking licenses to offer DBS/DTH services also should verify that there are no content-related restrictions which would bar U.S. DBS/DTH applicants from the relevant market, since satellite transmission is inextricably linked to content in the provision of DBS/DTH services. Laws and regulations that directly limit the ability of U.S. satellite operations to supply DBS/DTH programming in a foreign market are de jure barriers that can be as damaging to fair and vigorous competition as laws that restrict satellite transmission service.

De facto barriers would encompass constraints that are not "de jure," i.e., those which have an indirect impact on competition in the satellite services in question. These would include, for example, administrative practices and procedures which impair the ability of U.S. applicants to obtain licenses or which place them at an unfair disadvantage in the application process.

MCI agrees that the burden of demonstrating de jure barriers rests with the applicant. In the case of de facto constraints, the party opposing an application should be required only to make a prima facie showing that a barrier exists, after which the applicant should have the burden

of demonstrating that the de facto barrier so identified does not restrict "competitive opportunities" in the relevant market(s). This is appropriate because information regarding the particular conditions and circumstances surrounding a transaction is often uniquely within the knowledge of the applicant and its business associates participating in the transaction.

MCI shares the Commission's view that the public interest should be evaluated as part of the ECO-Sat test. Spectrum management should receive careful consideration in this context. Once spectrum is assigned, it is only with great difficulty that it can be recovered. In cases where U.S. licensees are required to obtain the right to use spectrum pursuant to auction, the Commission also should ensure that grant of an earth station license does not interfere with the public interest in maintaining the integrity of the auction process (or, alternatively, that it does not serve as a de facto constraint)

With respect to technical rules, in fairness to U.S. operators, communications with non-U.S. licensed satellites should be subject to the Commission's existing rules. To better accommodate the ECO-Sat test, certain modest modifications should be made to the application forms for licenses for earth stations that communicate with foreign satellites.

Finally, for both technical and competitive reasons, receive-only earth stations communicating with Intelsat or non-U.S. FSS satellites should continue to be licensed. For all of the reasons discussed herein, earth station licensing for DBS/DTH transmissions from a foreign satellite must be required. However, a blanket earth station license should provide adequate regulatory oversight. MCI sees no need to regulate earth stations receiving signals from U.S. FSS satellites only.

In conclusion, MCI urges the Commission to adopt the ECO-Sat test, along with the modest, but important, clarifications, recommended herein. The resulting rules should ensure an effective, workable process that properly weighs the interests of applicants for licenses to

communicate with foreign satellites, against the public interest in promoting open and fair competition in the provision of satellite services.

Finally, for both technical and competitive reasons, the Commission should continue to require licenses

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MCI COMMENTS

MCI Telecommunications Corporation (MCI), by its undersigned counsel, hereby submits its initial comments in response to the Notice of Proposed Rulemaking (NPRM)[1] in the above-captioned proceedings. The NPRM seeks comment on the Commission's proposal to implement

[1] FCC 96-210 (released May 14, 1996).

a consistent framework for evaluating applications by users in the United States for authority to access satellites licensed by other countries.

INTRODUCTION AND STATEMENT OF INTEREST

MCI's principal interest in this proceeding arises from its status as the highest bidder and solely authorized DBS license applicant at 110 degrees West Longitude. MCI intends to launch the first of its two satellites in late 1997 and the second in early 1998, and to provide capacity to two affiliated customer-programmers, American Sky Broadcasting (ASkyB) and skyMCI. ASkyB will target its offerings to the consumer market and skyMCI will focus on business-to-business and business-to-consumer offerings. Having committed to pay $682.5 million for the rights to construct and operate a DBS system in the "last available...DBS orbital location capable of nationwide service,"[2] MCI has a clear, direct and tangible interest in the outcome of this proceeding. To the extent that the Commission's "ECO-Sat" framework is effective in ensuring that U.S. satellite operators have "effective competitive opportunities" in other countries, U.S. DBS operators will have access to broader geographic markets and a larger base of potential subscribers, and their customers will benefit through a broader range of programming and service options. Conversely, if the Commission fails to adopt and faithfully implement an effective, comprehensive framework for the review of applications for authority to communicate with non-U.S. licensed satellites, U.S. satellite service providers will be disadvantaged vis-a-vis their

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[2] See FCC News Release, "MCI Telecommunications Corporation Bids $682,500,000 for Last Available Nationwide DBS Slot," (released January 25, 1996).

foreign-licensed competitors, U.S. consumers will lose out in the process, and U.S. competitiveness will be adversely affected in the long run.

MCI is also interested in the outcome of this proceeding as a carrier customer of other satellite service providers, principally in the Fixed Satellite Service (FSS). An effective ECO-Sat framework will help provide MCI, in its role as customer, with additional choices when it seeks to purchase satellite transmission services to serve its large and rapidly growing customer base throughout the world.

DISCUSSION[3]

A. A Formalized "Effective Competitive Opportunities for Satellites" Test Would Provide the Commission and the Industry With a Clear and Consistent Framework For the Review Of Applications for Authority to Communicate With Non-U.S. Licensed Satellite Systems.

MCI strongly supports the Commission's objectives in this proceeding, which are based on the premise that "Fair, vigorous competition among multiple providers leads to lower prices, better service, and more innovative service offerings for satellite users in the United States." NPRM, at paragraph 8 (emphasis supplied). When authorizing the delivery of services via non-U.S. satellites, it is essential for the Commission to ensure that competition is fair from the outset so that it can be vigorous over the long term. As the Commission observes in paragraph 11 of the NPRM:

> [T]here are circumstances under which unrestricted access to non-U.S. systems may adversely affect competition in the United States. For example, if a non-U.S. satellite can provide services on international routes that cannot be served by U.S. satellites, then the non-U.S. satellite will have a competitive advantage over its

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[3] MCI's comments are organized and numbered in the same manner as the "Discussion" section (Section III.) of the Commission's NPRM.

> U.S. counterparts on all routes because it will be able to offer its customers a wider range of communications capabilities. To the extent any such advantage is based solely upon the exclusion of U.S. operators from markets overseas, it can distort competition in the market for international satellite services.

As the Commission has recognized, both in the NPRM and in earlier case-by-case application proceedings,[4] exclusionary policies abroad can confer competitive advantages on non-U.S. operators, disadvantage their U.S. counterparts and distort competition in the satellite services market in the United States. Thus, it is entirely appropriate that the Commission undertake, in this proceeding, to formalize its current policies through the development of an "effective competitive opportunities for satellites," or ECO-Sat, test.

B. Review of Earth Station Applications Seeking Authorization to Communicate with Non-U.S. Satellites Is an Appropriate Procedural Forum for the Application of the ECO-Sat Test.

MCI supports the Commission's proposal to regulate access to non-U.S. satellites primarily through the licensing of earth stations that communicate with those satellites. (NPRM, para. 14.) Licensing earth stations that transmit signals to, or receive signals from, non-U.S. satellites permits the Commission to perform its critical spectrum management function and enforce the observance of technical standards as necessary to ensure that interference can be prevented or remedied. (NPRM, para. 10).

The Commission proposes a two-stage process for the review of applications for authority to construct or operate earth stations that communicate with non-U.S. satellites. The first stage would include the review of legal, technical and financial qualification submissions as well as the applicant's submission of information necessary to demonstrate compliance with the ECO-Sat

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[4] NPRM at n. 10.

standard. The second stage would encompass a review of other public interest factors (including national security, trade, and foreign policy considerations) supporting grant or denial of the particular application. In the second stage of the process, the Commission proposes to consult closely with the relevant agencies of the Executive Branch and to give considerable weight to their views within their respective areas of expertise. MCI supports the Commission's proposed two-stage process, with the additional prerequisites and clarifications proposed in Section C.4, below.

C. The ECO-Sat Test Should Be Applied Broadly and Flexibly

1. As a General Rule, All Applications Involving Communications to, from, or within the U.S. Via Non-U.S. Licensed Satellites Should Be Subject to the ECO-Sat Test

MCI supports the Commission's proposal (NPRM, para. 19) to apply the ECO-Sat test to all U.S. earth station applications involving transmissions to, from or within the United States via a non-U.S. space station. MCI strongly agrees that the test should be applied regardless of the ownership of the space station or the type of service offered.

MCI also urges the Commission to apply the same policies and rules adopted in this proceeding to applications pending at the time the NPRM was issued. As confirmed in its NPRM, (at para. 1, for example) the Commission is not adopting a "new policy" in this proceeding but, rather, is formalizing a policy that includes various criteria that it has heretofore applied on an individual case basis. Inasmuch as all previously filed applications have been subject to a review similar to that proposed to be applied prospectively to applications filed after the adoption date of the NPRM, there should be no significant burden on the few applicants that filed prior to that date. It would be unfair -- and wholly inconsistent with the Commission's existing policy -- to

create an exemption for pending applications. Accordingly, MCI urges the Commission to subject all pending applications to the criteria and standards established for ECO-Sat review.[5]

2. Both the Home and Route Markets Should Be Subject to the ECO-Sat Test, as Artificial Barriers in Either Market Can Adversely Affect U.S. Competition and Consumer Choice.

Following the model provided by the Market Entry Order, the Commission in this proceeding proposes to adopt a public interest test that comprises, in part, an effective competitive opportunities analysis. The stated objective is "not to secure open markets as an end in itself...[but to ensure that foreign affiliates'] entry promotes rather than hinders competition in the U.S. international [and domestic] services market[s]."[6] Clearly, restrictions on market access, i.e., artificial barriers to competition in international services markets, can create market anomalies and limit fair competition -- effects which, over the long term, can only work to the disadvantage of U.S. consumers. Thus, the Commission has proposed a licensing condition for satellite services that would limit the ability of competitors using foreign-licensed facilities to leverage

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[5] Of course, any application deferred, dismissed or denied should also be subject to the ECO-Sat test as outlined in the NPRM.

[6] See Market Entry and Regulation of Foreign-affiliated Entities, 11 F.C.C. Rcd. 3873, 3959 (1995) (Market Entry Order). MCI notes that the Commission has the jurisdiction to impose license restrictions expressly for the purpose of securing open markets for U.S. satellites. Specifically, Section 308(c) of the Communications Act, upon which the Commission relies (NPRM, para. 7), authorizes the Commission to impose "terms, conditions or restrictions" on radio station licensees in order to "secure rights for the landing or operation of [U.S. radio stations] in foreign countries, or in maintaining the rights or interest of the United States or of its citizens in foreign countries." However, the Commission has chosen to be more restrained in its approach, regulating foreign earth stations only as far as is necessary to assure the greatest possible availability of efficient and innovative satellite services for users in the United States. (NPRM, paras. 7-9).

artificial restrictions in the home market of the satellite operator or on relevant routes to the detriment of competition in the United States.

Specifically, the Commission identified two markets that should be examined for "effective competitive opportunities," namely, the "home market," i.e., the market of the administration that coordinates the spectrum allocation with the ITU (licenses the satellite) and the route market, i.e., those markets included on the route (or routes) served by the satellite. MCI agrees that both of these markets should be scrutinized carefully in individual cases. Foreign administrations have the ability and the incentive to create exclusive arrangements or restrictions that, ultimately, they or their customers or licensees may leverage to the detriment of U.S. operators with the effect of impairing competition in the United States.

To avoid the competitive distortion that is likely to result when only the foreign satellite system is able to offer services to two countries from a single uplink, MCI agrees that all "route markets" served by the foreign satellite must be examined. Foreign administrations on a U.S. international route that bar U S. operators from entry essentially grant exclusive rights to their own licensees, and their position in the market can be unfairly leveraged to the detriment of U.S. competition.[7] The most direct and obvious restrictions that route-market administrations may impose include limiting satellite operations to a specified monopoly or permitting only in-country operators to obtain licenses for uplinks, downlinks, spectrum or services.[8] The NPRM offers clear examples of the type of market distortion that can result when only the foreign satellite

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[7] The Commission recognizes that many markets deny entry to foreign satellites (including U.S.-licensed satellites). (NPRM, para. 29).

[8] MCI discusses more fully, below, the types of de jure barriers that may be erected by foreign administrations.

system is able to offer services to both countries -- the United States and the foreign market -- from a single uplink.[9]

Although the harmful impact of artificial barriers on international bidirectional satellite communications is of obvious concern, it must be emphasized that such barriers are just as damaging to competition in the market for unidirectional services such as direct broadcast consumer and home entertainment services. For example, assume that Country A authorizes a DBS/DTH satellite whose footprint includes the United States and Country B, but Country B does not allow DBS/DTH services to be offered from a U.S. satellite. If the U.S. permits a DBS/DTH operator to provide service on the foreign satellite, that operator will have both markets to support its operations and products, while the U.S. service provider would be able to rely on the U.S. market alone. [10]

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[9] See, e.g., NPRM, paras. 11 and 23. As a purchaser of satellite capacity, MCI agrees with the Commission's recognition that the ability to provide coverage to a larger geographic region, or to provide a more diverse service package, is important to large users. Market Entry and Regulation of Foreign-Affiliated Entities, Notice of Proposed Rulemaking, 10 F.C.C. Rcd. 4844, 4853 (1995) (Market Entry NPRM).

For example, assume that Country A and the U.S. both have satellites capable of offering international services between Country B and the United States. However, Country B has uplink or downlink restrictions that prohibit a U.S. satellite from operating on the U.S.-to-Country B route. If the U.S. were to permit the satellite licensed by Country A to operate along the U.S.-to-Country B route, U.S. satellite operators would, of course, be unable to compete for these international or transborder services. Further, if the U.S. were to permit the Country A satellite (or its licensee) to operate within the U.S., U.S. satellite operators could would also be at a substantial competitive disadvantage because the Country A satellite could operate on a more cost-effective basis (serving a larger international market) and offer a more attractive package of services (domestic services and international [U.S.-to-Country B] services).

[10] Note that for certain common carrier services, application of the competitive opportunities test, set forth in the Commission's Market Entry Order, 11 FCC Rcd 3873, 3881-3920 (1995) (hereinafter referred to as the Section 214 ECO test) should prevent unfair entry by

(continued...)

The size and diversity of the expanded market opportunity would also allow the foreign operator to offer a wider, more appealing array of programming. To illustrate, it may be uneconomical for the market-restricted U.S. operator to offer Spanish-language programming for a limited segment of the market in the United States, but a U.S. licensed, Mexican DBS/DTH operator would be able to offer a Spanish-language program service economically for consumers in both Mexico and the United States. Thus, the Mexican satellite system could leverage its exclusive position in the foreign market, permitting it to carry more choices of programming at less cost, to the competitive disadvantage of market-restricted U.S. suppliers.

In the foregoing illustrations, it would not be the innovation of the foreign operator, but regulatory restrictions, that determined the winner in the marketplace. The ECO-Sat test is pro-competitive because it creates the incentive for companies that wish to compete in the United States to encourage their governments to remove barriers in their own countries.[11] Clearly,

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[10](...continued)
a foreign carrier, whether it is using satellite or land-based facilities. However, other services, such as DBS/DTH services, are not necessarily subject to the Section 214 ECO test. For these services, the Commission relies entirely on the ECO-Sat standard adopted in this proceeding to protect against competitive distortions. See, *infra*, fns. 19 and 22.

[11] Some may argue that competition in the United States is reduced by not allowing unfettered access to all foreign entities. This would be true -- if at all -- in the short term only. In fact, the Commission has proposed a forward-looking policy for satellites, similar to that established in its competitive opportunities test for international telecommunications services. In the Market Entry Order, the Commission correctly recognized that such an "approach necessarily entails limiting the activities of certain competitors in U.S. markets . . . . Such action may reduce nominal competition in the U.S. in the short term, but should ultimately increase the competitive options available to U.S. telecommunications users. In our judgment, the benefits of allowing these foreign carriers unlimited access into the U.S. . . are outweighed substantially by the ultimate costs." Market Entry Order, 11 F.C.C. Rcd. 3873, 3887 (1995).

eliminating such restrictions will allow competition on a level playing field by a greater number of players, to the benefit of U.S. consumers.

A primary reason for evaluating the openness of the "home market" prior to allowing a foreign satellite operator access to the U.S. is that the home market is, in all probability, a route market or a potential route market. As the Commission indicates, the satellite footprint is likely to cover the home market in most cases. (NPRM, para. 23). With respect to DBS services, historically, the ITU plan was designed to provide coverage of the "home market" through the allocation of orbital locations and "channels" to specific countries within the satellite footprint.[12] For other DTH services, fixed satellite services or MSS, a country would probably be far more eager to "sponsor" an applicant if it had an interest in the services (e.g., if the country were located within the satellite footprint). Thus, MCI agrees that there should be a presumption that the home market should be examined for purposes of applying the ECO-Sat test.[13]

In fact, a home market can generally be viewed as a "super" route market, that is, a route market in which the foreign market administration has a great deal more power, incentive and

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[12] The 1977 World Administrative Radio Conference established a priori planning for DBS frequency allocations Final Acts of the WARC for the planning of the Broadcasting Satellite Service in Frequency Bands 11.7-12.2 (in Regions 2 and 3) and 11.7-12.56 Ghz (in Region 1), (Geneva, 1977). Also, the ITU Radio Regulations specifically require that all technical means available shall be used to reduce radiation over other territories. Rad. Reg. 30-2674.

[13] MCI recognizes that there may be a limited number of situations where the home market is not covered by the satellite footprint. In those instances, the openness of the home market may not be as relevant to the ECO-Sat test. However, to rebut the presumption that the home market is relevant, applicants should be required to demonstrate that the home market is not covered by the footprint of the satellite and that the home market does not place any conditions or restrictions on the satellite operator that could harm competition in the U.S. market.

potential to damage U.S. competition than the average route market (one that is not coordinating with the ITU or licensing the facility). For example, the regulators of the foreign home market may impose license conditions not only on spectrum or earth station licensees, but on the foreign satellite operator as well.

Additionally, home market administrations have substantial incentives to protect their licensees. As the Commission noted, the home market administration is likely to have a financial interest in, or obtain financial benefits from, the satellite licensee. (NPRM, para. 24). In fact, the coordinating country is far more likely to undertake the significant task of sponsoring an applicant to the ITU if it is receiving financial benefits from the endeavor. Examples of benefits jurisdictions may receive are license fees and taxes on revenues or profits generated by the satellite licensee.[14]

Financial links such as these provide an even greater incentive for the home market government to adopt restrictions on foreign entry in order to promote the home market champion. Specifically, if the foreign administration's satellite is able to tap the U.S. market and offer a wider variety of services than a U.S. satellite (as described above for the route market), the home market government will be able to extract greater license fees or auction revenues. Additionally, protectionism by the home market administration would increase the revenues and profitability of

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[14] For example, a representative of Canadian government recently revealed that it anticipates receiving significant amounts in annual fees from its licensees of DBS/DTH orbital assignments. Remarks of Larry Shaw, Associate Director-General, Telecommunications Policy Branch, Industry Canada at the Satellite Communications Congress, June 20-21. The United States, since the initiation of its spectrum auction policy, has received substantial revenues from orbital location and spectrum assignments. See, e.g., footnote 2, *supra*. Other home market countries are likely to garner similar benefits.

the licensee, creating a larger tax base and, hence, a greater revenue stream for the foreign government.

In conclusion, to guard against competitive distortion in the U.S. market, the Commission has appropriately selected the home and route satellite markets for evaluation as part of the ECO-Sat test.

3. The Commission Should Be Flexible in Its Service Category Definitions.

The Commission seeks to adopt a service-by-service approach to allowing foreign satellites to be used in the United States. (NPRM, paras. 33-36). MCI generally supports the Commission's proposal to allow foreign satellite operators to compete in the United States if U.S. operators have an effective competitive opportunity to offer the satellite service in the foreign market at issue. As the Commission asserts, this will promote fair competition in satellite service submarkets and procure the benefits to U.S. consumers sooner, i.e., when other countries undertake even an incremental opening of their markets for particular satellite services. (NPRM, para. 36).

MCI has no significant concerns about the initial categorization of services into DTH (including DBS), FSS and MSS. (NPRM, para. 34). In fact, MCI applauds the Commission's recognition that DTH services, even when offered over FSS, share more characteristics with DBS service than with other FSS services. More specifically, these satellite offerings are uniquely entangled with issues related to restrictive content and programming requirements.

The Commission, however, should be aware that its service categories may need to change over time, and MCI urges the Commission to recognize this fact in its final order. As the Commission itself has observed, "[t]he available types of satellite services continue to multiply,

and any lines of demarcation between service categories may be inherently both provisional and uncertain." (NPRM, para. 34). For example, MCI has learned of recent proposals which contemplate that Ka-band and DBS could be utilized in combination to offer multimedia services in the future.[15] If that were to occur, it might be unclear into what category the hybrid services would fall. The Commission can and should address these issues as they arise.

The Commission also should bear in mind that market power in one market or submarket can be abused in order to obtain an unfair and anticompetitive advantage in another. A foreign satellite provider may be able to leverage its market power if it has an exclusive right to offer certain services in its home country, and if U.S. satellite providers are prohibited from offering a full mix of services or do not have access to the satellite segment necessary to offer these services. MCI suggests that these factors be considered as part of the "de facto barriers" portion of the ECO-Sat test.

4. De Jure and De Facto Constraints Are Essential Elements of Eco-Sat Test.

As part of the ECO-Sat test, the Commission proposes to analyze both de jure and de facto constraints that limit or prevent foreign market access by U.S. satellite operators. (NPRM, para. 37). MCI wholly supports the Commission proposal that de jure and de facto constraints be considered as both are crucial to determining whether a market is truly open.

Procedurally, the Commission contemplates that the applicant wishing to communicate over non-U.S. satellite systems should bear the burden of demonstrating that there are no de jure barriers to effective competition, but the opposing party would have the initial burden of

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[15] "Preparing Canada for Global Communications in the 21st Century," a presentation by Colin D. Watson, President and Chief Executive Officer, Spar Aerospace Limited to the Satellite Communications Congress, June 20-21, 1996.

demonstrating de facto barriers (NPRM, paras. 39-42). It is essential to a fair and meaningful ECO-Sat test that the Commission require a thorough demonstration by the applicant that neither law, regulation or regulatory policy can (or do) act as barriers to entry by U.S. suppliers in the foreign market. The Commission must ensure that there is a diligent review of all such factors prior to issuing the license, because the distortions to competition cannot be easily reversed once service has been established and consumers are receiving it, as substantial disruption could occur.

As the NPRM recognizes, there are certain de facto issues that should routinely be considered as part of the ECO-Sat test as well. MCI supports the examination of both types of restrictions as part of the test, but recommends that the Commission clarify its procedures to ensure that the distinctions between de jure and de facto constraints is clear and the scope of the applicant's burden of proof is clear.

Additionally, for the reasons discussed below, the Commission should require a further demonstration by applicants seeking to provide DBS/DTH from a foreign satellite. Specifically, due to the inextricable linkage between content and distribution in the provision of these services, the Commission should require applicants to verify that there are no content-related restrictions which would bar U.S. DBS/DTH applicants from the relevant market.

a. The Commission should require applicants to demonstrate that government policy, as well as law and regulation, do not preclude entry in a relevant foreign market.

MCI urges the Commission to take particular care in defining the scope of the de jure limitations it will examine in the case of DBS/DTH services. Having surveyed the foreign regulatory landscape, MCI has found that there is a variety of different laws, regulations or

policies that may affect a U.S. satellite operator's ability to provide DBS/DTH satellite services to or within other countries. [16]

In this regard, it is also important to note that, under the NPRM proposal, the Commission would review the competitive opportunities that exist for U.S. carriers only at the time it evaluates the foreign operator's earth station license application. There evidently will be no mechanism for continuing to monitor the evolution of the competitive conditions evaluated as part of the ECO-Sat test once the license is granted by the Commission.[17] Thus, it is critical that the

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[16] Some countries have not privatized satellite communications, thus permitting the government alone to operate satellites. Others have restricted satellite communications to one monopoly provider. Certain governments may have allowed competition in certain components of satellite services, but not in others. Those countries that ostensibly allow competition in some or all satellite services may nonetheless impose several layers of law or regulation (including administrative procedures) that effectively close the process to foreign operators.

For example, the orbital slot allocation process may effectively preclude U.S. satellite operators from participating or, alternatively, the government may restrict satellite communications from foreign orbital slots. Additionally, countries may require a "satellite" or "radiocommunication" license for the space station and restrict satellite communications from foreign-licensed or operated space stations.

Another layer of potential regulation involves control over the "spectrum" or links. A country may require licensing of the uplink from the earth station to the satellite or the downlink from the satellite to the earth station. Conceptually, the licensing can be of the "spectrum" or frequencies, or the licensing may be of the earth stations that communicate with the space station. A country may not permit foreign satellite operators or their affiliates to qualify for any or all of these licenses.

Further, satellite services that are offered within the foreign country may be regulated with restrictive effect. With respect to DBS, it is not uncommon for both telecommunications and broadcast regulation to be implicated. A country may prohibit offering certain services using a foreign satellite.

Finally, other laws (e.g., foreign investment restrictions, cultural imperatives or tax laws) can make it difficult, if not impossible, for a U.S. company to compete against the domestic satellites of a foreign nation.

[17] Even if there is ongoing review of compliance by the Commission, the practical reality is

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Commission require all applicants, at the outset, to conduct a thorough review of all applicable satellite-related constraints for each appropriate market. They should demonstrate, at a minimum, that no foreign government law, regulation or policy regarding orbital slots, spectrum, landing rights, uplink and downlinks to the satellite or satellite services licensing, prohibits or restricts competition by, or access to, foreign satellite operators. In addition, in the case of newly enacted laws or regulations, the applicant should be required to demonstrate that there is an adequate implementation plan subject to a reasonable timetable.

b. For DBS/DTH earth station licenses, applicants should be required to demonstrate that no foreign law, regulation or policy contains restrictions on U.S. DBS/DTH service providers based on foreign-originated, or foreign-language, content, advertising or programming.

Unlike two-way satellite communications, DBS/DTH services involve an integrated offering of programming and broadcast transmission services. As a consequence, application of the ECO-Sat test must, as a matter of law and policy, include consideration of the extent to which content-related restrictions impede the ability of U.S. DBS/DTH operators to send their programming to an international audience -- in particular, consumers in the home market of the foreign satellite operator. The harmful impact of content restrictions in the DBS context was recently recognized by four agencies of the Executive Branch.[18]

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[17](...continued)
that it will be difficult to withdraw a license once customers are being served by the licensee.

[18] See, Letter of July 1, 1996 from the Department of State, Office of the U.S. Trade Representative, Department of Commerce and Department of Justice to Reed E. Hundt, Chairman, Federal Communications Commission, Re: TelQuest Ventures, L.L. C., File Nos. 758-DSE-P/L-96, 759-DSE-L-96 and Western Tele-Communications, Inc., File No. 844-DSE-P/L-96. ("Canada discriminates against U.S. . . . programmers and service
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The United States has, for many years, played a singularly forward-looking role in promoting the free flow of information with respect to DBS as well as other information-based services. In the past few years, for example, the U.S. government sought the elimination of artificial quotas affecting the video, film, audio recording and computer software industries in Europe and fought to protect intellectual property rights in Asia. However, these recent examples are but snapshots in the long history of struggle on the part of the U.S. to open world markets to the free flow of content, information and ideas.[19]

As early as December 1982, over one hundred nations approved a United Nations resolution which called for strict governmental controls on international DBS satellite transmissions, essentially establishing the right of nations to "veto any incoming television broadcasts from abroad." Central to these nations' concerns were two issues that continue to

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[18](...continued)
prviders in a number of ways. For example, Canada imposes extensive content restrictions on television and cable broadcasting, including a requirement that direct-to-home (DTH) service providers offer a 'preponderance' (a minimum of 50%) of Canadian content.")

[19] For example, the U.S. made a determined effort to link trade issues with intellectual property in the Uruguay round of GATT, now the World Trade Organization. See, Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994). Also, the United States Trade Representative diligently maintains a "watch list" of countries that do not grant the appropriate protections for U.S. content industries. See, e.g., United States Trade Representative, 1995 National Trade Estimate Report on Foreign Trade Barriers 102-3 (Greece cited for failure to act against motion picture and sound recording piracy and Italy listed for failure to protect against software duplication). Indeed, the United States has long maintained that intellectual property considerations should be a basic yardstick in determining whether countries should be accorded "Most Favored Nation" status. See, Brent W. Sadler, Comment, Intellectual Property Protection Through International Trade, 14 Hous. J. Int'l L. 393 (1992). Domestic law has also identified intellectual property infringement as an unfair trade practice and empowered the United States to initiate proceedings against the offending countries. 19 U.S.C. 2114(c) (1994).

plague the free flow of information -- sovereignty and cultural protectionism. The United States stood nearly alone as one of a handful of nations that objected to the proposal. Under these circumstances, it is appropriate that the Commission has recognized the pernicious effect that content restrictions may have on effective competitive opportunities for some satellite services. Such restrictions are, of course, real and potent impediments for U.S. DBS/DTH providers.

Clearly, discussion of DBS service in the United States and abroad has long encompassed consideration of both the satellite transmission and the programming being broadcast. Certainly, and perhaps uniquely for DBS/DTH services, it is difficult if not impossible to isolate the satellite transmission service from the content or programming. The following examples illustrate why the elimination of content restrictions is a prerequisite to the ability of U.S. DBS/DTH operators to compete on a level playing field abroad.

Assume that Country X prohibits foreign-originated programming, broadly defined as any programming from a foreign DBS or DTH satellite, but the U.S. permits unrestricted distribution of foreign DBS/DTH signals and programming into the U.S. Under this scenario, any U.S. DBS operator (whether a satellite owner/operator or customer-programmer on a U.S. DBS satellite) would be at a competitive disadvantage from the outset, just as if it were denied facilities access or spectrum. The U.S. operator will have to purchase or develop the programming for the audience in Country X and will not be able to rely on the economies of scale and scope that would have existed if it could have served the U.S. <u>and</u> Country X markets with the same unrestricted programming.[20] In contrast, a U.S.-licensed Country X satellite operator would be able to rely on

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[20] Restrictions on foreign advertising would have a similar impact, because the U.S. DBS/DTH provider would be unable to recover any of its costs with respect to

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