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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
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

CONSOLIDATED COMMENTS OF
DIRECTV, INC., DIRECTV INTERNATIONAL, INC.,
AND HUGHES COMMUNICATIONS GALAXY, INC.

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CONSOLIDATED COMMENTS OF DIRECTV, INC., DIRECTV INTERNATIONAL, INC., AND HUGHES COMMUNICATIONS GALAXY, INC.

DIRECTV, INC. ("DIRECTV"), DIRECTV International, Inc. ("DTVI"), and Hughes Communications Galaxy, Inc. ("HCG") (collectively, "Hughes") submit these Consolidated Comments in response to the Commission's Notice of Proposed Rulemaking (the "Notice") proposing to codify the existing framework for allowing U.S. earth station licensees access to foreign satellites. With some modifications, Hughes generally supports the

Commission's proposed "ECO-Sat" test to allow non-U.S.-licensed satellites access to the United States to the extent that U.S. satellites have effective competitive opportunities abroad. As set forth below, however, Hughes urges the Commission to carefully ensure that the proposed test does not become in effect a pure "reciprocity" test that could impede U.S. and global competition and undermine U.S. trade policy [1] Properly applied, the proposed ECO-Sat test can increase competition in the provision of satellite services, facilitate the widest possible range of satellite service options from U.S. and foreign systems for U.S. users, and encourage other countries to pursue procompetitive satellite regulatory policies.

INTRODUCTION AND SUMMARY

Hughes has long made clear its support for Commission proposals that afford satellite operators flexibility in serving their customers' satellite communication needs and allow satellite users access to the widest possible range of competitive satellite service options. Indeed, one year ago HCG and DIRECTV each filed comments supporting the Commission's proposal to treat all U.S.-licensed FSS satellites under a unified regulatory regime in which they can provide a full range of domestic and international services anywhere within their coverage areas without the need to obtain additional satellite authorizations from the Commission.[2] Similarly, each of the Hughes entities joining in these Consolidated Comments has a vital interest in ensuring that the Commission make clear that U.S. markets are open to foreign-licensed satellites, except in those

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1 In these Consolidated Comments, Hughes refers to "reciprocity" as meaning the concept that, where a foreign country's market is not equally as open as the U.S. home market, the U.S. is justified in taking unilateral action to close its market to the foreign country's satellites or to apply trade sanctions against that country.

2 See Amendment of the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems, 11 FCC Rcd 2429 (1996) ("DISCO I").

egregious cases in which foreign countries impose protectionist policies specifically designed to keep native industries free from competition or otherwise discriminate against potential U.S. competitors.[3] For example:

- HCG currently operates a fleet of in-orbit FSS satellites serving both the United States and other countries within their coverage areas. Through these satellites, HCG provides the means for commercial television and radio distribution, teleconferencing, video backhaul, high-speed image transmission (e.g., medical imaging), educational programming, and private data networks, among other services. HCG provides international transborder service and welcomes foreign competition in the delivery of these services, but believes that such competition must be on fair terms.

- DIRECTV began operating the first high-power DBS service in the United States in 1994 and presently provides approximately 175 video and audio channels to over 1.6 million subscribers over three DBS satellites. In addition to serving the United States, DIRECTV has the capability of serving substantial portions of Canada. Despite a four-year-long battle, DIRECTV's efforts to enter the Canadian market repeatedly have been frustrated by a series of Canadian protectionist barriers and regulatory hurdles. Although DIRECTV is unable to provide DBS service to Canada, two U.S. earth station operators now have petitioned the Commission for authority to communicate with Canadian DBS satellites to provide Canadian DBS service to the U.S. in competition with DIRECTV.

- DTVI will provide direct-to-home ("DTH") satellite services around the world, including in Latin America and Japan. In various countries in Latin America,

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3 A classic example of such an "egregious" case is Canada's continued construction of protectionist barriers to the delivery of DTH services to the Canadian market from U.S.-licensed satellites. See Petition to Deny of DIRECTV, Inc. in Telquest Ventures, L.L.C., FCC File Nos. 758-DSE-P/L-96, 759-DSE-L-96 (opposing request for Commission authority for earth station operator to communicate with a Canadian DBS satellite to provide Canadian DBS service to the U.S.); Petition to Deny of DIRECTV, Inc. in Western Tele-Communications, Inc., FCC File No. 844-DSE-P/L-96 (same); see also Petition for Declaratory Ruling of DIRECTV, Inc., Transborder Authorization of AT&T Corp. To Provide Canadian Direct-to-Home Satellite Services to the United States, FCC File No. 107-SAT-MISC-95 (filed April 24, 1995) (requesting a declaratory ruling that AT&T Corp was not authorized to use its U.S.-licensed satellite to carry Canadian direct-to-home satellite service, and describing some of DIRECTV's difficulties in seeking to enter the Canadian market), dismissed on withdrawal of petition, DA 95-1995 (Sept. 18, 1995). The Executive Branch specifically has noted that Canada unfairly discriminates against U.S. service providers in many ways. See Letter from the Department of State, Office of the U.S. Trade Representative, Department of Commerce, and Department of Justice to Reed E. Hundt, Chairman, FCC (July 1, 1996).

DTVI's foreign affiliates currently hold or are seeking the authorizations necessary to provide DTVI's Galaxy Latin America service over the U.S.-licensed Galaxy III(H) satellite.

- HCG's Galaxy Spaceway system is a global satellite system that will provide interactive, broadband communications services at affordable rates to ultra small satellite terminals around the world. Among other services, the system will provide high-speed, high-capacity data distribution; high-speed access to the Internet; and many other business services, including telephony and video distribution. Galaxy Spaceway will need to obtain authorizations from each country that it plans to serve before commencing service there.

- Hughes Telecommunications and Space is a strategic partner and major investor in ICO Global Communications ("ICO"), a United Kingdom-licensed private satellite operator organized in 1995 to develop, launch, and operate a global MSS system. As set forth more fully in ICO's separately filed comments in this proceeding, ICO seeks to promote fair competition among global MSS operators around the world and to establish a regulatory framework that allows non-U.S. MSS operators to compete in the U.S. under fair terms.

Based on this experience in promoting global competition in the provision of satellite services, Hughes supports the proposed formalization of the Commission's existing standard for evaluating U.S. earth station operators' applications to communicate with foreign satellites. It is imperative, however, that the Commission tread carefully in establishing a foreign satellite entry test. Rather than create a strict reciprocity test as the Notice appears to suggest, the Commission's policy should continue serving as a U.S. model to other countries of the advantages of allowing access to foreign satellites. In fact, a rigid "tit-for-tat" approach inappropriately could involve the Commission in resolving non-communications-related disputes, such as disputes over difficult international trade and U.S. foreign policy issues that should be addressed by the Executive Branch in other forums.

With certain modifications, the proposed ECO-Sat test could provide the proper procedural framework for evaluating U.S. earth station licensees' applications to communicate

with foreign satellites. Specifically, with respect to FSS and DBS satellites, the Commission should examine whether there are any de jure or de facto barriers to U.S. satellite operators' access to a foreign satellite's home and route markets. The Commission then should consider any communications-oriented public interest factors that warrant prohibiting or allowing U.S. earth station operators access to the foreign satellite despite the de jure and de facto showings, and presumptively allow U.S. entry.

Thus, while Hughes supports adoption of an ECO-Sat test, it urges the Commission to apply that test in a flexible manner, so as to set fair terms for non-U.S. satellites to make competitive alternatives available to U.S. users and to encourage worldwide satellite competition.

I. PROVIDED THAT THE PROPOSED ECO-SAT TEST DOES NOT BECOME A RECIPROCITY TEST, THE TEST IS A PROPER CODIFICATION OF EXISTING PROCOMPETITIVE COMMISSION POLICY.

To the extent that the Commission's proposed ECO-Sat test is a codification of the Commission's long-standing "open-skies" policy, as the Commission suggests,[4] Hughes supports the Commission's proposal to establish a clearer procedural framework within which to analyze U.S. earth station licensees' applications to communicate with foreign satellites. The Commission's open skies policy has afforded U.S. earth station users the widest possible range of satellite services from both U.S. and non-U.S. satellites, and particularly at a time when countries around the world are developing or expanding their own satellite systems, the Commission's policy can further even greater global competition. In implementing its open skies policy in the past, the Commission never has imposed a strict reciprocity test, and it should not do so now.

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4 See Notice at ¶¶ 12, 20.

The United States has long supported the free flow of ideas and information across national borders.[5] As the Commission repeatedly has noted in the satellite context, "[t]he foundation of the U.S. international satellite policy is the establishment of a global competitive communications environment that provides customers with increased satellite service options, improved quality, and lower rates."[6] The Commission has explained that "[t]his environment should provide U.S. satellite providers with access to foreign markets and the satellite systems of a foreign market access to the U.S. market," although the Commission also has made clear that "we do not expect foreign regulatory structures to be identical to that of the United States."[7] The Commission appropriately has expressed concern, however, "if any U.S. satellite provider is denied access to a country, particularly where the satellite systems of that country are permitted access to the U.S. international market."[8]

The Commission thus consistently has allowed foreign satellites to serve the United States. For example, the Commission has permitted the use of the Intersputnik satellite system for television and data service,[9] as well as for telephone service between the U.S. and the

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5 See, e.g., Remarks as Prepared for Delivery by Vice President Al Gore to G-7 Ministerial Conference on GII in Brussels (Feb. 25, 1995) (urging countries to "acknowleg[e] that the fruits of our cooperation should be open access to markets for all providers and users of creative content and information products, equipment and services. . . . Ideas should not be checked at the border.").

6 Vision Accomplished, Inc., 11 FCC Rcd 3716, 3718 (1995); accord IDB Worldcom Services, Inc., 10 FCC Rcd 7278, 7279 (1995).

7 Vision Accomplished, Inc., 11 FCC Rcd at 3718 (footnote omitted). The Commission went on to explain that "our concern is whether U.S. satellite systems have access to the Japanese market and are not placed at a competitive disadvantage with respect to their Japanese counterparts in the Japanese satellite service markets." Id.

8 IDB Worldcom Services, Inc., 10 FCC Rcd at 7279.

9 See IDB Communications Group, Inc., 6 FCC Rcd 2932 (1991).

Russian Federation.[10] Last year the Commission also granted several applications for authority to provide a full range of telecommunications services between the U.S. and the Russian Federation and other international locations using satellites owned, operated, or licensed by the Russian Federation.[11] In addition, the Commission granted a U.S. earth station operator authority to modify its license to use two satellites owned and operated by Japan Satellite Systems, Inc., Japan's largest satellite operator, to provide one-way video and associated audio services from Hawaii to Japan, specifically finding that U.S.-licensed satellite systems had access to the Japanese satellite market.[12] The Commission similarly has granted HCG special temporary authority to use capacity on the Brazilian-owned and licensed Brasilsat A1 satellite to serve the U.S.[13]

This open skies policy has provided important benefits to U.S. satellite users. First and foremost, it has afforded them access to the widest possible array of satellite services from both U.S. and foreign operators to serve their diverse satellite communication needs. The entry of competition from foreign operators that increasingly are expanding their own satellite systems in turn has spurred U.S. operators to meet that competition and respond more quickly and flexibly to their customers' needs.

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10 See American Telephone and Telegraph Co., 8 FCC Rcd 2668 (1993).

11 See IDB Worldcom Services, Inc., 10 FCC Rcd 7278 (1995).

12 See Vision Accomplished, Inc., 11 FCC Rcd 3716 (1995).

13 See Letter from Chief, Satellite and Radiocommunication Division, FCC International Bureau to Counsel for HCG (Feb. 13, 1996) (confirming verbal grant of special temporary authority for HCG to lease capacity from a Brazilian satellite to provide U.S. service). An amended application for interim authority to use capacity on the Brazilian satellite to provide U.S. service presently is pending before the Commission. See Hughes Communications Galaxy, Inc., FCC File No. 152-SAT-ITS-95 (filed Sept. 28, 1995), amended (filed June 14, 1996).

In fact, because of its open skies policy, the United States has been, and continues to be, a model to other countries of the benefits of having a procompetitive satellite regulatory policy. Rather than "go backwards" and establish a strict reciprocity policy as the Notice may appear to suggest, the Commission's policy should remain a model to other countries of the advantages of maintaining markets that are open to other countries' satellites and thereby enhancing global competition. Exceptions to the open skies policy should be appropriate only in those cases, such as the Canadian DTH situation, in which other countries discriminate against U.S. and other foreign satellite operators by imposing protectionist barriers or otherwise creating sanctuary markets to preserve native industries from competition.

A rigid reciprocity approach is especially problematic. To be sure, the Commission must implement the nation's communications laws within the context of the broader national policies developed elsewhere in the Executive Branch, such as the trade policies articulated and negotiated by the U.S. Trade Representative, but its focus must remain fully on the communications laws and policies that it is implementing. As the Commission correctly has recognized in the past,[14] only the Executive Branch, and specifically the U.S. Trade Representative, is in a position to decide whether it is appropriate to "trade" satellites for, say,

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[14] See Sprint Corporation Petition for Declaratory Ruling Concerning Section 310(b)(4) and (d) and the Public Interest Requirements of the Communications Act of 1934, as Amended, 11 FCC Rcd 1850, 1865 (1996) ("With respect to the other public interest factors laid out in the Foreign Carrier Entry Order, we note that the Executive Branch has not advised us of any national security, law enforcement, foreign policy, or trade concerns that support grant or denial of the petition."); Market Entry and Regulation of Foreign Affiliated Entities, 11 FCC Rcd 3873, 3897 (1995) ("The additional factors we will consider relevant to foreign carrier applications include . . . any national security, law enforcement, foreign policy, and trade concerns raised by the Executive Branch."); id. at 3963 (noting "the Executive Branch's ultimate responsibility for trade matters"); American Telephone & Telegraph Company, 89 F.C.C.2d 1167 (1982) (deferring to the U.S. Trade Representative's views regarding the inapplicability of U.S. international obligations to AT&T Section 214 application).

food, or whether it may violate U.S. trade policy or international agreements, or interfere with ongoing U.S. discussions on trade issues, to bar foreign countries' satellites from access to the U.S. Commission involvement in these non-communications-related areas not only would exceed the Commission's proper decisionmaking role, but by turning the Commission into an arbiter of potentially significant trade and foreign policy disputes that are appropriately resolved by the Executive Branch, could interfere with or undermine other important national policies.

In particular, the Commission must carefully coordinate the proposed ECO-Sat test with the United States' obligations under the 1993 General Agreement on Trade in Services ("GATS"), which imposes on signatories national treatment and most favored nation obligations with respect to covered services. As the Commission has noted elsewhere, GATS currently contains no obligations with respect to basic telecommunications services such as services provided over FSS and MSS satellites, because no country has scheduled any commitments in basic telecommunications.[15] The United States has offered proposals for open market access in basic telecommunications in the Negotiating Group on Basic Telecommunications ("NGBT"), which is scheduled to reconvene in February 1997. If the U.S. proposals are adopted at that time, the Commission's foreign satellite entry policy must conform to the agreement that ultimately is reached.

A reciprocity test presents issues beyond trade concerns as well. In fact, a reciprocity test may not be effective in achieving the Commission's goals of opening foreign markets to U.S. satellites and enhancing global competition, because the Commission actually has little leverage over most countries' satellite regulatory policies. The vast majority of countries do

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[15] See Market Entry and Regulation of Foreign-Affiliated Entities, 11 FCC Rcd at 3965-66.

not have satellite systems of their own, much less satellite systems that are designed to provide U.S. service. Most countries never even have had a reason to consider implementing satellite regulation. If other countries view the Commission's proposal as strong-arm tactics, foreign administrations could respond by imposing burdensome obligations on U.S. satellite licensees, if not barring them altogether -- exactly the opposite result from what the Commission intends. Instead of imposing reciprocity requirements on such countries, the U.S. should be encouraging them to create open market structures that welcome competition from the U.S. and abroad.

In short, while Hughes generally supports the Commission's proposed ECO-Sat framework, it urges the Commission to be mindful of the past success of its open skies policy and not to allow its new test to become a reciprocity test. The Commission therefore should design its market entry test so that it takes these factors into account and keeps its focus on communications issues.

II. THE COMMISSION'S PROPOSED CODIFICATION OF THE ECO-SAT TEST, WITH CERTAIN MODIFICATIONS, WILL PROVIDE AN EFFECTIVE MECHANISM FOR REGULATING U.S. ENTRY BY FOREIGN SATELLITE SYSTEMS.

In light of the successful history of the Commission's existing procompetitive open skies policy and the serious issues that a reciprocity test may raise, Hughes generally supports the Commission's proposal to codify its market entry test. As set forth below, the Commission has proposed a logical procedural framework within which to review U.S. earth station operators' applications for access to foreign-licensed satellites.[16] Limited modifications to that framework

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[16] Although the Commission correctly proposes not to "relicense" foreign satellites, it suggests an additional procedure for foreign satellite operators that is wholly separate from the Notice's general focus on licensing earth stations. Specifically, the Commission suggests that already authorized foreign satellite licensees, or foreign applicants whose satellites have been submitted for coordination to the ITU, may wish to participate in U.S. processing rounds in order to protect their (continued)

are necessary, however, to serve the Commission's procompetitive goals and to ensure that the framework does not result in a reciprocity test.

A. With Some Modifications, the Procedural Framework of the Proposed ECO-Sat Test Will Accomplish the Commission's Procompetitive Goals.

The Commission proposes a multi-step ECO-Sat framework. First, the Commission would examine the "home" and "route" markets of a non-U.S. FSS or DBS satellite to determine whether there are any de jure or de facto barriers to entry by U.S. satellite systems that seek to provide an analogous service abroad. For MSS satellites, an option the Commission apparently proposes is to determine whether there is some "critical mass" of foreign markets served by the non-U.S.-licensed MSS system that are open to U.S. MSS operators before the system could provide any U.S. service. Once these determinations have been made, the Commission proposes to consider whether there are any other public interest concerns that warrant prohibiting or allowing non-U.S. satellite systems to serve the United States. As set forth below, Hughes supports this general framework, but urges the Commission to ensure that the proposed procedures do not undermine the very policy that they are designed to implement.

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ability to serve the U.S. See Notice at ¶ 16. Allowing foreign operators the opportunity to "protect" their foreign orbital assignments in this manner will enhance their competitive opportunities in the U.S., and to that extent Hughes supports the Commission's proposal. The Commission should not require participation in processing rounds as a condition of serving the U.S., however. Requiring foreign operators of already operational satellites or whose satellites are prepared for launch to participate in processing rounds that are not yet underway or that may take up to two years or more to complete could delay the prompt provision of service to the U.S. by foreign satellites prepared to provide service, to the detriment of U.S. users. Moreover, if the Commission in effect imposes its licensing regime on foreign satellite operators, any other country logically could require U.S. operators to participate in increasingly cumbersome administrative processes around the world, making it harder rather than easier for U.S. operators to enter foreign markets.

1. The Commission Should Examine the Home and Route Markets of Foreign Satellites Seeking Access to the U.S.

In determining whether to allow a foreign satellite to have access to the U.S., it is appropriate to examine the markets that the foreign satellite serves. In the absence of strong indicia that a foreign satellite operator is licensed by an "administration of convenience,"[17] the Commission should treat the licensing and coordinating administration as the foreign satellite's home market. To the extent that the ECO-Sat approach will encourage foreign governments to allow increased competition and eliminate discriminatory policies, that administration is likely to be the one most interested in the foreign operator's success in obtaining access to the U.S.

In addition to examining the openness of the foreign satellite's home market, the Commission should analyze each of the route markets (those in which a satellite transmission originates or terminates) that the foreign-licensed satellite proposes to serve from the U.S.-licensed earth station. Thus, if a satellite from Country A, which allows competition from U.S. satellite operators, also serves Country B, which expressly prohibits foreign competitors or has granted the foreign satellite operator a special concession, it may be anticompetitive to allow Country A's satellite to serve Country B from the U.S., because U.S. operators could have no possible way to attempt to provide any satellite service -- much less competitive satellite service -- to Country B. In contrast, it would serve U.S. and global competition to allow Country A's satellite to provide service between the U.S. and Country A, since U.S. satellite operators could provide the same service on a competitive basis.

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[17] Id. at ¶ 26.

It would make no sense to apply a requirement that a "critical mass" of foreign markets be open to U.S. satellites before foreign global satellite systems are permitted to serve the United States.[18] Because "critical mass" is an inherently vague term without any commonly recognized meaning, any definition would be totally arbitrary and impractical in the context of international satellite systems that are subject to widely varying regulatory structures around the world. Far from promoting the provision of competitive global service, a "critical mass" test in fact could produce only anticompetitive results. For example, a single challenge regarding the market of just one country or a small number of countries necessary to reach the required "critical mass," however the standard is defined, could delay for years the entry of a global system that could provide important benefits to U.S. satellite users, even for routes the openness of which no one challenges, and prohibit U.S. users' access to the system entirely. Since few countries have licensing regimes in place that are similar to that of the United States, it may be impossible for a foreign-licensed system to gain access to the U.S. Such a result only harms U.S. users by reducing the competitive satellite options that are available to them.

In particular, a "critical mass" test would appear to be especially unfair to global MSS systems such as ICO. Such systems differ from FSS and DBS systems because by definition they are international in nature. Indeed, all global mobile systems have a similar international ownership structure that does not lend itself to simple market access tests. The international nature of such systems and the large number of countries they serve make it especially important that regulatory restrictions in a handful of foreign countries not be permitted to preclude a

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[18] See id. at ¶ 31, 47.

potential international competitor completely from access to the U.S.[19] Applying a "critical mass" test to global systems such as ICO[20] improperly could result in excluding successful global satellite systems from the U.S. and denying U.S. earth station operators the benefits of increased competition.[21]

2. The Commission Should Apply the ECO-Sat Test on a Service-by-Service Basis.

As the Commission proposes, in performing these home and route market analyses, the Commission should focus where possible on the treatment abroad of U.S. satellites seeking to provide the particular service that the non-U.S. system seeks to provide in the U.S., such as FSS or DTH (including true DBS) service.[22] Such a service-by-service approach

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19 The Commission has prohibited U.S.-licensed Big LEO systems from accepting exclusivity or other "special concessions" from foreign countries for precisely this reason. See Amendment of the Commission's Rules To Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Band, FCC 96-54, CC Docket No. 92-166, at ¶¶ 54-55 (released Feb. 15, 1996) (prohibiting exclusionary arrangements concerning communications to or from the U.S. that have the effect of foreclosing other Big LEO licensees from providing service to foreign markets, and noting that the Commission intends to construe its restrictions against handling or interchanging traffic to and from the U.S. "bearing in mind that spectrum coordination and availability in particular countries may limit the ability of Big LEO licensees to provide service to those countries.").

20 To the extent that concerns may remain about the extent to which ICO is independent of Inmarsat, that question properly is the subject of a separate proceeding pending before the Commission. See Application of Comsat Corp. for Authority to Participate in the Procurement of Facilities of the I-CO Global Communications Limited System, FCC File No. 106-SAT-MISC-95, Public Notice No. SPB-8 (May 10, 1995). Assuming that the proceeding is resolved favorably to ICO, however, the Commission must then treat ICO just like any other global MSS system seeking to enhance competition in the U.S. and abroad.

21 See Notice at ¶ 73. Licensing basic communications over the Intelsat and Inmarsat systems may present different issues. See id. at ¶¶ 69-70. To the extent that the satellite communications at issue are governed by treaties and other intergovernmental agreements, U.S. obligations obviously cannot be changed in this forum, and to the extent it is inconsistent with these obligations, the ECO-Sat test therefore cannot apply.

22 Id. at ¶¶ 33-36.

(assuming that the country at issue has satellite operators providing the particular service) will provide certainty to earth station licensees and satellite operators. It also will provide the most meaningful determination of the openness of foreign markets, and promote competition within each "submarket" for satellite services.[23]

3. The Burden of Proof Should Shift to the Party Challenging the Entry of a Foreign Satellite.

With respect to the actual informational showings that the ECO-Sat test would require of U.S. earth station operators seeking to communicate with a foreign satellite operator, the Commission proposes a burden of proof initially borne by the U.S. earth station operator in its application, but then shifting to the party opposing the application. Because the Commission presumptively should allow access to foreign satellites to promote U.S. and global competition, this is the proper placement of the burden of proof.

Requiring the U S. earth station operator to make a showing that the countries that it intends to serve over the foreign-licensed satellite do not maintain de jure barriers to entry, as the Commission proposes,[24] is a logical placement of the initial burden of demonstrating compliance with the ECO-Sat standard. In fact, since the vast majority of countries have no satellites and no satellite regulatory policy -- much less laws regulating foreign satellite entry -- the required showing that the foreign markets at issue do not have protectionist or discriminatory laws in place should not be burdensome on an earth station applicant. In order to reduce this

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[23] The Commission appears to suggest in the Notice that foreign video content providers could be treated as DTH providers under the proposed ECO-Sat test. See id. at ¶¶ 1 n.1, 33. Since the Commission does not regulate video content providers in the satellite context, but only satellite and earth station licensees, Hughes assumes that the Commission means to refer to foreign DTH providers rather than video content providers.

[24] Id. at ¶ 39.

burden even further, Hughes supports the Commission's proposal that the applicant should be deemed to have satisfied the de jure showing if the particular country and service at issue appear on an aggregate list, to be maintained by the International Bureau, of the countries that U.S.-licensed satellites serve and the services they provide there.[25] In order to reduce the burden on U.S.-licensed satellite operators, and to avoid placing unnecessary additional burdens on the Commission, the Commission should require U.S. satellite operators to submit to it on no more frequently than an annual basis the information from which the International Bureau would compile the aggregate list; where possible, licensees should be permitted to incorporate the required information in other required filings.

The burden then should shift to any party opposing the earth station application to demonstrate a basis for denying the application in its entirety or with respect to a particular route on the ground that a foreign operator's home or route markets impose de facto barriers to entry by U.S. satellite operators. Since there can be no finite list of de facto barriers that impede U.S. satellite operators from competing abroad, this is the only logical placement of the burden of showing that a foreign market is not in fact open. The Notice suggests several de facto barriers to entry, including the transparency of the regulator, the separation between the regulator and the foreign-licensed satellite system, the existence of safeguards to reduce the competitive advantages enjoyed by a government-subsidized system, the ability to use earth stations associated with the foreign system, and content-based restrictions.[26]

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25 Id.

26 Id. at ¶ 41.

These factors suggest the importance of applying the ECO-Sat test in a flexible manner. Since most countries do not have their own satellite systems, or if they do, those systems are government-owned, the Commission should not use the ECO-Sat test to penalize foreign regulatory systems (assuming that it would have any leverage over those systems at all), but rather to encourage those systems to follow its lead and invite competition from around the world. Except in circumstances in which countries intentionally erect protectionist barriers or otherwise prevent U.S. licensees from competing in a sanctuary market, it would not be sound public policy to consider other countries' different regulatory structures as a basis for denying their licensees access to the U.S. Petitioners to deny therefore should be required to satisfy the burden of showing that any de facto barriers to service abroad are sufficiently serious that denial to the foreign satellite operator of access to the U.S. market is warranted.

Similarly, the mere existence of content barriers in the home or route markets served by a foreign-licensed satellite should not automatically bar that satellite from serving the U.S. Indeed, if that were the law, almost no foreign-licensed satellite ever could satisfy the ECO-Sat test, because virtually every country, including the United States, has content restrictions of some kind designed to serve the particular country's legitimate public interest needs. Since there is no logical way to rank the severity of program content restrictions, the Commission should consider content restrictions only in certain situations, such as when those restrictions are part of a broader discriminatory policy brought to the Commission's attention by the Executive Branch. In addition, the Commission should consider content-based restrictions as themselves de facto limitations on competition where foreign regulators purposefully discriminate against potential U.S. competitors by imposing limits on programming of foreign origin that amount to the

protection of a sanctuary market, or by restricting the facilities over which programming is transmitted. In such cases, there can be no serious dispute that a foreign regulator is enforcing a "sanctuary" policy specifically designed to protect its home market at the expense of competition.

4. Examination of Public Interest Factors Is Critical Regardless of the Outcome of the De Jure and De Facto Showings.

Whatever the result of the de jure and de facto showings, the Commission should carefully examine other communications-related public interest factors that bear on whether grant of an earth station application serves the public interest. In other cases under the effective competitive opportunities test that is already applicable to other telecommunications services under the Foreign Carrier Entry Order, such public interest factors have been important to the Commission's decision to permit entry.[27] Hughes believes that the Commission should pay close attention to such factors here as well.

In the Notice, the Commission proposes to consider factors such as the general significance of the application to the promotion of competition; national security, foreign policy, and trade; and spectrum availability and coordination.[28] But most of these factors go well beyond the Commission's proper role in examining communications-oriented public interest factors such as spectrum availability, frequency coordination, and the general effect of additional entrants on the competitiveness of the U.S telecommunications markets. As the Commission has noted

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[27] See, e.g., Sprint Corporation Petition for Declaratory Ruling Concerning Section 310(b)(4) and (d) and the Public Interest Requirements of the Communications Act of 1934, as Amended, 11 FCC Rcd 1850 (1995) (approving foreign investment in Sprint by Deutsche Telekom and France Telecom in excess of Commission's alien ownership restrictions based on two significant countervailing public interest factors: (1) the planned liberalization of the German and French telecommunications markets; and (2) the competitive benefits of the German and French $4.2 billion investment in Sprint for the U.S. telecommunications market).

[28] Notice at ¶ 48.

elsewhere,[29] issues such as national security, foreign policy, and trade are properly left to the Executive Branch. Unless the Executive Branch advises the Commission of a problem in any of these areas, the Commission should not take such non-communications-related issues into account in applying its ECO-Sat analysis.

5. **The ECO-Sat Test Should Apply to All Pending Applications.**

Although the ECO-Sat test should not be applied to review existing licenses and authorizations, the test should apply to all pending applications regardless of when those applications were filed. Contrary to the Commission's suggestion in the Notice,[30] such application of the ECO-Sat test clearly would not be an impermissible retroactive application of a new Commission policy. In light of the Commission's long-standing open skies policy, applying the ECO-Sat framework to existing applicants would not subject those applicants to a basic standard that is any different from the standard that the Commission has applied for years and that was applicable to them when they filed their applications. In any event, as the Commission noted in applying the effective competitive opportunities test that it had adopted in the Foreign Carrier Entry Order to a pending application, "[i]t is well established that the Commission may apply new rules and policies to pending matters."[31] So that applicants may have an opportunity to make a de jure showing in compliance with the Commission's proposed procedural framework, however, the Commission should allow them to amend their applications to contain the required showing.

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29 See cases cited in note 14 supra.

30 Notice at ¶ 20.

31 Sprint Corporation Petition for Declaratory Ruling, 11 FCC Rcd at 1855 (footnote omitted); cf. Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983) (holding that the Commission need not undertake a rulemaking proceeding where there is no abrupt policy change).

B. The Commission Should Not Require Strict Observance by Foreign-Licensed Satellite Operators of U.S. Legal, Technical, and Financial Requirements.

While Hughes generally supports the basic procedural framework of the proposed ECO-Sat test, Hughes does not support the Commission's proposal to require as part of that test a demonstration by the U.S. earth station operator that the foreign satellite satisfies all of the Commission's technical, financial, and legal requirements for the particular satellite service.[32] The Commission's proposal far exceeds the requirements that are necessary to protect U.S. interests and in fact could have serious repercussions for U.S. satellites seeking to operate abroad.

The Commission's interest is not in forcing foreign operators, even those that seek to serve the U.S., to build satellites precisely to every Commission standard, regardless of the purpose served by the particular standard. Rather, the U.S. interest properly is in ensuring that foreign satellites do not cause harmful interference to U.S. licensees and can coexist with U.S. satellites. The Commission's proposal to require full compliance with all Part 25 technical requirements,[33] including requirements such as full frequency reuse and other obligations to ensure efficient satellite operation, simply do not serve that interest and accordingly impose unnecessary burdens on U.S. earth station licensees, which must submit the required material, and the Commission, which must review it.

Thus, only those Part 25 technical requirements that serve the Commission's interest in eliminating harmful interference to U.S. satellites should be required as a condition of providing U.S. service. Specifically, the Commission should adopt its proposal to apply its antenna performance requirements to all C and Ku band earth stations that seek interference

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32 See Notice at ¶¶ 10, 52-61, & n.45.

33 See id. at ¶ 54.

protection, regardless of the satellites with which those earth stations are communicating.[34] Similarly, the Commission's proposal to prohibit earth stations from accepting transmissions from non-U.S. satellites with power limits above those permitted for two degree compliant U.S. space stations also ensures that foreign satellites serving the U.S. do not cause harmful interference to U.S. satellites.[35] Rather than requiring foreign satellites to comply with all Part 25 technical requirements, the Commission therefore should require either (1) compliance with only those specific regulations necessary to prevent interference with U.S. satellites, or (2) a general showing that the satellite will not cause harmful interference to existing or future U.S. satellites.

While there may be a need to require compliance with certain technical requirements, there is no basis for requiring foreign satellite operators to satisfy the Commission's legal and financial requirements, except where a satellite operator chooses to circumvent the Commission's licensing process.[36] Aside from the fact that imposing all of the Commission's satellite licensing requirements on foreign operators as a condition to U.S. entry in effect subjects those operators to relicensing in a second country under potentially conflicting standards, the Commission has no legitimate interest in requiring foreign operators to comply with its legal and financial requirements for U.S operators. To be sure, in cases of egregious protectionist conduct by a foreign administration, or where a satellite operator chooses to obtain a license from an

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34 See id. at ¶ 55.

35 See id. at ¶ 56.

36 See, e.g., Petition to Deny of DIRECTV, Inc. in Telquest Ventures, L.L.C., FCC File Nos. 758-DSE-P/L-96, 759-DSE-L-96 (opposing request for Commission authority for earth station operator to communicate with a Canadian DBS satellite to provide Canadian DBS service to the U.S.); Petition to Deny of DIRECTV, Inc. in Western Tele-Communications, Inc., FCC File No. 844-DSE-P/L-96 (same).

"administration of convenience" that has minimal (or no) licensing requirements,[37] it may be appropriate to consider all of the foreign regulator's licensing requirements as possible de facto barriers to entry, but in the ordinary case there simply is nothing to be gained by doing so.

In fact, requiring full compliance with all of the Commission's licensing requirements could redound to the detriment of U.S. operators that seek to serve multiple foreign markets. If foreign regulators were to impose similar technical, legal, and financial requirements on U.S. operators seeking to serve their markets, those U.S. operators could be subject to a series of conflicting retaliatory requirements that have nothing at all to do with their service to the particular country. In short, while the Commission has a legitimate interest in ensuring that foreign satellites do not interfere with U.S. satellites, the Commission's interest generally goes no further.

III. THE COMMISSION SHOULD CONTINUE TO LICENSE RECEIVE-ONLY EARTH STATIONS THAT COMMUNICATE WITH NON-U.S. SATELLITES.

Since earth station licensing is the most viable mechanism for regulating the provision of U.S. service by foreign satellites, the Commission should retain its existing licensing requirements for receive-only earth stations communicating with non-U.S. satellites. Although the Commission has had pending for three years a proceeding to deregulate receive-only earth stations by eliminating licensing requirements for the reception of foreign signals over U.S. satellites or signals from non-U.S. satellites,[38] the Commission's need to maintain jurisdiction over

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[37] Efforts to obtain satellite licenses from administrations of convenience should be limited because of the high value placed by satellite operators on holding a U.S. authorization and the stability and certainty of U.S. laws and regulations. If the U.S. market is open and the Commission's processes remain fair, quick, and efficient, this problem should be minimized.

[38] See Amendment of Section 25.131 of the Commission's Rules and Regulations to Eliminate the Licensing Requirement for Certain International Receive-Only Earth Stations, Notice of Proposed Rulemaking, 8 FCC Rcd 1720 (1993).

U.S.-licensed earth stations communicating with foreign satellites calls much of that proposal into question.

First of all, the Commission correctly proposes to distinguish between receive-only earth stations operating with U.S.-licensed FSS satellites for the reception of services from other countries, and receive-only earth stations operating with foreign satellites.[39] With respect to the former category, the Commission's proposal to eliminate the earth station licensing requirement and replace it with a voluntary registration process is appropriate because the Commission has another even more effective means to regulate the satellite in the event of harmful interference to another U.S. satellite or earth station licensee: retaining jurisdiction over the space station itself. Far from raising concerns about how the Commission will ensure a satellite's interference-free operation, eliminating the licensing requirement for the reception of foreign signals over a U.S. FSS satellite properly is, as the Commission previously determined, "prompted by the increasing competition in the satellite industry, the resulting stimulation of new and increased services, and the Commission's desire to prevent the benefits of this competition from being frustrated by delay in authorizing earth station facilities and by imposing unnecessary burdens on applicants."[40]

The operation of U.S. receive-only earth stations with non-U.S.-licensed satellites raises different issues, however. Except for the license issued to the earth station operator, the Commission has no practical recourse against a foreign satellite that may be causing harmful interference to U.S. satellites and their users. Thus, Hughes supports the Commission's proposal

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39 See Notice at ¶¶ 77-78.

40 Amendment of Section 25.131 of the Commission's Rules and Regulations to Eliminate the Licensing Requirement for Certain International Receive-Only Earth Stations, 8 FCC Rcd at 1721 (footnote omitted).