C. The National Market Of Each Investor In A Non-U.S.-Licensed MSS System Should Be Determined Using The Test For Identifying An Alien Entity's National Market Under Section 310(b)(4) Of The Communications Act.

In order to identify the national market of each investor in a non-U.S.-licensed MSS system, the Commission should employ a modified version of the straightforward test that it recently established as a means of determining an alien investor's "home market" for purposes of applying its effective competitive opportunities analysis under Section 310(b)(4) of the Communications Act of 1934, as amended (the "Act").[34] That test, which reflects an investor's "principal place of business," is well-grounded in law developed by the U.S. federal courts for purposes of determining federal diversity jurisdiction over a corporate entity.[35] As the Commission observed in its Foreign Carrier Entry Order, the proliferation of complicated investment, co-marketing, joint venture, and other alliance relationships requires that the Commission look beyond the simple place of organization of an entity in determining its true natonal market.[36] The test established in the Foreign Carrier Entry Order, as modified herein, will also enable the Commission to defeat attempts by investors to engage in international corporate "forum shopping" so as to associate themselves with liberal foreign communications markets and thereby obtain a favorable "critical mass" determination that they may not otherwise deserve.[37]

As in the Section 310(b)(4) context, the Commission should determine the national

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[34] See Foreign Carrier Entry Order, FCC 95-475, slip op. at ¶¶ 199-208.

[35] Id. at ¶ 203.

[36] Id. at ¶ 202.

[37] See id.

market of an entity investing in a non-U.S.-licensed MSS system by identifying: (1) the country of its incorporation, organization, or charter; (2) the nationality of all investment principals, officers and directors; (3) the country in which its world headquarters are located; (4) the country in which the majority of its tangible property, including production, transmission, billing, information, and control facilities, is located; and (5) the country from which it derives the greatest sales and revenues from its operations. TRW proposes that the Commission also examine these factors with respect to the corporate parent of any entity investing in a non-U.S.-licensed MSS system. If all five of these factors (as applied to the investing entity and its corporate parent) indicate that the same country should be considered to be the investor's national market, the Commission should presume it to be so, subject only to rebuttal based on clear and convincing evidence to the contrary. If the five factors yield inconsistent results, the Commission should balance them along with any other relevant information to determine the investor's national market under the totality of the circumstances. Where circumstances are such that the Commission's analysis should take into account competitive opportunties in a number of different markets with regard to a single investing entity, it must not hesitate to do so.

IV. The Commission Should Apply A More Stringent "Critical Mass" Test To The MSS Systems Of IGO Spin-Offs Than It Applies To The MSS Systems Of Historically Private Entities.

TRW urges the Commission to differentiate in its application of the "critical mass" portion of the "home markets"/"critical mass" ECO-Sat test for MSS systems between systems operated by historically private entities and those that may be operated by IGO Spin-Offs. The Commission should apply a strict "critical mass" standard to Earth station applications for

authority to communicate with the MSS systems of historically private entities so as to encourage the rapid removal of barriers to competition in the provision of MSS in the most significant national markets of those systems' investors, and TRW fully expects and accepts that its own MSS system and other U.S. MSS systems may be subject to comparable market entry tests abroad. It is important, however, that the Commission apply an even more stringent "critical mass" test to applications for authority to communicate with the MSS systems of IGO Spin-Offs. The Commission must safeguard vigorous competition in the U.S. MSS by preventing IGO Spin-Offs from exploiting the substantial and ongoing benefits that they continue to derive from their current and prior relationships with IGOs.

A. Earth Stations Should Be Permitted To Access An Historically Private Non-U.S.-Licensed MSS System Only Once U.S. MSS Systems Can Serve 80 Percent Of The Total Population Of The National Markets Of The System's Investors.

TRW recommends that the Commission withhold grant of an Earth station application for authority to communicate with a non-U.S.-licensed MSS system operated by an historically private entity or entities until 80 percent of the total population of the national markets of the system's investors (determined in the manner identified in Section III.C., supra) — i.e., 80 percent of the combined populations of all investors' national markets — can be served by U.S.-licensed MSS systems. This test will guarantee that a sufficient number of sizeable foreign markets are opened to U.S. MSS systems to make those systems viable and capable of providing service to most of the world's population, while setting a reasonable standard for foreign administrations to follow in establishing their own tests for foreign MSS system entry to their national markets. The Commission should apply this test whether the U.S. Earth station

applicant has sought authority to provide domestic or international service via the non-U.S.-licensed MSS system in question.

TRW urges the Commission to focus this "critical mass" test on a percentage of the combined populations of foreign nations, rather than a percentage of nations themselves, so as to ensure that U.S. MSS systems are permitted to reach most of the consumers they were designed to serve instead of a collection of the smaller and less-populated countries around the world. For the same reason, the Commission should include in its calculation the population of every investor's national market, and not merely the populations of the national markets of entities investing above a certain threshold level dollar amount or percentage of funds invested.

TRW also urges the Commission to look closely at the origins of each operator of a non-U.S.-licensed MSS system to ensure that it truly qualifies as an historically private entity. Entities that are nominally private but that have current or previous ties to IGOs or other organizations benefiting from intergovernmental privileges and immunities should be subject not to this "critical mass" test, but to the test discussed in Section IV.B. below.

B. The "Critical Mass" Test For The MSS Systems Of IGO Spin-Offs Should Take Fair Account Of The Benefits That Such Systems Enjoy.

In the NPRM, the Commission proposes to treat the satellite systems of IGO Spin-Offs "just like any other non-U.S. systems that seek access to the U.S. market, with the understanding that public interest factors are likely to play an unusually important role" in the Commission's evaluation of an Earth station application to communicate with an IGO Spin-Off's system.[38]

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[38] NPRM, FCC 96-210, slip op. at ¶ 73.

TRW agrees that a "home markets"/"critical mass" test is appropriate for evaluating an Earth station application associated with an IGO Spin-Off's MSS system. Special considerations, however, require that a more stringent version of this test be applied in such cases.

As the Commission notes, IGO Spin-Offs "have a treaty-based heritage and may continue to have at least some governmental ownership" in spite of their nominally "private" status.[39] The Commission goes on to observe that "[t]hese features could result in privileged access to national markets around the world and diminish effective competition in the U.S. market."[40] The ongoing interests of foreign administrations in IGOs may well predispose them to favor the MSS systems of those IGOs' Spin-Offs in decisions on market access and spectrum availability even if all government investment in IGO Spin-Offs were to cease. Also of concern are the numerous, complex and powerful ties that may continue to exist between certain IGOs and their Spin-Offs, in the form of contracts under which IGOs provide their Spin-Offs with all the facilities, intellectual property, and marketing, sales and maintenance services that a truly independent company would provide for itself.[41] Other benefits that Spin-Offs may derive from the IGOs that created them are intangible but nonetheless real, such as the acquired experience of personnel hired from the IGO, goodwill and contacts established by the IGO and transferred to the Spin-

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39 Id. at ¶ 64.

40 Id.

41 See, e.g., Petition to Deny of TRW Inc., File No. 106-SAT-MISC-95 (filed June 23, 1995) (detailing the existence of so many fundamental ties between Inmarsat and the I-CO Global Communications Limited System that the two constitute virtually one and the same entity) ("TRW Petition"); Reply of TRW Inc., File No. 106-SAT-MISC-95 (filed August 31, 1995) (providing further analysis of these ties).

Off, and research funded by the IGO and later exploited by the Spin-Off. Such benefits will linger long after any formal relationship between the IGO and its Spin-Off has been dissolved. All benefits that a Spin-Off may derive from ongoing or prior links to the IGO that created it would have an anticompetitive effect, in that they would permit the Spin-Off to exploit the privileges and immunities normally accorded only to an IGO to the detriment of the MSS systems with which the Spin-Off competes.

For these reasons, TRW urges the Commission to apply a more stringent "critical mass" test to an Earth station application seeking authority to communicate with the MSS system of an IGO Spin-Off than to an application to access the MSS system of an historically private MSS system. At the outset, the Commission should permit an MSS system of an IGO Spin-Off to provide domestic or international service in the U.S. market only if U.S.-licensed MSS systems have access to 80 percent of the total population of all nations represented by entities investing directly or indirectly in the IGO Spin-Off's MSS system, and of the national markets of any private investors investing directly or indirectly in that system. Where an IGO has itself invested in a Spin-Off, all member nations of the IGO should be treated as individual investors in the Spin-Off for purposes of making this calculation.[42] This latter requirement is both reasonable and important, as the member nations of an IGO have the power to vote on whether or not to invest in a Spin-Off, and will plainly benefit from any such investment.

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[42] As in the "critical mass" test that TRW recommends for applications to communicate with the MSS systems of historically private entities, all investor nations and private investors should be included in the Commission's calculation, regardless of the dollar amount or percentage of total invested dollars that they themselves have invested or claim in stock ownership.

In addition, the Commission should not permit U.S. Earth stations to communicate with the MSS system of an IGO Spin-Off — for either domestic services or international services — until all U.S.-licensed MSS systems are granted access to the top 10 markets (ranked by population) represented by entities investing directly or indirectly in the IGO Spin-Off's system.[43] This requirement will provide further assurance that U.S.-licensed MSS systems will be able to reach sufficient numbers of consumers around the world so as to make the ubiquitous services that they offer viable and worthwhile.

Finally, so as to reduce the anticompetitive effects of the lingering benefits of previous ties between IGOs and their Spin-Offs, the Commission should apply the aforementioned, more stringent "critical mass" test to Earth station applications for authority to communicate with an IGO Spin-Off for five years from the date that all formal ties between the IGO and its Spin-Off are severed.[44] Once these five years have elapsed, the Commission should make Earth station applications seeking access to the IGO Spin-Off's MSS system subject to the standard "critical mass" test for applications to access historically private MSS systems as described in Section

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43 If fewer than ten separate entities have invested in an IGO Spin-Off's MSS system, it would be reasonable to require that all nations represented by the investing entities grant access to U.S.-licensed MSS systems. In such a case, the economic stakes of all such nations are likely to be significant.

44 In considering the existence of such formal ties, the Commission should examine any written or oral contract, agreement, understanding or arrangement involving an IGO and its Spin-Off and concerning the direct or indirect lease, shared use, transfer or exchange of any tangible or intangible property, goods, facilities, services, information, benefits, contacts or goodwill.

IV.A. above.[45]

C. Earth Station Licensees With Authority To Communicate With IGO Space Segment Should Be Required To File Modification Applications Subject To The ECO-SAT Test If That Space Segment Is Transferred To An IGO Spin-Off.

TRW strongly supports the Commission's proposal to require affected Earth station operators or users to request a license modification if any space segment with which they are licensed to communicate is transferred from an IGO to that IGO's Spin-Off.[46] The Commission should place such Earth station modification applications on Public Notice and invite public comment, as the Commission must have sufficient information with which to decide whether the proposed operation of the U.S. Earth station in question with the IGO Spin-Off is consistent with U.S. policy. Furthermore, the Commission should subject such modification applications to the "home markets"/"critical mass" ECO-Sat test that TRW has proposed for applications to communicate with the MSS systems of IGO Spin-Offs. Although the revocation of an Earth station license under these circumstances might result in the disruption of existing services to consumers, the Commission should weigh the temporary inconvenience of any such disruption against the long-term anticompetitive effects of permitting a non-U.S.-licensed MSS system to

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45 Whether or not the Commission chooses to adopt the "critical mass" test proposed by TRW herein for applications to communicate with the MSS systems of IGO Spin-Offs, it is clear that any application filed by the Communications Satellite Corporation ("Comsat") or any other entity for authority to construct or modify Earth stations for purposes of communications with the I-CO Global Communications Limited System must be subject to the test that the Commission establishes in this proceeding to ensure that the relevant foreign markets are open to entry by U.S.-licensed MSS systems.

46 See NPRM, FCC 96-210, slip op. at ¶ 74.

employ facilities that were established with the benefit of an IGO's international privileges and immunities to the detriment of the entire U.S. MSS industry.

D. The ECO-Sat Test Should Not Be Applied To International Communications Over The Intelsat And Inmarsat Systems, Provided That Intelsat And Inmarsat Spin-Offs Play No Role In Such Communications.

The Commission proposes in the NPRM to continue licensing international communications over the Intelsat and Inmarsat systems without applying its ECO-Sat test to future Earth station applications for authority to communicate with those systems, even where those applications involve expanded Intelsat and Inmarsat services.[47] Except as it may apply to services not permitted by U.S. law or the respective Conventions of these organizations,[48] TRW has no objection to this proposal — provided that communications via the facilities of Intelsat and Inmarsat are not aided or facilitated in any way, or provided in cooperation or under contract with, the Spin-Offs of Intelsat or Inmarsat. Any form of agreement between Intelsat or Inmarsat and their Spin-Offs for purposes of providing services under the Intelsat or Inmarsat name would clearly dissolve any alleged boundary between those IGOs and their Spin-Offs, and permit the IGOs to use their international privileges and immunities to provide the very services that their Spin-Offs were established to offer. Therefore, should the Commission find that such an

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47 Any Earth station application to provide domestic services via the space segment of these organizations should be fully subject to the approporiate ECO-Sat test.

48 For example, Inmarsat lacks the legal authority to provide land mobile services because the land mobile amendments to the Inmarsat Convention have not entered into force. See Land-Mobile Satellite Services, Status of Amendments to Convention and Operating Agreement, Inmarsat Doc. ASSEMBLY/11/10, Annex 1 (January 25, 1996).

agreement underlies an Earth station application to communicate with Intelsat or Inmarsat facilities, it should subject that application to the "home markets"/"critical mass" ECO-Sat test for IGO Spin-Offs recommended by TRW herein.

V. In Using Pre-Established Service Categories To Judge The Openness Of Foreign Markets To U.S.-Licensed Space Stations, The Commission Should Proceed In A Pragmatic, Flexible Manner.

TRW supports the Commission's proposal to apply its ECO-Sat test to Earth station applications by focusing that test on the specific service that a non-U.S.-licensed space station or satellite system seeks to provide to, from or within the United States, and then determining whether U.S. space stations or satellite systems would be permitted to provide the same type of service to, from or within the foreign countries with interests in the non-U.S.-licensed space station or satellite system in question.[49] TRW cautions, however, that the Commission should recognize the idiosyncratic nature of the comparisons to be made, and urges it to take a flexible and practical approach to the service category determinations that it is to make.

As the Commission observes, the available types of satellite services continue to multiply, and any lines of demarcation that can currently be drawn between service categories are inherently provisional and uncertain.[50] The same service denomination may mean very different things to different operators. Moreover, foreign administrations may choose to define and/or regulate services using different definitions than those employed in the United States. Consequently, it is unlikely that the barriers that exist abroad to market entry by U.S. space

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[49] See NPRM, FCC 96-210, slip op. at ¶ 33.

[50] Id. at ¶ 34.

stations and satellite systems will correspond neatly to any "rule of thumb" service categories that the Commission may adopt for purposes of its analysis of foreign markets.[51] The adoption of a standard that is too rigid to acommodate these differences could unnecessarily prevent a non-U.S.-licensed space station from providing service in the United States, or result in the unwitting grant of an Earth station authorization that will cause anticompetitive harm to U.S. space station operators.

VI. The Commission Should Place On Earth Station Applicants The Primary Burden Of Demonstrating That No De Jure Or De Facto Barriers Exist In The Relevant Foreign Markets To Entry By U.S. Space Station Licensees.

TRW supports the Commission's proposal to evaluate Earth station applications for authority to access non-U.S.-licensed space stations by examining both de jure and de facto barriers to entry by U.S.-licensed space stations in foreign markets with interests in the non-U.S.-licensed space station in question.[52] TRW cannot, however, support the Commission's proposal to place the burden of demonstrating the existence of de facto barriers on the opponents of Earth station applications to access non-U.S.-licensed MSS systems.

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51 The Commission proposes in the NPRM to distinguish among Direct-to-Home service, Fixed Satellite Service and MSS in examining foreign markets pursuant to its basic ECO-Sat test. See id.

52 See id. at ¶ 37. With regard both to de jure and de facto barriers to market entry, the Commission should not accept claims by Earth station applicants that particular foreign markets will be opened to competition by U.S.-licensed satellite operators in one or more service categories at some date in the future. There can be no valid justification for permitting non-U.S.-licensed space stations or satellite systems to make any inroads into the U.S. market for any satellite services until U.S.-licensed space stations and satellite systems are actually permitted to enter the relevant markets for analogous services abroad.

A. U.S.-Licensed MSS System Operators Should Be Required Neither To Bear The Burden Of Demonstrating That De Jure Barriers Exist Abroad, Nor To Report On The Markets To Which They Have Obtained Access.

TRW agrees with the Commisson's proposal to require applicants wishing to communicate over a non-U.S.-licensed MSS system to bear the burden of demonstrating that none of the foreign markets subject to examination under the "home markets"/"critical mass" ECO-Sat test applicable to that system maintain de jure barriers to entry by U.S.-licensed satellite operators.[53] As entry to the U.S. market by non-U.S.-licensed MSS systems is a privilege that the Commission justly proposes to make contingent on the availability of effective competitive opportunities for U S. systems abroad, it is right that applicants seeking to facilitate such entry be required to demonstrate that effective opportunities exist abroad under law.

TRW disagrees, however, with the Commission's proposal to require U.S.-licensed satellite operators to inform the Commission through periodic mandatory filings of all foreign destinations where they are permitted to provide service, and the services that they are permitted to provide there.[54] The utility of such a list would be practically nil, as the service offerings have to be evaluated on a case-by-case basis for each system. The Commission's proposal also fails to account for the fact that U.S. systems have varying business plans, and that the grant of access to one system for a particular type of offering therefore may not mean that a second system would

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[53] Cf. id. at ¶ 39.

[54] See id.

gain access for its own offering.[55]

In this last regard, it is TRW's opinion that — contrary to the Commission's suggestion — a foreign nation's grant of market access to a single U.S.-licensed satellite operator to provide a particular service cannot be considered prima facie evidence that no de jure barriers exist to entry by other U.S.-licensed satellite operators to provide the same service or any other service.[56] Entry by a single U.S.-licensed satellite operator may be evidence that a foreign administration has temporarily waived legal barriers to market entry that remain in place for all U.S. satellites. Alternatively, entry by a single U.S.-licensed satellite operator may indicate that de jure barriers have been erected that unfairly favor that particular U.S.-licensed entity over others.[57]

B. Earth Station Applicants Should Bear The Burden Of Demonstrating The Absence Of Identified De Facto Barriers To Market Entry By U.S.-Licensed Satellite Systems.

In the NPRM, the Commission sets forth a non-exclusive list of de facto barriers to market entry by U.S.-licensed satellite systems which it proposes to consider in determining whether the relevant foreign markets are sufficiently open to such entry to warrant the admission of a non-U.S.-licensed satellite system to the U.S. market. Specifically, the Commission

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55 Should the Commission nevertheless require U.S.-licensed satellite operators to provide the information for its list of open foreign markets, and should it implement its proposal to publish an aggregate list of accessible foreign markets based on those filings, TRW requests that it safeguard the legitimate business interests of the filing parties by keeping confidential the identities of the operators serving particular foreign markets and the space stations serving those markets.

56 NPRM, FCC 96-210, slip op. at ¶ 39.

57 This possibility may be effectively countered by the "no special concessions" approach discussed in Section IX, infra.

proposes to examine:

> the existence of a fair and transparent regulatory framework for satellite services in the foreign country; the extent of separation between the foreign regulator and any incumbent non-U.S. satellite system; the implementation of safeguards to eliminate any competitive advantages that might be conferred by government ownership or subsidization of the non-U.S. satellite system; and the practical ability to use any dedicated earth stations associated with a particular system.[58]

TRW supports the Commission's consideration of these and other relevant de facto barriers, and urges the Commission to require that Earth station applicants seeking authority to communicate with a non-U.S.-licensed MSS system certify that no such barriers to market entry by U.S.-licensed MSS systems exist in the relevant foreign markets.[59] The burden should not be on opponents to make these demonstrations.

There can be no question but that station applicants are best situated to be able to obtain information on any such barriers through their contacts with the operator of the non-U.S.-licensed MSS system with which they propose to communicate. Much of this information is uniquely within the possession of the system operator or home market administration, and may

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58 NPRM, FCC 96-210 slip op. at ¶ 41. The Commission also states that the existence of content restrictions may be relevant for some services. Id.

59 There is one barrier that should be added now to the Commission's de facto barriers list. The Commission notes in the NPRM that, in some jurisdictions, U.S. satellites may have landing rights yet may nevertheless be prohibited from interconnection with the Public Switched Network ("PSN"). Id. at ¶ 34. Without this right, landing rights for MSS systems such as that of Odyssey™ would be largely meaningless. Therefore, in evaluating U.S. Earth station applications for authority to communicate with a non-U.S.-licensed MSS system, the Commission should consider the availability of PSN interconnection in the foreign markets with ties to that system and condition or deny the Earth station application where such interconnection cannot be obtained on commercially reasonable, fair and non-discriminatory terms and conditions.

be unavailable to opponents. By requiring that Earth station applicants certify the absence of such barriers, the Commission will avoid placing applicants in the position of proving a negative, while sparing any party opposing their applications the unfair burden of investigating the existence of such barriers in the many countries that may have ties to the non-U.S.-licensed MSS system in question. Should opponents of Earth station applicants allege the existence of de facto barriers that are not on the list of such barriers set forth in the NPRM, or as ultimately expanded by the Commission in its Report and Order in this proceeding, TRW agrees that they should be required to bear the burden of producing reliable evidence (e.g., declarations) that those barriers exist. The burden of countering such showings, however, must remain with the applicant. As the Commission discovers or is informed of new and relevant de facto market entry barriers or comes to discount the importance of considering others, it should modify its list of those barriers accordingly.

C. Earth Station Licensees Should Be Required To Keep The Commission Apprised Of Any New De Jure Or De Facto Barriers To Market Entry By U.S.-Licensed MSS Systems In The Relevant Foreign Markets.

The existence of vigorous competition in the markets for MSS services within the United States and around the world depends on the absence of foreign market entry barriers not only at the time that a non-U.S.-licensed MSS system seeks access to the U.S. market, but on an ongoing basis. For this reason, the Commission should require U.S. Earth station licensees communicating with non-U.S.-licensed MSS systems to keep the Commission informed of any new de jure or de facto barrier to market entry by U.S.-licensed MSS systems in any of the foreign nations with interests in the non-U.S.-licensed system in question. In addition, the

Commission should require such licensees to certify on a bi-annual basis as to the continuing absence of any de jure or de facto barriers to entry by U.S.-licensed MSS systems in the relevant foreign markets. When the Commission is informed of the establishment or re-establishment of such barriers, it should revisit the Earth station authorization of the licensee through a public proceeding..

Should the Commission find that a non-U.S.-licensed MSS system with which a U.S. Earth station licensee communicates no longer passes the "home markets"/"critical mass" test as a result of the establishment of new de jure or de facto barriers to market entry by U.S. satellite systems, it should not hesitate to revoke the Earth station licensee's license. While this measure clearly would cause a disruption in service to customers of the non-U.S.-licensed MSS system in question, TRW believes that it is the only effective means by which the Commission can enforce the equitable policy underlying its ECO-Sat test.

VII. The Commission Should Not Accept Earth Station Applications For Authority To Access Non-U.S.-Licensed MSS Systems Until Those Systems Can Be Examined By Means Of The Relevant "Home Markets"/"Critical Mass" ECO-Sat Test.

Given the central importance that the Commission rightfully places in the NPRM on evaluating Earth station applications based on the presence of effective competitive opportunities for U.S. satellite systems in foreign markets, there can be little point in accepting such applications for filing before they can be examined using the appropriate ECO-Sat test. With specific regard to applications for authority to communicate with non-U.S.-licensed MSS systems, TRW urges the Commission not to expend its limited resources in accepting such applications for filing until it can evaluate them using the "home markets"/"critical mass" test,

i.e., until the Commission can identify those systems' notifying and/or licensing nations and the national markets of all direct and indirect investors. Because it is difficult to identify a point in the development of all MSS systems at which all such nations, national markets and investors will be identifiable, TRW recommends that the Commission only accept Earth station applications for authority to communicate with a non-U.S.-licensed MSS system: (a) once that system is operational, or (b) based on a certification by the applicant that the system will be operational within one year from the date of filing of the application. Should the Commission be unable to apply the "home markets"/"critical mass" test to an Earth station application in spite of an applicant's certification as to when the system with which it will communicate will be operational, the Commission should postpone consideration of the application until such time as it can apply that test.

TRW urges the Commission not to permit pre-licensing construction of U.S. Earth stations designed to communicate with non-U.S.-licensed MSS systems. The Commission should not prejudice the outcome of the "home markets"/"critical mass" analysis or any other ECO-Sat analysis that it chooses to employ in examining the MSS system with which an Earth station would communicate by allowing the applicant to make large expenditures that it may later claim as public interest factors favoring the grant of its application.[60] If the Commission

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[60] Both the Commission and the courts have recognized that decisionmakers are human beings who may be unconsciously swayed by the time, effort and/or money spent on pre-permit construction, no matter how they may strive to remain impartial. See, e.g., Community Broadcasting Co. v. FCC, 274 F.2d 753, 759 (D.C. Cir. 1960) (decisionmakers may be unconsciously swayed where an applicant has already spent a substantial sum of money); Consolidated Nine, Inc. v. FCC, 403 F.2d 585, 591-92 (D.C. Cir. 1968) (in reviewing grants of interim

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chooses to permit such pre-licensing construction, it must make unmistakeably clear to all applicants that such construction is entirely at the risk of the applicant, and that subsequent failure to pass the relevant ECO-Sat test will result in the denial of a license regardless of any expenditures that the applicant may have made.

VIII. After Applying Its ECO-Sat Test, The Commission Should Examine Whether Market Entry By A Non-U.S.-Licensed MSS System Would Serve The Public Interest, Convenience And Necessity.

TRW supports the Commission's proposal to examine whether entry by a non-U.S.-licensed MSS system into the U.S. market would serve the public interest, convenience and necessity once the Commission has applied its ECO-Sat test to an Earth station application to facilitate such entry.[61] TRW agrees that the Commission should examine each Earth station application in light of the general significance of the proposed U.S. market entry by the non-U.S.-licensed MSS system with which the Earth station would communicate to the promotion of competition in the United States and the global satellite service market, and in light of issues of

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[60](...continued)
authority to operate a radio station, new investment made during period of temporary authorization that could prejudice ultimate award of license is a factor of importance); Southern California Rapid Transit District, 67 R.R.2d 328, 330 (1989) ("experience teaches that the very act of constructing and operating even a 'temporary' or 'experimental' facility often creates equities in its retention"); TeleSTAR, Inc., 61 R.R.2d 1418, 1440 (1987), aff'd 64 R.R.2d 1444 (1988) (quoting WJIV, Inc. v. FCC, 231 F.2d 725 (D.C. Cir. 1956) ("If facilities are constructed prior to authorization, the fact that facilities have been built could be used to pressure the Commission in its decision to grant permits or licenses.").

[61] See NPRM, FCC 96-210, slip op. at ¶ 48.

national security, law enforcement, foreign policy and trade.[62] TRW also agrees that the Commission should consider whether the notifying and/or licensing country of the non-U.S.-licensed MSS system in question will coordinate the spectrum for its system with U.S. satellite systems — and with the rest of the world, in the case of non-geostationary MSS systems — in good faith.[63] As the Commission notes, such good faith will be particularly important in the case of non-geostationary MSS systems such as that of Odyssey™, as those systems will be using the same spectrum to provide service throughout the world.[64]

In this regard, it is also important for the Commission to consider spectrum availability in the context of its public interest analysis of Earth station applications for authority to communicate with non-U.S.-licensed MSS systems.[65] While the questions of whether and where spectrum may be available for use by a U.S. Earth station communicating with a non-U.S.-licensed MSS system are matters to be addressed in the international coordination process, it is nevertheless the case that spectrum availability may be pre-determined by some administrations in a prejudicial and anti-competitive manner.[66]

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62 See id. On matters of national security, law enforcement, foreign policy and trade, TRW agrees that the Commission should both solicit, and, as appropriate, defer to the views of the Executive Branch. Id.

63 See id. at ¶ 49.

64 Id.

65 See id. at ¶¶ 50-51.

66 One such case in point is the spectrum band plan presently under consideration by the European telephone and telegraph cooperative (CEPT). See CEPT/ERC/PT22, Draft ERC Decision on the Harmonized Use of Spectrum for Satellite Personal Communications Systems (Bonn, May 1996).

TRW applauds the Commission's recognition that it should give special weight to its public interest analysis of an Earth station application for authority to communicate with the MSS system of an IGO Spin-Off.[67] TRW agrees with the Commission that, after applying the customary public interest analysis to such an application, the Commission should study closely the extent to which the Spin-Off is truly independent of the IGO that created it and of the IGO's Signatories.[68] In the context of this examination, the Commission should look not only to financial, structural or contractual links between an IGO and its Spin-Off, but also to any intangible benefits that the Spin-Off may continue to derive from the privileges and immunities enjoyed by the IGO. The Commission should also give prominent consideration to the views expressed by the Executive Branch on whether the Spin-Off's structure is consistent with U.S. policy.[69] Ultimately, the Commission must consider any competitive advantages that the Spin-Off enjoys vis-a-vis U.S. satellite systems based on tangible or intangible ties to an IGO as directly contrary to the public interest in a truly competitive U.S. and global market for satellite services.

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67 NPRM, FCC 96-210, slip op. at ¶ 73.

68 See id.

69 See id.

IX. The Commission Should Expand Its "No Special Concessions" Policy To Protect Both U.S.-Licensed And Non-U.S.-Licensed Satellite Operators, Provided That It Makes U.S. Earth Station Authorizations For Communications With Non-U.S.-Licensed Satellite Systems Subject To The Same Condition.

In connection with the "route market" prong of the basic ECO-Sat test that the Commission proposes in the NPRM, the Commission seeks comment on whether it should expand the "no special concessions" condition that it currently imposes on U.S. licensees of separate satellite systems and MSS low Earth orbit systems licensed to operate above 1 GHz "in order to prohibit [any U.S. space station licensee] from acquiring or enjoying special arrangements that unfairly disadvantage any competing satellite operator, whether licensed by the U.S. or by another administration, for reasons other than spectrum scarcity."[70] Thus, whereas the Commission currently prohibits U.S. space station licensees engaged in international service from acquiring or enjoying special concessions from foreign administrations concerning traffic to or from the United States that are unavailable to other U.S. licensees,[71] the Commission would now prohibit all U.S. space station licensees from obtaining special concessions concerning such traffic — or possibly, traffic between a foreign point and any other point on the globe — that are unavailable to any other satellite system operator, whether licensed by the United States or not.

TRW supports the Commission's proposal to protect both U.S. and non-U.S. licensees from special concessions between any U.S. satellite system licensee and a foreign administration,

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70 Id. at ¶ 43.

71 See, e.g., 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, CC Docket No. 92-166 (FCC 96-54), 1996 FCC LEXIS 750 at ¶¶ 54-55 (released February 15, 1996); 47 C.F.R. § 25.143(h).

be those concessions applicable to communications between the United States and a foreign point or between two foreign points. TRW submits that this proposal is as applicable in the context of a "home markets"/"critical mass" ECO-Sat test as in the Commission's basic "home market"/"route market" ECO-Sat test. By imposing this additional requirement on U.S. satellite system licensees, the Commission would not only promote fair competition in the U.S. market for satellite services, but also set an example for nations around the world to follow.

TRW can only support the Commission's proposed expansion of its "no special concessions" policy, however, if non-U.S.-licensed satellite systems seeking to enter the U.S. market are subject to it as well. Specifically, the Commission should make all U.S. Earth station authorizations for communications with non-U.S.-licensed satellite systems subject to compliance by those satellite systems with the "no special concessions" policy. If any non-U.S.-licensed satellite system operator accepts special concessions from a foreign administration that are not available to competing U.S.-licensed or non-U.S.-licensed satellite systems, the Commission should revisit the authorizations of all U.S. Earth stations communicating with that operator's satellite system.

In the case of a non-U.S.-licensed MSS system, TRW urges the Commission to revisit Earth station authorizations for communications with that system whenever the system's operator acquires or enjoys special concessions from <u>any</u> foreign administration, not merely administrations that are linked to the system through their investments or those of their licensees. Such a policy is amply justified by the direct negative effect that such special concessions abroad will have on the ability of U.S.-licensed MSS systems to compete with non-U.S.-licensed MSS systems within the U.S. market and elsewhere. So as to forestall attempts to evade this policy,

the Commission should consider not only special concessions in the coordination of spectrum and landing rights, but also concessions involving landline communications for the origination or termination of transmissions travelling via MSS systems. As landline communications will be an integral part of MSS communications, and as U.S.- and non-U.S.-licensed satellite system operators have complete control over their acquisition and enjoyment of all special concessions, the "no special concessions" policy proposed by TRW for MSS systems would in no way be "arbitrary" or "capricious."

X. Conclusion.

For the foregoing reasons, the Commission should adopt its proposed framework for regulating access by non-U.S.-licensed satellite systems to the U.S. market in accordance with the proposals of TRW set forth herein.

Respectfully submitted,

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July 15, 1996

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