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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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
	)	DOCKET FILE COPY ORIGINAL
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

REPLY COMMENTS OF INTELSAT

Henry M. Rivera
J. Thomas Nolan
GINSBURG FELDMAN and BRESS, Chartered
1250 Connecticut Avenue, NW
Washington, DC 20036

Of Counsel:
Donald D. Wear, Jr.
Vice President/General Counsel
INTELSAT
3400 International Drive, N.W.
Washington, DC 20008

Dated: August 15, 1996

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SUMMARY

In the opening comments filed in the *DISCO II* rulemaking proceeding, parties commented on the Commission's proposed treatment of intergovernmental organizations seeking to provide satellite transmission capacity within the United States. The *DISCO-II Notice* proposed three alternative tests that an IGO would have to meet before it could offer domestic U.S. services. The first two tests are variants of the ECO-Sat test, which focus on the openness of some portion of the IGO's member countries to U.S.-licensed satellite operators. The third test focuses broadly on the competitive consequences of the IGO's provision of service within the United States. Many commenters, while not specifically approving any of the Commission's three formulations, raised issues of competition that fall squarely within the Commission's third test. INTELSAT urges the Commission to adopt this "effect on competition" test, and to apply it using the record in this proceeding to permit the immediate use of INTELSAT capacity by COMSAT to provide U.S. domestic service.

Use of INTELSAT capacity to serve the U.S. domestic market can only increase competitive alternatives for U.S. consumers. Commenters raise abstract concerns about INTELSAT's potential to cross-subsidize, but those concerns are unfounded. INTELSAT has no ability to behave anticompetitively because it lacks sufficient market power in the relevant market -- the international fixed telecommunications services market -- to do so. INTELSAT faces increasing competition in this market for the transmission of voice, data, and video by both satellite and fiber-optic cable. Moreover, by treaty INTELSAT may not discriminate geographically, and its tariff policy ensures that it does not cross-subsidize its service offerings. The FCC regulates COMSAT, the U.S. signatory to INTELSAT and the exclusive provider of INTELSAT services in the U.S., to detect and prevent cross-subsidization. The presence of these protections -- structural, regulatory, and competitive -- is sufficient to ensure that INTELSAT entry into the U.S. domestic services market through COMSAT is in the public interest.

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REPLY COMMENTS OF INTELSAT

The International Telecommunications Satellite Organization ("INTELSAT"), by counsel and pursuant to Sections 1.415 and 1.419 of the Commission's Rules, hereby submits these reply comments in response to the Commission's Notice of Proposed Rulemaking ("*Notice*") in the above-captioned proceeding.

I. Introduction

INTELSAT is an international cooperative organization which owns and operates a global satellite network for the purpose of providing fixed satellite communications services to its

members. INTELSAT's members are 139 nations represented within the organization by their signatories to the INTELSAT Operating Agreement. These signatories are currently a mix of government-owned postal and telecommunications administrations ("PTTs") and private corporations. INTELSAT's comments were limited to the *Notice*'s proposed treatment of intergovernmental organizations ("IGOs") seeking to provide satellite capacity within the United States. These reply comments are also limited to this subject.

II. Many commenters agree with INTELSAT that the Commission should adopt a market access test for IGOs that focuses broadly on the competitive consequences of the IGO's providing service within the United States.

A. An ECO-Sat test is ineffective when applied to IGOs.

INTELSAT agrees with those commenters who oppose the application of an ECO-Sat test to IGOs.[1/] As INTELSAT stressed in its opening comments, bilateral or multilateral efforts undertaken by the United States to open foreign markets to FCC-licensed satellite systems are far more likely to succeed than application of any ECO-Sat test to an IGO. An IGO has no control over the domestic policies of its member nations. In the United States, for example, COMSAT is required by law to provide non-discriminatory access to all users of the INTELSAT system, and the FCC has found this approach to be pro-competitive.[2/] Conversely, the domestic policies of other nations do not require the designated INTELSAT signatory to provide

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[1/] *See* Comments of Capital Cities/ABC *et. al.* at 13 (inappropriate to apply ECO-Sat to prohibit the use of non-U.S. satellites, including INTELSAT, for international video transmissions); Comments of COMSAT Corp. at 11 (ECO-Sat test would deprive U.S. consumers of choice); Comments of KDD Co. at 2-3 (rejecting ECO-Sat alternatives); Comments of L/Q Licensee, Inc., *et. al.* at 12-14 (ECO-Sat test may prompt retaliatory trade initiatives and undermines global partnerships).

[2/] *INTELSAT Satellite Facilities*, 97 F.C.C.2d 296, 325 (1984), *aff'd sub. nom. Western Union Int'l v. FCC*, 804 F.2d 1280 (D.C. Cir. 1986).

access to its competitors. In either case, INTELSAT itself has no control over these domestic policy decisions. Thus, a U.S. policy decision requiring U.S. earth station operators to satisfy an ECO-Sat test before allowing them to use the INTELSAT system is not likely to create any incentive for member nations to be more or less receptive to allowing entry to U.S.-licensed satellite systems.

B. The "critical mass" concept is inapplicable to fixed satellite services.

In its comments describing the "critical mass" test, Motorola is careful to distinguish the situation of *fixed* services provided by foreign satellite systems and IGOs.[3/] INTELSAT agrees that a "critical mass" test is not appropriate as a condition for IGO entry into the U.S. domestic fixed satellite services market. As Motorola explained, the concept of a "critical mass" originated in the economic theory of network externalities, which are present in many telecommunications services. In the case of a global mobile telecommunications service, Motorola argues that there is a "critical mass" or "tipping" point above which the service has economic value; under this theory, a critical mass test may properly be applied to such a service.[4/] However, as Motorola is careful to point out, the essential characteristic of such a service is its mobility, a characteristic not shared by other satellite services.[5/] There is no "critical mass" or "tipping point" in fixed services; each route stands alone, unaffected by the

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[3/] *See generally* Comments of Motorola, *et. al.*, at 15-39 (advocating critical mass test for global *mobile* satellite service). *See also* Comments of TRW, Inc. at 14-16 (same).

[4/] *See* Comments of Motorola, *et. al.* at 25-27.

[5/] *Id.* at 19.

presence of other routes. Comments advocating that some form of "critical mass" test be applied to fixed services are ill-considered.[6]

C. Concerns about cross-subsidization and other anticompetitive behavior fall within the scope of the "effect on competition" test.

INTELSAT suggests that those commenters who raise anticompetitive concerns with respect to IGO entry into the U.S. domestic service market are actually supporting the Commission's third alternative formulation, the "effect on competition" test.[7] Under this test, the Commission proposes to "ask whether the IGO, in light of its intergovernmental status and global dominance, would be in a position to diminish effective competition in the United States."[8] As INTELSAT stated in its opening comments, it advocates the application of this test as a condition for IGO entry into the U.S. domestic services market through COMSAT. INTELSAT agrees that issues of market power, cross-subsidization, and anticompetitive behavior fall squarely within the scope of this test. INTELSAT's only disagreement with these commenters, as explained below, is in the outcome of the test as applied to the provision of INTELSAT services in the United States. Indeed, the Commission now has sufficient

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[6] See Comments of Home Box Office at 21; Comments of ORBCOMM at 5. Columbia advocates a "critical mass" test only for privatized IGO successors. *See* Comments of Columbia Communications Corp. at 22.

[7] *See* Comments of AT&T Corp. at 15 (concern that IGOs' participation "would be detrimental to fair competition"); Comments of Columbia Communications Corp. at 22 (concerns that IGOs could "distort competition"); Comments of GE Americom at 10 (concerns that IGOs could have "substantial competitive advantages"); Comments of PanAmSat at 6 (concerns that IGOs could have "enormous competitive advantages"). In addition, AMSC, while not referring specifically to the Commission's formulation, supports the "effect on competition" test. Comments of AMSC Subsidiary Corp. at 5 ("AMSC supports the need for a unique test for IGOS that includes a careful examination of the impact that their access to the United States might have on . . . the ability of regional and domestic systems to compete.").

[8] *See Notice* at ¶ 68.

information in the record of this proceeding to apply the test, and conclude that immediate use of INTELSAT capacity by COMSAT for U.S. domestic services is in the public interest.

III. INTELSAT cannot cross-subsidize among its U.S. domestic service and its non-U.S. services as feared by some commenters.

One reason advanced by the commenters opposing IGO entry into the U.S. domestic market is a fear of cross-subsidization. In expressing this fear, no commenter substantiates how this cross-subsidization would occur. For example, PanAmSat states that "there is too great a potential for INTELSAT, through Comsat, to undercut its competitors in the domestic market by cross-subsidizing between its competitive and monopoly services."[9] GE Americom states simply that IGOs' "dominant market position permits them to engage in cross-subsidization."[10]

This fear is unfounded. INTELSAT is unable to engage in predatory cross-subsidization for two reasons. First, INTELSAT lacks market power in the relevant market for international transmission services, and without market power in the international market it would be unable to earn the supracompetitive profits necessary to finance successfully any attempt at cross-subsidization in the domestic market.[11] Second, INTELSAT's tariff policy, which requires

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[9] Comments of PanAmSat Corp. at 6.

[10] Comments of GE Americom at 11.

[11] Market power is defined as the ability to control prices and exclude competitors. *Competitive Common Carrier Services, Fourth Report and Order*, 95 F.C.C.2d 554, 558-59 (1983). Possession of market power -- whether through monopoly or through regulation -- is a necessary element of cross-subsidization. *See Computer II*, 77 F.C.C.2d 384, 467 (1980) (ability to cross-subsidize depends on possession of market power in adjacent market); *United States v. Western Elec. Co.*, 900 F.2d 283, 296 (D.C. Cir. 1990) ("no damage to competition -- through 'leverage' or otherwise -- can occur unless [a company] can exercise market power"), *cert. denied,* 498 U.S. 911 (1991). If INTELSAT is actually able to undercut its competitors, it is not through cross-subsidization, but through its well-developed economies of scope and scale. As the Commission well knows, such economies are valuable and efficient; every effort should be made to develop them and pass them on to consumers.

that the charge for each service recover at least the long-run incremental costs of providing that service, ensures that no cross-subsidization between services can occur. COMSAT's rates for INTELSAT space segment, in turn, are regulated and monitored by the FCC; the agency also has imposed structural separations and accounting requirements for the sole purpose of detecting and preventing cross-subsidization. Thus, concerns about pricing of INTELSAT capacity for U.S. domestic offerings by COMSAT are groundless.

Moreover, as COMSAT explained in its opening comments, there are in total only 14.5 INTELSAT transponders that COMSAT could even market for U.S. domestic service, as compared to about 550 transponders on competitive domestic satellite systems. With such a minor market share, the addition of INTELSAT capacity can have only a limited effect on the domestic services market.

If an anticompetitive threat arises at all, it will not come from INTELSAT, which is regulated under international law through the provisions of the INTELSAT Agreements, or COMSAT, which is FCC-regulated. Rather, it is likely to come from the separate satellite operators, whose raising of the cross-subsidization issue merely diverts attention away from themselves. These operators serve many routes with multiple satellites -- in some cases with global coverage[12] -- and are not subject to any form of common carrier regulation. They can

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[12] PanAmSat currently has four satellites in orbit providing global service, with plans for as many as 8 more. Columbia has 3 satellites serving the Americas, Europe, and Asia. The Russian Gorizont/Intersputnik system provides global coverage through an extensive satellite network. The former U.S. domsats (*e.g.*, AT&T, GE Americom, and Hughes), have nearly 30 satellites now authorized to provide international services throughout their coverage regions. Moreover, there are a large number of regional satellite systems: Anik, Solidaridad, Hispasat, Nahuelsat, Brazilsat, Eutelsat, Astra, Telecom, Italsat, Turksat, DFS-Copernicus, Arabsat, Amos, Optus, Asiasat, Apstar, Chinasat, Insat, Koreasat, Measat, Palapa, Rimsat, and Thaicom.

price without regard to cost, bundle together space and ground segments, create single-customer offerings and private carriage contracts, and skim off the most profitable routes and services (since they have no universal service obligation). They trumpet their flexibility to respond to competition as their unique advantage.

A. INTELSAT lacks market power in the relevant market.

Commenters -- perhaps encouraged by the FCC's characterization of IGOs[13] -- have stated that IGOs have a "monopoly" over satellite services.[14] In fact, INTELSAT has no monopoly in international satellite services; however, the real issue is whether INTELSAT possesses market power in the relevant market -- the market for international fixed telecommunications service. Clearly it does not, because INTELSAT's ability to raise price is constrained by the presence of numerous competitive alternatives for the international transmission of voice, data, and video to all parts of the world.

Any market power analysis requires identification of the relevant market. Defining the relevant market too narrowly will lead to an erroneous result because a producer may have a

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[13] *See Notice* at ¶ 62 (According to the FCC, IGOs "have established dominant positions in the global market" and are the "primary if not exclusive providers" of certain services).

[14] *See* Comments of AT&T Corp. at 14 (IGOs have "substantial monopolies"); Comments of GE Americom (IGOs have a "virtually complete monopoly"); Comments of Columbia Communications Corp. at 22 (IGOs have "unique market power in the international satellite marketplace"). Only GE Americom, of all commenters, attempted to produce any evidence of such a monopoly, and that evidence is hopelessly out of date. *See* Comments of GE Americom in IB Docket No. 95-41 at 12 (1995) (pointing out what it took to be evidence of cross-subsidization in a 1987 COMSAT tariff). Whether or not INTELSAT had a monopoly in satellite services in 1987 -- a year before the first transoceanic fiber-optic cable and the first U.S. separate satellite system were even put in service -- it does not have one today; moreover, as described below, INTELSAT's current tariff policy differs significantly from its policy in 1987.

monopoly in a particular product or service but still have no market power. This is the case if there are ready substitutes to which consumers will switch if the monopolist attempts to raise price.[15]

The relevant market in this case is international fixed telecommunications service. Although INTELSAT provides fixed telecommunications service only via satellite, it faces competition from fiber-optic cable operators as well as from other satellite operators. A relevant market analysis must recognize that cable and satellite services are complete substitutes for one another. A customer requiring capacity for international telecommunications cares only that the traffic is carried from its source to its destination, and does not care how it is carried there.

Direct evidence of the impact of fiber-optic cable systems on INTELSAT's satellite service market is found in the proportion of INTELSAT's revenues generated by international public switched network (IPSN) service -- the service for which cable is the best substitute. In 1988, approximately 76 percent of INTELSAT's revenues derived from IPSN. In 1995, that figure had declined to 47.7 percent.[16] This decline is due to the emergence of competitive cable providers -- such as TAT-10 in the Atlantic and TPC in the Pacific -- which have been undercutting INTELSAT's IPSN rates since 1992.

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[15] *See* U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines § 1.0 (1992) ("In determining whether a hypothetical monopolist would be in a position to exercise market power, it is necessary to evaluate likely demand responses of consumers to a price increase. A price increase could be made unprofitable by consumers either switching to other products or switching to the same product produced by firms at other locations.").

[16] INTELSAT Annual Reports, 1989-90 and 1995-96.

Because the relevant market includes close substitutes to INTELSAT's service, INTELSAT has no market power despite being the predominant supplier of international fixed satellite services. INTELSAT cannot profitably raise its price, because its customers would shift to fiber-optic cable service. Moreover, INTELSAT has no monopoly even in fixed *satellite* telecommunications service. INTELSAT competes with both foreign-licensed and U.S.-licensed satellite systems -- the so-called separate satellite systems -- for carriage of international telecommunications traffic. PanAmSat and Gorizont/Intersputnik each offer a global private satellite alternative. Orion and Columbia each offer interregional private network and video transmission services. Dominant regional satellite systems, such as Arabsat (Middle East), Eutelsat (Europe), Asiasat (Asia) handle the bulk of satellite transmission traffic within their regions. In fact, fewer than one-third of all satellites in the geostationary arc serving international telecommunications traffic are INTELSAT's.

B. INTELSAT cannot discriminate geographically among its customers, and its tariff policy ensures that its services are not cross-subsidized.

A second reason that INTELSAT cannot cross-subsidize U.S. domestic service through revenues generated by non-U.S. services is that INTELSAT is prohibited by its formational agreement from engaging in geographic price discrimination, and prohibited by its formal tariff policy from engaging in service cross-subsidization.

INTELSAT's prime objective is "the provision, on a commercial basis, of the space segment required for international public telecommunications services of high quality and reliability to be *available on a non-discriminatory basis to all areas of the world.*"[17]

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[17] INTELSAT Agreement, Art. III(a) (emphasis added).

INTELSAT's rates and charges "*shall be the same for all applicants* for space segment capacity . . . ."[18] Cross-subsidization in order to lower rates for a particular group of customers, *i.e.*, U.S. domestic users, would be a violation of these provisions, enforceable by INTELSAT parties (including the U.S. Government) and signatories (including COMSAT). INTELSAT's non-discrimination requirement is reflected in its tariff schedules. INTELSAT's channel/carrier service and transponder leases are priced independently of distance and point of origination or termination. For equivalent service, in other words, INTELSAT would have to charge the same rate between U.S. domestic points as it does between international points.

INTELSAT's non-discrimination requirement does not, however, require it to charge the same rates for different services. Nevertheless, INTELSAT's tariff policy, which was formally adopted by its Board of Governors in 1989 and fully reflected in its tariffs by 1991, prohibits cross-subsidization by ensuring that the charges for each service recover the long-run incremental costs of providing the service.

Under its resource-based methodology, INTELSAT computes the forward-looking costs of each of its transmission paths and requires its charges to fully cover the those allocable capacity costs together with a proportional recovery of shared costs. This methodology promotes economically efficient resource utilization by sending appropriate pricing signals to consumers. Significantly, it precludes cross-subsidization, because no service is priced below its forward-looking, long-run incremental cost.[19]

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[18] *Id.*, Art. V(d) (emphasis added).

[19] The Commission recently endorsed the use of cost-based pricing using long-run incremental costs in pricing unbundled local exchange service elements. *See Implementation of* (continued...)

C. FCC regulatory authority over COMSAT ensures that COMSAT cannot cross-subsidize between its regulated and unregulated business.

AT&T states that COMSAT's status as the exclusive provider of INTELSAT space segment "further reinforc[es] the substantial monopolies enjoyed by [IGOs] in international satellite communications" and requests that the Commission eliminate COMSAT's exclusive status as a condition of IGO entry into the U.S. domestic market. The short answer to AT&T is that COMSAT's role as the sole provider of INTELSAT space segment in the U.S. does not give it any market power whatsoever, Today, consumers can choose among AT&T, MCI, Sprint, PanAmSat, Columbia, Orion, Hispasat, Intersputnik, GE Americom, AMSC, and Hughes to send their voice and data transmissions overseas. COMSAT's provision of INTELSAT capacity is hardly an exclusive monopoly choice.

Moreover, as noted above, COMSAT is a regulated common carrier subject to the FCC's Title II jurisdiction. The FCC requires structural separation between COMSAT's regulated and competitive businesses, and requires COMSAT to file unbundled, cost-based space segment and earth station rates.

IV. INTELSAT has not engaged in anticompetitive behavior as some commenters allege.

Several commenters point to INTELSAT's vote against coordination with Columbia as an example of anticompetitive behavior, allegedly made possible by INTELSAT's "dominant"

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[19](...continued)
the Local Competition Provisions, First Report and Order, FCC No. 96-325 (Aug. 8, 1996) at ¶¶ 672-732. The Commission concluded that such costs "simulate[ ] the conditions in a competitive marketplace," *id.* at ¶ 679, and "ensure efficient entry and utilization of the telecommunications infrastructure." *Id.* at ¶ 630.

position in the global market.[20] As set forth above, INTELSAT has no market power in the international fixed telecommunications service market, and so has nothing to wield anticompetitively. In any case, these commenters wrongly characterize this event.

INTELSAT's position on the use of its 40.5°W (319.5°E) orbital location is a matter of public record, and need not be fully repeated here.[21] Briefly, INTELSAT has invested nearly $100 million to procure satellite capacity for use in that location -- a location to which it has legitimate right of use -- in reliance on the commitments made in the 1991 U.S.-INTELSAT coordination agreement; INTELSAT has a real demand for that capacity, particularly from its underserved Latin American community; INTELSAT has a fiduciary obligation to its members to fill that demand. INTELSAT made numerous efforts to negotiate a mutually satisfactory amendment to the coordination agreement. In the end, it was Columbia's uncompromising demands that caused INTELSAT's Board of Governors to deny Columbia's coordination request on April 15, 1996. INTELSAT exercised no more than the power possessed by all individuals -- the right to refuse to amend an agreement fairly negotiated five years earlier.

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[20] *See* Comments of Orion Network Systems, Inc. at 12; Comments of PanAmSat Corp. at 5-6.

[21] *See In re Columbia Communications Corporation*, File No. 95-SAT-STA-96, Petition for Review of INTELSAT (June 5, 1996); Reply of INTELSAT (July 5, 1996); *In re Columbia Communications Corporation*, File No. 116-SAT-ML-96, Petition to Deny of INTELSAT (July 5, 1996).

V. Conclusion

For the foregoing reasons, the Commission should adopt a test for IGO provision of U.S. domestic service that focuses broadly on the competitive consequences of the IGO's provision of domestic service, and should apply that test to permit the use of INTELSAT capacity for U.S. domestic service.

Respectfully submitted,

THE INTERNATIONAL
TELECOMMUNICATIONS SATELLITE
ORGANIZATION (INTELSAT)

By: _____
Henry M. Rivera
J. Thomas Nolan
GINSBURG FELDMAN and BRESS,
Chartered
1250 Connecticut Avenue, NW
Washington, DC 20036
(202) 637-9000

Its Attorneys

Of Counsel:

Donald D. Wear, Jr.
Vice President/General Counsel
INTELSAT
3400 International Drive, N.W.
Washington, DC 20008

Dated: August 15, 1996

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Comments of INTELSAT was served this 15th day of August, 1996, by first class mail, postage prepaid, or by hand (*) to each person on the attached service list.

Carol Nyhof

Carol Nyhof
Ginsburg, Feldman and Bress
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

Service List
August 15, 1996

The Honorable Reed E. Hundt
Chairman
Federal Communications Comm.
1919 M Street, N.W.
Room 814
Washington, D.C. 20554

The Honorable James H. Quello
Commissioner
Federal Communications Comm.
1919 M Street, N.W.
Room 802
Washington, D.C. 20554

The Hon. Rachelle B. Chong
Commissioner
Federal Communications Comm.
1919 M Street, N.W.
Room 844
Washington, D.C. 20554

The Honorable Susan Ness
Commissioner
Federal Communications Comm.
1919 M Street, N.W.
Room 832
Washington, D.C. 20554

Donald H. Gips
Chief
Federal Communications Comm.
2000 M Street, N.W.
Room 800
Washington, D.C. 20554

Paula Ford, Esquire
International Bureau
Federal Communications Comm.
2000 M Street, N.W.
Room 502-A
Washington, D.C. 20554

Virginia Marshall, Esquire
International Bureau
Federal Communications Comm.
2000 M Street, N.W.
Room 515
Washington, D.C. 20554

Thomas J. Keller
Eric T. Werner
Verner, Liipfert, Bernhard
901-15th Street, N.W.
Suite 700
Washington, D.C. 20005-2301

Philip L. Malet
Alfred M. Mamlet
Steptoe & Johnson, LLP
1330 Connecticut Ave., N.W.
Washington, D.C. 20036

William B. Baker
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Lon C. Levin
Vice Pres. and Reg. Counsel
AMSC Subsidiary Corporation
10802 Parkridge Boulevard
Reston, VA 22091

Bruce D. Jacobs
Glenn S. Richards
Fisher Wayland Cooper Leader
2001 Pennsylvania Ave., N.W.
Suite 400
Washington, D.C. 20006

Mark C. Rosenblum, Esq.
Peter H. Jacoby, Esq.
AT&T Corp.
295 No. Maple Avenue
Room 3244J1
Basking Ridge, NJ 07920

Joel S. Winnik, Esq.
K. Michele Walters, Esq.
Hogan & Hartson L.L.P.
555 Thirteenth St., N.W.
Washington, D.C. 20004-1109

Peter A. Rohrbach
Karis A. Hastings
Hogan & Hartson L.L.P.
555 Thirteenth St., N.W.
Washington, D.C. 20004-1109

Raul R. Rodriguez, Esq.
Stephen D. Baruch, Esq.
Leventhal, Senter & Lerman
2000 K Street, N.W.
Suite 600
Washington, D.C. 20006

Christine G. Crafton, Ph.D.
Director, Industry Affairs
General Instrument Corp.
1133 21st Street, N.W.
Suite 405
Washington, D.C. 20036

William D. Wallace
Crowell & Moring
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Gerald Mussarra
Space and Strategic Missles Sector
Lockheed Martin Corp.
1725 Jefferson Davis Hwy.
Arlington, VA 22202-4127

Albert Halprin, Esq.
Halprin, Temple, Goodman & Sugrue
Suite 650 East Tower
1100 New York Ave., N.W.
Washington, D.C. 20005

Henry Goldberg, Esq.
Joseph A. Godles, Esq.
Goldberg, Godles, Wiener & Wright
1229 Nineteenth Street, N.W.
Washington, D.C. 20036

Gary M. Epstein, Esq.
John P. Janka, Esq.
Latham & Watkins
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2505

Randolph J. May, Esq.
Timothy J. Cooney
Sutherland, Asbill & Brennan
1275 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2404

Mr. Kazunori Inagaki
Kokusai Denshin Denwa Co.
3400 International Dr., NW
Suite 3K-02
Washington, D.C. 20008-3098

Benjamin J. Griffin, Esq.
Kathleen A. Kirby
Reed Smith Shaw & McClay
1301 K Street, N.W.
Suite 1100, East Tower
Washington, D.C. 20005

Leslie A. Taylor
Guy t. Christiansen
Leslie Taylor Associates
6800 Carlynn Court
Bethesda, MD 20817

Debra A. Smilley-Weiner
Deputy General Counsel
Lockheed Martin Astro Space
P.O. Box 800
Princeton, NJ 08543-0800

Stephen L. Goodman, Esq.
Halprin, Temple, Goodman & Sugrue
Suite 650 East Tower
1100 New York Ave., N.W.
Washington, D.C. 20005

Michael J. Lehmkuhl, Esq.
Pepper & Corazzini, L.L.P.
1776 K Street, N.W.
Suite 200
Washington, D.C. 20006

Cheryl A. Tritt, Esq.
Susan H. Crandall, Esq.
Morrison & Foerster, LLP
2000 Pennsylvania Ave., NW
Suite 5500
Washington, D.C. 20006

James T. Roche, Esq.
Keystone Communications Corp.
Suite 880
400 No. Cap. St., N.W.
Washington, D.C. 20001

Jack E. Robinson
National Telecom Satellite
Communications, Inc.
Clearwater House
2187 Atlantic Street
Stamford, CT 06902

Scott Blake Harris
Mark A. Grannis
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036

Norman P. Leventhal, Esq.
Raul R. Rodriguez, Esq.
Leventhal, Senter & Lerman
2000 K Street, N.W.
Suite 600
Washington, D.C. 20006

Robert S. Koppel
Tally Frankel
Worldcom, Inc.
15245 Shady Grove Road
Suite 460
Rockville, MD 20850

Mr. Yasuharu Iwashima
Japan Satellite Systems, Inc.
5th Fl. Tranomon 17 Mori Bldg.
1-26-5 Tranomon Minato-ku
Tokyo 105 Japan

Carol R. Schultz
Larry A. Blosser
MCI Telecommunications
Corporation
1801 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Terri B. Natoli, Esq.
Fleischman and Walsh, LLP
1400 Sixteenth Street, N.W.
Suite 600
Washington, D.C. 20554

Alan Y. Naftalin
Gregory C. Staple
Koteen & Naftalin, LLP
1150 Connecticut Ave., NW
Suite 1000
Washington, D.C. 20036

John C. Quale, Esq.
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006