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

RECEIVED
AUG 1 6 1996
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

DOCKET FILE COPY ORIGINAL

REPLY COMMENTS OF
WESTERN TELE-COMMUNICATIONS, INC.

Richard E. Wiley
John C. Quale
Todd M. Stansbury
Bruce A. Olcott
of
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

Its Attorneys

August 16, 1996

SUMMARY

Western Tele-Communications, Inc. ("WTCI") is seeking to uplink U.S. programming to transponders that it will own on a satellite located in a Canadian DBS orbital location. WTCI's programming will be transmitted to U.S. consumers, providing much needed competition to existing U.S. DBS providers which have opposed WTCI's application. WTCI believes that its proposal (which will ultimately lead to an increase from three to five in the number of orbital slots from which full-CONUS DBS service is possible) promotes the public interest and is in full compliance with the policies proposed in this proceeding.

Despite the abundant public interest benefits that would accrue from WTCI's proposal, WTCI's prospective competitors have used their comments in this proceeding to attack WTCI's application. None of their contentions, however, warrants adoption of any rule or policy which would preclude grant of WTCI's application.

As WTCI and a number of other commenters have demonstrated, the Commission should not abandon in this proceeding its long-standing policy of permitting the use of foreign satellites for domestic purposes in situations of domestic satellite scarcity. In the past, this policy has provided the public with numerous beneficial telecommunications services that would not have otherwise been available without the authorized use of non-U.S. capacity. The Commission should continue this policy, or, at a minimum, create a strong presumption in its ECO-Sat analysis that the

public interest is always served by permitting the use of non-U.S. capacity in times of scarcity.

Furthermore, whatever policies are adopted for other services, the Commission, in recognition of the unique status of DBS under international law, should permit unlimited use of non-U.S. DBS satellites. As WTCI explained in its initial comments, the ITU Region 2 Plan for DBS already provides for allocation and regulation of DBS orbital capacity, and contemplates both transborder and shared DBS systems. In view of this country's commitment to open borders for DBS services, the U.S. should be the last nation to disrupt an exemplary model of international cooperation based upon competition concerns which are inapplicable to DBS.

The Commission should also heed the comments of numerous parties in this proceeding that have urged the Commission to apply narrowly an effective competitive opportunities test to strictly analogous proposals, and only to foreign regulation of facilities. By limiting the focus of an ECO-Sat examination to truly analogous service offerings, the Commission will ensure that its application procedures are not misused by existing operators to keep out new entrants. Additionally, the Commission should not use its ECO-Sat test to engage in subjective examinations of ancillary trade issues such as programming and content regulation. These matters are more appropriately left to the Executive Branch.

Finally, the Commission should affirm its tentative conclusion that the rules adopted in this proceeding should not be applied to applications filed before the release of the NPRM. It would be unfair and burdensome to apply the rules adopted in this

proceeding to pending applications. WTCI's proposal, which will provide tremendous consumer benefits when implemented, was developed in the light of, and is fully consistent with, long-standing Commission policy.

TABLE OF CONTENTS

Page

I. NO COMMENTER HAS ADVANCED ANY SUBSTANTIAL GROUND FOR ABANDONMENT OF THE COMMISSION'S EXISTING POLICY OF PERMITTING THE USE OF NON-U.S. SATELLITES TO PROVIDE U.S. SERVICES WHERE DOMESTIC CAPACITY IS INSUFFICIENT TO SATISFY DEMAND 2

II. IF ADOPTED, ANY ECO-SAT TEST SHOULD EXEMPT THE DBS SERVICE DUE TO ITS UNIQUE INTERNATIONAL ALLOCATION AND REGULATORY STATUS 4

III. THE COMMISSION SHOULD APPLY THE ECO-SAT TEST NARROWLY, AND ONLY WITH RESPECT TO FOREIGN REGULATION OF FACILITIES 7

A. The Commission Should Apply the Proposed ECO-Sat Test Solely to Analogous Proposals Within Each of the Functionally Similar Satellite Services 7

B. The ECO-Sat Test Should Not Take into Account Programming Considerations As to Which the Commission Should Defer to the Executive Branch 8

C. The Commission Should Not Include as an "Additional Public Interest Factor" in its ECO-Sat Examination the Goal of Capturing the DBS Orbital Assignments of Other Countries 10

D. In Applying its Proposed ECO-Sat Test, the Commission Should Limit its Examination to Barriers to Foreign Trade, Rather Than Ancillary Issues of Regulatory Parity 12

Page

IV. NEITHER THE COMMISSION NOR ANY COMMENTER HAS JUSTIFIED THE ABANDONMENT OF THE COMMISSION'S 1993 PROPOSAL TO DEREGULATE RECEIVE-ONLY EARTH STATIONS 13

V. THE COMMISSION WAS CORRECT IN TENTATIVELY CONCLUDING THAT IT WOULD BE UNFAIR AND BURDENSOME TO HOLD PENDING APPLICATIONS IN ABEYANCE IN ORDER TO SUBJECT THEM TO AN ECO-SAT EXAMINATION 14

VI. CONCLUSION 15

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

REPLY COMMENTS OF
WESTERN TELE-COMMUNICATIONS, INC.

Western Tele-Communications, Inc. ("WTCI") hereby submits its reply comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM" or "DISCO II NPRM").with respect to the regulation of non-U.S. satellites and related facilities. As explained in its comments, WTCI is seeking Commission consent to uplink U.S. programming to transponders that it will own on a satellite located in a Canadian orbital location. WTCI's programming will be transmitted to U.S. consumers, providing much needed competition to existing U.S. DBS operators which have opposed WTCI's application.

WTCI believes that its proposal (which will ultimately lead to an increase from three to five in the number of orbital slots from which full-CONUS DBS service is possible) promotes the public interest and is in full compliance with the rules proposed in this proceeding, as well as existing Commission policies on the use of non-U.S. satellites.

Despite the abundant public interest benefits that would accrue from WTCI's proposal, WTCI's prospective competitors to varying extents have, overtly or indirectly, sought to use their comments in this proceeding to oppose WTCI's application. None of their contentions, however, warrants adoption of any rule or policy in this proceeding which would preclude grant of WTCI's application or other proposals where the use of non-U.S. satellites provides the only means by which additional competitive services can be delivered to the U.S.

I. NO COMMENTER HAS ADVANCED ANY SUBSTANTIAL GROUND FOR ABANDONMENT OF THE COMMISSION'S EXISTING POLICY OF PERMITTING THE USE OF NON-U.S. SATELLITES TO PROVIDE U.S. SERVICES WHERE DOMESTIC CAPACITY IS INSUFFICIENT TO SATISFY DEMAND

As WTCI and a number of participants in this proceeding have argued, the Commission should retain its long-standing policy of permitting the use of non-U.S. satellites to provide U.S. domestic services when domestic capacity is unavailable.[1] The public interest is always served when non-U.S. facilities provide the only means to increase the number of competitive service offerings available to U.S. consumers. The benefits of

[1] See Comments of General Instruments Corp. at 7-8 ("GI"); Comments of Mobile Datacom Corporation & Newcomb Communications, Inc. at 4-7.

WTCI's uplink proposal are particularly compelling in view of the limitations in DBS orbital slots imposed on the U.S. by the ITU Radio Regulations. Grant of WTCI's application could lead to a two-thirds increase in the number of slots from which full-CONUS DBS service is possible.[2]

Retention of the existing policy with respect to domestic capacity shortages is particularly appropriate since the benefits sought to be achieved through the ECO-Sat test are, at best, speculative.[3] As numerous commenters have pointed out, the vast majority of countries are not home to satellite system operators, and only a fraction of the systems that do exist have the potential to provide services in the U.S.[4] Furthermore, application of

---

[2] MCI suggests that DBS and Direct-to-Home (DTH) services utilizing FSS satellites should be considered alike. See Comments of MCI Telecommunications Corp. at 12 ("MCI"). Given the vastly different international regulatory schemes, discussed infra, which accord DBS unique protection and enable DBS to operate with far higher power than FSS, the two services should in no sense be deemed substitutable.

[3] See Consolidated Comments of DIRECTV, Inc., DIRECTV International, Inc., and Hughes Communications Galaxy, Inc. at 9-10 ("DIRECTV"); Comments of L/Q Licensee, Inc. and Loral Space & Communications Ltd. at 12 ("Loral"); Comments of GE American Communications, Inc. at 4 ("GE"); Comments of ICO Global Communications at 35 ("ICO"); Comments of Charter Communications at 4 ("Charter"). As some parties in this proceeding have observed, the ECO-Sat test could reduce, rather than increase the number of available satellite transmission services. Thus, a coalition of television networks has requested an exception to the ECO-Sat test for video transmissions involving breaking news and special events, arguing that the proposed ECO-Sat test could further restrict what is already a tight market for international carriage of video transmissions via satellite. See Comments of Capital Cities/ABC, Inc., CBS Inc., National Broadcasting Company, Inc. and Turner Broadcasting System, Inc. at 1-10 ("Networks").

[4] See Charter at 4; Loral at 12; GE at 4; ICO at 35; Comments of PanAmSat Corp. at 7; DIRECTV at 9-10.

ECO-Sat could lead to a backlash by foreign governments that view the test as an unfair demand for reciprocity.[5]

Thus, in order to ensure that the greatest number of competitive satellite services are made available to U.S. consumers, the Commission should retain its current policy of permitting the use of non-U.S. satellites to provide U.S. domestic services when domestic capacity is unavailable, regardless of the competitive conditions in the home market of the non-U.S. satellite involved. At a minimum, the Commission should create a strong presumption in its ECO-Sat analysis that the public interest would be best served by permitting the use of non-U.S. satellites when domestic capacity is unavailable.[6]

II. IF ADOPTED, ANY ECO-SAT TEST SHOULD EXEMPT THE DBS SERVICE DUE TO ITS UNIQUE INTERNATIONAL ALLOCATION AND REGULATORY STATUS

As WTCI explained in its initial comments, it would be inappropriate for the Commission to apply an ECO-Sat test to DBS due to its unique international regulatory status. The Commission has acknowledged that "for all practical purposes, DBS is the only service in which all orbital/channel resources have been allocated to the United States by

---

[5] See Comments of Embassy of Japan at 1-3 (indicating that adoption of an ECO-Sat test could harm the trade liberalization talks in the Group on Basic Telecommunications of the WTO); see also Loral at 12; GE at 4.

[6] No commenter argued against the use of spectrum scarcity in an ECO-Sat analysis. See DISCO II NPRM at ¶ 12.

international agreement."[7] The pertinent international agreement, the ITU Region 2 Plan for BSS, contemplates both the provision of international DBS services,[8] and the shared use of a single satellite by two nations in the Western Hemisphere.[9]

No commenter in this proceeding has suggested any substantial reason why the U.S. should disturb this model of international cooperation. As WTCI explained in its initial comments, the Commission's theoretical basis for an ECO-Sat test is inapplicable to DBS, because it is inherently a one-way service. Thus, the Commission's stated concern that non-U.S. satellites capable of serving additional "routes" may be able to offer customers "a wider range of communications capabilities"[10] has no relevance to DBS.

MCI posits nonetheless that a foreign DBS operator whose home market is closed to U.S. providers could gain an unfair advantage since the foreign "operator will have both markets to support its operations and products, while the U.S. service provider would be able to rely on the U.S. market alone." In fact, the foreign operator gains no advantage in the market for communications facilities, because DBS satellites and transmit earth stations are

---

[7] Revision of Rules and Policies for the Direct Broadcast Satellite Service, Notice of Proposed Rulemaking, 11 FCC Rcd 1297, 1304 n.27 (1995) ("DBS Auction NPRM").

[8] See Domestic Fixed Satellites and Separate International Satellite Systems, 11 FCC Rcd 2429, 2438 n.76 (1996) ("DISCO I Order").

[9] Resolution 42 provides that "some administrations of Region 2 [North and South America] may cooperate in the joint development of a space system with a view to covering two or more service areas from the same orbital position or to using a beam which would encompass two or more service areas." International Telecommunication Union, 3E Radio Regulations, Resolution 42 (1994).

[10] DISCO II NPRM at ¶ 11.

by nature "sunk costs" (meaning that they must be purchased up front without consideration of the size of the potential market involved), the ability of a foreign operator to serve both the U.S. and another country would provide it with no cost advantage. Likewise, its costs of operating the satellite are the same no matter how many countries it is able to serve.

As MCI's hypothetical suggests, the foreign operator's advantage arises, if at all, in the programming market, not the market for communications facilities. Other commenters, as discussed infra, correctly argue, however, that conditions in the program market are more appropriately addressed by the Executive Branch departments charged with administering trade policy.

For all practical purposes, moreover, only Canadian and Mexican DBS operators could serve their home markets as well as the United States. Given the far larger size of the U.S. market, any theoretical advantage of a Canadian or Mexican operator is, at best, de minimis. The Canadian market is estimated to include, at most, two million DBS homes,[11] a sizable number of which may already be receiving services through the gray market.[12] Focusing on the larger Mexican market, MCI notes that a Mexican provider could offer a Spanish language service for consumers in both Mexico and the U.S.[13] Implicit in MCI's argument, however, is the notion that there would be a sufficient number of U.S. subscribers interested in a Spanish-only DBS service to support at least two Spanish-only networks (i.e.,

---

[11] Jeffrey Williams, ExpressVu Plans to Woo Gray Market, Satellite Bus. News, July 3, 1996, at 22.

[12] DIRECTV has reportedly managed to capture as many as a quarter of a million subscribers in Canada. See id.

[13] MCI at 9.

one Mexican and one U.S.) and that there would be a sufficient number of U.S. subscribers to the Mexican service to accord it an unfair pricing advantage over its competitor. MCI, however, provides no empirical evidence to support this highly improbable scenario.

Accordingly, no reason exists for the Commission to impose an effective competitive opportunities test on the DBS service. The one-way nature of the service, its existing international regulatory scheme, and the apparent ability of consumers to receive the services across international borders, even without regulatory authorization, strongly suggest that it would be inappropriate to adopt an ECO-Sat examination for DBS.

III. THE COMMISSION SHOULD APPLY THE ECO-SAT TEST NARROWLY, AND ONLY WITH RESPECT TO FOREIGN REGULATION OF FACILITIES

If the proposed ECO-Sat test is adopted for the DBS service, it should be applied in a reliable manner by limiting the Commission's examination to strictly analogous proposals. A number of commenters in this proceeding have supported WTCI's call for narrow application of the proposed test. By focusing narrowly on analogous service offerings, the Commission will ensure that the ECO-Sat test is not misused by existing operators to keep out new entrants.

A. The Commission Should Apply the Proposed ECO-Sat Test Solely to Analogous Proposals Within Each of the Functionally Similar Satellite Services

The Commission proposes to apply its ECO-Sat test on a "service-by-service" basis, looking at whether "analogous" opportunities exist in foreign markets. A number of commenters have correctly urged the Commission to apply narrowly its proposed test. The

commenters argue that satellite service offerings that are not substitutable for, and do not compete with other service offerings should not be linked. For example, Teledisic Corporation calls for distinctive treatment for Interactive Broadband Satellite Services ("IBSS"),[14] Mobile Datacom Corporation and Newcomb Communications, Inc. seek differentiation between low data rate and high data rate MSS,[15] and WorldCom, Inc. asks the Commission to treat separately barriers to international versus domestic satellite services.[16]

Separate treatment for each of these service offerings is appropriate since, as the commenters point out, the services do not compete against functionally or technically distinctive services. A trade barrier involving one of the services would have no significance with respect to the existence of effective competitive opportunities in another service. In order to provide separate treatment for each of these service offerings, the Commission should limit its effective competitive opportunities analysis to purely analogous proposals. Any examination that exceeds this framework would unnecessarily complicate the Commission's regulatory process, and would provide existing satellite operators with a regulatory means to forestall the introduction of additional competition.

---

[14] See Comments of Teledisic Corp. at 1-7.

[15] See Mobile Datacom & Newcomb at 7-8.

[16] See Comments of WorldCom, Inc. at 6.

B. The ECO-Sat Test Should Not Take into Account Programming Considerations As to Which the Commission Should Defer to the Executive Branch

The application of an effective competitive opportunities test to non-common carrier services raises the question of whether the Commission should assess the appropriateness of programming and content restrictions placed on domestic media services by foreign countries. As WTCI explained in its initial comments in this proceeding, it would be inappropriate for the Commission to consider the domestic programming and content policies of foreign governments.[17] Given this country's content restrictions described in the comments of WTCI, the implementation of policies of reciprocity in content is more appropriately carried out by the Executive Branch departments responsible for trade policy.

MCI contends, however, that there is an "inextricable linkage between content and distribution.[18] Again, MCI does not explain the basis for this linkage or why content and facilities should not be separately examined. Since nearly every country, including the U.S.,

---

[17] WTCI is not alone in arguing against an examination of foreign content regulations by the Commission. For example, DIRECTV indicates in its comments that the Commission should refrain from examining foreign content regulations, unless the regulations "are part of a broader discriminatory policy brought to the Commission's attention by the Executive Branch," or when foreign administrations "purposefully discriminate." DIRECTV at 17. DIRECTV, however, is incorrect in suggesting that Canada engages in purposeful discrimination. The regulations applicable to DTH services in Canada apply equally to both Canadian and non-Canadian operators. DIRECTV is also incorrect in misconstruing WTCI's proposal as a "Canadian DBS service." Id. at 3 n.3. WTCI is a domestic company, that has put forth a proposal to deploy a U.S. DBS service using an orbital location assigned to Canada. WTCI's proposal promises tremendous public interest benefits through a substantial increase in the number of DBS services available in the U.S.

[18] MCI at 14.

maintains programming restrictions that may have the effect of deterring the importation of foreign-produced programming, inclusion of a content analysis in an ECO-Sat examination would immerse the Commission in a subjective assessment of the perceived merits and flaws of the programming rules and policies of sovereign foreign governments. This role should be left to the appropriate Executive Branch departments.

C. The Commission Should Not Include as an "Additional Public Interest Factor" in Its ECO-Sat Examination the Goal of Capturing the DBS Orbital Assignments of Other Countries

MCI argues that the Commission should include as an "additional public interest factor" the strategy of wresting control of "excess" DBS orbital assignments held by other countries, presumably including Canada. Specifically, MCI asserts that if the U.S. permits non-U.S. satellites to provide services to U.S. consumers, the additional services "may effectively preclude U.S. operators, in cooperation with the U.S. government, from seeking modifications to the ITU BSS plan for the purpose of reallocating this 'excess' spectrum to meet other U.S. needs, such as delivery of local programming via satellite."[19] Spectrum is apparently "excess" if it is "used predominately to reach U.S. consumers."[20] Given the

---

[19] Id. at 23.

[20] Id.

recognition in the ITU Region 2 Plan for shared use of DBS facilities,[21] MCI's plan is highly unlikely to meet with success at the ITU.[22]

The U.S., moreover, does not need to usurp control of the assignments of neighboring countries in order to ensure that they are put to efficient and beneficial use. As long as market forces are not restrained, every DBS orbital assignment capable of full-CONUS service will be utilized in the most effective and efficient manner possible, regardless of whether they are licensed by U.S. or foreign regulators.[23]

---

[21] See supra, n.9.

[22] Due to the slow pace at which the ITU is currently processing modification applications, an application to reassign DBS orbital capacity, even one unopposed by the administration slated to lose its capacity, could be subjected to extremely lengthy delays. Of course, the resulting preservation of scarcity of DBS services in the U.S. may be exactly what MCI is seeking.

[23] In an apparent effort to restrain market forces, in an August 1, 1996 letter, MCI suggests that the Commission should seek modification of the ITU Region 2 BSS plan in order to provide the U.S. with DBS orbital slots at 83° and 92°W. Under MCI's proposal, these assignments would be incapable of providing full-CONUS services to U.S. consumers, but would instead be limited to a spot beam configuration. MCI's proposal is plainly intended to block the pending ITU applications of Canada and Mexico to modify some of their DBS orbital assignments in order to create at least three additional full-CONUS orbital positions.

MCI states that its ITU modification plan is necessary to meet the "specialized requirements" of the business plans of MCI and The News Corporation Limited and will provide "an economically attractive option for resolving the capacity shortfall anticipated by MCI." MCI letter at 2. MCI seeks to prevent the entry of up to three additional full-CONUS DBS providers into the U.S. market. In resolving the conflict between the ITU modification proposals of MCI, Mexico and Canada, the Commission should reject MCI's proposal as in conflict with the FCC's established public interest objective of increasing the number of DBS service providers capable of providing U.S. consumers full-CONUS DBS services.

D. In Applying its Proposed ECO-Sat Test, the Commission Should Limit its Examination to Barriers to Foreign Trade, Rather Than Ancillary Issues of Regulatory Parity

The Commission states in its NPRM that it intends to utilize its proposed ECO-Sat test to determine whether de jure or de facto barriers to trade exist in foreign countries seeking entry into the U.S. satellite industry. The Commission indicates that by barring entry by foreign satellites, its proposed policy may encourage other countries to open their markets to U.S. investment. In a twist on the Commission's proposal, MCI argues that the Commission should effectively penalize rather than reward countries that fail to maintain burdensome regulatory regimes. Specifically, MCI urges the Commission to consider whether foreign governments issue licenses for satellites without conducting auctions, and enforce public service requirements that are less exhaustive than those in the U.S.[24] Whether or not another nation auctions orbital slots confers no unfair advantage, however, on non-U.S. providers. The possible entry of Canadian operators was well known to MCI and the other bidders at the recent U.S. auction and was undoubtedly a factor in MCI's determination of its winning bid. Accordingly, the Commission should reject WTCI's proposal out of hand as contrary to the Commission's goals of opening foreign markets and increasing competitive opportunities in the U.S.

[24] MCI at 20-21.

IV. NEITHER THE COMMISSION NOR ANY COMMENTER HAS JUSTIFIED THE ABANDONMENT OF THE COMMISSION'S 1993 PROPOSAL TO DEREGULATE RECEIVE-ONLY EARTH STATIONS

In the 1993 NPRM, the Commission tentatively concluded that it would be in the public interest to eliminate most remaining licensing requirements for receive-only earth stations.[25] Numerous parties in this proceeding have expressed support for the Commission's 1993 proposal, observing that no reason exists for the Commission to maintain a licensing scheme for passive reception devices.[26] The Commission would be unable to address spectrum management and competition concerns through receive-only earth station licensing. Spectrum management issues are best resolved in the ITU coordination process, rather than through the licensing of passive reception devices. Nor is it realistic to expect that the Commission could manage competition policy through the licensing of possibly thousands, if not millions of receive dishes. As the Commission itself has acknowledged, licensing receive-only stations "would be burdensome and possibly hinder the rapid introduction of . . . new services."[27] Accordingly, the Commission should adopt the 1993 proposal, which permits Commission examination of policy issues in the event an objection to automatic licensing is lodged.

---

[25] Amendment of § 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, 1723 (1993) ("1993 NPRM").

[26] See Charter at 6; Comments of Transworld Communications at 6; Comments of Keystone Communications Corp. at 5-7; Comments of Comsat Corp. at 39-40; Comments of TMI Communications and Co., L.P. at 19-20.

[27] 1993 NPRM at 1721.

V. THE COMMISSION WAS CORRECT IN TENTATIVELY CONCLUDING THAT IT WOULD BE UNFAIR AND BURDENSOME TO HOLD PENDING APPLICATIONS IN ABEYANCE IN ORDER TO SUBJECT THEM TO AN ECO-SAT EXAMINATION

As a number of parties in this proceeding have noted, it would be unfair and burdensome to apply the rules adopted in this proceeding to applications filed before the release of the NPRM.[28] Substantial delays in processing would result if applicants were required to prepare and file amendments to their applications and the Commission reviewed the proposals under an extensive set of new rules. The severity of the delays would be particularly onerous if the Commission issues a further notice in this proceeding, an approach urged by several commenters.[29]

Processing of pending applications is especially important in light of the tremendous consumer benefits that would be rapidly provided by the proposals currently before the Commission. For example, WTCI has arranged to launch an additional full-CONUS DBS satellite system within a few months, likely in advance of the adoption of rules in this proceeding. Accordingly, the Commission should not hold pending applications in abeyance pending adoption of an ECO-Sat examination.

Two of WTCI's potential competitors argue that applying DISCO II to pending applications would not be unfair because the proposed rules are simply a "formalization" of

---

[28] See Charter at 4-5; Transworld at 4-5; WorldCom at 3-4.

[29] See Charter at 2; WorldCom at 10; see also Comments of National Telecom Satellite Communications, Inc. at 2-3.

existing policy.[30] In fact, the Commission presents its proposed ECO-Sat test as a departure from existing policy. For example, under long-standing policy, U.S. companies are permitted to use non-U.S. satellites to provide U.S. domestic services when domestic capacity is unavailable. The Commission must still determine whether this procompetitive practice, and others like it, will continue under the ECO-Sat regime.

In the interim, the Commission should move forward and process applications filed before the release of the DISCO II NPRM under the Commission's existing rules and policies. Holding these procompetitive proposals in abeyance pending resolution of this rulemaking would deprive consumers of the rapid introduction of important telecommunications services.

VI. CONCLUSION

In proposing to adopt an effective competitive opportunities test, the Commission risks disruption of long-standing procompetitive policies in satellite services. In particular, the Commission should heed the comments of a number of parties in this proceeding that urge the Commission to retain its long-standing policy of permitting the use of foreign satellites in situations of domestic scarcity (as in the case of DBS), without regard to competitive opportunities in the satellite operator's home market. The speculative possibility of opening new markets through the application of

[30] See DIRECTV at 19; MCI at 5. DIRECTV makes this argument while simultaneously warning that it would be a step "backwards" in Commission policy to adopt the proposed ECO-Sat test as it appears in the NPRM. DIRECTV at 8.

an ECO-Sat test cannot outweigh the public interest benefits derived from fulfilling current service needs. The Commission should also refrain from applying its proposed test to the DBS service due to its unique international regulatory status, and because the Commission's stated concerns with respect to competitive distortions due to market foreclosures simply do not apply to a one-way service such as DBS. To the extent that the Commission does adopt its proposed ECO-Sat test for the various satellite services, the Commission should adhere to its tentative conclusion that it would be unfair and burdensome to apply the rules adopted in this proceeding to applications pending at the time of the release of the NPRM.

Respectfully submitted,

WESTERN TELE-COMMUNICATIONS, INC.

By: _____

Richard E. Wiley
John C. Quale
Todd M. Stansbury
Bruce A. Olcott
of
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

Its Attorneys

August 16, 1996