

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

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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 and)	IB Docket No. 96-111
)	
Amendment of Section 25.131 of the Commission's Rules and Regulations to Eliminate the Licensing Requirement for Certain International Receive-Only Earth Stations and)	CC Docket No. 93-23 RM-7931
)	
COMMUNICATIONS SATELLITE CORPORATION)	DOCKET FILE COPY ORIGINAL
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 OF TMI COMMUNICATIONS AND COMPANY,
LIMITED PARTNERSHIP

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REPLY COMMENTS OF TMI COMMUNICATIONS

These reply comments are filed on behalf of TMI Communications and Company, Limited Partnership (TMI), in response to the Commission's Notice of Proposed Rule Making, IB Docket No. 96-111 et al., FCC 96-210, released May 14, 1996 (hereafter DISCO II Notice).

I. The Satellite Services Market Should Be Divided Into Additional Segments, As TMI And Other Parties Suggest. To Increase The ECO-Sat Test's Competitive Benefits

In the DISCO II Notice the Commission proposes to review applications to use a foreign satellite on a service-by-service basis to determine whether the ECO-Sat test is met -- i.e., whether effective competitive opportunities exist for U.S. satellites in foreign markets.¹ Three satellite

¹ See e.g., DISCO II Notice, *supra* at ¶ 18.

service categories are proposed: Mobile Satellite Service (MSS), Fixed Satellite Service (FSS) and Direct-to-Home (DTH) service.² To satisfy the ECO-Sat test, therefore, a party need only demonstrate that the foreign satellite's home market and/or route markets provide effective access for the particular service which it wishes to access, rather than for all satellite services.

TMI supports this approach to market liberalization. As explained in its initial comments, however, a further subdivision of the proposed service categories is necessary to foster greater U.S. access to foreign satellites as well as more effective competitive opportunities for U.S. services abroad. To that end, the MSS should be divided into at least two segments. One segment should include the MSS systems now operated by TMI and the AMSC Subsidiary Corporation (AMSC) which have almost identical North American service footprints and use the same standardized user terminals. These two similar satellites thus should not be grouped together with the global MSS systems now under development which will have global footprints and markets.

Decoupling these two market segments is essential to promote MSS competition in the near term. Otherwise competition in the MSS market in the U.S. may be unnecessarily delayed because a prospective user of the TMI system would face the impossible task of demonstrating that a "critical mass" of countries provide access to U.S. global MSS systems which will not be launched until 1998 or 1999 at earliest. For these and other reasons, TMI has proposed a simplified region-specific ECO-Sat test for the TMI and AMSC satellites: U.S. earth stations should be permitted to communicate with TMI's satellite provided that Canadian earth stations can communicate with AMSC's satellite for like services. Market access for other MSS systems licensed in the U.S. (or Canada) should not be controlling.

The public interest in expanding the FCC's three satellite service categories is echoed by

² Ibid.

several other parties. For example, Teledesic Corporation (Teledesic), which has proposed a global satellite system for interactive broadband services, also urges the Commission to adopt service categories which facilitate a "coherent competitive analysis."³ Teledesic points out that the interactive features of its planned satellites resemble some MSS systems, whereas its broadband capability resembles the FSS. Teledesic states that the MSS/FSS distinction per se consequently is not relevant to the Commission's goal of rationally defining various satellite markets. To ensure that Teledesic's market entry options are not adversely affected by grouping it with non-comparable systems, Teledesic suggests that the Commission recognize a separate service category for International Broadband Satellite Services (IBSS).⁴

The need to tailor more closely the service categories proposed by the ECO-Sat test to current market conditions is also evidenced by the joint comments of Newcomb Communications, Inc. (Newcomb) and Mobile Data Corporation (Mobile Datacom). These parties are concerned that the broad service categories proposed by the DISCO II Notice may frustrate the competitive goals of the ECO-Sat test. In particular, Newcomb and Mobile Datacom oppose lumping MSS packetized data services, such as those used for radio-determination satellite service (RDSS), together with other MSS offerings, such as two-way voice service. In their own words:

"Newcomb and Mobile Datacom fear that a considerable delay in resolving all the related issues and adopting ultimate standards for applying the ECO-Sat test to a very broad based MSS category, particularly issues associated with the critical mass approach, will frustrate the ability of RDSS-type MSS service providers to [satisfy] the ECO-Sat test for their discrete subset of MSS services for which other countries may more readily and quickly grant access to U.S. licensed systems."⁵

³ "Comments of Teledesic Corporation," July 15, 1996, p. 6.

⁴ Id. at p. 7. The IBSS service category proposed by Teledesic would not include TMI or AMSC, because, inter alia, the channels routinely allocated to users are below Teledesic's suggested threshold of 64 Kbps.

⁵ "Joint Comments," dated July 15, 1996, pp. 8-9.

The message of these comments, like that of TMI's submission, is straightforward: Make sure the ECO-Sat test does not forestall the possibility for competitive access to certain MSS offerings -- e.g., regional MSS or RDSS -- pending resolution of the market access issues involved with global MSS. To do so, the FCC should establish different MSS market segments or adopt a simplified ECO-Sat test for the AMSC and TMI systems.⁶

II. Treating The TMI And AMSC Regional MSS Systems As A Distinct Market Category Also Will Advance The Commission's Spectrum Goals

The DISCO II Notice states that application of the ECO-Sat test is only the first step in determining whether U.S. access to a foreign satellite service is in the public interest. Other factors must then be considered including the impact of market entry on "spectrum availability and coordination".⁷ For example, the FCC states that it "propose[s] to consider whether the licensing country of the non-U.S. satellite system will coordinate the spectrum of its system(s) ... in good faith."⁸ And, "where the United States and other administrations are engaged in coordination of spectrum covering the United States, we propose to consider the effect that any authorization of [foreign] service would likely have on spectrum coordination efforts."⁹ These legitimate spectrum concerns also underscore the importance of distinguishing the TMI and AMSC

⁶ The need for the Commission to take into account the different policy and technical issues raised by each satellite service is also highlighted by Loral and Qualcomm. As they state, "FSS, MSS and DTH differ significantly and need to be evaluated on a service-by-service basis." "Comments of L/Q Licensee, Inc. and Loral Space & Communications Ltd." dated July 15, 1996, p. 25. We "are not persuaded that a uniform [ECO-Sat] policy should be applied to all services," particularly when the FCC "has adopted independent licensing policies for these different satellite services." *Ibid.* TMI agrees. Moreover, in the case of MSS, the FCC has adopted an entirely different licensing regime for the AMSC geostationary L-Band system as compared to the non-geostationary global MSS systems using the 1.6/2.4 GHz bands. See the discussion in TMI's initial comments at p. 7, n. 15.

⁷ DISCO II Notice, *supra* at ¶ 48.

⁸ *Id.* at ¶ 49.

⁹ *Ibid.*

systems from global MSS.

First, the L-band (1.5/1.6 GHz) spectrum necessary for the TMI and AMSC systems to provide reasonably equivalent North American service until at least 1998 has already been coordinated.¹⁰ By comparison, no spectrum coordination has been completed for any proposed global MSS system. Thus, if a foreign country's willingness to coordinate spectrum with the U.S. in good faith is an important factor in determining whether that country's satellites can access the U.S. market, this factor plainly distinguishes the TMI space segment from other MSS systems.

Second, the L-band MSS spectrum which is now available for the TMI and AMSC systems has been coordinated for use based on the North America-wide footprints of the two systems. As the FCC recognizes, "the current design of mobile terminals for MSS systems do not permit them to share frequencies in adjacent or similar geographic areas."¹¹ Further, as the two systems are virtually identical in terms of design capacity, similar amounts of spectrum are required for the two systems to realize intended their commercial objectives whether they serve distinct national markets or are allowed to compete in a regional market. Thus, once spectrum is coordinated for the TMI and AMSC satellites, if it is only used in one part of the region, the spectrum cannot be reused in North America. The only consequence of such market area segmentation is to deprive the combined market of the benefits of competition. That is why the U.S.-Canada "open skies" policy recommended by TMI is uniquely applicable to the TMI and AMSC MSS systems and, for these satellites, will stimulate the most efficient North American-wide use of coordinated spectrum.

Consequently, in the context of North American regional MSS systems, we do not

¹⁰ See "FCC Hails Historic Agreement On International Satellite Coordination." FCC Public Notice, Report No. IN 96-16, June 25, 1996.

¹¹ Upper and Lower L-Band Notice of Proposed Rulemaking, FCC 96-259, released June 18, 1995, at ¶ 9.

understand AMSC's contention that the "Commission must maintain a strong policy of denying access to foreign systems, if there is not sufficient spectrum for more than one domestic system."¹² Such an "all-or-nothing" policy does not reflect technical or marketplace realities. As explained above, once L-Band spectrum has been coordinated for use by a given North American regional MSS system, there is no technical reason to restrict its geographical use. Moreover, incremental domestic competition between the TMI and AMSC systems using coordinated spectrum is not only possible but desirable.¹³ The Commission need not chose between spectrum coordination and competition; it can have both. Indeed, competition will bring both consumer choice and efficient spectrum utilization.¹⁴

III. The Public Interest Also Would Be Served By Granting Foreign Space Segment Providers The Right To Seek An FCC Determination On Whether The ECO-Sat Test Is Met For A Proposed U.S. Service

The DISCO II Notice proposes to regulate foreign satellite access to the U.S. market by

¹² "Comments of the AMSC Subsidiary Corporation," dated July 15, 1996, p. 4.

¹³ AMSC's "all-or-nothing" approach is also belied by the Mexico City MOU. The six year stalemate on L-Band spectrum coordination was broken only after the parties moved away from an all-or-nothing, band segmentation plan to a flexible plan under which the parties will meet annually to ascertain current and projected spectrum needs for relevant satellites. As Comsat has noted, this flexible-demand driven approach to spectrum coordination "is consistent with the U.S.'s pro-competition policies." It also is "self balancing and depends upon success in the marketplace," rather than before the FCC. See "Consolidated Opposition of Comsat Corporation to Petition to Deny" re File No. ITC 95-341, dated July 11, 1995, p. 29.

¹⁴ The ability of TMI and AMSC to use coordinated L-Band spectrum to compete in each other's home markets need not prejudice the future coordination of adequate spectrum for either satellite system. Competition *per se* is likely to have a limited impact on the overall size of the regional MSS market. The combined demand for spectrum by TMI and AMSC will be similar whether or not each satellite is limited to its home market. In any event, the FCC need not address these issues here. They will be reviewed again in the next round of multilateral spectrum coordination meetings for L-Band MSS. In addition, the alleged shortage of L-Band spectrum for AMSC and other regional MSS systems, and the appropriate FCC response thereto, is currently before the agency in a separate proceeding. See Upper and Lower L-Band Notice, *supra*.

requiring U.S. earth station operators to obtain prior FCC approval under Title III of the Communications Act. Hence, under the Commission's proposal, earth station operators, rather than foreign space segment providers, would bear the full burden of satisfying the proposed ECO-Sat test. Upon reflection, TMI agrees with the Communication Satellite Corporation (Comsat) and other parties that this burden should be shared.¹⁵ The Commission should state, as a matter of policy, that any foreign space segment provider may seek a declaratory ruling that the public interest would be served by permitting an identified U.S. earth station (or category of earth stations) to access a given foreign space segment.

There is ample precedent for broadening the market access options for foreign satellite services beyond that contemplated in the current rulemaking notice. Most notably, the Commission has previously used declaratory rulings to review the merits of several market access requests by foreign carriers.¹⁶ A similar procedure should be endorsed here so that foreign space segment providers may facilitate access by prospective U.S. customers, and in so doing, demonstrate the competitive opportunities which exist for similar U.S. satellites in their home markets.

IV. The Comments Concur That The Licensing Of Receive-Only Mobile Earth Station Terminals (ROMETs) Would Be Contrary To The Public Interest And Unlawful

To implement the new ECO-Sat policy, the DISCO II Notice proposes that certain receive-

¹⁵ See "Comments of Comsat Corporation," dated July 15, 1996, pp. 33-35. See also "Comments of Keystone Communications Corporation," dated July 15, 1996, pp. 2-3.

¹⁶ See e.g., Sprint Corporation, FCC 95-448, released January 11, 1996. [Declaratory ruling regarding proposed 10% equity investment in Sprint by France Telecom and Deutsche Telekom.]; MCI/BT, 9 FCC Rcd 3960 (1994). [Declaratory ruling regarding BT's proposed 20% equity investment in MCI.]; Brightstar Communications Ltd., 72 P&F Radio Reg. 2d 114 (1993). [Declaratory ruling on authority of U.K. company to hold Title III license for providing international television service via Intelsat as a non-common carrier.]; Reuters Information Services, 4 FCC Rcd 5922 (1989); [Declaratory ruling on FCC statutory authority to license Intelsat transmit/receive earth station to private carrier owned by U.K. company.]

only earth stations as well as all transmit-receive stations be licensed to communicate with a foreign satellite.¹⁷ The Commission contends that licensing of the receive-only terminals is necessary to protect the agency's competition policies (i.e., the proposed ECO-Sat standard) and for spectrum management.

TMI has previously shown that neither of these reasons is valid for MSS. By definition, ROMETs are passive devices; their presence (or absence) in a market can not by virtue of their design generate or in any way affect the interference for any radio service.¹⁸ Neither do such passive stations affect the international coordination of spectrum. Similarly, licensing ROMETs is unnecessary to protect the agency's competition policies because any one-way service provided by a foreign satellite would have a *de minimus* impact on the core two-way voice business of any U.S. MSS operator. TMI has shown that licensing ROMETs would: (a) unlawfully discriminate against satellite paging services because terminals used to access terrestrial nation-wide paging services have been deregulated; and (b) violate Section 401 of the Telecommunications Act of 1996 which mandates regulatory forbearance for such competitive one-way messaging services.

The public interest arguments for deregulating common carrier receive-only terminals are supported by several other parties. As Comsat states, contrary to the FCC's suggestion, "licensing r/o [receive/only] earth stations [would] *impede* competition by creating a regulatory hurdle for the introduction of new and competitive services and by giving incumbent firms an

¹⁷ See DISCO II Notice, *supra* at ¶s 19-20 and 75.

¹⁸ For this reason, the licensing ROMETs is also inconsistent with the agency's recent streamlining proposal for satellite and earth station facilities. See Notice of Proposed Rulemaking, FCC 95-285, IB Docket No. 95-117, released August 11, 1995. There the agency proposes that transmit-receive earth station licensees be permitted to make minor modification to their facilities -- i.e., changes which do not have the potential to increase interference to adjacent satellites -- without prior FCC authorization. If a post hoc notification process is adequate to satisfy the FCC's spectrum concerns in these cases, it is hard to discern the technical rationale for prior FCC licensing of passive receive-only stations.

opportunity to block new entrants.”¹⁹ In addition, Comsat notes, the economic and technical position of receive-only earth station operators gives them even less ability than transmit earth station operators to affect foreign market access decisions by influencing non-U.S. systems or the foreign nations that license them.

Charter Communications International, Inc., a relatively new carrier, also questions the rationale for regulating receive-only earth stations. In addition, like TMI, Charter challenges the legality of the agency’s proposal in view of recent amendments to the Communications Act: “Given the deregulation of all domestic receive-only stations [t]he Commission should not ... retrogress to a more intrusive,” regime internationally, “particularly in light of the deregulatory tenets of the Telecommunications Act of 1996.”²⁰

The only significant support for the FCC’s proposal to regulate receive-only earth stations comes from the U.S. DTH satellite industry.²¹ This is understandable because delivery of signals to receive-only earth stations is typically the only business of a DTH service provider. TMI’s proposal to deregulate receive-only earth stations is limited to MSS receive only terminals because, unlike DTH, two-way services are the essence of MSS.

V. Conclusion

The proposed ECO-Sat test should be modified so that the existing North American MSS systems are treated as a distinct regional market segment. Decoupling regional and global MSS

¹⁹ “Comments” of Comsat Corporation, *supra*, p. 40.

²⁰ “Comments” of Charter, dated July 12, 1996, p. 6. Deregulation of common carrier receive-only terminals is also supported by the “Comments of Keystone Communications Corporation,” dated July 15, 1996, pp. 4-7; and the “Comments of Transworld Communications (U.S.A.), Inc.” dated July 12, 1996, pp. 5-6.

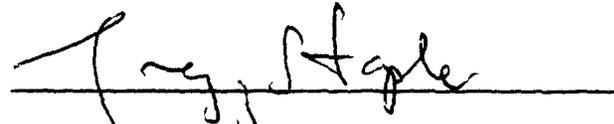
²¹ See e.g., “Consolidated Comments of DIRECTV, Inc., DIRECTV International, Inc. and Hughes Communications Galaxy, Inc.,” dated July 15, 1995, pp. 22-24; “MCI Comments,” dated July 15, 1996, p. 26.

for market access purposes will facilitate the adoption of a U.S.-Canada "open skies" policy without compromising U.S. trade or spectrum concerns regarding global MSS. A regional MSS ECO-Sat policy will bring about the benefits of competition sooner and will also foster the most efficient use of L-band spectrum.

Respectfully submitted,

TMI COMMUNICATIONS AND COMPANY,
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By:

A handwritten signature in black ink, appearing to read "Gregory C. Staple", is written over a solid horizontal line.

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I, Leola Johns, a secretary in the law firm of Koteen & Naftalin, L.L.P., do hereby certify that copies of the foregoing "REPLY COMMENTS OF TMI COMMUNICATIONS" were served by First Class United States mail, postage prepaid, on this 16th day of August, 1996 to the following:

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