ORIGINAL

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 Services 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

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To: The Commission

REPLY COMMENTS OF TRW INC.

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To: The Commission

REPLY COMMENTS OF TRW INC.

TRW Inc. ("TRW"),[1/] by its attorneys and pursuant to Sections 1.415 and 1.419 of the Commission's rules, hereby responds to the comments filed by various parties regarding the

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1/ TRW has been authorized to construct, launch and operate a satellite system in the Mobile Satellite Service Above 1 GHz (the "MSS Above 1 GHz"). See TRW Inc., 10 FCC Rcd 2263 (Int'l Bur. 1995); Erratum, 10 FCC Rcd 3924 (Int'l Bur. 1995); recon. denied sub nom. Constellation Communications, Inc. et al., FCC 96-279 (released June 27, 1996).

Commission's Notice of Proposed Rule Making in the above-captioned proceeding.[2/]

INTRODUCTION AND SUMMARY

TRW urges the Commission to press on with the task of designing a framework for the regulation of entry by non-U.S.-licensed satellite systems[3/] into the U.S. market. While the Commission may wish to postpone final resolution of this proceeding pending the conclusion of the February 1997 round of talks among the member nations of the Group on Basic Telecommunications ("GBT") within the World Trade Organization ("WTO"), and to solicit further comment (if appropriate) at that time, there is no question that it will be necessary to adopt a regulatory framework of the kind described in the NPRM. Indeed, the framework that the Commission outlined in the NPRM has now garnered broad support.

Should the WTO/GBT talks not result in significant new market access for U.S. satellite systems abroad — a distinct possibility, given the outcome of the April 1996 round — the Commission must have a regulatory system to put into place as U.S.-licensed MSS systems such as that of TRW move rapidly towards their target launch dates. Even if the talks prove successful, it will still be necessary to have a scheme in place to cover those countries with satellite capabilities (e.g., Russia and China) that do not belong to the WTO. It is also essential that the Commission reach a determination as soon as possible on the appropriate means of regulating U.S. market entry by subsidiaries, affiliates or successors (together,

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2/ FCC 96-210 (released May 14, 1996) ("NPRM").

3/ The use of the term "satellite systems" herein refers to constellations of satellites that collectively provide a service or set of services, and not to the Earth stations with which such satellite constellations operate.

"Spin-Offs") of intergovernmental organizations ("IGOs") — entities that, until they are determined to be truly and fully private, do not fall within the parameters of the WTO/GBT negotiations.

Therefore, at a minimum, the Commission should: (1) affirm its commitment to the principles underlying its proposed effective competitive opportunities test for satellites (the "ECO-Sat test"); and (2) reiterate its intention to apply regulations embodying those principles to IGO Spin-Offs in a manner that takes into account any advantages that those entities may enjoy as a result of ongoing or prior ties to the IGOs that created them.

As TRW explains below, and contrary to the views of certain commenters, the Commission possesses the authority to establish and enforce its proposed ECO-Sat test in consultation with the Executive Branch. The ECO-Sat test is chiefly a formalization of existing policy; it is in no way retaliatory, and is entirely consistent with the position that the United States has taken within the GBT and with applicable international trade principles.

The Commission need not fear that the test will provoke the establishment of barriers to foreign market entry by U.S. satellite systems, as those barriers are already widespread. Indeed, absent ongoing pressure from the United States and other countries that favor international competition, there will be no trend towards the opening of foreign markets to U.S. satellite systems at all. Application of the ECO-Sat test to requests for authority to communicate with non-U.S.-licensed MSS systems would not discriminate unfairly between such systems and U.S.-licensed MSS systems — contrary to the claims of ICO Global Communications ("ICO"). As non-U.S.-licensed MSS systems are not subject to the Commission's regulatory oversight, the Commission must examine the effect of their entry

into the U.S. market with care in order to protect the public interest in a competitive MSS.

The Commission should regulate the entry of global, non-U.S.-licensed MSS systems into the U.S. market by means of the "home markets"/"critical mass" ECO-Sat test proposed by TRW, so as to ensure that such systems and U.S.-licensed MSS systems have comparable access to foreign markets. ICO's inconsistent and misleading arguments to the contrary represent a desperate attempt to prevent, at all costs, the establishment of a policy that will force ICO to compete fairly with U.S.-licensed MSS systems around the world. In this regard, the Commission should pay special heed to the Executive Branch's recommendation that any application to provide ICO services in the United States be held in abeyance until such time as it can be determined whether other global handheld telecommunications providers have nondiscriminatory access to other national markets.[4/]

The Commission should also adopt TRW's proposal that applications to communicate with the MSS systems of IGO Spin-Offs be subject to a more stringent "home markets"/"critical mass" test than applications to communicate with historically private, non-U.S.-licensed MSS systems. In addition, the Commission should apply an enhanced public

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4/ Letter from Ambassador Vonya B. McCann, United States Coordinator for International Communications and Information Policy, U.S. Department of State, and Larry Irving, Assistant Secretary for Communications and Information, U.S. Department of Commerce, to Reed Hundt (Sept. 29, 1995) at 4 ("Executive Branch Letter"). Government concerns persist about the nexus between Inmarsat and ICO, and the impact of ICO on the ability of U.S. systems to gain access to foreign markets. See "Competitive Impact of Restructuring the International Satellite Organizations," Report of U.S. General Accounting Office to Chairman, House Committee on Commerce, at 10-14 (July 8, 1996) ("GAO Report") (concluding that Inmarsat's owners may have incentives to aid ICO, that ICO's owners control essential access to markets, and that ICO may enjoy special privileges due to its shared ownership with Inmarsat).

interest test to applications seeking access to the systems of IGO Spin-Offs, focusing in particular on any ties between IGO Spin-Offs and the IGOs that created them. Both tests are necessary in order to take full acount of any and all privileges, immunities and other advantages that IGO Spin-Offs enjoy as a result of current or prior ties to IGOs. The Commission should disregard ICO's inaccurate and inappropriate characterization of itself as a fully private entity with no such advantages.

TRW continues to support the application of the expanded "no special concessions" policy proposed in the NPRM to U.S. space station licensees, provided that it is also applied to the operators of non-U.S.-licensed satellite systems through the U.S. Earth stations with which their systems communicate. TRW urges the Commission to recognize, however, that this policy will not, by itself, ensure effective competitive opportunities for U.S. satellite systems abroad.

Finally, the "effect on competition" test supported by Comsat Corporation ("Comsat") as an alternative to the ECO-Sat test for global MSS systems is hopelessly vague, and would do nothing whatsoever to ensure that U.S. MSS systems ever obtain market access abroad. Comsat's proposal that the Commission not license mobile Earth stations at all should be dismissed out of hand; such regulation is by no means "impractical," as Comsat claims, and is essential if the Commission is to have effective control over the entry of non-U.S.-licensed MSS systems into the U.S. market.

DISCUSSION

I. The Commission Should Continue Its Work In Designing A Regulatory Framework For U.S. Market Entry Of Non-U.S.-Licensed Satellite Systems.

TRW urges the Commission to move ahead in its design of a regulatory framework for the review of U.S. Earth station applications seeking authority to communicate with non-U.S.-licensed satellite systems. There is broad support among the commenters in this proceeding for the Commission's basic ECO-Sat test,[5] as well as for its tentative determination to regulate U.S. market entry by non-U.S.-licensed systems through the licensing of U.S. Earth stations rather than of non-U.S.-licensed space stations.[6] It is vital both to U.S. consumers and to the future of U.S.-licensed MSS systems such as TRW's Odyssey™ system[7] that the Commission take action to speed the opening of foreign markets to U.S.-licensed satellite systems at the earliest possible time.

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[5] See, e.g., Comments of AT&T Corp. ("AT&T") at 4-5; Comments of Columbia Communications Corporation ("Columbia") at 6-7; Consolidated Comments of DIRECTV, Inc., DIRECTV International, Inc., and Hughes Communications Galaxy, Inc. (together, "DIRECTV") at 10-15; Comments of the International Telecommunications Satellite Organization ("Intelsat") at 5; Comments of Lockheed Martin Corporation ("Lockheed") at 3-4; Comments of MCI Telecommunications Corporation ("MCI") at 3-4; Comments of Motorola Satellite Communications, Inc. and Iridium, Inc. (together, "Motorola") at 15, 28-30 ; Comments of Teledesic Corporation ("Teledesic") at 1-3; Comments of TRW Inc. at 6-7.

[6] See, e.g., Columbia Comments at 7; ICO Comments at 8-9; Intelsat Comments at 6-7; Lockheed Comments at 4-5; Comments of L/Q Licensee, Inc. and Loral Space & Communications Ltd. ("Loral") at 15; MCI Comments at 4-5; Comments of TMI Communications and Company, Limited Partnership ("TMI") at 17; TRW Comments at 7-8.

[7] Odyssey is a trademark of TRW Inc. Odyssey is a satellite telecommunications system which is to be comprised of a constellation of 12 satellites in medium Earth orbit.

As several commenters suggest, the Commission may wish to postpone final resolution of this proceeding pending the conclusion of the February 1997 WTO/GBT round of negotiations and to solicit further input at that time.[8] TRW urges the Commission to recognize, however, that a framework of the kind described in the NPRM for the regulation of U.S. market entry by non-U.S.-licensed satellite systems will be required in any event.[9] As operators of U.S.-licensed non-geostationary MSS systems such as Odyssey™ cannot plan their system operations without knowing to which countries their systems will have access — and as the target launch dates for those systems are rapidly approaching — it is critical that the Commission have a regulatory framework in place in the event that the WTO/GBT talks do not result in the opening of a sufficient number of foreign markets to U.S.-licensed MSS systems to enable those systems to compete effectively with foreign-licensed MSS systems. Such a framework will be required in any case to address market entry issues for countries that

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[8] See, e.g., Comments of Airtouch Communications ("Airtouch") at 8-10; Comments of Charter Communications International, Inc. at 2-4; Comments of GE American Communications, Inc. at 5-8; Loral Comments at 10-11; Motorola Comments at 13-14; Comments of Transworld Communications (U.S.A.) Inc. at 2-4.

[9] It is by no means guaranteed that the WTO/GBT negotiations will conclude successfully; although the procedures in the GBT permit any member of the WTO to make a market opening offer containing specific market opening commitments for each telecommunications sector, only 10 countries made offers in the April 1996 round of WTO/GBT talks that the United States Trade Representative considered equivalent to the offer of the United States. See Statement of Ambassador Charlene Barshefsky, Office of the United States Trade Representative, Basic Telecom Negotiations, April 30, 1996, at 1. These offers were made by Austria, Denmark, Finland, Germany, Luxembourg, the Netherlands, New Zealand, Norway, Sweden, and the United Kingdom. Id. at Annex, Status of WTO Telecom Offers.

are not part of the WTO.[10]

The Commission must also not allow the inevitable requests of various commenters for special treatment to deter it from proceeding with the design of its ECO-Sat test. Rather, it should acknowledge the support for that test voiced by the vast majority of commenters by adhering to the outlines of the test as set forth in the NPRM, and carve out any necessary exceptions for entities that legitimately do not fit within the test's structure.[11]

II. The Commission Possesses The Requisite Authority To Establish And Enforce The ECO-Sat Test.

A. Section 308(c) Of The Communications Act Of 1934 Grants The Commission Authority To Employ The ECO-Sat Test.

The Commission correctly observes that it is authorized by Section 308(c) of the Communications Act of 1934, as amended (the "Act"), to impose on any license that it grants for international radio communications:

> 'any terms, conditions or restrictions' that, among other things, would 'assure just and reasonable rates and service' or 'assist . . . in maintaining the rights or interests of the

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10/ In this last regard, Russian and China are implicated. Until IGO Spin-Offs are determined to be truly and fully private and independent of the IGOs that created them, they, too, do not fall within the parameters of the WTO/GBT talks. Rather, they can only be considered extensions of their IGOs and subject to the international agreements under which the IGOs operate.

11/ For example, should the Commission find any merit in the request of TMI to be treated, along with AMSC Subsidiary Corporation, as a market segment separate from the rest of the MSS, it should grant that request. See TMI Comments at 7 et seq. The particular concerns of TMI in no way cast doubt on the Commission's proposed application of its ECO-Sat policy to other non-U.S.-licensed MSS systems.

United States or its citizens in foreign countries.'[12]

TRW fully supports Motorola's detailed explanation of the Commission's well-established authority under Section 308(c) to regulate U.S. market entry by non-U.S.-licensed satellite systems.[13]

B. The ECO-Sat Test Is Not A Reciprocity Standard, And Does Not Usurp Executive Branch Authority Over International Trade Matters.

There is no merit to the claims of ICO and Comsat that the proposed ECO-Sat test constitutes an ultra vires "trade reciprocity standard."[14] Rather, as the Commission made clear in the NPRM, the ECO-Sat test is only a portion of a public interest analysis to be undertaken when a non-U.S.-licensed satellite system seeks access to the U.S. market. The Commission also incorporates and defers to the views of the Executive Branch on international trade and other matters, and consequently does not place itself in a position to take any action that conflicts with Executive Branch authority on those matters.

The genesis of the ECO-Sat test lies in the effective competitive opportunities ("ECO") standard adopted by the Commission late last year as a means of regulating U.S. market entry by foreign carriers.[15] In the Foreign Carrier Entry Order, the Commission dismissed the

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12/ NPRM, FCC 96-210, slip op. at 6 (¶ 7) (quoting An Act Relating to the Landing and Operation of Submarine Cables in the United States, Pub. L. No. 67-8, 42 Stat. 8 (1921) (incorporated by reference into Section 308(c)).

13/ See Motorola Comments at 16-19. See also MCI Comments at 6 n.6.

14/ See ICO Comments at 10-21; Comsat Comments at 12 n.13.

15/ See NPRM, 96-210, slip op. at 3-4 (¶¶ 2-3); Market Entry and Regulation of Foreign-affiliated Entities, 11 FCC Rcd 3873, 3881 et seq. (1995) ("Foreign Carrier Entry

arguments of those commenters that claimed the Commission lacked authority under Section 214 of the Act to apply a "reciprocity" test to applications seeking to enable foreign carriers to enter the U.S. market. As the Commission painstakingly explained:

> [W]e are not adopting a reciprocity requirement. [Rather], we are adopting a public interest analysis that is comprised, in part, by an effective competitive opportunities analysis for those Section 214 applications filed by U.S. carriers affiliated with foreign carriers that have the ability and incentive to discriminate against unaffiliated U.S. carriers, thereby harming U.S. consumers and businesses. We apply this standard not to secure open markets as an end in itself, but rather to ensure that U.S. consumers and businesses realize the benefits of effective competition in the provision of their international telecommunications services. We find that effective competitive opportunities on the foreign end of U.S international routes are necessary to limit the potential for anticompetitive conduct by foreign carriers and to ensure that their entry promotes rather than hinders competition in the U.S. international services market.[16]

The Commission observed that it has "ample authority under Section 214 to prescribe the conditions necessary to protect the public interest, convenience and necessity from anticompetitive conduct."[17] In addition, the Commission noted that the U.S. Department of Justice ("Justice") and the National Telecommunications Information Administration ("NTIA") were in full agreement that the Commission's jurisdiction to protect competition through the ECO test did not infringe upon the Executive Branch's ultimate responsibility for trade matters.[18]

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[15](...continued)
Order").

[16] Foreign Carrier Entry Order, 11 FCC Rcd at 3959 (¶227) (emphasis added).

[17] Id. at 3958 (¶ 225).

[18] Id. at 3963 (¶ 235). As the Commission specifically noted:

> Justice states that our policy is especially warranted 'in light of the substantial
(continued...)

Like the ECO test, the ECO-Sat test proposed by the Commission in the NPRM is designed to enhance competition in the United States in telecommunications services. To this end, the Commission seeks to "facilitate much greater access to non-U.S. satellites, thus benefitting users within the United States."[19] In order to ensure that U.S. market entry by non-U.S.-licensed satellite systems enhances rather than diminishes competition in that market, the Commission also seeks, through the ECO-Sat test, to "encourage foreign governments to open their satellite communications markets, thereby enhancing competition in the global market for satellite services."[20] Thus, as in the case of the ECO test, the Commission's effort to encourage open market access for satellite services abroad is not an end in itself, but an attempt to promote the public interest in vigorous competition in the U.S. market for those services.[21]

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[18](...continued)

> harms that foreign carriers with monopoly rights or market power can cause to U.S. consumers of international telecommunications services and the potential for full facilities-based competition in foreign countries to redress these harms . . . .' NTIA observes that the effective market access test simply refines our established precedent of considering the character of foreign markets as part of our public interest analysis for Section 214 applications. NTIA further observes that we have concurrent authority with the Executive Branch to protect competition involving telecommunications carriers by enforcing antitrust laws such as the Clayton Act.

Id. at 3956 (¶ 221).

[19] NPRM, FCC 96-210, slip op. at 2-3 (¶ 1).

[20] Id.

[21] In this respect, a policy that ICO incorrectly labels as a "reciprocal test" — the Commission's equivalent resale opportunities policy — has been proven successful. The (continued...)

Also like the ECO test, the ECO-Sat test would only be one component of the Commission's analysis of applications seeking authority for U.S. market entry by non-U.S.-licensed telecommunications entities.[22] Applicants would have an opportunity under the Commission's proposed regulatory framework to obtain licenses to communicate with non-U.S-licensed satellite systems even if those systems flunk the ECO-Sat test, should additional public interest factors so warrant.

Given the clarity with which the Commission has explained its authority to employ

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[21](...continued)

Commission found in 1992 that equivalent resale opportunities had been made available to U.S. carriers in Canada; in 1994, in the United Kingdom; and just this year, in Sweden. Numerous petitions are currently pending before the Commission for similar findings with respect to other countries. In its Foreign Carrier Entry Order, the Commission conformed the equivalent resale opportunities policy to its new ECO test so as to clarify the close relationship between the two regulatory mechanisms. See Foreign Carrier Entry Order, 11 FCC Rcd 3923-26 (¶¶ 132-138). Thus, contrary to ICO's assertions (see ICO Comments at 35-36), the history of the equivalent resale opportunities policy supports, rather than counsels against, the establishment of the ECO-Sat test for MSS.

[22] The Commission emphasized this regulatory symmetry in the NPRM:

> Once an Earth station user submits an application to operate with a non-U.S. satellite system, we would conduct our broad public interest analysis by first applying our ECO-Sat test to determine whether the proposed service falls within the scope of effective competitive opportunities for U.S. satellite operators abroad. In addition, as in our Foreign Carrier Entry Order, we would also consider whether any additional countervailing public interest factors weigh in favor of a result different from the one we would reach under the ECO-Sat analysis alone. These factors would include spectrum availability and our spectrum management needs, as well as Executive Branch concerns regarding national security, law enforcement, foreign policy, and trade.

NPRM, FCC 96-210, slip op. at 8 (¶ 12). The Commission stated in the NPRM that it will defer to the Executive Branch's views on those matters. Id. at 18 (¶ 48).

effective competitive opportunities tests in both the Foreign Carrier Entry Order and the NPRM, the attempts by ICO and Comsat to resuscitate the notion that such regulation constitutes a "reciprocity standard" fall flat. Like the ECO test, the ECO-Sat test is not an attempt to regulate international trade at all, but an effort to promote the consumer benefits of effective competition in the U.S. satellite services market and to protect U.S. businesses, consumers and carriers from foreign satellite system operators that have both the ability and the incentive to act anticompetitively.[23/]

23/ See Foreign Carrier Entry Order, 11 FCC Rcd at 3963 (¶ 235). As the ECO-Sat test is not a "reciprocity standard," ICO's claim that the Commission has no authority to employ such standards under its own precedent is irrelevant. For the record, however, TRW notes that the decisions cited by ICO do not support its argument. In Regulatory Policies and International Telecommunications, 4 FCC Rcd 7387 (1988) ("Regulatory Policies") — contrary to ICO's assertion — the Commission did not decline to adopt a "reciprocity proposal" in response to protests from NTIA that it lacked authority to do so. ICO Comments at 12-14. Rather, the Commission merely held that it would be premature to consider the telecommunications policies of foreign governments in formulating U.S. regulatory policies without more information. Regulatory Policies, 4 FCC Rcd at 7396 (¶¶ 12, 13). The Commission explicitly noted NTIA's recommendation that "we establish procedures that deal with trade issues as they arise, provided that we routinely consult with the executive branch with respect to trade policy . . . ." Id. at 7392-93 (¶ 7). That is precisely what the Commission is proposing to do in the instant proceeding. In Amendment of Parts 76 and 78 of the Commission's Rules to Adopt General Citizenship Requirements for Operation of Cable Television Systems and for Grant of Station Licensees in the Cable Television Relay Service, 77 F.C.C.2d 73 (1980), the Commission declined to adopt a reciprocal requirement restricting foreign investment in U.S. cable television systems not because it found it lacked all authority to take foreign trade practices into account under any circumstances, but because, inter alia, it found that such investment was unlikely to have an anticompetitive effect within the United States. See id. at 79-80 (¶¶ 15-18).

C. The ECO-Sat Test Is Fully Consistent With The U.S. Position In The WTO/GBT Negotiations, And With International Trade Principles.

ICO is also incorrect in claiming that the ECO-Sat test is inconsistent with the United States' call for open market access at the WTO/GBT talks,[24] and with the "standstill" provision adopted by the WTO/GBT parties.[25] Moreover, the Most Favored Nation ("MFN") and National Treatment principles present no bar to establishment of the ECO-Sat test.[26]

Although the Commission's focus in this proceeding is on enhancing competition in the U.S. market for satellite services, as discussed above, both the Commission and the U.S. negotiators at the WTO/GBT talks understand the related necessity of fostering competition among telecommunications service providers at home and abroad. Both the Commission, in the NPRM, and the U.S. negotiators, by their actions, have also demonstrated a healthy skepticism as to whether the United States can achieve open market access for such services abroad simply by "leading by example," as ICO would have it do.[27] Instead, they have recognized that U.S. interests would be better served by opening the U.S. market to non-U.S.-licensed telecommunications service providers only once a significant level of foreign market access is available to U.S. licensees. The Commission's ECO-Sat test embodies this principle, offering access to the U.S. market to any non-U.S.-licensed satellite system with which U.S.-licensed satellite systems can fairly compete in foreign markets.

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[24] ICO Comments at 19.

[25] Id. at 16-18.

[26] Contra, id. at 20-21.

[27] Id. at 19.

There is no truth to ICO's assertion that the ECO-Sat test proposed in the NPRM would violate the "standstill" provision barring any participant in the WTO/GBT talks from applying any measure that would improve its negotiating position and leverage.[28] Even if the Commission were to establish the ECO-Sat test before the talks end — and it may choose not to do so — the Commission previously held that its establishment of the ECO test for foreign carrier entry into the United States would not improve the negotiating position or leverage of the United States within the GBT because it would not deny U.S. market access to such carriers.[29] Rather, the Commission concluded, the test would merely enhance a public interest factor that had previously been employed to examine applications seeking authority for such entry.[30] The same is true of the ECO-Sat test, which is a formalization of extant Commission policy. As U.S. market entry by non-U.S.-licensed satellite systems is already subject to a public interest analysis, the establishment of the ECO-Sat test as part of that analysis also would not improve the U.S. negotiating position and leverage within the GBT.

Finally, as ICO readily concedes, the United States is not obligated to "avoid violating the spirit of MFN and National Treatment" pending final agreement among the GBT parties.[31] These international trade principles have no penumbral effect that would bar the establishment of the ECO-Sat test.

28/ Id. at 16-18.

29/ Foreign Carrier Entry Order, 11 FCC Rcd at 3965 (¶ 243).

30/ Id.

31/ ICO Comments at 20.

III. Establishment Of An ECO-Sat Test For Regulating U.S. Market Entry By Non-U.S.-Licensed MSS Systems Will Promote, Not Restrict, International Competition.

A. Few Foreign Markets Will Open To U.S.-Licensed MSS Systems Without Continuing Pressure From The United States And Other Countries Favoring Competition In The MSS.

ICO would have the Commission believe that "the trend in most foreign countries already is toward open access" for all MSS systems.[32] Contrary to ICO's claims, however, there is no such trend, and there will continue to be none absent ongoing pressure from the United States and other nations that favor international competition in the MSS.[33]

ICO's own comments reveal the emptiness of its assertions. Observing that certain foreign countries have developed regulations to govern mobile services, ICO leaps to the conclusion that "the countries of the world . . . already have an established framework that can be used to open MSS markets."[34] Elsewhere, however — attempting to illustrate how difficult it would be for ICO to prove the absence of legal barriers to entry by U.S. MSS systems into foreign markets — ICO complains that many countries "have no regulatory scheme for MSS yet in place,"[35] and later openly concedes that foreign administrations "may lag" in putting in place regulatory mechanisms to ensure that U.S.-licensed MSS systems are not subject to

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[32] Id. at 33-34.

[33] See id.

[34] Id. at 34. See also Comsat Comments at 28 (asserting that "the evidence to date suggests that few of the major foreign markets are in fact closed to U.S.-licensed MSS providers.")

[35] ICO Comments at 23.

unfair discrimination as they attempt to gain access to foreign markets.[36]

The table that ICO attaches to its Comments in an effort to compare what it terms the "spheres of influence" of U.S.-licensed MSS system operators with its own extensive ties to foreign governments greatly distorts the current difficulties faced by U.S. MSS licensees in obtaining foreign market access.[37] It is therefore not surprising that ICO states that it cannot guarantee the accuracy or completeness of the information in those tables.[38] As TRW discusses further below,[39] the fact remains that ICO's relationship with foreign governments gives it far greater access to those governments' national markets than U.S. MSS licensees can hope to obtain under current conditions. Indeed, of the 45 entities holding direct ownership interests in ICO (excluding Inmarsat and the two U.S. investors), only three are from nations that made market opening commitments that were deemed satisfactory by the United States at the April 1996 WTO/GBT negotiations.[40] Of the 78 Signatories of Inmarsat — which continues to exercise control over ICO, as TRW also discusses further herein — only eight made market opening commitments equivalent to that of the United States. As to ICO's tables purporting to describe competitive conditions in wireless communications abroad, TRW notes that those tables indicate nothing about the openness of the identified markets to U.S.

36/ Id. at 41.

37/ Id. at Exhibit A.

38/ Id.

39/ See infra Section V.B.

40/ These three entities (which represent Finland, Germany and the Netherlands) own approximately 10 percent of ICO.

companies.[41] Furthermore, ICO states that the information in those tables refers "to the legal possibility of competition[,] not necessarily the status of the market."[42]

If there truly were already a significant trend towards open market access for MSS systems throughout the world, TRW submits that ICO would have no fear of the ECO-Sat test for non-U.S.-licensed MSS systems — whether that test ultimately consists of a "critical mass" test or takes some other form. Instead, it would be confident of passing the test. The fact that ICO opposes the ECO-Sat MSS test with such vehemence is a warning that true open market access for U.S.-licensed MSS systems abroad is not yet imminent, and is unlikely to develop of its own accord.

B. The Commission Need Not Fear That The ECO-Sat Test Will Provoke The Establishment Of Barriers To Foreign Market Entry By U.S.-Licensed MSS Systems.

There is little reason for the Commission to worry that its proposed ECO-Sat test for non-U.S.-licensed MSS systems will provoke foreign administrations to establish retaliatory barriers to market entry by U.S.-licensed MSS systems. In spite of ICO's grave pronouncements to this effect,[43] the fact remains that most of the world's nations have yet to show a willingness to grant market entry to U.S.-licensed MSS systems. Thus, the Commission's primary concern in this proceeding with regard to nongeostationary MSS systems should not be to assuage the few foreign administrations that are already willing to

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41/ See ICO Comments at Exhibit B.

42/ Id.

43/ See id. at 17.

grant access to U.S.-licensed MSS systems, but to establish policies that will encourage the vast majority of nations that are not yet prepared to grant those systems such market access to do so. Those nations that have moved to open their markets to U.S.-licensed MSS systems are likely to support the United States in this endeavor.

TRW would welcome, however, the establishment by foreign administrations of ECO-Sat tests for MSS comparable to the one it proposes in its Comments. Although ICO sees the use of ECO-Sat tests by foreign administrations as having "chilling effects" on the MSS industry,[44] TRW views its ECO-Sat test for MSS as a pro-competitive regulatory mechanism, not a trade barrier. The only "chilling effect" such an ECO-Sat test is likely to have is on anticompetitive behavior.[45]

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[44] Id. at 36.

[45] TRW agrees with ICO that the Commission should not re-license non-U.S.-licensed satellite systems seeking to enter the U.S. market. ICO Comments at 9. Any such requirement may well cause foreign administrations to retaliate by imposing the same expensive and redundant requirements on U.S.-licensed satellite systems. For the same reasons, the Commission should disregard ICO's call for participation by non-U.S.-licensed satellite systems in U.S. processing rounds, unless the operators of such systems specifically seek a U.S. license. ICO Comments at 9-10. Access to and use of frequencies by non-U.S.-licensed satellite systems is a matter for resolution in the international coordination process, not in the Commission's licensing proceedings. TRW also wishes to reiterate, however, that the Commission should consider the need for a separate evaluation of the terms on which equitable access will be provided for future MSS systems within the United States (e.g., those that would operate in the 2 GHz bands) and the specific conditions that may be imposed on Earth station licensees for the provision of particular services. See TRW Comments at 10 n.20. It is essential that the Commission treat U.S.- and non-U.S.-licensed satellite systems equally in matters of spectrum access, and require all spectrum users to share any obligations related to the relocation of existing services.

C. Application Of The ECO-Sat Test To Non-U.S.-Licensed MSS Systems Would Not Be Discriminatory, Arbitrary Or Capricious.

Should U.S. Earth station applicants seeking authority to communicate with ICO's MSS system fail to pass the ECO-Sat test — as ICO itself predicts they will[46] — it will not be because the ECO-Sat test is unfairly discriminatory, arbitrary or capricious. Rather, it will be because U.S. market entry by ICO would have an anti-competitive impact that would harm U.S. consumers and the U.S. economy.[47]

In tacit recognition of this situation, ICO endeavors to portray itself as just another MSS Above 1 GHz system.[48] Although its attempt must fail for myriad reasons,[49] ICO's effort to trivialize the distinction between the United States (the licensing administration for TRW's Odyssey™ system and the other MSS Above 1 GHz systems) and the United Kingdom (ICO's licensing administration) is particularly misleading.[50] As a U.K. licensee, ICO will not be subject to the Commission's direct regulatory oversight, and the Commission will thus

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46/ ICO Comments at 33.

47/ ICO errs in its claim that denial of U.S. market entry to its MSS system will itself result in harm to the U.S. economy by causing financial harm to Hughes and Comsat. See id. These entities, neither of which comes to the table in this context with clean hands, are fully capable of assessing the regulatory and financial risks of their involvement with ICO, and must be deemed to have assumed those risks willingly.

48/ See id. at 28-32. See also Comsat Comments at 28-29.

49/ See infra at Section V.B. (discussing, inter alia, ICO's origins as an affiliate of Inmarsat and its ongoing financial and other ties to Inmarsat, all of which provide ICO with marketplace advantages unavailable to the U.S.-licensed MSS system operators).

50/ ICO's bald assertion that the "'foreign' versus 'domestic' distinction" among global MSS systems "is purely artificial" is simply ridiculous. ICO Comments at 7. TRW notes that, were the distinction between the United States and the United Kingdom unimportant, much musket shot could have been saved in the 18th century.

be powerless to redress any competitive injuries that ICO may cause. It is therefore vital that the Commission scrutinize closely any application that would afford ICO or any other non-U.S.-licensed MSS system access to the U.S. market.

IV. A "Home Markets"/"Critical Mass" Test Is The Most Appropriate Means Of Regulating U.S. Market Entry By Non-U.S.-Licensed Global MSS Systems.

A. There Is Broad Support For The Application Of A "Critical Mass" Test With Regard To Non-U.S.-Licensed, Global MSS Systems.

Numerous commenters agree with TRW's view that a "critical mass" test of the kind discussed in the NPRM would be the most logical and effective means of regulating U.S. market entry by non-U.S.-licensed global satellite systems such as MSS systems.[51] As Motorola demonstrates in its comments, the global nature of non-geostationary MSS systems and the economic realities of the international MSS market require that the Commission apply, with respect to those such systems that will be licensed by foreign administrations, an ECO-Sat test different from the "home market"/"route market" test that it proposes to apply with regard to other kinds of satellite systems.[52]

There was overwhelming support for the Commission's examination of competitive conditions in the "home market(s)" of a non-U.S.-licensed satellite system. TRW therefore recommends once again that the Commission permit U.S. Earth station applicants to access the

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[51] See, e.g., Motorola Comments at 34; Comments of Home Box Office ("HBO") at 14-15; Lockheed Comments at 11-13; Comments of Orbital Communications Corporation ("Orbcomm") at 5; Teledesic Comments at 4-19; TRW Comments at 12-25.

[52] See Motorola Comments at 19-27. See also Airtouch Comments at 4 (stating that "LEO satellite systems are inherently global in nature, and thus ill-suited to an analysis that focuses on a 'home market' or on a 'route-by-route' analysis").