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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

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REPLY COMMENTS OF PANAMSAT CORPORATION

PanAmSat Corporation ("PanAmSat"), by its attorneys, hereby submits this reply to the comments filed with respect to the Notice of Proposed Rulemaking (the "Notice") in the above-referenced proceeding.

INTRODUCTION AND SUMMARY

As discussed in greater detail below, the vast majority of commenting parties support some form of the Commission's proposed ECO-Sat test. These parties concur with the Commission's conclusion that increased competition in the United States can lead to lower prices and better service for domestic consumers, and that access to the U.S. market can be used as a lever to open foreign markets to U.S. satellite licensees. The few parties who have opposed application of the ECO-Sat test do so for wholly unpersuasive reasons.

There was considerable consensus as well regarding many of the other important issues raised in the Notice. For instance, very few parties supported the Commission's proposal to require U.S.-licensed operators to inform the Commission in writing, on a regular basis, of all foreign destinations to which they are permitted to provide service. Several U.S.-licensed operators pointed out that the proposed disclosure requirement would be unduly burdensome, unnecessarily invasive, and less efficient as a regulatory mechanism than requiring parties opposed to the use of a particular satellite to demonstrate that barriers to entry by U.S. operators exist in the relevant market of the satellite proposed to be used.

Perhaps most importantly, virtually every private commercial satellite party argued that future commercial affiliates or successors to Intelsat and Inmarsat should be subject to the ECO-Sat test in the same manner as any other non-U.S. system seeking to access the U.S. market. There also is substantial agreement among the commenting parties that, until Intelsat's special privileges and immunities are

abolished, it would be premature to consider allowing U.S. earth station licensees to use Intelsat capacity for domestic service. The only significant opposition to this position comes, not surprisingly, from Comsat, which claims, in short, that it is unfair to exclude Comsat from the domestic market. To the contrary, because of Intelsat's special governmental privileges and immunities, Intelsat and Comsat would be able to undercut their competitors in the domestic market with cross-subsidization of its competitive services. It would, moreover, distort competition in the U.S. domestic market to include competitors who have immunity from the antitrust laws and from effective regulatory oversight by the FCC.

DISCUSSION

I. The Commission Should Allow Non-U.S.-Licensed Satellites To Provide Service In The U.S. If They Satisfy The ECO-Sat Test.

The vast majority of commenting parties, which represent a broad cross-section of the satellite services industry, support the Commission's proposed ECO-Sat test for non-U.S.-licensed satellite operators seeking to provide U.S. domestic and international satellite services.[1] Although many of these parties propose modifications to the ECO-Sat test, all agree that some measure of reciprocal access to the home and route markets of non-U.S. licensed satellite operators is appropriate.

As PanAmSat explained in its initial comments, increased competition in the U.S. market from non-U.S.-licensed satellites should lead to lower prices, better service and more innovative service offerings for domestic consumers. Moreover, by conditioning access to the U.S. market on reciprocity of access abroad, the ECO-Sat test will help to open foreign markets to U.S.-licensed satellite operators. This, in turn, will increase the level of competition in those markets and benefit consumers abroad. Thus, application of the Commission's proposed ECO-Sat test will benefit U.S. consumers, U.S.-licensed satellite operators, and consumers in foreign countries.

Nonetheless, a few parties have opposed application of the ECO-Sat test. A group of broadcasters, for example, argues that the ECO-Sat test "should not apply to broadcasters' use of non-U.S.-licensed satellites for purposes of transmitting

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[1] See, e.g., Comments of MCI Telecommunications Corporation ("MCI") at 3-24; Comments of AT&T at 4-14; Comments of Columbia Communications Corporation ("Columbia") at 6-18; Comments of Orion Network Systems, Inc. ("Orion") at 6-12; Comments of Lockheed Martin Corporation ("Lockheed") at 3-11; Comments of Home Box Office ("HBO") at 12-17; Comments of TRW, Inc. ("TRW") at 6-8; Comments of DirectTV, Inc. ("DirectTV") at 5-22.

international video and associated audio programming materials."[2] The broadcasters claim that such an exemption for video programming material is warranted because "broadcast and cable organizations will not be able to provide television coverage of fast-breaking news and other special events on a timely basis if they first are required to compile the legal and other information necessary to satisfy the ECO-Sat test for a particular non-U.S. satellite and wait for the Commission's approval of its application."[3]

The broadcasters concerns, however, can be addressed with existing procedures outside of the context of the ECO-Sat test. Should a broadcaster or news organization find it necessary to use a non-U.S.-licensed satellite to cover a "fast-breaking" news event, it may apply for an STA ("special temporary authority") to do so.[4] If, at the end of its STA period, it wishes to continue to use the satellite, it may seek an extension of its STA or apply for conventional authority. However, if it chooses the latter approach — the exigent circumstances warranting the STA having abated — there is no reason to treat the broadcaster any differently than other applicants to use non-U.S.-licensed satellites.

Similarly unfounded is the broadcasters' claim that, if the ECO-Sat test applies with respect to video programming materials, it should not apply where "there are no alternative sources of satellite capacity."[5] The implication in the broadcasters' comments is that important news events will go unreported if they are required to use capacity on U.S.-licensed satellites or non-U.S.-licensed satellites that have satisfied the ECO-Sat test. Notably absent from their comments, however, is any claim that they are, in fact, unable to obtain adequate capacity even today, prior to any non-U.S.-licensed satellite being permitted to provide service to this country. The specter of news going unreported because of the Commission's proposed ECO-Sat test is just that — a phantom.

Two foreign satellite operators also object to the Commission's proposed ECO-Sat test. Space Communications Corporation of Japan ("SCCJ") complains that the ECO-Sat will lead to inordinate delays and put non-U.S.-licensed satellite operators

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[2] Comments of Capital Cities/ABC, Inc., *et al.*, at 13.
[3] Id. at 13-14.
[4] See, e.g., Cable News Network, Inc., Request for Special Temporary Authority (May. 3, 1995) (STA granted to operate a receive-only earth station in conjunction with the Russian Western Space Data Relay Network to support CNN's coverage of the summit meeting between President Clinton and Russian President Boris Yeltsin).
[5] Id. at 16-17.

at a competitive disadvantage.[6] Japan Satellite Systems, Inc. ("JSAT") urges the Commission to consider only communications-oriented laws and policies in its ECO-Sat analysis.[7] A broader inquiry, JSAT warns, risks involving the Commission in "complex trade and foreign policy issues."[8] These concerns are misplaced.

To begin with, the ECO-Sat application process will not unreasonably delay service from non-U.S.-licensed satellites or impair the ability of these satellites to compete in the U.S. market. For most customers, the ECO-Sat application will be a one-time event. Indeed, it is the regulatory equivalent of an application by a U.S.-licensed satellite operator for authority to launch and operate a satellite. The fact that, in one instance, the satellite already is on-station makes no difference from the standpoint of the customer. In either case, there is some risk that a customer requiring immediate capacity will go elsewhere (although, as discussed above, this is somewhat less of a risk for a non-U.S.-licensed satellite subject to the ECO-Sat test given the availability of STAs), but in most cases, a brief delay while regulatory approvals are obtained is not significant and certainly is not uncommon in Japan and other countries in which PanAmSat has sought authorizations. Thus, application of the ECO-Sat test would not unfairly prejudice operators of non-U.S.-licensed satellites.

In any event, there are important public policy issues raised by the participation of non-U.S.-licensed satellites in the U.S. market that are worthy of consideration by the Commission and the short delay that such consideration may entail.[9] A deliberative process is not *per se* a bad thing; an unnecessarily slow deliberative process is. There is no basis to assume that the Commission's handling of ECO-Sat applications will involve an unnecessarily slow deliberative process.

Finally, there is nothing in the Notice that would suggest that the Commission will inject itself into "complex trade and foreign policy issues." This proceeding involves satellite licensing issues that are well within the scope of the Commission's authority and expertise. Although opening the U.S. market to non-U.S.-licensed satellites necessarily requires the Commission to ensure that its rules protect U.S. consumers, U.S.-licensed satellite operators, and the Commission's own

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[6] See Comments of SCCJ at 2-3.
[7] Comments of JSAT at 2-3.
[8] Id. at 3.
[9] These public policy considerations also justify the Commission's tentative conclusion to continue to require licensing of receive-only earth stations to receive signals from non-US licensed systems, including Intelsat. See Notice ¶ 77. Without such licensing, the Commission will have no way of ensuring that satellite activities in the US are conducted in accordance with its rules and policies.

satellite licensing procedures, the Commission's efforts in this regard are not an exercise in foreign or trade policy.

II. The Commission Should Not Require U.S. Licensees To Compile And Disclose Information Concerning Market Opportunities In Foreign Countries.

The Notice proposes that all U.S.-licensed operators should be required to inform the Commission in writing, on an annual or semi-annual basis, of all foreign destinations where they are permitted to provide service, as well as a general description of the services they are permitted to provide. The International Bureau would compile a list of this information and release an aggregate list of all destinations served by at least one U.S. licensee and a description of the services provided to those destinations. The appearance of any country on this list would be *prima facie* evidence that no *de jure* barriers to entry exist.

PanAmSat and others opposed this "compile and disclose" approach.[10] As PanAmSat demonstrated in its initial comments, compile and disclose would require U.S.-licensees to make public highly sensitive proprietary information and impose upon U.S.-licensees unnecessarily burdensome obligations to which no obvious benefit would attach. Indeed, the incentives of "compile and disclose" are backwards.

Applicants to use non-U.S.-licensed satellites have an interest in demonstrating that no entry barriers are present in the relevant markets; U.S.-licensees may not have such an interest. This is not to say that U.S.-licensees will not assiduously comply with the requirement to compile relevant market access data or that they would not be forthcoming with that data, but complaints and objections would surely be made by applicants and the implementation of enforcement and investigative mechanisms would inevitably follow.

By aligning the burden of production with the incentive to produce, the Commission can avoid the enforcement issue entirely. Thus, instead of requiring U.S.-licensed operators to compile and disclose market access data, the Commission should take the same approach to *de jure* barriers that it proposes to take with respect to *de facto* barriers: Put the application to use the non-U.S. satellite on Public Notice and allow parties opposed to the application to demonstrate that *de jure* and/or *de facto* barriers to entry by U.S. operators exist (or that some other public interest considerations compel denial of the application) in the relevant markets. If

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[10] See, e.g., Comments of Columbia at 17.

evidence of barriers is demonstrated by a party opposing grant of the application, the burden then would be placed on the applicant to demonstrate why grant of the application is appropriate. This suggested alternative approach would allow the issues to be joined in the context of a concrete proposal to use a specific satellite rather than through routine regulatory filings.

III. The ECO-Sat Test Should Apply To Applications To Use Intelsat Satellites Provisionally Assigned To Intelsat's Future Commercial Affiliates and Subsidiaries.

Most parties agree with the Commission's tentative conclusion to refrain from applying the ECO-Sat test to international communications over the Intelsat system. Intelsat's private commercial subsidiaries and/or affiliates, however, are another matter. With regard to these entities, virtually every private satellite party argued that future commercial affiliates or successors to Intelsat and Inmarsat should be subject to the ECO-Sat test in the same manner (or, in some cases, in a more rigorous manner) as any other non-U.S. system seeking access to the U.S. market.[11] For the reasons set forth in these comments, the Commission should, therefore, apply the ECO-Sat test to both the home and route markets of any commercial Intelsat affiliate.

It would be naive, however, to think that, until the day comes when a commercial entity actually is spun-off, Intelsat will not use its substantial market power and special privileges and immunities to insulate its planned commercial subsidiary from competition. As the Notice recognizes, it is not a secret that Intelsat is in the process of creating a commercial subsidiary and there is a very real risk that Intelsat will attempt to "leverage the benefits of [its] intergovernmental status to unfairly distort service."[12] Thus, PanAmSat urges the Commission to apply the ECO-Sat test to U.S. earth station applications that seek to use Intelsat satellites provisionally assigned to Intelsat's future commercial subsidiary.

IV. Intelsat Capacity Should Not Be Used For U.S. Domestic Service.

Finally, there is substantial agreement among the parties that, until Intelsat's special privileges and immunities are abolished, it would be premature to consider allowing U.S. earth station licensees to use Intelsat capacity for domestic service.[13]

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[11] See, e.g., Comments of SCCJ at 8; Comments of Lockheed at 13-14; Comments of Columbia at 22-24; Comments of AT&T at 17.
[12] Notice ¶ 71.
[13] See, e.g., Comments of AT&T at 15; Comments of Columbia at 22.

Intelsat's special governmental privileges and immunities give it numerous competitive advantages over U.S. satellite licensees. Moreover, these special privileges and immunities are not confined strictly to Intelsat. For instance, Comsat is afforded complete immunity from U.S. antitrust laws when it acts in its capacity as an Intelsat Signatory (a capacity that is not well defined).[14] Naturally, such immunity provides Comsat with broad discretion to engage in unfair and anticompetitive acts or practices. Although Intelsat, and derivatively Comsat, may one day be divested of its special privileges and immunities, there is no basis at this time to allow Intelsat to compete in the U.S. domestic market as if it already were a fully private enterprise.

Not surprisingly, Comsat disagrees. Comsat claims that it is unfair to exclude Comsat from the domestic market. In support of this claim, Comsat argues that the amount of Intelsat capacity that it would devote to U.S. domestic service would be too small to impede competition and that Comsat is, after all, a U.S. company.[15]

The latter objection may quickly be dismissed. The basis for the exclusion lies in the potential for Intelsat, through Comsat, to undercut its competitors in the domestic market by cross-subsidizing between its competitive and monopoly services. It is the intergovernmental status of Intelsat space stations and the Commission's lack of authority over Intelsat's space segment charges that creates this risk. Comsat's "nationality," therefore, is not germane.

With regard to Comsat's allegation that the Commission's prohibition on the use of Intelsat capacity to provide U.S. domestic service is unfair, Comsat misses the mark with is claim that Intelsat, through Comsat, lacks the domestic transponder capacity to affect the market. It is not the number of Intelsat transponders that Comsat may use for domestic service that will lead to market distortions, but the ability for Comsat to leverage Intelsat's special governmental privileges and immunities, and its derivative immunity, in an anti-competitive manner.[16] In any event, there is nothing that would prevent Intelsat from adding domestic capacity were it given authority, through Comsat, to provide U.S. domestic service.

For this reason, the Commission has recognized that special scrutiny will be required of any proposed U.S. satellite activities by intergovernmental organizations

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[14] See Alpha Lyracom Space Communications, Inc. v. Communications Satellite Corp., 946 F.2d 168, 174-75 (2d Cir., 1991).
[15] See Comments of Comsat Corporation at 16-19, 26.
[16] See Comments of HBO at 20-21.

("IGOs") or their subsidiaries and affiliates.[17] For instance, authorizations for one such entity should not automatically vest in another when there is a restructuring of an IGO.[18] Further, "as part of the public interest analysis, the Commission should consider whether the IGO, in light of its intergovernmental status and global dominance, would be in a position to diminish effective competition in the United States."[19] Such vigilance is required if competition in the U.S. domestic market ever is to take hold.

CONCLUSION

For the reasons set forth above and in PanAmSat's initial comments, PanAmSat supports the Commission's proposed ECO-Sat test with respect to applications to use non-U.S.-licensed satellites to provide satellite services to, from or within the United States. In addition, the Commission should apply the ECO-Sat test to Intelsat's future private subsidiaries and prohibit the use of Intelsat capacity for domestic U.S. service. finally, U.S.-licensees should not be required to compile and disclose information concerning market opportunities in foreign markets.

Respectfully submitted,

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[17] See Notice ¶¶ 71-72.
[18] Id. at 74; see also Comments of Columbia at 24; Comments of AT&T at 17.
[19] Comments of AT&T at 17.