

BEFORE THE
Federal Communications Commission

ORIGINAL

WASHINGTON, D.C. 20554

JAN 21 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re Application of)
)
MCI COMMUNICATIONS CORPORATION)
)
For Transfer of Control)
of Direct Broadcast Satellite Authorization)
(File No. 73-SAT-P/L-96) To)
)
BRITISH TELECOMMUNICATIONS PLC)

GN Docket No. 96-245

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To: The Commission

PETITION TO DENY OR CONDITION GRANT

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SUMMARY

On November 4, 1996, British Telecommunications plc ("BT") announced its proposed \$20.88 billion acquisition of MCI Communications Corporation ("MCI"). This transaction involves a transfer of control of literally hundreds of FCC authorizations, most of which are "passive" or common carrier facilities used in connection with MCI's interexchange carrier activities. Time Warner expresses no opinion regarding the proposed transfer of control of those facilities.

MCI also seeks to transfer control of the license for the last full-CONUS DBS orbital position assigned to the United States. MCI bid \$682.5 million for the rights to this license in January of 1996. The real economic beneficiary of this license, however, will be Australian-controlled ASkyB, the entity which will be empowered to select, package and market the programming services offered over the DBS facility to U.S. consumers. The MCI/BT transfer of control application makes absolutely no public interest showing to support the unprecedented award of 100 percent ownership of a DBS license to a U.K. corporation, the economic benefits of which will flow to an Australian corporation.

Section 310(b) of the Communications Act and Section 100.11(e) of the FCC rules require the Commission to determine whether 100 percent foreign ownership of MCI -- four times the statutory benchmark -- would serve the public interest before approving the transfer of MCI's DBS authorization to BT. The International Bureau's previous disregard for foreign ownership issues in granting MCI's DBS application stands in marked contrast to the Commission's insistence on strict compliance with the Section 310(b) limits by the PCS applicant NextWave. DBS, like PCS, is subject to an express rule establishing a 25 percent benchmark on foreign equity. As a matter of policy, it is unsupportable for the Commission

to require a restructuring by NextWave to ensure strict compliance with alien ownership requirements, while failing to apply the same restrictions in another new service. This is particularly true in the case of DBS, as the Commission has long held that the provision of content by a licensee raises special concerns under the alien ownership limits.

Foreign ownership of the DBS licensee and control of the entity that will select, package and market all of the DBS program services over this system raises important trade, investment policy, foreign policy and national security issues. The Commission must not approve the transfer of control of MCI's DBS authorization to BT until it has conducted a thorough analysis, based upon a complete record, as to whether the United Kingdom and Australia are really open to U.S. satellite service and video programming entities on a competitive basis. In 1995, the Commission implemented a new policy whereby Section 310(b) determinations are used to promote effective competitive opportunities for U.S. firms in other countries (the "ECO" test). It has since proposed a similar ECO-Sat test for foreign satellites seeking to serve the U.S. The Executive Branch departments with responsibility for international trade and foreign policy issues have recently endorsed the Commission's consideration of competitive opportunities in another satellite licensing proceeding. MCI itself has advocated an ECO-Sat test for foreign-licensed satellites seeking to provide services to the U.S.

There is no reason to treat an application proposing foreign ownership of a U.S. DBS facility differently than an application by a foreign satellite to serve the U.S. Both involve foreign entry into the U.S. to provide satellite-delivered program services. If an ECO analysis would prohibit a satellite licensed by a foreign government from serving the U.S.,

then an entity from that country should not be permitted to circumvent the test by acquiring control of a U.S. licensed satellite.

Further, News Corp.'s extensive and vital involvement in the DBS service that will be provided over MCI's DBS system requires scrutiny not only of BT's home market, but News Corp.'s as well. News Corp. will own at least 50 percent of the venture that will select and provide all of the DBS program service over MCI's DBS system. Indeed, the proposed DBS service would not appear to be viable without News Corp.'s financial participation, expertise and DBS interests elsewhere. News Corp.'s role in this programming entity will only increase as MCI scales back its own participation.

U.S. firms face onerous restrictions in seeking to provide video programming in both the U.K. and Australia. As a member of the European Union, the U.K. might be required to impose significant program content restrictions, designed to reserve a majority of transmission time for European works. The Executive Branch departments and MCI itself have advocated consideration of content restrictions in an ECO-type analysis for satellite services. Australian law also imposes content restrictions on services devoted to dramatic programs, requiring that 10 percent of program expenditures be spent on new Australian drama programming. In addition, Australia restricts foreign ownership of subscription television licensees to just 20 percent individually and 35 percent in the aggregate, without any waiver mechanism.

Moreover, in light of ongoing and potential trade negotiations, the Commission should not surrender the Executive Branch's leverage to open these foreign markets to U.S. satellite programming distributors. Audiovisual services such as DBS programming are included in

the General Agreement on Trade in Services, satellite services in the current World Trade Organization negotiations, and the liberalization of investment barriers in the negotiations within the Organization For Economic Cooperation and Development. The Commission must not risk undermining the U.S. position in all of these trade fora.

If the FCC fails to seize this opportunity to condition the license transfer on a finding of reciprocal entry opportunities for U.S. firms in the U.K. and Australia, the final opportunity to advance this important U.S. trade policy objective will be forever lost. Accordingly, the FCC should not approve the transfer of control of MCI's DBS application to BT until it has conducted a thorough analysis, based upon a complete record, as to whether the U.K. and Australia are sufficiently open to U.S. satellite service and video programming entities, based upon the policies underlying the ECO tests. In addition, FCC consent to the transfer of MCI's DBS license to BT should be specifically conditioned on full U.S. access to provide satellite and video programming in both the U.K. and Australia.

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BRITISH TELECOMMUNICATIONS PLC)

To: The Commission

PETITION TO DENY OR CONDITION GRANT

Time Warner Inc. ("Time Warner"), by its attorneys and pursuant to Section 309(d) of the Communications Act of 1934, as amended, hereby petitions to deny or condition the grant of the above-captioned application to transfer control of the Direct Broadcast Satellite ("DBS") authorization held by MCI Telecommunications Corporation ("MCI") to British Telecommunications plc ("BT").¹ As shown below, MCI's proposed transfer of the last remaining full-CONUS DBS authorization in the United States to a foreign company, to be used to deliver video programming and information from another foreign-controlled entity, raises significant legal and public interest issues. Those issues cannot be resolved based upon the record now before the Commission, and thus the above-captioned application must be denied, or granted only on the condition that appropriate measures be taken to ensure

¹See Public Notice, DA 96-2079, released December 10, 1996. Time Warner takes no position regarding the transfer of MCI's other licenses and authorizations.

full access by U.S. companies to the home markets of the foreign entities that will provide service using this valuable DBS authorization.

As a world leader in the creation and distribution of audio visual works,² Time Warner has been a staunch supporter of efforts by the current Administration and FCC to open foreign markets for investment opportunities by U.S. firms. The subject DBS license is the last full-CONUS allocation available for award by the U.S. government.³ Thus, if the FCC fails to seize this opportunity to condition the license transfer on a finding of reciprocal entry opportunities for U.S. satellite and video programming firms in the U.K. and Australia, the final opportunity to advance this important U.S. trade policy objective will be forever lost.

²For example, in 1995, Warner Bros. reported that about 40 percent of its revenues came from outside the U.S. Warner Bros. International Television ("WBIT") is the world's largest distributor of television programming and licenses feature films and television programs in more than 170 countries. Warner Home Video ("WHV") operates in at least 52 countries, and shipped a record 125 million units in 1995. WHV (together with MGM/UA Home Entertainment) has entered into a landmark licensing agreement to release video product in the People's Republic of China. The Warner Music Group conducts business in more than 70 countries and more than 57 percent of its recorded music revenues comes from outside the U.S. Time Warner's international cable services include HBO Ole, HBO Brasil, HBO Asia, HBO Hungary and HBO Czech; TNT Latin America, Cartoon Network Latin America, TNT & Cartoon Network Europe, and TNT and Cartoon Network Asia; and CNN International. Time Inc. is the world's leading magazine publisher, a leading direct marketer of books, music and video, and a provider of content for the global news media environment.

³As MCI and News Corp. recognized in another proceeding, "MCI has obtained the last slot available for full-CONUS DBS service." Consolidated Petition to Deny of MCI Telecommunications Corporation and The News Corporation Ltd, filed April 25, 1996, In Re Applications of TelQuest Ventures, L.L.C. and Western Tele-Communications, Inc., File Nos. 758-DSE-P/L-96 *et al.* ("MCI Telquest Petition"), at 5.

I. BACKGROUND.

In the Commission's DBS auctions of January 24 and 25, 1996, MCI submitted the winning bid of \$682.5 million for 28 channels at orbital location 110° W.L. MCI filed its "long form" DBS application with the Commission on February 27, 1996. MCI proposed that it would manage and control the proposed DBS space station facility, but that American Sky Broadcasting ("ASkyB"), a joint venture between MCI and The News Corporation Ltd. ("News Corp."), an Australian company,⁴ would actually select, package and market the DBS video programming services to be offered to U.S. subscribers. According to MCI's application, this venture would be granted a contractual right to use all available transponder capacity on the MCI DBS satellite.⁵ In other words, ASkyB, owned in significant part by foreign interests, will enjoy exclusive control over the selection of programming and information to be sent to U.S. homes.

On November 1, 1996, BT, a company chartered in the United Kingdom ("U.K."), announced that it has contracted to acquire MCI's parent company, MCI Communications Corporation. A number of entities, including Time Warner, filed letters expressing concern with the resulting alien ownership of MCI's DBS authorization and related foreign policy and

⁴See Fox Television Stations, Inc., 10 FCC Rcd 8452 (1995) ("Fox I") at ¶ 2 (in response to FCC inquiry, News Corp., an Australian company, revealed its ownership of more than 99 percent of the equity of Fox's parent company, well in excess of the statutory benchmark on alien ownership).

⁵MCI Application at 2, 8.

trade issues.⁶ In addition, three Executive Branch departments wrote to the Commission to request that any action taken on MCI's pending DBS application

expressly preserve the ability of the Executive Branch to make recommendations to you on matters of trade and investment policy, foreign policy or national security in the event that MCI seeks to transfer control of any DBS licensee or assign any DBS license. In particular, any such action on the application should preserve the ability of the Executive Branch to make recommendations to the Commission on the appropriate criteria for reviewing any such transfer or assignment, particularly if the transfer or assignment involves foreign entities, and notwithstanding the regulatory classification of the DBS licensee.⁷

On December 2, 1996, MCI and BT filed applications for FCC approval of the transfer of control of MCI's licenses and their proposed merger. MCI requested consent to transfer control of the above-referenced DBS authorization "if received" by it. By Order, released December 6, 1996, DA 96-1793 ("Initial MCI Order"), the Chief, International Bureau, found MCI's DBS application was "ready for grant." In doing so, the Bureau affirmed the public's right to comment on issues raised by the proposed transfer of this authorization to BT:

In finding that MCI's DBS authorization is ready for grant, this order does not prejudice or predetermine any of the recently

⁶At the time of the DBS auction, the Commission had authorized no more than 35 percent total foreign ownership in MCI. See MCI Communications Corp., 10 FCC Rcd 8697 (1995).

⁷Letter from Jeffrey M. Lang, Deputy U.S. Trade Representative, Office of the U.S. Trade Representative; Hon. Larry Irving, Assistant Secretary for Communications and Information, Department of Commerce; and Ambassador Vonya B. McCann, U.S. Coordinator, International Communications and Information Policy, Department of State, to Reed E. Hundt, Chairman, Federal Communications Commission, dated November 27, 1996 (emphasis added) ("November 27, 1996 Executive Branch Letter"). See Exhibit 1 hereto.

filed transfer of control applications by MCI and BT, including the transfer of control application filed with respect to the DBS authorization. . . . The Commission will closely review each of these transfer of control applications, including the application relating to MCI's DBS authorization, for compliance with all relevant provisions of the Communications Act and the Commission's Rules.⁸

* * *

We wish to emphasize, again, that this order does not prejudice, in any way, any of the applications MCI has filed to transfer control of its licenses and authorizations, including its DBS authorization, to BT. . . . Our determination in this order is that the application for DBS authorization filed by MCI, not BT, is ready for grant, upon payment within five days by MCI, not BT, of the balance due on its auction bid.⁹

MCI paid the remaining balance due on its bid on December 13, 1996. By Order released December 20, 1996, DA 96-2165, the Chief, International Bureau, conditionally authorized MCI to provide DBS service.

II. THE PROPOSED ALIEN OWNERSHIP OF MCI'S DBS AUTHORIZATION AND THE ASSOCIATED DBS SERVICE PROVIDER IMPLICATES SIGNIFICANT FEDERAL ISSUES UNDER ESTABLISHED FCC POLICY.

A. The Proposed Transfer Of MCI's DBS Authorization To BT Is Subject To The Alien Ownership Provisions In The Communications Act And FCC Rules.

Pursuant to Section 310(b) of the Communications Act and Section 100.11(e) of the FCC rules, corporations directly or indirectly controlled by other corporations which are more than 25 percent owned by aliens may not hold DBS licenses unless the FCC determines

⁸Initial MCI Order at ¶ 9.

⁹Id. at ¶ 29. On January 6, 1997, EchoStar Satellite Corporation, PRIMESTAR Partners L.P. ("PRIMESTAR"), and National Association for Better Broadcasting filed applications for review of the Initial MCI Order, which remain pending.

that the public interest will be served by granting such licenses.¹⁰ Thus, Section 310(b) of the Act and Section 100.11(e) of the FCC rules require the FCC to determine in this case whether 100 percent foreign ownership of MCI's DBS authorization -- four times the established benchmark -- would serve the public interest before approving the transfer of that authorization to BT.

In the Initial MCI Order, the International Bureau concluded that Section 310(b) of the Act literally applies only to broadcast, common carrier and aeronautical licenses.¹¹ The Bureau reasoned that in 1987 the Commission's Subscription Video decision classified subscription DBS as a "non-broadcast" service.¹² As PRIMESTAR pointed out in its Application for Review, however, DBS did not even exist in 1974 when the Communications Act was amended to apply the foreign ownership provisions to these specific license classifications, and thus could not have been specifically named.¹³ While the 1987 Subscription Video decision did conclude that certain public interest obligations of broadcasters would not be applied to DBS licensees, it did not specifically address foreign ownership requirements codified in the Act and in the FCC rules. In any event, in 1992, Congress did establish public interest obligations for all DBS service providers in adopting

¹⁰47 U.S.C. § 310(b)(4); 47 C.F.R. § 100.11(e).

¹¹Initial MCI Order at ¶ 21.

¹²Subscription Video, 2 FCC Rcd 1001 (1987), *aff'd sub nom. National Association of Better Broadcasting v. FCC*, 849 F.2d 665 (D.C. Cir. 1988).

¹³PRIMESTAR Application For Review at 3.

Section 335 of the Act,¹⁴ thus undermining the Bureau's rationale that broadcast-type obligations are generally inapplicable to DBS.

The Bureau also found Section 100.11(e) of the FCC rules to be inapplicable to MCI's DBS application, despite the express language of that rule.¹⁵ Unlike Section 310(b)(4) of the Act, Section 100.11(e) literally and specifically applies to DBS -- without qualification. In the years since adopting Section 100.11, the Commission has never proposed or even considered repealing that rule. Indeed, in a comprehensive review of its DBS regulations in 1995, the Commission affirmed that the alien ownership restrictions continue to apply to DBS.¹⁶ Just last October, the Commission amended Section 100.11 to delete the provisions regarding alien officers and directors -- as mandated by the Telecommunications Act of 1996 -- but preserved the provisions restricting alien equity in DBS licensees.¹⁷ Contrary to its reasoning in the MCI case, the International Bureau itself has applied Section 100.11(e) in a recent decision.¹⁸

Moreover, the Bureau's disregard for foreign ownership issues in the case of MCI's DBS application stands in marked contrast to the Commission's insistence on strict compliance with the Section 310(b) limits by PCS license applicants. PCS, like DBS, is

¹⁴47 U.S.C. § 335.

¹⁵Initial MCI Order at ¶ 22.

¹⁶Revision of Rules and Policies for Direct Broadcast Satellite Service, 11 FCC Rcd 9712 (1995) at n.185.

¹⁷Order, FCC 96-396, released October 9, 1996.

¹⁸Continental Satellite Corporation, 10 FCC Rcd 10473 (Int'l Bur. 1995).

subject to an express rule establishing a 25 percent benchmark on foreign equity.¹⁹

Although NextWave Personal Communications, Inc. ("NextWave") bid successfully for authorizations in May of 1996, the award of its licenses was delayed as the FCC scrutinized attendant alien ownership issues. The grant of NextWave's licenses in January of 1997 was expressly conditioned, under threat of automatic cancellation, upon NextWave taking the steps necessary to come into compliance with the Section 310(b) alien ownership limits. Moreover, in six months' time, NextWave must "submit a report to the Bureau documenting how its ownership and debt structure complies with Section 310(b)."²⁰

As a matter of policy, it is unsupportable to require a restructuring by NextWave to ensure strict compliance with the 25 percent limit on alien ownership while failing to apply the same restrictions applicable to another new service. The foreign ownership benchmark must have the same meaning for all new services to which it applies. Moreover, the need for careful scrutiny of the proposed alien ownership in this case is even greater than with a PCS licensee, as the Commission has long recognized that the alien ownership restrictions are particularly important with respect to services in which the licensee participates in selecting and creating the content of transmissions.²¹ MCI/BT, while claiming to be neither a common carrier nor broadcaster in this instance, will be involved in program content as an

¹⁹47 C.F.R. §§ 24.404(b)(4), 24.804(b)(4).

²⁰See FCC Public Notice, DA 97-12, released January 3, 1997. BT's 100 percent alien ownership is four times the strict 25 percent limit imposed on NextWave.

²¹See, e.g., MCI Communications Corporation/British Telecommunications plc, 9 FCC Rcd 3960 (1994) at ¶ 23 ("because the Title III licenses involved are common carriers and exercise no control over the content of the transmissions, they do not raise the traditional Title III concerns about alien control over the operation of U.S. radio services . . .") (footnote omitted).

owner of ASkyB and through its ability to select the programmer entity which will offer service to the public over the DBS facility.

The International Bureau emphasized that its Initial MCI Order did not "in any way" prejudice Commission review of MCI's application to transfer control of its DBS authorization.²² On the contrary, by concluding that the foreign ownership restrictions in the DBS rules are somehow inapplicable to MCI's DBS authorization, the Bureau has effectively sought to remove the principal grounds for Commission review of the DBS transfer, i.e., whether 100 percent alien ownership of the DBS authorization would serve the public interest and further the trade, foreign policy, national security and other policies implicated by BT's proposed ownership.

In short, the Bureau's conclusion that the alien ownership restrictions in Section 310(b) of the Act and Section 100.11(e) of the rules are inapplicable to MCI's DBS authorization was simply erroneous.²³ The Commission must therefore determine whether 100 percent alien ownership of this U.S. facility and the scarce resource it represents would be in the public interest. Moreover, even if the Commission ultimately decides to repeal Section 100.11(e) of its rules and that Section 310(b) of the Act does not mandate foreign

²²Initial MCI Order at ¶ 29.

²³Indeed, four members of Congress recently wrote to the Chairman of the FCC to question the legal basis for the Bureau's decision, and whether that decision had in fact preserved the right of the Executive Branch to make recommendations, as requested. Letter from Hon. John D. Dingell, Edward J. Markey, Ernest F. Hollings and Daniel K. Inouye to Reed E. Hundt, Chairman, Federal Communications Commission, dated December 19, 1996. See Exhibit 2 hereto. In this proceeding and in connection with the pending Applications For Review, the Commission has the opportunity to revisit the International Bureau's erroneous conclusions.

ownership restrictions for DBS, the Commission has nevertheless committed to apply the relevant public interest analysis to this particular license in the context of the MCI/BT transfer of control application.²⁴ Indeed, the November 27, 1996 letter from three Executive Branch departments directs the Commission to provide a full opportunity for the appropriate public interest analysis "notwithstanding the regulatory classification of the DBS licensee."²⁵ In other words, the Commission is not free to ignore the applicable public interest criteria by characterizing the subject DBS license as a "subscription" service. As discussed below, the Commission has already established an appropriate framework for this analysis.

B. The Commission Must Undertake An Analysis Of Whether There Are Effective Competitive Opportunities For U.S. Firms To Engage In Video Programming Distribution Generally, And By DBS Specifically, In The U.K. And Australia.

In 1995, the Commission implemented a new policy whereby foreign ownership determinations under Section 310(b)(4) of the Communications Act are used to promote opportunities for U.S. common carriers in other countries' markets. Specifically, under its effective competitive opportunities ("ECO") test, the Commission will investigate whether a

²⁴ See "The Hard Road Ahead -- An Agenda For The FCC in 1997," Reed E. Hundt, Chairman, Federal Communications Commission, December 26, 1996 ("The Road Ahead") at 12 ("We also anticipate that in ruling on the anticipated petition to transfer control of MCI's licenses to British Telecom, the FCC will be asked to consider a variety of issues that affect international telecommunications, such as the implications of such a transfer of control on trade policy, foreign policy and national security"); FCC News, No. 71293, released December 13, 1996 (announcing that the new Senior Legal Advisor to the Chief, Telecommunications Division, International Bureau "will direct and coordinate the Telecommunications Division's review of certain foreign carrier U.S. market entry issues, including the proposed BT/MCI merger").

²⁵ November 27, 1996 Executive Branch letter, attached hereto as Exhibit 1.

foreign market offers effective competitive opportunities to U.S. carriers in making a public interest determination whether entities from that nation may acquire an interest in a U.S. carrier in excess of the 25 percent statutory benchmark under Section 310(b)(4). Through this policy, the Commission seeks to encourage other countries to remove barriers to competitive entry by U.S. firms seeking to offer international telecommunications services.²⁶ The Commission has more recently proposed to extend its effective competitive opportunities test to foreign satellite systems seeking to serve the U.S. ("ECO-Sat"), in order to "encourage foreign governments to open their satellite communications markets, thereby enhancing competition in the global market for satellite services."²⁷

In its Initial MCI Order, the International Bureau failed to apply the ECO test to MCI, because it concluded that Section 310(b) of the Act and even the express foreign ownership restrictions on DBS in the FCC rules were inapplicable to "subscription DBS."²⁸ As shown above, however, the Bureau's conclusion regarding the alien ownership provisions was erroneous as a matter of law. Nevertheless, even if the Commission ultimately repeals its DBS foreign ownership restrictions, the policy underlying the ECO analysis must not be ignored in this case. Pursuant to the above-captioned application, the Commission must determine whether the public interest is generally served by the transfer of MCI's licenses

²⁶Market Entry and Regulation of Foreign-Affiliated Entities, 11 FCC Rcd 3873 (1995) ("ECO Order") at ¶¶ 1-2.

²⁷Amendment 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, NPRM in IB Docket No. 96-111, FCC 96-210, released May 14, 1996 ("DISCO II") at ¶¶ 1-2.

²⁸Initial MCI Order at ¶ 27.

to BT, a company that is 100 percent alien owned and controlled. As a matter of policy, the Commission has already concluded that the public interest is served by the use of its licensing process -- and its determinations regarding alien ownership in particular -- to open foreign markets for particular services which are closed to similarly situated U.S. firms.²⁹ Moreover, it is national trade policy to pursue the opening of foreign markets to U.S. goods and services. These policy goals should not be ignored with respect to the proposed alien ownership of the last available U.S. full-CONUS DBS authorization.

The Executive Branch departments with responsibility in the areas of international trade and foreign policy have recently endorsed the Commission's consideration of competitive opportunities in satellite licensing. In connection with the applications of TelQuest Ventures, L.L.C. ("TelQuest") and Western Telecommunications, Inc. to use a Canadian orbital slot to provide DBS programming in the U.S., the Departments of State, Commerce and Justice and the Office of the U.S. Trade Representative brought concerns regarding trade reciprocity with Canada to the Commission's attention.³⁰ These Executive Branch departments asserted that Canada discriminates against U.S. and other foreign programmers and service providers through content restrictions on direct-to-home and other

²⁹ See "The Road Ahead," *supra*, at 11 ("DBS services are already significant providers of video programming and we are seeking to facilitate the growth of DBS, by negotiating access to foreign markets").

³⁰Letter from Ambassador Vonya B. McCann, U.S. Coordinator, International Communications and Information Policy, U.S. Department of State; David S. Turetsky, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice; Jeffrey M. Lang, Deputy U.S. Trade Representative, Office of the U.S. Trade Representative; and Hon. Larry Irving, Assistant Secretary for Communications and Information, Department of Commerce; to Reed E. Hundt, Chairman, Federal Communications Commission, dated July 1, 1996. See Exhibit 3 hereto.

video programming. They further argued that Canada maintains restrictions over the use of non-Canadian satellites to provide direct-to-home and other services to customers in that country.

Indeed, MCI itself has advocated an ECO-Sat test for foreign satellites seeking to provide services to the United States in the DISCO II proceeding:

An ECO-Sat standard that tests whether there are "effective competitive opportunities" for the provision of satellite services in other countries will help ensure that U.S. satellite operators, including MCI, have access to broader geographic markets and a larger base of potential subscribers. The ECO-Sat test will also promote fair and vigorous competition in the provision of satellite services, from which U.S. consumers will reap significant benefits in the form of increased innovation and choice.³¹

MCI argued that the Commission's analysis should encompass de jure barriers, including program content restrictions, as well as other de facto barriers.

Prior to obtaining a license, applicants should demonstrate, at a minimum, that no de jure barriers exist, i.e., that no foreign law, regulation or policy regarding orbital slots, spectrum, landing rights, uplink and downlinks to the satellite or satellite services licensing, prohibits or restricts competition by, or access to, foreign satellite operators. . . .

Applicants seeking licenses to offer DBS/DTH services also should verify that there are no content-related restrictions which would bar U.S. DBS/DTH applicants from the relevant market, since satellite transmission is inextricably linked to content in the provision of DBS/DTH services. Laws and regulations that directly limit the ability of U.S. satellite operations to supply DBS/DTH programming in a foreign market are de jure barriers that can be as damaging to fair and vigorous competition as laws that restrict satellite transmission service.

³¹MCI Comments, IB Docket No. 96-111, filed July 16, 1996, at i.

De facto barriers would encompass constraints that are not "de jure," i.e., those which have an indirect impact on competition in the satellite services in question. These would include, for example, administrative practices and procedures which impair the ability of U.S. applicants to obtain licenses or which place them at an unfair disadvantage in the application process.³²

MCI's Comments also advocated applying the policies and rules adopted in the DISCO II proceeding to all applications pending at the time of that NPRM (May, 1996). According to MCI, the test would not represent a new policy, but rather the formalization of previously-applied criteria.³³

Furthermore, both MCI and News Corp. advocated a reciprocity-based analysis in the recent TelQuest proceeding:

The gross inequities that would result from grant of the applications are illustrated by reference to the ECO test for entry into the U.S. market by foreign common carriers. . . . Under this test, the Commission requires a level of open entry into foreign markets before it will permit foreign entities to operate in the United States. The Commission recognized that limits on U.S. participation in foreign markets threaten some or all of the desired public interest benefits of foreign entry into the U.S. market. The fact is that Canadian law and policy effectively prohibit competition in Canada by U.S. firms in either the satellite services or video program services market segments.³⁴

There is no policy reason to treat an application proposing foreign ownership of a U.S. DBS facility differently than an application by a U.S. company to use a foreign satellite to serve the U.S. for purposes of the ECO policy. Both situations concern foreign entry into

³²Id. at ii.

³³Id. at 5.

³⁴MCI TelQuest Petition at 18-19 (footnote omitted).

the U.S. to deliver satellite program services. In adopting the original ECO Order regarding international telecommunications services, the Commission applied the policy not only to Section 214 applications by foreign carriers but also to foreign ownership determinations involving U.S. licensees. Indeed, the policy would appear to have particular applicability where a foreign entity seeks to serve the U.S. by acquiring control of a U.S. licensed satellite. If the ECO analysis would prohibit a satellite licensed by a foreign government from providing service to the U.S. in the absence of reciprocal opportunities for U.S. firms in that country, then an entity from that country should not be permitted to circumvent the test by acquiring control of a U.S. licensed satellite.

The need to carefully examine the openness of foreign markets to U.S. entities is even greater for DBS program distribution than it is for telecommunications services. In the latter situation, the only harm to U.S. interests (carriers and consumers) is economic (i.e., loss of revenues, settlement payments, etc.). In the DBS programming situation, the potential impact on the U.S. public interest is far greater -- foreign interests will enjoy unfettered access to the U.S. population to disseminate entertainment, creative art, information, political views and all other program content and information, even if their home countries are closed to reciprocal opportunities for investment by U.S. firms. As previously noted, the Commission has long recognized that alien control over the content of transmissions raises special concerns. In this regard, the inconsistency in the laissez faire approach taken by the International Bureau in the Initial MCI Order, compared with the strict approach taken by the Wireless Bureau in the recent NextWave case, is all the more irreconcilable.

In the present case, the Executive Branch departments have expressly directed the Commission to preserve their right to make recommendations concerning the transfer of MCI's DBS authorization related to trade policy, foreign policy and national security.³⁵ Both the ECO test and the proposed ECO-Sat test require consideration of such issues brought to the Commission's attention by the Executive Branch.³⁶ Thus, an ECO-type analysis is the appropriate vehicle to address Executive Branch concerns in this case. As MCI and News Corp. have eloquently advocated, such an analysis must encompass both the ability of U.S. firms to obtain authority to launch a DBS satellite as well as to engage in program distribution over foreign DBS satellites, thus enabling the FCC to determine whether U.K. or Australian law or policy effectively prohibit competition by U.S. firms "in either the satellite services or video program services market segments."³⁷

C. The Commission's ECO Analysis Must Cover The Home Country Of All The DBS Service "Providers," Including The Programmer As Well As The Licensee.

News Corp.'s extensive involvement in the DBS service that will be provided over MCI's DBS system requires scrutiny not only of BT's home country, but News Corp.'s as well. If MCI's transfer applications are granted, not only will the DBS licensee be 100 percent foreign-owned, but the entity that will select and provide programming over the licensed facility -- the real DBS provider -- will be at least 50 percent foreign-owned, possibly more. Moreover, authority to convey an even greater interest in the DBS

³⁵November 27, 1996 Executive Branch letter, attached hereto as Exhibit 1.

³⁶ECO Order at ¶ 3; DISCO II at ¶ 18.

³⁷MCI TelQuest Petition at 19.

programming entity to foreign owners will be solely in the hands of that foreign-owned licensee.

Congress has mandated that the Commission not focus on a DBS licensee alone, to the exclusion of a DBS program distributor like ASkyB, for regulatory purposes. In adopting Section 335 of the Communications Act in 1992, Congress required the Commission to impose certain public interest obligations upon "providers of direct broadcast satellite service," including the reservation of channel capacity for noncommercial, educational or informational programming.³⁸ The legislative history makes clear that these requirements

are intended to apply only to direct broadcast satellite providers, which the Commission shall interpret to mean a person that uses the facilities of a direct broadcast satellite system to provide point-to-multipoint video programming for direct reception by consumers in their homes. The Committee does not intend that the licensed operator of the DBS satellite itself be subject to the requirements of this subsection unless it seeks to provide video programming directly.³⁹

³⁸47 U.S.C. § 335(b)(1). Significantly, Sec. 335 requires the Commission at a minimum to impose reasonable access and equal opportunity requirements for political advertisements on providers of DBS service, as well as the requirement to set aside four to seven percent of channel capacity for noncommercial educational or informational programming. Beyond these minimum requirements, however, the Commission has unfettered jurisdiction to impose additional "public interest or other requirements for providing video programming" on DBS service providers.

³⁹H.R. Rep. No. 628, 102d Cong., 2d Sess. 124 (1992) (emphasis added). See also Implementation of Section 25 of The Cable Television Consumer Protection and Competition Act of 1992: Direct Broadcast Satellite Public Service Obligations, NPRM in MM Docket No. 93-25, FCC 93-91, released March 2, 1993 at ¶ 29 ("we believe that the reservation requirements for noncommercial, educational and informational programming . . . are intended by Congress to satisfy the public interest obligations of DBS licensees and service providers") (emphasis added).

In short, Congress has required the Commission to recognize for regulatory purposes that DBS "service" is provided by the entity responsible for content selection, packaging and marketing of the actual DBS service delivered to consumers, not just the licensee responsible for the technical parameters of the DBS satellite.

In its Comments in the DISCO II proceeding, MCI itself made the following observation (in arguing the need to address foreign content restrictions in any ECO-Sat analysis):

Clearly, discussion of DBS service in the United States and abroad has long encompassed consideration of both the satellite transmission and the programming being broadcast. Certainly, and perhaps uniquely for DBS/DTH services, it is difficult if not impossible to isolate the satellite transmission service from the content or programming.⁴⁰

In this case, News Corp. will clearly have a controlling role in selecting and providing DBS service over the licensed satellite system, regardless of whether the license is nominally held by MCI, BT, or some other entity. Indeed, the proposed DBS service apparently would not be financially viable without News Corp.'s participation. MCI's DBS application contemplated that it and News Corp. would each own 50 percent of ASkyB.⁴¹ In its SEC Form 10-Q for the quarter ended March 31, 1996, MCI estimated that the total cost required to initiate DBS service, including the costs involved in obtaining the license and constructing and launching the satellites, would be approximately \$1.3 billion, with MCI and

⁴⁰MCI Comments, IB Docket 96-111, at 18 (emphasis added).

⁴¹MCI DBS Application at 8.

News Corp. "shar[ing] the costs equally."⁴² Subsequently, MCI has chosen to reduce its stake in ASkyB from 50 percent to not more than 20 percent.⁴³ MCI's most recent SEC Form 10-Q, for the quarter ended September 30, 1996, confirms that MCI and News Corp. "have agreed to form a joint venture, in which the company [MCI] anticipates owning less than a 20% interest, to provide digital satellite services to homes and businesses. . . ."⁴⁴ Indeed, MCI's Chairman and CEO told reporters last November that MCI would try to sell the DBS authorization outright to News Corp.⁴⁵ MCI continues to estimate the total cost required to initiate DBS service to be approximately \$1.3 billion.⁴⁶

MCI's most recent Form 10-Q filing does not indicate, in light of MCI's plans to reduce its stake in ASkyB, how MCI and News Corp. will divide the substantial start-up costs of the proposed DBS venture. However, News Corp. would appear to continue to be responsible for at least half of such costs, corresponding to News Corp.'s continued 50

⁴²MCI Communications Corporation and Subsidiaries Form 10-Q For the Quarter Ended March 31, 1996, at 9, 18.

⁴³See "ASkyB to Launch DBS Service Next Fall; Seeks New Partner," *Media Daily*, Dec. 23, 1996, Vol. 4, No. 5 ("MCI . . . wants to slash its investment in ASkyB to 20% or less so it can focus on its planned merger with British Telecommunications.").

⁴⁴MCI Communications Corporation and Subsidiaries Form 10-Q For the Quarter Ended September 30, 1996, at 8, 20.

⁴⁵"Future of American Sky Broadcasting Project Uncertain," *Satellite Week*, November 11, 1996.

⁴⁶MCI Communications Corporation and Subsidiaries Form 10-Q For the Quarter Ended September 30, 1996, at 20.