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

In the Matter of

Federal-State Joint Board on
Universal Service

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CC Docket No. 96-45

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

PETITION FOR CLARIFICATION OR RECONSIDERATION
OF GE AMERICAN COMMUNICATIONS, INC.

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SUMMARY

The Universal Service Order provides that “satellite and video service providers must contribute to universal service only to the extent that they are providing interstate telecommunications services.” GE Americom supports this conclusion, and petitions here primarily for express clarification that such obligations do not apply to the provision of bare transponder space segment.

As a legal matter, the offering of satellite transponder capacity does not constitute “telecommunications” under the Act and so cannot be subject to contribution obligations. The party using the transponder -- which is nothing more than a repeater that happens to be located over 22,000 miles above the equator -- is the party that actually engages in telecommunications, including: (1) creating a transmission path of its own design; (2) managing that transmission path; and (3) distributing information over that path. In these circumstances, the satellite operator is not a “provider of telecommunications.”

The offering of transponder capacity is closely analogous to telecommunications equipment leases and network construction contracts, which enable customers to provide telecommunications for themselves or for others but do not themselves constitute a telecommunications offering. Other offerors of telecommunications network components, such as equipment vendors and fiber cable developers, are not required to contribute, and satellite transponders should not either.

These legal and competitive concerns overlay a practical issue. Unlike any other industry that will contribute to universal service, the vast majority of the

satellite industry's revenues come from very long term space segment contracts, and the significant new cost of doing business represented by a potential universal service contribution cannot be recovered except by reopening existing contracts. Although the affected revenues are trivial from the overall perspective of the universal service fund -- in the tenths of a percent -- the direct impact on this unique industry could be disproportionately large.

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**PETITION FOR CLARIFICATION OR RECONSIDERATION
OF GE AMERICAN COMMUNICATIONS, INC.**

GE American Communications, Inc. ("GE Americom"), by its attorneys, hereby requests Commission clarification regarding the scope of the obligations of satellite companies to contribute to the universal service fund. In particular, we ask the Commission to make clear that satellite space station operators are not required to contribute when they make available bare transponder space segment capacity.

The Report and Order in this proceeding states that "satellite and video providers must contribute to universal service only to the extent that they are providing interstate telecommunications services" -- which are further defined as "communications provided on a common carrier basis." See Report and Order, CC Docket No. 96-45, FCC 97-157, at para. 781-82 (rel. May 8, 1997) ("Order"). Because the provision of access to a satellite transponder is not the provision of "telecommunications" under the Act (let alone common carrier service), we understand the Order not to reach this activity. However, clarity on this subject is crucial to satellite operators and their customers. Although the affected revenues

are trivial from the overall perspective of the fund -- in the tenths of a percent -- the direct impact on this specialized industry could be disproportionately large. As discussed below, neither Section 254 nor sound policy justify reaching bare space segment. This and related points should be clarified or reconsidered, as discussed below.

I. BACKGROUND: DISTINGUISHING A SATELLITE COMPANY'S DIFFERENT LINES OF BUSINESS.

It is important to keep in mind that most satellite space station licensees engage in essentially two different lines of business. 1/ First, and most important, they operate spacecraft, managing the process by which satellites are designed, built, launched, controlled and operated in space, and replaced at the end of their working lives. This activity typically involves the commitment of \$150-300 million per satellite. Satellite companies financially support their spacecraft operations business from the revenues generated by contracts with customers who need to use transponders on the space stations for their own communications purposes, but who do not have expertise in satellite management themselves. 2/

1/ The fact that this activity may be done through one corporate entity is not relevant. Clearly firms may engage in both telecommunications and non-telecommunications activity without exposing their total revenue to universal service support obligations.

2/ Satellite operation involves highly specialized skills due to the technical complexity of satellite engineering, as well as unique requirements for coordination with other spacecraft and compliance with federal and international regulations. These skills are involved at every stage of a satellite's life, from initial design and authorization, through construction and launch, during management of the satellite in space, and through the process of replacement and decommissioning.

Typically these space segment contracts are for extended periods of years, and often they run for the entire working life of spacecraft. Furthermore, it is common for satellite companies and transponder customers to enter into these contracts well before a spacecraft is even launched. Customers require the certainty of knowing in advance that this element of their communications networks will be available. Operators are benefited because they can maximize the value of the spacecraft by designing it to meet the particular needs of the customers who will use it. ^{3/}

Importantly, however, it is the transponder space segment customer that actually uses the transponder to engage in telecommunications. The transponder itself is nothing more than a repeater that happens to be located over 22,000 miles above the equator. The customer decides how to use that repeater capacity in order to communicate. The customer separately arranges earth station services to transmit to the repeater, other earth stations to receive the signals that the customer directs to them, and additional terrestrial links to take communications to and from the earth stations. In that way the customer: (1) creates a transmission path of its own design; (2) manages that transmission path; and (3) distributes information over that path. The customer may act on its own behalf, develop transmission paths and distribute information for third parties, or do both. The responsibility of the satellite operator, on the other hand, is limited to

^{3/} See Domestic Fixed Satellite Transponder Sales, 90 FCC 2d 1238 (1982), aff'd sub nom. Wold Communications Inc. v. FCC, 735 F2d 1435 (D.C. Cir. 1984).

making sure that the satellite transponder used by the customer is available and working properly.

Confusion may arise because satellite companies also engage in a second line of business. These companies generally go beyond their role as spacecraft developer and provide telecommunications themselves, using some of their own transponder space segment. GE Americom, for example, operates several earth stations that, together with other network elements, are used to transmit customer information “between and among point’s specified by the user.” In these circumstances Americom is engaged in “telecommunications” as defined by Section 3(43) of the Communications Act.

Any consideration of the application of Section 254(d) to satellite companies must distinguish between these two lines of business. The provision of access to satellite transponders is fundamentally different from the provision of telecommunications. GE Americom accepts that when a satellite company engages in common carrier telecommunications services, universal service contributions are required based on revenue received from such services. However, the Order is not as clear as it could be that support obligations do not apply to revenue from non-common carrier satellite telecommunications activity.

Finally, and most importantly, the Order does not mention revenue from transponder space segment contracts where the satellite company does not engage in telecommunications at all. This may be because such activity is clearly and by definition entirely outside the scope of Section 254(d). However, because

some language in the Order could be misinterpreted, clarification on this important matter is appropriate.

II. THE COMMISSION SHOULD CLARIFY THE SCOPE OF THE UNIVERSAL SERVICE SUPPORT OBLIGATIONS OF SATELLITE COMPANIES.

A. Only Common Carrier Satellite Services Contribute.

GE Americom and other satellite operators participated in this proceeding, generally supporting the recommendations of the Joint Board. ^{4/} The Board had recommended “adoption of the TRS approach,” stating that contribution should be drawn from firms “to the extent that these entities are considered ‘telecommunications carriers’ providing ‘interstate telecommunications services’ . . .” The Joint Board’s approach thus would have reached the “mandatory contributors” identified by Section 254(d). Conversely, the Board would not have reached other activity falling within the “permissive” zone of the statute -- let alone activity outside of the statute altogether.

This approach was acceptable to satellite companies like GE Americom. It would have reached common carrier services provided using satellites, whether by the operator itself or some other party. On the other hand, it would not have reached situations in which the satellite company provided telecommunications on a non-common carrier basis. This line drawing is fair and consistent with the rationale of Section 254. Congress adopted that provision in

^{4/} See, e.g., GE Americom Comments at 3.

order to reform the existing universal service support system for the PSTN, and thereby facilitate local telephone competition. Satellite companies, however, do not provide local services and, when they engage in non-common carrier telecommunications, have no nexus whatsoever to the PSTN.

The Order here went beyond the Joint Board approach and cast the net for contributing revenues more broadly. The Order does not stop at revenues from “telecommunications services” -- revenues covered by the mandatory language of Section 254(d). The Order also generally reaches revenues from “other providers of telecommunications” -- which the Act authorizes the Commission to include “if the public interest so requires.” 5/

However, not all revenue from “other providers” is covered. GE Americom understands the Order to accept the principle that only satellite telecommunications services provided on a common carrier basis are subject to the contribution requirement. Specifically, in paragraph 781 of the Order the Commission expressly states its intention to “clarify the scope of the contribution obligations for “satellite” and “video” services” The Commission notes that “the Joint Board concluded that satellite operators should contribute to universal service to the extent that they provide ‘telecommunications services.’” The Commission agrees: “We adopt the Joint Board’s approach and clarify that satellite and video

5/ 47 U.S.C. § 254(d).

service providers must contribute to universal service only to the extent that they are providing interstate telecommunications services.” 6/

There is no dispute that provision of “telecommunications services” means the provision of telecommunications on a common carrier basis. The definition of “telecommunications services” in Section 3(46) of the Act expressly incorporates the conventional understanding of a common carrier by referring to the offering of “telecommunications for a fee directly to the public.” 7/ Furthermore, the Order goes to give specific examples that apply this distinction: Examples of satellite and video services provided “on a common carrier basis . . . would contribute to universal service;” non-common carrier services would not. 8/

The only ambiguity in the Order comes at the close of paragraph 796. In this paragraph the Commission exercises its “permissive” authority to, as a general matter, require universal service contribution from entities providing telecommunications on a private contractual basis.

However, GE Americom understands that this general rule is subject to the previous express clarification of the obligations of satellite and video service providers -- and therefore that satellite and video revenues from non-common carrier telecommunications are not covered. Paragraph 796 closes by “reiterat[ing] that” certain satellite and video telecommunications “would not be required to

6/ Order at ¶781.

7/ 47 U.S.C. §3(46).

8/ Order. at ¶781.

contribute pursuant to our permissive authority to require contributions from providers of interstate telecommunications.” GE Americom understands that this “reiteration” also should be read to include and exempt the other forms of non-common carrier satellite and video telecommunications covered previously in the specific paragraph dealing with this issue. 9/ The Commission should make this clarification.

B. Provision of Access to Transponder Space Segment is Not “Provision of Telecommunications” and is Outside Section 254(d) Altogether.

In the course of this proceeding several satellite companies asked the Commission to make clear in its Order that when they operate spacecraft and make access to transponders on the spacecraft available to others, that activity is not “telecommunications” for purposes of Section 254(d) at all. 10/ The Order does not address this subject. 11/

9/ In that regard, we agree with the Commission that the list of common carrier and non-common carrier satellite and video telecommunications set forth in Paragraph 781 “is not exhaustive.”

10/ See Ex Parte Letter of GE American Communications, Inc.; PanAmSat Corporation; DIRECTV, Inc.; Hughes Communications Galaxy, Inc.; and Orion Atlantic (April 24, 1997).

11/ The Commission may have concluded that there was no need to identify and exclude all of the many categories of activities that do not fall within the scope of being a “provider of interstate telecommunications” and therefore do not fall within Section 254(d).

GE Americom does not believe that this issue is open to serious dispute. However, the reason we asked for this clarification in the first place was to avoid any possibility of later disputes among the satellite industry, space segment customers and the Commission. The practical reality is that we already have existing contracts for lengthy terms covering access to most of our satellite space segment. The Order gives companies with long-term contracts and universal service contribution obligations the right to reopen such contracts and increase charges to customers in order to flow through contribution expenses. ^{12/} Satellite companies face a dilemma: we must know with certainty whether this is a right we should exercise or not. Assuming not, then the status quo continues. But if the Commission would in any respect apply Section 254(d) to the provision of access to space segment, then we need to know this now so that we can take appropriate action to obtain reimbursement of those charges from customers.

1. The Definition of “Telecommunications”

This issue is resolved immediately by reference to the statutory definitions added to Title 47 by the Telecommunications Act of 1996. The Commission has no authority, under Section 254(d), to require universal service contributions from parties that do not provide “telecommunications.” As noted above, Section 3(43) defines “telecommunications” as the “transmission, between and among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”

^{12/} Order, ¶ 851.

However, satellite companies do not engage in any such “transmission” when they make available and maintain the network component consisting of a repeater at the spacecraft. By itself, access to transponder space segment capacity is nothing. The user of space segment must also obtain other network components to create a transmission path, including earth stations and other terrestrial facilities. The space segment user must configure and manage the transmission path for itself. The user creates transmission paths between any points of its choosing, with no intervention or involvement of the satellite operator whatsoever. And that path may run between or among points anywhere within the footprint of the satellite, which can be as large as the entire United States.

This does not mean that Section 254(d) has no application to satellite communications. But the focus must be on whether the party using the space segment is engaged in “telecommunications,” and if so, whether Section 254(d) applies to that party. For example, once Firm X has assembled all the necessary network components to create a transmission path (including -- but by no means limited to -- the transponder), then Firm X can “transmit” over that path. That is, Firm X can engage in “telecommunications” as defined by the Act. Firm X may use that path to provide “telecommunications services” as defined by the Act, in which case Firm X will be required to contribute to universal service. In other cases Firm X may use the path only for internal communications. The Commission has decided not to seek universal service support from “private network operators that

serve only their internal needs.” ^{13/} We agree with that decision. But having done so, the Commission obviously could not reach back and seek contribution from suppliers of components for such private networks when such components do not themselves constitute “telecommunications.” This would violate Section 254.

2. Consistency and Competitive Equity.

Even leaving aside the strictly legal point, it would be arbitrary to seek universal service contribution from the supplier of one network component but not the supplier of others. The offering of bare transponder space segment capacity is closely analogous to other non-telecommunications offerings which enable customers of those offerings to provide “telecommunications” as defined by the Act, either for their own internal needs or to sell to others. For example, switch manufacturers like Lucent and Northern Telecom offer long term leases of telephone switching equipment to local and long distance telephone companies and others. These arrangements often provide for installation, maintenance, upgrades, repair and other services related to making the switch available for use by the customer. Similarly, companies like Kiewit and Tyco construct, respectively, fiber networks and submarine cables for use by others; these construction offerings often also include ongoing maintenance responsibilities.

The distinguishing factor is that these offerings, like transponder space segment, constitute network components that enable customers to provide telecommunications for themselves or for others. But none of these offerings

^{13/} Id., ¶ 799.

standing alone constitute “transmission . . . of information.” ^{14/} One goal of the Commission is to adopt universal service rules that will be competitively neutral. To achieve that goal, however, the Commission cannot treat developers of different technologies differently. To the extent that a company is not engaged in “telecommunications” itself, revenues it receives from operations may not be required to contribute. ^{15/}

3. Customer Impact.

Finally, the Commission should keep in mind the practical impact on customers here. As noted above, space segment is already committed under long

^{14/} The older term “common carriage” has two elements: the offering must be “common,” that is, offered for a fee indiscriminately to the general public; and it must be “carriage,” that is, a form of transmission (or movement) of information. “Private carriage” is not “common” but is still carriage. The original “common carriers” were wagon drivers, ferry operators, and others responsible for transporting people or goods, upon whom the common law imposed a higher degree of care than ordinary bailees. They were not the wheel manufacturers, wagon assemblers, or others who provided essential elements and services to the common carriers. See Sir William Jones, *An Essay on the Law of Bailments* at 91 (London, 1781) (3d ed., Nichols, ed., London, 1823, avail. in Library of Congress Law Library at call no. “Law, A&E Treat., Jones”) (citing *Coggs v. Bernard*, 2 Ld. Raym. 909 (1705)); Oliver Wendell Holmes, *The Common Law* 143-162, 177-78 (1881) (Howe ed. 1963).

^{15/} The Order does not address whether or not dark fiber constitutes “telecommunications,” but the same principles should apply. In any event, however, transponder capacity offered by satellite operators can be distinguished even from dark fiber. Dark fiber providers deploy a network facility that by definition establishes a path between or among specific points. By contrast, the offering of the use of transponder capacity, without the earth stations used to transmit and receive data between specific points, does not facilitate the movement of information between specific points selected by the user, because it can be used anywhere within its footprint if the user supplies the necessary transmission network facilities.

term contracts running for as long as the life of a satellite, and even covering the life of satellites that are not yet launched. To the extent that the space segment is subjected to a contribution requirement, satellite operators will have no choice but to reopen those contracts and pass the unexpected and unplanned for charge through to customers.

This problem is likely to be far smaller elsewhere. It is worth noting the fundamental difference between the satellite industry and every other industry that will contribute to universal service. In the ordinary case the Commission is dealing either with industries who already are contributing to universal service through a different mechanism, or for whom any new charge can easily be recovered through new rates charged to customers who do not have a contractual provision regarding rate stability. In short, the contribution cost can be easily spread across the carrier's entire customer base and recovered in the ordinary course, with no material distortions of customer expectations or cost burdens. To the extent that those companies have preexisting term contracts at fixed prices, two factors ameliorate the situation and may make it less necessary to reopen those contracts. First, the term contracts are generally a very small percentage of the carrier's overall revenue, so even without modifying those contracts providers could avoid materially distorting new customer rates when recovering the overall universal service cost. Second, the terms of the fixed price contracts themselves are likely to be relatively short, so the industry can adapt relatively quickly even there.

In contrast, the satellite industry uniquely involves a disproportionate percentage of very long term space segment contracts -- entered into with no

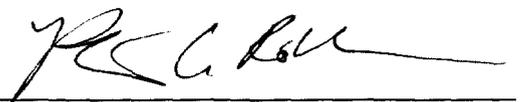
contemplation of universal service contributions -- that will continue in place for years to come. If space segment revenues must contribute, then satellite companies will face a significant new cost of doing business, without a ready way to recover that cost except to reopen existing contracts. While we appreciate the Commission's actions to grant us the right to do so, the far better course is not to impose this burden on either us or our customers, who each made investment decisions supporting the nation's current fleet of satellites without this obligation in mind. Of course, this is all the more true since imposition of such an obligation would be inconsistent with Section 254.

III. CONCLUSION

GE Americom seeks clarification regarding the contribution obligations of satellite companies so that there will be no disputes later among such companies, their customers and the Commission. We ask the Commission to clarify its Order on these points, and reconsider its Order to the extent that any decisions made there are inconsistent with our interpretation.

Respectfully submitted,

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July 17, 1997

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I, hereby certify that on this 17th day of July, 1997, I caused to be served by hand delivery, copies of the foregoing Petition for Clarification or Reconsideration of GE American Communications addressed to the following:

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