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August 21, 1997

HAND-DELIVERED

DOCKET FILE COPY ORIGINAL

William F. Caton
Acting Secretary
FEDERAL COMMUNICATIONS COMMISSION
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: *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, FCC 97-252, released July 18, 1997 (Further Notice of Proposed Rulemaking in IB Docket No. 96-111) (DISCO II)*

Dear Mr. Secretary:

On behalf of Orion Network Systems, Inc. ("Orion"), and pursuant to Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415, 1.419 (1996), I enclose herewith for filing an original and four (4) copies of its Comments In Response to Further Notice of Proposed Rulemaking in the above-captioned proceeding.

Kindly stamp and return to this office the enclosed copy of this filing designated for that purpose. You may direct any questions concerning this material to the undersigned.

Respectfully submitted,



Eric T. Werner

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

AUG 21 1997

In the Matter of)
)
Amendment of the Commission's Regulatory)
Policies to Allow Non-U.S.-Licensed Space)
Stations to Provide Domestic and International)
Satellite Service in the United States)
)
and)
)
Amendment of Section 25.131 of the)
Commission's Rules and Regulations to)
Eliminate the Licensing Requirement for)
Certain International Receive-Only Earth)
Stations)
)
and)
)
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)

IB Docket No. 96-111

CC Docket No. 93-23
RM-7931

File No. ISP-92-027

To: The Commission

**COMMENTS OF ORION NETWORK SYSTEMS, INC.
IN RESPONSE TO FURTHER NOTICE OF PROPOSED RULEMAKING**

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SUMMARY

As the first separate satellite system to seek authority from the FCC to compete against Intelsat, Orion has long promoted the benefits of an open, competitive marketplace in international satellite services. When the Commission commenced this proceeding a year ago, Orion supported the Commission's initiative, and also supported the parallel efforts of the United States Trade Representative to achieve the same objective through multi-lateral negotiations. Now that the USTR's efforts have yielded an agreement, Orion agrees that it is appropriate to reconcile the Commission's market access proposals with terms of the new global pact.

Orion supports the Commission's proposals in the Further Notice to harmonize its earlier proposals in this proceeding with the obligations undertaken by the United States in the recently concluded WTO agreement on basic telecommunications services. While holding out the carrot of U.S. market access, the proposals appropriately preserve the Commission's ability to wield the stick against non-WTO countries who seek the benefits of U.S. market access while nevertheless restricting access to their own markets. More importantly, the Commission's proposals also strike the appropriate balance between respecting the commitments made by the U.S. in Geneva, while preserving the Commission's ability to apply other public interest considerations -- including U.S. antitrust laws and the Communications Act -- to respond to entry proposals which threaten serious distortions in competition.

Finally, Orion particularly supports the Commission's proposals concerning U.S. market access by future IGO affiliates. The Commission noted that the unique relationship these entities have with their parent IGOs present a heightened risk of abusive marketplace

conduct and anti-competitive effects. Accordingly, Orion urges the Commission to scrutinize requests for U.S. market access from these entities with particular care.

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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
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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
)	
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-92-027
)	

To: The Commission

**COMMENTS OF ORION NETWORK SYSTEMS, INC.
IN RESPONSE TO FURTHER NOTICE OF PROPOSED RULEMAKING**

ORION NETWORK SYSTEMS, INC. ("Orion"), by its attorneys, and pursuant to Section 1.415 of the Commission's rules, 47 C.F.R. § 1.415 (1996), hereby submits its Comments in response to the Federal Communications Commission's ("FCC" or "Commission") Further Notice of Proposed Rule Making ("Further Notice") in the proceedings captioned above.^{1/}

^{1/} *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*, FCC 97-252, released July 18, 1997 (Further Notice of Proposed Rule Making in IB Docket No. 96-111, CC Docket No. 93-23, RM-7931, and File No. ISP-92-007) ("Further Notice").

I. INTRODUCTION

1. Orion welcomes the opportunity to comment on the FCC's most recent proposals in this proceeding. As a pioneer among private international communications satellite operators, Orion has long endeavored to bring the benefits of competition to its customers in the United States and abroad. However, too often in the past, Orion and other private U.S. licensed satellite operators have encountered difficulty in achieving free and open access to many overseas markets encumbered by regulatory barriers to entry, exclusionary arrangements with other service providers, and other obstructionist trade policies.

2. Accordingly, when the Commission a year ago first proposed a set of policies designed to facilitate entry to the U.S. satellite services market by foreign-licensed operators while simultaneously encouraging the opening of those foreign markets on a reciprocal basis,^{2/} Orion embraced the proposals and participated actively in the proceeding.^{3/} In this same spirit, Orion supported the concurrent efforts of the United States Trade Representative ("USTR") in the World Trade Organization ("WTO") discussions concerning Basic Telecommunications Services to negotiate a multilateral agreement to achieve the same

^{2/} See *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*, 11 FCC Rcd 18178 (1996) (Notice of Proposed Rule Making in IB Docket No. 96-111) [*"DISCO II Notice"*].

^{3/} See Comments of Orion Network Systems, Inc., in IB Docket No. 96-111, CC Docket No. 93-23 (RM-7931), and File No. ISP-92-027, filed July 15, 1996 [*"Orion Comments"*]; see also Reply Comments of Orion Network Systems, Inc., in IB Docket No. 96-111, CC Docket No. 93-23 (RM-7931), and File No. ISP-92-027, filed August 16, 1996 [*"Orion Reply Comments"*].

market access objectives under the auspices of the General Agreement on Trade in Service ("GATS").^{4/}

3. The WTO Agreement on Basic Telecommunications Services ("WTO Agreement") reached February 15, 1997, has yielded affirmative commitments from sixty-nine countries representing ninety-five percent of all global telecommunications revenues.^{5/} All but twenty of these participating nations have obligated themselves to opening their markets completely to competition in satellite services by January 1, 1998, or thereafter on a phased-in basis.^{6/} Accordingly, in light of this significant and laudable achievement, it is fitting that the Commission revisit its original proposals in the *DISCO II* proceeding to harmonize them with the U.S.'s new obligations under the WTO Agreement.

II. ORION SUPPORTS THE COMMISSION'S EFFORTS IN THE FURTHER NOTICE TO HARMONIZE ITS *DISCO II* PROPOSALS WITH THE PRO-COMPETITIVE INITIATIVES ADOPTED IN THE WTO AGREEMENT ON BASIC TELECOMMUNICATIONS SERVICES

4. Orion concurs with the Commission's observation in the Further Notice that the WTO Agreement will have an unprecedented impact in opening world telecommunications markets to competition, and that it promises to advance substantially the

^{4/} General Agreement on Trade in Services, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B I.L.M. 1167 (1994). Orion executives participated in a private sector delegation to Geneva to consult on the negotiations, and Orion's chairman authored a letter in support of the agreement. In addition, Orion participated domestically before the Office of the USTR, filing comments relative to the USTR's efforts at the WTO. See Comments of Orion Network Systems, Inc., Concerning Negotiations on Basic Telecommunications Services at the World Trade Organization, filed August 1, 1996.

^{5/} See Further Notice, slip op. at 6 ¶ 10.

^{6/} *Id.*

FCC's goal of promoting competition in satellite services both in the U.S. and overseas.⁷¹

Orion is very familiar with the terms of the commitment advanced by the United States in the WTO negotiations as well as with the commitments offered by the other participating countries. As noted above, Orion was deeply involved in the WTO process and was very supportive of the WTO negotiations. Indeed, Orion's Senior Vice President for Law and Administration and its Director of Regulatory Affairs both travelled to Geneva with a private sector delegation which consulted with the USTR on the ongoing negotiations.

5. While Orion recognizes that the WTO process may not have achieved the optimum level of liberalization in every WTO country, the WTO Agreement is a dramatic development that creates a positive framework for future liberalization and should be encouraged. Moreover, at least with respect to its participating nations, including the United States, the WTO Agreement creates legally binding obligations which must be respected. Thus, to the extent that the Commission's previous proposals in this proceeding diverge from the U.S.'s commitments in the WTO Agreement, they must be conformed to the WTO regime. Accordingly, Orion supports the Commission's proposal generally to waive application of the ECO-Sat test proposed in the *DISCO II Notice* with respect to, and afford streamlined review to, applications by satellite operators licensed by WTO Agreement participants to provide covered services in the United States or between the U.S. and a country participating in the WTO Agreement.

6. While concurring with this liberalized access regime for participants in the WTO Agreement, Orion also supports the Commission's proposal to reserve the possibility of denying access where an opposing party can demonstrate that approval of the application

would present a "very high risk to competition."^{8/} Orion anticipates that most applications submitted by operators licensed by a WTO member to provide service between the U.S. and a WTO member destination would present little, if any, such risk. Nevertheless, Orion can envision circumstances where such an additional safeguard would be appropriate, and the Commission should preserve its discretion to employ such a response where necessary.^{9/} Moreover, the Commission's proposal is consonant with appropriate limitations placed on the U.S.'s offer in the WTO negotiations. Thus, it does not run afoul of the U.S.'s international obligations.

7. With respect to "non-WTO member satellites" -- *i.e.*, satellites authorized or operated by those countries which did not agree to open their markets to competition under the WTO Agreement, and with which the United States does not have a separate bilateral trade agreement, the U.S. owes them no duty to afford them market access. Accordingly, the Commission's proposal to apply a separate and more rigorous standard -- *i.e.*, the ECO-Sat test -- to this class of applicants is entirely warranted.^{10/} Because the obligations and remedies available under the WTO are not available to assure free and fair competition with respect to these countries, the Commission must rely on other safeguards, and should employ any leverage within its authority to encourage these countries to open their markets. The ECO-Sat test is a valuable tool toward this end.

^{8/} Further Notice, slip op. at 9 ¶ 18.

^{9/} Though it should not be limited to such applicants, such a safeguard would be especially appropriate in the context of entry by IGO affiliates. *See, infra*, Section III.

^{10/} *See* Further Notice, slip op. at 10-11 ¶¶ 23-24.

8. In its previous comments in this proceeding, Orion discussed at length its support for the Commission's proposed "two-prong" methodology for applying the ECO-Sat test which would examine both the home and the route markets of the applicant foreign system.^{11/} Orion continues to believe that the home and route market analysis is appropriate. Certainly, analysis of the home markets of satellites licensed by non-WTO member countries would always be in order regardless of whether the route market is a WTO or non-WTO member: Absent a home market analysis, the Commission would have no relevant basis for evaluating the accessibility of a non-WTO member's market, or for exercising any leverage to persuade those countries with closed markets to open them. The route market analysis thereafter serves to provide additional relevant evidence to corroborate or attenuate the conclusions to which the home market analysis may lead. Thus, where a non-WTO member which erects market barriers to U.S.-licensed systems proposes to provide service from the U.S. via one of its satellites to another nation which also excludes U.S. operators, it would be difficult to discern any justification for granting such an application. By contrast, depending on the degree of exclusion of U.S. operators practiced by the home market administration, circumstances may give rise to a policy justification to grant the application where the non-WTO member system proposes to serve a WTO member route market destination.

9. In the Further Notice, the Commission also anticipates that the United States may, in the future, enter into bilateral agreements with other countries governing the

^{11/} See Orion Comments at 6-12. In these comments, Orion specifically discuss, among other things, the relative advantages of the two-prong approach over a "critical mass" approach. *Id.* at 8.

provision of satellite services.^{12/} The Commission notes, as an example, the recently concluded agreement with Mexico and proposes to accord such agreements the same status as that proposed for the WTO Agreement.^{13/} Orion supports the Commission's proposal; however, Orion further reminds the Commission that, when undertaking such negotiations toward a bilateral agreement, such discussions should be conducted expeditiously and services should not be halted during the interim. The U.S.-Mexico negotiations concerning fixed satellite services ("FSS"), for example, took six months to negotiate. While those talks were underway, the Commission held in abeyance all earth station applications to communicate with the Mexican Telecomm system. Such a freeze policy has affected Orion's and other U.S. licensed entities' ability to obtain licenses for current services which they intend to provide via the Telecomm system. The FCC could facilitate delivery of such needed services during the pendency of such negotiations by granting special temporary authority ("STA") to operate while the talks are underway.

10. Finally, Orion applauds the Commission's recognition that, notwithstanding their other considerable privileges and immunities, the intergovernmental satellite organizations ("IGOs") are not embraced by the WTO Agreement and, thus, are not entitled to the market access, national treatment, or most-favored-nation obligations which flow to

^{12/} See Further Notice, slip op. at 12-13 ¶¶ 29-30.

^{13/} *Id.* The Commission makes the critical assumptions that "such agreements would give U.S. satellite operators market access to that country on a national treatment basis, protect our ability to manage spectrum efficiently through our technical requirements, and ensure that other important public interest objectives are met." *Id.*, slip op. at 12 ¶ 29. Orion's support of the Commission's proposal herein is predicated on the existence of these minimal facts.

WTO Agreement participants.^{14/} In its initial comments and reply comments in this proceeding, Orion observed that the multiplicity of difficult issues presented by the IGOs warranted individualized attention in a separate rule making proceeding.^{15/} The WTO Agreement did change or address these difficult issues in any meaningful way. Accordingly, Orion renews its recommendation that the Commission undertake a thorough examination of the IGO issue in a separate proceeding.

III. CONSISTENT WITH THE ASSURANCES PROVIDED BY THE UNITED STATES TRADE REPRESENTATIVE, THE FCC SHOULD CAREFULLY SCRUTINIZE REQUESTS FOR U.S. MARKET ACCESS BY FUTURE IGO AFFILIATES TO ASSURE THEY WILL NOT PRODUCE SERIOUS DISTORTIONS OF COMPETITION

11. Without diminishing its general support for the general framework the Commission has proposed in the Further Notice to give effect to the WTO Agreement in its policies and rules, Orion wishes to highlight, and express its unqualified support for, the Commission's proposal relative to the treatment of future IGO affiliates under the regime created by the WTO Agreement. Specifically, while acknowledging that, as private entities, IGO affiliates would presumptively be entitled to the treatment afforded to their country of incorporation under the WTO Agreement,^{16/} the Commission also took notice of the fact that "the unique relationship between intergovernmental satellite organizations and their

^{14/} *Id.*, slip op. at 13 ¶ 32.

^{15/} *See* Orion Comments at 12-16; Orion Reply Comments at 7-10.

^{16/} Further Notice, slip op. at 14 ¶ 35. Thus, if an IGO affiliate were incorporated in a WTO member country, it would be entitled to the same national treatment and most favored nation rights afforded to other WTO member corporations.

affiliates provides an opportunity for behavior that could pose a very high risk to competition in satellite services to, from, and within the United States."^{17/}

12. In point of fact, this IGO/affiliate relationship, and the potential for competitive mischief arising therefrom, formed a central issue of concern during the negotiations. Parties expressed concern that the restructuring process was evolving in a manner which suggested that the ostensible independence of the new spin-off from its parent was illusory and was unlikely to produce pro-competitive results. Rather than establishing *bona fide* private entities that had to compete for capital, equipment, and orbital locations on an equal footing with other operators, parties were concerned that the IGOs were leveraging their public market power into a private monopoly by, among other things, spinning off to the affiliate existing assets, orbital locations, and market position obtained pursuant to the parent's special status,^{18/} and by other types of collusive behavior and cross-subsidization.^{19/} Owing to these concerns, the United States took the position in the WTO

^{17/} *Id.*

^{18/} As the Commission noted in the *DISCO II Notice*, the IGOs, Intelsat and Inmarsat, and their signatories such as COMSAT,

enjoy certain privileges and immunities that may provide them with competitive advantages over competing satellite service providers. For example, they hold tax free status and may be exempt from national regulations, and competition laws. They also have established dominant positions in the global market by virtue of their size and of the fact that, in general, their members are the primary if not exclusive providers of fixed and mobile maritime services in most major national markets.

DISCO II Notice, 11 FCC Rcd 18178, 18199 ¶ 62 (1996).

^{19/} These spin-offs' ability, by virtue of their unique relationships with the IGOs, to utilize preferential access to financing and coordination of slots to add value only serves to

(continued...)

negotiations that, while it would generally not subject to an ECO-Sat test IGO affiliates who are companies of WTO member countries, it would nevertheless retain the ability to enforce U.S. antitrust laws, regulations, and policies and, where necessary, deny access, in order to prevent disruptions to competition, and would scrutinize carefully the applications of IGO spinoffs to assure that such affiliates were structured so as to sever this umbilical connection.

13. Indeed, the USTR offered specific assurances to U.S. satellite operators that it, too, was "deep[ly] concern[ed] regarding the distortive impact on competition in the U.S. satellite services market of certain proposals for restructuring INTELSAT." The USTR further stated that:

We have also concluded that the United States cannot be forced to grant a license to a privatized ISO (should the ISO change its treaty status and incorporate in a country) or to a future privatized affiliate, subsidiary, or other form of spin-off from the ISO. Existing U.S. communications and antitrust law, regulation, policy and practice will continue to apply to license applicants if a GBT deal goes into effect. Both Department of Justice and FCC precedent evidence long-standing concerns about competition in the U.S. market and actions to protect that competition. We have made it clear to all our negotiating partners in the WTO that the United States will not grant market access to a future privatized affiliate, subsidiary or other form of spin-off from the ISOs, that would likely lead to anti-competitive results.^{20/}

14. Orion's support for the WTO Agreement was predicated in large measure on the assurances that the IGOs would not be permitted to disrupt genuine competition and

19/(...continued)

reinforce the conclusion that these ostensibly private progeny are born with a platinum spoon in their mouths.

20/ Letter from the Honorable Charlene Barshefsky, U.S. Trade Representative-Designate to Neil Bauer, President and Chief Executive Officer, Orion Network Systems, Inc., dated February 12, 1997 ["USTR Letter"] (A copy of the USTR Letter is appended hereto as Exhibit A.).

disadvantage other competitors merely by masquerading as privatized entities for the purposes of the WTO principles while retaining all of the trappings of their special privileged status. The Commission must aggressively police this issue to ensure that only *bona fide independent* affiliates of the IGOs are permitted access to the U.S. market.^{21/}

IV. THE COMMISSION'S PROPOSAL TO APPLY OTHER PUBLIC INTEREST CONSIDERATIONS TO ITS MARKET ACCESS ANALYSIS COMPORTS WITH THE UNITED STATES' OBLIGATIONS UNDER THE WTO AGREEMENT

15. In juxtaposition to its proposed general framework for application of the WTO Agreement in its decisions on whether and how to afford non-U.S. licensed satellite operators access to the U.S. market, the Commission also proposed to subject foreign satellite operators to certain other public interest considerations pursuant to Section 309(a) of the Communications Act.^{22/} Under the Commission's analysis, violations of the additional public interest criteria could lead to denial of an otherwise acceptable foreign satellite licensee's application to serve the United States.

16. Among the specific criteria the Commission has identified as relevant to this public interest component of its analysis are:

- general considerations -- including the applicant's competitive conduct and its character as manifest in the

^{21/} Moreover, neither the *DISCO II Notice* nor the Further Notice propose formally to define "affiliate" for the purposes of this inquiry. In this regard, Orion urges the Commission adopt a broad definition for what constitutes an "affiliate" and not to limit its examination to those entities under common ownership or control. Circumstances may arise where an IGO spin-off satisfies all of the requirements for *de jure* independence, yet nevertheless be able to behave in an anticompetitive fashion as a consequence of preferential contractual arrangements it may enjoy with the IGO signatory administrations who owned and controlled its creator.

^{22/} See Further Notice, slip op. at 15 ¶ 37.

applicant's candor and honesty,^{23/} national security, law enforcement, foreign policy, and trade concerns identified by the Executive Branch;

- spectrum availability and technical coordination;
- compliance with Commission rules and policies; and
- foreign ownership.

We address each of these in turn.

17. With respect to the first category, the Commission solicits comments on its proposal to condition or deny authorizations that implicate these general public interest concerns. Orion supports the Commission's proposal. As the USTR's Letter, quoted above, makes clear, these limitations on the U.S. offer were clearly set forth by U.S. negotiators during the WTO process. They were agreed upon in the context of the Reference Paper and the United States' established history of competition and anti-trust enforcement as a necessary corollary to the creation of a competitive, fair licensing environment. Moreover, to the extent that these criteria arise from a body of law which the Commission has long applied to its own licensees, they satisfy the national treatment standard of the WTO Agreement. Accordingly, the Commission should not hesitate to apply them, where appropriate, to non-U.S. licensed systems even as it does to U.S. licensed operators.

18. Orion also supports the Commission's implicit proposal to adopt a "first come, first served" policy with respect to spectrum assignments and technical coordination.^{24/} As

^{23/} The Further Notice specifically identified "adjudicated violations of U.S. antitrust law or other competition laws; fraudulent representations to governmental units; and criminal misconduct involving false statements or dishonesty" as conduct warranting denial of an authorization. *See id.*, slip op. at 15 ¶ 37.

^{24/} *Id.*, slip op. at 15-16 ¶ 38.

an initial matter, this is the predominant model used elsewhere throughout the world.

Moreover, it is a more efficient and equitable mechanism for spectrum allocation than efforts to reserve spectrum for particular users. Such arbitrary set asides run the risk of withholding spectrum from providers (U.S. and non-U.S. alike) who are prepared to make use of it sooner.^{25/} Moreover, because spectrum is often a scarce resource, such a warehousing scheme would place the Commission in the awkward position of deciding which of a group of U.S. licensed and non-U.S. licensed operators will be the lucky beneficiaries of the reservation.^{26/}

19. Historically, U.S. operators applying for licenses from the FCC have had to compete for available spectrum and coordination, and as the Commission's recent experience with the Ka Band licensing proceeding illustrates, the competition for the scarce resources is often tight. The national treatment principles of the WTO Agreement fully support the notion that non-U.S. systems seeking to enter the U.S. marketplace should be required to compete as well. They should be actively involved in the process, working with U.S. regulators and other operators, both foreign and domestic, to express their interest in U.S. market entry and to secure their position. Such is the burden U.S. operators have had to bear in their efforts to penetrate overseas markets.

^{25/} The "first come, first served" model is also a more effective means of resolving interference issues efficiently because it reduces the need to coordinate new systems against reserved systems that are entirely speculative.

^{26/} The difficulties in making such an allocation on a rational basis would be quite significant. Would the Commission, for instance, be called upon to reserve a specified segment of the spectrum for every eligible WTO member that sought entry? If not, then what governing distinguishing criteria should apply?

20. In its discussion of compliance with Commission rules and policies, the Further Notice advances a new requirement to supplement the proposal in the *DISCO II Notice* to require all non-U.S. systems to satisfy all of the Commission's technical and service rules in Parts 25 and 100 of the rules. Specifically, the Commission proposes alternatively either: (1) to impose upon non-U.S. systems the license condition, already applicable to U.S. operators, that forbids them from entering into exclusionary relationships with other countries for satellite capacity for a particular service or from acquiring rights to operate space or earth segment which are denied to other U.S. companies; or (2) to impose a more expansive license condition that would forbid the foreign-licensed operator from serving the U.S. market while it maintains an exclusionary agreement with any other foreign country.^{27/} In addition, the Commission proposes to enforce the condition by subjecting violators of the policy to license revocation.^{28/}

21. As a general matter, Orion supports the objectives of the Commission's proposal. Where exclusionary arrangements exist on a route-to-route or service-to-service basis, it would be desirable for the Commission to possess a mechanism to help pry open those barriers. That said, however, Orion is constrained to observe that, at least with respect to participants in the WTO Agreement, the Commission may lack the authority to impose such a license condition absent a showing that the exclusionary arrangement will create a "very high risk to competition" in the U.S. market. Accordingly, it may only be legally

^{27/} See Further Notice, slip op. at 16-17 ¶¶ 41-43.

^{28/} *Id.*

permissible to apply the condition to those authorizations which are not related to WTO members.^{29/}

22. Nevertheless, the Commission should adopt such a policy and apply it as broadly as is consistent with its obligations under the WTO agreement. This, the Commission should apply it to all non-WTO members; to as many of the WTO members as have signed on to the Reference Paper; and finally, should scrutinize closely the applications of those who have not signed on to the Reference Paper to ensure that they do not pose a very high risk to competition or implicate any of the other public interest concerns the U.S. has set forth as conditions on its offer in the WTO process.

23. Finally, with respect to the foreign ownership criterion of its public interest factors, the Commission observed that it had not, in the *DISCO II Notice*, proposed to require non-U.S. systems to seek a Title III license for its space segment or to hold the Title III license for the earth station that communicates with it.^{30/} Accordingly, the Commission observed the ownership restrictions of Section 310 of the Communications Act would not apply to foreign licensed systems.^{31/} While welcoming the liberalization of Section 310 implicitly effected by the WTO Agreement, Orion reiterates its previously stated support for the Commission's proposal not to require a foreign licensed system to obtain a dual Title III license from the Commission for its space station or for the earth station that would

^{29/} In any event, this proposal leaves unanswered the problem that exists when the exclusionary arrangement is informal in nature, *de facto* rather than *de jure*, supported only by a wink and a slap on the back rather than an express contract. Orion has encountered such *de facto* arrangements, particularly in relation to the protected access certain administrations afford to Intelsat.

^{30/} Further Notice, slip op. at 17-18 ¶ 45.

^{31/} *Id.*

communicate with its space segment. In its earlier comments in this proceeding, Orion recited the rationale supporting this approach, and those reasons have not changed:^{32/} The Commission cannot impose such a redundant licensing requirement upon on foreign-licensed operators entering the U.S. market without inviting those foreign administrations to impose a similar unnecessary burden on U.S.-licensed operators. Moreover, the respect that this approach accords to licensing decisions by foreign administrations is fully consistent with the WTO Agreement. In addition, as the Commission implicitly appears to recognize, such an approach would have the beneficial effect of making more capital available to all operators from a wider range of sources than in the past, an outcome which can only serve to enhance competition by strengthening the financial position of individual operators.

V. AS IN ITS INITIAL COMMENTS, ORION CONTINUES TO SUPPORT THE COMMISSION'S PROPOSAL TO CONSIDER ACCESS BY FOREIGN SATELLITE SYSTEMS IN CONNECTION WITH THE EARTH STATION LICENSING PROCESS

24. Finally, the Commission concluded its discussion by soliciting comments on a number of procedural matters relative to the consideration of foreign operators' requests for access to the U.S. satellite market. Specifically, the Commission reviewed its proposals in the *DISCO II Notice*, noting that it had eschewed a requirement that non-U.S. systems seek a separate license from the U.S. in favor of regulating access to the U.S. market through the earth station licensing process.^{33/} The Commission further observed that it had refined its proposal somewhat since following the initial comment cycle in this proceeding, and now proposed that non-U.S. systems would enter the U.S. market in one of three ways: (1) by

^{32/} See Orion Comments at 4; Orion Reply Comments at 10-11.

^{33/} Further Notice, slip op. at 18 ¶ 47.

filing a "letter of intent" to participate in a U.S. satellite processing round at the FCC; (2) by filing an earth station license application to participate in a satellite processing round at the FCC;^{34/} or (3) by filing an earth station license application outside of the context of satellite processing round.^{35/}

25. The Commission has requested comment on the appropriateness of these procedural proposals. In addition, the agency asks for input on whether it should revisit its proposals, set forth in the *DISCO II Notice*, concerning the waiver of licensing for, and blanket licensing of, receive-only earth stations.

26. In its initial comments filed in this proceeding, Orion expressed its support for the proposal to dispose of requests to access the U.S. market in the context of the earth station licensing process.^{36/} Consistent with those comments, Orion generally supports the Commission's present proposals with respect to the procedural avenues for consideration of foreign operators' requests to serve the U.S. market.^{37/} However, Orion suggests that the FCC incorporate adequate safeguards in its rules to assure that non-U.S. licensed systems electing the Commission's alternative, non-processing round option, will not be able to avoid

^{34/} In the first two of these categories, the Commission stated that its "primary consideration is how best to assign the orbit/spectrum resource among the competing space station applicants." *Id.*, slip op. at 18 ¶ 48.

^{35/} In this context, the Commission stated, its "primary consideration are (1) whether grant of the earth station license would cause technically unacceptable interference to other licensed operations in that band, and (2) whether the application would otherwise be consistent with [the Commission's] rules and policies for that particular satellite service." *Id.*, slip op. at 18-19 ¶ 49.

^{36/} See Orion Comments at 4.

^{37/} Indeed, in an informal presentation to the staff last year, Orion proposed something very similar to the "letter of intent" concept which the Further Notice advances.

the scrutiny and technical compliance obligations (*e.g.*, non-interference with adjacent systems) that participation in a processing round would provide.

27. With respect to blanket licensing of receive only earth stations, Orion strongly supports the Commission's proposal. Orion has found that for a large quantity of applications which are technically identical in most material respect, blanket licensing reduces substantially the burden on the FCC processing staff and, thus, it helps implement service more rapidly.^{38/}

VI. CONCLUSION

28. Orion commends the Commission for its disciplined effort to harmonize its proposals in this proceeding with the changes effected by the recently adopted WTO Agreement. While the WTO Agreement did not, and could not, achieve complete success in securing the opening of all markets on fair and equal terms, it nevertheless represents the most dramatic and effective development to date toward achieving that long sought objective. Orion was a strong supporter of the WTO process, and likewise supports the Commission's present efforts.

29. The Commission's proposals in the Further Notice, by and large, represent a well balanced attempt to embrace the obligations assumed by the United States under the framework of the WTO Agreement while reserving the power to address serious distortions

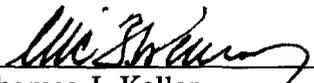
^{38/} Moreover, Orion believes that similar blanket licensing authority could be adopted as well in connection with certain transmit/receive earth stations. Orion has, in fact, informally circulated for review by the Commission staff an application seeking just such blanket licensing authority where the earth stations in question operate within a dedicated band of spectrum and, thus, do not present the same frequency coordination difficulties that arise in the shared bands. Such licensing should be acceptable provided the Commission receives the necessary information, *e.g.*, aeronautical information, and is specifically notified prior to the commencement of operations of a new earth station under the blanket license.

in competition caused by proposed foreign entrants and preserving a necessary structure for dealing with those countries which did not come forward with proposals to open their markets to U.S. operators. However, the Commission will have to exercise some care in carrying through on its proposals in the Further Notice to ensure that the procompetitive promise of the WTO framework is not lost in the implementation. Specifically, the Commission should devote particular attention to the requests for U.S. market entry which will no doubt come from the ISO affiliates to ensure that they do not undermine the important competition enhancing achievements of the WTO process.

Respectfully submitted,

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Date: August 21, 1997

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE
WASHINGTON, D.C. 20508

FEB 12 1997

Mr. Neil Bauer
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RECEIVED
FEB 12 1997
MR. NEIL BAUER

Dear Mr. Bauer:

I am writing in reply to a letter of January 31, 1997, from your legal counsel, regarding the negotiations on basic telecommunications services at the World Trade Organization. The U.S. goal in these negotiations is to strengthen the ability of the U.S. satellite services industry to compete globally, and on a level playing field, with the inter-governmental satellite services organizations and with satellite service providers of other countries.

The United States has taken a number of steps to make certain that our key trade partners provide market access for satellite-based delivery of basic telecom services. Based on a note issued by the chairman of the negotiations in November, 1996, which has become part of the formal record of the proceedings, we have clarified the scheduling approach with regard to satellites. As a result, close to forty countries have made offers that would provide full market access for satellite-based delivery of all scheduled services, on an immediate or phased-in basis.

WTO members that make specific commitments on satellites will be subject to allocating and assigning frequencies in accordance with the principles of most-favored-nation and national treatment, as well as in accordance with the requirement for domestic regulations in the General Agreement on Trade in Services. Almost all of the countries making full satellite commitments have also adopted the reference paper on pro-competitive regulatory commitments. As a result, they will be obligated to provide additional regulatory safeguards with respect to allocation and use of radio frequencies.

A successful agreement on basic telecom services would also obligate those countries which have not made satellite commitments to provide treatment no less favorable to satellite service providers of the United States than the treatment provided to service suppliers of other countries. This would apply, for example, to how WTO members reach decisions regarding new market access arrangements involving service suppliers of other countries.

I share your deep concern regarding the possible distortive impact on competition in the U.S. satellite services market of certain proposals for restructuring INTELSAT. The United States has proposed a restructuring of INTELSAT that would lead to the creation of an independent commercial affiliate, INTELSAT New Corporation (INC). If made independent, the United