company that owns a foreign-licensed satellite will be required to demonstrate compliance with all Commission technical and qualification rules before we will permit it to serve the United States. Furthermore, adoption of Columbia's suggestion would restrict U.S. satellite operators' rights to obtain satellite licenses in any country of their choice, thereby infringing on independent business strategies and decisions. Finally, Columbia or any other entity will be free to demonstrate that provision of service in the United States by a U.S. owned, but not U.S.-licensed satellite would cause competitive harm in the United States.

(3) Route Markets

Background

55. In the *Notice*, the Commission proposed to consider the "route market" -- that is, the country where the satellite transmission will originate or terminate[93] -- when determining whether to grant a non-U.S. satellite access to the United States. For example, if a non-U.S. satellite licensed in Country X proposes to provide service between the United States and Countries A and B, the Commission would perform an ECO-Sat test on Countries X, A, and B. If Country B fails, service between the United States and Country B would be prohibited. The rationale for this proposal is that, if the non-U.S. applicant were permitted to serve Country B, it would have a competitive advantage over U.S. providers unable to serve that market. Such an approach also would provide no incentive for Country B to open its market to U.S. operators.

56. In refining the route proposals after the WTO Basic Telecom Agreement, the Commission proposed that it would not need to perform an ECO-Sat analysis on route markets originating or terminating in WTO Members' territories (WTO route market). It recognized, however, that there may be cases where an earth station applicant will want to access a WTO Member satellite to provide WTO-covered services between the United States and non-WTO markets.[94] The Commission stated that applying an ECO-Sat test to the non-WTO route markets would allow us to promote effective competition through broader market access.[95] The Commission's rationale was that a non-WTO country has no obligation to open its telecommunications markets to the United States or any other country. Thus, applying an ECO-Sat test to non-WTO route markets would allow us to open U.S. markets in a manner consistent with the objective of promoting a competitive satellite market in the United States.[96]

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[93] *Notice* at ¶ 27.

[94] *Further Notice* at ¶ 25.

[95] *Id.* at ¶ 25.

[96] *Id.*

57. At the same time, however, the Commission recognized that this proposal could have negative implications regarding U.S.-licensed satellites. It would be contrary to the policy adopted in an earlier Commission decision[97] allowing any satellite licensed in the United States to provide service to any foreign country without additional Commission authorization.[98] If the Commission applied an ECO-Sat test to a non-WTO route, it might have to apply it to U.S. satellites seeking to serve non-WTO routes because of national treatment concerns, which would limit the flexibility of those licensees.[99]

58. As an alternative, the Commission proposed not to apply an ECO-Sat test in cases involving satellites licensed to WTO Members serving non-WTO routes, so as to afford these satellites the same flexibility as U.S. satellites.[100] In addition, it stated that concern regarding competition in non-WTO routes possibly could be remedied by prohibiting non-U.S. licensed satellites from entering into exclusive arrangements with the country in which they wish to operate -- a prohibition currently imposed on most U.S. licensed systems.[101]

Positions of the Parties

59. Most parties commenting on the *Further Notice* argue that the ECO-Sat test should not apply when a WTO satellite is serving a non-WTO route.[102] Generally, these commenters agree that if we were to apply the ECO-Sat test to non-U.S. satellites under the U.S. national treatment obligation, we might be obligated to apply the same test to U.S. companies -- a result the commenters oppose because it would defeat the objective of *DISCO*

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[97] *Amendment of the Commission's Regulatory Policies Governing Domestic Fixed-Satellite and Separate International Satellite Systems*, 11 FCC Rcd 2429 (1996) (*DISCO I*).

[98] *Further Notice* at ¶ 26.

[99] *Id.*

[100] *Id.* at ¶ 27.

[101] *Id.*

[102] COMSAT FNPRM Comments at 7-8; COMSAT FNPRM Reply Comments at 2, 4-5; European Commission FNPRM Reply Comments at 4; France Telecom Reply Comments at 5, note 4; GE Americom Comments at 3-5; GE Americom FNPRM Reply Comments at 1-3; GlobeCast FNPRM Comments at 3-4; Government of Japan FNPRM Comments at 2; Hughes FNPRM Comments at 8-9; Hughes FNPRM Reply Comments at 4; ICO FNPRM Comments at 12-15; ICO FNPRM Reply Comments at 4; Japan Sat FNPRM Comments at 2; Lockheed Martin FNPRM Comments at 4-5; Lockheed Martin FNPRM Reply Comments at 2, 6; Loral FNPRM Comments at 4-6; Motorola FNPRM Comments at 5 and n.12; PanAmSat FNPRM Comments at 4-5; Qualcomm FNPRM Comments at 4-5; Space Communications FNPRM Reply Comments at 7; Teledesic FNPRM Comments at 3-4. *Compare* Orion FNPRM Reply Comments at 3-4.

I and burden U.S. licensed systems serving non-WTO routes.[103] The Government of Japan requests that, with a view toward promoting multilateral liberalization and expanding the telecommunications market worldwide, we should ensure GATS consistency, especially national treatment, and not apply the ECO-Sat test in this context.[104]

60. Commenters generally advocate that instead of the ECO-Sat test, we should apply the presumption in favor of entry where a WTO-licensed satellite seeks to provide service to or from the United States, regardless of whether the route is a WTO Member or not.[105] Teledesic contends that, although it is theoretically possible for a foreign operator to gain a competitive advantage over U.S. operators by entering non-WTO routes that are closed to U.S. operators, based on the number and scope of the market access commitments in the WTO Basic Telecom Agreement, the likelihood is "insufficient to justify the re-regulation of international satellite services."[106] COMSAT specifically advocates that the corresponding burden on the opposing party to demonstrate a very high risk to competition apply as well.[107]

61. Columbia contends that, where a satellite is licensed by a WTO Member, and the entity that controls the satellite is from a non-WTO country that is the route market to be served, we should apply an ECO-Sat test to the non-WTO route market.[108] According to Columbia, a company from a country not subject to WTO requirements and dispute resolution procedures should not be able to avoid the ECO-Sat test simply by obtaining a license from a WTO Member.[109] Columbia asserts that this approach should help deter forum shopping by companies that benefit in their actual home markets from restrictive entry policies.[110] It claims that this approach would not violate national treatment because the same test would be applied if the foreign-controlled company sought a U.S. license directly to serve its non-WTO

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[103] *See e.g.*, COMSAT FNPRM Comments at 7-9; European Commission FNPRM Reply Comments at 4; France Telecom Comments at 5 n.4; Government of Japan FNPRM Comments at 2; Hughes FNPRM Comments at 8-9; ICO FNPRM Comments at 13; Motorola FNPRM Comments at 5 and n.12; Orion FNPRM Reply Comments at 3-4; Qualcomm FNPRM Comments at 4; Skybridge FNPRM Comments at 5; Teledesic FNPRM Comments at 3.

[104] Government of Japan FNPRM Comments at 2.

[105] *E.g.*, COMSAT FNPRM Comments at 8; GE Americom FNPRM Comments at 4; ICO Comments at 13.

[106] Teledesic FNPRM Comments at 3-4.

[107] COMSAT FNPRM Comments at 7-8.

[108] Columbia FNPRM Comments at 4-5. Thus, according to Columbia, an ECO-Sat test should apply, for example, where a space station is licensed in South Africa, controlled by an entity from China, and that entity seeks to provide service from the United States to China.

[109] *Id.* at 5.

[110] *Id.*

market.[111] Hughes disagrees, arguing that national treatment requires the Commission to afford all foreign-licensed satellites providing covered services the same opportunities that U.S. satellites are afforded under *DISCO I*.[112]

62. Some parties suggest methods for guarding against market distortions that could result from service to a non-WTO country by a WTO-licensed satellite. COMSAT states that we should grant such applications absent a demonstration that authorizing service between the United States and a non-WTO country would pose a very high risk to competition in the U.S. satellite market that could not be addressed by conditions on the grant of the authorization.[113] Several other parties suggest extension of the rule prohibiting U.S.-licensed satellites from entering into exclusive arrangements with non-U.S. satellites.[114] This would ensure that no satellite system of a WTO Member that provides service in the United States can gain an unfair advantage in any foreign market.[115] GE Americom points out, however, that in some markets, a *de facto* policy of exclusivity may exist even in the absence of an exclusive route agreement with the satellite services provider, and suggests that we consider this possibility in evaluating whether service to a given non-WTO route creates a risk to competition.[116]

63. PanAmSat supports not applying the ECO-Sat test to avoid creating a procedure "for a problem that may prove non-existent."[117] PanAmSat also recommends, however, that the Commission reconsider applying the ECO-Sat test to the route market if competitive disparities arise between U.S. licensees and other WTO Member licensees.[118] GE

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[111] *Id.*

[112] Hughes FNPRM Reply Comments at 4-5.

[113] COMSAT FNPRM Comments at 7-8.

[114] GlobeCast FNPRM Comments at 3; Hughes FNPRM Comments at 9; Hughes FNPRM Reply Comments at 5; Loral Comments at 6; Orion FNPRM Reply Comments at 3-4; COMSAT FNPRM Reply Comments at 5; Qualcomm FNPRM Comments at 4-5.

[115] Orion questions whether we have the authority to impose such a prohibition on WTO Members, absent a showing that the exclusive arrangement will have a "very high risk to competition." Orion FNPRM Comments at 14-15. We disagree. *See infra* Section III.B.4.a.

[116] GE Americom FNPRM Comments at 4. Orion supports this position. Orion FNPRM Reply Comments at 4.

[117] PanAmSat FNPRM Comments at 5.

[118] *Id.* at 5.

Americom, Orion, and COMSAT concur.[119] PanAmSat suggests further that if we were to apply the ECO-Sat test, we could employ a rebuttable presumption that the provision of service between the United States and a non-WTO route market by both U.S.-licensed satellites and other WTO Member satellites is in the public interest.[120] The presumption then could be overcome regarding a particular non-WTO route market upon a demonstration that U.S. licensees are not afforded access to such market. According to PanAmSat, if service to the non-WTO route market would not serve the public interest, then neither U.S.-licensed satellites, nor satellites licensed by other WTO Members, would be permitted to serve the route. PanAmSat contends that because the presumption would apply equally to U.S. licensed satellites and other WTO Member-licensed satellites, it would satisfy national treatment.[121]

Discussion

64. As suggested in the *Further Notice*,[122] and overwhelmingly endorsed in the record, we will not evaluate the effective competitive opportunities in the route market for non-U.S. satellites licensed by a WTO Member providing WTO-covered services. Thus, we will not perform an ECO-Sat test on *any* route, whether a WTO route market or a non-WTO route market. We take this approach for two reasons.

65. First, we do not currently evaluate the route markets served by U.S.-licensed satellite systems. In *DISCO I*, we permitted U.S. satellites to provide both domestic and international services according to their business plans, regardless of the route. The purpose of this approach was to provide licensees flexibility in system offerings and encourage development of global, innovative services for the benefit of U.S. consumers. That policy is equally compelling today and we will continue to follow it. Furthermore, as the majority of parties asserted, applying a route market analysis to non-U.S. satellites licensed by WTO Members providing WTO-covered services, while not doing so for U.S.-licensed satellites, could raise national treatment concerns. We find that we can further our procompetitive objectives and at the same time address any potential anticompetitive concerns resulting from service on a non-WTO route by prohibiting a non-U.S. licensed satellite from entering an exclusive arrangement with the country it wishes to serve, a restriction that currently applies to U.S.-licensed satellites as well.[123] Moreover, parties are free to raise concerns that entry by

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[119] GE Americom FNPRM Reply Comments at 8-9; Orion FNPRM Reply Comments at 4 n.9; COMSAT FNPRM Reply Comments at 5.

[120] PanAmSat FNPRM Comments at 5-6, n.10.

[121] *Id.*

[122] *Further Notice* at ¶ 28.

[123] We agree with Teledesic, for example, that the likelihood of competitive harm in the United States from a foreign operator serving non-WTO routes that are closed to U.S. operators is not sufficient to justify a change in our flexible regulatory policies.

the WTO satellite will create anticompetitive consequences in the U.S. market because of a closed route market.

66. Our second consideration relates to the GATS and the benefits of the WTO Basic Telecom Agreement. As described above, because all WTO Members are governed by the general obligations of the GATS, including MFN and transparency, the GATS provides some protection against discriminatory conduct on a route. In addition, increased competition in the global satellite market resulting from commitments in the WTO Basic Telecom Agreement, and the regulatory mechanisms available to us and our trading partners to guard against anticompetitive consequences, will help prevent harm to competition in the U.S. market.

67. Further, we find it unnecessary to adopt Columbia's suggestion that we apply an ECO-Sat analysis to a non-WTO route market where the satellite is licensed by a WTO Member and the controlling entity is from a non-WTO route market.[124] As previously discussed, we will look to the ownership of the satellite, rather than to the licensing administration, if we are presented with evidence that the licensing administration is simply a "flag of convenience" used to circumvent an ECO-Sat analysis.[125] Finally, we do not adopt a rule requiring us to apply an ECO-Sat analysis to the route market where competitive disparities arise between U.S. licensees and other WTO Members, as PanAmSat suggests, or a rule requiring us to consider *de facto* exclusivity in the absence of an exclusive route agreement, as GE Americom suggests. In all cases, where the presumption in favor of entry applies and we do not conduct an ECO-Sat analysis, opponents may demonstrate that entry will nevertheless pose a risk to competition in the United States, and in the exceptional case in which grant would pose a very high risk that cannot be cured by conditions placed on the license, we will deny the application. We will thus examine whatever potential competitive harms exist in this context, which is consistent with international agreements and should satisfy both PanAmSat's and GE Americom's concerns.

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[124] Columbia FNPRM Comments at 4-5.

[125] *See supra* Section III.B.1.a.2.

b. Non-WTO Member Satellites Providing WTO-Covered Services

(1) General Framework

Background

68. In the *Notice*, the Commission proposed to examine "effective competitive opportunities" in both the foreign "home market" of the non-U.S. satellite and "route markets" to which service from a U.S. earth station is proposed.[126] Thereafter, in the *Further Notice*, the Commission tentatively concluded that an ECO-Sat test should be applied with respect to the home markets of satellites licensed by non-WTO countries, regardless of whether the route market is a WTO Member country or not. Further, the Commission proposed to apply a separate ECO-Sat test to the route market when the route market is a different non-WTO country.[127] The Commission proposed to continue to apply an ECO-Sat test in these circumstances because non-WTO countries have assumed no obligations under the WTO Basic Telecom Agreement specifically or under the GATS generally. They have made no binding commitments to open their satellite services markets or to abide by procompetitive regulatory principles. Thus, reasoned the Commission, allowing non-U.S. satellites licensed by non-WTO countries to serve the United States could adversely affect competition in the United States by giving the non-U.S. operator a competitive advantage over its U.S. counterparts.

Positions of the Parties

69. The commenters generally support implementation of an ECO-Sat analysis in this context.[128] Many contend that, absent a home market analysis, the Commission would

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[126] *Notice* at ¶¶ 2, 27, 37-43; *see also Further Notice* at ¶ 4.

[127] *Further Notice* at ¶ 23.

[128] We also incorporate here those comments filed in response to the *Notice* that remain pertinent to the general discussion of the ECO-Sat test. *See, e.g.*, AT&T NPRM Comments at 5; Columbia NPRM Comments at 11; General Instrument NPRM Comments at 3; HBO NPRM Comments at 12-13; ICO NPRM Comments at 10-23; Keystone NPRM Comments at 4-5; Lockheed Martin NPRM Comments at 3-4; MCI NPRM Comments at 3-12; PanAmSat NPRM Comments at 2-3; OrbComm NPRM Comments at 3; Orion NPRM Comments at 6-12; Teledesic NPRM Comments at 3-4; Lockheed Martin FNPRM Comments at 3-4; Orion FNPRM Comments at 6; Qualcomm FNPRM Comments at 5; Motorola FNPRM Comments at 5; GE Americom Reply Comments at 5; Lockheed Martin Reply Comments at 6; GE Americom FNPRM Comments at 5 (making a distinction in evaluating applicants from non-WTO countries by urging that the Commission evaluate the home market of the *foreign-licensed provider*).

have no relevant basis for evaluating the accessibility of a non-WTO market or for exercising any leverage to persuade those countries with closed markets to open them.[129]

70. Some commenters argue that application of the ECO-Sat test may harm U.S. licensed systems seeking access to foreign markets and may result in retaliatory measures from other countries.[130] CC/Networks claim that they rely on satellite technology for overseas video and associated audio transmissions and consider transoceanic fiber less efficient regarding cost, connectivity, technical performance, and operational flexibility.[131] They argue that limiting broadcast and cable operators' use of satellite capacity will hinder their ability to provide television coverage of international events, especially fast-breaking news.[132] To the contrary, Columbia argues that we should apply the ECO-Sat test to all types of services in a fair and even-handed manner.[133] It maintains that Networks's need for transmission capacity can best be met by considering, as part of the general public interest inquiry, whether U.S. satellites are available to provide this transmission capacity.

71. A few commenters favor a less rigid ECO-Sat test, which would permit each applicant to demonstrate whether a home market test, route market test, or critical mass test, is appropriate for its proposal.[134] In order to remedy concerns about foreclosing competitive entry by U.S.-licensed satellites into foreign markets, Hughes proposes that we generally allow entry of foreign-licensed satellites into the United States to compete in the provision of satellite services, absent a showing that the licensing administration imposes significant protectionist barriers that shield its satellite industry from competition.[135] Hughes argues that, by applying the ECO-Sat test in this flexible manner, the Commission can best demonstrate to foreign administrations the benefits of implementing a procompetitive satellite regulatory policy.[136] Hughes notes that none of the parties disputed its proposal for a modified ECO-Sat

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[129] Orion FNPRM Comments at 6; Qualcomm FNPRM Comments at 5; Motorola FNPRM Comments at 5.

[130] PanAmSat FNPRM Comments at 4-5; Hughes FNPRM Comments at 5; COMSAT FNPRM Reply Comments at 6.

[131] CC/Networks NPRM Comments at 12.

[132] *Id.*

[133] Columbia FNPRM Reply Comments at 5-6.

[134] Telesat NPRM Reply Comments at 14.

[135] Hughes FNPRM Comments at 12.

[136] *Id.* Hughes proposes that an earth station applicant seeking access to a non-U.S.-licensed satellite would have the initial burden of demonstrating that the foreign satellite's home and route markets do not impose *de jure* barriers to U.S.-licensed satellites seeking to compete in the provision of the same satellite services. If no *de jure* barriers existed, the burden would shift to parties opposing entry of the foreign-licensed satellite to

(continued...)

test.[137] In addition, Hughes argues that none of the parties deny that a strict reciprocity test will undermine the Commission's goal of opening foreign markets to competition if foreign administrations impose equally rigid reciprocity tests to evaluate the entry by U.S.-licensed satellites.[138]

Discussion

72. We adopt the proposal to apply the ECO-Sat test to non-U.S. satellites licensed by non-WTO countries. This approach is necessary to ensure that participants in the global satellite services market are on equal footing and that applicants from non-WTO countries are not able to distort competition to the detriment of U.S. operators. Fair and vigorous competition among multiple providers leads to lower prices and more innovative service offerings for satellite communications users in the United States and throughout the world. Applying the ECO-Sat test will confirm that foreign markets do not have *de jure* or *de facto* barriers that impede opportunities for U.S. providers to enter and compete in those markets prior to permitting operators from such countries to compete in the United States. Unlike WTO Members, including those that have not made specific commitments of market access, non-WTO countries are not subject to the general obligations of the GATS. Most non-WTO countries have made little progress toward promoting competition and opening their markets. To the extent that some have allowed foreign entry and have begun to liberalize their markets, they are not obliged under the GATS to refrain from discriminating against U.S.-licensed satellite operators. Thus, the potential for anticompetitive conduct continues to exist with respect to applicants from non-WTO countries.

73. For these reasons, we are not persuaded by the commenters' arguments against applying the ECO-Sat test to non-U.S. satellites licensed by non-WTO countries. In response to some commenters' concerns about possible negative effects of this rule on the efforts of U.S.-licensed systems to access foreign markets, we point out that our primary focus is on increasing competition in the United States market, and on realizing the benefits of such competition for U.S. users here.[139] If this policy causes other countries to adopt an ECO-Sat test for U.S. satellite operators seeking to provide service in that country, we find it, on balance, a minimal burden when compared to the possibility that unrestricted entry by

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[136](...continued)
demonstrate that *de facto* barriers existed on the satellite's home or route markets. Hughes adds that the Commission would consider next, "communications and competition-related issues as well as national security, foreign policy and trade issues raised by the Executive Branch." *Id.* at 13.

[137] Hughes FNPRM Reply Comments at 7.

[138] *Id.*

[139] We also recognize, however, that the opening of markets abroad also will facilitate greater competition in the satellite services market worldwide, including in this country, and the policies we adopt today are also designed to further that goal.

foreign-licensed satellite systems would distort competition in the U.S. market. Hughes's proposed test would not suffice because, for example, Country X may permit *some* foreign satellites to serve its market while blocking U.S. satellites, falling short of Hughes's "significant protectionist barrier" measure. If we permit a satellite licensed by Country X to serve the U.S. market, that operator could have a competitive advantage in the United States because of its more comprehensive service offerings. Indeed, competition could be distorted in the United States even if a foreign country does allow entry by U.S. satellites if that country erects obstacles that prevent such competition from being effective as a practical matter, such as government subsidization of the non-U.S. system. In this case, the non-U.S. operator could have a competitive advantage in the United States because of an ability to offer lower-cost service. Consequently, we find that our proposed test for determining whether U.S. operators have effective competitive opportunities in a foreign country provides an even-handed approach that allows the greatest degree of access to non-U.S. systems consistent with the public interest. In addition, we reject Hughes's suggested ECO-Sat test.[140] It is equally necessary to examine both *de jure* and *de facto* barriers because *de facto* barriers can be as impeding as *de jure* barriers and more difficult to detect. Hence, the applicant should bear the burden to demonstrate the absence of both.

74. We recognize the Networks' concern that our policy could inhibit the coverage of fast-breaking news or other special events. We point out, however, that we will *not* apply an ECO-Sat test in the vast majority of cases where the Networks will be receiving foreign video transmissions. In particular, we will not apply an ECO-Sat test when the satellite relaying the foreign transmissions into the United States is licensed by a WTO Member, or, as discussed below, is operated by an IGO affiliate satellite or an IGO satellite providing international service.[141] We will apply the ECO-Sat test only where the satellite is licensed by a non-WTO country. In these cases, an ECO-Sat test is a minimal burden compared to the market distorting impact and competitive harm in the United States that may result if a U.S.-licensed system is denied access in the relevant foreign market. Further, the Networks may apply for an earth station license to communicate with specified non-WTO satellites. In considering whether to grant that application, we could consider, regardless of the outcome of the ECO-Sat analysis, whether other satellites are available to provide this transmission capacity. An earth station license carries a ten-year license term; no further applications will be necessary for the Networks to access that non-WTO satellite once a license is granted.

75. In applying the ECO-Sat test, we will examine whether the country in which the non-U.S. satellite is licensed provides effective competitive opportunities for U.S.-licensed satellites to serve the foreign market. We will look at *de jure* barriers to entry, such as statutory or regulatory prohibitions against service by U.S. providers, as well as *de facto*

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[140] *See supra* n.136.

[141] *See infra* Sections III.B.1.d. and II.B.2.

barriers. For example, a country may permit U.S. entities to provide FSS service, but impose more stringent technical requirements on U.S. providers than on its own providers.

(2) Home Markets

Background

76. In the *Notice*, the Commission proposed to look first at the country of license, or the "home market," when evaluating effective competitive opportunities for U.S. providers.[142] For example, if a satellite licensed by Country X seeks to serve the U.S. market, the first step would be to determine whether U.S.-licensed satellites may provide analogous services to, from, or within Country X. The Commission recognized, however, that the country of license approach had two shortcomings. First, if the Commission were to look only at the licensing country, satellite operators from closed markets might seek to obtain a satellite license from a country with an open market. In effect, such satellite operators could forum shop to find an administration that would most likely pass the ECO-Sat test. The Commission therefore sought comment on the possibility of looking at ownership in addition to the country of license, for example, evaluating each investor's home country or those of the most substantial investors.[143]

Positions of the Parties and Discussion

77. Commenters supporting application of an ECO-Sat test uniformly support applying this test to the "home market" of the satellite.[144] Some question, however, whether the "home market" should be the country that licenses a satellite or the administration that coordinates it or some other measure, such as the nationality or principal place of business of the owner. For reasons discussed above in determining the WTO status of the satellite in question,[145] we will look to the licensing country or coordinating administration to determine the home market. In determining the home market, we will, however, entertain requests to consider other factors, such as the nationality or principal place of business of the owner.[146]

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[142] *Id.* at ¶ 18.

[143] *Notice* at ¶ 30.

[144] Lockheed Martin FNPRM Comments at 3. Orion FNPRM Comments at 6.

[145] *See supra* Section III.B.1.a.2.

[146] *See id.*

(3) Route Markets

Background

78. In the *Notice*, the Commission proposed to conduct a separate ECO-Sat analysis of the "route market" or markets if different from the home market. It defined the route market as the market in which the satellite transmission originates or terminates.[147] The Commission stated that applying an ECO-Sat test to the non-WTO route markets would allow it to promote effective competition through broader market access. Specifically, because some countries may offer landing rights to satellites from certain foreign countries but not others, U.S. satellites may have opportunities to compete in some route markets but not others. Making a decision on market access for a non-U.S. system based solely on the openness of that system's home market would therefore leave open the possibility that the non-U.S. satellite, once it entered the U.S. market, might be able to serve some routes on which U.S. satellites are prevented from competing. This result would distort competition in the United States. Consequently, in the *Further Notice*, the Commission proposed that when a non-WTO satellite provides service involving a different non-WTO market, it would apply two separate ECO-Sat tests: the first test would be applied on the non-WTO home market as discussed above; the second ECO-Sat test would be conducted on the non-WTO route market. If the non-WTO route market did not provide U.S. operators with effective competitive opportunities to serve that market, the Commission would not permit the non-U.S. satellite to provide any service between the United States and that route market.

Positions of the Parties

79. Most commenters agree that a route market ECO-Sat test is necessary to avoid distortion of competition.[148] They contend that a separate ECO-Sat test should be applied to each non-WTO route market. Some commenters, however, argue that the ECO-Sat test should not be applied in cases where, as a practical matter, only non-WTO satellites can access the route market.[149] Qualcomm, for example, argues that application of the ECO-Sat test would only delay the implementation of innovative satellite services where effective competitive opportunities for U.S.-licensed or other WTO Member satellites cannot effectively exist.[150]

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[147] *Notice* at ¶ 27.

[148] *See, e.g.*, DirecTV NPRM Comments at 12-14; MCI NPRM Comments at 6-7; PanAmSat NPRM Comments at 2-3; WorldCom NPRM Comments at 5.

[149] Qualcomm FNPRM Comments at 5; KDD NPRM Comments at 2.

[150] Qualcomm FNPRM Comments at 5.

80. Lockheed Martin, on the other hand, does not endorse the application of an ECO-Sat test to route markets.[151] Lockheed Martin believes that if a satellite operator is subject to competition in its home market then it is significantly less likely to have market distorting capabilities in other route markets that its serves.[152]

81. Other commenters, while not opposing a route market analysis in theory, argue that route markets are difficult to define[153] or that a route market test is insufficient because, in certain situations, *de facto* barriers may be difficult to prove.[154] CC/Networks recommends that the Commission allow all U.S.-authorized earth station licensees to access non-U.S. satellites immediately for specified route markets once a non-U.S. satellite has satisfied the ECO-Sat test requirements.[155] Further, ICO argues that a route market analysis would be impractical with global satellite systems, such as mobile satellite service (MSS) systems, that could conceivably serve over 200 countries.[156] COMSAT agrees that applying an ECO-Sat test in these circumstances could, in fact, impede the development of the global MSS market.[157]

Discussion

82. We adopt the following rules regarding non-U.S. satellites licensed by non-WTO Members: We will *not* apply an ECO-Sat test to *WTO* Member route markets served by non-U.S. satellites licensed by non-WTO countries. We will, however, apply an ECO-Sat test to *all non*-WTO route markets served by non-U.S. satellites licensed by non-WTO countries. If a non-WTO satellite serves one or more different non-WTO route markets, we will apply an ECO-Sat test to the non-WTO home market, as well as an ECO-Sat test to each non-WTO route market. Discussion of each rule follows.

83. First, as to *WTO* routes, we will not apply an ECO-Sat test here for the same reasons discussed above regarding WTO-Member-licensed satellites .[158] As stated, all WTO Members are governed by the general obligations of the GATS. The GATS provides some

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[151] Lockheed Martin FNPRM Reply Comments at 6.

[152] *Id.* at 6.

[153] Loral NPRM Reply Comments at 6; Transworld NPRM comments at 2-3.

[154] Lockheed Martin FNPRM Comments at 3; Lockheed Martin FNPRM Reply Comments at 2.

[155] CC/Networks NPRM Comments at 22.

[156] ICO FNPRM Comments at 13-14.

[157] COMSAT FNPRM Reply Comment at 5.

[158] *See supra* Section III.B.1.a.3.

protection against discriminatory conduct on a WTO route. In addition, increased competition in the global satellite market resulting from commitments under the WTO Basic Telecom Agreement and the regulatory mechanisms available to us and our trading partners to guard against anticompetitive consequences, will help prevent harm to competition in the U.S. market.

84. Second, as to *non*-WTO routes, it is necessary to apply an ECO-Sat test to all routes because the home market inquiry is, by itself, insufficient to protect U.S. satellite operators from distortion in the U.S. satellite market. Each satellite typically covers many different countries and a satellite's point-to-multipoint capability makes it possible for the same satellite to be used simultaneously for transmissions between other countries and the United States. U.S. satellite operators must obtain an authorization from all countries in which they seek to provide service. It is possible that certain non-WTO countries may prohibit access by U.S. satellites, while allowing access by satellites from other countries. In this scenario, the non-U.S. satellite granted access to that market would have a competitive advantage over U.S. systems by virtue of its broader service area. We cannot ignore this potential competitive distortion.

85. We recognize that applying an ECO-Sat analysis to each non-WTO route market served by a global satellite system, such as a low-earth orbit MSS or a fixed-satellite service system, will be cumbersome. An alternative would be to determine whether there is some critical mass of route markets open to U.S. satellite systems to satisfy us that effective competition will not be distorted in the United States. If so, we could dispense with a route-by-route analysis for global systems altogether. The commenters' positions varied on what would constitute a critical mass of open route markets, and on how to determine whether a critical mass has been reached.

86. We find that there is no single method to measure whether a critical mass has been reached that would work in every case. This is because, from a provider's perspective, critical mass depends in large part upon its individual business plans. For example, a company intending to provide global service may be satisfied that a critical mass has been achieved if a majority of the world's largest markets are open to U.S. satellite services. A country targeting the Asian market could, in contrast, legitimately argue in the same environment that a critical mass has *not* been reached if several of the world's closed markets are in Asia. Consequently, we cannot devise a critical mass test that would uniformly apply to all satellite services. We also are concerned that a critical mass test would not encourage countries to open closed markets to U.S. satellite services, to the detriment of U.S. consumers. We conclude that the most practical approach, and the most appropriate and forceful way to promote competition in the United States and around the world, is to look at each of the actual routes that will be served. Thus, we will apply an ECO-Sat test to each non-WTO route market served by a non-WTO satellite.

87. We disagree with Lockheed Martin, the only party that opposes generally applying a route market ECO-Sat analysis, which argues that the test is not necessary because

competition in the *route* market is not likely to be distorted if the satellite operator is subject to competition in its home market. Contrary to that position, our route market analysis is designed to promote competitive conditions in the *United States* by addressing a non-U.S. system's ability to serve markets not open to U.S operators.

88. In response to Qualcomm's suggestion that we not apply the ECO-Sat test where *only* non-WTO countries are able to serve a route market, we point out that we will consider such circumstances in applying the ECO-Sat test. For example, if U.S. operators are not serving a particular route market because they do not have satellites with coverage areas allowing them to serve that route, the non-WTO satellite providing service to that route market would not fail the ECO-Sat test on that basis. In that case, we would not preclude a non-U.S. satellite from providing service between the United States and that market. In applying the ECO-Sat test, we are looking for *artificial* barriers blocking access to that market by U.S. operators.

(4) Satellite Service Distinctions

Background

89. In applying the ECO-Sat test, the Commission proposed in the *Notice* to focus on the specific satellite service that the non-U.S. system seeks to provide in the United States and determine whether U.S. satellite systems would be permitted to provide the same type of service in the relevant foreign country. For example, if there were a request to provide mobile-satellite service (MSS) in the United States using a satellite licensed by non-WTO Country X, the ECO-Sat analysis would focus on whether a U.S. satellite could provide MSS in Country X.[159] The Commission proposed to look at three service categories in making this analysis: DTH (including DBS service), Fixed Satellite Service (FSS) and MSS. The Commission noted, however, that if another country draws finer distinctions when considering whether to allow U.S. satellites to provide services (such as distinguishing between Very Small Aperture Terminal (VSAT) and voice fixed-satellite services), it might consider applying the same distinctions when considering a request involving a satellite licensed in that country.[160]

90. Nevertheless, the Commission recognized in the *Notice* that this basic approach may not be adaptable to all satellite services in all instances. For example, an MSS system providing service between the United States and another country could consist of satellite transmissions that do not involve earth stations in the United States. By illustration, a telephone call could travel via an MSS system link from a telephone in the United States by cable to Poland, and then from there by satellite to China, where it could be received by a

[159] *Notice* at ¶ 33-34.

[160] *Id.*

handheld telephone (earth station). The Commission pointed out that because the earth station is in a foreign country and would be licensed by that country, there would be no vehicle by which to apply an ECO-Sat analysis. Given this, it proposed to evaluate effective competitive opportunities for MSS providers on a global basis by considering whether some critical mass of foreign markets is open to U.S. licensed systems before a non-U.S. system could provide *any* service in the United States.

Positions of the Parties

91. Most commenters support our proposal to adopt a service-by-service approach in applying the ECO-Sat test so as to ensure effective competition regarding each service.[161] Indeed, DirecTV asks us to consider new services as they evolve.[162] Columbia suggests that we further subdivide service categories to include video, voice, and data services.[163] AirTouch objects to the critical mass alternative to cover satellite service systems that do not have a satellite component in the United States. AirTouch asserts that the critical mass approach would be burdensome to administer because it would be difficult to determine which markets are relevant and sufficiently open to warrant regulatory streamlining, and that the approach would create too much uncertainty for foreign providers trying to plan their businesses.[164]

Discussion

92. We adopt the proposal to apply the ECO-Sat test, when applicable, on a satellite-service-specific basis. As recognized in the *Notice*, we may find that a particular country permits U.S. satellites to provide some, but not all, satellite services. We agree with the commenters that in these cases the public interest would be best served by permitting satellites licensed by such a country to enter the U.S. market to provide those services that can be competitively offered by U.S. satellites in that country, but not for other satellite services. We also adopt the proposal to specify DTH (including DBS service), FSS, and MSS as our service categories in applying the ECO-Sat test. Consistent with our treatment of voice and non-voice MSS in the same service category for ECO-Sat purposes, we will consider DARS, an audio satellite service established after the *Notice* was issued that provides service directly to consumers, in the same category as DTH. We may further subdivide these categories, as Columbia suggests, if another country makes such distinctions in deciding

[161] AT&T NPRM Comments at 7; DirecTV NPRM Comments at 14-15; General Instrument NPRM Comments at 4; HBO NPRM Comments at 15; Loral NPRM Comments at 25; Motorola NPRM Comments at 19; MCI NPRM Comments at 12; Telesat NPRM Reply Comments at 17-18; WTCI NPRM Comments at 12.

[162] DirecTV NPRM Reply Comments at 14; General Instrument NPRM Comments at 4.

[163] Columbia NPRM Comments at 13.

[164] AirTouch FNPRM Comments at 3-4.

whether to allow U.S. satellite systems to serve its market. We find, however, that it will be sufficient and administratively simpler to apply the three broader service categories as a rule of thumb.

93. We will not adopt the proposal to require some critical mass of foreign markets to be open to U.S. satellite operators before we would permit a non-WTO MSS system to provide the landline portion of its service in the United States. As previously discussed, there is no objective way in which to define a critical mass and such a standard would not, in any case, further our goals of opening markets and promoting global competition. Rather, we will rely on the policies and rules adopted in our companion *Foreign Participation Report and Order* to govern foreign entry through terrestrial facilities.

c. Non-WTO Covered Services

Background

94. As discussed above, the U.S. Schedule of Specific Commitments to the WTO Basic Telecommunications Agreement excludes DTH, DBS, and DARS.[165] Many other WTO Members, including many of the United States' major trading partners, did not include these services in their market access commitments, creating a potential market imbalance. To resolve this imbalance, the United States made no market access or national treatment commitments and took an MFN exemption for these services.

95. Thus, because the WTO Basic Telecom Agreement will not do as much to advance our goal of promoting a competitive satellite marketplace for these services, in the *Further Notice*, the Commission proposed to apply the ECO-Sat test to all requests for access by non-U.S. satellite systems for delivery of DTH, DBS, and DARS services into the United States.[166] In conducting an ECO-Sat test, the Commission proposed to evaluate both *de jure* and *de facto* constraints on entry by U.S. satellite operators.[167] The Commission sought comment on the continuing need to encourage open markets for these services, and on the application of an ECO-Sat test to achieve that goal.

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[165] *See supra* Section III.B.1.a.1.

[166] *Further Notice* at ¶ 20-22.

[167] *Notice* at ¶¶ 37-42; *Further Notice* at ¶ 4.

Positions of the Parties

96. Several commenters support the proposal to use an ECO-Sat test for non-covered services.[168] MPAA recommends, however, that the Commission include in its rules provision for eliminating the ECO-Sat test should future GATS negotiations yield market access commitments by WTO Members that provide an open, competitive global environment with respect to DTH, DBS, and DARS services, allowing the United States to remove its MFN exemptions in these services.[169] Hughes further argues that the ECO-Sat test should bar entry only where a foreign country imposes significant protectionist barriers against U.S.-licensed satellites.[170]

97. Many commenters, however, object to applying the ECO-Sat test to these non-covered services.[171] Specifically, the European Commission argues that the U.S. MFN-exemption might negatively impact the economic viability of non-U.S.-licensed satellite systems, since satellite systems normally provide both telecommunications and DTH-DBS transmission services. The scope and economic impact of the U.S. MFN exemption, the European Commission contends, depend on the "precise definition of DTH and DBS television services, and of digital audio services," which the European Commission urges us to define.[172] The European Commission also claims that these services are broadcast services and therefore the United States is required to provide market access and MFN treatment under its 1994 WTO commitments on audio visual services.[173]

Discussion

98. We will apply the ECO-Sat test to requests involving provision of DTH, DBS, and DARS by non-U.S. satellites. Specifically, we will apply the test to the home market of the non-U.S. satellite, as well as to all routes that the non-U.S. satellite proposes to serve.

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[168] Lockheed Martin FNPRM at 5; MPAA FNPRM Reply Comments at 2; Hughes FNPRM Comments at 13-14 (arguing that the modified ECO-Sat test applied on a service-by-service basis, affords foreign administrations flexibility to open their markets to competition).

[169] MPAA FNPRM Reply Comments at 3.

[170] Hughes uses Canada as an example where Canada continues to impose barriers that prevent U.S.-licensed DBS and DTH service providers from competing in the Canadian market resulting in providers such as DIRECTV's Canadian affiliate being barred from the Canadian market. Hughes FNPRM Comments at 16.

[171] Networks FNPRM Comments at 5; European Commission FNPRM Reply Comments at 3.

[172] European Commission FNPRM Reply Comments at 3.

[173] *Id.*

The ECO-Sat test is necessary because of the continuing need to encourage open markets for these services and to avoid anticompetitive conduct in the U.S. market.[174]

99. In applying the ECO-Sat test, we will examine effective competitive opportunities for U.S.-licensed satellites to serve the foreign markets. We will look at *de jure* barriers to entry, such as statutory or regulatory prohibitions against service by U.S. providers. These could include absolute or partial bars, as well as direct or indirect ones. For example, a foreign country could prohibit outright U.S. satellites from providing *any* home programming services by U.S. entities or could prohibit *any* indirect U.S. ownership. It also could prohibit video, but not audio services. By contrast, *de facto* barriers would constitute barriers that are not *per se* prohibitions, nor not necessarily formally adopted by the country's government, but that exist and, in practice, act as impediments to entry. For example, a country may permit U.S. entities to provide DTH service, but may impose more stringent technical or programming requirements or higher fees on U.S. providers than on its own providers. By discriminating against U.S. providers, any such *de facto* barriers would severely curtail, if not wholly eliminate, the ability of U.S. satellite entities to do business in the foreign market. As a result, the companies in the home market of the foreign-licensed satellite would be able to serve a market closed, in whole or in part, to U.S. companies. Denying competitive opportunities to U.S. entities in the foreign market, while allowing them for the country's own companies, would give the foreign-licensed satellite a competitive advantage over U.S. entities, causing competitive distortions.

100. Furthermore, we find that Hughes's proposed modified ECO-Sat test does not adequately address our concern that *any* artificial entry barriers foreign administrations place on traffic to or from the United States, even those not arising to the level of "significant protectionist barriers," could distort competition in the United States.

101. We disagree with the European Commission that these services are broadcasting services. The Commission has specifically concluded that it will not regulate DTH and DBS as broadcasting services.[175] Rather, the Commission regulates these services as basic telecommunications services. As such, the U.S. exclusion of these services from market access commitments and the MFN exemption taken during the WTO basic telecommunications negotiations are valid. Therefore, applying the ECO-Sat test to non-WTO covered services is fully consistent with our GATS obligations. With respect to Deutsche Telekom's concern about applications to provide both WTO-covered and non-WTO covered

[174] As discussed below, we will not apply the ECO-Sat test to requests to provide these services by entities licensed by nations with which we have bilateral agreements. *See* Section III.B.1.e.

[175] *In the Matter of Subscription Video*, 2 FCC Rcd 1001, *aff'd* 849 F.2d 665 (1988).

services over a non-U.S. satellite,[176] we clarify that we will address such requests separately, under the rules we adopt for each situation.

d. Intergovernmental Satellite Organizations and Their Affiliates

(1) Introduction

Background

102. In the *Notice* and *Further Notice*, the Commission addressed issues relating to opening the U.S. domestic satellite market to INTELSAT and Inmarsat, and their affiliates.[177] INTELSAT and Inmarsat are treaty-based, intergovernmental organizations (IGOs) designed to ensure world-wide satellite communications.[178] These organizations have certain privileges and immunities that provide them competitive advantages over competing satellite providers. For example, they are immune to suits in court (with limited exceptions for commercial contracts), including jurisdictional, discovery and asset immunity from antitrust laws. They also enjoy tax-free status. For example, they are exempt from income, corporate and property taxes, and customs and other duties in the host countries and other member states. Their size and the fact that their members are the primary, if not exclusive, providers of fixed and mobile maritime services in most major markets gives them a special, and possibly dominant, position in the global market. Further, COMSAT, by virtue of the Communications Satellite Act of 1962[179] and the 1978 International Maritime Satellite Telecommunications Act,[180] is the U.S. signatory to the IGOs. COMSAT provides INTELSAT and Inmarsat space segment capacity to users in the United States. COMSAT pays taxes, but as we discuss below, indirectly benefits from IGO immunity from suit, including suit based on U.S. antitrust laws.

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[176] Deutsche Telekom FNPRM Reply Comments at 4. Teledesic withdraws its proposal in comments and reply comments in the *Notice* that the Commission establish a fourth service category called the "Interactive Broadband Satellite Services" and apply a critical mass test for this category. It now contends that there are likely to be so many competing IBSS providers from so many countries that the Commission need not worry about competitive distortions in the U.S. market. Teledesic FNPRM Comments at 5-6.

[177] *Notice* at ¶¶ 62-74; *Further Notice* at ¶¶ 31-36.

[178] *Notice* at ¶¶ 62-64. The International Telecommunications Satellite Organization (INTELSAT) operates a global system that provides fixed satellite service for voice, data, video and audio communications. *See* Agreement Relating to the International Telecommunications Satellite Organization, Aug. 20, 1971, 23 U.S.T. 3813, T.I.A.S. No. 7532. The International Mobile Satellite Organization (Inmarsat), which provides global maritime and aeronautical mobile satellite communications services, has for several years been in the process of amending its Agreement in order to provide land mobile satellite services. *See* Convention on the International Maritime Satellite Organization, Sept. 3, 1976, reprinted Inmarsat Basic Documents (4th Ed. 1989).

[179] 47 U.S.C. §§ 701-744 (Satellite Act).

[180] 47 U.S.C. §§ 751-757 (Maritime Act).

103. In the *Notice*, the Commission asked whether, and under what conditions, it should permit INTELSAT and Inmarsat to serve the U.S. market, recognizing that home market and route market analyses would be analytically difficult to apply with respect to applications from these entities.[181] In the *Further Notice*, the Commission asked whether the WTO Basic Telecom Agreement will result in a critical mass of open markets among IGO member countries that is sufficient to presume that the Commission can rely on competitive market forces and forego an ECO-Sat analysis.[182] The Commission also proposed to treat IGO affiliates as it would treat any other non-U.S. satellite system. That is, the Commission would not apply an ECO-Sat test if the IGO affiliate is a satellite system licensed by a WTO Member and providing covered services.

Position of the Parties

104. Several commenters argue initially that we should not address access to the U.S. market by INTELSAT, Inmarsat, or IGO affiliates in this proceeding, and that instead we must establish a new proceeding in which to do so.[183] GE Americom points out that there is no need to complete consideration of entry questions involving IGOs prior to January 1, 1998, when the WTO Basic Telecom Agreement goes into force, because IGOs do not derive benefits from the Agreement.[184]

105. Orion, for example, argues that a new proceeding is necessary because IGOs present significant and complex factual and legal issues that have not been sufficiently aired.[185] These commenters also assert that a new proceeding is particularly appropriate to address access by IGO affiliates, given pending proposals for restructuring and privatization.[186] Loral contends that a new proceeding regarding the affiliates would examine questions relating to: the proper level of ownership by IGOs, signatories and predecessors; which IGO assets and how many may be transferred without unduly disadvantaging

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[181] *Notice* at ¶¶ 64-65. We noted, in particular, that 136 countries are members of INTELSAT and 78 are members of Inmarsat. *Id.* In addition, both of these organizations provide global services. INTELSAT membership has grown to 141 countries and Inmarsat to 80.

[182] *Further Notice* at ¶ 33.

[183] *See, e.g.*, GE Americom NPRM Reply Comments at 17; GE Americom FNPRM Comments at 6-7; GE Americom FNPRM Reply Comments at 6-7; Orion NPRM Comments at 13; Orion FNPRM Comments at 8; Orion FNPRM Reply Comments at 8-9; Columbia FNPRM Reply Comments at 2; Loral FNPRM Comments at 10 (do not address access involving IGO affiliates); PanAmSat FNPRM Reply Comments at 5-6.

[184] GE Americom FNPRM Comments at 6.

[185] Orion FNPRM Comments at 8-9; Orion FNPRM Reply Comments at 8-9.

[186] GE Americom FNPRM Comments at 17; Loral FNPRM Comments at 10-11; PanAmSat FNPRM Reply Comments at 6.

competition; what level of government financing of an IGO affiliate is anticompetitive; and what opportunities for cross-subsidization and non-arm's length transactions exist in the IGO affiliate context and what steps need to be taken to prevent each.[187]

106. COMSAT, in contrast, opposes a new proceeding, noting that this rulemaking was established to address entry by non-U.S. satellites into the U.S. market, including IGOs and their affiliates.[188] COMSAT notes that the *Further Notice* specifically asked for comment related to the IGOs and their affiliates.[189] ICO objects to inclusion of ICO in any future proceeding, arguing that it should be treated like satellites from other WTO Members and that any such proceeding should addresss only future IGO affiliates.[190]

Discussion

107. We find that a new proceeding is not needed -- neither for the IGOs nor IGO affiliates -- because we are only setting a framework for entry here. The *Notice* and *Further Notice* specifically addressed the unique competitive concerns relevant to entry by IGOs and IGO affiliates, and specifically requested comment on the standard to be applied for access to these satellite systems. We recognize that issues related to restructuring or privatization of INTELSAT and Inmarsat currently are the subject of international negotiations[191] and that the issue of ICO independence from Inmarsat is currently before this Commission.[192] Any specific concerns about whether, and to what extent, entry by a particular IGO or IGO affiliate would be anticompetitive are more appropriate in the context of a specific license application. As discussed below, the outcome of pending proceedings could be taken into account in conducting a public interest determination regarding a particular application. We therefore conclude that a separate proceeding is unnecessary and turn to the substantive issues of what entry test to apply to IGOs and IGO affiliates.

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[187] Loral FNPRM Comments at 11-12.

[188] COMSAT FNPRM Reply Comments at 9-10.

[189] *Id.*

[190] ICO FNPRM Reply Comments at 10-11.

[191] The Commission is committed to seeking substantial reform of the IGOs. The United States has taken a lead role on these issues. INTELSAT is considering the creation of an affiliate, possibly in 1998, to provide DTH, video and multimedia services. Inmarsat is considering full privatization of its commercial and operational arm, possibly in 1998, with a residual, scaled back IGO remaining to maintain its commitment to observe public service obligations, such as provision of maritime distress and safety services.

[192] *See* Application of COMSAT for Authority to Participate in the Procurement of Facilities of the I-CO Global Communications Limited System (File No. 106-SAT-MISC-95) (filed May 1, 1995).

(2) Intergovernmental Satellite Organizations

Background

108. In the *Notice*, the Commission noted that IGOs present certain analytical issues within the framework it was proposing to apply to non-U.S. satellites. First, IGOs have no single home market, unlike private satellite operators, which are incorporated in and licensed by an individual country. Second, the Commission recognized that because IGOs were created to provide ubiquitous service and serve virtually every country from the United States, it may be difficult to apply a route market analysis to an application involving an IGO.[193] The Commission proposed several alternative standards for deciding whether earth stations could access an IGO satellite for the provision of U.S. *domestic* service:

(1) The degree of openness of all various route markets served by the IGO (or at least all the markets of the IGO's members);[194]

(2) The degree of openness of the number of countries constituting the minimum level of concurrence required for any official act of an IGO;[195] or

(3) A determination of whether the IGO, as result of its intergovernmental status and global dominance, would be in a position to diminish effective competition in the United States.[196]

109. As to provision of *international* service involving the United States, the Commission tentatively concluded that it would not be in the public interest to apply the ECO-Sat test.[197] The Commission reasoned that there are still many nations in the world that are connected to the United States only by satellite, and any policy that makes it more difficult to reach these points would unduly constrain the already limited service to them. The Commission also stated that such an approach might be inconsistent with the statutes governing U.S. participation in INTELSAT and Inmarsat and established U.S. policy for use of those systems for certain international services.[198] As a result, the Commission proposed to

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[193] *Notice* at ¶¶ 64-65.

[194] *Id.* at ¶ 66.

[195] *Id.* at ¶ 67.

[196] *Id.* at ¶ 68.

[197] *Id.* at ¶ 70.

[198] *Notice* at ¶¶ 69-70. *See* 47 U.S.C. § 753(c)(3)(A).

continue licensing *international* communications over INTELSAT and Inmarsat without applying an ECO-Sat test.

110. In the *Further Notice*, the Commission revisited these proposals in light of the successful conclusion of the WTO Basic Telecom Agreement. Initially, the Commission noted that because IGOs are intergovernmental treaty organizations, they do not benefit from that Agreement, which covers only services or service suppliers of WTO Members. Consequently, the Commission noted that the United States owes no market access, national treatment or MFN obligations to the IGOs.[199]

111. The Commission asked, however, whether the commitments made under the WTO Basic Telecom Agreement constitute a critical mass of open satellite markets sufficient to presume that allowing entry by IGOs for provision of U.S. *domestic* service would enhance competition in the United States.[200] In that regard, the Commission noted that 51 of the 141 INTELSAT members made full or partial market access commitments in basic telecom services under the WTO; these 51 members, including the United States, own 80% of the shares of INTELSAT. In addition, 49 of the 80 Inmarsat members made commitments on basic telecommunications services. All 30 countries that made market access commitments for mobile satellite services in the WTO Basic Telecom Agreement are Inmarsat members.[201]

Position of the Parties

112. Space Communications, Motorola, and PanAmSat support applying some form of ECO-Sat test to all or particular IGOs seeking entry to provide *domestic* service in the United States.[202] PanAmSat strongly opposes allowing U.S. earth stations to use INTELSAT capacity for the provision of U.S. domestic services because of enormous competitive advantages the IGOs derive from their privileges and immunities.[203] Some parties assert that IGOs are not covered by the WTO Basic Telecom Agreement,[204] while PanAmSat specifically claims that IGOs should not be treated as if they were WTO satellites because access by the

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[199] *Further Notice* at ¶ 32.

[200] *Id.* at ¶ 33.

[201] *Id.* at ¶ 32.

[202] AMSC NPRM Comments at 5; Space Communications NPRM Comments at 8; PanAmSat NPRM Comments at 5; Motorola NPRM Comments at 41-44.

[203] PanAmSat FNPRM Comments at 6.

[204] *See, e.g.*, AMSC FNPRM Reply Comments at 10; Lockheed Martin FNPRM Comments at 7; Orion NPRM Reply Comments at 7-8.

IGOs was discussed in detail during the WTO basic telecommunications negotiations and rejected by the negotiators.[205]

113. Other commenters recommend that we not impose an ECO-Sat test either on IGOs in general or with regard to specific IGO services. INTELSAT asserts that the ECO-Sat test is ineffective when applied to IGOs, because IGOs have no control over the domestic policies of its sovereign members.[206] Furthermore, INTELSAT and COMSAT argue that a test imposed on IGOs does not motivate foreign countries to open their markets to U.S. satellite systems, as many countries do not seek access to the U.S. market.[207] BTNA claims that it is unnecessary to subject traditional Inmarsat domestic services to a competitive entry test while COMSAT contends that no test is necessary for INTELSAT or Inmarsat.[208] Lockheed Martin proposes that the core treaty-based services offered by INTELSAT and Inmarsat not be subject to any ECO-Sat analysis and instead continue to be authorized in the same manner as they have been in the past.[209] COMSAT also argues in the alternative that the Commission should apply the same treatment to provision of service using INTELSAT and Inmarsat satellites as the Commission proposes for satellites licensed by WTO Members.[210]

114. The Networks argue that an ECO-Sat test should not be applied to transmission of video services using INTELSAT because of a shortage of capacity.[211] In response, Columbia states that the networks have not made a sufficient case for special treatment of video services. It notes that shortage of capacity can be a factor considered in application of the ECO-Sat test and, where there are no other options, override the absence of effective

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[205] PanAmSat FNPRM Reply Comments at 6-7; AMSC FNPRM Reply Comments at 10.

[206] INTELSAT NPRM Comments at 9.

[207] INTELSAT NPRM Reply Comments at 4; COMSAT NPRM Reply Comments at 17; COMSAT NPRM Comments at 20-23. COMSAT also argues that there is no evidence in the record to suggest that provision of domestic services by COMSAT would have anticompetitive effects. COMSAT NPRM Comments at 12-20. This argument, however, does not go to whether an entry test is necessary but whether the analysis under any such test has been satisfied.

[208] BTNA FNPRM Comments at 2; COMSAT FNPRM Comments at 13.

[209] Lockheed Martin FNPRM Comments at 7. Inmarsat's core services are international maritime distress and safety services.

[210] COMSAT FNPRM Comments at 9-12; COMSAT FNPRM Reply Comments at 10-12.

[211] Networks FNPRM Comments at 8 -9. In the alternative, the networks argue that the Commission should grandfather existing services provided by INTELSAT or should determine that the critical mass test has been met. *Id.*