

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the matter of)
)
Policies and Rules for Alternative) IB Docket No. 98-60
Incentive Based Regulation of)
Comsat Corporation)

REPLY OF PANAMSAT CORPORATION

PanAmSat Corporation ("PanAmSat"), by its attorneys, hereby submits this reply to the comments of Comsat Corporation ("Comsat") regarding the above-referenced Notice of Proposed Rulemaking.

As PanAmSat noted in its comments, there is nothing inherently objectionable about the use of incentive-based regulation to check competitive abuses by Comsat. The success of such incentive-based regulation, however, will turn upon the details of the approach and the effectiveness of its implementation. If the regulation of Comsat in its role as a dominant carrier is to mean anything, it must be regulation in more than mere form.

For this reason, PanAmSat supports the suggestion of the "Networks"¹ that the Commission's incentive-based regulation of Comsat should, at minimum, include (1) no pre-set expiration date, (2) an aggressive downward adjustment "X-factor," and (3) separate "service baskets" for occasional-use video and PSTN services.² As the Networks demonstrate in their comments, these three elements are necessary to ensure that Comsat is not able to abuse its continuing dominant position in key markets.

¹ See Comments of ABC, Inc., CBS Corporation, National Broadcasting Company, Inc. and Turner Broadcasting System, Inc. (filed May 29, 1998).

² Comments of the Networks at 4.

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Even, however, if the Commission adopts a regulatory program capable of containing Comsat's market power in markets, and on routes, in which Comsat remains dominant, that program will be for naught if Comsat is able to elude regulation through market reclassification. PanAmSat, therefore, opposes Comsat's suggestion that it should be allowed to escape dominant carrier regulation on "a *prima facie* showing that competition exists on a particular route."³ There is no precedent or logic to support Comsat's proposal.

As a factual matter, a market or route does not become competitive, nor should one be deemed to be so *ex gratia*, merely because Comsat presents some evidence that another competitor provides service in the market or on the route in question. As the Networks note in their comments, the analysis is just not that simple.⁴ Moreover, as a legal matter, Comsat's suggestion runs contrary to the structure of Communications regulation set forth in Titles II & III of the Communications Act of 1934, as amended, and to the Commission's long-established precedents, all of which provide that applicants seeking a change in regulatory status must bear the burden of proof.⁵

Thus, to the extent that Comsat believes that a particular route or market has become competitive, the burden should be, and is, upon Comsat to make an affirmative showing that such is the case. Otherwise, the Commission puts Comsat's customers in the difficult position of having to prove the negative — that competition on the route or in the market in question is not an adequate check on Comsat's market power — constrained by the same limitations in obtaining information that Comsat cites as justification for its proposal. Comsat

³ Comsat Comments (filed May 29, 1998) at 16.

⁴ Comments of the Networks at 2 & n.4 (the fact that one other competitor provides service in a market does not mean the market is competitive).

⁵ See, e.g., 47 U.S.C. § 309(e) (burden of proof rests with the applicant); AT&T and MCI Petitions for Waiver of the International Settlements Policy, 5 FCC Rcd 4618, 4621 (1990) (applicant seeking a waiver of an existing rate bears the burden of proof); United Broadcasting Co., 93 FCC.2d 517, 562 (1978) (renewal applicant bears burden of proof in demonstrating its qualifications to be a licensee); In re Applications of NYNEX Corp., File No. NSD-L-96-10 (rel. Aug. 14, 1997) (under both Title II and Title III, applicants bear the burden of proof); see also, e.g., In the Matter of TCI Cablevision of Alabama, Inc., 13 FCC Rcd 6398 (1998) (under Title VI, cable systems seeking to be freed from rate regulation bear the burden of demonstrating that they face "effective competition" in the market in question).

has not provided any compelling or substantial reason for the Commission so to burden Comsat's customers. Comsat's suggestion, therefore, should be rejected.

Respectfully submitted,

PANAMSAT CORPORATION

By:  /s/ W. Kenneth Ferree

Joseph A. Godles
W. Kenneth Ferree

GOLDBERG, GODLES, WIENER & WRIGHT
1229 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 429-4900

Its Attorneys

June 12, 1998

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply of PanAmSat Corporation was sent by first-class mail, postage prepaid, this 12th day of June, 1998, to each of the following:

* Regina M. Keeney
Federal Communications Commission
2000 M Street, N.W.
Room 800
8th Floor, Mail Stop 0800
Washington, D.C. 20554

* Tom Tycz
Chief, Satellite Division
International Bureau
Federal Communications Commission
2000 M Street, N.W., Room 800
8th Floor, Mail Stop 0800B
Washington, D.C. 20554

* Fern Jarmulnek
Chief, Policy Branch Satellite Division
International Bureau
Federal Communications Commission
2000 M Street, N.W., Room 518
Mail Stop 0800B
Washington, D.C. 20554

Randolph J. May
Sutherland, Asbill & Brennan, LLP
1275 Pennsylvania Avenue, NW
Washington, DC 20004

Mark W. Johnson
CBS Corporation
Suite 1200
600 New Hampshire Avenue, NW
Washington, DC 20037

David C. Kohler
Turner Broadcasting Systems, Inc.
One CNN Center
PO Box 105366
100 International Blvd.
Atlanta, GA 30348

Charlene Vanlier
ABC, Inc.
21 Dupont Circle
6th Floor
Washington, DC 20036

Diane Zipursky
National Broadcasting Company, Inc.
Warner Building, 11th Floor
1299 Pennsylvania Avenue, NW
Washington, DC 20004

Lawrence W. Secrest, III
Gregory J. Vogt
Rosemary C. Harold
Wiley, Rein & Fielding
1776 K Street, NW
Washington, DC 20006

Mark C. Rosenblum
Lawrence J. Lafaro
Michael Behrens
295 N. Maple Avenue
Room 3245H3
Basking Ridge, NJ 07920

/s/ Hema Patel
Hema Patel



* By Hand