

Before the
Federal Communications Commission
Washington D.C. 20554

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In the Matter of)
)
Direct Access to the) IB DOCKET NO. 98-192
INTELSAT System) File No. 60-SAT-ISP-97

NOTICE OF PROPOSED RULEMAKING

Adopted: October 22, 1998 Released: October 28, 1998

Comments due: December 18, 1998
Reply Comments due: January 8, 1999

By the Commission:

1. On April 24, 1998, we granted Comsat Corporation's (Comsat) petition for reclassification as a non-dominant carrier in competitive product markets and denied its petition for reclassification in non-competitive markets.¹ In non-competitive markets where Comsat remains dominant, we also denied Comsat's request for forbearance under Section 10 of the Communications Act of 1934, as amended (the Communications Act).² We indicated, however, that we would consider favorably in evaluating any new forbearance request any actions that Comsat might undertake to promote competitive market conditions. One of the potential pro-competitive actions to which we referred was Comsat granting U.S. carriers and users direct access to the International Telecommunications Satellite Organization (INTELSAT) satellite system³ for the purpose of providing

¹ Comsat Corporation Petition pursuant to Section 10(c) of the Communications Act of 1934, as Amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier, Order and Notice of Proposed Rulemaking, FCC 98-78 (released April 28, 1998). (*Comsat Non-Dominant Order*)
² 47 U.S.C. § 16.
³ The phrase "direct access to the INTELSAT system" is also phrased as "direct access to INTELSAT" or "direct access to INTELSAT satellites."

international communication services.⁴ We also committed to initiate expeditiously a proceeding to explore the legal, economic, and policy ramifications of direct access.⁵

2. This Notice of Proposed Rulemaking requests comment on issues related to permitting direct access to the INTELSAT system in the United States. We tentatively conclude that the Communications Satellite Act of 1962⁶ and the Communications Act give discretion to the Commission to permit U.S. carriers and users the option of obtaining contractual, or Level 3, direct access to the INTELSAT system.⁷ We request comment on whether Level 3 direct access would introduce competition in non-competitive markets and enhance competition in markets where competition does exist.

3. A number of parties asked that direct access to INTELSAT be made a condition of granting Comsat the regulatory relief it sought in the *Comsat Non-Dominant* proceeding. In this NPRM, we have made use of the comments and other filings made in the *Comsat Non-Dominant* proceeding addressing direct access to identify many of the issues that need to be considered in this proceeding, and in making tentative conclusions in this Notice. We will incorporate by reference into this proceeding the relevant portions of the record in the *Comsat Non-Dominant* proceeding.

4. Congress is also considering the issue of direct access in connection with proposed legislation.⁸ This Notice requests comment on legal, economic, and policy issues arising from permitting direct access under existing law. We will consider issuing a further notice if legislation relating to direct access is enacted during the pendency of this proceeding.⁹

⁴ *Comsat Non-Dominant Order* at para. 156.

⁵ *Id.* at paras. 6 and 156.

⁶ 47 U.S.C. § 701 et seq.

⁷ See paragraph 8 for definitions of the various types of direct access that INTELSAT offers to non-Signatories.

⁸ H.R. 1872 which was passed by the House of Representatives on May 13, 1998, would require the Commission to permit Level 3 and Level 4 direct access subject to a determination that certain circumstances exist. See Report of the Committee on Commerce to accompany H.R. 1872, "Communications Satellite Competition and Privatization Act of 1998", House of Representatives, 105th Congress, 2nd Session, Report 105-494, dated April 27, 1998, at pp. 58-62. Legislation has been introduced but not passed in the Senate (S.1328 and S.2365).

⁹ The Commerce Committee stated in its Report on H.R. 1872 that it "does not intend to prevent the Commission from exercising its discretion to provide for direct access to INTELSAT or Inmarsat prior to the deadlines outlined in the bill". Commerce Committee Report on H.R. 1872 at p 61. The original sponsors of H.R. 1872 asked the Commission to implement direct access if the Commission granted Comsat's petition for non-dominant classification. Letter from Chairman Thomas J. Bliley and Edward J. Markey to Chairman William E. Kennard, dated April 16, 1998.

I. BACKGROUND

5. The Commission considered direct access to the INTELSAT system in 1984, before INTELSAT developed its current direct access offerings. In 1982, the Commission commenced an inquiry into whether U.S. carriers should be permitted direct access to INTELSAT's space segment.¹⁰ The Commission considered two alternatives for carriers to obtain direct access to INTELSAT: indefeasible right of use [IRU] and capital leases.¹¹ In 1984, the Commission terminated the proceeding, concluding that both alternatives then under consideration would result in little savings to end users and would not be in the public interest.¹² The Commission indicated that it would be amenable to reconsidering the issue of direct access at a future date should alternative measures the Commission was then pursuing to benefit Comsat's customers prove ineffectual.¹³ The Commission did not address its legal authority to require direct access.

6. In the *1984 Direct Access* proceeding, proponents of direct access pointed to the difference between the INTELSAT utilization charge (IUC) -- which INTELSAT Signatories pay INTELSAT for space segment -- and the space segment portion of Comsat's tariff as proof that Comsat's rates were not cost-justified. They argued that, by allowing the carriers to obtain service at rates that were based on the IUC, direct access would enable those carriers to compete effectively with Comsat in providing leased-channel service.¹⁴ The Commission concluded that the carriers had not shown that the adoption of direct access would promote the public interest.¹⁵ The Commission found that the IUC, while serving as a measure of the costs INTELSAT incurs in operating the system, is not

¹⁰ Regulatory Policies Concerning Direct Access to INTELSAT Space Segment for U.S. International Service Carriers (Notice of Inquiry), 90 FCC 2d 1446 (1982) (*1982 Direct Access Inquiry*).

¹¹ *1982 Direct Access Inquiry* at 1452-1454. The Commission posed two general direct access options that were described in its Notice. Under the first option, Comsat would have leased space segment facilities to the carriers on a "cost-pass-through" basis, plus a "ministerial fee" to cover administrative and maintenance costs incurred by Comsat in connection with the provision of the particular facilities leased to them. Under the second option, the end-to-end carriers would have purchased investment interests in a specific number of circuits -- known as indefeasible rights of user (IRUs) -- in the INTELSAT system through Comsat. Under this approach, the carriers, in addition to their investments, would have paid Comsat a fee to cover its costs of providing satellite service and carrying out its functions as U.S. Signatory.

¹² Regulatory Policies Concerning Direct Access to INTELSAT Space Segment for the U.S. International Service Carriers, (Report and Order), 97 FCC 2d 296 (1984) (*1984 Direct Access Order*); *aff'd*, *Western Union International, Inc. v FCC*, 814 F.2d 1280 (D.C. Cir. 1986).

¹³ *1984 Direct Access Order*, 97 FCC 2d at 298 and 326.

¹⁴ *Id.* at 304-305.

¹⁵ *Id.* at 298

a measure of Comsat's costs because it does not reflect the internal costs which Comsat incurs making satellite circuits available to U.S. customers and engaging in other activities connected with its role as U.S. Signatory.¹⁶ The Commission reviewed the categories of costs included in Comsat's revenue requirements and found (without approving any particular level of costs) that all were costs Comsat incurs operating the satellite system and providing service. While some of those costs arguably might be assumed by other carriers under a regime of direct access, the Commission found that none of them were likely to be eliminated or even substantially reduced by that process.¹⁷ The Commission concluded that direct access at best would redistribute, rather than reduce, the costs of providing INTELSAT satellite service; thus, it decided any benefit to end users would be negligible.¹⁸

7. In 1985, the Department of Commerce petitioned the Commission to consider authorizing "competitive access" to INTELSAT by U.S. carriers and users for certain customized international communications services. Without commenting on the merits of the petition, the Commission dismissed the petition without prejudice in 1990 because the record was stale and did not reflect relevant developments occurring after the filing of the petition.¹⁹ Since then, the Commission has not considered the issue of permitting direct access to INTELSAT.²⁰

8. Beginning in 1992, INTELSAT developed procedures for non-Signatory carriers and users to obtain space segment capacity directly from INTELSAT rather than through INTELSAT Signatories. INTELSAT now offers to non-Signatories four types or "levels" of direct access.²¹ The first two levels involve access to information: (a) Level 1 direct access permits customers to receive operational and technical information and attend global traffic meetings as an operation representative

¹⁶ *Id.* at 310-319

¹⁷ *Id.* at 313-319

¹⁸ *Id.* at 318-319

¹⁹ Petition for Rulemaking to Consider Authorizing Competitive Access to INTELSAT, (RM 4904) FCC 906 Memo No. 37839, released January 11, 1990.

²⁰ In 1989, the Commission considered with respect to Inmarsat a proposal that would have allowed service providers in addition to Comsat to access Inmarsat for aeronautical services directly. *Provision of Aeronautical Services via the Inmarsat System*, 4 FCC Rcd 6072 (1989). The proposal then under consideration would have involved a dual Signatory approach which the Commission found to be infeasible because it would require amendment of the Maritime Satellite Act, 47 USC 75 and the Inmarsat Convention to permit more than one Signatory per country. The Commission found the operational cost and regulatory complexities in implementing an access scheme absent dual U.S. signatories to be unacceptable. 4 FCC Rcd, 6080-6082.

²¹ See "Accessing INTELSAT...Directly", reprinted in Record of Hearing before the Subcommittee on Telecommunications, Trade, and Consumer Protection on H.R. 1872, at 135-141. See also INTELSAT's world-wide web page at "<http://www.intelsat.com/cmc/connect/daccess.htm>;" INTELSAT AP-21-7E "Report by the Board of Governors on INTELSAT Access Arrangements," March 18, 1997.

and (b) Level 2 direct access permits customers to meet with INTELSAT management and staff regarding capacity availability, commercial and INTELSAT tariff matters. The third and fourth levels involve access to communication services: (a) Level 3 direct access permits customers to enter into a contractual agreement with INTELSAT for ordering, receiving, and paying for INTELSAT space segment capacity at the same rate that INTELSAT charges its Signatories and (b) Level 4 direct access permits customers, in INTELSAT member countries only, to make a capital investments in INTELSAT in proportion to utilization of the INTELSAT system. Customers are also permitted to obtain INTELSAT space segment at INTELSAT tariff rates.

9. INTELSAT only permits direct access in countries where direct access is authorized by the Signatory representative. For both Level 3 and Level 4 direct access, a customer is required to enter into a service agreement with INTELSAT that sets forth the general terms and conditions for INTELSAT supply of its space segment capacity.²² So long as the service agreement remains in effect, a customer is able to access INTELSAT space segment directly. Level 3 customers have no investment obligations or rights to participate in the operation of the INTELSAT system. A Signatory permitting Level 3 direct access will earn a return on its investment in space segment capacity used by a Level 3 customer (currently up to 21 percent).²³ A Level 4 customer undertakes all of the financial obligations under the INTELSAT Operating Agreement that are applicable to Signatories and thus is entitled to earn a return on its investment in INTELSAT. A Level 4 customer is not accorded rights to participate in the INTELSAT governance process unless special arrangements are made by the Party and Signatory representing its country.

10. In our *Comsat Non-Dominant Order*, we noted that while direct access is not available in the United States, 93 countries permit either Level 3 or Level 4 direct access.²⁴ Seventy-six countries permit Level 3 direct access and 17 countries permit Level 4 direct access to INTELSAT, as noted in Appendix A. Non-signatory investment has become a significant portion of INTELSAT's ownership structure. Level 4 direct access investors cumulatively account for approximately 6.83

²² Copies of the service agreements are available on INTELSAT's world-wide web page: <http://www.intelsat.com/cmc/connect/servform.htm>.

²³ INTELSAT operates on a commercial basis as a cost sharing cooperative with the long term objective of providing services at prices which meet its revenue requirements. Each shareholder contributes to INTELSAT and receives capital repayments and compensation for the use of capital in proportion to its investment share. Capital repayments are calculated so as to return all surplus cash to shareholders. Generally, the amount is equivalent to depreciation and other similar types of non-cash expense. Compensation for the use of capital is calculated based on a target rate, or range, of return which is established by the INTELSAT Board of Governors and periodically reviewed. All shareholders (Signatories and Level 4 direct access investors) are entitled to the target rate of return. In 1997, the INTELSAT Board of Governors decided to establish a range of 17-21 percent for the target rate of return and to review the range annually. During 1997, the actual return on shareholders' invested capital was approximately 18 percent, which was within the target range. See INTELSAT 1997 Annual Report at pp. 30 and 37.

²⁴ *Comsat Non-Dominant Order*, at para. 157.

percent of the total share of investment in the INTELSAT system.²⁵ Comsat subsidiaries, Comsat Argentina in Argentina and Comsat General in the United Kingdom, are permitted Level 4 direct access to INTELSAT in those countries.

11. In the record established in response to Comsat's request for reclassification as a non-dominant carrier, which will be referred to herein as the "*Comsat Non-Dominant* proceeding," U.S. carriers and users of INTELSAT services urged the Commission to permit direct access to the INTELSAT system. AT&T, MCI, and WorldCom submitted a study to support their argument that there would be substantial cost savings from direct access.²⁶ They also filed a legal analysis to support their contention that the Commission has authority to permit direct access.²⁷ AT&T, MCI, and WorldCom contend that direct access will allow carriers to handle more efficiently international traffic which would serve consumers and the public interest.²⁸ In addition, in comments filed in the *Comsat Non-Dominant* proceeding, several Networks (ABC, CBS, NBC, and Turner Broadcasting) requested that the Commission reexamine the direct access issue. The Networks contend that direct access to INTELSAT by U.S. entities other than Comsat is banned only by Commission policy which it has not addressed since 1984.²⁹ The Networks maintain that direct access by carriers and end users could provide benefits in terms of reduced end user rates and providing a competitive check on Comsat.³⁰ U.S. earth station operators, Keystone Communications Corporation, and Washington International Teleport, point out that direct access is available in many major telecommunications markets and request that the option be made available in the United States.³¹

12. Comsat opposes the introduction of direct access in the United States. Comsat argues

²⁵ See INTELSAT's 1997 Annual Report.

²⁶ See Satellite Users' Coalition "Analysis of Privatization of Intergovernmental Satellite Organizations Proposed in H.R. 1872" filed by AT&T on March 16, 1998.

²⁷ See Satellite Users' Coalition "The Legal Authority of the Federal Communications Commission to Authorize Direct Access to the INTELSAT System" filed on March 6, 1998.

²⁸ Letter from the Satellite Users' Coalition (AT&T, MCI, and WorldCom) to Secretary, Federal Communications Commission, dated February 19, 1998. See also Comments of WorldCom at p. 14. See also para. 45, *infra*.

²⁹ See Partial Opposition of ABC, Inc., CBS, Inc., National Broadcasting Company, Inc. and Turner Broadcasting System, Inc. (the Networks) in the *Comsat Non-Dominant* proceeding, filed on June 16, 1997 at p. 23.

³⁰ *Id.* at pp. 23-24.

³¹ Comments of Keystone Communications at p. 3 and comments of Washington International Teleport, Inc. at pp. 4-5 in the *Comsat Non-Dominant* proceeding.

that the Commission has no authority to permit direct access.³² Comsat contends that some forms of direct access would do more harm than good to users and would harm intermodal competition, i.e. competition between satellite and fiber optic cable service providers. Comsat further maintains that direct access would threaten Comsat's ability to speak with a unified voice within the INTELSAT system³³ and would delay the restructuring of INTELSAT.³⁴ It also argues that direct access would result in increased regulatory and administrative costs and a loss in economies of scale to Comsat that benefit small users.³⁵ Under a direct access regime, Comsat argues that it would not be adequately compensated for costs it incurs in providing services via INTELSAT. Comsat submitted an economic evaluation of direct access,³⁶ and a response to the Satellite Users' Coalition analysis challenging the Coalition's claim that benefits will result from direct access.³⁷ Comsat argues that the commenters' analysis of the benefits of direct access is flawed because direct access would allow U.S. carriers "a free ride on Comsat's investment and statutory Signatory functions" and not allow Comsat to recover costs for services it must provide to all U.S. users.³⁸

13. PanAmSat also addressed the issue of direct access in the *Comsat Non-Dominant* proceeding. PanAmSat argued that direct access would permit INTELSAT to operate at the "retail level" in the U.S. market while enjoying full immunity from liability for anti-competitive behavior.³⁹ PanAmSat also stated that direct access should not be permitted in the U.S. market unless accompanied by an INTELSAT waiver of its immunities.⁴⁰

³² See Comsat Corporation "An Analysis of the FCC's Authority to Mandate 'Direct Access' for the INTELSAT System," dated December 24, 1997.

³³ Reply Comments of Comsat in the *Comsat Non-Dominant* proceeding at p. 49.

³⁴ *Id.* at pp. 49-50

³⁵ *Id.* at pp. 42-47.

³⁶ See Comsat Corporation, "An Economic Evaluation of Direct Access to the INTELSAT System by U.S. Telecommunications Customers" by Professor Jerry R. Green, Harvard University, and Brattle/PR, dated October 1995 and submitted by letter from Howard D. Polsky, Comsat Corporation to Secretary, Federal Communications Commission, dated March 17, 1998.

³⁷ Comsat Corporation, Joint Response to the Satellite Users' Coalition, "Analysis of the Privatization of the Intergovernmental Satellite Organizations as Proposed in H.R. 1872 and S. 1382", dated March 9, 1998, submitted by letter from Howard D. Polsky, Comsat Corporation to Secretary, Federal Communications Commission, dated March 17, 1998.

³⁸ Reply Comments of Comsat in the *Comsat Non-Dominant* proceeding at p. 47.

³⁹ Reply Comments of PanAmSat in the *Comsat Non-Dominant* proceeding at pp. 2-3.

⁴⁰ Letter from Henry Goldberg on behalf of PanAmSat Corporation to Secretary, Federal Communications Commission, dated December 2, 1997.

II. DISCUSSION

14. Consideration of direct access at this time is necessary and appropriate for several reasons. First, since our *1984 Direct Access Order*, INTELSAT has instituted a formal program permitting non-Signatory direct access to INTELSAT services. In light of INTELSAT's direct access program, it is appropriate for the Commission to consider whether U.S. carriers and users should have an opportunity to avail themselves of direct access. Second, Comsat's customers, both carriers and users, are asking the Commission and Congress to permit direct access in the United States. Third, we recently found that Comsat continues to be dominant in 63 countries for switched voice and private line services and in 142 countries for occasional use video services.⁴¹ We refer to these markets where customers have no choice but to use Comsat in obtaining satellite capacity for those services as the "non-competitive markets."

15. We intend to take a broad look at Level 3 direct access options in this proceeding. We request comment on implementation of Level 3 direct access in the United States in connection with services to both competitive and non-competitive markets, as defined in our *Comsat Non-Dominant Order*. As discussed below, we do not believe that the Commission currently has authority to implement Level 4 "investment" direct access under the Communications Satellite Act of 1962 ("Satellite Act"). We note in the *Comsat Non-Dominant Order* that the U.S. carriers seeking Level 3 direct access agree that the Commission is barred by the Satellite Act from permitting Level 4 direct access.⁴² We therefore will focus on issues related to implementing Level 3 contractual direct access in the United States. This assessment raises the following questions: (1) does the Commission have authority to implement direct access in the United States?; (2) what are the potential benefits of direct access?; (3) what competitive concerns are raised by direct access?; and (4) how would direct access affect U.S. efforts to privatize INTELSAT? These questions are interrelated and the conclusions we arrive at for any one may affect the conclusions we make with respect to others. Also, we recognize that these questions may not be comprehensive. We therefore request comment on related issues that may not be raised in the discussion below.

- (1) **Does the Commission have the authority to implement direct access in the United States?**

16. Comsat argued in the *Comsat Non-Dominant* proceeding that the Commission lacks the authority to permit direct access to the INTELSAT system by other U.S. carriers. Comsat contends that the provisions of the Satellite Act, as well as court and Commission decisions, give Comsat the exclusive right to access the INTELSAT system.⁴³ Comsat states that the Satellite Act makes it the

⁴¹ *Comsat Non-Dominant Order* at para. 132 and Appendix A and B.

⁴² Satellite Users Coalition, "The Legal Authority of the Federal Communications Commission to Authorize Direct Access to the INTELSAT system", at pp. 4-5.

⁴³ *See generally* "An Analysis of the FCC's Authority to Mandate 'Direct Access' to the INTELSAT System," filed by Comsat Corporation, dated December 24, 1997.

sole participant in INTELSAT and that the language of the Act and legislative history demonstrate Congressional intent that Comsat have exclusive access to INTELSAT.⁴⁴ Comsat argues that Commission decisions and Congressional action subsequent to the Satellite Act support an interpretation barring direct access.⁴⁵ Comsat also maintains that Commission action permitting direct access to the INTELSAT system would contravene the "Takings Clause" of the Fifth Amendment of the U.S. Constitution because it would deny Comsat's shareholders a return on their investment in Comsat to which they have a reasonable expectation.⁴⁶ PanAmSat argued in the *Comsat Non-Dominant* proceeding that permitting direct access would disrupt the scheme created under the Satellite Act to regulate Comsat. PanAmSat maintains that the INTELSAT system and its foreign Signatories would be outside of the U.S.'s regulatory reach.⁴⁷

17. In the *Comsat Non-Dominant* proceeding, the Networks and AT&T, MCI, and WorldCom maintained that the Commission has the authority to permit Level 3 direct access to INTELSAT satellites and that Commission policy is the only bar to direct access.⁴⁸ AT&T, MCI, and WorldCom agree with Comsat that the Satellite Act deems Comsat the only U.S. participant in INTELSAT; however, they contend that participation applies to investment in and governance of INTELSAT, not access to the system.⁴⁹ They argue that Level 3 direct access is therefore not barred by the Act. The Networks state that, as U.S. carriers are permitted to operate earth stations accessing INTELSAT, the Satellite Act gives them the same "non-discriminatory and equitable" access to INTELSAT as it gives Comsat.⁵⁰ Finally, they contend that the Commission has never determined that there is a legal bar to direct access.⁵¹

18. As discussed above, the Commission decided in 1984 not to require direct access for policy reasons.⁵² The Commission did not address its legal authority to require direct access.⁵³ The

⁴⁴ *Id.* at pp. 2-5

⁴⁵ *Id.* at pp. 7-8

⁴⁶ *Id.* at p. 12; *see also* Reply Comments of Comsat in *Comsat Non-Dominant* proceeding at p. 50.

⁴⁷ Reply Comments of PanAmSat in *Comsat Non-Dominant* proceeding at p. 2.

⁴⁸ Reply Comments of Networks at pp. 10-11; Comments of Networks at pp. 23-24; Comments of WorldCom at pp. 10-14. Satellite Users Coalition "The Legal Authority of the Federal Communications Commission to Authorize Direct Access to the INTELSAT System", March 6, 1998 at pp. 4-5.

⁴⁹ Satellite Users Coalition, "The Legal Authority of the Federal Communications Commission to Authorize Direct Access to the INTELSAT System", at pp. 4-5.

⁵⁰ *Id.* at pp. 6-7

⁵¹ *Id.* at p. 16.

⁵² *1984 Direct Access Order* at 310 and 326.

D.C. Circuit affirmed the Commission's decision in 1986. However, there is nothing contained in its decision suggesting that the Commission did not have discretion to impose direct access had it found policy grounds to do so.⁵⁴ The Court simply found that the Commission's decision not to mandate direct access was reasonable based on the record.

19. We tentatively conclude that the Commission has the authority to permit other U.S. carriers and users to obtain Level 3 direct access to INTELSAT.⁵⁵ We tentatively find that Level 3 direct access is consistent with the Satellite Act and the requirements of the Fifth Amendment. As discussed below, however, we tentatively conclude that we do not have authority under the Satellite Act to permit U.S. carriers and users to obtain Level 4 direct access to INTELSAT. We request comment on these tentative conclusions and our analysis below.

20. Satisfaction of Satellite Act Requirements: The Satellite Act declares it the policy of the U.S. to establish a commercial communications satellite system with global coverage "in conjunction and in cooperation with other countries."⁵⁶ It directs that "care and attention will be directed toward providing such services to economically less developed countries and areas as well as those more highly developed."⁵⁷ In addition, it provides that "United States participation in the global system shall be in the form of a private corporation subject to appropriate governmental regulation."⁵⁸ The Satellite Act requires that "all authorized users have nondiscriminatory access to the system" and "that maximum competition be maintained in the provision of equipment and services utilized by the system."⁵⁹ The corporation formed under the Satellite Act is required to "be so organized and operated as to maintain and strengthen competition in the provision of communications services to the public."⁶⁰

21. In order to achieve the objectives and carry out the purposes of the Satellite Act, the President is required by the Act to exercise oversight of the Corporation's development and

⁵³ *Id.*

⁵⁴ *Western Union International, Inc. v. FCC*, 804 F.2d 1280 (D.C. Cir. 1986).

⁵⁵ The Commerce Committee Report to H.R. 1872 stated that the FCC has the current authority to institute direct access and further stated that the Committee did not intend the provisions in H.R. 1872 applying to direct access to imply a need for amendment of the 1962 Satellite Act to permit direct access. See H.R. Report No. 105-499 at p. 61.

⁵⁶ 47 U.S.C. § 701(a).

⁵⁷ 47 U.S.C. § 701(b).

⁵⁸ 47 U.S.C. § 701(c).

⁵⁹ *Id.*

⁶⁰ *Id.*

participation in the global satellite system.⁶¹ The Satellite Act requires the Commission to exercise certain regulatory functions in its administration of the provisions of the Communications Act as supplemented by the Satellite Act.⁶² Among the requirements placed on the Commission is to "ensure that all present and future authorized carriers shall have nondiscriminatory use of, and equitable access to, the communications satellite system and satellite terminal stations."⁶³ The Commission also is to "prescribe such ratemaking procedures as will ensure that any economies made possible by a communications satellite system are appropriately reflected in rates for public communication services," and the Act empowers the Commission to "make rules and regulations to carry out the provisions of [the] Satellite Act."⁶⁴

22. The Satellite Act created Comsat as a for-profit corporation to be the U.S. participant in the global satellite system that became INTELSAT.⁶⁵ The Act authorizes Comsat to:

- (1) plan, initiate, construct, own, manage, and operate itself or in conjunction with foreign governments or business entities a commercial communications satellite system;
- (2) furnish, for hire, channels of communication to United States communications common carriers and to other authorized entities, foreign and domestic; and

⁶¹ 47 U.S.C. § 721. The Satellite Act requires the President to: (a) aid in planning and developing the system, including fostering and executing a national program toward this end; (2) review all phases of system development, including Comsat's activities under the Act; (3) coordinate activities of governmental agencies; (4) supervise Comsat's relationships with foreign governments or entities or with international bodies; (5) ensure timely arrangements for foreign participation in the system; (6) ensure availability of the system for governmental purposes; and (7) exercise authority to attain efficient spectrum use and system compatibility with communications facilities in the U.S. and abroad. *See also* Executive Order 12046, 43 F.R. 13349 (March 27, 1978).

⁶² 47 U.S.C. § 721(c).

⁶³ 47 U.S.C. § 721(c)(2).

⁶⁴ 47 U.S.C. §§ 721(c)(4) and (c)(11). In addition, the Satellite Act places additional requirements on the Commission: (1) ensure competitive bidding in procurement for the system; (2) upon advice of the Secretary of State, institute proceedings under Section 214(d) of the Communications Act to require establishment of communications links to a foreign point; (3) ensure technical compatibility of system facilities with existing communications facilities; (4) approve system technical characteristics; (5) authorize construction and operating of satellite terminal stations; (6) authorize Comsat to issue capital stock, borrow money, or assume security obligations; (7) ensure that proposed additions to the system are in the public interest; and (8) in accordance with Section 214 of the Communications Act, require additions to the system where such additions would serve the public interest. *See* 47 U.S.C. § 721(c).

⁶⁵ 47 U.S.C. § 731.

(3) own and operate satellite terminal stations when licensed by the Commission under section 201(c)(7).⁶⁶

The Satellite Act also authorizes Comsat "to contract with authorized users, including the United States Government, for the services of the communications satellite system."⁶⁷ It deems Comsat a common carrier within the meaning of the Communications Act and, as such, fully subject to titles II and III of the Communications Act.⁶⁸

23. Comsat argues that implementing Level 3 direct access would violate the Satellite Act provisions providing for Comsat's sole participation in the global system that became INTELSAT.⁶⁹ The Satellite Act clearly created Comsat to undertake an exclusive role as the U.S. participant in the global system that became INTELSAT. That government-sanctioned role entails Comsat investment in the system and its participation in system governance. We tentatively find, however, that Level 3 direct access would not be inconsistent with Comsat's role as the sole U.S. participant in INTELSAT. If we were to permit Level 3 direct access, Comsat would continue to be the only U.S. investor in INTELSAT earning a return of up to 21 percent on its investment in space segment used by U.S. direct access customers. Comsat also would continue to be the only U.S. representative on the INTELSAT Board of Governors, as well as the Meetings of Signatories participating in INTELSAT. Thus, Comsat would remain the sole U.S. entity in INTELSAT activities that "plan, initiate, construct, own, manage, and operate" the satellite system in conjunction with other members of INTELSAT. We seek comment on this analysis and these tentative findings.

24. Comsat argues that other provisions in the Satellite Act make it the sole entity authorized to provide INTELSAT services to U.S. customers.⁷⁰ Comsat cites provisions that authorize it to provide U.S. customers with access to the INTELSAT space segment through its own common carrier service offerings.⁷¹ The Act's authorization of Comsat to undertake certain activities, including furnishing "for hire channels of communication" to U.S. customers, is not, however, expressed in terms of exclusivity.⁷² We request comment on this tentative finding.

25. Comsat also points to the provisions of the Act requiring that customers have "non-

⁶⁶ 47 U.S.C. § 735(e).

⁶⁷ 47 U.S.C. § 735(b)(4).

⁶⁸ 47 U.S.C. § 741.

⁶⁹ Comsat "An Analysis of the FCC's Authority to Mandate 'Direct Access' to the INTELSAT System" dated December 24, 1997, at pp. 2-8, citing 47 U.S.C §§ 701(c) and 702(8).

⁷⁰ *Id* at pp. 2-4.

⁷¹ *Id* at 4, citing 47 U.S.C. § 731-735.

⁷² 47 U.S.C. § 735

discriminatory" and "equitable" access to the satellite system as evidence of Congressional intent that customer access be only through Comsat owned capacity. Comsat states that the Act "specifies that Comsat must provide its customers with access to its space segment capacity in a "nondiscriminatory" and "equitable manner."⁷³ It is the Commission, however, that is mandated by language of the Act to insure "nondiscriminatory" and "equitable" access to the satellite system as part of its "administration of the provisions" of the Act.⁷⁴ Moreover, the Satellite Act does not specify, as Comsat argues, that customer access to the INTELSAT satellite system must be through Comsat space segment.⁷⁵ The Act states that customers are to have "nondiscriminatory" and "equitable access to" the "communications satellite system."⁷⁶ The Act defines "communications satellite system" in general and technical terms without referencing Comsat space segment.⁷⁷ Our review of the legislative reports accompanying the Satellite Act does not reveal a Congressional requirement that Comsat maintain its own space segment within the satellite system for purposes of providing service to U.S. customers.⁷⁸ Neither do the legislative reports require the global satellite system to be structured in such a way that its investors are the sole distributors of services from the system. Accordingly, we tentatively find that provisions of the Satellite Act relied upon by Comsat do not mandate that Comsat be the sole provider of access to the INTELSAT system. We request comment on this analysis and these tentative findings.

26. We believe that the Act accords the Commission discretion as to how to insure "nondiscriminatory" and "equitable access" to the system, and that we may permit Level 3 direct access in the exercise of that discretion. This is evidenced by the fact that the Act requires the

⁷³ Comsat "An Analysis of the FCC's Authority to Mandate Direct Access to the INTELSAT System," at p. 3, citing 47 U.S.C. 721 (c)(2).

⁷⁴ 47 U.S.C. § 201(c)(2). *See also* Report of the Committee on Interstate and Foreign Commerce to accompany H.R. 11040, "Communications Satellite Act of 1962", House of Representatives, 87th Congress, 2d session, Report No. 1636, dated April 24, 1962 at p. 12.

⁷⁵ Satellite Users Coalition "The Legal Authority of the Federal Communications Commission to Authorize Direct Access to the INTELSAT's System" at p. 7.

⁷⁶ 47 U.S.C. § 201(c)(2)

⁷⁷ 47 U.S.C. § 702(1). The term "communications satellite system" refers to a system of communications satellites in space whose purpose is to relay telecommunication information between satellite terminal stations, together with such associated equipment and facilities for tracking, guidance, control, and command functions as are not part of the generalized launching, tracking, control, and command

⁷⁸ *See* Report of the Committee on Interstate and Foreign Commerce to accompany H.R. 11040, "Communications Satellite Act of 1962", House of Representatives, 87th Congress, 2d session, Report No. 1636, dated April 24, 1962; Report of the Committee on Aeronautical and Space Sciences to accompany S. 2814, "Communications Satellite Act of 1962", Senate, 87th Congress, 2d Session, Report No. 1584, dated June 11, 1962. Report of the Committee on Commerce to accompany H.R. 11040, "Communications Satellite Act of 1962", Senate, 87th Congress, 2d Session, Report No. 1584, dated June 11, 1962.

Commission to "regulate the manner in which available facilities of the system and stations are allocated among users."⁷⁹ Should we decide to permit Level 3 direct access, we would carry out our discretion to ensure "nondiscriminatory" and "equitable" access by requiring that Comsat, as the U.S. Signatory, undertake such actions necessary under INTELSAT procedures to make Level 3 direct access available to all U.S. carriers and users that seek it.⁸⁰ We request comment on this approach.

27. In the *Comsat Non-Dominant* proceeding, Comsat further contended that a Commission order implementing direct access would conflict with prior Commission decisions recognizing "the general concept pervading the Satellite Act of [Comsat] as a monopoly (insofar as the space segment of international communications is concerned)."⁸¹ In the *Authorized User I* decision, the Commission stated that Comsat is given a virtual monopoly position in the operation of the INTELSAT space segment and that the Commission lacks authority to authorize other carriers to operate space segment facilities from INTELSAT.⁸² The Commission's decision in *Authorized User I*, however, addressed whether the Satellite Act allowed Comsat to provide services directly to entities other than carriers.⁸³ The issue of whether Comsat has exclusive direct access to the INTELSAT

⁷⁹ 47 U.S.C. § 201(c)(2).

⁸⁰ As noted in paragraph 9, INTELSAT only permits direct access to a country if authorized by the Signatory. Under INTELSAT procedures, the Signatory may determine the level of direct access subject to national regulatory requirements. A Signatory that issues a direct access authorization is indicating its commitment to both the customer and to INTELSAT that the Signatory is willing to allow the customer to have direct access to INTELSAT in accordance with the terms of the authorization. Depending on national regulatory requirements, the Signatory may revise or alter an authorization it has previously issued, including revocation of the authorization. Each customer must be individually authorized by the Signatory. The customer must sign a service agreement that establishes a contractual relationship between INTELSAT and the customer and the general terms and conditions of doing business with INTELSAT. Because the INTELSAT Agreements require that INTELSAT must provide service to all customers at the same tariff, and on the same terms and conditions, the service agreement cannot be modified for individual customers. See "Accessing INTELSAT...Directly", reprinted in Record of Hearing before the Subcommittee on Telecommunications, Trade, and Consumer Protection H.R. 1872, at 139-140.

⁸¹ Comsat "An Analysis of FCC's Authority to Mandate 'Direct Access' to the INTELSAT System", at 11, citing *In re Authorized Entities and Authorized Users Under the Communications Satellite Act*, 4 FCC 2d 421 (1966) (*Authorized User I*); *In re Establishment of Regulating Policies Relating to Authorization Under Section 214 of the Communications Act of 1934 of Satellite Facilities for Handling of Transiting Traffic*, 23 FCC 2d 9 (1970) (*Satellite Facilities for Handling Transiting Traffic*), citing *Authorized User I* as support.

⁸² *Authorized User I*, 4 FCC 2d at 428, 430 and 435.

⁸³ *Id.* at p. 422. In *Satellite Facilities for Handling Transiting Traffic*, the Commission did not resolve issues involving direct access to Intelsat. Rather, it considered and rejected the argument that the Satellite Act requires U.S. carriers to deal through Comsat for space segment facilities to be used with foreign earth station facilities. 23 FCC 2d at 12.

space segment under the Satellite Act was not before the Commission in *Authorized User I*, so the statements on which Comsat relies are dicta. Moreover, the Commission's *Authorized User I* decision contained virtually no analysis of the relevant statutory language or legislative history. For these reasons, we do not believe that we are foreclosed from an analysis of our authority under the Satellite Act to permit direct access now that INTELSAT offers direct access to non-signatory users.⁸⁴ We seek comment on our analysis.

28. Comsat cites our 1997 *DISCO II* decision implementing the World Trade Organization Agreement on Basic Telecommunications Services (WTO Agreement) as support for its arguments that direct access is not permissible under the Satellite Act. In that decision, we stated that the U.S. Schedule of Specific Commitments "maintains access to INTELSAT and Inmarsat satellites through Comsat for the provision of any service, domestic or international."⁸⁵ However, neither our *DISCO II* Order nor the language of the U.S. Schedule of Specific Commitments in the WTO Agreement supports a finding that the Satellite Act prohibits direct access. These are simply reflections of existing policy and practice that are not intended to be changed by the WTO Agreement. More recently, in response to a Congressional inquiry as to whether any part of the Satellite Act was inconsistent with the U.S. offer in the WTO, the Department of Commerce, on behalf of the administration, responded that "nothing in the WTO telecommunications agreement requires the United States to change its telecommunications laws or precludes the FCC's ability to make decisions on the basis of the public interest."⁸⁶ Thus, those provisions of our *DISCO II* Order have no bearing on our possible future decision to require direct access under the Satellite Act.

29. Further, we believe the 1978 amendments to the Satellite Act show that when Congress intended to give Comsat an exclusive role in the operation of a satellite system, it used specific language to make that intent clear. Congress amended the Satellite Act in 1978, designating Comsat "as the *sole operating entity* of the United States for participation in Inmarsat for the purpose

⁸⁴ Comsat cites additional cases as precedent for its argument that it is the sole provider of INTELSAT space segment capacity in the United States. *Communications Satellite Corporation*, 56 FCC 2d 1101 (1975), remanded sub nom. *Communications Satellite Corp. vs. FCC* 611 F.2d 883, modified 68 FCC 2d 941 (1978) (*Comsat Rate Case*). *Communications Satellite Corporation v. FCC*, 836 F. 3d 623 (D.C. Cir. 1988); and, *Alpha Lyracom Space Communications, Inc. v. Communications Satellite Corporation*, 1990-2 Trade Cas. 64,578 (S.D.N.Y. 1990), *aff'd in part, reversed and remanded in part*, 946 F. 2d 168 (2d Cir. 1991), *cert. denied*, 502 U.S. 1096 (1992). These cases, however, did not determine whether the Commission has authority to permit direct access to INTELSAT by other carriers. Rather, they merely recognized Comsat's role as the U.S. participant in INTELSAT, and the fact that Comsat currently is the only available means to access INTELSAT services in the United States.

⁸⁵ See Non U.S. Licensed Satellites providing Domestic and International Service in the United States 12 FCC Rcd 24094, 24146 (1997) (*DISCO II Order*).

⁸⁶ See Record of Hearing on the Communications Satellite Competition and Privatization Act, H.R. 1872, Subcommittee on Telecommunications, Trade, and Consumer Protection. 1st Session, September 30, 1997, Serial No. 105-6, at page 210 citing Letter to Thomas Bliley, Chairman, Committee on Commerce, from Jack Gleason, Department of Commerce, dated January 23, 1998.

of providing international maritime satellite telecommunications services."⁸⁷ The Commission has consistently viewed Comsat's provision of Inmarsat space segment for the provision of maritime services as an exclusive role within the United States by virtue of the Maritime Satellite Act.⁸⁸ In contrast, the 1962 Satellite Act specified no such exclusive role for Comsat with respect to access to INTELSAT system services nor did it make any reference to Comsat space segment in the system. We believe that this contrasting approach suggests that Congress did not intend to give Comsat exclusive access to the INTELSAT system, but intended rather to give it an exclusive role in system governance and ownership. We request comment on this analysis.

30. Finally, the Satellite Act empowers the Commission to implement the provisions and achieve the goals of the Satellite Act. We tentatively conclude that permitting U.S. carriers and users to obtain Level 3 direct access for services to those markets where Comsat remains dominant would further the purposes of the Satellite Act to: (a) "maintain and strengthen competition in the provision of communications services to the public";⁸⁹ and (b) direct "care and attention ... toward providing such services to economically less developed countries."⁹⁰ Many of the countries included in our list of non-competitive markets for switched voice and private line services and for occasional use video services are designated by the International Telecommunication Union (ITU) as "least developed countries".⁹¹ We tentatively conclude that imposing Level 3 direct access would serve the Satellite Act's purpose of promoting growth in communications between the U.S. and economically less well

⁸⁷ 47 U.S.C. § 752(a)(1), (emphasis added); *See also* H.R. Rep. No. 95-1134, Part I, 95th Cong., 2d Sess. 15 (1978); H.R. Rep. No. 95-1134, Part II, 95th Cong., 2d Sess. 12 (1978); S. Rep. No. 95-1036, 95th Cong., 2d Sess. 20 (1978)

⁸⁸ *See* Provision of Aeronautical Services in the Inmarsat System, 2 FCC Rcd. 390 (1987) (*Aeronautical Services Order I*; Appeal docketed, No. 87-1077/78 (D.C. Cir. February 12, 1987), remanded by Order of the Court on November 22, 1988 in response to the November 15, 1988 Commission request; In the matter of Provision of Aeronautical Services via the Inmarsat System, 4 FCC Rcd. 6072 (1989) (*Aeronautical Services Order II*); *See also* Participation by Comsat Corporation in a New Satellite System Designed to Provide Service for Hand-held communications Devices (*Inmarsat-P Declaratory ruling*), 9 FCC Rcd. 7693 (1994) *motion for temporary relief denied*, 10 FCC Rcd. 1061 (Int'l. Bur. 1993); petition for review denied, D.C. Court of Appeals, No. 95-1057, *Comsat Corporation v. FCC*, March 15, 1996.

⁸⁹ 47 U.S.C. § 701(c).

⁹⁰ 47 U.S.C. § 701(b).

⁹¹ The ITU has identified 48 Least Developed Countries (LDCs) about which it provides analysis and statistics on LDC telecommunication networks and services. The LDCs are defined as "low income countries that are suffering from long-term constraints by growth, in particular low levels of human resource development and severe structural weaknesses." *See* Telecommunications Indicators for the Least Developed Countries, First Edition, 1995, at pp. 1-3. Of the 48 listed LDCs, 38 are included on our list of thin route countries for switched voice and private line service. *Comsat Non-Dominant Order*, at para. 41-42 and Appendix A.

developed countries by promoting competition and expanding user choice for U.S. services to these markets.⁹² We seek comment on this tentative conclusion.

Constitutional Issues

31. In the *Comsat Non-Dominant* proceeding, Comsat argued that a Commission decision permitting other U.S. carriers to obtain direct access to INTELSAT would violate the Fifth Amendment.⁹³ Comsat asserts that permitting direct access would breach the regulatory contract between Comsat and the U.S. Government, and constitute an uncompensated "taking" in violation of the Fifth Amendment.⁹⁴ According to Comsat, direct access would deprive Comsat of its exclusive INTELSAT franchise without just compensation, and would likewise deprive its shareholders of a return on their investment.

32. We tentatively conclude that permitting other U.S. carriers and users to obtain Level 3 direct access to INTELSAT satellites would not violate the Fifth Amendment. We tentatively conclude that the provisions of the Satellite Act and the regulatory scheme created thereby do not result in a regulatory contract between the U.S. Government and Comsat that confers on Comsat an exclusive right to access INTELSAT satellites from the U.S. In addition, we tentatively conclude that Comsat possesses no contractual property right with respect to its access to INTELSAT satellites that could be considered vested property within the meaning of the Fifth Amendment. Moreover, the allowance of Level 3 direct access would not result in a permanent physical occupation, a physical invasion or an economic regulation of Comsat's private property that would constitute a taking requiring just compensation under the Fifth Amendment. We request comment on these tentative conclusions and the corresponding analysis.⁹⁵

33. No Comsat Property Right Exists: Comsat argues that a regulatory contract arises under the Satellite Act between the U.S. Government and Comsat, and that U.S. Government action that permits U.S. carriers and users to access INTELSAT satellites directly from the U.S. would

⁹² See paragraph 54 in which we ask for comments as to whether to impose Level 3 direct access in competitive markets.

⁹³ U.S. CONST. amend. V. The Fifth Amendment provides that "private property [shall not] be taken for public use without just compensation."

⁹⁴ See Comsat "An Analysis of the FCC's Authority to Mandate 'Direct Access' to the INTELSAT System," at p. 12.

⁹⁵ The House Commerce Committee addressed similar issues in its recent consideration of H.R. 1872. The Commerce Committee Report on H.R. 1872 concluded that H.R. 1872, which includes provisions mandating direct access, would not result in a taking under the Fifth Amendment. See H.R. Rep. No. 105-494 at pp. 25-26.

breach this contract.⁹⁶ In the cases cited by Comsat in support of its argument, the Supreme Court concluded that express promises made by the government had been breached.⁹⁷ In *The Binghamton Bridge* case, the Court held that a state breached an express statutory provision conferring geographical exclusivity on a bridge builder when the state subsequently permitted another bridge builder to construct a bridge in violation of the first bridge builder's exclusive rights. In *U.S. v. Winstar*, the Court concluded that the U.S. Government was liable for breach of contract when a Federal statute and implementing regulations invalidated a specific provision in contracts previously negotiated between thrifts and U.S. bank regulatory authorities permitting the thrifts to count supervisory goodwill and capital credits toward their regulatory capital requirements.

34. A vested property right may be conferred upon a private party by the U.S. Government.⁹⁸ Whether such a property right is vested depends upon the nature of the relationship between the private party and the U.S. Government. Under the Supreme Court's decision in *U.S. v. Winstar* the first inquiry may be whether there was a contract at all between the private party, and the U.S. Government.⁹⁹ This inquiry focuses in part upon whether the relationship was one of governmental regulation of the private party as opposed to a contractual undertaking with that private party.¹⁰⁰ In *U.S. v. Winstar*, the Court indicates that, assuming that a governmental contract may exist, the inquiry next moves to consideration of "special rules, not generally applicable to private contracts, [that] govern the enforcement of the governmental contracts . . ."¹⁰¹ Application of these special rules may preclude the enforcement of a contract right against the U.S. Government, and hence preclude the existence of a vested property right. The Court explained that these special rules include, among others, the canon of contract construction that surrenders of sovereign authority must appear in unmistakable terms, and the rule that an agent's authority to make such surrenders must be delegated in express terms.¹⁰² In other words, *U.S. v. Winstar* makes clear that the creation of a vested property

⁹⁶ Comsat "An Analysis of the FCC's Authority to Mandate 'Direct Access' to the INTELSAT System" at p. 12.

⁹⁷ *The Binghamton Bridge*, 70 U.S. 51, 74 (1865); *U.S. v. Winstar Corporation et al.*, 518 U.S. 839 (1996).

⁹⁸ See, e.g., *Lynch v. United States*, 292 U.S. 571 (1934).

⁹⁹ See *U.S. v. Winstar Corporation et al.*, 518 U.S. 839, 860-861 (1996).

¹⁰⁰ *Id.* at 861-64, 896-97. See also *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 55 (1986) (alleged contract right in issue was part of a regulatory program over which the Congress retained its right to amend in the exercise of its power to provide for the general welfare).

¹⁰¹ *U.S. v. Winstar Corporation et al.*, 518 U.S. at 860.

¹⁰² *Id.* at 860, citing *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. at 52 (surrenders of sovereign authority must appear in unmistakable terms) and *Home Telephone & Telegraph Co. v. City of Los Angeles*, 211 U.S. 265 (1908) (an agent's authority to make such surrenders must be delegated in express terms). Other special rules that may apply include the doctrine

right on behalf of a private party against the U.S. Government must be unambiguous or clearly implied from the instruments at issue.

35. Applying these standards, we tentatively conclude that, in this instance, no vested property right exists. Comsat cites to no contract negotiated with the U.S. Government akin to what private parties might negotiate. What does exist is regulation of Comsat. In the preceding section, we discussed at length the statutes and regulatory scheme which govern Comsat's access to INTELSAT satellites. We tentatively concluded that Congress did not vest in Comsat an exclusive right under the Satellite Act, and the regulatory scheme created thereby, to access INTELSAT satellites from the U.S. It is this alleged exclusivity upon which Comsat appears to rely for its assertion of the existence of a regulatory contract. Beyond this, Comsat cites to no particular statutory provision or regulatory program that amounts to a contractual undertaking by the U.S. Government with respect to Comsat's access to INTELSAT satellites.¹⁰³ Thus, we tentatively conclude that there is no commitment by the U.S. Government relating to Comsat's access to INTELSAT satellites that amounts to a governmental contract.

36. Comsat also fails to demonstrate that consideration of "special rules," such as those identified by the Court in *U.S. v. Winstar*, require a finding of a vested contractual right in this case. Comsat fails to show that there was an unmistakable or unambiguous surrender of sovereign authority, or that there was an express delegation to an agent to surrender such authority, that effectively vested a property right in Comsat with regard to access to INTELSAT satellites. Indeed, Congress expressly reserved the "right to repeal, alter, or amend" the Satellite Act as part of a pervasive program to regulate international satellite communications,¹⁰⁴ and the Commission is free to amend its regulatory scheme as permitted by its governing statutes.¹⁰⁵ Therefore, for these additional reasons, we conclude

that a government may not, in any event, contract to surrender certain reserved powers, *Stone v. Mississippi*, 101 U.S. 814 (1880), and the principle that a Government's sovereign acts do not give rise to a claim for breach of contract, *Horowitz v. United States*, 267 U.S. 458 (1925). See *U.S. v. Winstar Corporation et al.*, 518 U.S. at 860.

¹⁰³ By contrast, in *U.S. v. Winstar Corporation et al.*, the Court found a number of specific commitments by the U.S. Government which were identified by petitioners that amounted to contractual undertakings. 518 U.S. at 860-64. For example, the Court found that the U.S. Government had expressly agreed to indemnify the private party for costs associated with regulatory change. *Id.* at 886-87.

¹⁰⁴ See 47 U.S.C. § 732.

¹⁰⁵ Courts have held that such reservations preclude the existence of a vested contract or property right. See, e.g., *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. at 54 (a termination provision in an agreement entered into pursuant to Federal statute in which Congress reserved the right to amend the Federal statute was not a contractual right or a property right within the meaning of the Fifth Amendment); see also *State of Delaware v. Cavazos*, 723 F. Supp. 234, 241 (D.C. 1989)(a reserve fund managed by a state under a Federal statute and regulations where Congress expressly reserved the power to amend the statute did not rise to the level of a contractual right or private property protected by the Fifth Amendment).

that there is no property right vested with regard to Comsat's access to INTELSAT satellites. We seek comment on these tentative conclusions.

37. Not a Taking under Fifth Amendment: Having tentatively concluded in the preceding section that Comsat possesses no vested property right with respect to its access to INTELSAT satellites from the U.S., we need not reach the question of whether there would be a taking of "property" in violation of the Fifth Amendment if Level 3 direct access were permitted. Assuming, however, that Comsat might possess a "property" interest with regard to its access to INTELSAT satellites from the U.S., on some basis other than a regulatory contract, we tentatively conclude that Comsat has failed to demonstrate that there would be a violation of the Fifth Amendment if Level 3 direct access were permitted.

38. As a threshold matter, courts generally find a taking where the character of the governmental action results in a "permanent physical occupation" of property.¹⁰⁶ We tentatively find permitting other U.S. carriers and users to obtain Level 3 direct access to INTELSAT satellites would not result in a permanent physical occupation of Comsat's or INTELSAT's property. Level 3 direct access is a voluntary contractual arrangement between a U.S. carrier or user and INTELSAT that permits use, but not permanent physical occupation, of INTELSAT satellites. Pursuant to a service agreement with the direct access customer, INTELSAT agrees to make available its space segment capacity on a best efforts basis in return for payment from the customer.¹⁰⁷ Other contractual terms and conditions also apply to the arrangement. The U.S. Government is not a party to the service agreement or in the arrangement. Consequently, we tentatively find that a direct access customer's use of INTELSAT satellites does not result in a permanent physical occupation of Comsat's or INTELSAT's property such that a property right of Comsat would be taken within the meaning of the Fifth Amendment. We seek comment on this tentative finding.

39. For governmental action that results in a physical invasion of property (short of a permanent physical occupation), or a regulation that merely affects the use of property, courts base their Fifth Amendment taking analysis on a factual inquiry that applies the following three factors: (a) the character of the governmental action; (b) its economic impact on the owner of the property; and (c) its interference with reasonable investment-backed expectations.¹⁰⁸ A Commission rule or policy permitting other U.S. carriers and users to obtain Level 3 direct access to INTELSAT satellites

¹⁰⁶ See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-16 (1992); *Loretto v. Teleprompter v. Manhattan CATV Corp. et al.*, 458 U.S. 419, 434-35 (1982) (a taking occurs to the extent of the occupation without regard to whether the governmental action achieves an important public benefit or has only minimal impact on the owner).

¹⁰⁷ See INTELSAT Service Agreement para. 2 (May 1, 1997) available at: <http://www.intelsat.int/cmcc/connect/servform.htm>.

¹⁰⁸ *Ruckelshaus v. Monsanto Company*, 467 U.S. 986, 1005 (1984). See also *Loretto* at 426 (the degree of interference with investment-backed expectations is of particular significance); *Penn Central Transportation Company et al. v. City of New York*, 438 U.S. 104, 124 (1978); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992).

arguably could be viewed as a form of governmental action resulting in a short-term physical invasion or economic regulation of the use of Comsat's and INTELSAT's property. Applying the three factors identified by the Supreme Court to this type of governmental action, we tentatively conclude that such a rule or policy would not give rise to a taking under the Fifth Amendment. We request comment on this tentative conclusion and our analysis.

40. The first factor in determining whether there has been a taking requires an analysis of the character of the governmental action. "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."¹⁰⁹ As discussed above, the Commission has the authority under Section 201(c)(2) and (11) of the Satellite Act to adopt a rule or policy permitting other U.S. carriers and users to obtain nondiscriminatory and equitable Level 3 direct access to INTELSAT satellites.¹¹⁰ A rule or policy permitting other U.S. carriers and users to obtain Level 3 direct access would not compel physical use of Comsat's or INTELSAT's facilities. Rather, such a rule or policy would be permissive because a carrier's or user's direct access to INTELSAT's facilities would be based on a voluntary contractual arrangement entered into between a carrier or user and INTELSAT. In addition, the rule or policy would serve the important Commission objective of promoting competition. We tentatively conclude that the character of the Commission's proposed action is reasonably related to an important Commission objective and is likely to produce a widespread public benefit. Hence, we find no taking on this ground. We request comment on our tentative conclusion and the accompanying analysis.

41. The second factor in a takings inquiry is the economic impact of the government's action on the owner of the property. The proposal permitting Level 3 direct access would not have a significant economic impact on Comsat. Under a Level 3 direct access contractual arrangement, customers will be required to compensate INTELSAT for the use of INTELSAT satellites. In addition, Comsat and its shareholders will continue to have a reasonable opportunity to earn a fair return from INTELSAT in connection with the traffic attributable to INTELSAT's U.S. customers with Level 3 direct access contractual arrangements. Level 3 direct access may result in some of Comsat's customers switching to competing carriers for switched voice, private line and occasional-use video service particularly in markets where Comsat now is dominant. As a consequence, Comsat may lose the benefit of monopoly rents in markets where Comsat is now dominant. With direct access, however, Comsat would be free to price and package its services in response to competitive market conditions to counter any adverse economic effect from new competition.¹¹¹ For these reasons, we find that the second prong of the taking inquiry is not satisfied. We request comment on our tentative

¹⁰⁹ *Penn Central v. City of New York* at 124.

¹¹⁰ 47 U.S.C. § 721(c)(2) and (11); *see supra* para. 41-43.

¹¹¹ *See Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 645 (1993)("[O]ur cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking.")

conclusion and the accompanying analysis.

42. The third factor in a takings inquiry is the degree of interference that the governmental action has on an owner's reasonable investment-backed expectations regarding its property. We tentatively conclude that Comsat and its shareholders were on notice of the Satellite Act and the regulatory scheme established thereby and, therefore, they could not have had a reasonable investment-backed expectation that other U.S. carriers or users would not be able to obtain direct access to INTELSAT satellites from the U.S. The Satellite Act explicitly provides that the Commission "shall insure that all authorized carriers shall have nondiscriminatory use of, and equitable access to," the INTELSAT system¹¹² and gives the Commission discretion as to how we should implement these and other provisions of the Satellite Act. The Satellite Act also expressly reserves to Congress the "right to repeal, alter, or amend" its provisions.¹¹³ Regulatory agencies historically have ordered access to common carrier bottleneck facilities for the purpose of increasing competition and facilitating the development of new services¹¹⁴ or they have imposed other requirements to satisfy statutorily-mandated public interest objectives.¹¹⁵ Because Comsat and its shareholders have been on notice of the regulatory framework within which the company operates, this knowledge should have been factored into their investment-backed expectations regarding the company.¹¹⁶ Consequently, we tentatively conclude that neither Comsat nor its shareholders could have reasonably maintained an expectation that Comsat's access to INTELSAT satellites from the U.S. would be exclusive. We

¹¹² 47 U.S.C. § 721(c)(2).

¹¹³ 47 U.S.C. § 732.

¹¹⁴ See, e.g., *United States v. Terminal Railroad Ass'n*, 224 U.S. 383 (1912) (antitrust court ordered railroads to provide competitors equivalent access to bottleneck railway terminal facilities), *appeal after remand*, 236 U.S. 194 (1915); *Cellular Communications Systems*, 86 FCC 2d 469, 495-96 (1981) (Commission required telephone companies to furnish interconnection to cellular systems upon terms no less favorable than those used by or offered to wireline carriers), *modified*, 89 FCC 2d 58 (1982), *further modified*, 90 FCC 2d 571 (1982); *Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, 59 RR 2d 1275 (1986), *clarified*, 2 FCC 2d 2910 (1987), *aff'd on recon.*, 4 FCC Rcd 2369 (1989) (Commission clarified policies regarding interconnection of cellular and other radio common carrier facilities to landline network); *Lincoln Tel. & Tel. Co. v. FCC*, 659 F.2d 1092, 1103 (D.C. Cir. 1981) (court upheld Commission's order requiring Lincoln to provide interconnection facilities to MCI).

¹¹⁵ For example, the Commission required AT&T to de-tariff and sell its customer premises equipment (CPE). *CPE De-tariffing (Computer II)*, 95 FCC 2d 1276, 1295-96, *recon. denied*, 100 FCC 2d 1290 (1983). We rejected AT&T's Fifth Amendment claim because we found that the sale requirement was reasonably related to our legitimate objective of protecting the ratepayer's equitable share of the gains on regulated assets and the public's interest in the availability of reasonably priced CPE. *Id.* at 1295.

¹¹⁶ See *Concrete Pipe and Products*, 508 U.S. at 645 (readjusting rights and burdens in a particular field subject to federal regulation is not unlawful solely because it "upsets otherwise settled expectations" even if new duties or liabilities are imposed).

request comment on this tentative conclusion and analysis.

43. Comsat's Return from INTELSAT: Even if permitting Level 3 direct access were to be construed as a taking, we tentatively conclude that just compensation to Comsat, which would normally be required, is not an issue here. It is not required because Comsat will still have a reasonable opportunity to earn a fair financial return from its INTELSAT investment. Comsat cites *Duquense Light Company v. Barasch* to support its contention that the Fifth Amendment protects public utilities owned by private investors from being limited to a rate that is so unjust as to be confiscatory.¹¹⁷ As discussed below, we tentatively conclude that Level 3 direct access may impede Comsat's ability to earn monopoly rents in the switched voice, private line, and occasional-use video non-competitive markets, but Comsat would continue to have a reasonable opportunity to earn a fair return on its investment from INTELSAT in connection with the voice, data, and video traffic that Comsat and other U.S. direct access customers originate and terminate via the INTELSAT system.¹¹⁸ Thus, notwithstanding other carriers and users obtaining Level 3 direct access to INTELSAT satellites, Comsat's opportunity to earn a reasonable return from its INTELSAT investment will be preserved. Accordingly, we tentatively conclude that, even if other carriers and users obtain Level 3 direct access to INTELSAT satellites, Comsat will have a reasonable opportunity to earn a fair financial return from its INTELSAT investment, independent of the issue of just compensation.¹¹⁹ We request comment on these tentative conclusions and analysis.

(2) What are the potential benefits of direct access?

44. INTELSAT has described various benefits that direct access may offer to customers: (1) improved responsiveness to customer inquiries on service implementation; (2) avoidance of mark-up costs charged to third parties; (3) greater control over service quality, performance costs, connectivity, redundancy, and earth station capabilities; and (4) more flexibility (than through third parties) in tailoring services in terms of bandwidth, time duration, performance standard, redundancy and service applications.¹²⁰ The fact that 93 countries already permit some level of direct access may indicate international recognition of some of these benefits.

¹¹⁷ *Duquense Light Company v. Barasch*, 488 U.S. 299, 307 (1989)(citing *Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U.S. 578, 597 (1896)).

¹¹⁸ *See Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194-95 (1985) (it is only necessary that a reasonable, certain and adequate provision for obtaining compensation exist at the time of the taking; "[i]f the government has provided an adequate process for obtaining compensation, and if resort to that process [results in compensation], then the property owner [has no takings claim]").

¹¹⁹ There is also the legal issue of whether the Commission or the U.S. Court of Claims would be the proper entity to determine what constitutes just compensation.

¹²⁰ *See "Accessing INTELSAT...Directly"*, reprinted in Record of Hearing before the Subcommittee on Telecommunications, Trade, and Consumer Protection on H.R. 1872, at pp. 135-141.

45. As illustrated by comparison in Appendix B, Comsat and INTELSAT 1997 rates are substantially different.¹²¹ In the *Comsat Non-Dominant* proceeding, AT&T, MCI, and WorldCom claimed that Comsat rates are 250 percent higher than the INTELSAT Utilization Charge (IUC), "even though Comsat itself was providing no facilities to its customer."¹²² The IUC is the rate Signatories pay INTELSAT for use of the space segment. AT&T, MCI, and WorldCom state that Comsat's average margin over the IUC is 68 percent and estimate that the competition from carriers with direct access would reduce this margin to 35 percent.¹²³ AT&T, MCI, and WorldCom project savings from direct access of over \$1 billion over a ten year period (which they calculate has a present value of \$690.3 million).¹²⁴

46. In contrast, Comsat contends that direct access would not result in significant cost savings. Comsat states that it is not a "reseller" of INTELSAT services but is an investor owning a share of INTELSAT space segment capacity that it uses to provide services to U.S. customers.¹²⁵ Comsat contends that, as the U.S. investor in INTELSAT, it must be allowed to earn a return on its investment and recover costs, and that factoring these considerations into any direct access scheme would demonstrate that customers would not realize any meaningful savings. Comsat argues that its rates include a "mark-up" over the IUC because it needs to recover all of its costs associated with its Signatory and carrier functions.¹²⁶ Comsat claims that the IUC does not reflect many costs (e.g., launch and satellite insurance and Signatory functions) that it would bear on behalf of direct access customers.¹²⁷ Comsat contends that Level 3 direct access at the IUC would allow carriers and users a "free ride" because Comsat would not be able to recover its full cost of providing INTELSAT services.¹²⁸ According to Comsat, if its costs are properly quantified, the savings from direct access for AT&T, MCI, and WorldCom would be zero, not the 35 percent estimated by these carriers.¹²⁹

¹²¹ We note that Comsat's tariffs in Appendix B are based on rates before the release of the Commission's *Comsat Non-Dominant Order*.

¹²² Satellite Users' Coalition, Analysis of privatization of the Intergovernmental Satellite Organizations at pp. 17 and 23-24.

¹²³ *Id.* at p. 24

¹²⁴ Comsat Corporation "Joint Response to Satellite Coalition Analysis" at pp. 13-14.

¹²⁵ *Id.* at pp. 3 and 13

¹²⁶ Comsat Corporation, Consolidated Reply in the *Comsat Non-Dominant* proceeding, at p. 49, footnote 134.

¹²⁷ Comsat "Joint Response to Satellite Coalition Analysis" at p. 13.

¹²⁸ Comsat Corporation "Joint Response to Satellite Coalition Analysis" at pp. 13-14.

¹²⁹ *Id.* at pp. 3 and 13-14.

47. In our *Cosat Non-Dominant Order*, we recognized Cosat's concern about adequate compensation for costs of carrying out its statutorily-imposed official Signatory functions under a direct access regime.¹³⁰ We also stated, however, that Cosat, like any other company facing new competition, must control its costs to remain competitive.¹³¹ The IUC has three components: a) INTELSAT's operating expenses; b) depreciation of capital assets; and c) a rate of return for use of Signatories' capital.¹³² Cosat has stated that its mark-up over the IUC rate includes operational expenses such as: (a) signatory costs; (b) marketing/sales costs; (c) satellite insurance costs; (d) transactions costs; (e) operational costs; (f) regulatory compliance costs; and (g) taxes.¹³³ We request that Cosat specify the activities or transactions that give rise to these costs and the magnitude of these costs. Cosat should specify which of these costs it believes should be added to the IUC to allow for fair recovery. Cosat should also specify how the costs it deems recoverable should be allocated among the different INTELSAT services. Since some costs which Cosat believes should be recoverable may be incurred by functions which also generate non-recoverable costs, we ask Cosat to discuss how it would assign its costs. For example, a Cosat employee's role may involve Signatory functions for part of the day and involve marketing functions for the remainder. We also request Cosat to specify how it would plan to allocate these recoverable costs between itself and Level 3 users. Cosat should also demonstrate how these costs would be allocated if Level 3 direct access is adopted only for services in non-competitive markets.

48. We request parties to respond to the cost information that Cosat provides. We seek comment from all parties on which costs, if any, should be recovered by Cosat, irrespective of whether consumers purchase INTELSAT capacity through Cosat or by direct access to INTELSAT. We request comment on whether as a matter of law and policy, Cosat should have an opportunity to recover any of the costs it currently recovers from its mark-up over the IUC, or whether the up to 21 percent return reflected in the IUC is already adequate to compensate Cosat for any such costs and still provide Cosat with a fair net return on its investment.¹³⁴ Cosat should in particular address why there should be a cost recovery concern with respect to direct access users when Cosat invests in INTELSAT beyond its annual usage rate of the INTELSAT system.

49. We also request all parties to address in their comments the relevance of findings

¹³⁰ *Cosat Non-Dominant Order* at para. 157.

¹³¹ *Id.*

¹³² INTELSAT Operating Agreement, Article 8, T.I.A.S. No. 7532.

¹³³ Cosat Press Conference, February 4, 1998, Cosat Vice President of Federal Policy and Regulation Howard Polsky.

¹³⁴ INTELSAT's Level 3 direct access program assures Signatories of a return on investment (currently up to 21 percent) for all INTELSAT traffic attributable to direct access customers in their country. Thus, Cosat would receive up to a 21 percent return on its investment in INTELSAT space segment utilized by U.S. carriers and users under Level 3 direct access arrangement.

made by the Commission in its *1984 Direct Access Order*.¹³⁵ In 1984, the Commission concluded that neither an IRU nor a capital lease direct access alternative then under consideration would produce significant cost savings and related efficiencies for customers. The Commission determined that direct access would not save users money either by increasing efficiency, enhancing competition, or curbing Comsat's allegedly excessive tariffs.¹³⁶ In assessing the likelihood that direct access would lower costs, the Commission examined each category of costs on which Comsat based its space segment tariff.¹³⁷ It concluded that each category was properly allocable to the tariff. In the Commission's view, neither the IRU or capital lease options under consideration would reduce any of these costs; rather, either alternative would redistribute the costs among Comsat and the carriers.¹³⁸ The Commission did not, however, then have the opportunity of considering application of the direct access programs that INTELSAT later put into place. As we described above, Level 3 direct access offers non-Signatory carriers and users an opportunity to obtain service directly from INTELSAT without having to make a capital investment. As the U.S. Signatory, Comsat would earn up to a 21 percent return on its investment in connection with Level 3 direct access usage in the United States. We request comment on whether the availability of Level 3 direct access might lead us to different conclusions than we made in our 1984 Direct Access Order as to cost savings to customers.

50. We also request comment on whether permitting direct access in the United States would result in cost savings to U.S. carriers and users if we were to determine that Comsat has unavoidable support costs that must be added to the IUC. Commenters should adjust their estimate of the cost savings to take into account any additional tax incurred as a result of the cost savings to Level 3 direct access users. We request comment on Comsat's argument that no cost savings would exist because Comsat must be permitted to recover certain costs that are not recoverable through the IUC. We also request comment from Comsat and other parties on how our recent decision to reclassify Comsat to non-dominant carrier status for most of its services, as well as our pending consideration of incentive-based rather than rate of return regulation of Comsat's remaining dominant services, should affect our consideration of Comsat's cost recovery concerns in connection with direct access. In view of our decision to substantially deregulate Comsat on the basis that competitive markets have developed, parties should comment on whether, and to what extent, the Commission should be concerned about Comsat's ability to recover costs beyond those associated with its "statutorily imposed official Signatory functions."¹³⁹

51. Carriers seeking direct access should also comment on how they would pass any cost savings to consumers in view of the efficiencies that they predict would result from direct access.

¹³⁵ *1984 Direct Access Order* at 313-319.

¹³⁶ *Id.*

¹³⁷ *Id.* at 310-319.

¹³⁸ *Id.*

¹³⁹ *See para. 47 supra.*

We ask proponents of direct access to specify the nature of the efficiencies they foresee and provide information as to the level and timing of cost savings to consumers. To the extent information may be available, we ask all parties to comment on whether any of the other 76 countries that permit Level 3 direct access had concerns about Signatory cost recovery and, if so, what actions they may have taken to resolve such concerns. For example, do carriers in countries that allow direct access pay the same rates to INTELSAT as do Signatories, or do carriers pay a higher rate to cover certain Signatory costs?

52. Comsat argues that direct access would result in a loss of economies of scale, resulting in harm to low volume users of INTELSAT.¹⁴⁰ We request comment generally on the possible impact of direct access on low volume users. We also seek comment on Comsat's argument that loss of economies of scale as a result of direct access would lead to an increase in rates to low volume users that might not elect to purchase capacity directly from INTELSAT.

53. In the *Comsat Non-Dominant Order*, we stated that if U.S. carriers and users were permitted to obtain nondiscriminatory, contractual direct access to INTELSAT satellites, or Level 3 direct access, Comsat would no longer be the sole provider of switched voice, private line, and occasional use video service in non-competitive markets.¹⁴¹ We found that Level 3 direct access would: (1) reduce Comsat's control over INTELSAT capacity serving these markets; (2) give U.S. carriers and users the option of using another supplier; and (3) reduce Comsat's market power in these markets.¹⁴² We noted that additional suppliers would likely provide competitive market conditions with the potential for price competition, service quality improvements, and innovation.¹⁴³ We concluded that the availability of direct access for switched voice and private line services and occasional use video services in non-competitive markets would provide a basis for forbearance from dominant carrier regulation of Comsat.¹⁴⁴ We therefore request comment on whether permitting Level 3 direct access for switched voice, private line, and occasional use video service in non-competitive markets would provide competitive alternatives and consumer benefits that do not now exist.

54. The carriers seeking direct access request that it be permitted without distinction to competitive and non-competitive markets and services.¹⁴⁵ In our *Comsat Non-Dominant Order*, we

¹⁴⁰ See Comsat Corporation "An Economic Evaluation of Direct Access to the INTELSAT System by U.S. Telecommunications Customers" at pp. 43-44.

¹⁴¹ *Comsat Non-Dominant Order* at para. 155.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at para. 156.

¹⁴⁵ Satellite users Coalition "The Legal Authority of the Federal Communications Commission to Authorize Direct Access to the INTELSAT System," at pp. 1-5 and 15.

found Comsat to be non-dominant with respect to most of its international services on most of its international routes, except for those mentioned above. We request comment in this proceeding, however, on the desirability of allowing direct access to INTELSAT with respect to all product and geographic markets including those markets that we have found to be competitive and for which we have found that Comsat is non-dominant. Parties should address whether direct access to all markets would further increase the level of competition to the extent that prices to consumers would be likely to fall, even in competitive markets. We have already noted that a large number of foreign countries have authorized direct access to INTELSAT. In the countries where direct access to INTELSAT is authorized, is direct access allowed for the provision of all services to all locations? If so, would that fact suggest that we should authorize direct access with respect to all markets?

55. In our *Comsat Non-Dominant* proceeding, Comsat argued that direct access is not needed because U.S. users already can choose between alternative cable and satellite facilities. Comsat also states that the Canadian Signatory, Teleglobe, is aggressively pursuing U.S. customers for its INTELSAT service offerings.¹⁴⁶ Comsat maintains that it does not control bottleneck facilities and is not a vertically integrated Post Telephone and Telegraph carrier like many other Signatories, and thus the arguments in favor of allowing direct access in many foreign countries do not apply in the U.S.¹⁴⁷ We request comment on these contentions. We seek comment on how and to what extent Teleglobe can effectively compete with Comsat, given its similar Signatory status as Comsat. In addition, parties seeking direct access should provide information showing why existing customer choice is limited or inadequate in competitive markets and how direct access would be necessary to provide adequate customer choice.

(3) What competitive concerns are raised by direct access?

56. In the *Comsat Non-Dominant* proceeding, both Comsat and PanAmSat raised competitive concerns associated with permitting direct access in the United States. Comsat argued that Level 4 direct access would lead to an undesirable concentration of control of cable and satellite facilities if U.S. carriers were permitted to invest in INTELSAT.¹⁴⁸ Comsat also argued that permitting direct access in the United States would allow INTELSAT to compete in the U.S. market immune from any regulatory jurisdiction and oversight of its rates and practices.¹⁴⁹ Similarly, PanAmSat maintained that INTELSAT must waive its immunities from suit and process before being

¹⁴⁶ Comsat "Joint Response to Satellite Coalition Analysis" at p. 3.

¹⁴⁷ *Id.* at 12, citing Marius Schwartz "Introducing Direct Access by U.S. Users to INTELSAT, An Economic Assessment", September, 1997.

¹⁴⁸ Comsat "Joint Response to Satellite Coalition Analysis", at p. 13.

¹⁴⁹ Comsat Corporation "An Economic Evaluation of Direct Access to the INTELSAT System by U.S. Telecommunications Customers" at 47; Comsat "Joint Response to the Satellite Coalition Analysis" at p. 14.

permitted to provide service directly to customers in the U.S. market.¹⁵⁰ We seek comment on Comsat's concern that direct access would encourage concentration of control of cable and satellite facilities. We request that parties distinguish between Level 3 and Level 4 direct access, in light of the fact that Level 3 customers would not have an investment in INTELSAT and would exercise no control over or participation in the governance and the operation of the INTELSAT system.

57. We seek comment on Comsat's and PanAmSat's concern that direct access would result in INTELSAT entering the U.S. market immune from Commission jurisdiction over rates and practices. Will the Commission be able to protect consumers by treating INTELSAT in the same manner that it treats other foreign satellite systems that may enter the U.S. market under the terms under which we have implemented the 1997 WTO Agreement?¹⁵¹ That is, will the Commission's authority to license earth stations be a sufficient means of overseeing INTELSAT operations in the U.S. markets through a carrier with direct access? If not, what other regulatory protection might have to be imposed?

58. We also seek comment on PanAmSat's concern about INTELSAT's immunity from suit and process, and the potential for INTELSAT to use its immunity to insulate itself from liability for any anti-competitive activities.¹⁵² What steps are available to minimize the effects of INTELSAT's immunities?¹⁵³ Are the risks associated with INTELSAT's continuing immunity under direct access outweighed by the public interest benefits that may accrue to U.S. customers under a direct access scheme? We request parties pose other options that may resolve the competition concerns that have been raised.

(4) Would direct access affect U. S. efforts to privatize INTELSAT?

59. Comsat asserts that direct access in the United States would delay or undermine U.S. influence toward privatization of INTELSAT. Comsat emphasizes the need to speak with one U.S.

¹⁵⁰ PanAmSat Reply Comments in the *Comsat Non-Dominant* proceeding at p. 3.

¹⁵¹ *DISCO II Order* at 24148-24150.

¹⁵² *See Comsat Non-Dominant Order* at para. 158-162.

¹⁵³ Congress recently passed legislation addressing the competitive advantages of the immunities of intergovernmental satellite organizations such as INTELSAT. *See International Anti-Bribery Act of 1998, § 5 "Treatment of International Organizations Providing Commercial Communications Services," action by consent on S. 2375, 105 Cong. Rec. H11670- H11672 (October 20, 1998); 105 Cong. Rec. S. 12973 - S.12974 (October 21, 1998); See also Report of the Committee on Banking, Housing, and Urban Affairs to accompany S. 2375, International Anti-Bribery Act of 1998," Senate, 105th Cong., 2d. Sess., Report No. 105-277, dated July 30, 1998; See also Report of the Committee on Commerce to accompany H.R. 4353, "International Anti-Bribery and Fair Competition Act of 1998," House of Representatives, 105th Cong., 2d Session, Report 105-102, dated October 8, 1998.*

voice in INTELSAT.¹⁵⁴ Comsat's argument appears based on the presumption that U.S. carriers and users that are permitted direct access will gain a benefit, in the form of underpriced space segment service, that would cause carriers and users to oppose INTELSAT privatization options.¹⁵⁵ Comsat anticipates that privatization would result in U.S. customers obtaining "direct access" to INTELSAT.¹⁵⁶ In the *Comsat Non-Dominant Order*, we found that Level 3 direct access would neither dilute Comsat's voting power on the INTELSAT Board of Governors nor give customers the right to participate in the INTELSAT governance process.¹⁵⁷ We further note here that the companies seeking direct access also have stated their support for privatization of INTELSAT at an early date.¹⁵⁸ Under these circumstances, we request comment on how implementing direct access in the United States might impact the U.S. objective of a privatized INTELSAT.

III. PROCEDURAL MATTERS

1. Ex parte Presentations

60. This is a permit-but-disclose notice and comment rulemaking proceeding. Ex Parte presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's rules. See generally 47 C.F.R. §§ 1.1202, 1.1203, 1.1206.

2. Regulatory Flexibility Act

61. See Appendix C, infra for the Initial Regulatory Flexibility Analysis.

3. Comment filing Procedures

62. General Requirements: Interested parties may file comments on before December 15, 1998, and reply comments on or before January 8, 1998. Comments may be filed either by filing paper copies or using the Commission's Electronic Comment Filing System (ECFS). See Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24,121 (1998). Pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's rules 47 CFR §§ 1.415, 1.419, for paper filings, interested parties must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of

¹⁵⁴ Comsat Reply Comments in *Comsat Non-Dominant* proceeding at p. 49.

¹⁵⁵ Comsat Corporation "Joint Response to Satellite Users Coalition Analysis" at p. 13.

¹⁵⁶ Comsat Corporation, "An Economic Evaluation of Direct Access to the INTELSAT System by U.S. Telecommunications Customers", at p. 41.

¹⁵⁷ *Id.*

¹⁵⁸ See Satellite users Coalition "Analysis of the Privatization of the Intergovernmental Satellite Organization in H.R. 1872".

your comments, you must file an original and 11 copies. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW, Washington, D.C. 20554, with a copy to Kathleen A. Campbell of the International Bureau, 2000 M Street, N.W., Suite 800, Washington, D.C. 20554. Paper filings will be received at a designated counter located at TW-A325 in the 12th street lobby. The Commission expects to complete its relocation to The Portals within the next six month. During the transition period, paper filings also will be accepted at 1919 M Street, NW, Room 222, but only between the hours of 4:00pm to 5:30pm. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Services, Inc., 1231 20th Street, N.W., Washington, D.C. 20036. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, 1919 M Street, N.W., Room 239, Washington, D.C. 20554.

63. Electronically filed comments that conform to the Commission's Rules will be considered part of the record in this proceeding. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Comments filed through the ECFS can be sent as an electronic file via the Internet to <<http://www.fcc.gov/e-file/ecfs.html>>. To file electronic comments, you must use the electronic filing interface available on the FCC's World Wide Web site at <<http://dettifoss.fcc.gov:8080/cgi-bin/ws.exe/beta/ecfs/upload/hts>>. Further information on the process of submitting comments electronically is available at that location and at <<http://www.fcc.gov/e-file/>>. You must note whether an electronic submission is an exact copy of the formal comments on the subject line. You also must include your full name and Postal Service mailing address in your submission. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply.

64. Other requirements: Comments and reply comments must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also comply with Section 1.49 and all other applicable sections of the Commission's rules.¹⁵⁹ We also direct all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. Comments and reply comments also must clearly identify the specific portion of this Notice to which a particular comment or set of comments is responsive. If a portion of a party's comments does not fall under a particular topic listed in the outline of this Notice, such comments must be included in a clearly labelled section at the beginning or end of the filing.

65. Parties submitting diskettes should submit them along with their formal filing to the

¹⁵⁹ See 47 C.F.R. § 1.49. We require, however, that a summary be included with all comments and reply comments. The summary may be paginated separately from the rest of the pleading (e.g. as "i, ii"). See 47 C.F.R. § 1.49.

Office of the Secretary. These diskettes should be submitted to: Kathleen A. Campbell of the International Bureau, 2000 M Street, N.W., Suite 800, Washington, D.C. 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using WordPerfect 5.1 for Windows or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labelled with the commenter's name, proceeding (including the lead docket number in this case IB Docket No.98-192, type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase "Disk Copy - Not an Original." Each diskette should contain only one party's pleading, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, International Transcription Service, Inc., 1231 20th Street, N.W., Washington, D.C. 20037.

IV. ORDERING CLAUSES

66. Accordingly, **IT IS ORDERED** that pursuant to the authority contained in sections 4(i), 4(j) 201, 214 and Title III and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i)(j), 201, 214, 301 et seq., and 403, and sections 201(c)(5) and (c)(11) and 401 of the Communications Satellite Act of 1962, 47 U.S.C. §§ 721(c)(5) and (c)(11) and 741 and the applicable procedures set forth in sections 1.415 and 1.3-419 of the Commission's rules, 47 C.F.R. §§ 1.415 and 1.419 that this *Notice of Proposed Rulemaking* is hereby **ADOPTED**.

67. **IT IS FURTHER ORDERED** that interested parties may file comments on or before December, 18, 1998, and may file reply comments on or before January 8, 1999.

68. **IT IS FURTHER ORDERED** that the Commission's Office of Public Affairs Reference Operations Division shall send a copy of this *Notice of Proposed Rulemaking*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

Appendix A¹⁶⁰

Countries In Which Level 3 Direct Access Is Authorized

Afghanistan	Kuwait
Armenia	Lao, P.D.R.
Australia	Latvia
Austria	Lithuania
Azerbaijan	Macedonia
Bangladesh	Malaysia
Belarus	Mali
Belize	Malta
Benin	Moldova
Bosnia-Herzegovina	Monaco
Botswana	Morocco
Brazil	Namibia
Brunei Darussalam	Nepal
Burundi	Netherlands
Cambodia	Niger
Cameroon	Nigeria
Central African Republic	Paraguay
Chad	Portugal
Colombia	Qatar
Comoros	Romania
Congo	Russia
Costa Rica	Sao Tome E Principe
Czech Republic	Somalia
Denmark	Spain
Egypt	Sri Lanka
El Salvador	St. Lucia
Ethiopia	Sudan
Gabon	Switzerland
Georgia	Tajikstan
Germany	Tonga
Guyana	Turkmenistan
Hungary	Tuvalu
Indonesia	Uganda
Iraq	Ukraine
Israel	Taiwan
Japan	Venezuela
Kiribati	Yemen
Korea	Zambia

¹⁶⁰ Source: INTELSAT document provided to the United States Party.

Level 4 Direct Access

Argentina
Chile
China
Ivory Coast
France
Ghana
Guinea
Haiti
Ireland
Kazakhstan
Madagascar
New Zealand
Peru
Singapore
Swaziland
Sweden
United Kingdom

Appendix B - Sample Tariff Comparison for Major Services *
Intelsat (IS) vs. Comsat (CQ)

Coverage	Capacity/ Data rate	Term	Earth Station Standard By Antenna Size			Intelsat Tariff (\$/mo)	Comsat Tariff (\$/mo)	Tariff Ratio (CQ/IS)
			Std A=15-18 Meters	Std B=10-13 Meters	Std C=11-14 Meters			
Voice - IDR (International Digital Route):								
Hemi/Zone/ Ku-band	0 - 270 Ckts:							
	IDR - 64 kb/s	5-Year	A/C		\$295	\$1,000	3.39	
	IDR - 64 kb/s	7-Year	A/C		\$265	\$640	2.42	
	IDR - 64 kb/s	10-Year	A/C		\$250	\$515	2.06	
	IDR - 64 kb/s	15-Year	A/C		\$240	\$475	1.98	
	271 - 630 Ckts:							
	IDR - 64 kb/s	5-Year	A/C		\$295	\$1,000	3.39	
	IDR - 64 kb/s	7-Year	A/C		\$265	\$580	2.19	
	IDR - 64 kb/s	10-Year	A/C		\$250	\$460	1.84	
	IDR - 64 kb/s	15-Year	A/C		\$240	\$425	1.77	
	631 - 1080 Ckts:							
	IDR - 64 kb/s	5-Year	A/C		\$295	\$1,000	3.39	
	IDR - 64 kb/s	7-Year	A/C		\$265	\$525	1.98	
	IDR - 64 kb/s	10-Year	A/C		\$250	\$410	1.64	
	IDR - 64 kb/s	15-Year	A/C		\$240	\$375	1.56	
	Above 1080 Ckts:							
	IDR - 64 kb/s	5-Year	A/C		\$295	\$1,000	3.39	
	IDR - 64 kb/s	7-Year	A/C		\$265	\$475	1.79	
	IDR - 64 kb/s	10-Year	A/C		\$250	\$365	1.46	
	IDR - 64 kb/s	15-Year	A/C		\$240	\$330	1.38	
Hemi/Zone/ Ku-band	0 - 270 Ckts:							
	IDR - 1.544 Mb/s	5-Year	A/C		\$6,270	\$23,040	3.67	
	IDR - 1.544 Mb/s	7-Year	A/C		\$5,745	\$14,760	2.57	
	IDR - 1.544 Mb/s	10-Year	A/C		\$5,425	\$11,880	2.19	
	IDR - 1.544 Mb/s	15-Year	A/C		\$4,750	\$10,440	2.20	
	271 - 630 Ckts:							
	IDR - 1.544 Mb/s	5-Year	A/C		\$6,270	\$23,040	3.67	
	IDR - 1.544 Mb/s	7-Year	A/C		\$5,745	\$13,320	2.32	
	IDR - 1.544 Mb/s	10-Year	A/C		\$5,425	\$10,680	1.97	
	IDR - 1.544 Mb/s	15-Year	A/C		\$4,750	\$9,360	1.97	
	631 - 1080 Ckts:							
	IDR - 1.544 Mb/s	5-Year	A/C		\$6,270	\$23,040	3.67	
	IDR - 1.544 Mb/s	7-Year	A/C		\$5,745	\$12,120	2.11	
	IDR - 1.544 Mb/s	10-Year	A/C		\$5,425	\$9,480	1.75	
	IDR - 1.544 Mb/s	15-Year	A/C		\$4,750	\$8,280	1.74	
	Above 1080 Ckts:							
	IDR - 1.544 Mb/s	5-Year	A/C		\$6,270	\$23,040	3.67	
	IDR - 1.544 Mb/s	7-Year	A/C		\$5,745	\$10,920	1.90	
	IDR - 1.544 Mb/s	10-Year	A/C		\$5,425	\$8,400	1.55	
	IDR - 1.544 Mb/s	15-Year	A/C		\$4,750	\$7,320	1.54	

**Appendix B - Sample Tariff Comparison for Major Services *
Intelsat (IS) vs. Comsat (CQ)**

Coverage	Capacity/ Data rate	Term	Earth Station Standard By Antenna Size			Intelsat Tariff (\$/mo)	Comsat Tariff (\$/mo)	Tariff Ratio (CQ/IS)
			Std A=15-18 Meters	Std B=10-13 Meters	Std C=11-14 Meters			
Hemi/Zone/ Spot	0 - 270 Ckts:							
	IDR - 2.048 Mb/s	5-Year	A/C		\$7,790	\$28,800	3.70	
	IDR - 2.048 Mb/s	7-Year	A/C		\$7,180	\$18,450	2.57	
	IDR - 2.048 Mb/s	10-Year	A/C		\$6,785	\$14,850	2.19	
	IDR - 2.048 Mb/s	15-Year	A/C		\$5,985	\$13,050	2.18	
	271 - 630 Ckts:							
	IDR - 2.048 Mb/s	5-Year	A/C		\$7,790	\$28,800	3.70	
	IDR - 2.048 Mb/s	7-Year	A/C		\$7,180	\$16,650	2.32	
	IDR - 2.048 Mb/s	10-Year	A/C		\$6,785	\$13,350	1.97	
	IDR - 2.048 Mb/s	15-Year	A/C		\$5,985	\$11,700	1.95	
	631 - 1080 Ckts:							
	IDR - 2.048 Mb/s	5-Year	A/C		\$7,790	\$28,800	3.70	
	IDR - 2.048 Mb/s	7-Year	A/C		\$7,180	\$15,150	2.11	
	IDR - 2.048 Mb/s	10-Year	A/C		\$6,785	\$11,850	1.75	
	IDR - 2.048 Mb/s	15-Year	A/C		\$5,985	\$10,350	1.73	
	Above 1080 Ckts:							
	IDR - 2.048 Mb/s	5-Year	A/C		\$7,790	\$28,800	3.70	
	IDR - 2.048 Mb/s	7-Year	A/C		\$7,180	\$13,650	1.90	
	IDR - 2.048 Mb/s	10-Year	A/C		\$6,785	\$10,500	1.55	
	IDR - 2.048 Mb/s	15-Year	A/C		\$5,985	\$9,150	1.53	
Data - IBS (Intelsat Business Services):								
Hemi/Zone/ (C-band)	IBS - 64 kb/s	1-Year	A/B		\$370	\$465	1.26	
	IBS - 64 kb/s	2-Year	A/B		\$350	\$460	1.31	
	IBS - 64 kb/s	3-Year	A/B		\$320	\$425	1.33	
	IBS - 64 kb/s	5-Year	A/B		\$295	\$395	1.34	
	IBS - 64 kb/s	7-Year	A/B		\$265	\$370	1.40	
	IBS - 64 kb/s	10-Year	A/B		\$250	\$350	1.40	
	IBS - 1.544 Mb/s	1-Year	A/B		\$7,980	\$10,305	1.29	
	IBS - 1.544 Mb/s	2-Year	A/B		\$7,580	\$9,930	1.31	
	IBS - 1.544 Mb/s	3-Year	A/B		\$6,945	\$9,435	1.36	
	IBS - 1.544 Mb/s	5-Year	A/B		\$6,270	\$8,515	1.36	
	IBS - 1.544 Mb/s	7-Year	A/B		\$5,745	\$8,130	1.42	
	IBS - 1.544 Mb/s	10-Year	A/B		\$5,425	\$7,420	1.37	
	IBS - 2.048 Mb/s	1-Year	A/B		\$9,975	\$13,740	1.38	
	IBS - 2.048 Mb/s	2-Year	A/B		\$9,475	\$13,245	1.40	
	IBS - 2.048 Mb/s	3-Year	A/B		\$8,680	\$12,580	1.45	
	IBS - 2.048 Mb/s	5-Year	A/B		\$7,790	\$11,350	1.46	
	IBS - 2.048 Mb/s	7-Year	A/B		\$7,180	\$10,840	1.51	
	IBS - 2.048 Mb/s	10-Year	A/B		\$6,785	\$9,895	1.46	
	Spot (Ku-band)	IBS - 64 kb/s	1-Year	C		\$370	\$585	1.58
		IBS - 64 kb/s	2-Year	C		\$350	\$570	1.63
IBS - 64 kb/s		3-Year	C		\$320	\$535	1.67	
IBS - 64 kb/s		5-Year	C		\$295	\$495	1.68	
IBS - 64 kb/s		7-Year	C		\$265	\$460	1.74	
IBS - 64 kb/s		10-Year	C		\$250	\$435	1.74	

Appendix B - Sample Tariff Comparison for Major Services *
Intelsat (IS) vs. Comsat (CQ)

Coverage	Capacity/ Data rate	Term	Earth Station Standard By Antenna Size			Intelsat Tariff (\$/mo)	Comsat Tariff (\$/mo)	Tariff Ratio (CQ/IS)
			Std A=15-18 Meters	Std B=10-13 Meters	Std C=11-14 Meters			
Spot (Ku-band)	IBS - 1.544 Mb/s	1-Year			C	\$7,980	\$12,885	1.61
	IBS - 1.544 Mb/s	2-Year			C	\$7,580	\$12,415	1.64
	IBS - 1.544 Mb/s	3-Year			C	\$6,945	\$11,745	1.69
	IBS - 1.544 Mb/s	5-Year			C	\$6,270	\$10,640	1.70
	IBS - 1.544 Mb/s	7-Year			C	\$5,745	\$10,105	1.76
	IBS - 1.544 Mb/s	10-Year			C	\$5,425	\$9,275	1.71
	IBS - 2.048 Mb/s	1-Year			C	\$9,975	\$17,180	1.72
	IBS - 2.048 Mb/s	2-Year			C	\$9,475	\$16,555	1.75
	IBS - 2.048 Mb/s	3-Year			C	\$8,680	\$15,660	1.80
	IBS - 2.048 Mb/s	5-Year			C	\$7,790	\$14,185	1.82
	IBS - 2.048 Mb/s	7-Year			C	\$7,180	\$13,475	1.88
	IBS - 2.048 Mb/s	10-Year			C	\$6,785	\$12,365	1.82

* Due to unlimited combinations of service offerings, depending on parameters, such as transponder type, beam coverage, data rate, earth station type, and transmission power, this table only lists the most popular combinations at various available service duration offerings among major services - Voice (IDR), Data (IBS), and Video services (full-time and occasional use).

Sources:

- (1) INTELSAT Tariff - BG 118-18, May 8, 1997.
- (2) COMSAT Tariff (FCC No.1) :
 - IDR - July 15, 1993, Original Page 129-130
 - IBS - July 1, 1997, 5th Revised Page 149.14

**Appendix B - Sample Tariff Comparison for Major Services
Intelsat (IS) vs. Comsat (CQ)**

Frequency Band	Capacity	Power (Standard/High)	Term	Preemptible (P - cancellable) or Non-Preempt (N/P) (non-cancellable)	Intelsat Tariff (\$/Yr)	Comsat Tariff ** (\$/Yr)	Tariff Ratio (CQ/IS)
Full-Time Video:							
C/Hemi/Zone	36 MHz	Std	5-Year	N/P	\$1,440,000	\$1,972,800	1.370
C/Hemi/Zone	36 MHz	Std	10-Year	N/P	\$1,200,000	\$1,786,800	1.489
C/Hemi/Zone	72 MHz	Std	5-Year	N/P	\$2,375,000	\$3,646,920	1.536
C/Hemi/Zone	72 MHz	Std	10-Year	N/P	\$1,985,000	\$3,233,640	1.629
C/Global	36 MHz	Std	5-Year	N/P	\$2,455,000	\$3,105,840	1.265
C/Global	36 MHz	Std	10-Year	N/P	\$2,110,000	\$2,753,640	1.305
Ku	36 MHz	Std	5-Year	N/P	\$1,770,000	\$2,239,200	1.265
Ku	36 MHz	Std	10-Year	N/P	\$1,510,000	\$1,980,000	1.311
Ku	72 MHz	Std	5-Year	N/P	\$2,840,000	\$3,732,000	1.314
Ku	72 MHz	Std	10-Year	N/P	\$2,425,000	\$3,300,000	1.361
INTELSAT K (H5-H8 Transponders)							
(IS Std Rate)	27 MHz	Std	5-Year	N/P	\$1,770,000	\$2,192,040	1.238
	27 MHz	Std	10-Year	N/P	\$1,510,000	\$1,980,000	1.311
(IS Std Rate)	54 MHz	Std	5-Year	N/P	\$2,840,000	\$3,639,000	1.281
	54 MHz	Std	10-Year	N/P	\$2,425,000	\$3,300,000	1.361
C-Hemi	36 MHz	Std	1-Year	P	\$1,000,000	\$1,182,840	1.183
C-Hemi	36 MHz	Std	2-Year	P	\$955,000	\$1,135,680	1.189
C-Hemi	36 MHz	Std	5-Year	P	\$810,000	\$1,005,000	1.241
C-Hemi	36 MHz	Std	7-Year	P	\$755,000	\$945,720	1.253
C-Hemi	36 MHz	Std	10-Year	P	\$675,000	\$863,280	1.279
C-Hemi	72 MHz	Std	1-Year	P	\$1,610,000	\$1,971,480	1.225
C-Hemi	72 MHz	Std	2-Year	P	\$1,540,000	\$1,892,760	1.229
C-Hemi	72 MHz	Std	5-Year	P	\$1,335,000	\$1,674,960	1.255
C-Hemi	72 MHz	Std	7-Year	P	\$1,250,000	\$1,576,200	1.261
C-Hemi	72 MHz	Std	10-Year	P	\$1,115,000	\$1,438,800	1.290
Ku - Spot	36 MHz	Std	1-Year	P	\$1,485,000	\$1,881,840	1.267
Ku - Spot	36 MHz	Std	2-Year	P	\$1,440,000	\$1,806,720	1.255
Ku - Spot	36 MHz	Std	5-Year	P	\$1,300,000	\$1,598,880	1.230
Ku - Spot	36 MHz	Std	7-Year	P	\$1,225,000	\$1,504,560	1.228
Ku - Spot	36 MHz	Std	10-Year	P	\$1,110,000	\$1,373,400	1.237
Ku - Spot	72 MHz	Std	1-Year	P	\$2,380,000	\$3,136,440	1.318
Ku - Spot	72 MHz	Std	2-Year	P	\$2,310,000	\$3,011,160	1.304
Ku - Spot	72 MHz	Std	5-Year	P	\$2,085,000	\$2,664,720	1.278
Ku - Spot	72 MHz	Std	7-Year	P	\$1,965,000	\$2,507,520	1.276
Ku - Spot	72 MHz	Std	10-Year	P	\$1,785,000	\$2,289,000	1.282
C/Global	36 MHz	Std	1-Year	P	\$1,595,000	\$1,989,360	1.247
C/Global	36 MHz	Std	2-Year	P	\$1,545,000	\$1,909,920	1.236
C/Global	36 MHz	Std	5-Year	P	\$1,400,000	\$1,690,200	1.207
C/Global	36 MHz	Std	7-Year	P	\$1,320,000	\$1,590,480	1.205
C/Global	36 MHz	Std	10-Year	P	\$1,205,000	\$1,451,880	1.205

Appendix B - Sample Tariff Comparison for Major Services
Intelsat (IS) vs. Comsat (CQ)

Frequency Band	Capacity	Power (Standard/High)	Term	Preemptible (P - cancellable) or Non-Preempt. (N/P) (non-cancellable)	Intelsat Tariff (\$/Yr)	Comsat Tariff ** (\$/Yr)	Tariff Ratio (CQ/IS)
Full-Time Video:							
C-Hemi	24 MHz	High	1-Year	P	\$1,065,000	\$1,301,280	1.222
C-Hemi	24 MHz	High	2-Year	P	\$1,015,000	\$1,249,200	1.231
C-Hemi	24 MHz	High	5-Year	P	\$835,000	\$1,105,560	1.324
C-Hemi	24 MHz	High	7-Year	P	\$800,000	\$1,040,280	1.300
C-Hemi	24 MHz	High	10-Year	P	\$715,000	\$949,680	1.328
C-Hemi	36 MHz	High	1-Year	P	\$1,500,000	\$1,774,320	1.183
C-Hemi	36 MHz	High	2-Year	P	\$1,430,000	\$1,703,520	1.191
C-Hemi	36 MHz	High	5-Year	P	\$1,215,000	\$1,507,560	1.241
C-Hemi	36 MHz	High	7-Year	P	\$1,135,000	\$1,418,640	1.250
C-Hemi	36 MHz	High	10-Year	P	\$1,015,000	\$1,294,920	1.276
Ku - Spot	36 MHz	High	1-Year	P	\$1,855,000	\$2,352,360	1.268
Ku - Spot	36 MHz	High	2-Year	P	\$1,795,000	\$2,258,400	1.258
Ku - Spot	36 MHz	High	5-Year	P	\$1,625,000	\$1,998,600	1.230
Ku - Spot	36 MHz	High	7-Year	P	\$1,530,000	\$1,880,760	1.229
Ku - Spot	36 MHz	High	10-Year	P	\$1,385,000	\$1,716,720	1.240
Ku - Spot	72 MHz	High	1-Year	P	\$2,975,000	\$3,920,520	1.318
Ku - Spot	72 MHz	High	2-Year	P	\$2,880,000	\$3,763,920	1.307
Ku - Spot	72 MHz	High	5-Year	P	\$2,605,000	\$3,330,960	1.279
Ku - Spot	72 MHz	High	7-Year	P	\$2,455,000	\$3,134,400	1.277
Ku - Spot	72 MHz	High	10-Year	P	\$2,225,000	\$2,861,280	1.286
C/Global	24 MHz	High	1-Year	P	\$1,700,000	\$2,188,320	1.287
C/Global	24 MHz	High	2-Year	P	\$1,650,000	\$2,100,960	1.273
C/Global	24 MHz	High	5-Year	P	\$1,490,000	\$1,859,280	1.248
C/Global	24 MHz	High	7-Year	P	\$1,405,000	\$1,749,600	1.245
C/Global	24 MHz	High	10-Year	P	\$1,280,000	\$1,597,200	1.248
C/Global	36 MHz	High	1-Year	P	\$2,395,000	\$2,984,040	1.246
C/Global	36 MHz	High	2-Year	P	\$2,320,000	\$2,864,880	1.235
C/Global	36 MHz	High	5-Year	P	\$2,100,000	\$2,535,360	1.207
C/Global	36 MHz	High	7-Year	P	\$1,980,000	\$2,385,720	1.205
C/Global	36 MHz	High	10-Year	P	\$1,805,000	\$2,177,880	1.207

Occasional TV -

Frequency Band	Capacity	Down Link (DL)	Preemptible (P)/ Non-Preempt. (N/P)	INTELSAT Tariff \$/ Minute	COMSAT Tariff \$/ Minute	Tariff Ratio (CQ/IS)
C/Globe Beam	18 MHz	Single DL	N/P	\$6.50	\$10.10	1.554
C/Globe Beam	24 MHz	Single DL	N/P	\$9.00	n.a.	
C/Globe Beam	36/41 MHz	Single DL	N/P	\$13.00	\$20.20	1.554

** Intelsat offers the "whole" transponder rate. To make a comparable comparison, the Comsat's tariff (which expressed in monthly charge for 1/2 transponder) has been converted to an annualized rate (i.e. multiple Comsat's monthly charges by 12*2).

Sources:

- (1) INTELSAT Tariff - BG 118-18, May 8, 1997
- (2) COMSAT Tariff - COMSAT Tariff F.C.C. No. 1.
Full - Time Video - Oct 1, 1993, 1st Rev p.82, 83, 84; Oct. 29, 1997, 3rd Rev. p. 68; Jul 8, 97, 4th Rev. p. 97.
Occ. TV. - Apr. 1, 1996, 3rd Rev. p. 48 & 49.



APPENDIX C
Initial Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act, ("RFA"),¹⁶¹ the Commission has prepared an Initial Regulatory Flexibility Analysis ("IRFA") of the expected significant economic impact on small entities by the rules proposed in this *Notice of Proposed Rulemaking* ("*Notice*"). Written public comments are requested on the IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments set forth in paragraph [65] of the *Notice*. The Commission will send a copy of the *Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration. See 5 U.S.C. § 603(a). In addition, the *Notice* and IRFA (or summaries thereof) will be published in the Federal Register. See *id.*

I. Need for, and Objectives of, the Proposed Rules

The purposes of the *Notice* are to initiate a notice and comment proceeding that explores the legal, economic and policy ramifications of permitting direct access to the INTELSAT¹⁶² system in the United States and to propose rules for permitting U.S. carriers and users to obtain non-discriminatory direct access to INTELSAT's satellites. "Direct access" is a term used to refer to the means by which users of the INTELSAT satellite system obtain service directly from INTELSAT rather than through INTELSAT's Signatories.

The *Notice* tentatively concludes that: (a) the Commission has authority under applicable statutes to permit U.S. carriers and users to obtain services from INTELSAT directly at the same rates that INTELSAT charges its Signatories; and (b) direct access presents the opportunity to introduce competition in markets where competition does not exist and enhance competition in markets where it does exist. Consistent with these tentative conclusions, the *Notice* proposes rules that would permit U.S. carriers and users to obtain direct access to INTELSAT. The *Notice* invites interested parties to comment on these tentative conclusions and related proposed rules. If commenters believe that the proposed rules discussed in the *Notice* require additional RFA analysis, they should include a discussion of this in their comments.

II. Legal Basis

The authority for the *Notice* is the Administrative Procedure Act, 5 U.S.C. § 553; and sections 4(i) and 201(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 201(b), and sections 201(c)(5) and (c)(11) of the Communications Satellite Act of 1962, 47 U.S.C. §§ 721(c)(5), (c)(11) and 741.

¹⁶¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 *et seq.*, has been amended by the Contract with America Advancement Act of 1996, Public L. No. 104-121, 110 Stat. 847 (1996) ("CWAAA"). Title II of the CWAAA is The Small Business Regulatory Enforcement Fairness Act of 1996.

¹⁶² INTELSAT is an acronym for the International Telecommunications Satellite Organization.

III. Description and Estimate of the Number of Small Entities to Which Proposed Rule Will Apply

Under the Small Business Act, a "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; (3) meets any additional criteria established by the Small Business Administration.¹⁶³

The Commission has not developed a definition of small entities applicable to satellite service licensees. Therefore, the applicable definition of small entity is the definition under the Small Business Administration ("SBA") rules applicable to Communications Services "Not Elsewhere Classified." This definition provides that a small entity is one with \$11 million or less in annual receipts.¹⁶⁴

If the Commission adopts the proposed rules permitting U.S. carriers and users to obtain direct access to INTELSAT, the Commission would require Comsat Corporation ("Comsat") to take appropriate actions within INTELSAT to give effect to these rules. Comsat's 1996 revenues were in excess of \$11 million. Thus, Comsat does not qualify as a small entity under the SBA's definition. U.S. carriers and users that may benefit from the Commission's adoption of the proposed rules, may include small entities that offer communications services. According to the SBA, the Census Bureau estimates that there are approximately 848 entities providing communications services, not elsewhere classified. Of those, approximately 775 reported annual receipts of less than \$9.999 million or less and would qualify as small entities subject to the proposed rules.¹⁶⁵ More precise data is not available.

IV. Description of Projected Reporting, Recordkeeping or Other Compliance Requirements

The proposals in the *Notice* are not expected to result in any additional reporting, recordkeeping and other compliance.

V. Steps Taken to Minimize Significant Economic Burden on Small Entities, and Significant Alternatives Considered

The *Notice* considers two alternatives for U.S. carriers and users to obtain direct access to INTELSAT: Level 3 direct access and Level 4 direct access. Level 3 direct access permits a customer to enter into a contractual agreement with INTELSAT for ordering, receiving and paying for INTELSAT space segment capacity at the same rate that INTELSAT charges its Signatories. Level 4

¹⁶³ See 15 U.S.C. § 632.

¹⁶⁴ 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4899.

¹⁶⁵ U.S. Bureau of the Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications, and Utilities, UC92-S-1, Subject Series, Establishment and Firm Size, Table D, Employment Size of Firms: 1992, SIC Code 4899 (May 1995).

direct access permits a customer to make a capital investment in INTELSAT in proportion to its customers' utilization of the INTELSAT system at INTELSAT tariff rates. The *Notice* proposes rules that would permit U.S. carriers and users to obtain Level 3 direct access to INTELSAT. The *Notice* does not propose a rule permitting Level 4 direct access to INTELSAT because the *Notice* tentatively concludes that such a rule would contravene the requirement under the Communications Satellite Act of 1962 that Comsat be the sole U.S. participant in INTELSAT. The proposed rules would permit small entities to obtain Level 3 direct access to INTELSAT, however, as a Level 3 direct access customer of INTELSAT, such small entities would not be required to undertake any of the financial obligations or be entitled to participate in the INTELSAT governance process as are Signatories. We believe that the proposed rules will permit authorized carriers and users, including small entities, to benefit from direct access through greater choice and lower rates in connection with use of the INTELSAT system and we seek comment on these and other benefits that may result from direct access. We recognize that other issues not raised in the *Notice* may be significant to authorized carriers and users, including small entities, and we also request comment on issues relating to direct access that are not raised in the *Notice*. We do not expect the proposed rules to cause any economic burden to small entities, and seek comment on any issues pertinent to this.

VI. Federal Rules That Overlap, Duplicate, or Conflict with These Proposed Rules

None.

