

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

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

COMMENTS OF CABLE & WIRELESS

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SUMMARY

Cable & Wireless plc and Cable & Wireless USA strongly support this Commission's proposal to authorize direct access by U.S. carriers and users to the INTELSAT system. The experience of other countries -- particularly the United Kingdom -- with direct access confirms the benefit to consumers when INTELSAT space segment can be accessed without recourse to a monopoly intermediary. The Commission should extend those benefits to U.S. consumers, and should do so without requiring direct access users to provide COMSAT with special compensation for its carrier and Signatory activities.

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Cable & Wireless USA (“C&W USA”) and Cable & Wireless plc (“C&W plc”) (jointly “C&W”)¹ strongly support the Commission’s proposal to permit direct access to INTELSAT by U.S. carriers. C&W plc, as the first entity to obtain direct access to INTELSAT in the United Kingdom and the first Duly Authorized Telecommunications Entity (“DATE”) worldwide to obtain Level 4 direct access to INTELSAT, has ample experience of the competitive benefits of direct access. C&W USA, as a U.S. carrier that relies on INTELSAT facilities, urges the Commission to extend those same competitive benefits to all customers of U.S. carriers in the United States.

I. Direct Access To INTELSAT Will Benefit U.S. Consumers

The Notice of Proposed Rulemaking (“NPRM”)² asks commenters to identify the cost savings and consumer benefits that will result from direct access to INTELSAT.³ The

¹ Cable & Wireless plc is one of the world’s leading providers of integrated communications, offering Internet, data, voice and video service to 17 million customers in over 70 countries. Cable & Wireless USA, a leading provider of long distance, international and Internet backbone service, serves over 100,000 U.S. customers and employs over 3,000 people in the United States.

² *Direct Access to the INTELSAT System*, IB Docket No. 98-192, Notice of Proposed Rulemaking FCC No. 98-280 (rel. Oct. 28, 1998) (“NPRM”).

³ NPRM ¶ 51.

NPRM also seeks comments on COMSAT's claim that the benefits of direct access are illusory and will be fully offset by increases in the INTELSAT Utilization Charge ("IUC") required to recover COMSAT's carrier and Signatory costs.⁴ C&W's experience with direct access in the United Kingdom qualifies it to respond to both requests.

A. Direct Access Has Enhanced Competition In The UK And Will Produce Similar Benefits In The U.S.

C&W has substantial experience of the benefits of direct access. When INTELSAT's Board of Governors agreed to allow direct access to the system in 1993, C&W was the first company to seek direct access and the first to become a non-signatory investor in the system. The benefits for C&W's customers where direct access became available -- most notably in the UK -- were immediate and dramatic. And these cost savings have been supplemented by other benefits to C&W and its customers, including streamlined processes for dealing with INTELSAT, greater control over the quality and variety of the satellite services C&W receives and provides, and greater ability to respond quickly to the changing needs of C&W's customers -- advantages that are especially important in the highly competitive UK telecommunications environment.

C&W USA and other U.S. carriers, and their customers, are harmed by the lack of direct access to INTELSAT in the United States. The COMSAT markup over the IUC, which varies from 68 percent to 250 percent, makes it uneconomical for C&W fully to utilize the services offered by INTELSAT.⁵ Similarly, because COMSAT does not offer all of the services available from the INTELSAT Tariff Manual, the dependence of U.S. carriers on COMSAT for INTELSAT system access limits the variety of services these carriers can provide to their customers through INTELSAT's space segment.

⁴ *Id.* ¶ 46.

⁵ *Id.* ¶ 45; see Satellite Users' Coalition, *Analysis of Privatization of the Intergovernmental Satellite Organizations Proposed in H.R. 1872, and S.1382* (Mar. 1998) at pp. 17 and 23-24.

Lack of direct access to INTELSAT also imposes a severe competitive disadvantage on U.S. carriers. Notably, Teleglobe now offers rates for Internet traffic to and from the U.S., using a combination of landline facilities, Canadian earth stations and INTELSAT space segment, that C&W and other U.S. carriers have difficulty matching because of the COMSAT mark-up on the INTELSAT portion of the service. Only direct access to INTELSAT from the U.S. will correct this competitive imbalance.

C&W is confident that in the United States, as in the UK, direct access will create a competitive environment in which INTELSAT space segment will support a wider variety of services at substantially lower cost. C&W anticipates that it will realize substantial savings in the first year of direct access, and that those savings will increase by 50 percent in each subsequent year. In the highly competitive U.S. market, as in the UK, C&W will have every incentive to pass these cost savings to its customers. Accordingly, this Commission's authorization of direct access is a proconsumer, procompetition initiative that should not be further delayed.

B. The COMSAT Markup Is Not Justified And Should Not Be Imposed On Direct Access Carriers And Users

C&W strongly disagrees with COMSAT's argument that direct access will not -- and should not -- result in significant cost savings to carriers and users.⁶ COMSAT's argument appears to be based upon two claims: first, that some of COMSAT's costs are incurred for Signatory functions that all users of INTELSAT space segment should be required to support;⁷ and second, that COMSAT is somehow entitled to recover all of the investment it has made, and all of the expenses it incurs, in order to provide INTELSAT access -- even where those costs are not related to its Signatory functions. Accordingly, COMSAT contends that if direct access is authorized, its present

⁶ *Id.* ¶ 46.

⁷ *Id.* ¶ 12.

markup must be passed on in its entirety to all entities that access INTELSAT directly -- effectively eliminating any cost saving that direct access otherwise might achieve.

COMSAT's claims are legally and factually flawed. As a legal matter, the claim that COMSAT is entitled to recover whatever costs it incurs is simply a variant of its unwarranted claim to a property interest in its INTELSAT access monopoly. As this Commission has found in the past, permitting carriers to recover "embedded" or "opportunity" costs from rivals as the price of competition stifles the very consumer benefits that competition is intended to produce.⁸

Even if it is assumed, for the sake of argument, that COMSAT is legally entitled to recover costs that it incurs for carrier and Signatory functions, COMSAT's assumptions concerning the magnitude of those costs are illogical and unsupported by the record. COMSAT appears to assume, for example, that its operational and marketing expenses will remain the same even after some of the customers for which those expenses are incurred switch to direct access. Similarly, COMSAT claims that direct access will reduce its return on its investment in INTELSAT, even though COMSAT will earn a return on investment for all revenues that INTELSAT receives from direct access customers.⁹ Finally, to the

⁸ In fact, COMSAT's argument resembles the claim, rejected by the Commission in *Implementation of Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*"), that an incumbent carrier that provides a facility to a competitor should do so at a rate that ensures the profit the incumbent would have made if it had used the facility to provide service to the end user at a monopoly price - *i.e.*, the profit the monopolist would have made if it had kept its monopoly. As the Commission rightly pointed out in the *Local Competition Order*, approaches of this kind take a monopolist's prices as "given" and do not "provide any mechanism for moving prices towards competitive levels." *Local Competition Order* at 15859. Here, as in its earlier decision, the Commission should reject this approach as inherently anticompetitive.

⁹ INTELSAT is a cooperative organization in which each Signatory must make capital contributions, based on its use of the system, from which it will earn a return based on an annual target rate set by the Board of Governors. A Signatory also can adjust its

(Footnote continues on following page.)

extent COMSAT is claiming that its costs attributable to Signatory activities are both fully justified and not compensable by its return on investment, those claims are not supported by the record.

The Commission should not reject direct access in order to protect COMSAT's inflated costs; nor should the Commission adopt a direct access regime that increases the IUC simply to guarantee COMSAT's recovery of those costs. In fact, the discipline of the marketplace is badly needed to reduce COMSAT's excessive markup above the IUC. Direct access would force COMSAT to trim its costs, therefore resulting in savings for customers that continue to use COMSAT to access INTELSAT. As the experience in the UK attests, the expenses of providing access to INTELSAT can be substantially contained in a competitive environment.

Finally, if the Commission decides that COMSAT's Signatory costs "should be added to the IUC to allow for fair recovery,"¹⁰ the resulting markup must be limited to the provable, long-term incremental cost of statutory activities that benefit all users of INTELSAT space segment. In arriving at the appropriate cost figures, the experience of the UK might offer some guidance. Specifically, before direct access was fully implemented in the UK, OfTel -- the regulator of telecommunications in the UK -- authorized formation of an Office of Signatory Affairs within British Telecom (the INTELSAT Signatory for the UK) and authorized a markup of 7 percent over the IUC to fund the functions of that office. British Telecom did not dispute that this markup -- a far cry from COMSAT's 68 percent to 250 percent -- compensated it fully for the exercise of its Signatory functions. Accordingly,

(Footnote continued from previous page)

shares to a level above or below its usage, so long as other Signatories are prepared to make corresponding adjustments to their own participation. The current target rate for compensation of Signatories for their investment in the system is 21 percent.

¹⁰ NPRM ¶ 47.

any “Signatory functions surcharge” authorized by this Commission should be several orders of magnitude smaller than the present COMSAT markup.¹¹

II. The Commission’s Authority To Permit Level 3 Direct Access Is Beyond Doubt

As the NPRM tentatively concludes, direct access is consistent with the Satellite Act, the World Trade Organization Agreement on Basic Telecommunications Services (“Basic Telecom Agreement”) and the United States Constitution. Accordingly, the Commission should act promptly to extend the pro-competitive benefits of direct access to U.S. consumers.

A. Direct Access Is Consistent With The Satellite Act

The NPRM correctly concludes that the Satellite Act does not confer a permanent COMSAT monopoly over access to the INTELSAT system from the United States. In fact, the creation of COMSAT was a policy response to the specific circumstances of 1962, when satellites were still a new technology of doubtful technical and economic viability.¹² Under these circumstances, creating COMSAT as an intermediary between INTELSAT and U.S. space segment users was perhaps the best way to achieve the Congress’s stated goal to achieve an “efficient and economical use of the electromagnetic spectrum, and . . . reflection of the benefits of this new technology in both quality of services and charges for such services.”¹³ Nothing in the Satellite Act, however, suggests that COMSAT is assigned the permanent role of sole intermediary between INTELSAT and its U.S. users,

¹¹ As noted earlier, C&W does not concede that any markup over the IUC is necessary or appropriate to compensate COMSAT for its Signatory functions. In the UK, for example, the former 7 percent charge has not been assessed since direct access was fully implemented.

¹² INTELSAT itself was created to spread the risk of this new technology and pool the resources of several countries because none (with the possible exception of the United States) could develop its own satellite fleet at the time.

¹³ 47 U.S.C. § 701 (b).

or that this Commission may not choose other means of achieving the Satellite Act's goals as changes in technology and the marketplace dictate.

Ample evidence on this point is provided by the contrast between the statutory role of COMSAT in the INTELSAT system and its role in INMARSAT. The Satellite Act states the intention of Congress to “provide for the widest possible participation by private enterprise”, and establishes that “all authorized users [shall] have nondiscriminatory access to the system” and that “the corporation created under this Act [shall] be so organized and operated as to maintain and strengthen competition in the provision of communications services to the public.”¹⁴ Moreover, the Commission is directed to “insure that all present and future authorized carriers shall have nondiscriminatory use of, and equitable access to, the communications satellite system under just and reasonable charges, classifications, practices, regulations, and other terms and conditions and regulate the manner in which available facilities of the system and stations are allocated among such users thereof.”¹⁵ No such language is present in the INMARSAT Act. Rather, the INMARSAT Act merely specifies that “[t]he communications satellite corporation established pursuant to Title III of this Act is hereby designated as the *sole* operating entity of the United States for participation in INMARSAT . . . ”¹⁶ The contrast between the two statutes could not be more stark or revealing.

The Commission has confirmed this view of its statutory discretion to permit direct access under the Satellite Act. Notably, in the original Direct Access proceeding, the Commission did not find a legal bar to imposing direct access, even at a time when INTELSAT itself did not allow it. Rather, the Commission rejected direct access because

¹⁴ *Id.* § 701 (c)

¹⁵ *Id.* §721 (c) (2).

¹⁶ *Id.* § 752 (a) (1) (emphasis added).

“direct access in the form of capitalized leases, noncapitalized leases or IRU interests would not produce significant economic savings to carriers or users.”¹⁷

Now is an appropriate -- and in fact, overdue -- time for the Commission to exercise its discretion to permit direct access. The telecommunications market has changed dramatically in the fourteen years since 1984.¹⁸ The AT&T divestiture and the introduction of competition in the long distance and international markets have resulted in fierce competition among carriers in those markets. Unlike in 1984, the Commission need not worry that direct access will give AT&T the power “to exercise control over investment decisions on the U.S. end regarding both terrestrial and satellite facilities.”¹⁹ There is now significant intramodal (satellite to satellite) as well as intermodal (satellite to cable) competition in the provision of circuits. INTELSAT allows direct access to its system, dozens of Parties have authorized it as well, and millions of customers are enjoying its benefits throughout the world. Accordingly, the public interest goals of the Satellite Act will best be served by extending those benefits to U.S. consumers as well.

¹⁷ *Regulatory Policies Concerning Direct Access to INTELSAT Space Segment for the U.S. International Service Carriers*, Report and Order, 97 F.C.C. 2d 296, 310 (1984) (“*Direct Access Order*”).

¹⁸ The Commission should respond to changed circumstances in this proceeding, just as it responded to changed circumstances when it decided to end the monopoly of a designated consortium of carriers -- including COMSAT -- over ownership of earth stations in the United States. *Modification of Policy on Ownership and Operation of U.S. Earth Stations that Operate with the INTELSAT Global Communications Satellite System*, Report and Order, 100 F.C.C. 2d 250 (1984). In that proceeding the Commission found that restrictive regulations that “addressed the needs of a nascent satellite telecommunications industry” should be replaced by “the introduction of competition . . .” *Id.* at 264 and 267. The Commission is correct in its tentative conclusion that a similar decision is required in this proceeding.

¹⁹ *Direct Access Order* at 324.

B. Direct Access Is Consistent With The WTO Commitments Of The United States

The Commission also is correct in its tentative conclusion that neither the WTO Basic Telecom Agreement, nor the *DISCO II* decision implementing that agreement, commits the FCC to a permanent COMSAT monopoly over access to INTELSAT.²⁰ As the Commission points out, the U.S. Schedule of Specific Commitments and the Commission's *Disco II Order* note, but do not in any sense require the continuation of, the present position of COMSAT as sole intermediary between INTELSAT and its U.S. users.²¹ In fact, the notion that a market - liberalizing initiative such as direct access would violate the commitments of the United States under the Basic Telecom Agreement -- an agreement expressly intended to *increase* competition in telecommunications markets -- is simply bizarre.

C. Direct Access Is Not An Uncompensated Taking Of COMSAT's Property

COMSAT also resorts to the familiar complaint of the monopolist suddenly thrust into a competitive world: *i.e.*, the claim that its monopoly was a property right conferred as part of a pact with the government, and that the Constitution requires it to be made whole if it suffers any loss of profits or market share to more efficient rivals. As the NPRM correctly concludes, COMSAT possesses no vested property right in its monopoly of INTELSAT access in the United States and offers no evidence to show -- even if it could demonstrate a protectible property interest -- that direct access would amount to a taking of that interest.²² And even if direct access did effect such a taking, the ability of COMSAT to earn a 21 percent return on INTELSAT capacity that it does not use certainly exceeds the constitutional standard for "just compensation."

²⁰ *Id.* at 269.

²¹ *Id.*

²² *Id.* at 272-73.

COMSAT's Fifth Amendment argument, in fact, is indistinguishable from claims that this Commission has rejected when made by other monopolists. In its proceedings implementing the Telecommunications Act of 1996, for example, the Commission was confronted by incumbent local exchange carriers' ("ILECs") claims that if they were forced to provide competitors with access to their networks at rates based on forward-looking costs, they would suffer a loss of investment in embedded plant in violation of the Takings Clause.²³ The careful response the Commission gave to this argument at the time is definitive,²⁴ and applies with equal force to COMSAT's constitutional claims in this proceeding.

III. The Commission Should Reconsider Its Analysis Of Its Statutory Authority To Permit Level 4 Access

The NPRM concludes that the Satellite Act does not empower the Commission to authorize direct Level 4 access to INTELSAT, apparently on the ground that COMSAT's statutory role as the sole U.S. participant in INTELSAT precludes any other entity from investing in INTELSAT.

C&W urges the Commission to reconsider its interpretation. It is at least equally plausible to interpret the statutory phrase "United States participation in the global system"²⁵ to refer, not to investment participation, but to the governance functions that are specifically excluded from INTELSAT's definition of Level 4 access unless "special arrangements are made by the Party and Signatory representing [the customer's] country."²⁶ Accordingly, Level 4 access, which increases the competitive options available for

²³ *Local Competition Order, supra*, at 15872.

²⁴ *Id.* at 15869-15872.

²⁵ 47 U.S.C. § 701 (c).

²⁶ NPRM ¶ 9.

INTELSAT system access, is not plainly inconsistent with the Satellite Act and should be permitted.²⁷

²⁷ Authorization of Level 4 direct access to INTELSAT from the U.S. also would cure the reciprocity problem presented by the fact that "Comsat subsidiaries, Comsat Argentina in Argentina and Comsat General in the United Kingdom, are permitted Level 4 direct access to INTELSAT in those countries." *Id.* ¶ 10.

Conclusion

Direct Access to INTELSAT in the United States is, quite simply, an idea whose time has come. As the NPRM points out, 17 countries already allow level 4 access, and seventy-six more permit level 3 access.²⁸ On the other hand, the United States, which historically has been the main force behind liberalization of telecommunications markets, lags behind countries such as Yemen, Zambia and Nepal in the extent of its liberalization of its market for access to the INTELSAT system. C&W strongly supports the Commission's proposal to bring this anomalous situation to an end.

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Respectfully submitted,

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²⁸ NPRM ¶ 10.

CERTIFICATE OF SERVICE

I, Kimberly E. Thomas, do hereby certify that the foregoing **COMMENTS OF CABLE & WIRELESS** were served by hand delivery on this 22nd day of December, 1998, upon the following:

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