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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

December 22, 1998

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: **Direct Access to the INTELSAT System,**
IB Docket No. 98-192, File No. 60-SAT-ISP-97

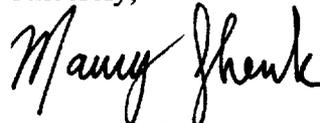
Dear Ms. Salas:

Enclosed for filing are an original and four copies of the Comments of MCI WorldCom, Inc. in the above-referenced matter. Please date stamp and return the additional enclosed copy of this submission.

In addition, a 3.5 inch diskette containing an electronic version of the submission is enclosed, and is also being provided to Kathleen Campbell of the International Bureau and to International Transcription Services.

Please contact me if you have any questions regarding this filing.

Sincerely,



Maury D. Shenk

Enclosures

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Direct Access to the INTELSAT System

**IB Docket No. 98-192
File No. 60-SAT-ISP-97**

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DEC 22 1998

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

To: The Commission

COMMENTS OF MCI WORLDCOM, INC.

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December 22, 1998

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SUMMARY

It is now time for the Commission to end the only monopoly that it has not addressed under the broad pro-competitive mandate of the Telecommunications Act of 1996, by implementing direct access to the space segment of the International Telecommunications Satellite Organization ("INTELSAT"). The Chief of the International Bureau recently explained to Congress why Commission action is now appropriate:

The Commission last considered direct access to INTELSAT in 1984. It did not, at the time, impose direct access because the concept was undefined and any potential benefits were outweighed by the difficulties posed in its implementation. In the early 1990's, however, INTELSAT formally introduced direct access for non-Signatory customers. As a result, the Commission is now in a position to evaluate the potential benefits of the direct access options that INTELSAT currently makes available.¹

The United States should follow the 94 other countries that have authorized direct access to INTELSAT. The Commission should immediately implement (1) Level 3 direct access to INTELSAT, (2) "fresh look" for long term commitments with COMSAT, and (3) portability of INTELSAT capacity. Once direct access is implemented on all routes, COMSAT can be regulated as non-dominant for all INTELSAT services.

Legal Authority. The Communications Satellite Act of 1962 (the "Satellite Act") draws a clear distinction between participation in INTELSAT as a Signatory (for which COMSAT has exclusivity) and commercial relations with INTELSAT (for which COMSAT

¹ Letter from Regina M. Keeney, Chief, FCC International Bureau, to Hon. Thomas Bliley, Chairman, House of Representatives Committee on Commerce, Enclosure at 1 (Dec. 22, 1997) ("Keeney Letter") (emphasis added), reprinted in The Communications Satellite Competition and Privatization Act of 1997: Hearing on H.R. 1872 Before the Subcomm. on Telecommunications, Trade, and Consumer Protection of the House of Representatives Comm. on Commerce, 105th Cong., 1st Sess., H.R. Doc. 105-61, at 146 (1998) ("Satellite Hearing").

does not have exclusivity). In particular, the Act requires the Commission to “insure that all present and future authorized carriers shall have nondiscriminatory use of, and equitable access to [INTELSAT].”² Now that INTELSAT has made direct access available, the Satellite Act requires the Commission to make direct access available in a nondiscriminatory manner to U.S. customers. Furthermore, direct access does not implicate the Takings Clause of the Constitution, because COMSAT has no property interest in access to INTELSAT.

Public Interest Benefits. Direct access would serve the public interest by bringing competition to the U.S. market for access to INTELSAT. Dramatic changes over the last fifteen years indicate that the Commission’s public interest analysis should now be far different than in the 1984 Direct Access Order. The most important change is that beginning in 1992 INTELSAT adopted procedures for four “levels” of direct access – and 94 countries have now implemented direct access at Level 3 or Level 4. There has also been a decisive trend toward competition in the broader telecommunications market. COMSAT’s de facto monopoly with respect to U.S. access to INTELSAT is the only U.S. telecommunications monopoly that the Commission has not addressed under the broad pro-competitive mandate of the Telecommunications Act of 1996; and of the 69 countries that joined the 1997 WTO Telecom Agreement, only the United States and three others reserved exclusive access to INTELSAT. The Satellite Users Coalition (composed of AT&T, MCI and WorldCom) estimates that total consumer benefits from direct access would be more than \$1 billion over a 10 year period.

² 47 U.S.C. § 721(c)(2) (emphasis added).

Benefits to End-Users and Carriers. COMSAT's mark-ups for INTELSAT services average approximately 68 percent and are as high as 270 percent. These mark-ups, which COMSAT charges even when it provides no facilities other than INTELSAT space segment, plainly are not cost-justified – particularly because COMSAT earns a significant return on its investment in INTELSAT. With implementation of direct access, competition will eliminate unjustified mark-ups, reduce end-user prices, and provide increased flexibility to INTELSAT service providers and end-users. Direct access will also benefit U.S. carriers. Today, many foreign carriers have a significant global competitive advantage over U.S. carriers because they can purchase INTELSAT services at the underlying INTELSAT Utilization Charge. The absence of direct access creates an artificial incentive to route INTELSAT traffic through foreign facilities, to the detriment of investment and employment in the United States.

Implementation on All Routes. The Commission should introduce the significant competitive benefits of direct access on all routes, not only on “thin routes” on which there is no competition from fiber optic cable. Because only a small portion of U.S. INTELSAT capacity is used on “thin routes” – for reasons independent of the lower costs of fiber optic cable – most benefits of direct access would be lost if it is limited to “thin routes.” Implementation of direct access on less than all routes would also create competitive inefficiencies by impairing flexibility of routing by U.S. carriers and producing an artificial bias against U.S. facilities.

No Competitive Concerns. The “competitive concerns” regarding direct access that COMSAT has raised are plainly not justified. **First**, investments in INTELSAT by carriers other than COMSAT, which are permitted under Level 4 direct access, are entirely irrelevant to Level 3 direct access. **Second**, U.S. entities that have direct access to INTELSAT will be fully

subject to Commission regulation under Titles II and III of the Communications Act. **Third**, direct access will not increase (and may reduce) the effect of INTELSAT's privileges and immunities.

INTELSAT Privatization. Direct access also will not delay privatization of INTELSAT, because direct access customers will have a strong interest in supporting privatization in order to promote the long-term viability of INTELSAT and to gain the right to invest directly in INTELSAT.

"Fresh Look" and Capacity Portability. In order to effectively implement direct access, the Commission should simultaneously implement (1) a "fresh look" period for long-term commitments to COMSAT and (2) portability of INTELSAT space segment capacity.

"Fresh look" is a Commission policy that applies where (1) an area subject to monopoly service provision is opened to competition and (2) pre-existing contracts or arrangements would prevent customers from obtaining the benefits of the changed circumstances. These conditions are present, because (1) direct access would eliminate COMSAT's de facto INTELSAT monopoly and (2) COMSAT has exploited its monopoly to compel its customers to commit to long-term contracts and tariffs. As in the previous Commission decisions imposing "fresh look," long-term commitments to COMSAT would prevent many of the benefits of direct access from being realized. Therefore, the Commission should require that for a six-month period following the implementation of direct access, users of INTELSAT service with long-term commitments to COMSAT may renegotiate these commitments with COMSAT or any other authorized entity, including INTELSAT.

Because COMSAT controls the vast majority of INTELSAT capacity available to provide service in the United States, it is also critical that the Commission require portability of INTELSAT space segment capacity. While “fresh look” is needed to ensure that long-term commitments between COMSAT and its customers do not impair direct access, portability of INTELSAT capacity is needed to ensure that COMSAT’s commitments for INTELSAT space segment capacity do not have a similar effect. Like telephone number portability, INTELSAT capacity portability permits a customer that switches to a new carrier to take with it a related, crucial network resource. Unless INTELSAT capacity is portable, direct access customers are unlikely to be able to obtain sufficient space segment capacity to provide INTELSAT services. Therefore, the Commission should require COMSAT to relinquish INTELSAT capacity when a user of INTELSAT space segment moves to a carrier other than COMSAT.

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**Before the
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Washington, DC 20554**

**In the Matter of
Direct Access to the INTELSAT System**

**IB Docket No. 98-192
File No. 60-SAT-ISP-97**

To: The Commission

COMMENTS OF MCI WORLDCOM, INC.

MCI WorldCom, Inc. ("MCI WorldCom") hereby comments on the Commission's Notice of Proposed Rulemaking in the above-captioned matter (the "Direct Access NPRM").

The Commission should promptly implement direct access to the space segment of the International Telecommunications Satellite Organization ("INTELSAT") because it would increase competition and reduce prices, and is consistent with the Communications Satellite Act of 1962 (the "Satellite Act").¹ The de-regulatory mandate of the Telecommunications Act of 1996 and sweeping changes in the telecommunications market indicate that the policy grounds on which the Commission declined to implement direct access when it last considered the issue in 1984 are no longer applicable.² Most important, INTELSAT has now implemented standard procedures for direct access, and at least 94 countries have authorized carriers to take advantage

¹ Pub. L. No. 87-624, 76 Stat.419 (1962) (codified as amended at 47 U.S.C. §§ 701-744).

² See Regulatory Policies Concerning Direct Access to the INTELSAT Space Segment for U.S. International Service Carriers, 97 F.C.C.2d 296 (1984) ("1984 Direct Access Order"), aff'd, Western Union International v. FCC, 804 F.2d 1280 (D.C. Cir. 1986).

of these procedures to purchase space segment directly from INTELSAT. The United States should not remain a laggard in permitting competition in the provision of INTELSAT services.

The Chief of the Commission's International Bureau noted these changed circumstances in Congressional testimony exactly one year ago:

The Commission last considered direct access to INTELSAT in 1984. It did not, at the time, impose direct access because the concept was undefined and any potential benefits were outweighed by the difficulties posed in its implementation. In the early 1990's, however, INTELSAT formally introduced direct access for non-Signatory customers. As a result, the Commission is now in a position to evaluate the potential benefits of the direct access options that INTELSAT currently makes available.³

In the Direct Access NPRM, the Commission has undertaken such an examination of the benefits of direct access. For the reasons set out in the Direct Access NPRM and in these comments, the Commission should immediately implement (1) Level 3 direct access⁴ to INTELSAT space segment in the United States, (2) "fresh look" for long term commitments to COMSAT for INTELSAT space segment, and (3) portability of INTELSAT capacity for direct access. The Commission should implement direct access on all routes because the public will benefit from increased competition on all routes. Furthermore, once direct access is implemented, it will be appropriate for COMSAT to be regulated as non-dominant on all routes.

³ Letter from Regina M. Keeney, Chief, FCC International Bureau, to Hon. Thomas Bliley, Chairman, House of Representatives Committee on Commerce, Enclosure at 1 (Dec. 22, 1997) ("Keeney Letter") (emphasis added), reprinted in The Communications Satellite Competition and Privatization Act of 1997: Hearing on H.R. 1872 Before the Subcomm. on Telecommunications, Trade, and Consumer Protection of the House of Representatives Comm. on Commerce, 105th Cong., 1st Sess., H.R. Doc. 105-61, at 146 (1998) ("Satellite Hearing").

⁴ Level 3 direct access permits an entity that is not a Signatory to INTELSAT to purchase space segment capacity directly from INTELSAT, and Level 4 direct access permits a non-Signatory to invest in INTELSAT. See Direct Access NPRM, ¶ 9.

As required by the Commission, these comments follow the structure of the Direct Access NPRM.⁵ Sections I through IV respond to the four basic questions raised by the Commission, and the headings and subheadings of these sections include references (in parentheses) to the specific sections of the Direct Access NPRM to which they relate. In addition, Section V addresses “fresh look” and portability of INTELSAT capacity.

I. THE COMMISSION HAS AUTHORITY TO IMPLEMENT DIRECT ACCESS IN THE UNITED STATES (¶¶ 16-43)

MCI WorldCom agrees with the tentative conclusions “that the Commission has authority to permit other U.S. carriers [than COMSAT] and users to obtain Level 3 direct access to INTELSAT ... [and] that Level 3 direct access is consistent with the Satellite Act and the requirements of the Fifth Amendment.”⁶ Indeed, the language of the Act makes clear that Level 3 direct access is permitted.

A. Level 3 Direct Access to INTELSAT is Consistent With the Satellite Act (¶¶ 18-30)

The Satellite Act enumerates the various roles of COMSAT with respect to INTELSAT. The Act provides that “United States participation in [INTELSAT] shall be in the form of a private corporation”⁷ – i.e., COMSAT. This provision indicates that COMSAT is the only U.S. Signatory of INTELSAT. In addition, COMSAT has the basic powers to:

⁵ See id., ¶ 64.

⁶ Id., ¶ 19.

⁷ 47 U.S.C. § 701(c) (emphasis added).

- (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
- (3) own and operate satellite terminal stations when licensed by the Commission ...⁸

In the first area – ownership and management of INTELSAT – the Satellite Act arguably may be interpreted to grant COMSAT exclusive authority.

In the second and third areas – sale of INTELSAT capacity and ownership of INTELSAT earth stations – the Satellite Act plainly cannot be interpreted to provide exclusivity to COMSAT. **First**, the Act explicitly permits carriers other than COMSAT to operate INTELSAT earth stations.⁹ **Second**, while the power to “plan, initiate, construct, own, manage and operate [the INTELSAT system] itself or in conjunction with foreign governments or business entities”¹⁰ might be interpreted to give COMSAT exclusivity, the power to “furnish, for hire, channels of communication to United States communications common carriers”¹¹ plainly conveys no exclusivity. Likewise, the Satellite Act provision regarding U.S. government use of

⁸ 47 U.S.C. § 735(a).

⁹ See 47 U.S.C. § 721(c)(7) (authorizing the Commission to “grant appropriate authorization or [sic] the construction and operation of each satellite terminal station, either to [COMSAT] or to one or more authorized carriers or to [COMSAT] and one or more such carriers jointly”).

¹⁰ 47 U.S.C. § 735(a)(1).

¹¹ 47 U.S.C. § 735(a)(2).

INTELSAT provides no exclusivity for COMSAT.¹² **Third**, and most important, the Commission is required to “insure that all present and future authorized carriers shall have nondiscriminatory use of, and equitable access to [INTELSAT].”¹³ Significantly, the House of Representatives report on the recently enacted International Anti-Bribery and Fair Competition Act of 1998 cites certain of these provisions and concludes that “Congress sought to promote competition in this market by permitting broad availability of [INTELSAT] to carriers and users.”¹⁴

Nor is there any logical reason that COMSAT’s exclusive right to participation in INTELSAT as U.S. Signatory makes COMSAT the sole U.S. customer of INTELSAT, as COMSAT has previously argued.¹⁵ Taken to a logical extreme, this reading of the “participation” language of the Satellite Act would mean that no U.S. entity may buy INTELSAT services even through COMSAT, because that would amount to “participation” in INTELSAT that is forbidden under the Act. Moreover, even COMSAT itself, when it argues that competition from Teleglobe provides a ground for rejecting direct access,¹⁶ recognizes that

¹² See 47 U.S.C. § 721(a)(6) (President shall “take all necessary steps to insure the availability and appropriate utilization of the communications satellite system for general governmental purposes except where a separate communications satellite system is required to meet unique governmental needs, or is otherwise required in the national interest”).

¹³ 47 U.S.C. § 721(c)(2) (emphasis added).

¹⁴ H.R. Rep. No. 105-802, at 12-13 (Oct. 8, 1998) (emphasis added).

¹⁵ See COMSAT Corporation and Wiley, Rein & Fielding, An Analysis of the FCC’s Authority to Mandate Direct Access to the INTELSAT System, at 2-5, File No. 60-SAT-ISP-97 (Dec. 24, 1997).

¹⁶ See Direct Access NPRM, ¶ 55. This argument is addressed in section II.A.2 below.

the Commission has long permitted foreign Signatories of INTELSAT to provide space segment for U.S.-originated services in competition with COMSAT.¹⁷

Like the Satellite Act, the past decisions of the Commission do not support COMSAT's claim of legal exclusivity with respect to access to INTELSAT space segment. In the 1984 Direct Access Order, the Commission declined to adopt direct access solely on policy grounds; and the Commission noted in the Direct Access NPRM that "there is nothing contained in [the D.C. Circuit] decision [affirming the 1984 Direct Access Order] suggesting that the Commission did not have discretion to impose direct access had it found policy grounds to do so."¹⁸ The Chief of the International Bureau made the same point in the Congressional testimony that is quoted at the beginning of these comments¹⁹; and the Congressional committee report on the satellite bill passed by the House of Representatives last session takes a similar view of the Commission's authority:

The Committee believes the FCC has the current authority to institute direct access [T]he Committee does not intend to prevent the Commission from exercising its existing discretion to

¹⁷ See Establishment of Regulatory Policies Relating to the Authorization Under Section 214 of the Communications Act of 1934 of Satellite Facilities for the Handling of Transiting Traffic, 23 F.C.C.2d 9 (1970) ("INTELSAT Transit Order") (allowing U.S. carriers to purchase INTELSAT space segment capacity from foreign entities to provide U.S.-originated service using foreign INTELSAT earth stations).

¹⁸ Direct Access NPRM, ¶ 18.

¹⁹ See Keeney Letter, Enclosure at 1 ("The Commission last considered direct access to INTELSAT in 1984. It did not, at the time, impose direct access because the concept was undefined and any potential benefits were outweighed by the difficulties posed in its implementation.").

provide for direct access to INTELSAT or Inmarsat prior to the deadlines outlined in this bill.²⁰

Finally, MCI WorldCom agrees with the Commission that Authorized User I²¹ and the DISCO II Order²² – in which the issue of direct access was not before the Commission – “have no bearing on [a] ... decision to require access under the Satellite Act.”²³

Quite simply, it is the Satellite Act that controls the Commission’s authority to implement direct access; and the Satellite Act unquestionably permits the Commission to do so. The Act explicitly requires the Commission to “insure that all present and future authorized carriers shall have nondiscriminatory use of, and equitable access to [INTELSAT].”²⁴ In view of the changing conditions in the telecommunications market, it is now plain that this Congressional mandate requires implementation of Level 3 direct access to the INTELSAT system.

B. Level 3 Direct Access Does Not Implicate the Fifth Amendment Takings Clause (¶¶ 31-43)

MCI WorldCom also agrees with the Commission’s tentative conclusion that implementation of Level 3 direct access is not a regulatory taking without compensation that

²⁰ H.R. Rep. No. 105-494, at 61 (Apr. 27, 1998).

²¹ Authorized Entities and Authorized Users Under the Communications Satellite Act, 4 F.C.C.2d 421 (1966) (“Authorized User I”).

²² Amendment of the Commission’s Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States, 12 FCC Rcd. 24094 (1997) (“DISCO II Order”).

²³ Direct Access NPRM, ¶¶ 27-28.

²⁴ 47 U.S.C. § 721(c)(2).

would violate the Fifth Amendment Takings Clause.²⁵ COMSAT's Takings Clause arguments have no substantial basis in law, and need be addressed only briefly.

The fundamental requisite of a claim under the Takings Clause is a governmental taking of property,²⁶ and COMSAT has no property interest in exclusive access to the INTELSAT system. The Satellite Act creates no such exclusivity, and there has been no promise or contractual undertaking by the U.S. government that would confer such exclusivity.²⁷ Indeed, the only decision in which the government has squarely addressed direct access is the 1984 Direct Access Order, which implicitly assumed that direct access is permissible as a matter of law; and the Commission long ago authorized U.S.-originated INTELSAT service using foreign INTELSAT earth stations.²⁸ The de facto exclusivity that COMSAT continues to enjoy with respect to U.S. access to INTELSAT rests solely on the Commission's 1984 finding that direct access was not in the public interest at that time. Thus, COMSAT's asserted "property interest" is no more than a claim of immunity from the changes in the telecommunications market that now indicate that direct access is in the public interest. Such a claim has no basis in law.

Even if Level 3 direct access were a taking, no compensation to COMSAT would be required. Under direct access COMSAT will continue to earn (1) the same return on its

²⁵ See Direct Access NPRM, ¶ 32; U.S. Const. amend. V ("nor shall private property be taken for public use without just compensation").

²⁶ See, e.g., Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 221-222 (1986).

²⁷ See Direct Access NPRM, ¶¶ 33-35 ("a vested property right on behalf of the U.S. Government must be unambiguously or clearly implied from the instruments at issue") (citing United States v. Winstar Corporation, 518 U.S. 839 (1996)).

²⁸ See INTELSAT Transit Order.

investment in INTELSAT (which was 18 percent in 1997)²⁹ and (2) a market-based profit on the INTELSAT services it continues to provide to customers. The only thing COMSAT will lose through direct access is its monopoly rents on INTELSAT services. It would be contrary to public policy to compensate COMSAT for supranormal profits that it has enjoyed at the expense of its customers.

II. DIRECT ACCESS WOULD SERVE THE PUBLIC INTEREST BY BRINGING COMPETITION TO THE U.S. MARKET FOR INTELSAT SPACE SEGMENT SERVICES (¶¶ 44-55)

Because direct access is permitted by the Satellite Act, the relevant inquiry in this proceeding is whether Level 3 direct access is in the public interest. The Commission has authority to engage in a public interest analysis under its general mandate to “make rules and regulations to carry out the provisions of th[e] [Satellite] Act,”³⁰ including the Act’s stated purpose of ensuring that INTELSAT “will be responsive to public needs and national objectives”³¹ Evaluation of the public interest benefits of direct access was also the basis on which the Commission considered (and declined to implement) direct access in the 1984 Direct Access Order.³² Dramatic changes at INTELSAT and in the broader telecommunications market over the last 15 years indicate that the outcome of the Commission’s public interest analysis should

²⁹ See Direct Access NPRM, ¶ 23 (1997 INTELSAT return on investment was 18 percent).

³⁰ 47 U.S.C. § 721(c)(11).

³¹ 47 U.S.C. § 701(a).

³² See 1984 Direct Access Order, 97 F.C.C.2d at 298 (“we conclude that proponents of direct access have failed to establish that it will serve the public interest”).

now be different than in the 1984 Direct Access Order, and that the Commission should immediately implement Level 3 direct access to INTELSAT.

A critical change in the 15 years since the 1984 Direct Access Order is that INTELSAT, beginning in 1992, adopted procedures for four types of direct access – Level 1 (access to INTELSAT operational/technical information), Level 2 (access to INTELSAT commercial documents and service terms), Level 3 (direct purchase of space segment from INTELSAT) and Level 4 (direct investment in INTELSAT).³³ The adoption of these INTELSAT procedures means that the Commission no longer must use artificial structures to implement direct access, such as the capital lease and infeasible right of use (“IRU”) approaches that were at issue in the 1984 Direct Access Order.³⁴ The speculation that was required to analyze possible cost savings in connection with these proposals is no longer necessary.³⁵

Implementation of direct access now requires nothing more than obtaining regulatory authorization and completing the relevant INTELSAT forms. The ease of this process is illustrated by the fact that at least 94 countries have now authorized INTELSAT direct access at Level 3 or Level 4 (which subsumes Level 3).³⁶ Canada joined the countries permitting direct

³³ See Direct Access NPRM, ¶ 8 (direct access implemented beginning in 1992); INTELSAT, Direct Access <<http://www.intelsat.int/cmc/connect/daccess.htm>> (visited Dec. 17, 1998) (describing levels of direct access). Each level of direct access subsumes the lower levels.

³⁴ See 1984 Direct Access Order, 97 F.C.C.2d at 300-01.

³⁵ See Direct Access NPRM, ¶ 50 (“The Commission did not ... [in 1984] have the opportunity of considering application of the direct access programs that INTELSAT later put in place.”).

³⁶ See id., Appendix A (listing 93 countries with Level 3 or Level 4 direct access). The addition of Canada brings the total to 94.

access just this month.³⁷ It is time that the U.S. remedies its laggard status in this area and also implements Level 3 direct access.

The decisive trend toward competition in the telecommunications market also indicates that the Commission should update its analysis in the 1984 Direct Access Order. This trend is exemplified by the Telecommunications Act of 1996 and the 1997 World Trade Organization Basic Telecommunications Agreement (“WTO Telecom Agreement”).³⁸ Strikingly, COMSAT’s de facto monopoly with respect to U.S. access to INTELSAT is the only remaining monopoly in the U.S. telecommunications market that the Commission has not yet addressed under the Telecommunications Act, which broadly mandates elimination of any restriction that “may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”³⁹ Moreover, of the 69 countries that joined the WTO Telecom Agreement, only the United States and three others (Brazil, El Salvador and Mexico) included in their commitments a reservation regarding exclusive access to INTELSAT. Further, the Commission has recently liberalized its rules for satellite systems other than INTELSAT, by eliminating the distinction between domestic satellites and separate international satellite systems in the DISCO I Order⁴⁰ and opening the U.S. market to foreign

³⁷ See Industry Canada, INTELSAT and Inmarsat Restructuring Initiatives § 2.3.2 (Dec. 1998) (“Canada Direct Access Paper”) (explaining that Canada has authorized Level 3 and Level 4 direct access).

³⁸ See Fourth Protocol to the General Agreement on Trade in Services, WTO Doc. S/L/20 (Apr. 30, 1996) (attaching Feb. 15, 1997 commitments under the WTO Telecom Agreement).

³⁹ 47 U.S.C. § 253(a).

⁴⁰ Amendment to the Commission’s Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems, 11 FCC Rcd. 2429 (1996) (“DISCO I Order”).

satellite systems in the DISCO II Order. A similar liberalization with respect to INTELSAT, through implementation of direct access, is long overdue.

A. Direct Access Would Enhance Competition in the U.S. Market for INTELSAT Services, to the Benefit of U.S. Consumers and Carriers (¶¶ 44-52)

Direct access would bring substantial public interest benefits because it would introduce competition in the U.S. market for INTELSAT services, in which COMSAT now has a de facto monopoly. Like any monopolist, COMSAT has taken the economically rational path of charging inflated prices that maximize its profits. The Satellite Users Coalition (composed of AT&T, MCI and WorldCom) estimates that total consumer benefits from direct access would be more than \$1 billion over a 10 year period.⁴¹

1. COMSAT's Mark-Ups on INTELSAT Services Far Exceed Its Costs (¶¶ 45-49)

COMSAT charges mark-ups on the underlying INTELSAT Utilization Charge (“IUC”) that average approximately 68 percent (for a total of approximately \$86 million in 1996)⁴² and are as high as 270 percent for some services.⁴³ These huge mark-ups over the IUC – which COMSAT charges on bare INTELSAT space segment – plainly are not cost-justified. A

⁴¹ See Satellite Users' Coalition, Analysis of the Privatization of the Intergovernmental Satellite Organizations Proposed in H.R. 1872, at 23-25 & Table A6, File No. 60-SAT-ISP-97 (filed Mar. 16, 1998) (“SUC Economic Analysis”).

⁴² See Keeney Letter, Enclosure at 10; Direct Access NPRM, ¶ 45; see also Salomon Smith Barney, COMSAT Corporation (Company Report), at 15 (Oct. 5, 1998) (“Salomon Smith Barney Report”) (estimating COMSAT price premium on INTELSAT services at 69%).

⁴³ See Direct Access NPRM, Appendix B.

more complete record will be available on this issue when COMSAT responds to the Commission's request for information on its INTELSAT-related costs,⁴⁴ and MCI WorldCom will respond in the second round of comments to the information submitted by COMSAT.⁴⁵

In any event, the excessive nature of COMSAT's mark-ups is readily apparent from the fact that COMSAT charges these mark-ups on space segment services for which it provides no facilities other than INTELSAT space segment. Indeed, many of COMSAT's largest INTELSAT customers (including MCI WorldCom and other large inter-exchange carriers) own and operate earth stations that communicate directly with INTELSAT satellites.⁴⁶ Even though INTELSAT communications by these customers are never handled by COMSAT, COMSAT obtains windfall mark-ups of up to 270 percent over the IUC by virtue of its de facto monopoly on access to INTELSAT.

**2. Direct Access Will Benefit U.S. Consumers and Carriers
(¶¶ 50-52, 55)**

Implementation of direct access will provide substantial benefits to U.S. consumers. INTELSAT itself advertises a variety of benefits of direct access:

Efficiency	Direct Access Customers obtain quick answers to questions and faster service implementation . . . , from the initial planning stages through the final end-to-end testing and start of operation.
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⁴⁴ See id., ¶ 47.

⁴⁵ See id., ¶ 48 (“We request parties to respond to the cost information that Comsat provides.”).

⁴⁶ See, e.g., MCI International, Inc., 7 FCC Rcd. 2215 (1992) (authorizing construction and operation of INTELSAT earth station).

- | | |
|--------------|--|
| Cost Savings | <u>Customers avoid the mark-up costs that a third party usually charges.</u> |
| Control | Direct Access Customers have the advantage of greater control over a number of elements that can affect their telecommunications services, such as service quality, performance costs, connectivity, redundancy, and earth station capabilities. ... |
| Service | <u>Direct Access Customers can tailor services more flexibly than going through a third party provider,</u> for virtually any bandwidth, time duration, performance standard, redundancy and service application required. ⁴⁷ |

The most important of these benefits of direct access are reduced costs (through elimination of mark-ups by third parties like COMSAT) and increased flexibility for INTELSAT carrier and end-user customers. The need for increased flexibility results largely from the fact that COMSAT has refused to resell certain INTELSAT services. For example, COMSAT presently will not sell preemptible leases on INTELSAT satellites; consequently, MCI WorldCom is compelled to purchase more expensive non-preemptible leases that some customers do not need.

There also can be no doubt that implementation of direct access will significantly reduce the resale margin on INTELSAT services and thereby reduce costs to consumers and business end-users. This is the effect of a competitive market, and this has repeatedly been the effect of the introduction of competition to U.S. telecommunications markets – including the markets for long distance and international services since elimination of the AT&T monopoly

⁴⁷ INTELSAT, Accessing INTELSAT ... Directly, at 3 (Sept. 1997), reprinted in Satellite Hearing at 135.

and the market for wireless services since introduction of broadband PCS competition.⁴⁸ A recent Commission study found that “international calling prices have declined significantly during the last year,” with price declines of up to 51 percent (and averaging 13 percent) for the three largest carriers on the five largest international routes.⁴⁹ With implementation of direct access, competitive market forces will cause similar reductions in prices for INTELSAT services.⁵⁰

COMSAT is incorrect that direct access would reduce economies of scale, producing harm to low-volume users who do not purchase directly from INTELSAT.⁵¹ It is INTELSAT, not COMSAT, that enjoys economies of scale with respect to the INTELSAT space segment. Price reductions from direct access will increase U.S. traffic over the INTELSAT

⁴⁸ See, e.g., 1998 Biennial Regulatory Review – Spectrum Aggregation Limits for Wireless Telecommunications Carriers, ¶ 34, WT Docket No. 98-205 (rel. Dec. 10, 1998) (“[A]lthough the evolution of the CMRS sector is at an early stage, signs of competition are clear. ... And although there are local variations, on average prices are falling markedly, service quality is improving, and new services are becoming available.”).

⁴⁹ Report on International Telecommunications Markets 1997-1998 (Prepared for Senator Ernest F. Hollings), at Introduction, 1 (Dec. 7, 1998). An average price decline of 13.02% can be calculated from the data in this study by weight averaging the reported declines using U.S.-originated traffic volumes from 1996 Section 43.61 International Telecommunications Data (rel. Jan. 28, 1998).

⁵⁰ Because market forces will lead to lower prices, there is no basis for a required pass-through of cost reductions to consumers. This is the approach that the Commission recently adopted in International Settlement Rates, 12 FCC Rcd 19806 (1996): “We believe that we should, to the extent possible, preserve the ability of U.S. carriers to make pricing decisions in response to ... competitive market forces. We thus find that it is not in the public interest at this time to mandate a particular approach U.S. carriers should take to pass through to consumers reductions in net settlements that occur as a result of the settlement rate benchmarks we adopt” Id. at 19930.

⁵¹ See Direct Access NPRM, ¶ 52.

system and thus increase economies of scale. With respect to earth stations, the largest potential direct access customers (i.e., the large IXCs) own INTELSAT earth stations, so direct access will not affect their use of facilities. Furthermore, COMSAT will remain the only U.S. Signatory to INTELSAT and will retain whatever economies of scale are inherent in this structure. Most important, low-volume users who do not wish to obtain direct access will have the option of purchasing INTELSAT services from carriers other than COMSAT. This will allow these customers to benefit from competitive price reductions and from the market for smaller bundles of INTELSAT space segment (like the IXC resale market) that will likely develop.

Direct access would also provide major benefits to U.S. carriers who compete in the increasingly global market. Many foreign carriers, either as INTELSAT Signatories or direct access customers, have the right to purchase INTELSAT services at or near the IUC. These foreign carriers enjoy a significant competitive advantage over U.S. carriers, who incur much higher costs for space segment, in competing for global customers. For example, MCI WorldCom recently lost a contract for international Internet services to a foreign carrier because of an inability to match this carrier's cost-based pricing for INTELSAT satellite links.

In the absence of direct access, U.S. carriers have an incentive to route INTELSAT traffic through foreign facilities, because the mark-ups charged by COMSAT can easily exceed the cost of moving traffic over fiber optic cable to foreign INTELSAT earth stations. This has the effect of reducing investment and employment in the United States. It is both extremely inefficient and contrary to the Satellite Act for the Commission to authorize U.S.

carriers to build earth stations,⁵² but to impair the economic value of these facilities by failing to “insure ... nondiscriminatory use of, and equitable access to, [INTELSAT].”⁵³

Competition to COMSAT from foreign companies, such as Teleglobe, the Canadian Signatory to INTELSAT, demonstrates the bias toward foreign facilities created by this inefficiency. This competition will likely increase with the recent implementation of direct access in Canada.⁵⁴ However, the availability of access to INTELSAT through foreign companies such as Teleglobe does not counsel against direct access.⁵⁵ To the contrary, by limiting competition for INTELSAT access for U.S.-originating and -terminating traffic to foreign companies with direct access, the Commission would artificially restrict competition, increase costs, and penalize companies that have invested in U.S. earth station facilities. The Commission should permit full competition for INTELSAT services by eliminating the middleman role of COMSAT, thereby following the example of the numerous other countries that have adopted direct access.

B. The Commission Should Implement Direct Access on All Routes (¶¶ 53-54)

It is critical that the Commission implement direct access on routes to all countries, not only the “thin routes” on which there is no competition from fiber optic cable. A

⁵² See 47 U.S.C. § 721(c)(7).

⁵³ 47 U.S.C. § 721(c)(2).

⁵⁴ See Canada Direct Access Paper.

⁵⁵ See Direct Access NPRM, ¶ 55.

decision to implement direct access in such a limited manner would be based on a faulty premise. Specifically, the fact that COMSAT may be subject to some competition in particular markets does not mean that increased competition in those markets would not provide substantial consumer benefits and does not eliminate the potential for anticompetitive behavior by COMSAT.⁵⁶ Direct access will bring significant public interest benefits of increased competition and lower prices on all routes, and direct access will be largely ineffective if it is not implemented on all routes. Furthermore, once direct access is implemented, the resulting competition in provision of INTELSAT services will justify non-dominant classification of COMSAT on all routes.

INTELSAT traffic on “thin routes” is only a relatively small portion of INTELSAT traffic. For example, only 15 percent of INTELSAT capacity used by MCI WorldCom is on routes found by the Commission to be “thin routes”, while 85 percent is on “thick routes” – the routes on which the Commission has found COMSAT to be non-dominant.⁵⁷ Thus, MCI WorldCom has nearly six times as much INTELSAT traffic on “thick routes” as it

⁵⁶ For example, in its recent order in Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers, WT Docket No. 98-100 (rel. July 2, 1998), the Commission maintained a variety of regulatory safeguards to prevent anticompetitive behavior by commercial mobile radio service (“CMRS”) providers, notwithstanding that all CMRS providers are regulated as non-dominant (except COMSAT, with respect to Inmarsat services).

⁵⁷ See 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, ¶¶ 42, 130, 132, File No. 60-SAT-ISP-97 (Apr. 24, 1998) (“COMSAT Non-Dominance Order”) (finding COMSAT to be dominant on “thin routes” served only by INTELSAT and non-dominant on “thick routes” served both by INTELSAT and by fiber optic cables).

does on “thin routes.” Based on these usage patterns alone, it is evident that without implementation of direct access on routes on which COMSAT is non-dominant, only a fraction of the benefits of direct access will be realized.

The economic reasons for these INTELSAT usage patterns are independent of the generally lower costs of fiber optic cable. Even on a “thick route,” the theoretical availability of fiber optic cable capacity does not mean that the route is fully competitive. Fiber optic cable does not provide a viable alternative to INTELSAT where: (1) fiber optic transmission involves complex or inefficient routing (e.g., Eastern Europe), (2) fiber optic transmission facilities do not reach the entire country (e.g., India, Russia), (3) there is insufficient cable capacity to meet demand (e.g., Latin America), or (4) only one cable is available and satellite capacity is required to provide diversity of routing to minimize the effects of network outages (e.g., Argentina, Brazil, Chile, Colombia, El Salvador, Honduras, Jamaica, Netherlands Antilles, South Africa, Uruguay, Vietnam). Carriers also use INTELSAT to provide overflow capacity for high-volume periods. Furthermore, foreign carriers often require use of INTELSAT capacity as part of a half-circuit correspondent relationship.⁵⁸ Each of these reasons for use of satellite capacity on “thick routes” is independent of the cost advantage that fiber optic cable generally has over INTELSAT space segment. Therefore, the availability of cable capacity does not provide significant pressure on COMSAT’s monopoly pricing even on “thick routes.” By contrast, direct access on all routes will lead to competitive pricing of INTELSAT services on all routes.

⁵⁸ Alternative satellite systems often do not provide any meaningful competition to INTELSAT, largely because satellite operators in many countries – who can buy INTELSAT services at or near the IUC and who have made substantial investments for approximately three decades in INTELSAT earth stations – lack the incentive and financial ability to rapidly build capital-intensive ground infrastructure to access these relatively new systems.

A major benefit of direct access is the ability to route traffic efficiently, and implementation of direct access on less than all routes would produce significant routing inefficiencies. COMSAT's unjustified mark-ups on INTELSAT services would continue to distort traffic routing decisions and intermodal competition between satellite and fiber optic cable. On routes where there is no direct access, there would continue to be an artificial incentive to favor cable over satellite and, as discussed above, to favor routing U.S. traffic via foreign INTELSAT earth stations rather than U.S. earth stations. Furthermore, direct access carriers would be forced to have two sources for INTELSAT capacity – INTELSAT (i.e., direct access) on "thin routes" and COMSAT on "thick routes." This would undermine carriers' flexibility in shifting capacity commitments among routes⁵⁹ and in buying transponder leases that permit service to both "thin route" and "thick route" countries. Finally, INTELSAT's direct access procedures make no provision for authorization of direct access on some routes but not on others.⁶⁰

⁵⁹ INTELSAT policies permit long-term capacity commitments by a carrier on one route to be shifted to another route if capacity is no longer needed. However, it would not be feasible to shift a direct access commitment to COMSAT, or vice versa.

⁶⁰ See Signatory Access/Liability/Investment Authorization Form <<http://www.Intelsat.com/cmc/connect/sigform.htm>> (visited Dec. 10, 1998). Direct access on less than all routes would be inconsistent with the role of INTELSAT as a provider of non-discriminatory global universal service. The INTELSAT Convention provides that "INTELSAT shall have as its prime objective the provision, on a commercial basis, of the space segment required for international public telecommunications services of high quality and reliability to be available on a non-discriminatory basis to all areas of the world." Agreement Relating to the International Telecommunications Satellite Organization (INTELSAT), Aug. 20, 1971, Art. III(a), 23 U.S.T. 3818, 3819 (emphasis added).

In sum, implementation of direct access on all routes is required to ensure that the benefits of increased competition and reduced prices for INTELSAT services are fully realized.

III. DIRECT ACCESS DOES NOT RAISE COMPETITIVE CONCERNS (¶¶ 56-58)

Direct access, as demonstrated above, will plainly enhance competition in the satellite telecommunications market and further the public interest. The “competitive concerns” that are discussed in the Direct Access NPRM are simply not justified.

First, COMSAT’s concern regarding the effect of U.S. carrier investments in INTELSAT relates only to Level 4 direct access, and is entirely irrelevant to Level 3 direct access.⁶¹

Second, the concern raised by COMSAT and PanAmSat regarding INTELSAT immunity from Commission jurisdiction over rates and practices is baseless.⁶² The U.S. entity that accesses the INTELSAT system will be required to hold appropriate U.S. licenses under Titles II and III of the Communications Act, and will be fully subject to the jurisdiction of the Commission and the rules of the DISCO II Order and Foreign Participation Order.⁶³ Indeed, the concern raised by COMSAT and PanAmSat is precisely what was at issue in those two proceedings – *i.e.*, the proper means of regulation of U.S. services provided by a foreign entity that is not directly subject to the jurisdiction of the Commission. Consistent with these

⁶¹ See Direct Access NPRM, ¶ 56.

⁶² See *id.*, ¶ 57.

⁶³ Rules and Procedures on Foreign Participation in the U.S. Telecommunications Market, 12 FCC Rcd. 23891 (1997) (“Foreign Participation Order”).

decisions, the Commission can exercise its statutory authority to regulate and impose any needed license conditions on U.S. entities that have direct access to INTELSAT.⁶⁴

Third, the privileges and immunities of INTELSAT are not a proper basis for rejecting direct access.⁶⁵ Direct access will not increase the effect of INTELSAT's privileges and immunities in any way. To the contrary, direct access customers will have none of the INTELSAT-related immunities of COMSAT.⁶⁶ Furthermore, it is direct access customers who would be most affected by INTELSAT's privileges and immunities, and INTELSAT provides recourse to these customers by agreeing to submit to arbitration in its standard direct access service agreement.⁶⁷ In addition, the International Anti-Bribery and Fair Competition Act of

⁶⁴ See 47 U.S.C. § 214(c) ("The Commission ... may attach to the issuance of the [license] such terms and conditions as in its judgment the public convenience and necessity may require."), § 303(r) (Commission may "prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act").

⁶⁵ See Direct Access NPRM, ¶ 58. It is disingenuous for COMSAT to argue against direct access based on INTELSAT's privileges and immunities, while steadfastly maintaining that the existence of the privileges and immunities should not affect Commission decisions whether to authorize COMSAT to provide INTELSAT services in the United States. See COMSAT Corporation v. FCC, File No. 98-1011 (D.C. Cir. filed Jan. 12, 1998) (COMSAT petition for review of requirement of DISCO II Order that COMSAT waive its INTELSAT and Inmarsat privileges and immunities as a condition of providing U.S. domestic service over these systems).

⁶⁶ See Alpha Lyracom Space Communications, Inc. v. Communications Satellite Corporation, 946 F.2d 168 (2d Cir. 1991) (COMSAT entitled to statutory immunity from antitrust liability for activities as INTELSAT Signatory).

⁶⁷ INTELSAT, [Direct Access] Service Agreement, ¶ 12, <<http://www.Intelsat.com/cmc/connect/servform.htm>> (visited Dec. 10, 1998) ("either party may submit the dispute, controversy or claim for settlement by arbitration in accordance with the UNCITRAL Arbitration Rules in effect on the date of the Agreement").

1998 provides for the reduction or elimination of INTELSAT's privileges and immunities with respect to commercial telecommunications services.⁶⁸

IV. DIRECT ACCESS WILL NOT DELAY PRIVATIZATION OF INTELSAT (¶ 59)

Direct access also will not delay privatization of INTELSAT. MCI WorldCom and other U.S. carriers have consistently supported a pro-competitive INTELSAT privatization and will continue to do so.⁶⁹ The U.S. government and COMSAT (the only current U.S. customer of INTELSAT) also have strongly supported INTELSAT privatization,⁷⁰ and presumably they will continue to do so as well. Moreover, direct access in the United States should have no effect on the privatization positions of other countries (many of which have already implemented direct access).⁷¹

⁶⁸ See International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, § 5(d)(1) (President shall "expeditiously take all appropriate actions necessary to eliminate or to reduce substantially all privileges and immunities that are accorded to an international organization [providing commercial communications services]"); see also *id.*, § 5(c)(1).

⁶⁹ See SUC Economic Analysis; Letters to Congress from Ad Hoc Coalitions of Carriers (Apr. 27, June 24 & July 16, 1998).

⁷⁰ See Hendrik S. Houthakker, Marius Schwartz, Johannes P. Pfeifenberger, William B. Tye, M. Alexis Maniatis & Jerry R. Green, 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", at 4, File No. 60-SAT-ISP-97 (filed Mar. 17, 1997) ("We too firmly support privatization, because it would allow the ISOs' assets to be used more efficiently and more flexibly, thereby benefiting customers directly as well as indirectly – by stimulating competition.").

⁷¹ The Canadian government recently implemented direct access and noted at the same time that "Canada is supportive of initiatives leading to the privatization of INTELSAT." Canada Direct Access Paper, § 2.2.2.

The argument that direct access customers will oppose INTELSAT privatization⁷² is based on the flawed premise that privatization is not in the interest of direct access customers. To the contrary, INTELSAT customers have a strong interest in promoting the long-term viability of INTELSAT; and it is clear that a pro-competitive privatization is in the best interest of INTELSAT.⁷³ Furthermore, privatization will presumably provide direct access customers with the important opportunity to invest directly in INTELSAT (which no U.S. carrier other than COMSAT now has).

More to the point, privatization has been under consideration for many years and will likely take several more years to complete. Potential delays in privatization that are unrelated to direct access should not provide a reason to delay direct access, which is a separate issue on which the Commission can and should act now, based on clear public interest benefits.

V. EFFECTIVE IMPLEMENTATION OF DIRECT ACCESS REQUIRES “FRESH LOOK” AND PORTABILITY OF INTELSAT CAPACITY

In order to ensure effective implementation of direct access, the Commission should simultaneously implement (1) a reasonable “fresh look” period for renegotiation of long-term commitments between COMSAT and its INTELSAT space segment customers and

⁷² See Direct Access NPRM, ¶ 59.

⁷³ See COMSAT Corporation, “COMSAT applauds New Skies Satellites, N.V. as privatized company begins commercial service today” (Dec. 1, 1998) (press release) (“New Skies demonstrates that the privatization process is driven by market realities, and accomplished through cooperative efforts between owners. . . . INTELSAT’s top management has a sharp focus on privatizing the remaining organization as quickly as possible We are supportive of this goal, and will work closely with them to capitalize on the current momentum and complete the process.”).

(2) portability of INTELSAT space segment capacity that is subject to commitments between COMSAT and INTELSAT. A recent report by Salomon Smith Barney described the competitive circumstances requiring these conditions:

In reality, direct access is somewhat muted [M]ore than half of [COMSAT's] business is under long-term contracts ..., meaning that only short-term contracts and new business opportunities are available. ... [M]ost importantly, COMSAT has a capacity contract with Intelsat, which gives the company ownership of the vast majority of capacity connecting with the U.S. In effect, others can play ball under direct access, but COMSAT owns the equipment.⁷⁴

A. “Fresh Look” Will Ensure That Long-Term Commitments Between COMSAT and Customers Do Not Prevent Benefits of Direct Access From Being Realized

"Fresh look" is a Commission policy that permits renegotiation of existing contracts where:

- an area subject to monopoly service provision is opened to competition (or conditions of competition in a market otherwise change significantly); and
- pre-existing contracts or arrangements would prevent customers from obtaining the benefits of the changed circumstances, inhibiting the development of a competitive market.

“Fresh look” is plainly appropriate in connection with the implementation of direct access, because both of these conditions are present. **First**, COMSAT has had a de facto monopoly on provision of INTELSAT space segment in the United States, which would be eliminated by implementation of direct access. **Second**, COMSAT has exploited its monopoly to compel its

⁷⁴ Salomon Smith Barney Report, at 16.

customers to commit to long-term contracts and tariffs offering terms much less favorable than those that will be available under direct access.

The Commission has applied “fresh look” in at least four cases.⁷⁵ In the Expanded Interconnection decision, the Commission implemented pricing flexibility for local exchange carrier (“LEC”) special access offerings, stating:

The existence of certain long-term access arrangements also raises potential anticompetitive concerns since they tend to “lock up” the access market, and prevent customers from obtaining the benefits of the new, more competitive access environment. To address this, we conclude that certain LEC customers with long-term access arrangements should be permitted to take a “fresh look” to determine if they wish to avail themselves of a competitive alternative.⁷⁶

Similarly, in 800 Number Portability, the Commission introduced 800 number portability and recognized the risk that existing long-term contracts would impair the development of competition:

We ... require AT&T to permit customers ... to terminate [certain contracts] within ninety days of the time 800 numbers become portable without the imposition of termination liabilities. This measure will ensure that customers who may be dependent on a specific 800 number cannot be leveraged by AT&T into long-term

⁷⁵ See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 11 FCC Rcd. 15499, 16044-45 (1996) (“Interconnection Order”); Expanded Interconnection with Local Telephone Company Facilities, 7 FCC Rcd. 7369, 7458-65 (1992) (“Expanded Interconnection”); Competition in the Interstate Interexchange Marketplace, 6 FCC Rcd. 5880, 5906 (1991) (“800 Number Portability”); Amendment of the Commission’s Rules Relative to Allocation of the 849-851/894-896 MHz Bands, 6 FCC Rcd. 4582, 4583-84 (1991) (“GTE Airfone”).

⁷⁶ Expanded Interconnection, 7 FCC Rcd. at 7463-64 (emphasis added).

commitments ... that prevent their taking advantage of 800 number portability when it arrives.⁷⁷

Long-term commitments between COMSAT and its INTELSAT customers raise the same risk of preventing the benefits of direct access from being realized. COMSAT has been able to obtain very long-term contracts for INTELSAT voice services (covering periods as long as 15 years) by leveraging its de facto monopoly for INTELSAT services. For example, COMSAT charges much higher mark-ups on shorter-term contracts than on long-term contracts, without any cost-based economic justification. The data in the Direct Access NPRM shows that COMSAT's mark-up on C- and Ku-band voice service contracts averages 258 percent for 5-year contracts and 79 percent for 15-year contracts.⁷⁸ The effect of long-term commitments to COMSAT is particularly significant because a few large customers (the large interexchange carriers and the television networks) account for most of the U.S. market for INTELSAT services.

Undoubtedly, a major reason that COMSAT has used the competitive leverage provided by its de facto monopoly on INTELSAT space segment to make long-term contracts more attractive than short-term contracts is that it realized that direct access was inevitable. The

⁷⁷ 800 Number Portability, 6 FCC Rcd. at 5906 (emphasis added). See also Interconnection Order, 11 FCC Rcd. at 16044 (implementation of the reciprocal compensation provision of the Telecommunications Act of 1996 ("fresh look" permits renegotiation of contracts between local exchange carriers ("LECs") and wireless carriers that did not provide for reciprocal compensation)) ("[W]e conclude that CMRS providers that are party to pre-existing agreements with incumbent LECs that provide for non-mutual compensation have the option to renegotiate these agreements with no termination liabilities or other contract penalties."); GTE Airfone, 6 FCC Rcd. at 4583-84 ("fresh look" in connection with the opening of the air-to-ground radio telephone service market to companies other than the single initial licensee).

⁷⁸ See Direct Access NPRM, Appendix B at 1-2.

Commission should not permit the effects of this leverage to continue even after COMSAT's monopoly has been terminated through implementation of direct access. If bound by long-term contracts with COMSAT, customers would not be able to enjoy the benefits of direct access for the duration of their contracts. These customers would be further disadvantaged in competing with new entrants who, without the burden of long-term contracts, would be able to obtain direct access and offer lower prices for INTELSAT services.

In each of the four previous instances in which the Commission has applied "fresh look," it led to increased competition. For example, during the 800 number portability fresh look period, AT&T retained many of its existing customers by improving services, reliability and price commitments. In other instances, customers switched to new providers offering improved service and/or lower prices.

Absent "fresh look" for INTELSAT customers who have long-term contracts with COMSAT, full competition in the market for INTELSAT space segment will be unlikely to develop until expiration of these long-term contracts – which extend for up to 15 years (i.e., until 2013) – and the full public interest benefits of direct access will not be realized. Accordingly, the Commission should require that for a period of six months following the implementation of direct access, users of INTELSAT service with long-term contracts or commitments to COMSAT will have the opportunity to renegotiate these commitments with COMSAT or any other authorized entity, including INTELSAT.

B. Portability of INTELSAT Capacity Will Ensure That Long-Term Capacity Commitments Between COMSAT and INTELSAT Do Not Prevent the Benefits of Direct Access From Being Realized

It is also critical that the Commission require portability of INTELSAT space segment capacity controlled by COMSAT. Although this issue is closely related to “fresh look,” it is significant even where “fresh look” does not apply. “Fresh look” is needed to ensure that long-term commitments between COMSAT and its customers do not impair implementation of direct access, and portability of INTELSAT capacity is needed to ensure that commitments for space segment capacity between COMSAT and INTELSAT do not have a similar effect.

COMSAT has “ownership of the vast majority of [INTELSAT] capacity connecting with the U.S.”⁷⁹ Without a requirement that this capacity be made portable, direct access customers are unlikely to be able to obtain sufficient space segment capacity to provide INTELSAT services. This would permit COMSAT to maintain its *de facto* monopoly on INTELSAT access and to continue to charge high, supracompetitive prices. Continued control by COMSAT of the vast majority of INTELSAT capacity used by U.S. customers would also be inconsistent with the Commission’s obligation under the Satellite Act to “insure that all present and future authorized carriers shall have nondiscriminatory use of, and equitable access to [INTELSAT].”⁸⁰

Portability of INTELSAT capacity is analogous to portability of telephone numbers – in both cases, when a customer switches to a new carrier it has a significant need to take with it a related network resource (*i.e.*, access to a telephone number or to space segment

⁷⁹ Salomon Smith Barney Report, at 16.

⁸⁰ 47 U.S.C. § 721(c)(2).

capacity). In the Telecommunications Act of 1996, Congress mandated that all local exchange carriers have “[t]he duty to provide, to the extent technically feasible, number portability,”⁸¹ because “Congress recognized that the inability of customers to retain their telephone numbers when changing local service providers hampers the development of local competition.”⁸² Earlier, in 800 Number Portability, the Commission mandated 800 number portability after recognizing the “significant costs for some customers [of] forfeiting the value of their old 800 numbers, including any value inherent in the number itself, as well as any other goodwill associated with the number.”⁸³ Portability of INTELSAT capacity is even more essential to implementation of direct access than is number portability to development of local competition, because a direct access customer cannot provide service at all without availability to it of INTELSAT capacity.

In order to allow the competitive benefits of direct access to be realized, the Commission should require COMSAT to relinquish existing INTELSAT capacity when a COMSAT customer for INTELSAT space segment moves to another carrier.

VI. CONCLUSION AND DIRECT ACCESS PROPOSAL

For the reasons set forth above, the Commission should conclude that direct access to the INTELSAT system is consistent with the Satellite Act and required to bring the

⁸¹ 47 U.S.C. § 251(b)(2).

⁸² Telephone Number Portability, ¶ 3, CC Docket No. 95-116 (rel. May 12, 1998).

⁸³ 800 Number Portability, 6 FCC Rcd. at 5904.

public interest benefits of competition for INTELSAT services to U.S. consumers and carriers.

Specifically, the Commission should:

- permit Level 3 direct access as provided by existing INTELSAT procedures (to obtain direct access, an entity must sign an INTELSAT service agreement using the standard INTELSAT form);
- require COMSAT to cooperate with U.S. customers seeking direct access from INTELSAT;
- institute a six month “fresh look” period during which entities with long-term (one year or more) contracts or other commitments with COMSAT for INTELSAT space segment capacity can renegotiate these commitments with COMSAT or any other authorized entity, including INTELSAT; and
- require COMSAT to relinquish existing INTELSAT capacity when a COMSAT customer for INTELSAT space segment moves to another carrier.

Respectfully submitted,

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December 22, 1998

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Comments of MCI WorldCom, Inc. was served this 22nd day of December 1998, by hand delivery on the following:

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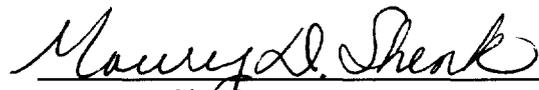
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