

development or otherwise block the equitable provision of satellite services. The best way to do so, lawmakers decided, was to afford carriers an indirect ownership stake in the first global system through an independent corporation that would exclusively control the provision of satellite services to all U.S. users.

1. The Satellite Act grants only COMSAT the power to “furnish, for hire, channels of communication” with INTELSAT

The text of the Satellite Act should be construed in harmony with the legislative background outlined above. Thus, in keeping with lawmakers’ intent to vest the new entity with the sole power to launch and provide services via the satellite system under specific statutory safeguards, the Act states that U.S. participation in the global system “shall be in the form of *a private corporation*, subject to appropriate regulation.”¹¹¹ The Act defines “corporation” as “*the corporation authorized*” by Title III of the Act, which became COMSAT.¹¹² The Act explicitly provides only for 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; and (2) *furnish, for hire, channels of communication to United States communications common carriers* and to other authorized entities, foreign and domestic....”¹¹³ And the Act

¹¹¹ 47 U.S.C. § 701(c); *see also* 47 U.S.C. § 731 (to carry out the purposes of the Act, “[t]here is authorized to be created *a communications satellite corporation for profit*”) (emphasis added).

¹¹² 47 U.S.C. § 702(8).

¹¹³ 47 U.S.C. § 735(a) (emphasis added).

expressly provides only for COMSAT to “contract with authorized users ... for the services of the communications satellite system.”¹¹⁴

These terms, while not couched as explicitly exclusive, are consistent with the lawmakers’ plan to grant COMSAT sole authority to provide INTELSAT services in the United States. The Act continually refers to U.S. participation in the global system in the singular form—*e.g.*, U.S. participation in the global system “shall be in the form of a private corporation.”¹¹⁵ Repeated use of the singular “a” and “the” throughout the Act is significant.¹¹⁶ These references make clear that Congress intended that just one entity exercise particular powers in order “to achieve the objectives and carry out the purposes of this Act.”¹¹⁷

The statute therefore authorizes only “the corporation” to “own” the U.S. portion of the global system and—as its second listed power—to “furnish, for hire, channels of communication” via that system to U.S. customers.¹¹⁸ The terms of the Satellite Act provide only one form of access to INTELSAT capacity for U.S. “communications common carriers” and other “authorized” users: access “furnished” through COMSAT

¹¹⁴ 47 U.S.C. § 735(b)(4).

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

¹¹⁶ Although Congress did recognize that COMSAT might establish the global system “in conjunction with foreign governments or business entities,” 47 U.S.C. § 735(a)(1); *accord id.* at § 701(a) both the context and the legislative history make clear that Congress meant *foreign* business entities.

¹¹⁷ 47 U.S.C. § 735(a).

¹¹⁸ *See* 47 U.S.C. §§ 735(a)(1)-735(a)(2).

to the capacity owned by COMSAT. The Act plainly does not contemplate that the satellite system to be created could bypass the U.S. investor and contract directly with the U.S. carriers and other authorized users. That role was reserved for COMSAT because the “company would have only a single source of revenue ... the rentals from satellite circuits.”¹¹⁹

Equally compelling is the fact that the statutory terms authorize no U.S. entity *other than* COMSAT to either provide space segment services to U.S. customers via INTELSAT or to invest directly in that global system.¹²⁰ This logic apparently moves the Commission at times for the *Notice* concedes that section 735(a)(1) makes COMSAT the “sole U.S. entity in INTELSAT activities that ‘plan, initiate, construct, own, manage, and operate’ the satellite system.”¹²¹ Yet the FCC fails to recognize that when Congress *in like terms in the same subsection* authorized COMSAT to “furnish, for hire, channels of communication,” it would have been superfluous to specify that COMSAT alone was empowered to provide those channels of communication with the new satellite system.

¹¹⁹ 1962 House Commerce Hearings at 569.

¹²⁰ By contrast, where Congress created other private corporations in the 1960s to carry out government purposes, it specified that those corporations were *not* to act as exclusive service providers in their spheres. *See, e.g.* Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 902(c), 82 Stat. 476, 547 (1968); H.R. Rep. No. 1585, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S. Code Cong. & Admin. News 2873, 2949 (National Housing Partnership Corporation “would not enjoy a monopoly or special competitive advantages over existing organizations”).

¹²¹ *See Notice* ¶ 23; *see also* ¶ 15 (“we do not believe that the Commission currently has authority to implement Level 4 ‘investment’ direct access under the [Satellite Act]”).

The entire authorization was granted in the context of a statute constructed around the concept of U.S. participation in the satellite system through a single corporation.¹²²

The Act's simple declarative language is no accident. As noted above, the legislative history is replete with statements recognizing that COMSAT would serve as the exclusive U.S. participant in one global system with respect to both providing service to U.S. users and owning the U.S. portion of the system's capacity.¹²³ Nothing in the statute or its legislative history indicates that lawmakers intended COMSAT to alone invest in the first global

¹²² The Commission argues that the mandate that COMSAT be the sole U.S. participant in INTELSAT applies only to the ownership and operation provisions of the first paragraph of section 735(a), not the access provisions of the second. *Notice ¶¶ 23, 24*. That reading ignores the explicit mandate at the beginning of section 735(a) that all three authorized powers are to be exercised to achieve the objectives and purposes of the Act, which unambiguously include sole U.S. participation in INTELSAT through COMSAT. The Supreme Court recently repeated "the established canon of construction that similar language contained within the same section of a statute must be accorded a consistent meaning." *National Credit Union Administration v. First National Bank & Trust*, 118 S. Ct. 927, 939 (1998).

¹²³ With respect to COMSAT's ownership rights, Senator Morse objected to the Satellite Act because it would "*entrench[] legal vestments*, instead of leasehold interests, to [the] American monopoly under this bill. You are proceeding to give them legal vestment interests. If, as we have proved, the whole communications system in the years immediately ahead and the program set up under this bill become obsolete, *we are going to have to compensate them in order to give up the use of that property for something better.*" *1962 Foreign Relations Hearings* at 230 (emphasis added). *See also* 1962 Senate Foreign Relations, Comm. Report at 11 (Minority Views of the Senate Foreign Relations Comm.) ("The corporation which would be created by this bill, and which would be the recipient of *vested monopoly rights* in the anticipated commercial satellite system, would be organized solely for the profit of its stockholders.") (emphasis added). Congress later explained that "[t]he participants in Intelsat own the "space segment" of the satellite system, which consists of the communications satellites and the tracking, control, command, and related ground facilities required for operation of the satellites. The participants' ownership of the space segment is in the form of undivided shares based on their respective contributions to the costs of the design, development, construction, and establishment of the space segment." Report of the House Comm. on Ways and Means, H.R. Rep. No. 90-1889, 90th Cong., 2d Sess. at 2 (Sept. 10, 1968); *see also* Report of the Senate Comm. on Finance, S. Rep. No. 90-1652, 90th Cong., 2d Sess. at 2 (Oct. 9, 1968).

commercial satellite system, but then compete with the existing U.S. carriers to sell the space segment services provided via that new system. To the contrary, Congress understood that COMSAT was to be the “carriers’ carrier,” not a carrier of last resort. Discussion in Section I.A. reveals that lawmakers anticipated that the new U.S. entity would be required to assume this special role, regardless of its ownership structure, precisely because the entity—by virtue of its exclusive ownership and operation rights—also would have the exclusive right to provide services via the first global system.

This understanding was explicitly stated with respect to the Kennedy Administration’s plan for COMSAT. In first transmitting his proposal to Congress, the President stated that “it must ... be realized that such a system is by nature a Government-created monopoly[.]”¹²⁴ The President then listed what were to be the “purposes and powers of the new corporation”—the first of which was “furnishing for hire channels of communication to authorized users.”¹²⁵ Other parties testifying before Congress—whether supporting or opposing the Administration-backed proposal—consistently recognized that COMSAT would be the exclusive provider of access to the global system.¹²⁶

¹²⁴ 1962 House Interstate and Foreign Commerce Comm. Report at 17 (App. A, Letter from President John F. Kennedy).

¹²⁵ *Id.* at 18.

¹²⁶ *See, e.g., 1962 Senate Commerce Hearings* at 149 (Statement of James Webb, Administrator of NASA) (compares COMSAT to common carriers that are given “monopoly positions” for public reasons); *1961 Senate Small Business Hearings – Part 2 at 440* (Statement of T.A.M. Craven, FCC Commissioner) (stating that foreign governments will want to deal with a U.S. monopoly, not several companies from the same country). Indeed, certain members of Congress who favored direct U.S. government ownership in INTELSAT opposed the Kennedy-backed bill precisely because it would create a “private corporation that would own and operate the U.S. portion of a world-wide satellite communications

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As noted in the introduction to this analysis, the best reflection of this understanding came from the chairman of the Commission itself. Approximately one week before passage of the Satellite Act, Newton Minow testified that

[i]n terms of communication between this country and a foreign point, there are three essential elements: A foreign entity having a ground station; the satellite; and the U.S. carrier with access to a U.S. ground station. It is important to remember that in this respect the satellite corporation is a common carrier's common carrier. It will make available its relay facilities—the satellite and any ground terminals which it operates—to the international carriers, both foreign and United States....

To communicate by satellite, the foreign entity must have a ground station and must obtain capacity in the satellite facilities. The U.S. carrier must also obtain capacity in the satellite system. *Such capacity must be obtained, of course, from the satellite corporation.*¹²⁷

In a letter to the Senate majority leader which was incorporated into the same hearing, the FCC Chairman explained that

the satellite corporation and the carriers do not compete. The market to be served by the corporation consists of the carriers who will use its facilities. The market to be served by the carriers will be the senders and recipients of communications traffic. *The corporation will depend upon the carriers for its revenues; the carriers will depend upon the corporation for facilities.* Thus, this will not be a situation in which one enterprise is motivated to control another enterprise in order to stifle competition, to the public detriment. On the contrary, the interest of the carriers will lie in promoting the success of the corporation, thereby promoting their own success, with resulting benefits to the public.¹²⁸

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system." 1962 Senate Commerce Comm. Report at 51 (minority views of Senators Yarborough and Bartlett) (emphasis added).

¹²⁷ 1962 Senate Foreign Relations Hearings at 20 (emphasis added).

¹²⁸ *Id.* at 27 (quoting Letter of Newton Minow to Sen. Mike Mansfield, Senate Majority Leader).

In earlier testimony, Chairman Minow stated that the Administration's measure "contemplates that existing communication carriers will continue to bear the responsibility for furnishing service to the public *through facilities obtained from the proposed corporation as well as through their present facilities.*"¹²⁹ In other words, carriers had two options for overseas transmissions: satellite service provided by COMSAT or their existing undersea cable service.¹³⁰ There was no option for bypassing the new U.S. satellite corporation.

Similarly, Senator Pastore, the Senate floor manager for the legislation that became the Satellite Act, anticipated that the carriers would "be the principal customers of COMSAT for the space segment services of the global system."¹³¹ He also expected that "the only users of this system will be the carriers themselves.... [who] will have an integral interest in the *rentals* to be charged them."¹³² Even competitor-customers understood that COMSAT's ownership and operational roles carried with them the concomitant right to exclusively provide INTELSAT-based services to U.S. users.¹³³

¹²⁹ 1962 Senate Commerce Hearings at 62 (emphasis added).

¹³⁰ As noted *supra*, HF radio technology did not provide a sufficient substitute.

¹³¹ 108 Cong. Rec. 16,873 (1962).

¹³² 1962 Senate Commerce Hearings at 54 (Statement of Senator John Pastore). See also *Satellite Communications: Hearings Before the Subcomm. on Communications of the House Comm. on Commerce*, 88th Cong., 1st Sess. at 58-59 (1963) (statements of Senators Pastore and Monroney.).

¹³³ See *supra* Sec. I.B. This understanding of congressional intent extended into the late 1960s, when a representative of RCA Global testified before a House Subcomm. on the issue of INTELSAT-based domestic service in the United States. See *Assessment of Space Communications Technology: Hearings Before the Subcomm. on Space Science and Applications of the House Comm. on Science and Astronautics*, 91st Cong., 1st Sess. at 172-73 (1969). Asked whether the law allowed other companies to provide "domestic

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This consistent understanding is irreconcilable with any contention that U.S. customers would be permitted to bypass COMSAT and deal directly with INTELSAT. Administrative agencies, like courts, must look at “clearly expressed intention as expressed without dissent in the legislative history” to be certain that their construction of the statute is consistent with the “manifest purpose as clearly mirrored in the legislative history.”¹³⁴ The manifest purpose of the Satellite Act was to establish COMSAT as the exclusive provider of INTELSAT services to U.S. users—and nothing to the contrary appears in the statute or its legislative history.

2. The Act’s inclusion of pro-competitive safeguards confirms that lawmakers granted COMSAT the exclusive franchise over access to the global system

As the legislative history recounted above reflects, Congress imposed a catalog of restraints in order to ensure that COMSAT’s exclusive franchise over providing satellite services could not be employed—by the corporation or any of its customers—to harm competition in the U.S. marketplace. Congress undertook considerable effort to ensure that

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communications satellite services,” the RCA Global spokesman testified that “[i]f the INTELSAT system is going to be used to provide domestic service, then that is a satellite system that is owned jointly by COMSAT and many countries around the world. And therefore, it would be COMSAT’s role [to provide services] to the extent that that satellite system is used to provide domestic service.” *Id.* at 172. The spokesman went on to say that he understood “Congress intended to permit” other entities to provide domestic satellite services by “other means.” *Id.* at 173. *See also 1964 House Government Operations Hearings* at 281 (AT&T views itself as a “cooperator with COMSAT” in making use of the global system); *see also id.* at 283 (James R. Rae, Assistant Vice President, Engineering Long Line Dept., AT&T testifying that COMSAT is “in the wholesale business of providing broad frequency bands between the various continents, which the carriers, such as AT&T[,] the international carriers[,] and so on[,] could *rent* from Comsat”) (emphasis added).

¹³⁴ *Radowich v. United States Attorney*, 658 F.2d 957, 961 (4th Cir. 1981).

the various provisions of the statute would operate as a package to achieve this goal.¹³⁵

Against this backdrop, there can be no doubt that COMSAT's ownership structure, its exclusive right to invest in the global system, its sole franchise over operational access to the system, and its regulation as a "monopoly" having such sole access, are not separate concepts, as the Commission's *Notice* appears to contend.¹³⁶ Rather, they are mutually reinforcing elements in the overall statutory scheme, which is largely focused on the *operational* objective.¹³⁷ The idea of allowing other carriers to bypass COMSAT is directly contrary to this congressional intention.

¹³⁵ For example, the Senate Judiciary Comm. reported at the end of 1962 that because the Satellite Act "raised many problems of great importance to the U.S. domestic and foreign policy ... relat[ing] to competition and monopoly in the communications and equipment manufacturing business," the Comm. made "a full public study of the antitrust problems related to communications space satellites." See, e.g., Report of the Senate Subcomm. on Antitrust and Monopoly of the Senate Comm. of the Judiciary, S. Rep. No. 88-165, 88th Cong., 1st Sess. at 13 (May 1, 1963) (reporting that member held nine days of hearings to "explore[] all aspects of the impact of satellite communications on the operation of the domestic and international telephone industry, communications in general, and on the equipment manufacturing industry."). Such effort to consider all issues is inconsistent with the contention in the *Notice* that lawmakers simply did not address the exclusivity of COMSAT's service franchise.

¹³⁶ *Notice* at ¶ 23.

¹³⁷ For example, Attorney General Robert Kennedy testified that "the administration has, of course, been mindful of antitrust laws and policy from the beginning of its studies as to the best means of promptly developing an operational system." Report of the Senate Comm. on Small Business, S. Rep. No. 88-104, 88th Cong., 1st Sess., at 44 (Apr. 2, 1963) ("1963 Senate Small Business Comm. Report"). The Attorney General noted the main competitive safeguards that accompanied the proposal included "broad public participation in the ownership of the system," "the requirement that there be equitable access to the system by all its users," and "effective competition in the Satellite Communication Corp.'s procurement of equipment and services." *Id.*; see also *1962 Senate Judiciary Hearings - Part 1* at 29.

a) **The Act's requirement for nondiscriminatory access makes sense only if COMSAT has exclusive access to the system**

As one element in the integrated statutory scheme, Congress required that COMSAT (via FCC common carrier regulation) provide "equitable" and "nondiscriminatory" access to all authorized users, regardless of their stock ownership or board representation. Specifically, the Satellite Act calls for COMSAT to provide "nondiscriminatory access to the system" for all U.S. customers.¹³⁸ The statute then charges the Commission with ensuring that all U.S. users enjoy "equitable access ... under just and reasonable charges."¹³⁹

The latter provisions do not, however, put U.S. carriers or "authorized users" on the same footing *as* COMSAT. They simply ensure that all customers are treated equally *by* COMSAT—as the regulated "carrier's carrier"—in order to ensure that, at the very least, the new transmission technology did not disrupt the competitive balance of the U.S. international service marketplace.¹⁴⁰ As one Administration spokesman testified before the Senate Commerce Committee, the Kennedy-backed proposal "would have *one single*, you might call it, a *wholesaler* of communications services to carriers, but the same competitive relationships

¹³⁸ 47 U.S.C. § 701(c).

¹³⁹ 47 U.S.C. § 721(c)(2).

¹⁴⁰ *See, e.g.*, 1963 Senate Small Business Comm. Report at 44 (industry witness urging that the new U.S. satellite entity "should serve as a common link for communications common carriers which would be its customers" and thus be "analogous to a common terminal facility owned and operated by competing trucking companies or railroads and kept available for use by any future competing communications common carrier.")

1961 House Science and Astronautic Hearings - Part 1 at 75-76.

that now exist would continue; the only difference being that part of the communications would be handled via the satellite.”¹⁴¹

Moreover, the design of the Act demonstrates that COMSAT—not INTELSAT—is to provide satellite service to the carriers. Although Congress was aware that COMSAT might be a participant in a larger, multi-national satellite system,¹⁴² it is COMSAT that is authorized to “furnish, for hire, channels of communication to United States communications common carriers and to other authorized entities[.]”¹⁴³ The statute certainly provides no indication that Congress envisioned INTELSAT furnishing these “channels of communications” directly. To de-couple the provision of service from COMSAT’s other duties under the Satellite Act would, as the legislative scheme inherently recognizes, undermine Congress’ efforts to protect the competitive market for U.S. international services.

Indeed, Level 3 direct access would render irrelevant the requirement in the Act that the Commission “insure that all present and future authorized carriers shall have nondiscriminatory use of, and equitable access to, the communications satellite system.”¹⁴⁴ This provision is directed towards common carriers acting *as customers of a regulated entity*. With carrier direct access to an unregulated intergovernmental entity, the Commission would

¹⁴¹ 1962 *Senate Commerce Hearings* at 106. And, as noted *supra* Section I.A.5 and accompanying text, lawmakers strongly hoped that the new venture would augment the competitiveness of the marketplace by providing an intermodal alternative to AT&T’s undersea cables.

¹⁴² 47 U.S.C. § 735(a)(1).

¹⁴³ 47 USC § 735(a)(z)

¹⁴⁴ 47 U.S.C. § 721(c)(1); *see generally* Sections.

have little power to enforce this statutory mandate, a mandate that was central to Congress's consideration of the Act itself.¹⁴⁵ Read most naturally, the protection of nondiscriminatory access by common carriers to the new satellite system suggests that another entity—COMSAT—would control all U.S. access to that system.¹⁴⁶

b) The Act's restraints on carrier stock ownership and board representation would be meaningless if COMSAT lacks the exclusive franchise to provide services via the first global system

Another set of pro-competitive conditions in the Satellite Act were the restraints set on the retail carriers' stock ownership and board representation. Lawmakers allowed for some carrier investment in the new venture—and to gain benefit of carrier expertise in operating transmission systems—while precluding the opportunity for the then-dominant carrier to improperly influence U.S. usage of the global system.¹⁴⁷

¹⁴⁵ See Section I.A.2.

¹⁴⁶ The Commission turns the guarantee of nondiscriminatory access on its head and finds in the grant of that regulatory authority the power to circumvent the clear dictates of exclusive access in the Act. *Notice* ¶ 26. As discussed *supra* Section I.B, however, the grant of this regulatory authority must be read in the context of the language of the statute and the statutory scheme as a whole. The FCC's grasp at other general empowering provisions and statements of purpose and goals in the Act is equally unavailing in the face of the plain meaning of the Act in granting COMSAT exclusive U.S. access to the INTELSAT system. See *Notice* ¶ 30.

¹⁴⁷ See, e.g., 1962 Senate Commerce Comm. Report at 11. While Congress authorized only COMSAT to "own" the U.S. portion of the global system, 47 U.S.C. § 735(a)(1), lawmakers afforded U.S. carriers and other entities the means to obtain some stake in INTELSAT by specifically providing for *indirect* investment, which is to take the form of shareholdings in COMSAT itself. 47 U.S.C. § 734; see also 47 C.F.R. §§ 25.501-25.531. See also 1962 Senate Foreign Relations Hearings at 32 (quoting Letter of Deputy Attorney General Katzenbach to Senate Majority Leader Mansfield) ("the system will not be controlled by a favored few but rather will reflect broadly the interests of all those who are concerned with the system, whether as communications carriers, manufacturers and suppliers, investors, (Continued...)

As ultimately enacted, the Satellite Act authorized a single class of stock, with ownership by the carriers jointly limited to 50% of the total.¹⁴⁸ Numerical restraints were placed on carriers' ability to elect board representatives.¹⁴⁹ Officers of the corporation also were barred from having outside employment, thus ensuring that no employee of a retail carrier served as a COMSAT officer.¹⁵⁰ The Senate Commerce Committee report on the legislation explained that

[the statute] contains safeguards and limitations with respect to voting stock ownership of the corporation and the composition of its board of directors. The specific measures in this respect are designed to blend ownership by the public with ownership by *communications common carriers, who will be the principal users of the corporation's facilities* and so have a vital stake in the success and efficiency of the corporation.¹⁵¹

In the debates, Senator Pastore, floor manager for the bill, stated that “[t]he ownership structure of the corporation was designed to reflect a dichotomy between the carriers, on the one hand, who have extensive experience in communication operations to contribute to the corporation and *will be the principal customers of the corporation*; and, on the other hand, the

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or citizens and taxpayers”).

¹⁴⁸ 47 U.S.C. § 734(b)(2); *see* H.R. Res. 11040, at § 304.

¹⁴⁹ 47 U.S.C. § 733(a).

¹⁵⁰ 47 U.S.C. § 733(b). *See also 1961 Senate Business Hearing – Part 2 at 550* (statement of Lee Loevinger, Assistant Attorney General in charge of the Antitrust Division, U.S. Dep’t of Justice) (explaining that such restraints historically had been imposed “to separat[e] the ownership interests of the several modes of transportation”).

¹⁵¹ 1962 Senate Commerce Comm. Report at 11 (June 11, 1962) (emphasis added); *see also 1962 House Commerce Hearings at 564* (statement of Attorney General Robert F. Kennedy) (“It is the administration’s considered conclusion that a corporation with wide public participation, which recognizes the special role of existing carriers, and which is subject to appropriate governmental controls, best meets our policy objectives.”).

general public whose interests will be principally investment for profit.”¹⁵² Administration witnesses in hearings testified that the proposal’s “widespread ownership” was designed both to “mitigate the effects of monopoly” and, in particular, to “help us to avoid domination by a single carrier,” *i.e.*, AT&T.¹⁵³ Congress capped the price of COMSAT’s stock in the initial public offering “to insure the widest distribution to the American public” and thereby contribute to the corporation’s operational independence.¹⁵⁴

¹⁵² The drafters did not envision that U.S. customers might be the “principal customers” of INTELSAT itself—or even absolutely expect than the IGO would be formed. *See also Nomination of Incorporators: Hearings Before the Senate Comm. on Aeronautical and Space Sciences*, 88th Cong., 1st Sess., at 86 (1963) (statement of Sen. Stuart Symington) (“I think the purpose in trying to get as wide a stock ownership as possible in this corporation” was because “taxpayers have a stake in it in that their money has gone into it to a degree.”).

¹⁵³ *1962 House Commerce Hearings* at 383 (statement of Dr. E.C. Welsh, Executive Secretary of the National Aeronautics and Space Council); *id.* at 566 (statement of Attorney General Robert F. Kennedy).

¹⁵⁴ *See, e.g.*, Report of the Senate Comm. on Aeronautical and Space Sciences, S. Rep. No. 1319, 87th Cong., 2d Sess. 7 (Apr. 2, 1962). While seeking to allow interested citizens to become investors, lawmakers also “recognize[d] that purchase of such stock would be speculative and purchasers should understand that the corporation is entirely a private corporation for profit and that such purchases must assume the same risk as would be taken by a person purchasing stock in any other private corporation.” Report of the Senate Comm. on Aeronautical and Space Sciences, S. Rep. No. 1319, 87th Cong., 2d Sess. 7 (Apr. 2, 1962). FCC Chairman Minow also noted that the Commission’s initial support for the carrier consortium proposal was rooted in the agency’s concern about the financial riskiness of the global satellite venture—and the pressures that such risk could put on satellite rates:

One of the basic things in our view on the restricted ownership, this, in our opinion would enable you to have cheaper rates. You then permit an averaging of the investment with the existing equipment and existing plant, whereas now, if people who are not in existing communications business have an investment, they are entitled to a return on their investment. And this business is not going to be profitable for a while. As a matter of fact, it may not be profitable, perhaps. There are estimates all the way to 10 years.

1962 Senate Judiciary Hearings - Part 2 at 294.

These detailed statutory requirements, directed solely at the ownership and management of one corporation, plainly suggest that Congress did not intend that COMSAT simply be one of a number of independently operating U.S. providers of INTELSAT-based services. Rather, these provisions comport with the legislative history: Congress felt it necessary to lay out detailed directives to govern COMSAT's ownership structure because lawmakers intended that COMSAT alone would provide services via the global system to all U.S. users. Only if COMSAT had exclusive U.S. access to the system would it or anyone who controlled it have any potential to adversely affect—or positively enhance—competition in the U.S. market. It is a fundamental principal of statutory construction that no provision should be read in such a way as to render another without function or effect.¹⁵⁵

c) The Act's explicit requirements for competition in other facets of the global system demonstrates that lawmakers did not permit competition in the provision of satellite services

The Satellite Act's consistent emphasis on COMSAT as the designated U.S. participant in INTELSAT—both as to ownership and provision of satellite-based services—stands in marked contrast to those statutory sections providing for competition in other aspects of the global system. This disparity is significant: “[W]here Congress includes particular language in one section of a statute but omits it in another section of the *same [a]ct*, it is generally

¹⁵⁵ See *Astoria Federal Savings & Loan Association v. Solimino*, 501 U.S. 104, 112 (1991) (“of course we construe statutes, where possible, so as to avoid rendering superfluous any parts thereof”).

presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”¹⁵⁶ The relevant statutory provisions are noted below.

Earth station ownership and operation—The statute specifically allows the FCC to authorize competition in the provision of the earth station links to INTELSAT, and the agency has done so.¹⁵⁷ This provision was, in fact, at the center of one of the key legislative debates in 1962. Having agreed to grant COMSAT the exclusive rights to provide the satellite-based portion of the new communications service, lawmakers struggled over whether COMSAT also should be allowed to compete against other U.S. carriers in offering ground links to the global system.

The Kennedy proposal originally gave only the carriers explicit rights to obtain earth station licenses, but certain lawmakers and potential customers protested that the corporation also should be authorized to provide ground segment services.¹⁵⁸ The Senate Committee on Aeronautical and Space Sciences explained:

¹⁵⁶ *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) (internal citation omitted) (emphasis added); *accord Field v. Mans*, 516 U.S. 59, 75 (1995) (subsequent history omitted) (“The more apparently deliberate the contrast [between statutory sections], the stronger the inference [that Congress acted intentionally], as applied, for example, to *contrasting statutory sections originally enacted simultaneously* in relevant aspects.”) (emphasis added). However, as discussed *infra* Section III.B, this logic cannot be applied when comparing provisions of the 1962 Satellite Act with the [1978] Inmarsat Act—for the simple reason that Congress in 1962 did not know how the as-yet-unbuilt global system itself would be organized. By the time that Inmarsat arose, lawmakers had the model of the functioning INTELSAT system to draw upon and therefore could be more explicit in defining the relationship between COMSAT and the new system.

¹⁵⁷ *See* 47 U.S.C. § 721(c)(7).

¹⁵⁸ *Compare* 1962 House Interstate and Foreign Commerce Comm. Report at 4, 12 *with id.* at 26-27 (“Additional Views” of Rep. John E. Moss and Rep. John D. Dingell).

While as a practical matter there probably can be only one system of commercial satellites, there can be a number of ground stations all served by the same satellite system. Thus, competition might well be fostered if the carriers establish and operate their own ground stations. The committee believes that the carriers should be encouraged to establish ground stations, but that the corporation should not be excluded from providing such stations if circumstances should so require.... The committee also required the Commission to insure that each authorized carrier shall have equitable access to, and nondiscriminatory use of, such stations on just and reasonable terms.¹⁵⁹

The matter was settled by explicitly ordering the FCC to “authorize the construction and operation of such [earth] stations by communications common carriers or the corporation, without preference to either.”¹⁶⁰ The legislative history is quite pointed, in fact, about the need for clarity when this contentious debate over competition arose.¹⁶¹ That history reveals no

¹⁵⁹ 1962 Senate Aeronautical and Space Comm. Report at 5 (Apr. 2, 1962).

¹⁶⁰ 47 U.S.C. § 721(c)(7). Moreover, the text of the Act with respect to earth stations also undercuts the contention that the Commission has broad discretion to divest COMSAT of its exclusive service franchise under the agency’s authority to “insure ‘equitable’ and ‘nondiscriminatory’ access to the system.” *Notice* at ¶ 25 (internal citations omitted). The same provision cited by the FCC also gives the agency power to insure precisely the same kind of “nondiscriminatory use of, and equitable access to, ... *satellite terminal stations*.” 47 U.S.C. § 721(c)(2) (emphasis added). COMSAT agrees that this language imposes common carriage obligations on providers of earth station services—but notes that the Commission has not claimed that the provision also gives the agency authority to strip AT&T, MCI, Sprint, or others of the exclusive right to offer services via the earth stations that they own and operate.

¹⁶¹ The Senate Commerce Comm. noted that earth station competition was the subject of considerable discussion by your Comm.... In view of the various statements made throughout the numerous hearings on this proposal, *your committee’s intention must be made quite clear*. It is for this reason that the second sentence ... has been changed to provide that there shall be no preference shown either to the corporation or the carriers. *The intention of this change in language is to make clear that there is no legislative prejudgment as to who shall establish a ground terminal station.*”

1962 Senate Commerce Comm. Report at 18 (emphasis added).

similar debate, however, with respect to Congress' understanding of COMSAT's role as the exclusive provider of the INTELSAT space segment to U.S. users. Indeed, the explicit provision for competition in earth station services would be pointless if Congress had not intended that COMSAT alone would provide what has come to be called "space segment" services between the ground link and satellites. Secretary of State Dean Rusk explained that while the amended bill allowed for multiple owners of earth stations, "this particular corporation would own and operate the satellites in between the ground stations. That is a limited position of monopoly in the total operation of this system."¹⁶²

Procurement of equipment—With little apparent discussion, lawmakers agreed that there should be "effective competition" in the procurement of equipment used in operation with INTELSAT.¹⁶³ The Senate Select Committee on Small Business noted that the explicit mandate requiring competition in securing hardware and services "was not happenstance. It reflected recognition of the words of the President that the communications satellite system is by nature a Government-created monopoly, and that procurement activities incident to the system cannot in good conscience be limited to a few companies."¹⁶⁴ This provision thus

¹⁶² *Communications Satellite Act of 1962: Hearings on H.R. 11040 Before the Senate Comm. on Foreign Relations*, 87th Cong., 2d Sess. 185 (1962).

¹⁶³ 47 U.S.C. § 721(c)(1).

¹⁶⁴ Thirteenth Annual Report of the Senate Select Comm. on Small Business, S. Rep. No. 104, 89th Cong., 1st Sess. 43 (Apr. 2, 1963). *See also*, *1962 Judiciary Hearings - Part 2* at 452 (statement of Newton N. Minow, FCC Chairman) ("Well, in the space communications field, there can only be one system, there can only be one entity. And, for that reason, we recognize that we are going to have unprecedented problems of control, and we want to be sure that every company has a fair shake and a fair chance to sell its equipment to this one entity.").

reflects lawmakers' ability to explicitly provide for competition within the overall statutory scheme when they intended to allow for it.

Provision for future competing satellite systems—Perhaps most tellingly, the Satellite Act allows for the creation of competing satellite systems: “[i]t is not the intent of Congress ... to preclude the creation of additional communications satellite systems, if ... required in the national interest.”¹⁶⁵ Lawmakers' decision to permit this *facilities-based* competition is the inverse of the Act's reservation of the exclusive INTELSAT service franchise to COMSAT alone.

This provision indicates that the type of satellite competition Congress envisioned in 1962 was the type which ultimately developed: alternative transmission *systems*, not a balkanization of U.S. use of INTELSAT capacity.¹⁶⁶ Although the Satellite Act explicitly envisions future facilities-based competition, neither the statute nor its legislative history even hint that competition might be created by Level 3-type direct access to the INTELSAT system itself.¹⁶⁷

¹⁶⁵ 47 U.S.C. § 701(d). *See also supra* note 121 (discussing the Act's explicit grant of the exclusive INTELSAT service franchise to COMSAT).

¹⁶⁶ 47 U.S.C. § 701(c). In 1984, the President determined that such systems were in the national interest. Presidential Determination No. 85-2 of Nov. 28, 1984, 49 Fed. Reg. 46,987 (Nov. 30, 1984). The FCC approved the concept of separate systems for communications among private line systems the next year—shortly after determining that the then-pending direct access proposals provided no appreciable public interest benefits. *Establishment of Satellite Systems Providing International Communications*, 101 F.C.C.2d 1046 (1985) (Report and Order); *Regulatory Policies Concerning Direct Access to INTELSAT Space Segment for the U.S. International Service Carriers*, 97 F.C.C.2d 296 (1984) (Report and Order).

¹⁶⁷ Direct access would create competition in the provision of INTELSAT-based satellite services, but not the facilities-based competition in the form of separate satellite systems contemplated by Congress. Such competition has developed precisely because other carriers
(Continued...)

To the contrary, the legislative history indicates that any competition in the provision of satellite services for U.S. users would come from other telecommunication systems, rather than from multiple access to INTELSAT. For example, the potential for rival "separate" systems was noted as early as 1961, when the Rand Corp. testified before a Senate committee shortly after the Kennedy proposal was made public.¹⁶⁸

Moreover, in the floor debate on the legislation, Senator Church sought and obtained an amendment to Section 201(a)(6) of the Act to ensure that the government had authority to assure the availability of satellite services and to develop a separate system "if otherwise required in the national interest."¹⁶⁹ Noting that another provision already spoke about the potential establishment of alternative satellite systems, the senator stated that "certainly this enabling legislation should not preclude the establishment of alternative systems, whether

(...Continued)

have incentives to invest in the infrastructure necessary to present end users with real choices among competing communications systems.

¹⁶⁸ *Space Satellite Communications: Hearings Before the Subcomm. on Monopoly of the Senate Comm. on Interstate and Foreign Commerce, 87th Cong., 1st Sess. 92 (1962)* (statement of Leland L. Johnson, Economist, The Rand Corp., Santa Monica, Calif.) ("[W]hile in the early years only one satellite system will likely be commercially feasible, a continuing increase in demand for communications over the years may eventually support several systems operating side by side. Therefore, it may be possible to achieve in this later period competition in sales of satellite voice channels as a substitute for the earlier monopolistic market structure. In view of this possibility, it appears desirable that the first satellite firm should be given its franchise with the understanding that monopoly rights are not conferred in perpetuity, but rather that at some future date additional franchises may be given to competing firms.").

¹⁶⁹ 108 Cong. Rec. 15,407 (1962). The amendment was adopted without opposition. 108 Cong. Rec. 15,344 (1962); see 47 U.S.C. § 721(a)(6).

under private or public management.¹⁷⁰ The Senate Commerce Committee report accompanying the legislation stated plainly that

The corporation is authorized to 'plan, initiate, construct, own, manage, and operate * * * a commercial communications satellite system.' By definition, however, this 'system' is exceedingly restricted in what it covers, and, indeed, *the bill specifically reserves the right to create additional satellite systems in the future which may not be within this corporation's jurisdiction....*¹⁷¹

Furthermore, Congress was aware that intermodal competition to the as-yet-unbuilt satellite system already existed—as reflected in the following colloquy between the Chairman of the Senate Space Committee and the Vice President of Hughes Aircraft in 196[2]:

The Chairman: So that any reference to competition would be between customers of the Corporation and not between this Corporation and any other competitor, because there would not be any other competitor.

Dr. Puckett: There wouldn't be any other competitor in the communications satellite business, that is correct.

The Chairman: So there would be no competition insofar as this Corporation is concerned except between those who wanted to do business with it.

Dr. Puckett: I think there is an element of competition which should not be overlooked. There would be an element of competition between the service provided by communications satellites and the service provided by other types of long lines. For example, the submarine cables.¹⁷²

¹⁷⁰ 108 Cong. Rec. 15,207, 15,334 (1962); see 47 U.S.C. § 701(d).

¹⁷¹ 1962 House Interstate and Foreign Commerce Comm. Report at 26 (Additional Views of Rep. John E. Moss and Rep. John D. Dingell) (going on to note "that even in the narrow field where the corporation is authorized to operate, it may, in actuality, be further confined, for the legislation contemplates that other nations will participate and have interests in the satellites themselves. In effect, therefore, the corporation merely will be the repository of whatever may be the U.S. interest arising from international agreements covering the system.").

¹⁷² *Communications Satellite Legislation: Hearings Before the Senate Comm. on Aeronautical and Space Sciences*, 87th Cong., 2d Sess. at 230 (1962).

All of this legislative history implicitly recognizes what Dr. Puckett had made explicit—that COMSAT's franchise over service provided to U.S. users via the first global system is an exclusive one

d) Congress's rejection of the carrier consortium alternative demonstrates that congress intended to grant COMSAT an exclusive franchise over access to the new satellite system

As noted above, lawmakers considered, and specifically rejected, proposals to create a carrier consortium to be the sole U.S. participant in the new global satellite communications system. The paramount concern was that the then-dominant carrier, AT&T, would control the consortium and thereby exploit its direct access to the new satellite system—to the detriment of non-participating carriers, the competitive development of satellite technology, and consumers. The Commission's Level 3 direct access proposal would bring about essentially the same outcome that Congress rejected in the carrier consortium alternative.¹⁷³

e) Permitting direct access to the INTELSAT system would have undermined the central purpose of the Satellite Act

Another reason why Congress could not have intended to permit the Commission to order direct access by carriers is that to have done so would fundamentally undercut the most central element of the Act—the rapid construction of a global communications satellite system through private financing.¹⁷⁴ The possibility that direct access might be mandated would

¹⁷³ See Brattle Group Analysis at I.

¹⁷⁴ See *Rowland v. California Men's Colony*, 506 U.S. 194, 210 (1993) (“the statutes in question manifested a purpose that would be substantially frustrated if we did not construe the

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plainly have hindered COMSAT's ability to raise capital for itself and for the construction of the new satellite system. As noted above, AT&T at the time controlled almost all of the U.S. market for international communications. If direct access had been permitted, AT&T would hardly have been willing to route its traffic through COMSAT and thus incur the obligation to pay fair rent. Rather, AT&T would have had every incentive to channel its traffic to INTELSAT directly, leaving COMSAT with little if any traffic to carry, and hence without a viable business, and unable to carry out its statutory mission. In short, if direct access had been a possibility, the INTELSAT system might never have been created.¹⁷⁵

3. Direct Access Makes No Sense in the Context of a Satellite System Entirely Owned by COMSAT

The proposal for Level 3 direct access sits quite oddly against the Act's deliberate flexibility allowing COMSAT itself to construct and own the new global satellite system by itself, without any foreign cooperation. If that route had been taken, access to the system would by definition have been through COMSAT as the sole owner and operator of the

(...Continued)

statute to reach artificial entities"); *id.* at 211 n.12 ("A focus on statutory text, however, does not preclude reasoning from statutory purpose. To the contrary, since '[s]tatutes . . . are not inert exercises in literary composition[, but] instruments of government, a statute's meaning is inextricably intertwined with its purpose, and we will look to statutory text to determine purpose because 'the purpose of an enactment is embedded in its words even though it is not always pedantically expressed in words.'" (alterations in original) (citations omitted)).

¹⁷⁵ Furthermore, the Satellite Act establishes COMSAT as a "for profit" corporation with its only enumerated profit-making activity being the lease of capacity available on the new system. Lawmakers would not have established such a for-profit entity and taken pains to ensure broad ownership among the citizenry if they also intended to hobble the new entity's ability to give the non-carrier shareholders a return on their investment.

system. Congress clearly contemplated either possible ownership outcome. It would be odd for lawmakers to grant an exclusive franchise under one ownership scenario but another under a cooperative ownership structure—and all the while make no mention of the possibility.

* * *

In sum, the Satellite Act's detailed mandates are directed solely at one corporation: COMSAT. Congress established an elaborate statutory scheme to maintain the independent operation of the global system, with mutually reinforcing provisions to prevent the existing carriers from using their ownership interests or marketplace influence to deprive rival users of equitable access to the system's capacity. These restrictions and obligations would have been pointless—and in some instances absurd—if Congress had meant COMSAT to be just one of many independently operating U.S. entities with a franchise to offer INTELSAT services.

II. Direct Access Runs Counter to the Statutory Understanding Underlying Agency and Court Decisions Over the Decades

Although the language, structure, and legislative history of the Satellite Act are dispositive, Commission interpretations of the Act further bolster the conclusion that it prohibits Level 3 direct access. It is well-established that contemporaneous construction can aid in the interpretation of legislation, and courts will carefully scrutinize a significant modification of long-standing agency construction of a statute.¹⁷⁶ As discussed below, a number of early post-Satellite Act decisions by the agency reflected the universal

¹⁷⁶ *Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 414 (1993); *Cf. Peters v. United States*, 853 F.2d 692, 700 (9th Cir. 1988) (citing *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551 (1979)).

understanding that COMSAT had exclusive access to the INTELSAT system. Judicial interpretations of the Act have supported the same determination.

The *Notice* attempts to dismiss the FCC's own prior holdings by claiming that these determinations are simply dicta.¹⁷⁷ However, as demonstrated below, the FCC's recognition that direct access was impermissible was a key basis of its 1966 decision to prohibit, on policy grounds, COMSAT from providing service directly to end users.¹⁷⁸ Similarly, its confirmation of COMSAT's statutorily conferred exclusive franchise over INTELSAT services within U.S. borders was fundamental to the FCC's 1970 decision on transiting traffic. These determinations were significant underpinnings of the Commission's orders and therefore cannot be depicted as unnecessary to the agency's decision.¹⁷⁹ It is well-established that considerations necessary to an ultimate holding are not dicta: "When an opinion issues . . . it is not only the result but also those portions of the opinion necessary to that result by which [courts] are bound."

The 1966 decision in *Authorized User I* required the Commission to interpret the Satellite Act in order to determine which entities were "authorized users," and thus eligible to be COMSAT customers under the statute. The FCC's order followed Congress' predominant conception of COMSAT by generally restricting the corporation to its role as a "carrier's

¹⁷⁷ *Notice* at ¶ 27.

¹⁷⁸ *Authorized Users I*, 4 F.C.C.2d at 421.

¹⁷⁹ See *Seminole Tribe of Fl.*, 517 U.S. at 67 (1996); *S.B.L. v. Evans*, 80 F.3d 307, 310 (8th Cir., 1996) (citing *Robinson v. Norris*, 60 F.3d 457, 460 (8th Cir., 1995), *cert. denied*, 517 U.S. 1115 (1996)) ("statements necessary to court's decision are not dicta"); *Tank Insulation Int'l, Inc. v. Insultherm, Inc.*, 104 F.3d 83, 88 n.2 (5th Cir., 1997), *cert. denied*, 118 S. Ct. 265 (1997).

carrier.”¹⁸⁰ In reaching this result, the Commission largely relied on its underlying determination that the Satellite Act barred carriers from direct access to the global system—which then prompted the agency, as a matter of policy, to prohibit COMSAT from competing with the carriers in providing service to end users.¹⁸¹ The FCC stated that

[a]t least insofar as international common carriers communications services are concerned, [COMSAT] is given a virtual statutory monopoly position with respect to the operation of the space segment of the commercial communications satellite system. *See* Sections 102(d) and 305(a)(1) of the [Act]. *The Commission is not given authority to license any other U.S. carrier to operate the space segment of a satellite system to provide international communications satellite service. Instead, such carriers must procure the space segment facilities from COMSAT.*¹⁸²

The Commission likewise concluded that “the terrestrial carriers cannot under existing law themselves be licensed to operate the space segment of the international system” and, therefore, could not to compete directly with COMSAT in providing satellite service to the

¹⁸⁰ Authorized User I, 4 F.C.C.2d. at 425. As noted *supra* Section I.A.4 and accompanying text, the FCC later determined that the statute allowed COMSAT to serve end users—albeit under significant practical constraints that the agency felt were necessary to address the power COMSAT enjoyed by virtue of its exclusive franchise over INTELSAT services.

¹⁸¹ *Authorized Users I*, 4 F.C.C.2d at 431.

¹⁸² *Id.* at 428 (emphasis added). The FCC added: “[W]e have a situation where there is an artificial restraint upon the terrestrial carriers. They cannot ordinarily be licensed to provide the essential space segment of the international satellite circuits and thus compete with COMSAT on equal terms, *but must rely on COMSAT which was created to provide these facilities to them.*” *Id.* at 431. (emphasis added). The FCC’s use of the term “ordinarily” here recognizes that the carriers may in some instances seek access to INTELSAT from foreign points of origin, which are outside the scope of COMSAT’s monopoly. *See, e.g., Teleglobe USA Inc.*, 12 F.C.C. Rcd 6592 (1997). *Authorized Users I*, 4 F.C.C.2d at 428. In addition, it is interesting to note that the FCC used the term “direct access” to refer to access by users to COMSAT, not to access by carriers to INTELSAT. (Memorandum and Statement of Policy).

public.¹⁸³ The agency further manifested the importance of this issue in its decision by noting that prohibiting COMSAT from serving end users would not have an unduly harsh impact on the corporation because “the carriers must come to Comsat for at least the space segment of the facilities” due to the corporation’s “virtual monopoly” over this aspect of international service.¹⁸⁴ Thus, the Commission’s recognition of, and indeed its focus on, COMSAT’s exclusive access to the INTELSAT system played a central role in its decision; it was not merely dicta.

The agency affirmed this early recognition of COMSAT’s statutorily conferred exclusive service franchise in its 1970 decision regarding “transiting traffic.”¹⁸⁵ At issue in the case was U.S. carriers’ practice of moving their traffic via cable across the U.S. border and then securing access to INTELSAT from those foreign points in order to avoid using the INTELSAT space segment controlled by COMSAT. The Commission was asked to pass upon the legality of “transiting” international traffic from a point of origin in the United States via wire to a foreign country, where the traffic would be uplinked to the INTELSAT system or, conversely, receiving INTELSAT traffic abroad and carrying it via wire to the United States for termination.

The FCC held that U.S. carriers could access INTELSAT from foreign points, but explicitly confirmed its conclusion in *Authorized User I* that COMSAT held a statutorily

¹⁸³ *Authorized Users I*, 4 F.C.C.2d at 435.

¹⁸⁴ *Id.* at 434.

¹⁸⁵ *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).

conferred exclusive franchise over international traffic to and from earth stations within the United States.¹⁸⁶ While noting that Section 305 of the Satellite Act did not include any “specific words” indicating that COMSAT’s franchise was exclusive outside of the United States, the FCC stated that a reading of the statute as a whole left “no doubt that the [A]ct provides that [COMSAT] is the chosen instrument to provide space segment facilities to licensees of earth stations in the United States.”¹⁸⁷ This underlying determination that the statute granted COMSAT an exclusive service franchise was key to the agency’s ultimate conclusion about the geographic scope of that exclusive franchise—and therefore cannot be dismissed as only dicta. Also in 1970, the agency construed the Satellite Act in the course of its proceeding to establish U.S. domestic satellite facilities.¹⁸⁸ In the *Domsat* decision, COMSAT contended that its status as the sole U.S. provider of satellite services under the statute extended to domestic satellite telecommunications. The Commission acknowledged this argument and did not challenge COMSAT’s status with respect to INTELSAT. The agency

¹⁸⁶ *Id.* at 12.

¹⁸⁷ *Id.*; see 47 U.S.C. § 715. Although the FCC states in its *Notice* that it did not resolve issues involving direct access to INTELSAT in the “transiting traffic” decision, *Notice* at n.83, the Commission, as explained above, squarely addressed COMSAT’s exclusive access to the INTELSAT space segment in this decision and specifically upheld its *Authorized User I* holding in this respect. In addition, more recent Commission action on “transiting” is consistent with this holding. In May 1997, the agency granted a Section 214 application from Teleglobe, which proposed routing international traffic originating and terminating in the United States through Teleglobe’s facilities in Canada. *Teleglobe USA Inc.*, 12 F.C.C. Rcd. 6592 (1997). The proposal called for Teleglobe to connect with INTELSAT facilities via the Canadian Signatory in order to complete international calls originating in this country. While the Commission granted the application, nothing in the decision challenged COMSAT’s exclusive franchise on providing access to INTELSAT via U.S.-based earth stations.

¹⁸⁸ *Establishment of Domestic Communications-Satellite Facilities by Nongovernmental Entities*, 22 F.C.C.2d 86 (1970).

simply distinguished domestic satellite communications from international satellite communications, finding that only the latter fell within the scope of the Satellite Act.¹⁸⁹ By implication, this distinction provides further confirmation of the FCC's recognition of COMSAT's exclusive access to the INTELSAT facilities.¹⁹⁰

In its 1980 study of COMSAT's corporate structure and operating activities, the Commission once again recognized that the Satellite Act accorded the corporation exclusive access to INTELSAT.¹⁹¹ Pursuant to the International Maritime Satellite Telecommunications Act, the Commission was required to conduct and submit a study to Congress with, among other findings, its recommendations for necessary or appropriate legislative changes to COMSAT's corporate structure. Among the many legislative options the FCC explored was a concept it labeled as "disenfranchisement."¹⁹² While the agency did not ultimately recommend the proposal, it described the idea as:

relieving COMSAT of its special role as the sole U.S. representative in INTELSAT and provider of INTELSAT space segment capacity to U.S.

¹⁸⁹ *Id.* at 130.

¹⁹⁰ In addition, in a decision issued during the course of the lengthy 1970s rate-making proceeding, the Commission evaluated COMSAT's business risk in formulating the corporation's permissible rate of return as part of the ratemaking process—an analysis based directly upon COMSAT's statutory rights as the sole provider of satellite services via the only international system then serving the United States. *Communications Satellite Corp., Investigation into Charges, Practices, Classifications, Rates, and Regulations*, 56 F.C.C.2d 1101, 1153-54 (1975) (decision) (subsequent history omitted); *see also id.* at 1178 (referring to COMSAT's bringing live television broadcasts by satellite pursuant to its "statutory monopoly").

¹⁹¹ *Comsat Study—Implementation of Section 505 of the International Maritime Satellite Telecommunications Act*, 77 F.C.C.2d 564 (1980) (Final Report and Order).

¹⁹² *Id.* at 693-95.

international communications common carriers and other authorized users. *The goal would be to eliminate Comsat's current monopoly at the wholesale level in the provision of INTELSAT services and require it to compete at the retail level with other U.S. international service carriers.*¹⁹³

This proposal not only acknowledged COMSAT's status as the only U.S. entity authorized to provide INTELSAT services, *it also recognized that congressional action would be required in order to change the corporation's exclusive position.* Thus, the agency obviously recognized that in order to achieve the goal of eliminating COMSAT's exclusive franchise over the wholesale provision of INTELSAT services, the entire scheme of the Satellite Act would have to be altered, requiring congressional—rather than Commission—action.¹⁹⁴

In addition, though the judicial opinions directly addressing COMSAT's rights in the INTELSAT system are not numerous, the existing court authority reinforces the conclusion that direct access would be unlawful. In a 1984 decision addressing the eligibility of a COMSAT subsidiary to be licensed as a U.S. domestic DBS provider, the U.S. Court of Appeals for the District of Columbia Circuit described COMSAT as “the U.S. representative

¹⁹³ *Id.* at 693 (emphasis added).

¹⁹⁴ A similar analysis applies to a 1995 report to the Commission addressing ways in which the agency should be “reinvented.” One section of the report summarized a number of legislative changes recommended by FCC bureaus, including a proposal to rewrite the Satellite Act and specifically to “eliminat[e] Comsat's current exclusive status as the sole U.S. investor in, and provider of, INTELSAT and Inmarsat services.” Mary Beth Richards, Special Counsel to the Commission, *Creating a Federal Communication Commission for the Information Age*, Appendix A (1995). Thus, once again, the agency implicitly acknowledged that congressional action would be required to divest COMSAT of its exclusive access rights to the INTELSAT system.

to INTELSAT and the sole U.S. entity permitted access to the system.”¹⁹⁵ Similarly, in a 1988 decision remanding an agency order under the “transborder” policy, the D.C. Circuit noted that Congress established COMSAT as “*the* vehicle for United States participation in the envisioned global system.”¹⁹⁶

Decisions in a federal antitrust suit involving COMSAT addressed the relation of the corporation and INTELSAT in more depth, and also recognized that the Satellite Act accords COMSAT an exclusive role as service provider. Pan American Satellite (“PanAmSat”) filed the suit in the Southern District of New York in 1989, alleging anticompetitive activities by COMSAT in its provision of INTELSAT services. COMSAT filed a motion to dismiss, arguing *inter alia* that it was immune from the antitrust laws with respect to its activities as the United States representative to INTELSAT. The district court granted COMSAT’s motion on that basis.¹⁹⁷

¹⁹⁵ *National Association of Broadcasters v. FCC*, 740 F.2d 1190, 1214 (D.C. Cir. 1984).

¹⁹⁶ *Communications Satellite Corp. v. FCC*, 836 F.2d 623, 625 (D.C. Cir. 1988) (emphasis added).

¹⁹⁷ *Alpha Lyracom Space Communications, Inc. v. Communications Satellite Corporation*, 1990-2 Trade Cas. (CCH) ¶ 69188 (S.D.N.Y. Sept. 13, 1990), *aff’d in part, rev’d in part*, 946 F.2d 168 (2d Cir. 1991), *cert. denied*, 502 U.S. 1096 (1992) (affirming the district court’s decision that COMSAT enjoys antitrust immunity in regard to its activities as U.S. representative to INTELSAT, but reversing the district court’s refusal to allow plaintiffs to amend the complaint against COMSAT in its capacity as a common carrier); *Alpha Lyracom Space Communications, Inc. v. Communications satellite Corp.*, 1993-1 Trade Cas. (CCH) ¶ 70184 (S.D.N.Y. Mar. 30, 1993) (denying motion to dismiss Second Amended Complaint); 1994-2 Trade Cas. (CCH) ¶ 70689 (S.D.N.Y. June 7, 1994) (granting leave to file Third Amended Complaint); *Alpha Lyracom Space Communications v. COMSAT Corp.*, 968 F.Supp. 876 (S.D.N.Y. 1996) (denying plaintiffs’ discovery motions and granting COMSAT’s summary judgment motion as to all claims, including antitrust allegations); 113 F.3d 372 (2d Cir. 1997) (affirming district court’s decision).

The Court's opinion acknowledges that the Satellite Act makes COMSAT the sole provider of access to INTELSAT. In determining that COMSAT should be immune from the antitrust laws with respect to its involvement in INTELSAT, the Court held that lawmakers granted COMSAT an *exclusive franchise over the services* provided via the system to U.S. users—and not simply an exclusive role as the U.S. manager or financing shell: “Congress intended to establish through a global system, a single provider of international satellite services to and from the United States.”¹⁹⁸ The Court further noted that “Congress established COMSAT as a government-created monopoly” and as the official “United States participa[nt] in the global system.”¹⁹⁹

The United States Court of Appeals for the Second Circuit upheld this determination, stating that Congress “created COMSAT to wield monopoly power.”²⁰⁰ The Second Circuit distinguished between COMSAT's status as the U.S. Signatory to INTELSAT and its common carrier role as “the sole provider of access to the global Satellite System to <WJB> U.S. communications carriers” and determined that COMSAT's immunity from the antitrust laws applied only to the former role.²⁰¹ Yet this separation of functions did not prevent the Court from recognizing COMSAT's exclusive franchise over the provision of INTELSAT services.²⁰²

¹⁹⁸ *Alpha Lyracom*, 1990-2 Trade Cas. ¶ 69, 188 (citing 1962 Senate Commerce Comm. Report at 28, 30 (1962)).

¹⁹⁹ *Id.* (quoting 47 U.S.C. § 701).

²⁰⁰ *Alpha Lyracom*, 946 F.2d at 174 (reversing and remanding on other grounds).

²⁰¹ *Id.* at 175.

²⁰² Indeed, the Second Circuit recognized—as detailed *supra* Sections I.A, I.B, and I.D—that “the principal antitrust concern voiced within Congress during the consideration of the

(Continued...)

In sum, the Commission's contemporaneous construction of the Satellite Act, as well as the federal courts' findings, buttress the incontrovertible evidence in both the structure of the Act and in its legislative history that Congress did not intend to establish a system of multiple access to INTELSAT, as would occur with Level 3 direct access. Following the lead of the *Authorized User I* decision, in which the Commission squarely addressed direct access and specifically held that it was barred by the Act, a number of early post-Act decisions reflected the understanding that COMSAT enjoyed statutory exclusivity in providing INTELSAT services.

III. Subsequent Congressional Action Confirms That the Satellite Act Precludes Direct Access

In 1978, Congress enacted the International Maritime Satellite Telecommunications Act ("Inmarsat Act") as an amendment to the Satellite Act—and thereby designated COMSAT as the U.S. participant in a second global satellite consortium. The *Notice* seeks comment on the agency's tentative conclusion that a comparison of the two pieces of legislation suggests that Congress intended to grant COMSAT an exclusive role only in the governance and ownership of the Inmarsat system.²⁰³ In fact, an examination of the language and structure of the Inmarsat

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[Satellite Act], once the fundamental decision was made to create a private corporation with monopoly powers, was that the *common carriers participating in ownership of COMSAT would use their ownership position for private competitive purposes.*" *Alpha Lyracom*, 946 F.2d at 174 (emphasis added) (noting also that this focus is reflected in the "Declaration of Policy and Purpose" provision of the Act, 47 U.S.C. § 701(c), which lists some of the safeguards that Congress intended would address its concerns about the potential for anticompetitive carrier behavior).

²⁰³ *Notice* at ¶ 29.

Act, as well as its legislative history, bolsters the conclusion that Congress intended in 1962 to grant COMSAT exclusive access to what would become the INTELSAT system—and understood in 1978, in replicating that scheme with respect to Inmarsat, that it had done so.

A. Congress consciously patterned the Inmarsat legislation on the Satellite Act

As initially devised by the Carter administration, the Inmarsat legislation was “modeled on the 1962 Communications Satellite Act.”²⁰⁴ Accordingly, each of the legislative proposals for U.S. participation in the International Maritime Satellite Organization (“Inmarsat”) designated a single entity to be responsible for the “establishment, ownership, and operation” of the U.S. portion of the satellite consortium.²⁰⁵ Selecting the entity to serve as the U.S. participant was a focal point in the congressional debates. Unlike the proposals for the Satellite Act, which included calls for U.S. government ownership of the U.S. portion of the global system, proposals for Inmarsat centered only on commercial entities as the U.S. participant—and service provider. Lawmakers considered only two variations on that theme: (1) ownership by existing carriers, either in the form of a corporation owned by the carriers or through a carrier consortium; and (2) ownership and service by COMSAT.²⁰⁶

²⁰⁴ *International Maritime Satellite Telecommunications: Hearings on S.2211 and H.R. 11209 Before the Subcomm. on Communication of the Comm. on Commerce, Science and Transportation, 95th Cong., 2d Sess. at 26 (1978)* (“1978 House Science and Transportation Hearings”) (letter from Patricia Wald, Assistant Attorney General of the Dep’t of Justice).

²⁰⁵ *1978 House Science and Transportation Hearings* at 1 (letter from Sen. Daniel K. Inouye).

²⁰⁶ *See, e.g., Report of the Senate Comm. on Commerce, Science and Transportation S. Rep. No. 95-1036, 95th Cong. 2d Sess. at 5 (1978)* (“1978 Senate Commerce, Science and Technology Report”).

Similar to the proceedings in 1962, the carriers—this time with the support of the White House—vigorously lobbied for carrier ownership.²⁰⁷ The proponents of this approach contended that it would permit all carriers with an interest in doing so to invest in maritime satellite service and would minimize the conflicts of interest that any individual corporation might have.²⁰⁸ In addition, the carriers asserted that their previous service to the maritime communications market through their development of the Marisat program (a precursor to Inmarsat) had earned them the opportunity to form a corporation that would serve as the designated U.S. entity to Inmarsat.²⁰⁹ Advocates of carrier ownership further argued that COMSAT would be plagued with a number of conflicts of interest if it served as the designated entity to both INTELSAT and Inmarsat.²¹⁰

²⁰⁷ See *Merchant Marine Misc. - Part 2: Hearings on H.R. 11209 Before Subcomm. on Merchant Marine of the House Comm. on Merchant Marine Fisheries*, 95th Cong., 2d Sess. at 69 (1978) (“1978 House Merchant Marine & Fisheries Hearings”) (testimony of John McKinney, Executive Vice President, ITT World Communications); *Id.* at 230 (testimony of Robert Angliss, Executive Vice President, R.C.A. Global Communications, Inc.); *International Maritime Satellite Act: Hearings on S. 2211 and H.R. 11209 Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 2d Sess. at 76 (1978) (“1978 House Interstate and Foreign Commerce hearings”) (testimony of E.E. Carr, Director, Overseas Admin. Long Lines Dep’t., AT&T); *Id.* at 84-87 (testimony of Richard Nicholas, Vice President, Overseas Long Line Dep’t AT&T); *Id.* at 64-65 (testimony of Henry Geller, Assistant Secretary-Designate, Telecomm. and Info., Dep’t. of Commerce).

²⁰⁸ *1978 House Merchant Marine & Fisheries Hearings* at 69 (testimony of Wladimir Naleszkiewicz, Representing William Fishman, National Telecomm. and Info. on Admin. Dep’t of Commerce).

²⁰⁹ 1978 Senate Commerce, Science and Technology Comm. Report.

²¹⁰ *1978 House Science and Transportation* at 103 (1978) (testimony of George K Knapp, President, ITT World Communications, Inc.).

However, the major battle cry of the carrier ownership advocates was that designating COMSAT as the U.S. participant would “extend[] COMSAT’s existing statutory monopoly into a new field.”²¹¹ These parties repeatedly expressed their concern that if the statutory monopoly that the Satellite Act already had granted to COMSAT in the fixed services market spread into the realm of mobile maritime satellite service, COMSAT would have a “stranglehold on satellite communications.”²¹² As one COMSAT competitor asserted, Congressional grant of yet another exclusive service franchise in favor of COMSAT would mean that “[l]ess advantaged U.S. companies will find it ever more difficult to compete with COMSAT in its non-monopoly endeavors, and they will be absolutely foreclosed in the COMSAT-monopoly sectors.”²¹³

On the other side of this debate, proponents of designating COMSAT as the U.S. participant in the Inmarsat consortium contended that because of its expertise in international satellite communications, COMSAT would be the entity best able to make the provision of

²¹¹ 1978 House Interstate and Foreign Commerce Hearings at 69 (statement of Wladimir Naleszkiewicz, National Telecommunications and Information Administration). See also Hearings on S. 2211 and H.R. 11209, at 63, 65 (testimony of Henry Geller, Ass’t Secretary-Designate, Telecommunications and Information, Dep’t of Commerce); *id.* at 137 (testimony of Robert J. Angliss, RCA Global Communications, Inc.); S. Rep. No 95-1036, at 5 (1978); Merchant Marine Subcomm. Hearings on 11209, at 256 (testimony of William Fishman, Office of Telecommunications Policy).

²¹² 1978 House Comm. on Science and Transportation Hearing at 96 (Edwa Gallagher, Chairman, W. Union Int’l, Inc.)

²¹³ *Id.*

maritime satellite communications an economically viable service.²¹⁴ Similarly, these parties argued that as a result of serving the dual roles of U.S. participant to both the INTELSAT and Inmarsat systems, "COMSAT will be in a better position to minimize overhead costs than a multi-carrier-owned corporation."²¹⁵

In addition, warnings about the potential adverse effects of a carrier consortium mirrored those set forth in the old debates leading up to the adoption of the Satellite Act. Congress again was concerned that the carriers not impede the development of the new satellite system,²¹⁶ and that the carriers not collude among themselves to the possible detriment of intermodal competition and U.S. policy goals.²¹⁷

Compounding these fears about potential collusive behavior were concerns that a carrier-owned entity would delay development of the Inmarsat system. Based on the difficulties that the carriers involved in the Marisat consortium had experienced in reaching a consensus on the system's operation,²¹⁸ it was believed that "the complications arising from the disparate process likely to arise would be a major hindrance to the effective and efficient participation in Inmarsat by a multicarrier-owned corporation."²¹⁹

²¹⁴ 1978 Senate Commerce, Science and Technology Report at 8 (1978); *1978 House Merchant Marine and Fisheries Hearings* at 191 (testimony of Richard B. Nicholas, Vice President, Overseas, Long Lines Dep't, AT&T).

²¹⁵ 1978 Senate Science and Transportation Comm. Report at 8.

²¹⁶ 1978 Senate Science and Transportation Comm. Report at 6-7.

²¹⁷ *Id.* at 6; *1978 House Comm. on Science and Transportation Hearings* at 29, 34 (1978) (testimony of Charles Ferris, FCC Chairman).

²¹⁸ *Id.* at 33.

²¹⁹ 1978 Senate Science and Transportation Comm. Report, at 6.

After weighing each of these considerations, Congress sided with the proponents of COMSAT ownership and designated the corporation as the U.S. participant in the Inmarsat consortium. On November 1, 1978, the Communications Satellite Act of 1962 was amended with the enactment of the International Maritime Satellite Telecommunications Act. As the remainder of this section will illustrate, in passing this amendment, Congress sought to accord COMSAT precisely the same access rights that the corporation already had been granted through the original Satellite Act.

B. A comparison of the Satellite Act and the Inmarsat Act clarifies that Congress granted COMSAT an exclusive right to provide INTELSAT services

Analyzing the key provisions of the Satellite Act and the Inmarsat amendment confirms that Congress intended to replicate the exclusive access relationship between COMSAT and INTELSAT in the new context. It is a well-settled rule of statutory construction that when “provisions of [an] original act or section ... are repeated in the body of [an] amendment, either in the same or equivalent words,” the provisions “are considered a continuation of the original law.”²²⁰ Thus, “[w]ords and provisions used in the original act or section are presumed to be used in the same sense in the amendment.”²²¹ Similarly, pursuant to the doctrine of legislative reenactment, Congress is presumed to be aware of administrative or

²²⁰ *Sierra Club v. Secretary of the Army*, 820 F.2d 513, 522 (1st Cir. 1987) (quoting IA C. Sands, *Sutherland on Statutory Construction*, § 22.33 (4th ed. 1985)).

²²¹ *Id.*

judicial interpretations of a statute and to incorporate those interpretations into the reenactment of the statute.²²²

As the comparison below demonstrates, the pertinent provisions of the Satellite Act are essentially reenacted in the Inmarsat Act:

Satellite Act

1. “[The] United States participation in the global system shall be in the form of a private corporation.”²²³

2. “[T]he corporation is authorized to - (1) plan, initiate, construct, own, manage and operate itself or in conjunction with foreign governments or business entities a commercial communications satellite system”²²⁵

Inmarsat Act

1. “[T]he participation of the United States in INMARSAT shall be through the communications satellite corporation ..., which constitutes a private entity operating for profit[.]”²²⁴

2. COMSAT may “establish, own, and operate the United States share of the jointly owned international space segment and associated ancillary facilities.”²²⁶

The similarities between the related provisions in the two acts are striking. The differences may be explained simply by virtue of the fact that the drafters of the Inmarsat Act benefited from the knowledge gained through years of implementation of the Satellite Act and the creation, deployment, and operation of the INTELSAT system. When the Satellite Act was passed, satellite terms of art did not exist and the technology was uncertain. Moreover, INTELSAT was not an existing entity; the structure of any international consortium was unknown.

²²² *Bragdon v. Abbott*, 118 S. Ct. 2196, 2208 (1998); *Pierce v. Underwood*, 487 U.S. 552, 567 (1988); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978).

²²³ 47 U.S.C. § 701(c).

²²⁴ 47 U.S.C. § 751(b).

²²⁵ 47 U.S.C. 735(a).

The Inmarsat Act may designate COMSAT as the “sole operating entity of the United States for participation in Inmarsat,” but the Satellite Act provides that “United States participation in the global system shall be in the form of a private corporation.”²²⁷ Both statutes refer to participation by a single entity -- COMSAT. It is hard to see how one more readily establishes an exclusive franchise than the other.

In addition, the Inmarsat Act may explicitly refer to COMSAT’s ownership and operation of the United States share of “space segment,” but the Satellite Act grants COMSAT authority to “furnish, for hire, channels of communication.”²²⁸ The term “space segment” may not have existed in 1962, but the concept is just as clearly expressed in the Satellite Act as in the Inmarsat Act.²²⁹ Similarly, neither uses the term “exclusive” when referring to this right of COMSAT to operate the “space segment” or provide “channels of communication,” but the context and meaning of both acts is clear. Having conceded that the Inmarsat Act grants COMSAT an exclusive franchise over access, the Commission must concede the same as to the Satellite Act. As noted above, when provisions of an original statute are replicated in an

(...Continued)

²²⁶ 47 U.S.C. § 752(b)(4).

²²⁷ Compare 47 U.S.C. § 752(a)(1) with *id.* § 701(c).

²²⁸ Compare 47 U.S.C. § 752(c)(4) with *id.* § 735(a)(2).

²²⁹ Participants in the 1962 debate over the Satellite Act clearly used the terms “channels of communication” to refer to what we now speak of as “space segment.” See, e.g., 1962 Senate Judiciary Hearings - Part 2 at 333 (Testimony of Bernard Strassburg, Ass’t Chief of FCC Common Carrier Bureau).

amendment, "either in the same or equivalent words," the provisions in amendment are presumed to be read in the same sense as in the original act.²³⁰

Although these provisions of the Inmarsat Act certainly spell out Congress' intent to grant COMSAT exclusive access to the Inmarsat system, the legislative history clarifies that the differences in language highlighted by the Commission do not signal Congress' intent to accord COMSAT more extensive access rights to the Inmarsat system than to the INTELSAT system.²³¹ Rather, the committee reports, testimony, and debates provide further evidence that the Inmarsat legislation reenacted the exclusive access rights that Congress had granted to COMSAT through the Satellite Act. The provisions in the Inmarsat Act were more explicit with respect to COMSAT's relationship with the new system and the concept of "space segment" only because these issues were more concrete in 1978 than they had been in 1962—before INTELSAT had even been conceived.²³²

As noted above, the opponents of designating COMSAT as the U.S. participant in Inmarsat repeatedly expressed concern that this approach would "extend [] the ... Corporation's existing statutory monopoly into a new field."²³³ Thus, at the time the Inmarsat

²³⁰ *Sierra Club*, 820 F.2d at 522 (1st Cir. 1987) (quoting 1A C. Sands, *Sutherland on Statutory Construction* § 22.33 (4th ed. 1985)).

²³¹ *Notice* at 29.

²³² As noted *supra* Section I.A.2, the Satellite Act was drafted and enacted well before the United States made concerted efforts to organize INTELSAT. Indeed, the text of the Satellite Act reflects lawmakers' efforts to provide the flexibility to permit COMSAT itself to serve as the organizational entity for the global system if foreign nations had concurred.

²³³ *1978 House Commerce, Science and Transportation Hearings* at 63 (testimony of Henry Geller, Ass't Secretary-Designate, Telecomm., and Info., Dep't. of Commerce).

Act was being debated, opponents viewed COMSAT as already having a statutorily granted exclusive franchise over INTELSAT-based fixed satellite services. Moreover, the “existing statutory monopoly” that these opponents wanted to prevent from spreading into the maritime satellite service market was not merely the exclusive governance or ownership control that COMSAT had over the U.S. portion of INTELSAT, but the exclusive ability to offer satellite services. The chairman of Western Union International, Inc., succinctly expressed this concern in a Senate hearing on proposed Inmarsat legislation: “Any *further* statutory monopoly powers for COMSAT would be harmful to consumers....”²³⁴ The chairman further noted that “COMSAT has a statutory monopoly over INTELSAT satellite circuits.”²³⁵ Thus, COMSAT’s competitors, as well as some government officials,²³⁶ were plainly concerned about the possibility that COMSAT’s statutorily secured exclusive franchise over the provision of INTELSAT satellite service would be repeated with respect to Inmarsat.

Yet despite this persistent focus on COMSAT’s “monopoly” powers and upon the potential extension of these powers into the field of maritime satellites, nothing in the legislative history of the Inmarsat Act suggests that lawmakers intended to give COMSAT *greater* access rights to the Inmarsat system than to the INTELSAT system. Undoubtedly, if Congress were upgrading COMSAT’s role from that of non-exclusive supplier of INTELSAT services to a position as the only entity with exclusive access to the Inmarsat system, this issue

²³⁴ *Id.* at 91 (1978) (testimony of Edward Gallagher, Chairman of the Board, Western Union Int’l, Inc.).

²³⁵ *Id.*

²³⁶ 1978 House Merchant Marine and Fisheries Hearings, at 256 (1978) (testimony of William Fishman, Office of Telecomm. Policy).

would have been discussed—probably extensively—in congressional hearings and debates in 1978. Yet, there was no debate about either of the provisions that the Commission now points to as evidence of congressional intent to augment COMSAT's access privileges to this second global consortium. What was discussed, instead, was the possible ramifications of extending the exclusive powers that COMSAT *already had* with respect to INTELSAT into the realm of maritime satellite service.²³⁷

This legislative history demonstrates that Congress intended to do no more through the Inmarsat legislation than ratify the then-existing understanding of COMSAT's exclusive role as owner and service provider in the INTELSAT system. Moreover, because it is clear that Congress intended to confer the same role on COMSAT with respect to both intergovernmental organizations, the language that Congress employs in describing COMSAT's role in the Inmarsat legislation bolsters the conclusion that lawmakers understood that COMSAT had exclusive access to the INTELSAT system as well. Instead of signaling Congress' intent to accord COMSAT greater access rights to Inmarsat than to INTELSAT, the differences between the two Acts highlighted in the *Notice* can be attributed to the simple fact that lawmakers in 1978 had a greater understanding of the workings of the IGO satellite systems than had their counterparts in 1962, who had no experience upon which to draw.

²³⁷ Congress did, however, take pains to clarify that designating COMSAT as the exclusive U.S. participant in both INTELSAT and Inmarsat did not create a precedent for COMSAT to serve as the U.S. representative to all possible international satellite systems that might later be created. Accordingly, the Senate Report on the Inmarsat legislation states that “[a]ction taken by the committee in this instance would not necessarily be a precedent for management of future international satellite systems.” 1978 Senate Commerce, Science and Technology Comm. Report at 8. Thus, it is clear that Congress—rather than being concerned about according COMSAT greater access rights to Inmarsat than to INTELSAT—was concerned that it had set a pattern of granting COMSAT the same role in every international satellite system.

Consequently, Congress described COMSAT's exclusive role with greater precision in 1978 than in 1962.

* * *

In sum, the Inmarsat Act itself and its abundant statutory history make it clear that Congress intended to replicate COMSAT's exclusive roles with respect to INTELSAT—including that of sole service provider for U.S. users—in the later legislation. There is no evidence that lawmakers in 1978 believed that the Inmarsat Act expanded upon COMSAT's existing role as the exclusive provider of services via the original global system. Rather, it is plain that Congress understood that COMSAT's relationship to INTELSAT was as the sole owner, operator, and provider of services via that system.

IV. Conclusion: The Preceding Statutory Review Shows that Direct Access is Unlawful Under the Satellite Act

The language and design of the Satellite Act, its legislative history, and its subsequent interpretation demonstrates that the Commission's proposal to implement Level 3 direct access is unlawful. This form of direct access is irreconcilable with the purpose of the Act to create an independent corporation that has an exclusive position with respect to its relationship to the global system—including provision of services via that system. Indeed, this exclusivity centers on the provision of the INTELSAT space segment services because that is the core function for COMSAT under the Act.