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January 29, 1999

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

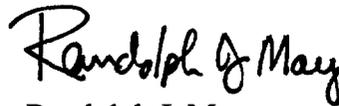
Re: **IB Docket No. 98-192; Direct Access to the INTELSAT System**

Dear Ms. Salas:

Enclosed for filing in IB Docket No. 98-192 you will find an original and eleven copies of "Reply Comments of CBS Corporation, National Broadcasting Company, Inc., Turner Broadcasting System, Inc., and The Walt Disney Company." Please date stamp the "stamp and return" reply copy of the comments for return by the messenger.

Please do not hesitate to contact me if you have any questions.

Sincerely,



Randolph J. May

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## **SUMMARY**

**In their initial comments, CBS Corporation, National Broadcasting Company, Inc., Turner Broadcasting System, Inc., and The Walt Disney Company, on behalf of its subsidiary, ABC, Inc., (collectively the "Networks"), demonstrated that the competition engendered by permitting Level 3 direct access to the INTELSAT system will produce positive benefits to U.S. users of international satellite services and that the Commission possesses the legal authority to implement its proposal to allow Level 3 access. The vast majority of parties submitting comments agree with the Networks on these points. Indeed, only COMSAT and its potential merger partner, Lockheed Martin, oppose the Commission's direct access proposal.**

**In these reply comments, the Networks respond to COMSAT's contentions concerning the Commission's legal authority by showing that COMSAT's arguments: (1) distort the plain meaning of the Satellite Act; (2) distort the meaning of the Satellite Act's legislative history; and (3) misconstrue the import of prior agency and judicial decisions. First, COMSAT reads into the Satellite Act words of exclusivity that simply are not in the statute. Second, it argues that the legislative history shows that it was intended to be a carrier's carrier, even though this point is in no way determinative of the direct access issue and, in any event, the Commission and the courts as far back as the mid-1980s rejected this view. In the Authorized User II and III decisions, the Commission held, and the court affirmed, that COMSAT lawfully could provide service directly to end users as well as carriers. In other words, the agency and the courts long ago rejected the assertion now put forward by COMSAT that it is merely a carrier's carrier.**

**Third, the statements in prior agency and judicial decisions cited by COMSAT for the proposition that COMSAT enjoys exclusive access to INTELSAT are the purest form of dicta. In the two most directly relevant judicial decisions, the D.C. Circuit decisions affirming the Commission's Authorized User II and III orders, the court assumed the Commission's authority to allow direct access.**

**Nothing in COMSAT's papers refutes the contention of the Networks and others that prompt implementation of direct access will produce sound public policy benefits. Contrary to COMSAT's arguments, direct access will not delay INTELSAT privatization. And, COMSAT's assertion that implementation of direct access in the U.S. may bring "smaller" benefits than it does in other countries is irrelevant. Finally, with regard to full-time and occasional video services, COMSAT's argument that reductions in the charges for U.S. space segment brought about by direct access will have a minimal effect on overall end-to-end service rates is wrong.**

**COMSAT did not provide the detailed cost information requested by the Commission to support its high mark-ups over the IUCs. Instead, it simply provided what it characterized as "initial" calculations showing the amount of revenue it claims it needs to receive to achieve various returns. In other words, COMSAT's approach assumes an**

**absolute entitlement to earn high returns, even if it loses business in a competitive environment to another entity and even if its own costs are unreasonable.**

**COMSAT's failure to provide the Commission with the requested information definitely should not stand in the way of prompt implementation of Level 3 direct access. The Commission should declare that in the increasingly competitive environment in which COMSAT claims to operate, the Commission will not guarantee COMSAT's ability to recover commercial operational costs. The only costs COMSAT perhaps should be allowed to recover are those limited costs specifically associated with its official signatory functions.**

**Finally, the Networks agree with those parties who urge the Commission to implement some form of "fresh look" requirement. While the Commission must take into account COMSAT's legitimate interests by not, for example, implementing a fresh look requirement that is unreasonably long, a properly-formulated policy would further the Commission's pro-competitive goal in implementing direct access.**



COMSAT and Lockheed Martin are the only parties who oppose the Commission's proposal.<sup>3</sup> PanAmSat and Columbia, two competitors of COMSAT for international traffic who will face greater competition if direct access is implemented, do not oppose direct access, but they express reservations relating to INTELSAT's privileges and immunities and tax-exempt status.<sup>4</sup>

If the issues in this proceeding were going to be decided on the basis of the greatest number of pages (and headings and subheadings) submitted by any one party, then COMSAT, with its 12 pages of executive summary, 86 pages of comments, and several hundred pages of attachments, might prevail. The Networks are confident, however, that when the Commission cuts through COMSAT's repetitious and largely unsupported assertions, it will agree with the Networks and the majority of the commenters that the merits dictate adoption of the Commission's direct access proposal.

In their initial comments, the Networks explained in considerable detail why, as major users of international satellite services, they will benefit from the increased competition that Level 3 access would bring.<sup>5</sup> They largely adopted the comprehensive arguments set forth in the Notice in support of the Commission's legal authority. In these reply comments, the Networks will not repeat points already set forth in their initial comments. Rather, they will

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Three Angels Broadcasting Network, Inc., Loral Space & Communications Ltd., and BT North America, Inc. References to initial comments in the remainder of this reply will simply use the familiar recognizable names of these corporations such as "AT&T" or "Sprint."

<sup>3</sup> See the comments filed on December 22, 1998, by COMSAT Corporation and Lockheed Martin Corporation.

<sup>4</sup> See the comments filed on December 22, 1998, by PanAmSat Corporation and Columbia Communications Corporation.

<sup>5</sup> Networks Comments, at 7-9.

respond to COMSAT's arguments concerning the Commission's authority and then will address more generally the issues that fall into the policy area.

**I. THE COMMISSION POSSESSES THE AUTHORITY TO IMPLEMENT LEVEL 3 DIRECT ACCESS**

COMSAT is the only party who contends that the Commission lacks authority under the Satellite Act to allow Level 3 direct access. Even the three other commenters who express reservations in varying degrees concerning the Commission moving forward promptly to implement Level 3 access do not argue that the Commission lacks the legal authority to do so.<sup>6</sup> Below the Networks respond to COMSAT's principal legal arguments.

**A. COMSAT's Arguments Distort Plain Meaning Of The Satellite Act**

In arguing that the Satellite Act gives it exclusive access to the INTELSAT system, COMSAT first ignores the plain language of the Act, instead basing its contentions on words it wishes had been included in the legislation. For example, COMSAT states that Congress directed that "COMSAT *alone* 'furnish, for hire, channels of communication to United States communications common carriers and to other authorized entities . . . .'"<sup>7</sup> It continues that Congress "granted *only* COMSAT the power 'to contract with authorized users . . . for the

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<sup>6</sup> See the comments of Lockheed Martin, PanAmSat, and Columbia. BT North America contends that the Commission possesses authority to require Level 4 (investment) access as well as Level 3 access. While the Networks do not necessarily disagree with BT on this point, the question regarding the Commission's authority to implement Level 4 access is sufficiently in doubt that the Commission simply should move forward promptly to implement Level 3 access and defer resolution of the Level 4 issue. As shown herein and in the Networks' initial comments, the Commission's authority with regard to Level 3 access is so clear, and the public policy benefits sufficiently compelling, that the Commission should not delay prompt conclusion of this proceeding by getting bogged down in the much less clear Level 4 issue.

<sup>7</sup> COMSAT Comments, at 10, citing 47 U.S.C. § 735(a)(2). Emphasis added.

services of the communications satellite system.”<sup>8</sup>

The problem with COMSAT’s hyperbole, of course, is that nowhere in the statute itself are to be found the words “alone” or “only.” The statutory provisions cited by COMSAT merely define the powers of COMSAT. They “authorize” COMSAT to engage in certain activities; they do not purport by their terms to grant COMSAT exclusive authority. As the Networks pointed out in their initial comments, when Congress wanted to confer COMSAT with an exclusive status, it knew how to do so. In amending the Satellite Act in 1978, it designated COMSAT “the sole operating entity of the United States” for access to INMARSAT.<sup>9</sup> No such language of exclusivity appears in the Satellite Act with regard to access to INTELSAT, and the fact that COMSAT supplies such words in its pleadings won’t change the statute.

**B. COMSAT Distorts The Meaning Of The Legislative History**

Curiously, COMSAT’s principal argument is that the legislative history of the Satellite Act shows that COMSAT was intended to be a carrier’s carrier. COMSAT makes this point over and over again, citing not to any language in the Act itself, but to various hearing statements and correspondence.<sup>10</sup> Several times COMSAT cites then-FCC Chairman Minow’s hearing testimony to the effect that “[I]t is important to remember that in this respect the satellite

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<sup>8</sup> COMSAT Comments, citing 47 U.S.C. § 735(a)(4). Emphasis supplied

<sup>9</sup> Networks Comments, at 16, citing 47 U.S.C. § 752(a)(1).

<sup>10</sup> See, for example, COMSAT Summary at 3, and COMSAT Comments at pages 9, 12, 26, 27. As a matter of legislative interpretation, the weight to be given to these types of testimonial and hearing statements -- not even Committee reports -- upon which COMSAT relies so heavily is minimal at best. At best, this is one of those cases where “far from clarifying the statute, the legislative history only muddies the waters.” United States v. Gonzales, 520 U.S.1, 137 L.Ed.2d 132, 139 (1997). But even taken for whatever they are worth, the testimonial statements don’t help COMSAT’s case.

corporation is a common carrier's common carrier."<sup>11</sup> COMSAT's purpose in going to such great lengths to establish that COMSAT was to be a carrier's carrier is not entirely clear, but apparently it aims at showing that Congress intended that the then international carriers, such as AT&T and ITT, not control the new corporation.<sup>12</sup>

The problem with COMSAT's effort is two-fold. First, the issue in this proceeding is not who controls COMSAT, but rather whether entities other than COMSAT may have contractual access to INTELSAT. More fundamentally, the argument that COMSAT was intended to be a carrier's carrier was rejected over fifteen years ago when the Commission held in its Authorized User II and Authorized User III decisions, and the court of appeals affirmed, that COMSAT could serve non-carrier users directly (in other words, non-carriers might have direct access to COMSAT).<sup>13</sup> Interestingly, despite the lengths to which COMSAT now goes in citing then-Chairman Minow's statements concerning COMSAT's carrier's carrier role, COMSAT then supported the FCC's Authorized User II decision that non-carrier users should be

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<sup>11</sup> COMSAT Executive Summary, at 3, citing Communications Satellite Act of 1962: Hearing on H.R. 11040 Before the House Comm. on Foreign Relations, 87th Cong., 2d Sess. 20 (Aug. 10, 1962). To the same effect, COMSAT cites Chairman Minow's testimony that: "Unlike those carriers, the Corporation will not furnish service to the general public. Its undertaking, rather, will be to furnish channels of communications to relatively few users; namely, common carriers and their foreign counterparts, who do serve the general public." COMSAT Comments, at 27, note 73, citing Communications Satellites - Part 2: Hearings on H.R. 10115 and H.R. 10138 Before the House Comm. on Interstate and Foreign Commerce, 87th Cong., 2d Sess. 407 (1962).

<sup>12</sup> COMSAT Comments, at 11-12.

<sup>13</sup> Modification of the Commission's Authorized User Policy Concerning Access to International Satellite Services of the Communications Satellite Corporation ("Authorized User II"), 90 FCC 2d 1394 (1982), vacated and remanded sub nom. ITT World Communications, Inc., 725 F.2d 732 (D.C. Cir. 1984), on remand, 100 FCC 2d 177 (1985) ("Authorized User III"), aff'd sub nom. Western Union Int'l, Inc. v. FCC, 804 F.2d 1280 (D.C. Cir. 1986).

allowed to access it directly.<sup>14</sup> Amidst COMSAT's recitation of the flurry of statements from Chairman Minow and others is buried in a footnote this one line acknowledgment: "The Commission later determined that the Satellite Act does not prevent COMSAT from serving end users . . . ."<sup>15</sup> Obviously, the Commission and the court of appeals long ago rejected the view of the legislative history upon which COMSAT now rests so much of its case.

**C. COMSAT Misconstrues The Import of Prior Agency And Judicial Decisions**

COMSAT suggests that the FCC and the courts have "explicitly" recognized that it has an exclusive franchise to access the INTELSAT system.<sup>16</sup> The agency precedent that COMSAT cites is another statement by then-FCC Chairman Minow that COMSAT should be a carrier's carrier and pre-Authorized User II Commission statements that carriers must obtain access to INTELSAT through COMSAT.<sup>17</sup> As shown above, Chairman Minow's statements do not represent the law Congress enacted, and the statement COMSAT quotes from the FCC's Authorized User I opinion is purely dicta. It is absolutely clear that the Commission was not purporting to decide in 1966 the issue of its legal authority concerning direct access to INTELSAT space segment, but rather making a policy determination, which it subsequently reversed in its Authorized User II and III decisions, that carriers could provide INTELSAT space capacity to end users only through COMSAT.

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<sup>14</sup> See ITT World Communications, Inc. v. FCC, 725 F.2d 732 (D.C. Cir. 1984); Western Union International, Inc. v. FCC, 804 F.2d 1280 (D.C. Cir. 1986).

<sup>15</sup> COMSAT Comments, at 27, note 73.

<sup>16</sup> COMSAT Comments, at 28-29.

<sup>17</sup> Id., at 28.

COMSAT cites two judicial decisions to support its contention that the courts have recognized that COMSAT possesses exclusive access to INTELSAT, but even COMSAT must admit that the statements from these decisions represent the purest form of dicta. In the National Association of Broadcasters case,<sup>18</sup> the issue before the court was whether the FCC's interim DBS regulations were reasonable and whether COMSAT, through a subsidiary, lawfully could provide non-INTELSAT and non-INMARSAT services such as DBS. The NAB argued that COMSAT could not engage in any non-INTELSAT/INMARSAT activities; COMSAT argued it could, and the court agreed. The case obviously had nothing to do with the lawfulness of direct access, and the court's statement concerning COMSAT's position in INTELSAT merely was dicta describing the then-current situation.

Likewise, the issue in the Alpha Lyracom case was whether COMSAT "is immune from antitrust liability for activity undertaken in its role as the United States representative to the International Telecommunications Satellite Organization ("INTELSAT")".<sup>19</sup> For purposes of antitrust liability, the court of appeals distinguished between COMSAT's activities in its capacity as U.S. signatory to INTELSAT and its activities as a U.S. common carrier. There was no discussion in either the court of appeals decision or the district court decision concerning whether the Commission possesses authority to implement direct access.

Not surprisingly, COMSAT ignores the two judicial decisions that bear most directly on the Commission's authority to implement direct access -- the D.C. Circuit's two

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<sup>18</sup> National Association of Broadcasters v. FCC, 740 F.2d 1190 (D.C. Cir. 1984).

<sup>19</sup> Alpha Lyracom Space Com., Inc. v. Communications Satellite Corp., 946 F.2d 168, 169 (2nd Cir. 1991), reversing and remanding, Alpha Lyracom Space Com., Inc., 1990-2 Trade Cas. (CCH ¶ 69,188 (S.D.N.Y. 1990)).

decisions reviewing the Authorized User II and III decisions allowing COMSAT to provide service directly to non-carrier users. In ITT World Communications, Inc. v. FCC, 725 F.2d 732 (D.C. Cir. 1984), the international carriers challenged Authorized User II on the basis that the Commission erred in failing to consider whether the carriers should be allowed direct access to INTELSAT at the same time that end users were allowed direct access to COMSAT. The court's decision is instructive in two respects. First, the court twice pointedly said COMSAT "*presently*" is the only entity permitted direct access to INTELSAT.<sup>20</sup> More fundamentally, the court remanded the case to the FCC on the basis that the agency abused its discretion in allowing non-carrier access to COMSAT "prior to considering the merits of direct access . . . ."<sup>21</sup> While the court was not called upon squarely to resolve the issue whether the FCC possesses authority to implement direct access, the court's remand to the agency specifically to consider whether direct access should be implemented indicates that the court assumed the Commission possesses such authority.

On remand, the FCC again affirmed its decision to allow non-carrier access to COMSAT and it decided, as a matter of policy, not to require direct access at that time.<sup>22</sup> The carriers appealed the agency's decision not to require direct access. The Court affirmed the FCC's Authorized User III decision, emphasizing that the agency "left open the possibility of

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<sup>20</sup> 725 F.2d at 737 n.5 and 741 n.19.

<sup>21</sup> *Id.*, at 752. See also *Id.*, at 755. ("[W]e hold that the FCC has abused its discretion by implementing its Authorized User II policy prior to considering the direct access and independent earth station ownership issues.")

<sup>22</sup> The Commission did not address its legal authority to require direct access; it indicated its willingness to reconsider the direct access issue at a future date should conditions change. 1984 Direct Access Order, 97 FCC 2d at 298 and 326.

reconsidering direct access" should conditions warrant.<sup>23</sup> Again, the court clearly assumed that the Commission possesses the authority to require at least Level 3 direct access. Otherwise, the remand itself and the statement in the affirmance emphasizing that the Commission might revisit direct access would have been pointless.

In sum, COMSAT's arguments concerning the statutory language, legislative history, and prior agency judicial precedent are meritless. If anything, put in the correct context, they demonstrate that the Commission does, in fact, possess the requisite authority under the Satellite Act to implement Level 3 access.

## **II. PROMPT IMPLEMENTATION OF DIRECT ACCESS WILL PRODUCE SOUND PUBLIC POLICY BENEFITS**

In their initial comments, the Networks showed that the competition brought about by Level 3 direct access will produce positive benefits to U.S. users of the INTELSAT system in the form of lower prices, better service quality, and greater operational flexibility.<sup>24</sup> All of the other users of the INTELSAT services who filed comments agree with the Networks on this point.<sup>25</sup> And, of course, INTELSAT itself touts that the benefits identified above flow from direct access.<sup>26</sup> Indeed, 76 other INTELSAT member countries already permit Level 3 access.

In considering the public benefits, the Networks urged the Commission not to

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<sup>23</sup> Western Union Int'l, Inc. v. FCC 804, F2d 1280, 1293 (D.C. Cir. 1986).

<sup>24</sup> Networks Comments, at 7-13.

<sup>25</sup> See the list of parties at note 2 *supra*.

<sup>26</sup> NPRM, at 44.

minimize the importance of any cost savings to be realized by users, regardless whether COMSAT or others might characterize these savings as “significant.”<sup>27</sup> And the Networks urged the Commission not to distinguish between so-called “non-competitive” and “competitive” markets because allowing direct access for markets that the Commission has designated “competitive” for tariff review purposes would certainly make those markets more competitive than they are at present.<sup>28</sup>

COMSAT itself recognizes that users of the INTELSAT system likely would receive *some* benefits from direct access, but it claims that these benefits would be outweighed by the costs.<sup>29</sup> Its economic consultants acknowledge that “direct access does have the potential to offer *some* benefits . . . .”<sup>30</sup> They go on to suggest, however, that the benefits will be outweighed by the following concerns: (1) the direct access benefits will be short-lived and will

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<sup>27</sup> The Networks pointed out that in the 1984 Direct Access Order the Commission recognized that users might realize “cost savings” from direct access, but then characterized the cost savings as not “significant” or only “a few percentage points.” See Networks Comments, at 12-13.

<sup>28</sup> Not surprisingly, COMSAT attempts to use the Commission’s recent COMSAT Non-Dominant Order to argue against direct access by claiming that no further competition is needed “on the highly competitive thick routes” on which the Commission declared COMSAT non-dominant. COMSAT Comments, at 56. The Networks do not believe the Commission characterized any routes as “highly competitive,” at least not with regard to video services. Indeed, as the Networks have pointed out, a route was designated as “competitive” if only one entity other than COMSAT reported serving that route. See Networks Comments, at 14, note 37. Obviously, most of the routes the Commission designated as “competitive” for tariff review purposes are not “highly competitive.” In any event, they all can benefit from further competition.

<sup>29</sup> COMSAT Executive Summary, at 10-12.

<sup>30</sup> An Economic Assessment of the Risks and Benefits of Direct Access to INTELSAT in the United States, The Brattle Group, December 21, 1998, at 5 (emphasis in original) (hereinafter “The Brattle Group”).

be realized automatically upon privatization of INTELSAT; (2) the potential for direct access benefits in the U.S. would be far smaller than in other countries; and (3) reflecting facilities-based competition and FCC regulation, the U.S. portion of INTELSAT space segment supplied by COMSAT today accounts for only a very small portion of the U.S. carriers' international retail revenues.<sup>31</sup>

The Networks will address each of these points in turn.

**A. Direct Access Will Not Delay INTELSAT Privatization**

The Networks agree that if INTELSAT ultimately were to be completely privatized the same benefits brought about by direct access would be achieved "automatically." The problem, of course, is that the future course of INTELSAT privatization is highly uncertain and, in the meantime, U.S. users of international satellite services should not be denied the benefits of direct access. It is not necessary to cast aspersions on any nation's motives or perceptions of its own national interests to understand that the full privatization of INTELSAT almost certainly will require at least a considerable number of years. The years devoted to achieving a consensus within INTELSAT on the much more modest New Skies spin-off is instructive in this regard.

COMSAT speculates that if the U.S. moves forward in the interim to implement Level 3 access privatization may actually be stalled. Certain unnamed signatories "may" view it as more beneficial to stall privatization because they already would have gained expanded access to the U.S. market without giving up the tax-exempt status which INTELSAT presently enjoys.

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<sup>31</sup> The Brattle Group, at 5-6. These concerns are reflected in the body of COMSAT's comments, of course.

The Commission should reject COMSAT's speculation on this point. It is very unlikely that the issue of INTELSAT's tax-exempt status looms as one of the key drivers in many countries' decisionmaking processes in the forthcoming privatization debate. COMSAT never attempts to quantify the extent of this claimed advantage that INTELSAT (of which COMSAT is the major owner and beneficiary) presently enjoys.<sup>32</sup> In any event, as GE Americom points out, COMSAT's argument concerning the advantages of INTELSAT's present intergovernmental status at most may be a reason that INTELSAT should not be permitted access to the U.S. domestic market, but is a "red herring" in this proceeding.<sup>33</sup> Ellipso states that direct access will not interfere with privatization. Instead, as another example of the U.S. taking the initiative to open a monopoly market, "it should be expected to accelerate the process."<sup>34</sup>

**B. COMSAT's Argument That Direct Access In The U.S. Will Bring "Smaller" Benefits Than It Does In Other Countries Is Irrelevant**

COMSAT's second argument deserves short shrift. COMSAT argues that because it already faces more competition than INTELSAT signatories confront in most other countries and because the FCC has done a good job of regulating it, U.S. users of international services already are better off than users in other countries. Therefore, any benefits of direct access to U.S. users are likely to be smaller than the benefits realized by users abroad.

This argument is silly. The Networks do not doubt that U.S. users already have benefitted greatly from the pro-competitive steps taken by the Commission over the years to

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<sup>32</sup> For that matter, neither PanAmSat nor Columbia, both of whom express concerns about INTELSAT's tax-exempt status, attempt to quantify this advantage.

<sup>33</sup> GE Americom Comments, at 13.

<sup>34</sup> Ellipso Comments, at 13.

open up the international telecommunications arena. Indeed, in their initial comments the Networks recited and applauded some of the key steps already taken by the Commission.<sup>35</sup> That the U.S. now has less far to go than most other countries of the world in order to achieve the benefits of full competition is not a reason for the U.S. now not to take the important step of implementing direct access. The Networks are not bothered that users in other countries, having been denied the benefits of a competitive environment for a longer time than U.S. users, now may realize “larger” benefits from direct access. Nevertheless, U.S. users of INTELSAT services are anxious to realize the benefits from direct access as well.

**C. For The Networks, The U.S. Portion Of INTELSAT Space Segment Constitutes A Significant Portion Of End-To-End Service Charges**

COMSAT’s third argument attempting to minimize the benefits of direct access to U.S. users is that the U.S. portion of INTELSAT space segment supplied by COMSAT accounts for only a very small portion of the U.S. carriers’ international retail revenues.<sup>36</sup> COMSAT claims that “whatever cost reductions would accrue to U.S. carriers as a result of the implementation of direct access, it is unlikely that these savings would be fully passed on to end users.”<sup>37</sup> Thus, it suggests that “even substantial reductions in COMSAT’s U.S. half-circuit rates would have little impact on total end user prices . . . .”<sup>38</sup>

Whatever the merits of COMSAT’s claims with regard to end users who utilize

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<sup>35</sup> Networks Comments, at 3-4.

<sup>36</sup> The Brattle Group, at 6.

<sup>37</sup> COMSAT Comments, at 73.

<sup>38</sup> COMSAT Comments, at 74.

COMSAT's services through intermediary carriers,<sup>39</sup> and even in these cases the Networks believe COMSAT's claims are substantially exaggerated, they simply are not applicable to the Networks and other end users who order service directly from COMSAT. For both full-time and occasional use video services, the Networks almost never order INTELSAT circuits through an intermediary carrier.<sup>40</sup>

As COMSAT is well aware, the cost of its space segment rates comprise a very significant portion of the combined space/earth segment cost for an end-to-end video channel. Indeed, typically the earth station cost is considerably less than the space segment rate on the U.S. side. For example, the February 1997 edition of COMSAT's Broadcast Services Handbook contains the rates for occasional use service for U.S. earth station providers. Of the thirteen providers listed, taking into account some variations in rates for different locations and minimum commitment periods, the majority of providers charge substantially less for earth station service than COMSAT does for the associated comparable space service.<sup>41</sup> This same relationship holds true for full-time services, where the Networks report that earth station service typically is priced

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<sup>39</sup> This is the case, for example, when an AT&T or MCI WorldCom subscriber makes an ordinary long distance call overseas which is carried over an INTELSAT circuit.

<sup>40</sup> As the Networks pointed out in their initial comments, increasingly they have ordered occasional video service from Teleglobe, the Canadian signatory. This, of course, is not a situation of using an intermediary carrier to get COMSAT's service. The Networks use Teleglobe because the price is lower than COMSAT's and the service quality often superior. Contrary to COMSAT's suggestion at note 175 of its comments, Teleglobe's lower rates have little to do with "transit" rates. Instead, as the Networks pointed out in their initial comments, Teleglobe's per minute rate for a combined space and earth video service is approximately 15% less than COMSAT's rate for the space segment service only, and this comparison is separate and apart from whether the traffic is transited to the U.S. See Networks Comments, at 10, note 28.

<sup>41</sup> COMSAT Broadcast Services Handbook, February 1997, at 11-40.

less than one-half of the price of COMSAT's comparable space segment service. Thus, at least with regard to the full-time and occasional video services for which the Networks are seeking direct access, it is not accurate for COMSAT to contend that substantial reductions in the space segment rate would not have a very direct beneficial effect on the overall rate.

### **III. THE COSTS COMSAT CLAIMS FOR ITSELF ARE UNSUPPORTED AND EXAGGERATED**

In its NPRM, the Commission asked COMSAT to provide support for its previous claims that its high mark-ups over the IUCs are required in order to allow COMSAT an opportunity to earn a fair return. The Notice pointed out that COMSAT claims its high mark-ups include recovery of operational expenses such as (a) signatory costs; (b) marketing/sales costs; (c) satellite insurance costs; (d) transactions costs; (e) operational costs; (f) regulatory compliance costs; and (g) taxes.<sup>42</sup> The Commission directed COMSAT to "specify the activities or transactions that give rise to these costs and the magnitude of these costs."<sup>43</sup> COMSAT also was requested to specify which of these costs it believes should be added to the IUC and how the costs it claims are recoverable should be allocated among the different INTELSAT services.<sup>44</sup>

Even though COMSAT filed over 300 pages in response to the Notice, it took a pass on the Commission's request that it provide specific cost information in support of the categories of expenses which comprise its mark-up and that it delineate specifically the activities which cause the costs to be incurred. In fact, COMSAT responded that it "has *not* attempted to

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<sup>42</sup> NPRM, at para. 47.

<sup>43</sup> NPRM, at para. 47.

<sup>44</sup> NPRM, at para. 47.

replicate the complicated analysis that would be legally required in order to ensure a direct access surcharge regime was fully compensatory.”<sup>45</sup> Instead, it performed what it characterized as “initial” calculations which it says show that a fully compensatory surcharge could range between 28-46%.<sup>46</sup>

The problem with COMSAT’s “initial” calculations is that they turn the Commission’s request for specific cost information on its head. Rather than providing specific information to support any of the various operating expenses, COMSAT simply calculates the amount of revenue it says it needs to receive returns comparable to various classes of carriers. COMSAT’s approach thus assumes it possesses an absolute entitlement to earn high returns, even if it loses business in a competitive environment to another entity for whatever reason *and* even if its own costs are unreasonable.<sup>47</sup>

COMSAT’s failure to provide the Commission with the requested cost information should not stand in the way of prompt implementation of Level 3 direct access. In their initial comments, the Networks urged the Commission not to allow this proceeding to be

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<sup>45</sup> COMSAT Comments, at 83. Emphasis in original.

<sup>46</sup> COMSAT Comments, at 83-84.

<sup>47</sup> Two examples illustrate why COMSAT may have chosen not to provide specific cost information. One of the expense categories identified by the Commission as comprising COMSAT’s markup is “marketing/sales costs.” COMSAT claims that it “does not generate its own traffic but provides space segment mostly to large retail carriers. . .” and that it “does not generate the vast majority of traffic it places on the INTELSAT system.” The Brattle Group, at 3 and 22. If this is true, its marketing/sales expenses should be *de minimis*. With regard to satellite insurance, in their initial comments the Networks questioned whether this item might not already be recovered in INTELSAT’s operating expenses. See Networks Comments, at 11. Although still not entirely clear, INTELSAT apparently now carries the full insurance load, even if COMSAT may have purchased “top off” insurance in the past. The Brattle Group, at 35.

turned into a rate case, and now that COMSAT itself has failed to produce the requested information, there is no evidentiary basis to move in that direction in any event. Instead, the Commission should declare that in the increasingly competitive environment in which COMSAT claims it operates, the Commission will not guarantee COMSAT's ability to recover operational costs, except perhaps those specifically associated with its official signatory functions.<sup>48</sup> Costs such as "marketing/sales," "operational," and "regulatory compliance" are largely within COMSAT's control and are, of course, faced by all providers operating in a competitive commercial market.

The comments of BT are helpful on this point. BT reports that following the implementation of direct access in Great Britain it:

does not incur any 'marketing/sales,' 'operations,' or 'transactional' costs or taxes in relation to the operations of direct access to INTELSAT customers, such as those that the Comsat Corporation ("Comsat") argues it would have to bear on behalf of U.S. direct access customers. BT also does not incur what Comsat has described as the costs of satellite launch and insurance. Thus, BT's actual experience in the direct access environment over the past four and one-half years is completely contrary to Comsat's assertion that direct access would result in increased regulatory and administrative costs.<sup>49</sup>

BT, the British signatory to INTELSAT, does not charge any mark-up over the

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<sup>48</sup> The Networks recognize that COMSAT's costs incurred in fulfilling its official signatory functions differ from the costs relating to COMSAT's commercial operations, and in order to speed conclusion of this proceeding they would be willing to have a modest surcharge added to the IUC rate for direct access customers to compensate COMSAT for signatory activities. The Networks emphasize, however, that the compensable expenses should be confined to official duties performed in a reasonable manner, and COMSAT should be required to provide specific support for such expenses, unlike the single line item it provides in the Boll Affidavit attached to its comments. See Ex. 4, p.1.

<sup>49</sup> BT North America Comments, at 5. (Internal citations omitted.)

IUC in its own prices to recover for signatory and carrier functions because “any such costs are difficult to identify as separate from BT’s own commercial undertaking and, are, in any case, inconsequential.”<sup>50</sup> Not only does BT not increase its own prices to its INTELSAT customers to recover the type of costs COMSAT claims comprise its high mark-ups, entities availing themselves of direct access are not assessed any surcharge to recover such costs.<sup>51</sup> In other words, “[n]o surcharges or other artificial mechanisms were put into place to cancel out the price reductions and restrain competition.”<sup>52</sup>

It is difficult to understand why COMSAT’s situation should be so radically different than BT’s. The Networks understand that COMSAT claims that BT earns substantial revenue through providing end user telecommunications services, which COMSAT claims BT can use to offset loss of space segment business, while COMSAT says it depends on the wholesale provision of INTELSAT access as its primary source of revenue.<sup>53</sup> Although BT traditionally has been vertically integrated and enjoyed a dominant position in providing end-to-end telecommunications services, that situation is changing. BT, like many INTELSAT signatories, faces increasing competition at home. And, here in the U.S., it is not clear why COMSAT itself is content to remain largely dependent on being a wholesale provider of

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<sup>50</sup> BT North America Comments, at 6.

<sup>51</sup> BT North America Comments, at 6. Significantly, even before direct access was implemented, users in Great Britain were able to order INTELSAT capacity directly through BT’s Signatory Affairs Office at the IUC rate, plus a 7% charge. This 7% surcharge was eliminated with the implementation of direct access.

<sup>52</sup> BT North America Comments, at 6. BT does not seek recovery of even its signatory costs from direct access users.

<sup>53</sup> COMSAT Comments, at 81.

INTELSAT access, rather than going out and competing for more end-to-end revenue by selling packages of space segment and earth station services.<sup>54</sup>

In sum, COMSAT's concern that it may lose business if direct access is implemented is quite natural. But the appropriate response is for COMSAT to compete for new business in the changing environment which has led the Commission to grant in significant part COMSAT's recent requests for regulatory relief. There is no need for the Commission to guarantee that COMSAT recover operational costs, except perhaps those modest costs specifically associated with its official signatory functions.

#### **IV. THE COMMISSION SHOULD REQUIRE SOME FORM OF FRESH LOOK**

Several of the commenters supporting implementation of direct access contend that the Commission also should implement "fresh look" and "portability" requirements.<sup>55</sup> "Fresh look" refers to a period after implementation of direct access during which COMSAT's space segment customers with existing long-term contracts would be allowed to renegotiate these contracts, and "portability" refers to a requirement that COMSAT transfer the INTELSAT capacity associated with a customer's long-term commitment so that the customer taking a "fresh

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<sup>54</sup> Indeed, the Commission recently granted COMSAT's request that it be allowed to provide earth station services and space segment services on an integrated basis. COMSAT Corp., 13 FCC Rcd 14083, 165-170. This change should allow COMSAT to garner more end user revenue if it wishes to compete in the end-to-end market segment.

<sup>55</sup> See, e.g., MCI WorldCom Comments, at 24-30; Sprint Comments, at 10-14; AT&T Comments, at 15.

look” realistically would have INTELSAT capacity available if it wants to switch to a competitor.<sup>56</sup>

Fresh look supporters point out that the Commission previously has applied the concept in situations in which it is implementing a policy change intended to subject a heretofore dominant service provider to new competition.<sup>57</sup> The rationale is simple: where a carrier with historic dominant market power has been in a position to “lock up” customers with long-term commitments, absent a “fresh look” period, the new market-opening policy won’t bear fruit, at least quickly.

While the Networks would not go so far as Sprint in saying that, absent fresh look, direct access would be “essentially meaningless,”<sup>58</sup> they do agree that, consistent with past Commission determinations, a reasonable fresh look period in this instance would serve the public interest. Obviously, the Commission must take into account COMSAT’s legitimate interests by not, for example, implementing a “fresh look” period that is unreasonably long. However, a properly-formulated fresh look policy would further the Commission’s pro-competitive goal in implementing direct access.

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<sup>56</sup> Because most of the commenters advocating “fresh look” also either explicitly or implicitly advocate portability, the Networks hereinafter will use “fresh look” in the sense to encompass both concepts.

<sup>57</sup> See, for example, the FCC decisions regarding 800 number portability and expanded interconnection opportunities discussed in detail by MCI WorldCom, at 26-27, and by Sprint, at 11-12.

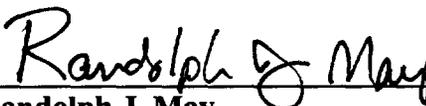
<sup>58</sup> Sprint Comments, at 13. Even without “fresh look,” those entities who are negotiating contracts for new service begin to receive the benefits of direct access as soon as it is implemented.

**V. CONCLUSION**

For the foregoing reasons, and the reasons contained in the Networks' initial comments, the Commission promptly should adopt its proposal to allow carriers and users to obtain Level 3 direct access to the INTELSAT system.

**Respectfully submitted,**

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