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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

To: The Commission

REPLY COMMENTS OF INTELSAT

INTRODUCTION AND SUMMARY

The International Telecommunications Satellite Organization ("INTELSAT") hereby replies to certain comments filed by PanAmSat Corporation on December 22, 1998, in the above-referenced rulemaking proceeding. Specifically, INTELSAT files this reply to correct the record with respect to: (1) the status of INTELSAT's immunities after the enactment of the International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998) (the "Anti-Bribery Act"); and (2) the Commission's authority to regulate INTELSAT as a provider of telecommunications services to, from, or within the United States.

Contrary to PanAmSat's assertions, INTELSAT's immunities remain intact. Also contrary to PanAmSat's claim, the Commission lacks the authority to regulate INTELSAT as it would any other

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carrier. In these Reply Comments, INTELSAT also responds to the FCC's inquiry about INTELSAT'S privatization efforts, by providing an update on the status of its restructuring and privatization activities.

BACKGROUND

INTELSAT, which owns and operates a global satellite system, acts as a wholesaler, providing services to end-users through the INTELSAT member in each country. Some member nations have chosen to authorize additional organizations to provide INTELSAT services within their countries, thereby permitting direct access to the INTELSAT space segment. INTELSAT takes no position as to whether a country, be it the United States or any other country, should adopt a direct access policy. In INTELSAT's view, that is a domestic issue. Accordingly, INTELSAT leaves it to each INTELSAT member nation to decide on the appropriate access arrangements for its specific regulatory and market goals.

In practice, INTELSAT accommodates the direct access arrangements of 90 INTELSAT member nations and duly authorized telecommunications entities that have introduced some level of direct access. The remainder of INTELSAT's 143 member nations do not have direct access arrangements. As noted above, INTELSAT accommodates both situations.

I. THE INTACT STATUS OF INTELSAT'S IMMUNITIES

Contrary to PanAmSat's assertions, Section 5(c) of the International Anti-Bribery and Fair Competition Act does not diminish or eliminate INTELSAT's immunities. When Congress enacted the Anti-Bribery Act, it preserved INTELSAT's immunities by directing that immunities "required by international agreements to which the United States is a party" be excepted from Section 5(c). Pub. L. No. 105-366 §5(c)(1). PanAmSat now claims that "Intelsat is fully subject to U.S. law when it provides commercial services to, from, or within the United States," because, inter alia "[t]here is no international agreement that gives Intelsat immunity for its commercial activities." Comments of PanAmSat at 8. PanAmSat's unsupported assertion clearly misapprehends the provisions of both the INTELSAT Agreement, 23 U.S.T. 3813, and the INTELSAT Headquarters Agreement, 28 U.S.T. 2248.

First, the INTELSAT Agreement specifically states that all of INTELSAT's activities, particularly its provision of space segment, are to be conducted "*on a commercial basis*." Art. III(a) (emphasis added). The Agreement then goes on to specify certain privileges and immunities to be granted by all Parties to INTELSAT, Art. XV(b). The Agreement further requires the United States, as Headquarters Party, to provide additional immunities, including immunity from legal process, under a Headquarters Agreement. Art. XV(a) and (c). PanAmSat's contention would effectively read Article XV out of the Agreement by denying

immunity for the very commercial activities that INTELSAT is mandated to conduct. It is impossible, as a matter of both plain meaning and well-settled principles of international law,[1] for PanAmSat's position to be sustained. The fact that INTELSAT provides commercial services, therefore, simply has no impact on INTELSAT's immunities.

Second, PanAmSat's argument that "no international agreement . . . gives INTELSAT immunity" (Comments of PanAmSat at 8) ignores the Headquarters Agreement. The INTELSAT Headquarters Agreement implementing Article XV(b) explicitly makes the archives of INTELSAT inviolable and fully protects INTELSAT's assets. Headquarters Agreement Art. 1. It would not be possible for the Commission to regulate INTELSAT's activities affecting the United States in the manner advocated by PanAmSat without both intruding into INTELSAT's archives and controlling INTELSAT's use of its assets. Both are prohibited under the Headquarters Agreement.

The conclusion that INTELSAT's immunities remain intact after the enactment of the Anti-Bribery Act is further reinforced by the legislative history to that bill. The legislative history of Section 5 of the International Anti-Bribery and Fair

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[1] The Vienna Convention on the Law of Treaties, Art. 31, makes the ordinary meaning of the text of a treaty the prime source of interpretation. Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF/39/27, 63 A.J.I.L. 875, 8 I.L.M. 679. The United States has not formally ratified the Vienna Convention but regards it as authoritative as a matter of conventional international law.

Competition Act expressly notes that the Act "does not compel the President to decertify INTELSAT . . . under the International Organization Immunities Act. . . ." Cong. Rec. October 21, 1998, S. 12974 (remarks of Senator Burns). The President's Executive Order designating INTELSAT as an international organization under the International Organization Immunities Act of 1945, 22 U.S.C. § 288 et seq.("IOIA"), specifically provides that INTELSAT shall be immune from suit and legal process.[2] The Commission must defer to the Executive branch's interpretation of Article XV of the INTELSAT Agreement, as embodied in the IOIA designation. That interpretation quite clearly refutes PanAmSat's contention.

In short, because INTELSAT's immunities derive from international agreements to which the United States is a party, PanAmSat errs when it argues that "Intelsat is fully subject to U.S. law. . . ." Because PanAmSat's argument that the Anti-Bribery Act eliminated INTELSAT's immunity is erroneous, INTELSAT does not need to address the mere fundamental -- and troubling -- question of whether any one nation can, by legislation, abrogate an international treaty.

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[2] Exec. Order No. 11966, 41 Fed. Reg. 4331 (1977). While arguments have been advanced that IOIA immunity extends only to non-commercial activities, no court has endorsed those arguments. See Randall-Speranza v. Nassim, 107 F.3d 913, 916 (D.C. Cir. 1997).

II. THE COMMISSION'S LACK OF AUTHORITY TO REGULATE INTELSAT LIKE ANY OTHER CARRIER

PanAmSat seeks to have the Commission regulate "Intelsat as it would any other similarly situated carrier providing services to, from, or within the United States." Comments of PanAmSat at 8. Specifically, PanAmSat contends that the Commission should require INTELSAT to "vie for orbital locations" with U.S. carriers, make INTELSAT subject to tariff regulation, and "otherwise require Intelsat to comply with all requirements of Titles II and III of the Communications Act." Id. Once again, however, PanAmSat's contentions are flatly inconsistent with the provisions of the INTELSAT Agreement to which the United States is bound.

INTELSAT does not use orbital locations or frequencies registered by the United States with the International Telecommunication Union ("ITU"), for use by U.S. operators under the "USA" designation. Rather, pursuant to Article X of the INTELSAT Agreement, INTELSAT's Board of Governors determines the organization's future need for orbital resources for the INTELSAT system. The United States participates in this process through its designated Signatory, Comsat, and the Commission plays its role in the Comsat instructional process. Once a Board decision is reached, the United States joins with other INTELSAT parties in registering orbital locations with the ITU for INTELSAT's exclusive use under the "USAIT" designation. Thus, INTELSAT does not and, indeed, cannot "vie" with U.S. operators for U.S.

orbital locations; and U.S. operators do not and cannot "vie" with INTELSAT for "USAIT" registrations.

In addition, PanAmSat is mistaken in characterizing INTELSAT as a carrier providing communications services. Under the INTELSAT Agreement, INTELSAT provides "the space segment required for international public telecommunications services," rather than the services themselves. Art. II, III(a). Article 15 of the INTELSAT Operating Agreement specifically provides that any allocation of INTELSAT space segment shall be to Signatories (or, in the case of "direct access," Signatory-authorized users). 23 U.S.T. 4091. "Services" using the INTELSAT system thus are provided by national entities like Comsat, not by INTELSAT. National services regulation can both achieve its legitimate ends and honor its appropriate boundaries by focusing on these *service-providing* entities.

III. INTELSAT'S PROGRESS ON RESTRUCTURING AND PRIVATIZATION

The Commission has asked for comments on the possible impact of the issues raised in this docket on INTELSAT's privatization. INTELSAT takes this opportunity to apprise the Commission that INTELSAT's 22nd Assembly of Parties, which met in Brazil last Spring, completed the first step of restructuring through the creation of New Skies Satellites N.V. The Assembly of Parties also noted with approval the Board of Governors' request that INTELSAT Management undertake an urgent review of further restructuring steps. Pursuant to that mandate, INTELSAT

Management and INTELSAT's Board of Governors are actively considering, on an accelerated basis, options for the continued restructuring and privatization of INTELSAT.

INTELSAT's restructuring program is driven by changing conditions in the international satellite market and the need to remain competitive. INTELSAT must respond to those changes in a manner that preserves and enhances the economic viability of INTELSAT's global service and that is sensitive to INTELSAT's obligations to all its members, including lifeline users. INTELSAT also is aware of, and attaches importance to, the interest of a number of INTELSAT Parties, including the United States, in prompt privatization. INTELSAT's restructuring and privatization activities thus will continue to proceed on an accelerated basis, in all circumstances.

CONCLUSION

For the reasons stated above, the Commission should reject PanAmSat's arguments that INTELSAT's immunities have been eliminated by the Anti-Bribery Act and that the Commission has the authority to regulate INTELSAT as it would any other carrier. While INTELSAT is actively and affirmatively moving forward with its restructuring and privatization activities, it remains at present an international organization with the privileges and immunities that adhere to such status.

Respectfully submitted,

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January 29, 1999