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January 29, 1999

VIA HAND DELIVERY

Magalie Roman Salas, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-A325
Washington, D.C. 20554

Re: Direct Access to the INTELSAT System
Comments of ICG Satellite Services, Inc.
IB Docket No. 98-192
File No. 60-SAT-ISP-97

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JAN 29 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Dear Ms. Salas:

On behalf of ICG Satellite Services, Inc., ("ICG") transmitted herewith is an original and ten (10) copies of ICG's reply comments in the above-referenced proceeding. This filing is being served on all parties to proceeding.

Please date-stamp the extra copy of this filing, and return it to us in the enclosed envelope. Should you have any questions with respect to this matter, please do not hesitate to contact the undersigned.

Respectfully submitted,



Eliot J. Greenwald
Tony S. Lee

Enclosures

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

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In the Matter of)

Direct Access to the)
INTELSAT System)

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) File No. 60-SAT-ISP-97
)
)

REPLY COMMENTS OF ICG SATELLITE SERVICES, INC.

I. INTRODUCTION

ICG Satellite Services, Inc. ("ICG"), by its attorneys and pursuant to the Federal Communications Commission's ("FCC's" or "Commission's") *Notice of Proposed Rulemaking* ("*NPRM*")¹ in the captioned proceeding, hereby submits its reply comments regarding the Commission's proposal to allow direct access to the International Telecommunications Satellite Organization ("INTELSAT") system. In its initial comments, ICG urged the Commission to permit Level 3 direct access, and suggested additional measures such as a "fresh look" period and retention of regulatory restrictions to promote a competitive marketplace. Comments filed by most interested parties mirrored ICG's suggestions. However, three parties submitted comments whose responses ICG believes to be antithetical to the Commission's goal of enhancing competition through direct access to the INTELSAT system. In particular, ICG addresses the comments filed in the instant proceeding by COMSAT Corporation ("COMSAT"), Lockheed Martin Corporation ("Lockheed Martin"), and Columbia Communications Corporation ("Columbia").

¹ *Direct Access to the INTELSAT System*, Notice of Proposed Rulemaking, IB Docket No. 98-192, FCC 98-280, released October 28, 1998 ("*NPRM*").

II. COMMENTS OF COMSAT CORPORATION

COMSAT's review of the regulatory, statutory, and constitutional framework governing COMSAT's participation in INTELSAT, while exhaustive, fails to provide any basis for the Commission to deny COMSAT's competitors to permit Level 3 direct access to INTELSAT. The issues raised by COMSAT have, for the most part, been well considered and properly dismissed by the Commission in order to provide the public the substantial competitive benefits of direct access. COMSAT's comments offer no justification for the Commission to deviate from its plan to grant direct access to INTELSAT.

Significantly, COMSAT's lengthy review of the legislative history surrounding the enactment of the Satellite Act cannot obscure the key fact, recognized by the Commission in the *NPRM*, that the Satellite Act does not specify that access to INTELSAT must be through COMSAT.² The Satellite Act states only that U.S. "participation in [INTELSAT] shall be in the form of a private corporation, subject to appropriate governmental regulation."³ It does not state that services must be provided through the private corporation, nor does it state that such corporation shall be the exclusive provider of such services. It merely states that the participation in INTELSAT shall be in the form of a private corporation.

² *NPRM* at ¶ 25.

³ 47 U.S.C. § 701(c).

The Commission's proposal to allow Level 3 direct access⁴ is therefore consistent with the statute because COMSAT would, as pointed out by the Commission, continue to be the only U.S. representative on the INTELSAT Board of Governors, and it would remain the sole U.S. entity that "participates" in INTELSAT activities that plan, initiate, construct, own, manage, and operate the satellite system in conjunction with other members of INTELSAT.⁵

Moreover, contrary to COMSAT's claims, the statute is not rendered meaningless if COMSAT's exclusive franchise is terminated. COMSAT's role as the original U.S. participant in INTELSAT and sole provider of international satellite services in the U.S. may have been appropriate at the nascent stage of the satellite industry present during which INTELSAT was founded. However, there is no basis for COMSAT's claim that Congress intended that COMSAT remain, in perpetuity, the sole gateway through which INTELSAT services could be obtained.

Indeed, the amendments to the Satellite Act made in 1978 clearly demonstrate that Congress will use specific language when it intends to grant exclusive authority to COMSAT. Congress appears to have specifically designated COMSAT as the sole operating entity of the United States for participation in INMARSAT for the purpose of providing international maritime satellite telecommunications services.⁶ There is no comparable language regarding the provision of

⁴ In its original comments, ICG also asserted that Level 4 direct access is needed because Level 4 direct access is already permitted in 17 countries. Such access is needed because Level 4 access enhances competition beyond Level 3 access because it permits companies to invest directly in INTELSAT, thereby obviating the need to pay a rate of return to COMSAT. Moreover, COMSAT subsidiaries are already permitted Level 4 access to INTELSAT in other countries, and therefore it enjoys an unfair competitive advantage over all other potential providers.

⁵ *NPRM* at ¶ 23.

⁶ 47 U.S.C. § 752(a)(1).

INTELSAT services by COMSAT. Accordingly, the "plain meaning" of the statute does not contain the requisite language which indicates congressional intent to grant sole access to INTELSAT by and through COMSAT.

Furthermore, Congressional intent to give COMSAT perpetual exclusivity cannot be deduced from Congress's mere assertion of the permissible activities of the private corporations it was chartering. That the Satellite Act explicitly authorizes COMSAT to "(1) plan, initiate, construct, own, manage, and operate . . . a commercial communications satellite system; (2) furnish, for hire, channels of communication to United States communications common carriers and to other authorized entities, foreign and domestic; and (3) own and operate satellite terminal stations when licensed by the Commission "⁷ does not establish a COMSAT "statutory right" to provide exclusive access to INTELSAT. This section of the Satellite Act also does not contain any language indicating that COMSAT has exclusive authority to provide INTELSAT services in the U.S. This portion of the Satellite Act merely grants COMSAT the ability to furnish communications services for hire, and it is noteworthy for the absence of any language which would convey monopoly status.

Similarly, the Commission and courts decisions cited by COMSAT as recognizing the "congressional mandate of exclusive access through COMSAT" are irrelevant to the key issue before the Commission.⁸ These cases did not address whether the Commission has authority to permit direct access to INTELSAT. Rather, "they merely recognized COMSAT's role as the U.S. participant in INTELSAT, and the fact that COMSAT is the only available means to access

⁷ See *Comments of Comsat*, p. 17; 47 U.S.C. §§ 735(a).

⁸ *Comments of COMSAT*, p. 14.

INTELSAT services in the United States."⁹ It is important to note that what these cases did not decide is the Commission's authority to modify the *status quo* in the future as circumstances dictate.

COMSAT's past reliance on direct access in raising capital in the early stages of INTELSAT does not justify continued exclusive access. Regardless of the possible merits of exclusive access in the past, now that INTELSAT has developed into a stable and mature system, and there are competing service providers, there can be no justification for this historic deviation from the Commission's established policy of relying on a competitive marketplace to promote telecommunication services in the public interest.

Nevertheless, COMSAT also argues that mandating Level 3 direct access would constitute a taking or a breach of a regulatory contract, which would obligate the government to pay compensation to COMSAT. COMSAT can hardly argue that there is a taking when it will continue to profit from its competitors even if they contract services directly through INTELSAT. Significantly, COMSAT's current ownership interest in INTELSAT will not be affected even after the implementation of direct access. Thus, COMSAT has no inherent right to enjoy monopoly profits at the expense of consumers. Furthermore, it is important to note that Level 3 or Level 4 access is available in 93 other countries. COMSAT cannot argue that it is in the interest of the United States to remain one of the last markets to restrict competition when direct access is already available in so many other areas of the world.

Moreover, the Commission has historically moved monopolized industries -- such as long distance telephony, cable television, and wireless mobile telecommunications -- into pro-competitive

⁹ *NPRM* at fn.84.

systems of regulation once it has become clear that market-based forces will create additional benefits for the consumer. Such actions have never been determined to be a compensable taking by the government. U.S. international satellite services is an industry that is ripe for such a transition, and thus the introduction of direct access to INTELSAT is necessary and appropriate to promote a competitive satellite services industry.

III. COMMENTS OF LOCKHEED MARTIN CORPORATION AND COLUMBIA COMMUNICATIONS CORPORATION

Lockheed Martin's role as the potential owner of COMSAT is the motivating factor responsible for its comments against direct access, especially since it will benefit from COMSAT's monopoly access to INTELSAT. Its comments support the privatization of INTELSAT in the name of competition, yet urge the FCC not to open the U.S. market to direct access on the premise that such pro-competitive efforts would provide uncertain, and at best short-lived, benefits.¹⁰ The arguments Lockheed Martin advances in support of these contentions cannot be substantiated by the current record.

It is obviously disingenuous for Lockheed Martin to assert that there is no intuitive connection between direct access and the promotion of competition in international telecommunications.¹¹ Direct access would put COMSAT in competition with INTELSAT itself, forcing COMSAT to lower its rates to be more in line with those that can be purchased directly from INTELSAT. Furthermore, direct access will enable companies to implement new service offerings,

¹⁰ *Id.* at 4.

¹¹ *Id.* at 3.

which previously may not have been cost effective given the need to contract INTELSAT services through COMSAT.

Lockheed Martin's comments defy logic in predicting the conclusions that also state that any benefits derived from direct access would be, at best, very short lived. It states that in all of the proceedings on direct access stretching back over the last 16 years, it was never demonstrated that the institution of a policy of direct access by INTELSAT would lead to a reduction in the charges that are paid by U.S. end-users. Even if true, which can be disputed, this observation is meaningless because in the entire history of the direct access proceedings, direct access has never been implemented in the U.S. Therefore, there has been no opportunity through a "real-life" trial period to show that direct access leads to a reduction in charges.

Moreover, in fact copious evidence does exist which demonstrates that direct access would indeed lead to a decrease in end-user rates. As set forth in Appendix B of the Commission's *NPRM*, COMSAT's user rates are anywhere from one-and-a-half to almost four times those charged by INTELSAT for Level 3 access. It is self-evident that the implementation of direct access will force COMSAT to lower its rates to comport with INTELSAT's rates. Otherwise, COMSAT would risk losing a large portion of its customer base to INTELSAT itself, as well as to other competitors that can bring out new and better service offerings through direct access.

Furthermore, the advent of direct access would create competition for COMSAT in the provision of services through INTELSAT, and force COMSAT to become more competitive in markets where it is beginning to feel the heat of competition. In addition, as previously discussed in ICG's comments, competition in other telecommunications industries, such as wireless telephony

and long distance telephone service, demonstrates that competition in previously monopolized areas will result in better service and lower rates to the end-user.

As a final argument, Lockheed Martin, as well as Columbia,¹² warns that the Commission's adoption of direct access could undermine efforts to privatize INTELSAT, and that the Commission should permit INTELSAT to have direct access to the U.S. market only if such access helps to secure the pro-competitive restructuring of INTELSAT. The privatization of INTELSAT is a wholly separate issue that can be accomplished without injecting it into the direct access debate. This issue was addressed in legislation proposed, but not passed, the previous session of Congress. The bill required, among other things, that the administration eliminate certain privileges and immunities enjoyed by INTELSAT. Last minute changes prevented passage of the bill. The debate regarding the privatization of INTELSAT, however, is still alive and being actively pursued. Therefore, the privatization issue need not delay the implementation of direct access.

Regardless of the INTELSAT privatization issues, it is clear that direct access increases users options. As with other telecommunications services that had little or no competition (such as long distance telephony), the introduction of competition ultimately benefitted the consumer through lower rates and new and more efficient service offerings. International satellite services will similarly benefit from the competition that will develop through the introduction of direct access.

¹² Columbia is one of only three U.S.-based international satellite operators that compete directly with INTELSAT in the international fixed-satellite service market. It is interesting to note that Columbia, like Lockheed Martin stands to benefit if market players are forced to sit on the sidelines while waiting for the advent of direct access to bring true competition to the U.S. international satellite marketplace. Should direct access not be permitted to INTELSAT, COMSAT will be able to continue to charge monopoly rates for satellite services. Similarly, Columbia will be able to continue to charge higher rates for satellites services. These rates would likely have to be reduced in order to compete against the considerably cheaper direct access rates.

Delays to consider privatization issues serve only to hinder the movement in that direction, thus forestalling the promotion of competition while preserving COMSAT's monopoly status. Direct access and privatization may be conflicting approaches to promoting competition, but each can be effective independently of each other. Postponing the enactment of direct access to consider privatization issues which are already being taken up elsewhere unnecessarily delays the introduction of competition in a monopolized industry, and does not advance the public interest.

IV. CONCLUSION

WHEREFORE, for the reasons discussed herein, ICG Satellite Services, Inc., urges the Commission to adopt rules to implement direct access to the INTELSAT system, including the regulatory procedures necessary to ensure a competitive marketplace, as set forth in its original comments in the instant proceeding.

Respectfully submitted,

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