

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

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of

Direct Access to the INTELSAT System

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

To: The Commission

**SUPPLEMENTAL COMMENTS OF WORLDCOM, INC.
ON LIMITED PETITION FOR RECONSIDERATION**

WorldCom, Inc. ("WorldCom")¹ submits these supplemental comments regarding the Petition for Limited Reconsideration that it filed in this proceeding on November 8, 1999. In that petition, WorldCom sought a recalculation of the direct access surcharge established in the Direct Access Order.² By these Supplemental Comments, WorldCom requests that the Commission eliminate the authority of COMSAT Corporation ("COMSAT") to collect a direct access surcharge, because the legal basis for the direct access surcharge was eliminated by the Open-Market Reorganization for the Betterment of International Telecommunications Act

¹ Effective May 1, 2000, MCI WorldCom, Inc. changed its name to WorldCom, Inc.

² Direct Access to the INTELSAT System, FCC 99-236, IB Docket No. 98-192, ¶¶ 51-73 (rel. Sept. 16, 1999) ("Direct Access Order").

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(“ORBIT Act”).³ Moreover, the Commission recently stated explicitly that it would consider this issue in the context of petitions for reconsideration of the Direct Access Order.⁴

In the ORBIT Act, Congress explicitly mandated Level 3 direct access to INTELSAT:

Beginning on the date of enactment of this title users or providers of telecommunications services shall be permitted to obtain direct access to INTELSAT telecommunications services and space segment capacity through purchases of such capacity or services from INTELSAT. Such direct access shall be at the level commonly referred to by INTELSAT, on the date of enactment of this title, as “Level III”.⁵

Significantly, the ORBIT Act mandated direct access without authorizing a direct access surcharge, as the Commission recently recognized in the BT Waiver Order:

The ORBIT Act ... does not legislate all aspects of the Commission’s *Direct Access* decision – including the requirement that direct access customers pay Comsat a surcharge and the restriction on foreign signatory direct access in the U.S. market. ... Provisions similar to these conditions appeared in previous bills passed by either the House or the Senate. The ORBIT Act mandates Level 3 direct access as implemented by INTELSAT without imposing any conditions.⁶

³ Pub. L. 106-180, 114 Stat. 48 (2000).

⁴ BT North America Petition for Waiver of Direct Access to INTELSAT System Restriction, FCC 00-166, IB Docket No. 98-192, ¶ 1 n.2 (rel. May 16, 2000) (“BT Waiver Order”).

⁵ 47 U.S.C. § 765(a) (as added by § 3 of ORBIT Act).

⁶ BT Waiver Order, ¶ 1 n.2.

Thus, the Commission has recognized that it lacks authority to permit, and COMSAT lacks authority to collect, a tariff-based surcharge on direct access, as initially authorized by the Direct Access Order⁷ – which was adopted before the ORBIT Act.

The analysis of the ORBIT Act in the BT Waiver Order is entirely accurate. In the Direct Access Order, there were four substantive matters at issue: (1) whether to implement direct access,⁸ (2) whether to implement a direct access surcharge and the amount thereof,⁹ (3) “fresh look” at COMSAT contracts for INTELSAT services,¹⁰ and (4) portability of INTELSAT capacity.¹¹ In the ORBIT Act, Congress addressed three of these four issues – by (1) mandating direct access,¹² (2) rejecting “fresh look,”¹³ and (3) requiring the FCC to initiate a proceeding regarding portability¹⁴ – but was silent on the direct access surcharge.

This silence is highly significant, particularly because, as the Commission noted in the BT Waiver Order, recent House and Senate satellite legislation that was ultimately superseded by the ORBIT Act explicitly addressed the surcharge issue. H.R. 1872, which was passed by the House of Representatives in 1998, would have permitted direct access only after:

⁷ See Direct Access Order, ¶¶ 210-213.

⁸ Id., ¶¶ 20-50, 94-116, 129-200.

⁹ Id., ¶¶ 51-93.

¹⁰ Id., ¶¶ 117-125.

¹¹ Id., ¶¶ 126-128.

¹² 47 U.S.C. § 765(a) (as added by § 3 of ORBIT Act).

¹³ 47 U.S.C. § 765(c) (as added by § 3 of ORBIT Act).

¹⁴ 47 U.S.C. § 765(b) (as added by § 3 of ORBIT Act).

INTELSAT has adopted a usage charge mechanism that ensures fair compensation to signatories for support costs that such signatories would not otherwise be able to avoid under a direct access regime, such as insurance, administrative and other operations and maintenance expenditures¹⁵

Likewise, the version of the ORBIT Act originally passed by the Senate provided that “[n]o satellite operator shall acquire or enjoy the exclusive right of handling traffic to or from the United States,”¹⁶ but contained an explicit exception to enforcement of this requirement – *i.e.*, that “the Commission ... shall not require the termination of existing satellite telecommunications services under ... tariff commitment”¹⁷ This exception apparently would have prohibited the Commission from eliminating COMSAT’s tariffed direct access surcharge. But there is no such language in the version of the ORBIT Act ultimately passed by Congress. That is, Congress did not simply passively fail to endorse Commission’s direct access surcharge, but took affirmative action to eliminate statutory language in the Senate bill that would have endorsed the surcharge.

Under established principles of statutory construction, Congress’ decision to remove authority for a direct access surcharge from the ORBIT Act bars imposition of such a surcharge by the Commission. For example, in Trevan v. Office of Personnel Management, 69 F.3d 520 (Fed. Cir. 1995), the Federal Circuit Court of Appeals held that a disability finding under the Social Security Act does not require a disability finding under the Federal Employees Retirement System (“FERS”) Act, because the FERS Act as enacted omitted an explicit

¹⁵ H.R. 1872, 105th Cong., § 3 (adding proposed § 641(1)(A)(i) to Communication Act).

¹⁶ S. 376, 106th Cong., § 4 (adding proposed § 635(a) to Communication Act).

¹⁷ Id. (adding proposed § 635(b) to Communication Act).

provision in an earlier version of the legislation that would have established such a linkage. Id. at 525-26. The court stated: “[W]e must enforce the statute as written and are not free to ignore what appears to have been a conscious choice of Congress” Id. at 526. Similarly, the Supreme Court has repeated a closely-related point:

[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.¹⁸

As the Federal Circuit recognized in Trevan, the same interpretive analysis applies where Congress includes language in a bill, but omits it in enacted legislation.

Moreover, under the Communications Act, tariffs must be filed by a carrier with respect to certain “interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system [and other points].”¹⁹ However, the Communications Act provides no authority for a tariff like COMSAT’s direct access surcharge tariff, which relates to services that COMSAT has no role in providing. Indeed, COMSAT’s direct access surcharge tariff explicitly states: “COMSAT is not a party to the furnishing of service under this tariff.”²⁰ WorldCom is not aware of any other Commission tariff filed by a carrier that is neither the facilities-based provider nor the reseller of the services covered by the tariff. While such a tariff might conceivably have been justified prior to the

¹⁸ Bates v. United States, 522 U.S. 23, 29-30 (1997) (citations omitted to two previous Supreme Court cases containing identical language).

¹⁹ 47 U.S.C. § 203(a).

²⁰ COMSAT Corporation – COMSAT World Systems Tariff F.C.C. No. 4, § 1.3 (Feb, 15, 2000).

ORBIT Act, the specific mandate of the ORBIT Act to allow direct access without any associated conditions plainly vitiates the legal basis for the tariff.

Under the ORBIT Act, the terms of direct access service are strictly a matter of private contract between INTELSAT and customers like WorldCom, and the Commission has consistently concluded that it lacks jurisdiction over such matters. As the Supreme Court has noted, “[t]he Commission has said frequently that controversies as to rights between licensees and others are outside the ambit of its powers.”²¹ This principle is equally applicable in the present case.

Finally, elimination of the direct access surcharge would not work any unreasonable financial hardship on COMSAT. First, as the Commission concluded in the direct access order, COMSAT already enjoys “a reasonable rate of return” from its investments in INTELSAT.²² COMSAT’s decision to increase its investment share in INTELSAT in 1999 and

²¹ Regents of the University System of Georgia v. Carroll, 338 U.S. 586, 602 (1950); see also, e.g., United Tel. Co. of Carolinas, Inc. v. FCC, 559 F.2d 720, 723 (D.C. Cir. 1977) (“The purpose of the [Communications] Act is to protect the public interest rather than to provide a forum for the settlement of private disputes.”).

²² Direct Access Order, ¶ 84.

again in 2000 demonstrates the attractiveness of this return.²³ Second, no direct access surcharge is assessed in a significant number of foreign countries where direct access is available.²⁴

For the reasons set forth above, WorldCom requests that the Commission reconsider the Direct Access Order by eliminating the authority of COMSAT to collect a direct access surcharge and allowing U.S. users to deal with INTELSAT on a private contractual basis. Furthermore, because the direct access surcharge tariff has been without legal basis since the enactment of the ORBIT Act, the Commission should order COMSAT to refund to direct access

²³ See COMSAT Increases Ownership Share in INTELSAT, available at http://www.comsat.com/news/archive_set.htm (Mar. 24, 2000) (press release) (announcing increase in COMSAT ownership of INTELSAT by 2.1%, to 22.5%, and quoting president of COMSAT as stating: “For COMSAT, an increased share in INTELSAT is a sound strategic investment that makes good business sense.”); Direct Access Order, ¶ 76 (quoting president of COMSAT regarding 1999 increase in INTELSAT ownership: “Comsat’s increased share in INTELSAT makes good business sense, and the corporation expects to see a strong return on this investment.”), ¶ 79 (“[W]e agree that Comsat’s election to have excess investment in INTELSAT demonstrates, at least to some degree, the attractiveness of IUC-based returns.”).

²⁴ See Direct Access Order, ¶ 82 (noting that there is no surcharge in Canada, Chile, France, Germany, the Netherlands, or the UK).

customers all surcharge payments that COMSAT has received with respect to direct access services provided on or after the effective date of the ORBIT Act (*i.e.*, March 17, 2000).

Respectfully submitted,

/s/ Robert S. Koppel

Alfred M. Mamlet
Maury D. Shenk
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 429-3000

Robert S. Koppel
WorldCom, Inc.
1801 Pennsylvania Ave, N.W.
Washington, D.C. 20006
(202) 887-2248

Counsel to WorldCom, Inc.

Dated: June 20, 2000

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of June, 2000, a true and correct copy of the foregoing SUPPLEMENTAL COMMENTS OF WORLDCOM, INC. ON LIMITED PETITION FOR RECONSIDERATION was served via hand-delivery (except where indicated) upon the following:

Don Abelson
Chief, International Bureau
Federal Communications Commission
The Portals – Rm. 6-B722
445 12th Street, S.W.
Washington, D.C. 20554

Douglas Webbink
Federal Communications Commission
The Portals – Rm. 6-C730
445 12th Street, S.W.
Washington, D.C. 20554

Ari Fitzgerald
Office of Chairman Kennard
Federal Communications Commission
The Portals – Rm. 8-B201
445 12th Street, S.W.
Washington, D.C. 20554

*Lawrence J. Lafaro
Teresa Marrero
AT&T Corporation
295 N. Maple Avenue
Basking Ridge, NJ 07920

Peter Pappas
International Bureau
Federal Communications Commission
The Portals – Rm. 6-C716
445 12th Street, S.W.
Washington, D.C. 20554

*Warren Y. Zeger
Howard D. Polsky
Keith H. Fagan
COMSAT Corporation
6560 Rock Spring Drive
Bethesda, Maryland 20817

James Ball
Federal Communications Commission
The Portals – Rm. 6-C749
445 12th Street, S.W.
Washington, D.C. 20554

*Kent Nakamura
James W. Hedlund
Sprint Communications Company LP
401 9th Street, N.W.
Washington, D.C. 20004

Cathy Hsu
Federal Communications Commission
The Portals – Rm. 6-C804
445 12th Street, S.W.
Washington, D.C. 20554

*Richard E. Wiley
Lawrence W. Secret III
Rosemary C. Harold
Martha E. Heller
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Michael McCoin
Federal Communications Commission
The Portals – Rm. 6-B510
445 12th Street, S.W.
Washington, D.C. 20554

*Delivered by first-class mail, postage prepaid



Karen J. Pettapiece