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

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In the Matter of	)	
	)	
Availability of INTELSAT Space Segment Capacity to Users and Service Providers Seeking to Access INTELSAT Directly	)	IB Docket No. 00-91

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RESPONSE OF
LOCKHEED MARTIN CORPORATION

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SUMMARY

The record in this proceeding shows that the only action the Commission should take to address INTELSAT capacity issues is to encourage the prompt deployment of INTELSAT's next generation of satellites. The record does not support adoption of any of the other "remedies" proposed by commenters whose sole purpose in this proceeding is to secure extraordinary and unwarranted government intervention in commercial transactions.

Lockheed Martin's initial comments described the analytic framework established by the ORBIT Act for this proceeding. Under that framework, the Commission must first analyze whether there is sufficient opportunity for direct access to INTELSAT capacity. If such opportunity does exist, no further action is required or permitted. If sufficient opportunity to access INTELSAT directly does not exist, then the Commission must determine the cause of any capacity constraints. Other than steps the Commission might take to increase the underlying capacity of the INTELSAT system itself, the Commission should take "appropriate action" to facilitate direct access through regulatory action only if a capacity shortfall results from unreasonable behavior by COMSAT, and only *after* directing the commercial parties toward commercial negotiations as the means to resolve business issues between COMSAT and its customers.

The comments and reply comments show that there is no basis for Commission action in this proceeding. Many carriers and other users are currently directly accessing INTELSAT capacity, which supports a finding that sufficient opportunity for direct access does already exist. The only party that complains that any of its requests have been denied is WorldCom, which has flooded INTELSAT with hundreds of direct access requests. While there are currently some

INTELSAT capacity constraints, they will be alleviated as INTELSAT deploys new replacement and additional satellites.

At the same time, COMSAT uses virtually all of the capacity it has contracted for with INTELSAT, and its reservations of future capacity are consistent with its legitimate business needs. Moreover, in the short time since direct access was implemented, COMSAT has relinquished more FRRs than it has exercised, showing that it does not warehouse capacity.

If the Commission finds there are capacity constraints, the best course would be to eliminate those constraints by ensuring that INTELSAT will be able to deploy its planned satellites. To the extent the Commission determines that any other action may be necessary, it should encourage normal commercial negotiations to address complaints about access to INTELSAT capacity.

Other proposals, such as Commission intervention that directs COMSAT to relinquish reservations or to sell capacity to third parties with only a two percent "management fee," are wholly unwarranted and are impermissible as they would violate Section 641(c)'s prohibition on abrogation or modification of contracts. The Commission also should disregard proposals for fishing expeditions into COMSAT's capacity usage and reservations, and should avoid second-guessing legitimate business decisions made by COMSAT in the early 1990s, as proposed by one commenter.

Finally, all parties agree that the Commission should not use this proceeding to scrutinize INTELSAT's post-privatization business arrangements. Those issues are best addressed in the context of INTELSAT's privatization negotiations, where they already are being considered.

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Availability of INTELSAT Space Segment Capacity to Users and Service Providers Seeking to Access INTELSAT Directly	)	IB Docket No. 00-91

RESPONSE OF
LOCKHEED MARTIN CORPORATION

Lockheed Martin Corporation ("Lockheed Martin") hereby submits its response in the above-referenced proceeding.[1] As described in more detail below, the record in this proceeding establishes that there is sufficient opportunity for users and service providers to obtain direct access to INTELSAT space segment capacity. Moreover, to the extent that the capacity to which they have access is limited, the limitations result from a normal, market-driven, albeit temporary, imbalance between U.S. demand and the finite supply of INTELSAT capacity. Consequently, except for actions that it may take to encourage an increase in the absolute volume of INTELSAT capacity, there is no basis for Commission regulatory intervention at all, let alone for the Commission to interpose itself between the parties to INTELSAT capacity transactions. Rather, the Commission should terminate this proceeding without any further action.

[1] Availability of INTELSAT Space Segment Capacity to Users and Service Providers Seeking to Access INTELSAT Directly, *Notice of Proposed Rulemaking,* IB Docket No. 00-91, FCC 00-186 (rel. May 24, 2000) (the *"Notice"*).

I. Introduction

Lockheed Martin's initial comments addressed the statutory framework for the FCC analysis of direct access issues required by Section 641(b) of the Satellite Act.[2] Under that framework, the Commission's primary task is to determine whether there is sufficient opportunity to obtain direct access to INTELSAT capacity. If so, the Commission's inquiry is at an end. If the Commission were to decide that sufficient opportunity to access INTELSAT capacity directly does not exist, it would first be required to determine the cause of any shortfall. Only if a shortfall results from unreasonable behavior by COMSAT would the Commission be warranted to take any "appropriate action" to facilitate direct access, except those actions the Commission could take to increase the underlying capacity of the INTELSAT satellite system itself. As recognized in the *Notice*, the Commission should very strongly encourage commercial negotiations as the means to resolve any issues between COMSAT and its customers arising out of the current market-driven capacity constraints.[3] Regulatory intervention would be "appropriate" only if a user could demonstrate that COMSAT has acted in a commercially unreasonable and anti-competitive manner to deny a user access to capacity that is unique to the user's requirements and that the user's good faith efforts to secure such access through commercial negotiations have failed.[4] In any event, the Commission's authority to adopt regulatory measures is limited by the Satellite Act's prohibition on the abrogation or modification of any contract.[5] Indeed, nothing in Section 641 suggests that any pre-existing

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[2] *See generally* Comments of Lockheed Martin Corporation, Availability of INTELSAT Space Segment Capacity to Users and Service Providers Seeking to Access INTELSAT Directly, IB Docket No. 00-91 (filed June 23, 2000).

[3] *Notice*, ¶ 25.

[4] *Id.*, ¶ 27.

[5] 47 U.S.C. § 641(c).

relationship between COMSAT and INTELSAT or COMSAT and its customers should be affected by the Commission's actions or, more broadly, is suspect in any way.

When the comments are analyzed under this framework, it is evident that the Commission need not take any further action to facilitate direct access in the United States, and certainly should not provide any opportunity for the few COMSAT customers who even bothered to comment in this proceeding to pursue extraordinary government intervention in their business dealings with a supplier. In particular, COMSAT's comments show that the prerequisites for Commission intervention do not exist. Specifically:

- INTELSAT is fulfilling a growing number of requests for direct access from a variety of direct access customers.
- Any constraint on INTELSAT capacity that serves the United States is merely a result of high demand for INTELSAT services on U.S. routes.
- COMSAT uses more than 97 percent of the capacity it obtains from INTELSAT to meet existing customer needs.
- COMSAT routinely reserves INTELSAT capacity only to meet customer requirements.
- Since the advent of direct access, COMSAT has relinquished more "automatic FRRs" than it has exercised and has exercised only those that reflected a firm customer commitment.

The increasing amount of available capacity for direct access in the United States and COMSAT's own measured approach to reserving INTELSAT capacity demonstrate that there is sufficient and expanding opportunity to access INTELSAT directly. Even if the Commission were to conclude that there is insufficient capacity available to direct access users of INTELSAT capacity right now, it would be unable to conclude that COMSAT is responsible for that condition because COMSAT's commercial practices have been entirely appropriate and plainly are intended to ensure only that it can serve its customers. In either case, there is no basis for the Commission to consider further action in this proceeding.

If, nevertheless, the Commission believes it should take some action in this proceeding, it should first focus serious attention on actions that are within its authority to encourage an increase in overall INTELSAT capacity.[6] Secondarily, it should make every effort to encourage commercial negotiations to resolve any complaints arising out of current capacity constraints. The "remedies" proposed by ATC Teleports ("ATC"), Cable & Wireless and Sprint/WorldCom are unwarranted and must be rejected. These proposals essentially require COMSAT to relinquish INTELSAT capacity any time a direct access customer wants it, regardless of whether that capacity would otherwise be used to meet the needs of COMSAT's customers. Not only would such proposals violate Section 641(c)'s ban on abrogation of contracts, but they would unfairly harm COMSAT and its customers. In addition, the Satellite User Coalition ("SUC") proposal amounts to nothing more than mandatory rate prescription. Therefore, rather than considering any of the ill-conceived remedies of the commenters, the Commission should, as contemplated by both the *Notice* and the *Direct Access Order*, direct the commercial parties to normal business negotiations as the means to address any complaints or issues that might arise.

Finally, all parties that commented on INTELSAT's post-privatization distribution arrangements agreed that the Commission should not consider this issue in the current proceeding. Instead, the Commission should rely on the ongoing diplomatic process and negotiations within INTELSAT to ensure that appropriate distribution arrangements are adopted.

[6] Indeed, several commenters note that increases in INTELSAT's physical capacity will be beneficial. *See, e.g.*, ATC Reply Comments at 5.

II. The Comments Show That There Is No Need for Commission Intervention in the Direct Access Process

A. Parties Seeking Direct Access Have Sufficient Opportunity to Obtain Capacity from INTELSAT.

The primary inquiry in this proceeding is whether U.S. users and service providers have sufficient opportunity to obtain direct access to INTELSAT capacity. As described in Lockheed Martin's comments, practical considerations are central to the Section 641(b) inquiry. The Commission must recognize not only that current INTELSAT capacity is finite, but that COMSAT and other existing users of INTELSAT are entitled contractually to the capacity they use to serve their customers.[7]

The information provided by COMSAT demonstrates that there is adequate and expanding opportunity for customers to obtain direct access to INTELSAT from the United States. COMSAT showed that both the number of U.S. direct access customers and the available direct access capacity have been increasing steadily since the implementation of direct access just over six months ago in December, 1999. Both carriers and end users have obtained capacity directly from INTELSAT, both for occasional use and pursuant to capacity leases that run as long as ten years.[8] This increasing usage is occurring even though there is currently a shortage of unused INTELSAT capacity able to serve the United States.

Despite the many direct access requests that have been satisfied by INTELSAT, clearly INTELSAT was unable to meet some requests for direct access.[9] Indeed, COMSAT itself has

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[7] 47 U.S.C. § 641(b); *see also* Lockheed Martin Comments at 7-9.

[8] *See* Comments of COMSAT Corporation ("COMSAT Comments") at 3-5. Of course, these direct access users have the same rights to make reservations as COMSAT, so they can, among other things, renew their long term leases.

[9] *See* Comments of Sprint Communications Company, L.P. and WorldCom, Inc. ("Sprint/WorldCom Comments") at 8-9.

had many requests for capacity denied by INTELSAT.[10] As acknowledged by the Commission, almost all of INTELSAT's capacity that can serve the United States already is in use, whether by COMSAT, foreign Signatories or foreign or U.S. direct access users.[11] Given this evidence of very strong demand for INTELSAT capacity and the ample alternative ways to carry most international traffic, it would be unreasonable to expect INTELSAT to have the capacity to meet all potential international communications needs.[12] Indeed, the only commenter that complains that it cannot obtain all the INTELSAT capacity it wants is WorldCom, and it appears that WorldCom has requested more capacity than all other U.S. direct access customers combined. Given WorldCom's unique role in the political maneuvering on direct access-related issues, it becomes questionable whether WorldCom had any genuine expectation that it would receive more than a fraction of the huge number of capacity requests it submitted. Rather, it appears that WorldCom has inundated INTELSAT with requests for direct access in an apparent effort to bolster its determined drive for government-imposed satisfaction of its complaints in this proceeding, which coincidentally it refers to as the "portability" rulemaking. Thus, the Sprint/WorldCom claim that "undisputed evidence" shows there is insufficient opportunity to access INTELSAT is contradicted squarely by the evidence of record.[13]

In sum, the direct access process is working as well as can be expected in light of the burgeoning demand for INTELSAT's finite capacity and the very short time since direct access

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[10] COMSAT Comments at 5-6. The Sprint/WorldCom Reply Comments say that INTELSAT's denial of COMSAT's requests should be ignored because WorldCom has had more requests denied. Sprint/WorldCom Reply Comments at 8. What this fact shows, however, is that COMSAT is being treated like all other INTELSAT customers and that any inability to obtain access relates solely to capacity constraints, not COMSAT's actions.

[11] *Notice*, ¶ 18.

[12] Sprint/WorldCom Comments at 4-5 (acknowledging "continued growth" of fiber optic cable and non-INTELSAT satellite capacity).

[13] Sprint/WorldCom Reply Comments at 4.

was implemented. Carriers and other users are obtaining capacity directly from INTELSAT at a steadily-increasing rate and there is no evidence that unique customer needs are not being met. On that basis alone, the Commission can conclude, consistent with Section 641(b), that no action is necessary or appropriate, except actions that enable INTELSAT to expand its overall satellite capacity.

B. Any Capacity Constraints Are Caused by Practical Limits on INTELSAT Capacity Rather Than by Actions of COMSAT

To the extent that INTELSAT capacity constraints result from strong market demand, the Commission may inquire as to whether capacity held by COMSAT is being used for legitimate business purposes, that is, to serve its customers. COMSAT's comments firmly establish that it does not reserve capacity to deny the benefits of direct access to others, and holds no excess capacity that could be "freed up" for direct access purposes. Thus, not only is there no basis for the Commission to act, but regulatory steps that could reduce COMSAT's access to INTELSAT would harm both COMSAT and its customer base.

1. COMSAT Holds and Has Reserved Only the Capacity It Needs to Serve Its Customers.

COMSAT's comments show that "virtually all of the capacity COMSAT has procured from INTELSAT is being used by U.S. customers."[14] Of the capacity currently held by COMSAT, more than 97 percent is actually in use to serve existing customers in the United States.[15] Thus, there is almost no unused INTELSAT capacity in COMSAT's inventory. Forcing COMSAT to relinquish any of its capacity would, in essence, require COMSAT to deny service to existing and potential customers. This would cause significant disruption and hardship

[14] COMSAT Comments at 15.

[15] COMSAT's comments show that 97.4 percent of COMSAT's total committed Standardized Circuit capacity is in use operationally, and that 97.6 percent of COMSAT's bulk capacity has been leased to customers. *Id.* at 15-16.

to both COMSAT and its customers and is not a result contemplated by Congress when it enacted the ORBIT Act.

In addition, COMSAT showed that capacity reservations are made only to serve its customer needs. As the COMSAT comments explain, COMSAT obtains automatic first refusal rights ("FRRs") to accommodate the rights of its customers to renew their long term contracts, and has a policy of exercising those rights only if it has a firm capacity commitment.[16] Indeed, since the *Direct Access Order* was implemented, COMSAT has relinquished a greater number of bulk capacity lease rights than it has exercised and has exercised only those FRRs for bulk capacity leases that reflected a firm commitment from a customer.[17]

No party provided any evidence to contradict COMSAT's showing regarding its use and reservation of INTELSAT capacity. Instead, the other commenters speculate about COMSAT's "warehousing" of capacity and urge the Commission to seek additional information from COMSAT.[18] The facts, however, show that there is no basis for any claim that COMSAT is not using its capacity, and certainly no warrant for a fishing expedition into COMSAT's capacity acquisition practices. COMSAT has provided ample evidence to prove that its use and reservation of INTELSAT capacity is based solely on commercial needs. Suggestions to the

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[16] *Id.* at 17.

[17] *Id.* at 18. These facts demonstrate that no "circumvention" of the direct access requirements of Section 641 is taking place.

[18] *See, e.g.,* Cable & Wireless Comments at 10 (suggesting that COMSAT may claim it is holding capacity for its own use). Cable & Wireless also suggests that COMSAT somehow has an advantage because INTELSAT allocates capacity on a first-come, first-served basis. *Id.* at 5-7. There is no basis for this claim. As a practical matter, all carriers allocate their capacity in this way, and the Commission long ago established that first-come, first-served allocation is appropriate. *See* Lockheed Martin Comments at 8 n.26. In addition, COMSAT never has had exclusive rights to INTELSAT capacity capable of serving the United States, but has had to compete with foreign Signatories and direct access users from other Western Hemisphere countries to get its capacity. Even if COMSAT did have some current advantage from being first in line, that advantage would disappear as its contracts expire and are not renewed and as INTELSAT capacity increases. *See infra* Part II(D).

contrary by WorldCom and Cable and Wireless, both of which are affiliated with Signatories and should understand the reservation processes, are at best disingenuous.

2. COMSAT Is Not Hoarding Capacity on the INTELSAT System.

COMSAT's comments show that it is not acting to hoard capacity on the INTELSAT system. Moreover, INTELSAT policies adopted in late 1999 make it very difficult for *any* INTELSAT Signatory or direct access user to hoard space segment capacity.

As described above, COMSAT has a consistent policy of reserving capacity only in response to expected customer demand and of exercising reservations only when the customer makes a firm commitment.[19] As a result, COMSAT has relinquished 30 capacity reservations – more than the number of reservations it has exercised – since the *Direct Access Order* went into effect.

Further, and as explained in the *Notice,* COMSAT's FRRs are subject to "challenge" by other parties – foreign signatories and foreign or U.S. direct access users alike – that seek to use the reserved capacity.[20] If COMSAT does not relinquish the challenged FRR, it must pay for the capacity whether or not it uses it, which gives COMSAT a strong incentive against reserving excess capacity. In addition, because COMSAT does not even know the identity of the challenging party (that is, whether the challenger is a U.S. or foreign user or another Signatory), COMSAT does not possess inside information that could be used to game the system or disadvantage competitors.[21]

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[19] COMSAT Comments at 17.

[20] *Notice,* ¶ 13.

[21] COMSAT Comments at 17-18.

Contrary to Sprint/WorldCom's claim, no party has provided any evidence to call COMSAT's practices into question.[22] In fact, the complaints about COMSAT's behavior are purely speculative or hypothetical. Sprint, in particular, provides no information of its own, but merely relies on WorldCom's claims, and Cable & Wireless merely reports allegations of unnamed third parties.[23] For instance, the Sprint/WorldCom comments argue that COMSAT has prevented WorldCom from obtaining capacity, but these claims are based entirely on allegations unsupported by any evidence. While the comments claim that COMSAT has taken steps to delay INTELSAT processing of direct access requests, they provide absolutely no support for this allegation. Nor do they explain how COMSAT could cause such delay, especially given that it is not involved in direct access provisioning.[24] In addition, WorldCom claims that COMSAT thwarted its efforts to obtain capacity to serve Brazil and Malaysia by obtaining information about WorldCom's request from INTELSAT.[25] As COMSAT's comments explain, however, the Commission has adopted procedures that prevent COMSAT from obtaining this information until *after* an order has been processed by INTELSAT.[26]

Similarly, Cable & Wireless speculates that COMSAT might have acted improperly when reserving capacity during the time periods following April 1998, when the FCC suggested in the *COMSAT Nondominance Order* that it would consider the possibility of direct access, and September 1999, when the *Direct Access Order* was adopted.[27] As shown above, however, COMSAT's policies for reserving capacity ensure that it does not reserve more capacity than it

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[22] Sprint/WorldCom Reply Comments at 6-7.

[23] *Id.*; Cable & Wireless Comments at 2.

[24] Sprint/WorldCom Comments at 10-12.

[25] *Id.* at 12.

[26] COMSAT Comments at 3 (describing reasons that COMSAT cannot provide recent data on direct access usage).

expects to need. In the absence of specific evidence that COMSAT has acquired capacity with the intent to prevent other users from obtaining direct access, these claims must be dismissed as unfounded.[28] Indeed, as described in Lockheed Martin's comments, the anti-circumvention provision of Section 641(b) requires a showing that capacity was acquired with the intent to circumvent Section 641.[29] COMSAT plainly could not have had that intent in 1998.[30]

As Lockheed Martin explained in its initial comments, any hoarding by COMSAT also would create significant business risks, especially in an environment in which satellite capacity is increasing rapidly.[31] This is particularly significant because, unlike facilities-based carriers such as Sprint and WorldCom that do not incur significant operational costs when facilities are idle, COMSAT has ongoing, real, out-of-pocket payment obligations for any capacity it acquires. Thus, it would be very commercially risky for COMSAT to acquire more capacity than it expects to need to serve its near-term customers.

The claims that COMSAT might be hoarding capacity are made even less credible by the failure of *any* of the commenters to even allege that they have been unable to address the matters

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[27] Cable & Wireless Comments at 7-10.

[28] ATC also alleges that COMSAT holds capacity unreasonably, but makes no showing that any capacity is not being held for use by current customers. In fact, the central theme of ATC's comments is that all reservations should be revoked, even if, as a result, COMSAT could not serve its existing customer base. ATC Comments at 2. This result was not intended by Congress and plainly would violate the express terms of the ORBIT Act.

[29] 47 U.S.C. § 641(b); Lockheed Martin Comments at 14-17.

[30] In this connection, Cable & Wireless's theory that COMSAT "knew" direct access would be adopted is unfounded. Cable & Wireless Comments at 7, 9-10. The *COMSAT Nondominance Order* merely indicated that the Commission would consider direct access in a later proceeding and even the *Direct Access Notice* did not adopt direct access, but merely proposed it without defined terms and conditions. Moreover, as the *Direct Access Order* describes, COMSAT had substantial legal and policy arguments that reasonably could have been expected to prevail, in which case COMSAT would not have been subject to direct access. *See* Direct Access to the INTELSAT System, *Report and Order*, 14 FCC Rcd 15703, 15760-81 (1999) (the "*Direct Access Order*"); COMSAT Corporation Petition Pursuant to Section 10(c) of the Communications Act of 1934, as amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier, *Order and Notice of Proposed Rulemaking*, 13 FCC Rcd 14083, 14160 (1998). Indeed, COMSAT appealed the *Direct Access Order* on, among other grounds, the question of the Commission's authority.

[31] Lockheed Martin Comments at 17.

they complain about in this proceeding in negotiations with COMSAT. This is particularly ironic, as the Commission specifically directed parties that could not be accommodated by INTELSAT to seek negotiated solutions.[32] In the absence of such efforts, it is particularly disingenuous to argue that COMSAT has acted in bad faith.[33] Indeed, as the Commission is well aware, prior to enactment of the ORBIT Act COMSAT and Lockheed Martin were engaged in broad negotiations with WorldCom, which claimed to represent other large carrier customers, regarding the terms upon which the carriers would secure INTELSAT capacity through COMSAT. These negotiations had made considerable progress, but before they could be concluded they were terminated by WorldCom for admittedly political, not business, reasons.[34] WorldCom is now expressing its clear preference, once again, for a government-imposed result over good faith negotiations, as is demonstrated, notably, by its designation of this rulemaking as the "portability proceeding."

Finally, the Commission should recognize that INTELSAT recently adopted policies that further ensure that no Signatory or direct access user, including Cable & Wireless and WorldCom, will be able to hoard capacity on future satellites. These policies reduce the maximum amount of lead time for reservations significantly, in most cases to six months or less. As Cable & Wireless acknowledges, these steps will "curtail the hoarding of capacity" in the future, and ensure that capacity is available when customers need it.[35] As a consequence, there is

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[32] *Direct Access Order*, 14 FCC Rcd at 15755.

[33] In this context, the Sprint/WorldCom claim that Lockheed Martin is seeking delay in ironic. Sprint/WorldCom Reply Comments at 5. Rather, it is the other parties in the proceeding that have failed to make the case that they do not have sufficient access to INTELSAT capacity.

[34] This experience belies ATC's claim that the Commission cannot expect COMSAT to engage in fair negotiations. ATC Reply Comments at 9.

[35] Cable & Wireless Comments at 12; *see also* COMSAT Comments at 18.

no basis for any concern that COMSAT might be able to hoard INTELSAT capacity in the future to prevent other users from obtaining direct access.

C. To the Extent There Is Any Shortage of Capacity, Deployment of New INTELSAT Satellites Will Address These Concerns.

Lockheed Martin recognizes that INTELSAT's capacity is finite and that in some cases requests for direct access to INTELSAT capacity cannot be satisfied. As Lockheed Martin's comments explained, in enacting Section 641(b), Congress expected the Commission to examine the availability of direct access capacity in light of INTELSAT's finite capacity and that it may not be possible for every potential direct access request to be met.[36] Specifically, and contrary to Sprint/WorldCom's claim, Congress did not require the Commission to act if each and every direct access request cannot be met.[37] Instead, Congress specifically limited the FCC's authority by permitting action only when capacity is insufficient; by authorizing only "appropriate" action; and by forbidding abrogation or modification of contracts.[38] Congress also did not anticipate that the Commission would take steps that would harm COMSAT and its customers just because INTELSAT capacity is nearly fully utilized. In that context, the best solution to capacity shortages is not to strip capacity from one customer to serve another, but to facilitate an increase in the total overall capacity available.

In practice, increased capacity will address many of the concerns that arise today when capacity is constrained. As COMSAT explains, INTELSAT (or its successor, Intelsat L.L.C.) will launch nine new satellites in the next three years, which will greatly increase INTELSAT

[36] Lockheed Martin Comments at 7-9.

[37] Sprint/WorldCom Reply Comments at 6.

[38] 47 U.S.C. § 641(b), (c).

capacity available to serve the United States.[39] This increase will come from incremental capacity on replacement satellites and additional capacity on new satellites in as yet unfilled orbital locations, none of which is not subject to any COMSAT reservations.[40]

Other commenters fail to acknowledge the increase in capacity that will occur in the next few years, or they argue that it is irrelevant.[41] However, this is an important factor in the Commission's deliberations. To the extent that capacity constraints will exist only in the short term, it would be inappropriate to take any regulatory action that would burden the normal workings of the marketplace. This is especially true when, as in this case, the evidence shows that there are current opportunities for direct access, that COMSAT is using its capacity only to serve its customers, and that COMSAT is not hoarding capacity to prevent others from using it. Consequently, there is no basis for any regulatory action in this proceeding.

III. The Utilization Information Provided by COMSAT Does Not Create Any Basis For Additional Commission Action.

Despite their access to the confidential information provided to the Commission by COMSAT, the three commenters (ATC, Cable & Wireless and Sprint/WorldCom) actually do little or nothing to analyze that data. Instead, these commenters mostly complain that, while COMSAT complied with the requirements of the *Notice*, it failed to provide reams of information that go far beyond the scope of this proceeding. If they had undertaken any real analysis, they would have found that COMSAT does not have an unreasonable number of reservations and, thus, has not "locked up" future capacity.

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[39] COMSAT Comments at 11-12.

[40] *Id.* at 11.

[41] *See, e.g.*, ATC Comments at 3 (claiming that little capacity is available today).

A. There Is No Basis for Claims That COMSAT Has Withheld Information.

Cable and Wireless and ATC devote most of their reply comments to claims that COMSAT should have provided, or should be required to provide, information that was not included in COMSAT's comments.[42] These filings argue that COMSAT should be punished for its failure to provide specific data that these parties deem relevant. While it may be understandable that Cable and Wireless and ATC want the Commission to engage in a broad fishing expedition, there is no basis for their complaints.

Despite the rhetoric in ATC's reply comments, the reality is that COMSAT did exactly what the Commission asked it to do. Not only did the Commission specify precisely the information that COMSAT should provide, it also specified the format in which the information would be provided.[43] COMSAT fully complied with those requirements. Moreover, COMSAT provided additional information following the initial comment deadline at the Commission's request and provided additional details regarding its contracts with INTELSAT when requested to do so by WorldCom and Sprint.[44] In other words, ATC's characterization of COMSAT's compliance as grudging and incomplete is totally unfounded.

At the same time, review of the laundry lists of additional information that ATC and Cable and Wireless would require COMSAT to provide demonstrates that the information

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[42] *See id.* at 1-6; Cable and Wireless Comments, *passim.*

[43] *Notice,* ¶¶ 20, 28. As required by the Commission, COMSAT provided current, not historical data. ATC's theory that COMSAT should have provided the requested data as of 1998 is contrary to the specific instructions of the *Notice. Id.*

[44] *See* Letters of Kenneth D. Katkin, Counsel to COMSAT, to Magalie Roman Salas, Secretary, FCC, July 13, 2000; Sprint/WorldCom Reply Comments at 7. Remarkably, ATC complains that COMSAT's *ex parte* letters were not served on it by hand. ATC Reply Comments at 2. It is not, of course, COMSAT's responsibility to ensure that any party receives an *ex parte* filing. For that matter, there is absolutely no basis for ATC's insinuation that COMSAT's willingness to provide additional information at the Commission's request means that COMSAT had been withholding information.

already filed does not provide support for any additional regulatory requirements. Remarkably, ATC suggests that the Commission should look as far back as 1992 – eight years ago – even though it was explicit United States policy to reject direct access, including in international trade negotiations, until very recently.[45] Indeed, much of the historical data that ATC and Cable and Wireless seek may not even exist at this time.

B. COMSAT's Factual Submission Shows That It Does Not Hoard Capacity.

[Redacted]

IV. The "Remedies" Proposed by Some Parties Are Unwarranted and Inconsistent with the Satellite Act

As discussed above, because users and service providers currently have sufficient opportunity to access INTELSAT directly to meet their service or capacity requirements and COMSAT is not hoarding capacity, there is no need for further action in this proceeding. To the extent the Commission concludes otherwise, however, Lockheed Martin urges the Commission to reject the "remedies" proposed by other parties and instead apply the standards for regulatory action proposed in the *Notice.*

A. There Is No Basis for the FCC to Impose Regulatory Measures to Address Capacity Constraints

Section 641(b) of the Satellite Act authorizes the Commission to take "appropriate action" to facilitate direct access only if sufficient opportunity for direct access does not exist.[46] In the *Notice*, the Commission indicated that it would consider requests for regulatory action in limited circumstance and where commercial negotiations prove unavailing.[47] As discussed

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[45] In fact, in 1996 the United States limited its market access commitment in the WTO Basic Telecommunications Services negotiations by formally scheduling COMSAT's exclusivity.

[46] 47 U.S.C. § 641(b).

[47] Specifically, regulatory action would be appropriate only when a user or service provider can demonstrate that COMSAT is holding capacity that is unique to its requirements and that COMSAT has not engaged in good faith negotiations to reach a commercial solution. *Notice*, ¶ 27.

below, none of the criteria for regulatory intervention have been met, and none of the remedies proposed by the various commenters can be considered "appropriate action" within the meaning of the Satellite Act.

The record of this proceeding demonstrates that, six months after implementation of direct access, U.S. users and service providers currently have sufficient opportunity to access INTELSAT directly, and that such opportunities will continue to expand. COMSAT obtains INTELSAT capacity only to meet legitimate customer needs, and does not "hoard" capacity to deprive others of the benefits of direct access. Moreover, as discussed in Section II.A above, despite two opportunities in this proceeding alone no commenter has demonstrated a unique need to access INTELSAT space segment to meet its service or capacity requirements, or demonstrated that they have tried and failed to pursue good faith negotiations with COMSAT to resolve complaints they may have regarding access to capacity. Thus, neither the requirements of the Satellite Act nor the FCC's own criteria for regulatory action have been met. Accordingly, the FCC should reject the unsupported calls for regulatory intervention by parties seeking government-imposed terms governing their access to INTELSAT capacity without regard to the practical limitations on that capacity and the legitimate claims of COMSAT.

The analysis the Commission must make takes place in the context of the history of COMSAT's pre-existing relationship with INTELSAT. There is nothing in the statute that suggests that any of COMSAT's existing arrangements with INTELSAT were suspect or should be terminated. Furthermore, as described in Lockheed Martin's comments, the Commission's authority to take "appropriate" action is limited by the scope of Section 641(b) of the Satellite Act, and the express prohibition on abrogation or modification of contracts in Section 641(c).[48]

[48] Lockheed Martin Comments at 7-9, 13-14.

In this context, it is evident that no "remedy" proposed by commenters in this proceeding meets the requirements of Section 641 of the Satellite Act.

For example, Cable & Wireless and ATC suggest that the FCC should require COMSAT to relinquish its existing reservations of INTELSAT capacity.[49] Given the plain language of Section 641(c), however, any proposed regulatory measures that would require COMSAT to relinquish any of its rights under its capacity contracts with INTELSAT, including reservations, are *per se* impermissible and may not be adopted by the Commission.[50] Indeed, ATC's analysis of the effect of 641(c) on its proposal to abrogate COMSAT's reservations is utterly without merit.[51] Contrary to ATC's assertions, the plain language of Section 641(c) protects all of COMSAT's contracts, not just COMSAT's customer contracts.[52] Moreover, ATC admits that COMSAT's reservations constitute "*rights* within a contract," so abrogating these rights plainly would be a prohibited modification of COMSAT's contracts under Section 641(c).[53]

Even if intruding into COMSAT's capacity arrangements with INTELSAT were not statutorily prohibited by Section 641(c), it would be unreasonable to do so. As discussed above, COMSAT routinely relinquishes INTELSAT capacity reservations when the reserved capacity is not needed to satisfy customer requirements. Thus, there is no basis to suggest that COMSAT's capacity reservations should be subject to a "presumption of anti-competitiveness" as suggested

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[49] Cable & Wireless argues that COMSAT should be required to transfer all capacity reserved after April 1998 in the context of mandated negotiations, and should be required to relinquished all capacity acquired after any "spike" in reserved capacity. Cable & Wireless Comments at 8-11. ATC suggests that COMSAT should be required to relinquish its "future reservations" of capacity and rights to capacity given up by its customers, and should be prohibited from acquiring INTELSAT capacity for which a user has indicated a need. ATC Comments at 2, 4.

[50] Section 641(c) provides that "[n]othing in this section shall be construed to permit the abrogation or modification of any contract." 47 U.S.C. § 641(c).

[51] ATC Reply Comments at 7 (emphasis in original).

[52] 47 U.S.C. § 641(c). Indeed, except for ATC, no party disagrees with Lockheed Martin's interpretation of Section 641(c).

[53] ATC Reply Comments at 7 (emphasis in original).

by Cable & Wireless. Moreover, interfering with COMSAT's capacity reservations would cause significant disruption and hardship to COMSAT and its customers. In short, there is no need and no public interest benefit that would support requiring COMSAT to relinquish its capacity reservations with INTELSAT.

The Commission also should reject the proposal of the Satellite Users Coalition ("SUC") to permit COMSAT's customers to renew expiring contracts for INTELSAT capacity at the IUC rate plus a network management fee.[54] Such a regulatory sleight of hand would not constitute "appropriate action" under the Satellite Act because it does not facilitate direct access to INTELSAT in any way. Rather, the SUC proposal contemplates that users would continue to purchase capacity and services directly from COMSAT at a prescribed rate. In effect, the SUC proposal would constitute mandatory rate prescription that is not contemplated by Section 641(b) of the Satellite Act. Moreover, the Commission could not adopt the SUC proposal without fulfilling the requirements for a rate prescription, including affording COMSAT a "full opportunity for hearing" and setting the carrier's rates at a "just and reasonable" level that recovers its costs and a reasonable profit.[55] Given that there is no evidence that COMSAT's costs are unreasonable or imprudently incurred, it is highly unlikely that the ultimate rate adopted in such a prescription would be close to the IUC plus the two to four percent

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[54] *See Notice*, ¶ 26 (discussing the SUC proposal). Sprint and WorldCom endorse this approach. *See* Sprint/WorldCom Reply Comments at 9.

[55] 47 U.S.C. § 205(a); *Ohio Bell Telephone Company v. FCC*, 949 F.2d 864, 867 (5th Cir. 1991). Vague comments in an informal notice and comment proceeding that do not address COMSAT's underlying costs and revenue requirements do not satisfy Section 205(a). In particular, the mere statement that "a reasonable" fee "would be approximately two percent" does not meet the standards articulated in the statute. Sprint/WorldCom Reply Comments at 11; 47 U.S.C. § 205(a). Even in the cases cited by Sprint and WorldCom, the Commission gathered and considered substantial evidence in an extensive formal proceeding before reaching its conclusions.

"management fee" proposed by SUC. In addition, and as noted by COMSAT, the Commission never has engaged in a rate prescription for any nondominant carrier.

ATC claims that the 5.58% surcharge levied on direct access services in the United States is overly burdensome and makes U.S. providers of INTELSAT capacity uncompetitive. However, ATC provides no factual or legal basis to challenge the Commission's decision to adopt the surcharge or to suggest that the level of the surcharge is inappropriate. At best, ATC's comments in this regard should be construed as an impermissible, untimely petition for reconsideration of the FCC's decision to adopt a direct access surcharge, and should be disregarded for this reason alone.

Finally, ATC argues that the Commission should reimpose dominant carrier regulation on COMSAT.[56] ATC fails to explain how this action would address any of its supposed concerns about direct access. In particular, and as ATC is aware, COMSAT is regulated as a nondominant carrier only on routes for which there is an alternative to INTELSAT, so COMSAT's cooperation with the direct access process has no effect at all on the competitive status of these markets.[57] In fact, ATC's own reply comments argue that the only relevant markets are those in which COMSAT is dominant, so changing COMSAT's regulatory status would have no effect on those markets.[58]

B. The Commission Should Direct Parties to Engage in Commercial Negotiations

In the *Notice*, the Commission stated that the primary means for resolving issues or complaints concerning capacity constraints should be commercial negotiations between

[56] ATC Reply Comments at 7-9.

[57] *COMSAT Nondominance Order*.

[58] ATC Reply Comments at 3.

COMSAT and an affected party.[59] The Commission should adopt this approach, and encourage parties to pursue it, because it is the best way to ensure that the parties reach mutually acceptable results. Indeed, the record shows that commercial negotiations are leading to the benefits predicted by the *Direct Access Order*.

One of the primary goals of the *Direct Access Order* was to bring down prices by reducing the margin between INTELSAT Utilization Charge ("IUC") rates and COMSAT's charges.[60] As COMSAT's comments indicate, this commercial approach is working precisely as intended by the Commission. For example, shortly after release of the *Direct Access Order*, COMSAT and AT&T renegotiated their long-term contract for Standardized Circuits, which now runs through 2006.[61] In addition, COMSAT and WorldCom negotiated a contract amendment making WorldCom eligible for rate reductions for all Standardized Circuits obtained over the next two years.[62] As a result of these successful negotiations, AT&T and WorldCom have obtained significant rate reductions and greater operational flexibility, as intended by the *Direct Access Order*, and without the need for FCC intervention.

In light of these significant successes, it is evident that the Commission's preference for unfettered commercial negotiations was correct. Cable & Wireless argues, however, that the Commission must impose strict guidelines for commercial negotiations to be effective.[63] Not only are Cable & Wireless's arguments refuted by the record of this proceeding, but examination

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[59] *Notice*, ¶ 25. This preference for commercial solutions originally was adopted by the Commission in the *Direct Access Order*. *See Direct Access Order*, 14 FCC Rcd at 15754.

[60] *Direct Access Order*, 14 FCC Rcd at 15720-1.

[61] *See* COMSAT Comments at 28.

[62] *Id.* COMSAT's negotiations with the third major carrier, Sprint, remains ongoing. *Id.*

[63] Cable & Wireless Comments at 8. For example, Cable & Wireless suggests the Commission should require COMSAT to make all capacity reserved after April 1998 available to carriers on a direct access basis. *Id.* Cable &

of Cable & Wireless's proposal reveals that it is designed merely to dictate the outcome of negotiations. For instance, Cable & Wireless asserts that negotiations should begin with the presumption that COMSAT automatically will relinquish the requested capacity, regardless of whether it already is in use.

There is no basis for the FCC to regulate COMSAT's negotiations with prospective direct access users as requested by Cable & Wireless. All evidence in the record demonstrates that COMSAT has engaged in good faith negotiations with its customers since the *Direct Access Order*. Furthermore, requiring COMSAT to transfer capacity rights and mandating an abbreviated negotiating period would remove any incentive for customers to reach a fair negotiated settlement. Such restrictions would undermine the negotiation process and have the effect of declaring winners and losers before the negotiations begin. In addition, any negotiation regime that did not account for the interests of COMSAT's existing customers would not be in the public interest. In sum, the Commission should continue to permit COMSAT and its customers to pursue free and unfettered negotiations to resolve capacity constraints.

V. The Commission Should Not Seek To Regulate Post-Privatization Distribution Arrangements for INTELSAT Capacity.

In its initial comments in this proceeding, Lockheed Martin observed that it would be inappropriate for the Commission to engage in a prospective inquiry into the nature of INTELSAT's post-privatization capacity distribution arrangements because, once privatization has been achieved in accordance with the ORBIT Act criteria, there will be no basis for regulating INTELSAT in a manner that is distinct from its competitors.[64] Just as other

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Wireless also urges the Commission to establish a maximum period of 60 days for COMSAT "to negotiate the transfer of capacity rights," after which either party could request the FCC to intervene. *Id.*

[64] Lockheed Martin Comments at 19-22.

international service providers such as Globalstar, ICO-Teledesic, Loral, New Skies, and PanAmSat, are left to determine their own private contracting arrangements, so must a successfully privatized INTELSAT be left to manage itself, as its officers and directors determine, in the best interest of its shareholders.

Most of the other commenters in this proceeding appear to agree with Lockheed Martin that the exclusive focus in this proceeding must be on the interim direct access regime that will exist prior to INTELSAT privatization, and that post-privatization capacity distribution arrangements should not be addressed.[65] For example, in their initial comments, Sprint and WorldCom decline to speculate on what the post-privatization landscape might look like, preferring to withhold any comment until "INTELSAT has disclosed its proposed corporate structure and rules of operation as a privatized entity."[66] Cable & Wireless goes a step further, noting that "because anyone correctly licensed can be a non-exclusive distributor or wholesale customer, [Cable & Wireless] believes there is not a need to address access issues in connection with INTELSAT's request to operate in the U.S. market as a private entity."[67]

As COMSAT notes, the very concepts that define direct access will have ceased to exist once INTELSAT has privatized.[68] Accordingly, once INTELSAT has privatized, market forces and legitimate business considerations will naturally determine the future shape of capacity

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[65] COMSAT Comments at 20.

[66] Sprint/WorldCom Comments at 15 n.41.

[67] Cable & Wireless Comments at 13. COMSAT expresses the same thought, noting that "post-privatization, all of Intelsat LLC's customers will, in effect, have the opportunity to be 'direct access' users." COMSAT Comments at 36.

[68] *See* COMSAT Comments at 35 and 36.

distribution for all participants in the satellite services marketplace.[69] Regulatory intervention into the contracting arrangements of one company would not only be inappropriate at such a juncture, but would have its own anti-competitive consequences. Once privatized, INTELSAT must not be consigned to a uniquely constrained regulatory status, but must be able to respond to market forces at the same pace and with the same flexibility as its competitors, unencumbered by excessive administrative restraints. A contrary approach would distort the marketplace by creating an unbalanced regulatory environment.

VI. Conclusion

For the foregoing reasons, Lockheed Martin respectfully requests the Commission to proceed in this rulemaking in accordance with the comments set forth herein.

Respectfully submitted,

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[69] *See, e.g.*, COMSAT Comments at 37, *citing* AP-24-3E Provisional P/10/99, at 10 & 15 (¶¶ 16(b)(ix) and 20(g) (Oct. 28, 1999) ("post-privatization distribution agreements for C/Ku-band services *cannot* be exclusive to former Signatories") (emphasis in original).

CERTIFICATE OF SERVICE

I, Vicki Lynne Lyttle, do hereby certify that on this 25th day of July, 2000, a copy of the foregoing "Comments of Lockheed Martin Corporation" was sent via hand delivery to the following:

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