

1. The Commission Should Reject Petitioners' Attempts to Use This Proceeding as a Vehicle for Achieving Governmental "Abrogation" of Existing Agreements

In their joint petition, WorldCom and Sprint ask the Commission to radically revise the circuit prices in their existing long-term carrier contracts with COMSAT.<sup>39</sup> Despite their careful avoidance of the term "fresh look" and their unsupported claim that their requested relief would not result in the "abrogation or modification" of existing contracts, there can be no legitimate dispute that these petitioners are asking the agency to reopen their existing carrier agreements—and either directly or indirectly force a change in the price terms. These thinly veiled calls for governmental modification of existing contractual arrangements, as well as Verestar's express request for fresh look, have no legitimate factual or legal basis. First, they plainly are not germane to the proposed transaction—and the Commission already is addressing the commercial disputes underlying petitioners' requests in a separate proceeding in any case. Furthermore, these petitioners do not even attempt to argue that their requests meet the rigorous standard for abrogating contracts or satisfy the rigorous procedural and substantive requirements that must be met to prescribe a carrier's rates. Nor do they confront the implications of Section 641(c) of the ORBIT Act, which provides an explicit bar on the abrogation of contracts.<sup>40</sup>

- a. The FCC already is addressing petitioners' commercial complaints in a separate, ongoing proceeding

Even if the Commission were inclined to give some credence to WorldCom's and Sprint's desires to evade their contractual obligations, this is not the proper proceeding in which to consider the issue. A separate FCC proceeding has been open for more than two years to

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<sup>39</sup> See WorldCom/Sprint Petition at 12.

<sup>40</sup> ORBIT Act, §641(c). Because COMSAT has a recognized property interests in these contracts, grant of the requested conditions would violate the Takings Clause of the Fifth Amendment to the United States Constitution.

evaluate the opportunities for accessing Intelsat capacity directly.<sup>41</sup> During the course of the Capacity Proceeding, the Commission has found no reason to grant WorldCom and Sprint the heavy-handed regulatory remedies that they once again seek here—indeed, as noted below, WorldCom abandoned its concerns in that proceeding some time ago. No different result is warranted by virtue of Intelsat’s proposed acquisition of CWS.

The Commission opened the Capacity Proceeding in May 2000, as required by the ORBIT Act, to determine “if users or providers of telecommunications services have sufficient opportunity to access INTELSAT space segment capacity directly from INTELSAT.”<sup>42</sup> Both WorldCom and Sprint have participated in the proceeding.<sup>43</sup> In September 2000, the FCC concluded that users and providers at that time did not have sufficient opportunity to access INTELSAT capacity—largely due to a capacity shortage resulting from high demand—but the agency could not make a determination as to the “near future.”<sup>44</sup> Due to the myriad business issues involved, the agency prudently chose to rely on commercial discussions between COMSAT and other interested parties to address this capacity-related matter. Notably, of the

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<sup>41</sup> See *Availability of INTELSAT Space Segment Capacity to Users and Service Providers Seeking To Access INTELSAT Directly*, 15 FCC Rcd 10606 (2000) (Notice of Proposed Rulemaking) (“Capacity Proceeding”); see also ORBIT Act, § 641(b).

<sup>42</sup> *Capacity Order*, 15 FCC Rcd. at 10608 (quoting ORBIT Act, §641(b)).

<sup>43</sup> Repeating assertions from the Capacity Proceeding, WorldCom and Sprint claim in their petition that “most orders for direct access were rejected by Intelsat because COMSAT already has already cornered nearly all of the capacity,” some of which “was sitting idle in COMSAT’s capacity pool.” WorldCom/Sprint Petition at 5. As COMSAT already has explained to the Commission, this claim has no factual basis. COMSAT has not “warehoused” capacity by “rolling extensions” of the capacity leased from Intelsat and has not reserved future capacity without first having a commitment from an identified customer. See Response of Lockheed Martin Corporation at 9, IB Docket No. 00-91 (filed July 25, 2000).

<sup>44</sup> *Capacity Order*, 15 FCC Rcd. at 19175. COMSAT has sought judicial review of this decision due to certain erroneous factual findings made by the Commission therein. See *COMSAT Corp. v. FCC*, Case No. 00-1509 (D.C. Cir. filed Dec. 1, 2000).

more than 200 COMSAT customers, only a handful expressed any interest in this opportunity for regulatory intervention in business negotiations.<sup>45</sup>

The Commission's decision to rely on "commercial negotiations" in the Capacity Proceeding has proven to be completely justified. Lockheed Martin has been in continuous contact with FCC staff, and has kept it closely apprised of the developments in these business negotiations. Indeed, per the Commission's request, COMSAT submitted a detailed report on the progress of these discussions more than a year ago,<sup>46</sup> and has supplemented the record from time to time since then.<sup>47</sup>

With respect to WorldCom, COMSAT undertook a concerted effort to pursue commercial negotiations. As a result, the parties resolved the only issue that WorldCom raised at that time, which did not concern the prices charged under WorldCom's contracts with COMSAT.<sup>48</sup> In its most recent contract with COMSAT, WorldCom expressly acknowledged that the agreement "was the product of good-faith negotiations between itself and COMSAT as contemplated by the FCC's September Report and Order in IB Docket No. 00-91."<sup>49</sup> It further recognized that the agreement "represent[ed] a *satisfactory commercial solution of all current issues between the Parties relating to the provision of INTELSAT capacity*" and that "further

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<sup>45</sup> Notably, AT&T was not among these few customers.

<sup>46</sup> Letter from Howard D. Polsky to Magalie Roman Salas, IB Docket No. 00-91 (March 13, 2001) ("Polsky Letter").

<sup>47</sup> In particular, Lockheed Martin has requested early termination of the Capacity Proceeding in light of the sufficient opportunity for users and service providers to obtain capacity directly from INTELSAT. *See* Response of Lockheed Martin Corporation at 1, IB Docket No. 00-91 (filed July 25, 2000).

<sup>48</sup> *See* Polsky Letter at 3. Rather, the issue was WorldCom's desire that COMSAT educate foreign correspondent Signatories about the lawfulness of direct access in the United States.

<sup>49</sup> Amendment No. 1 to Agreement, between COMSAT Corporation and WorldCom, Inc., ¶ 16, dated March 8, 2001 (on file with the Commission).

consideration of a regulatory solution of these issues is not required.”<sup>50</sup> Thereafter, WorldCom voluntarily decided to transfer *to* COMSAT several hundred circuits that WorldCom had previously leased directly from INTELSAT.<sup>51</sup> In light of the terms of the agreements and WorldCom’s own characterization of the contract, the claim WorldCom now makes—that COMSAT, and indeed the Commission itself, left it with no alternatives—strains credibility.

As for Sprint, COMSAT in March 2001 reported that commercial negotiations—involving substantial contacts between the parties over a period of time—had successfully identified Sprint’s legitimate capacity needs and concerns and were providing potentially viable means of addressing them. CWS continues to pursue these options with Sprint, but has found that Sprint has little interest in engaging in further negotiations. Sprint apparently simply wants relief from a 10-year contract for IDR circuits that it signed in 1993 admittedly “to get the best rates available at that time.”<sup>52</sup> Sprint’s desire to deprive COMSAT of the benefits of a commercial bargain that Sprint voluntarily entered into a decade ago plainly does not justify the regulatory intervention it seeks in the Capacity Proceeding, and it certainly does not justify importing Sprint’s contractual issues into this assignment proceeding.

Finally, the Commission should reject WorldCom’s and Sprint’s request that the agency prescribe new contract rates based on the old INTELSAT Utilization Charge (“IUC”) in effect at

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<sup>50</sup> *Id.* (emphasis added).

<sup>51</sup> WorldCom’s claim that it was forced to novate its circuits to COMSAT “to satisfy its volume commitments that COMSAT had been able to impose on WorldCom” is belied by the facts. *See* WorldCom/Sprint Petition at 6 n.9. Novation was not a requirement of WorldCom’s agreement with COMSAT. These volume commitments were made after the advent of direct access, in two separate contracts (not one, as WorldCom misleadingly states), which were executed in May 2000 and March 2001. The novation was part of the 2001 contract but was not something that COMSAT demanded; rather, it was expressly presented as a further option to already agreed upon terms for that 2001 agreement—one that WorldCom readily accepted. Moreover, at the time the circuits were novated, WorldCom was significantly above its contractually required minimum circuit obligations to COMSAT. WorldCom transferred the capacity to COMSAT because of COMSAT’s proven superior ability to manage it, a key ability that Intelsat is seeking to acquire through this transaction.

<sup>52</sup> WorldCom/Sprint Petition at 6.

the time the circuits were first purchased. Their request is merely for a retroactive rate prescription for contracts into which they freely entered, and their “buyer’s remorse” is not a matter of public interest concern.

Furthermore, as the Applicants already have explained, the proposed transaction will have a positive impact on the amount of Intelsat capacity that will be available for new business going forward—a goal that Sprint and WorldCom have long claimed to seek.<sup>53</sup> Once the acquisition closes, any capacity that becomes available through the expiration of a COMSAT customer contract will become immediately available for Intelsat’s use in pursuing new business. As existing contracts with COMSAT’s customers continue to expire, more and more capacity will move into the common pool to accommodate new customers—and existing customers who wish to enter into new agreements. In short, the transaction will alleviate the effects of any putative lack of capacity available directly from Intelsat.

b. Petitioners’ requests do not meet the stringent test for abrogating existing contracts

Even if Section 641(c) of the ORBIT Act did not already bar the relief that the petitioners seek,<sup>54</sup> their requests manifestly fail to meet the established test required to take such action. The FCC considers fresh look to be an “extraordinary remedy” used only to open markets that otherwise have been closed to competition by virtue of long-term contracts held by a dominant player.<sup>55</sup> Specifically, before subjecting existing contracts to fresh look, the agency must find

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<sup>53</sup> Application at 25 n.39. Both WorldCom and Sprint (as well as AT&T) recently have reduced the number of circuits that they route on satellites. That is the only reason why they have been unable to “take advantage of direct access.” WorldCom/Sprint at 4. But to the extent that their complaint is that they are having difficulty meeting their existing circuit commitments to COMSAT, they could easily solve this “problem” simply by rerouting a small number of circuits from the fiber-optic cables that they own. There is no reason for the Commission to intervene and release the carriers from commitments into which they voluntarily entered.

<sup>54</sup> The Applicants maintain that this statutory provision is an explicit bar to the calls for fresh look here.

<sup>55</sup> *Direct Access Order*, 14 FCC Rcd. at 15751.

that: (1) the entity holding the long-term contracts has market power and has exercised that power to create long term contracts to “lock up” the market in such a way that creates unreasonable barriers to competition; and (2) the contractual obligations can be nullified without harm to the public interest.<sup>56</sup>

In its *Direct Access Order*, the Commission rejected earlier calls by customers for fresh look, concluding that COMSAT’s provision of INTELSAT space segment capacity satisfied neither prong of this test. The FCC first determined that COMSAT’s contracts had not locked up the market for U.S. international capacity: “[o]n a global basis Comsat now accounts for no more than a 15 percent average global market share of the transmission capacity utilized for switched-voice and private line services.”<sup>57</sup> The agency noted that “[t]his relatively low market share suggests that these long-term contracts have not acted as a barrier to further competition through fiber optic cable and satellite alternatives.”<sup>58</sup> The Commission discounted any “lock up” suggestion in light of the fact that COMSAT’s “switched voice customers possess[] significant bargaining power giving them the flexibility to route a significant portion of their switched voice traffic to their own transmission facilities or those of alternative carriers as they choose.”<sup>59</sup>

With respect to the second prong of the fresh look standard, the *Direct Access Order* states that the public interest would not be served by nullifying carriers’ contractual obligations to COMSAT.<sup>60</sup> Noting that the carriers “entered into [the contracts] on their own accord based

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<sup>56</sup> *Id.* at 15752.

<sup>57</sup> *Id.* at 15753.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* (citing *COMSAT Non-Dominance Order*, 13 FCC Rcd. at 14121).

<sup>60</sup> *Id.* at 15754.

on business judgment. . . .” the Commission determined that it would not be “reasoned decision-making to upset previous commitments freely entered into by all parties.”<sup>61</sup>

None of the circumstances surrounding Intelsat’s proposed acquisition of CWS changes this analysis. In light of the exponential growth of U.S. international services in recent years,<sup>62</sup> COMSAT certainly has come no closer to “locking up” that marketplace since the Commission issued its *Direct Access* decision in 1999. Similarly, the Commission’s observation that carriers, such as WorldCom, have significant bargaining power that generally will ensure them sufficient access to U.S. international facilities still holds true.<sup>63</sup>

The contracts that WorldCom, Sprint, and Verestar seek to modify were legal at the time the parties voluntarily entered into them, and they remain so today.<sup>64</sup> Despite WorldCom’s and Sprint’s unsupported assertions to the contrary,<sup>65</sup> modifying the terms of these agreements unquestionably would constitute an abrogation of existing contracts. Moreover, if the petitioners opt to enter into new contracts with Intelsat, those agreements will be based on prevailing marketplace prices—just as they would be for any customer. Finally, the assertion that there will be pricing “discrepancies” between pre-existing common carrier contracts with COMSAT and new private carriage agreements with Intelsat does not raise a question concerning the

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<sup>61</sup> *Id.*

<sup>62</sup> See Application of COMSAT Corporation, et. al.; For Consent to Assignments, at 26-28, IB Docket No. 02-87 (filed April 5, 2002) (“Application”).

<sup>63</sup> WorldCom’s claim that it neither seeks nor requires COMSAT value-added services is contradicted by its recent behavior. See WorldCom/Sprint Petition at 4. When direct access was implemented, WorldCom began purchasing capacity from Intelsat because it offered lower prices than CWS, but subsequently opted to novate all of their circuits to COMSAT specifically because it wanted the level of network management services that it previously had received from COMSAT.

<sup>64</sup> The Verestar filing is particularly dismissive of the stringent legal standard: it explicitly requests fresh look in a one-paragraph letter that is substantiated only with an unsupported statement that Verestar would be “unfairly disadvantaged” by the transaction because its existing contracts are at “tariff rates.” See Verestar Letter.

<sup>65</sup> WorldCom/Sprint Petition at 12.

nondiscrimination principles in Section II of the Communications Act. Indeed, the Title II common carrier services offered by COMSAT are not identical to the private carriage options available from Intelsat. WorldCom and Sprint cite no precedent showing otherwise.<sup>66</sup>

2. The Proposed Transaction Provides No Basis for Subjecting Intelsat to Common Carriage or Other Nondiscrimination Obligations

Among their calls for conditions, WorldCom and Sprint ask the Commission to impose certain “nondiscriminatory pricing” obligations on Intelsat’s future carriage agreements.<sup>67</sup>

AT&T goes even further, asking the Commission to impose nondiscriminatory pricing mandates on the combined Intelsat/CWS and to regulate it as a common carrier.<sup>68</sup> Neither petition seriously addresses the well-established legal standard set forth in *National Association for Regulatory Utility Commissioners v. FCC* (“*NARUC I*”) for subjecting a communications entity to common carriage regulation—a particularly notable omission given that their calls for common carriage obligations would apply to only one non-dominant provider in a crowded marketplace.<sup>69</sup> Moreover, petitioners provide no basis for overturning FCC precedent that rejected previous requests to subject Intelsat to such regulation.

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<sup>66</sup> WorldCom/Sprint Petition at 7.

<sup>67</sup> WorldCom/Sprint Petition at 12-13. Among their requests for nondiscriminatory treatment, WorldCom and Sprint specifically ask that the Commission require the new Intelsat to provide the same “IDR-IBS exchangeability . . . given to Intelsat’s own customers.” *Id.* at 13. This request is baseless, as COMSAT currently offers greater flexibility in this regard than Intelsat, and this level of flexibility will continue to be available after the transaction is completed so long as there is a commercial market for such flexibility.

<sup>68</sup> AT&T Petition at 7-8.

<sup>69</sup> Instead of basing its argument on evidence, AT&T simply assumes that Intelsat shareholders would ignore all other considerations out of a motivation to favor the former COMSAT unit in order to enhance its profitability. As an economic matter, AT&T’s interests are protected here by the competitive state of the marketplace. Intelsat post-transaction will have no power in any “upstream” market that it could use to unfairly advantage any “downstream” affiliate. *See also infra* notes 80-85 and accompanying text. In any event, as a business matter, CWS will no longer be a stand-alone unit once the proposed transaction closes except as a matter of corporate form. How Intelsat may internally account for different profit-generating activities raises no public interest concern because the entire enterprise, either whole in any of its part, lacks market power.

In *NARUC I*, the D.C. Circuit established a two-part analysis that the Commission must undertake before imposing common carrier regulation.<sup>70</sup> First, the agency must analyze the likelihood that the services in question will be offered indifferently to the public. Second, if no such likelihood exists, the FCC must determine whether there are sufficient policy reasons to place the service provider under a legal compulsion to serve the public indifferently.<sup>71</sup> The only reference made in the petitions to this well-established standard is an unsupported statement in an AT&T footnote claiming that the mandate is somehow justified by the “significant change in circumstances” brought about by the proposed transaction.<sup>72</sup>

Furthermore, the Commission recently rejected regulating Intelsat as a common carrier in the Intelsat privatization proceeding.<sup>73</sup> Because the privatized company would be able “to assign capacity to users on a case-by-case basis, considering the individualized needs and requirements of each user,” the FCC found that there was “no basis on which to conclude that Intelsat LLC will offer capacity indifferently to the public.”<sup>74</sup> The agency further concluded that there was no public policy reason to compel Intelsat to act as a common carrier. In making this finding, the Commission noted that, for certain services on the “non-competitive” thin routes, COMSAT

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<sup>70</sup> *NARUC I*, 525 F.2d 630, 642 (D.C. Cir. 1976).

<sup>71</sup> *See id.*; *see also Intelsat Privatization Order*, 16 FCC Rcd. at 12301.

<sup>72</sup> *See AT&T Petition* at 7 n.18. Section 641 of the ORBIT Act provides no more foundation for a common carriage mandate than does the unsupported reference to *NARUC I*. The language, design, and legislative history of the ORBIT Act make obvious lawmakers’ expectations that the privatized Intelsat would be treated like any other private company. To bootstrap Section 641 into singling out Intelsat for common carrier treatment would be a gross distortion of Congressional intent.

<sup>73</sup> *See Intelsat Privatization Order*, 16 FCC Rcd. at 12300-02; *see also Satellite Policy Branch Information; Intelsat LLC*; File Nos. SAT-A/O-20000119-00002, et al., FCC Public Notice, Report No. SPB-164 (released March 23, 2001).

<sup>74</sup> *Id.* 12301.

would continue to be subject to the common carrier regulations set forth in the *Alternative Rate Regulation Order*.<sup>75</sup>

The proposed transaction will do nothing to change this analysis. Intelsat currently offers private carrier services; COMSAT currently offers customers a combination of common carrier and private carrier services. After closing on the transaction, Intelsat will maintain both types of services, as do many of its competitors. Moreover, in offering the thin route services formerly provided by CWS under the terms of the *Alternative Rate Regulation Order*, Intelsat will abide by the terms therein. As the Applicants already have explained, this will further assure that the proposed acquisition can raise no anticompetitive issues for customers using those services.<sup>76</sup>

For the bulk of its business, Intelsat already affords nondiscriminatory treatment to similarly situated customers pursuant to the Distribution and Wholesale Customer Agreements. These contractual benefits certainly exceed the treatment afforded to customers by Intelsat's private-carrier rivals—who are allowed to rely solely on the competitive state of the marketplace to justify their operations as private carriers. Moreover, none of Intelsat's customers expressed concerns regarding these standard Agreements in the Intelsat Privatization Proceeding, even though the Commission expressly provided them with the opportunity to do so.<sup>77</sup> Petitioners offer no valid reason to single out Intelsat for more restrictive treatment now, especially given that government-imposed nondiscrimination mandates would largely duplicate Intelsat's contractual commitments to its customers.

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<sup>75</sup> *Id.* 12302.

<sup>76</sup> *See* Application at 31.

<sup>77</sup> *See Intelsat Privatization Order*, 16 FCC Rcd. at 12281, 12301, 12302-03.

3. Petitioners' Calls for Structural Safeguards Have No Competitive or Legal Basis

WorldCom, Sprint, and AT&T contend that the combined Intelsat/CWS should be subject to a variety of structural separation requirements. AT&T requests that sweeping separation conditions be imposed on the post-transaction company, including requirements that Intelsat operate CWS as a separate corporate subsidiary with separate books of account and its own switching and transmission facilities.<sup>78</sup> WorldCom and Sprint likewise ask that the new Intelsat be required to publicly file the prices offered to such a "retail affiliate."<sup>79</sup> Neither petition offers any market-based or legal analysis in support of these burdensome conditions. The reason for these omissions is obvious: the rationale underlying the imposition of structural separations is wholly inapplicable in the context of this transaction because neither applicant holds market dominance or controls a bottleneck facility.<sup>80</sup> Moreover, because Intelsat as a business matter plans to fully integrate the former CWS business into the company's operations, rather than run CWS as a stand-alone subsidiary, petitioners' calls for structural separations would require radical government intervention for no public interest purpose.

Historically, the Commission has imposed structural separations in order to prevent dominant carriers from using their market power in so-called "upstream markets" (such as local exchange service) to harm competition in a "downstream market" (such as enhanced services)—

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<sup>78</sup> AT&T Petition at 7.

<sup>79</sup> WorldCom/Sprint Petition at 13. As a preliminary matter, there is no basis for WorldCom's and Sprint's assertion that accounting safeguards "should not be a significant burden for Intelsat, given that representatives of Lockheed Martin . . . have informed WorldCom that Intelsat intends to operate separate wholesale and retail subsidiaries after its merger with COMSAT." WorldCom/Sprint Petition at 13. Lockheed Martin has made no statements to this effect.

<sup>80</sup> See *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer III)*, Phase I, 104 F.C.C. 2d 958, 998-999 (1986), *recon.*, 2 FCC Rcd. 3035 (1987), *further recon.*, 3 FCC Rcd 1135 (1988), *second further recon.*, 4 FCC Rcd 5927 (1989), *vacated sub nom. California v. FCC*, 905 F.2d 1217 (9th Cir. 1990); Phase II, 2 FCC Rcd. 3072 (1987), *recon.*, 3 FCC Rcd. 1150 (1988), *further recon.*, 4 FCC Rcd. 5927 (1989), *vacated sub nom. California v. FCC*, 905 F.2d 1217 (9th Cir. 1990).

an especially heightened concern when the downstream competitors had to rely on the facilities of the dominant carrier to reach customers.<sup>81</sup> The rationale for structural safeguards was to prevent the dominant carrier from discriminating against its rivals in downstream markets and also to block the dominant carrier from cross-subsidizing its downstream offerings based upon its upstream market power.<sup>82</sup> Among the most prevalent examples of structural safeguards are those imposed by the agency and Congress on the Bell Operating Companies with respect to their provision of enhanced and domestic long-distance services.<sup>83</sup> Yet these examples date back more than a decade. In the absence of statutory mandates, moreover, the Commission has chosen to eliminate structural separation requirements since that time, finding that the significant costs of imposing the restrictions outweigh any benefits.<sup>84</sup> Even when such structural separation requirements have been statutorily mandated, the FCC has taken advantage of provisions allowing for them to sunset.<sup>85</sup>

Here, the necessary factual premise for imposing structural separations is not present, even if the Commission still favored this regulatory approach. Intelsat and CWS, either singly or

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<sup>81</sup> See *id.* at 998-999, 1001 (Structural separations appropriate “[g]iven AT&T’s vast size and resources, its vertically integrated structure, and its ability to engage in anticompetitive cross-subsidization and discrimination through its control of bottleneck facilities.” The Commission concluded that “even if structural separation has a net positive benefit in an absolute sense, if alternative safeguards are on the whole more beneficial to society,” then those structural separations should be replaced.)

<sup>82</sup> See *id.*

<sup>83</sup> See *Amendment to Sections 64.702 of the Commissions Rules and Regulations (Second Computer Inquiry)*, 84 F.C.C. 2d 50, 71 (1980) (Memorandum Opinion and Order), *mod. on further recon.*, 88 F.C.C. 2d 512 (1981), *mod. on further recon.*, 56 Rad. Reg. 2d (P&F) 301 (1984), *aff’d sub nom. Computer & Communications Industry Ass’n v. FCC*, 693 F.2d 198 (D.C.Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

<sup>84</sup> *Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies*, 2 FCC Rcd. 143, 148 (1987) (eliminating structural separations requirements for customer premises equipment operations); *Second Computer Inquiry*, 84 F.C.C. 2d 50, 71 (Structural separations seen as approach to be used as Commission “gain[s] more experience in [a] very complex area of communications regulation.”).

<sup>85</sup> See *Request for Extension of the Sunset Date of the Structural, Nondiscrimination, and Other Behavioral Safeguards Governing Bell Operating Company Provision of In-Region, InterLATA Information Services*, 15 FCC Rcd. 3267, 3268 (2000) (declining to extend sunset of structural separations).

together, lack power in any market that is legitimately identified. Moreover, neither controls a bottleneck facility upon which any of their rivals must rely—a fact that is indisputable in the cases of AT&T, WorldCom, and Sprint, who all own undersea fiber-optic facilities.<sup>86</sup>

Even the old structural separation requirements that once applied to COMSAT were eliminated years ago because of significant competitive changes in the marketplace. The Commission in the 1998 *COMSAT Non-Dominance Order* eliminated the mandates that separated COMSAT's then-existing "jurisdictional" and "non-jurisdictional" services. It found that the requirements were no longer necessary because COMSAT was "non-dominant" in markets "account[ing] for approximately 85 percent of [its] revenues from INTELSAT services...."<sup>87</sup> And even for the CWS services subject to thin-route regulation, the FCC concluded that COMSAT's position there still did not justify "continuing to require structural separation because the costs of imposing such a requirement would exceed any potential benefits to competition."<sup>88</sup>

With the growth of capacity available for U.S. international services since the *COMSAT Non-Dominance Order*, the petitioners present no cause for resurrecting outdated and unnecessary structural requirements and imposing them on Intelsat post-transaction. Furthermore, the requests for separate subsidiary safeguards are entirely unnecessary in light of the Commission's determination that the post-privatization Distribution and Wholesale Customer agreements do not afford former Signatories, including COMSAT, any protections or privileges

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<sup>86</sup> See Application at 27-32; *infra* at Section III.A.2.

<sup>87</sup> *COMSAT Non-Dominance Order*, 13 FCC Rcd. at 14087. When the Commission released its Alternative Rate Regulation Order in 1999, it found that COMSAT's traffic on competitive "thick" routes was up to 92 percent. *Alternative Rate Regulation Order*, 14 FCC Rcd. at 3065. This percentage is even higher today.

<sup>88</sup> *COMSAT Non-Dominance Order*, 13 FCC Rcd. at 14087.

unavailable to other customers.<sup>89</sup> Nothing about this transaction voids those agreements. Although AT&T asserts that “different incentives” purportedly arising from the proposed transaction would somehow undermine that determination,<sup>90</sup> it fails to cite a single fact to support its conclusion, much less satisfy the evidentiary burden required by Section 309 of the Communications Act.<sup>91</sup> While it may be understandable that the petitioners would find it advantageous to have Intelsat effectively compete against itself for their business, there is no public interest benefit that would be served thereby. Accordingly, the FCC summarily should reject arguments for structural arrangements that the petitioners would not want imposed upon themselves, nor have sought to have imposed on any competitor to Intelsat.

#### 4. The FCC Should Reject WorldCom’s and Sprint’s Backhanded Attempt to Expand the Existing Thin-Route Regulations

In another effort to use this proceeding as a vehicle for gaining private commercial advantages, WorldCom and Sprint make a circuitous request for the Commission to dramatically transform the existing thin-route rate regulation scheme by mandating the substitution of Intelsat prices for CWS’ tariffed rates.<sup>92</sup> Yet they do not even attempt to dignify this demand with any evidentiary support. This stands in sharp contrast to the factual foundation upon which the thin-route rate regulations stand—which, as the FCC well knows, grew out of a lengthy agency

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<sup>89</sup> *Intelsat Privatization Order*, 16 FCC Rcd. at 12302. The Commission reaffirmed this finding in a subsequent report to the Congress. *FCC Report to Congress As Required By The ORBIT Act*, FCC 01-190 (June 15, 2001).

<sup>90</sup> AT&T Petition at 6.

<sup>91</sup> 47 U.S.C. § 309(d)(1) (requiring affidavit to support factual dispute).

<sup>92</sup> WorldCom/Sprint Petition at 13. *See also* AT&T Petition at 8-9.

proceeding involving extensive market analyses.<sup>93</sup> Accordingly, the agency should flatly reject WorldCom's and Sprint's unsubstantiated request.

The Application here plainly states that after closing the transactions, Intelsat will comply with the terms of the *Alternative Rate Regulation Order*.<sup>94</sup> The obligations set forth there ensure that customers who take switched voice or private line services on those routes will enjoy the pricing benefits of competition.<sup>95</sup> Extension of these mandates to other Intelsat services, along whatever route, is not warranted by current competitive conditions.<sup>96</sup>

Furthermore, wholly apart from the existing *Alternative Rate Regulation* obligations, customers seeking switched voice or private line services on thin routes may rely upon another existing safeguard: the terms of the standard Intelsat Distribution Agreement or Wholesale Customer Agreement both provide nondiscriminatory pricing protections. Consequently, there can be no risk that the combined Intelsat/CWS will be able to raise prices above competitive levels on the remaining thin routes—because any customer interested in thin-route services may sign one of the Agreements to guarantee that it receives the contractual nondiscrimination benefit.

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<sup>93</sup> See *Alternative Rate Regulation Order*, 14 FCC Rcd. at 3071-75. See also *COMSAT Non-Dominance Order*, 13 FCC Rcd. at 14118-49; *COMSAT Streamlined Video Order* at 12 FCC Rcd. at 12060; *COMSAT Partial Relief Order* 11 FCC Rcd. at 9629-36.

<sup>94</sup> See Application at 31.

<sup>95</sup> See *Alternative Rate Regulation Order*, 14 FCC Rcd. at 3069-70.

<sup>96</sup> The Applicants also note that, due to the existence of pro-competitive WTO commitments, there are few, if any, legal barriers to competitive entry by additional U.S. providers along the remaining thin routes. See *supra* note 11 and accompanying text.

#### **IV. LRT RESURRECTS LONG-STANDING COMPLAINTS THAT THE FCC ALREADY HAS REJECTED OR THAT REMAIN PENDING IN OTHER PROCEEDINGS**

LRT's "provisional" petition to deny this Application repeats almost verbatim the arguments contained in its provisional petition to deny the recent Telenor-COMSAT assignment application.<sup>97</sup> (Indeed, the name Telenor mistakenly appears in the caption of LRT's petition in this proceeding.) The Commission, however, has already considered and rejected those arguments.<sup>98</sup> In addition, LRT's petition repeats—again, almost verbatim—various arguments that LRT has made in other Commission proceedings involving COMSAT and Lockheed Martin.<sup>99</sup> Those arguments are likewise without merit.

As a threshold matter, COMSAT and Lockheed Martin note that they previously have submitted materials to the Commission demonstrating that LRT's pleadings are not filed for any legitimate purpose, but rather for purposes of harassment and extracting a settlement. Rather than repeat the facts again here, COMSAT and Lockheed Martin respectfully direct the Commission's attention to the record in the Telenor-COMSAT docket.<sup>100</sup> LRT's submission here should be evaluated in light of this record.

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<sup>97</sup> See Provisional Petition of Litigation Recovery Trust to Deny and Petition of Litigation Recovery Trust for Protective Orders, File Nos. SES-ASG-20010504-00896 *et al.* (filed June 22, 2001) (Telenor-COMSAT transaction).

<sup>98</sup> See *Applications of Lockheed Martin Global Communications et al. and Telenor Satellite Mobile Services, Inc. et al.*, FCC 01-369 (rel. Dec. 18, 2001) (Order and Authorization) ("*Telenor-COMSAT Order*"); *stay denied*, DA 02-190 (rel. Jan. 24, 2002) ("*Telenor-COMSAT Stay Denial Order*"); *pet. for recon. pending*.

<sup>99</sup> See, e.g., Petition of Litigation Recovery Trust for Reconsideration, File Nos. ITC-97-222 *et al.* (dated Oct. 24 2001) (Inmarsat domestic service proceeding); Petition of Litigation Recovery Trust for Reconsideration, File Nos. 39-SAT-P/LA-98 *et al.* (dated Aug. 31 2001) (Lockheed Martin Ka-band proceeding); Petition of Litigation Recovery Trust for Reconsideration, File Nos. SAT-T/C-2000323 *et al.* (dated Aug. 28, 2000) (*Lockheed Martin/COMSAT merger proceeding*).

<sup>100</sup> See Opposition of Telenor Satellite Services Holdings, Inc., et al, and Lockheed Martin Global Telecommunications, et al., at 5-7, FCC File No. SES-ASG-20010504-00896 (filed Jan. 28, 2002) (discussing various court findings and sanctions against individual members of LRT arising out of "campaign of harassment" against COMSAT and its former subsidiary, BelCom Inc., which was sold in December 2001). LRT's alleged

As for the merits, LRT's arguments are baseless. The Commission has already considered and rejected most of the arguments in LRT's petition in the context of the Telenor-COMSAT proceeding. It concluded there, for example, that LRT had raised no substantial and material fact as to COMSAT's qualifications as assignor of Commission licenses and authorizations.<sup>101</sup> The same is true in this proceeding. In particular, there is no merit to LRT's claim that the licenses and authorizations at issue here cannot be assigned because the *Lockheed Martin/COMSAT Merger Order* is not final (in light of the petition for reconsideration filed in that proceeding by LRT).<sup>102</sup> The merger order was duly adopted and released<sup>103</sup> and has not been stayed, and is therefore in full force and effect. Accordingly, these licenses and authorizations are fully assignable.

The Commission also concluded unequivocally in the Telenor-COMSAT proceeding that the sale by Lockheed Martin of one of COMSAT's former jurisdictional businesses does not violate the ORBIT Act.<sup>104</sup> Further, the FCC declined to consider LRT's argument that COMSAT's Inmarsat and INTELSAT interests should be regarded as assets of the United States and not commercial assets belonging to COMSAT and, therefore, Lockheed Martin.<sup>105</sup> As the Commission noted, this matter was originally raised in a 1998 proceeding in which the FCC

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business grievances plainly fall into the category of private contractual disputes in which the Commission will not intervene. *See, e.g., Telenor-COMSAT Stay Denial Order* at n.33.

<sup>101</sup> *See Telenor-COMSAT Order* at ¶ 19.

<sup>102</sup> *See Provisional Petition to Deny* at 4, IB Docket No. 02-87 (filed May 24, 2002) ("LRT Petition").

<sup>103</sup> *See Applications of Lockheed Martin Corporation et al. and COMSAT Corporation et al.*, 15 FCC Rcd. 22910 (2000) (Order and Authorization).

<sup>104</sup> *See Telenor-COMSAT Order* at ¶ 16 ("We do not agree with LRT that the ORBIT Act, or the expectations of Congress in enacting the ORBIT Act, intended that the government have an ongoing interest, control, or involvement in Lockheed Martin Corporation's management of COMSAT Corporation's assets."); *see also id.* at ¶ 19.

<sup>105</sup> *See id.* at n.22.

denied a variety of petitions and complaints filed by LRT against COMSAT. LRT appealed the denial to the U.S. Court of Appeals for the Second Circuit, and the court dismissed the appeal.<sup>106</sup> Thus, the agency need not readdress this claim.

The *Telenor-COMSAT Order* also concluded that LRT's arguments with respect to foreign ownership (and in particular foreign government ownership) were groundless.<sup>107</sup> The Commission need not dwell for long on LRT's almost word-for-word rehash of those arguments. LRT's continued attacks on the *Deutsche Telekom-VoiceStream Order* are completely unpersuasive, and LRT barely addresses the fact (discussed at length in the Application<sup>108</sup>) that the FCC repeatedly has found that subsidiaries of Intelsat, Ltd. are fully qualified to be U.S. licensees.<sup>109</sup> More importantly, LRT provides absolutely no evidence that approval of the proposed transaction would pose any risk, let alone a very high one, to competition. LRT makes no effort to counter the Applicants' showings that: (1) the relevant markets are already competitive and will remain so post-transaction; (2) Intelsat and COMSAT historically held different roles in the marketplace; and (3) the transaction will serve the public interest by speeding the transformation of Intelsat into a conventional commercial satellite entity better able to compete as an efficient service provider.<sup>110</sup> Instead, LRT merely posits a competitive scenario that is "hardly as rosy" as that described in the Application,<sup>111</sup> and asserts that the Commission

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<sup>106</sup> See *Whitely v. FCC*, Case No. 00-4207, *Order* (2d Cir. filed Mar. 13, 2002).

<sup>107</sup> See *Telenor-COMSAT Order*, ¶¶ 21-36.

<sup>108</sup> See Application at 5-10.

<sup>109</sup> See, e.g., *Intelsat Licensing Order*, 15 FCC Rcd. 15460; *Intelsat Licensing Order Reconsideration*, 15 FCC Rcd. 25234; *Intelsat Privatization Order*, 16 FCC Rcd. 12280.

<sup>110</sup> Application at 17-32.

<sup>111</sup> LRT Petition at 29.

needs to collect more data. Such sheer speculation cannot overcome the presumptions reflected in the FCC's policies with respect to the pro-competitive effects of foreign investment.

Similarly, LRT's national security arguments are virtually identical to those it made in the Telenor-COMSAT proceeding; in fact, at one point, LRT refers to "Inmarsat related activities conducted by CWC [sic]" when it clearly means Intelsat related activities conducted by CWS. LRT makes no reference, however, to the *Telenor-COMSAT Order*, in which the Commission acknowledged that it pays an appropriate level of deference to Executive Branch expertise on national security and law enforcement issues.<sup>112</sup> Nor does LRT mention the GE/SES proceeding,<sup>113</sup> or the Applicants' showing that, like GE/SES, they do not provide switched services directly to individual customers and thus do not pose the same network security issues as, for example, those addressed in Telenor-COMSAT.<sup>114</sup>

Finally, there is no merit to LRT's assertion (which it omitted from its petition in the *Telenor-COMSAT* proceeding, but has included in its petitions in at least four other proceedings) that COMSAT and Lockheed Martin are unfit to be Commission licensees because they failed to disclose the fact that COMSAT's former subsidiary, ElectroMechanical Systems, Inc. ("EMS"), was under investigation by the Justice Department for allegedly mischarging on government contracts with the Navy.<sup>115</sup> As COMSAT and Lockheed Martin have repeatedly demonstrated, even the Commission's most stringent reporting requirements for a particular class of licensees—that applied to broadcast licensees, which COMSAT is not—requires reporting only

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<sup>112</sup> *Telenor-COMSAT Order* at ¶ 50.

<sup>113</sup> *See GE/SES Global Order*, 16 FCC Rcd. 17575.

<sup>114</sup> Application at 32-34.

<sup>115</sup> LRT Petition at 4-10.

once the matter has been adjudicated.<sup>116</sup> That is exactly what COMSAT has done, both here and in previous proceedings.<sup>117</sup> Accordingly, there is no basis for any of the sanctions that LRT proposes.

## V. CONCLUSION

The record now before the Commission in this proceeding demonstrates that Intelsat's proposed acquisition of the CWS licenses and authorizations will benefit the public interest. Intelsat already is a U.S. satellite licensee, and it is fully qualified to hold the earth station licenses and other authorizations at issue here as well. The facts before the agency show that the proposed transaction will help speed the transformation of Intelsat into a more efficient, effective service provider better able to compete in the robust U.S. international marketplace. The record also reveals that the petitioners' calls for conditions on the transaction, or the submission of more information, are meritless. The issues about which they complain plainly have no relationship to this acquisition or the current competitive state of the marketplace. The FCC already has addressed most of these unrelated issues, and others remain the subject of pending proceedings.

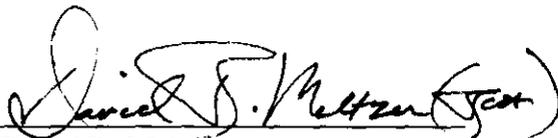
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<sup>116</sup> *Policy Regarding Character Qualifications in Broadcast Licensing*, 1 FCC Rcd. 421, 424 (1986) (Memorandum Opinion and Order); *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 F.C.C. 2d 1179, 1204-05 (1986) (Report, Order and Policy Statement); *Policy Regarding Character Qualifications in Broadcast Licensing*, 5 FCC Rcd. 3252 (1990) (Policy Statement and Order); *Cablecom-General, Inc.*, 87 F.C.C. 2d 784, 788-91 (1981) (Applications).

<sup>117</sup> Comsat first disclosed the EMS matter in August 2000, in an amendment to the Lockheed Martin/COMSAT merger application. See Application of Lockheed Martin Corporation and COMSAT Corporation, et al., File Nos. SAT-T/C-20000323, et al. (filed Mar. 23, 2000) ("Lockheed/COMSAT Application"); see e.g., Lockheed/COMSAT Application, Consolidated Opposition of Lockheed Martin Corp., LMGMT LLC and COMSAT Corp. at 5-8 (filed Sept. 12, 2000); Lockheed/COMSAT Application, Comments of "Newly Discovered Evidence" Submitted by Litigation Recovery Trust at 2-3 (filed Apr. 6, 2001). Out of an abundance of caution, COMSAT also referenced the EMS matter in the Telenor/COMSAT assignment application and in the instant applications. See Lockheed Martin Corporation, et al. and Telenor Satellite Mobile Services, Inc., et al. Applications for Assignment of Section 214 Authorizations, Private Land Mobile Radio Licenses, and Earth Station Licenses, File Nos. SES-ASG-20010504-00896, et al. (filed May 4, 2001); Application, Exhibit V to FCC Forms 312.

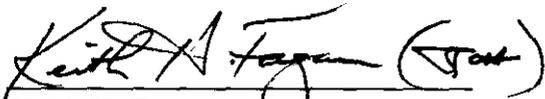
Accordingly, the Commission should promptly deny the petitioners' requests and grant the Application.

Respectfully submitted,

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June 7, 2002

**CERTIFICATE OF SERVICE**

I, Charlotte R. Waller, hereby certify that on June 7, 2002, I caused a copy of the foregoing OPPOSITION OF LOCKHEED MARTIN CORPORATION, *et al.*, and INTELSAT, *ltd., et al.* to petitions to deny to be mailed via first-class postage prepaid mail to the following:

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