

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

In the Matter of)	
)	IB Docket No. 06-137
)	
Petition of the International Telecommunications Satellite Organization)	File No. SAT-MSC-20060710-00076
)	
Under Section 316 of the Act)	DA No. 06-1460
)	

OPPOSITION OF INTELSAT

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EXECUTIVE SUMMARY

Intelsat North America LLC (“Intelsat”) hereby opposes the July 10, 2006 petition of the International Telecommunications Satellite Organization (“ITSO”) requesting that the Federal Communications Commission (“FCC” or “Commission”) commence a proceeding to impose conditions upon certain of Intelsat’s space station licenses under Section 316 of the Communications Act. For the reasons stated herein, the Commission should deny ITSO’s request to open a Section 316 proceeding and dismiss ITSO’s petition.

The Commission is not required to initiate formal Section 316 modification proceedings at ITSO’s request. Rather, the Commission itself must decide, based on the record, whether or not a Section 316 proceeding is warranted and must bear a heavy burden in such a proceeding. In addition, where, as here, the proposed modification involves the United States’ responsibilities under an international treaty, the Commission should appropriately defer the decision whether to initiate a Section 316 proceeding to the Department of State, which has constitutional supremacy in those matters. Moreover, given the contractual relationship between Intelsat and ITSO, which is implemented through the Public Services Agreement (“PSA”), the Commission should follow its longstanding policy of leaving determinations regarding contractual disputes to the courts of appropriate jurisdiction.

Even on the merits, the Commission has ample basis for dismissing the petition, which essentially requests that the FCC (1) serve as ITSO’s enforcement arm and (2) facilitate the intergovernmental organization’s return to commercial satellite operations. An analysis of the history and purpose of privatization shows that the United States, as

the Notifying Administration for Intelsat's ITU filings, has no responsibility to act as a guarantor of Intelsat's performance under the PSA. Indeed, the United States' responsibilities as the Notifying Administration are already fully implemented by the existing Intelsat licenses and the Commission's regulatory oversight.

ITSO's conjectures regarding rejection of the PSA in a hypothetical Intelsat bankruptcy are, as the FCC previously found, "speculative" and thus do not provide a basis for the Commission to take the requested actions at this time. Because the transfer of licenses in the context of a bankruptcy requires Commission approval, the FCC would have the opportunity to address ITSO's concerns in such a transfer proceeding. Furthermore, ITSO's proposal that the Commission set up a funding mechanism to allow it to purchase five satellites is not only unworkable, but plainly contrary to the privatization objective embodied in ITSO's organic treaty and the ORBIT Act.

For these reasons, the Commission should deny ITSO's request and dismiss its petition.

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¹ Intelsat North America LLC holds the satellite licenses that are the subject of this proceeding. Throughout this Opposition, Intelsat North America LLC and its related entities are collectively referred to as “Intelsat.” The intergovernmental organization that was the predecessor of Intelsat, prior to privatization, is referred to as “INTELSAT.” The intergovernmental organization that remained post-privatization is referred to as “ITSO.”

² Petition of the International Telecommunications Satellite Organization Under Section 316 of the Act, filed Jul. 10, 2006, *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518400563.

³ 47 U.S.C. § 316 (2000).

⁴ Petition of the International Telecommunications Satellite Organization Under Section 316 of the Act, Public Notice, DA 06-1460, IB Docket No. 06-137 (Jul. 18, 2006) (“*ITSO Section 316 Public Notice*”).

I. INTRODUCTION AND SUMMARY

ITSO, the successor to the INTELSAT intergovernmental organization (“IGO”), is composed exclusively of state sovereign parties, with a small secretariat. Prior to privatization, INTELSAT combined both sovereign interests and a commercial operation under international licensing. Privatization—which was accomplished consistent with Congressional mandate under the Open-Market Reorganization for the Betterment of International Telecommunications Act (“ORBIT Act”)⁵—transformed INTELSAT’s commercial operations into a private enterprise operating and licensed under national law. ITSO was left with the limited responsibility to monitor, as specified in a contract with Intelsat called the Public Services Agreement (“PSA”), privatized Intelsat’s adherence to certain so-called “Core Principles” relating to international public telecommunications services, particularly “lifeline” services on “thin” routes.⁶ ITSO was expressly restricted from conducting satellite operations by its revised treaty provisions. Since privatization, Intelsat has fulfilled its contractual obligation to provide global coverage and connectivity and has been a principal and reliable supplier of satellite services to so-called lifeline connectivity customers, as well as to hundreds of commercial and not-for-profit customers and numerous U.S. and foreign governmental entities.

⁵ 47 U.S.C. §§ 761-768.

⁶ See Agreement Relating to the International Telecommunications Satellite Organization, as Amended by the Twenty-Fifth (Extraordinary) Assembly of Parties in Washington, D.C. (Nov. 17, 2000) (“ITSO Agreement”), available at http://216.119.123.56/dyn4000/dyn/docs/ITSO/tp11_itso.cfm?location=&id+5&link_src=HPL&lang=english. The Core Principles include responsibilities to “(i) maintain global connectivity and global coverage; (ii) serve [Intelsat’s] lifeline connectivity customers; and (iii) provide non-discriminatory access to [Intelsat’s] system.” See *id.* at 3-4 art. III(b).

In the proceeding approving Intelsat's acquisition of PanAmSat, ITSO hypothesized that future financial conditions might someday impair Intelsat's ability to fulfill the Core Principles, including its commitment to provide lifeline connectivity. Speculating that Intelsat might file for bankruptcy, ITSO argued that the ITSO Agreement required the United States through FCC licensing to guarantee the continuity of lifeline services by imposing onerous license conditions and aggressive financial oversight of Intelsat.⁷

The FCC rejected ITSO's request, finding its claims speculative, unsupported and unrelated to the PanAmSat transaction. Moreover, observing that Intelsat's obligations with regard to the Core Principles were enforceable through the contractual PSA,⁸ the Commission held that it lacked the expertise and jurisdiction to adjudicate contractual disputes that might arise under the PSA. In any case, the agency noted that the proper vehicle for ITSO to seek modifications of Intelsat's space station licenses was the process set forth in Section 316 of the Communications Act.⁹ The ITSO Petition followed.

In its petition, ITSO argues that the ITSO Agreement obliges the United States, and thus the FCC, to regulate and condition Intelsat activities to ensure compliance with the Core Principles independent of the PSA. Further, ITSO demands that Intelsat execute

⁷ Comments of the International Telecommunications Satellite Organization (ITSO), IB Docket No. 05-290 (filed Nov. 14, 2005), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=651818004 ("ITSO Comments").

⁸ *Constellation, LLC, Carlyle PanAmSat I, LLC, Carlyle PanAmSat II, LLC, PEP PAS, LLC, and PEO PAS, LLC, Transferors, and Intelsat Holdings, Ltd., Transferee, Consolidated Application for Authority to Transfer Control of PanAmSat Licensee Corp. and PanAmSat H-2 Licensee Corp.*, Memorandum Opinion and Order, FCC 06-85, IB Docket No. 05-290, at 32 (¶ 59) (June 19, 2006) ("*Intelsat-PanAmSat Order*").

⁹ *Id.* at 35-36 (¶ 65).

a bond or grant a lien that would provide sufficient funds for ITSO to gain control of sufficient in-orbit assets in a bankruptcy process so that it could once again operate a global system.¹⁰

ITSO's arguments are no more persuasive in a Section 316 context than they were in the PanAmSat acquisition proceeding. ITSO has not asserted any claims under the PSA and cannot proffer any treaty provision obligating the United States, as a Notifying Administration under the treaty, to use its licensing authority to enforce ITSO's free-form interpretations of the PSA and the ITSO Agreement. Indeed, one of the Petition's stated objectives – the contemplated restoration of IGO services – flatly contradicts the fundamental objectives of the INTELSAT privatization. The remaining proposals are simply indirect efforts to transform Intelsat into the private operating arm of an IGO rather than the independent commercial company envisioned by the privatization process and the ORBIT Act.

Section 316 forbids post-hoc license modifications except where the FCC satisfies a demanding standard. ITSO's petition falls well short of this demanding standard. As shown below, ITSO's unsupported and unwarranted longing to return "back to the future" should be dismissed or denied.

¹⁰ ITSO requests that the Commission (1) "[e]nsure that the Commission's licenses to Intelsat are linked to the Core Principles"; (2) "[e]nsure that any successor to Intelsat, or any other satellite operator that uses the Parties' Common Heritage assets, is bound by the Core Principles in the ITSO Agreement through the execution of a public services agreement with ITSO"; and (3) "[r]equire that Intelsat place a lien, letter of credit, third party guarantee or other legal instrument on certain satellites in order to provide bankruptcy protection to ensure the fulfillment of the 'Core Principles' of the ITSO treaty Agreement, including global connectivity, global coverage, non-discriminatory access and protection of lifeline connectivity obligation (LCO) contracts." ITSO further requests that the "bankruptcy protection" in the third condition "include the replacement of a sufficient number of satellites for the ongoing achievement of these goals." ITSO Petition at 16-17.

II. BACKGROUND

Intelsat is the privatized successor to the operations of the former INTELSAT IGO. First created in 1964, INTELSAT's mission was "to continue and carry forward on a definitive basis the design, development, construction, establishment, operation and maintenance of the space segment of the [INTELSAT] global telecommunications system."¹¹

By the late 1990s, it had become apparent that "changing commercial, competitive, and regulatory conditions" made the continued operation of the INTELSAT global telecommunications system by the IGO impracticable in the long term.¹² Accordingly, after detailed and careful negotiations, the INTELSAT Parties and Signatories determined that it was necessary to transfer INTELSAT's operational assets to a private commercial entity that would possess the necessary flexibility to competitively respond to market changes and customer demands. The specific details of the privatization of INTELSAT were finalized and approved by unanimous consent at the Twenty-Fifth Assembly of Parties Meeting in November 2000. Among the details was an agreement to transfer the INTELSAT IGO's satellite filings at the International Telecommunication Union ("ITU") primarily to the U.S. administration, so that Intelsat would be regulated in a non-discriminatory, transparent manner and the filings (and their

¹¹ Agreement Relating to the International Telecommunications Satellite Organization ("INTELSAT"), art. II(a) 10 I.L.M. 909, 911 (Sept. 1971) ("INTELSAT Agreement").

¹² See, e.g., INTELSAT Assembly of Parties, Record of Decisions of the Twenty-Fifth (Extraordinary) Meeting, AP-25-3E Final W/11/00, at 5, ¶ 7(c)(i)-(ii) (Nov. 27, 2000)

services potential) would be protected by a diplomatically powerful administration with significant ITU experience.¹³

The centerpiece of privatization was the transfer of all operational assets and activities of the former INTELSAT IGO to Intelsat and the conversion of pre-existing Signatory investment shares into ordinary stockholdings which could be dealt with as commercial capital assets. The INTELSAT Assembly of Parties intended that Intelsat would operate as a truly commercial entity in the same manner as any commercial satellite operator.¹⁴ The transformation of INTELSAT also fulfilled a longstanding United States policy goal to remove IGOs from the provision of satellite services. This goal was codified in the ORBIT Act, which called for the transfer of substantially all of INTELSAT's operational assets and liabilities to an ordinary private company operating as an "independent commercial entity."¹⁵

To ensure the privatized Intelsat would continue to adhere to the Core Principles, however, INTELSAT's Parties agreed to bind Intelsat contractually and to retain ITSO as "a small residual intergovernmental organization," to monitor and enforce that contract.¹⁶

¹³ INTELSAT LLC (For Authority to Operate, and to further Construct, Launch, and Operate C-band and Ku-band Satellites that Form a Global Communications System in Geostationary Orbit), Memorandum Opinion, Order, and Authorization, 15 FCC Rcd 15460, 15463-15464 (¶ 9) (2000) ("2000 Licensing Order"), *on recon.* 15 FCC Rcd 25234 (2000). Certain Ka-band registrations were transferred to the United Kingdom.

¹⁴ See INTELSAT Assembly of Parties, Record of Decisions of the Twenty-Fourth Meeting, AP-24-3E Final P/10/99 at 7-10, ¶ 16 (Oct. 26-29, 1999) ("1999 Assembly Decision").

¹⁵ 47 U.S.C. § 763(2); *cf.* FCC Report to Congress as Required by the ORBIT Act, Seventh Report, FCC 06-82 (June 15, 2006) ("Seventh ORBIT Act Report").

¹⁶ *Applications of Intelsat LLC For Authority to Operate, and to Further Construct, Launch and Operate C-band and Ku-band Satellites that Form a Global Communications System in Geostationary Orbit*, Memorandum Opinion, Order, and Authorization, 16 FCC Rcd 12280, 12283 (¶ 10) (2001) ("ORBIT Act Compliance Order").

ITSO was to have “no commercial assets and undertake no commercial operations,”¹⁷ including any “operational or commercial role” in Intelsat.¹⁸ Thus, the ITSO Agreement substantially revised the pre-existing INTELSAT Agreement to remove all references to such activities, and the related INTELSAT Operating Agreement was terminated entirely. Under the resulting ITSO Agreement, “the main purpose of ITSO is to ensure, through the Public Services Agreement, that the Company provides, on a commercial basis, international public telecommunications services, in order to ensure performance of the Core Principles.”¹⁹

As an ordinary commercial operator, Intelsat surrendered its treaty-based access to national markets and special privileges and immunities.²⁰ Instead, Intelsat was to be licensed under U.S. and U.K. national law, and made subject to the requirements and regulations in the jurisdictions in which it operated.²¹ In accordance with this principle of non-discriminatory treatment, Intelsat was not to be singled out for unique regulatory burdens or restrictions at either the national or international level. Indeed, the INTELSAT 1999 Assembly of Parties “required the Commission to provide assurance that any satellites and ITU network filings transferred to the United States would be

¹⁷ *Id.*, 16 FCC Rcd at 12293 (¶ 41).

¹⁸ *Id.*, 16 FCC Rcd at 12283 (¶ 10).

¹⁹ ITSO Agreement at 3 art. III(a).

²⁰ *2000 Licensing Order*, 15 FCC Rcd at 15471 (¶ 23) (citing 1999 Assembly Decision at 7-9). Section 621(3) of the ORBIT Act similarly prohibited extension to Intelsat of the preferential treatment extended to INTELSAT. *See ORBIT Act Compliance Order*, 16 FCC Rcd at 12289 (¶ 29).

²¹ *Id.* The ORBIT Act requires that “any successor entity to INTELSAT...shall be a national corporation or similar accepted commercial structure, subject to the laws of the nation in which incorporated.” 47 U.S.C. § 763(5).

licensed to the applicant in a manner that would allow it to compete on a level playing field with U.S. and foreign commercial satellite operators.”²²

The ITSO Agreement also required the U.S. and U.K. Administrations to cancel the transferred ITU filings if they were no longer utilized by Intelsat or its successor.²³ This treaty provision expressly recognized that the prior INTELSAT registrations were to be restored to the ordinary ITU regime if no longer used by Intelsat or its successors, but were in no event to be restored to the non-operational IGO.

The FCC accepted this condition in the *2000 Licensing Order*, agreeing to “cancel any transferred frequency assignments and orbital locations under ITU procedures” if Intelsat or its successors were no longer licensed to use the “Common Heritage” orbital locations or frequencies.²⁴ The Commission criticized alternatives that would have allowed ITSO to designate the party to receive the orbital locations post-revocation or to have ITSO “hold frequency assignments and orbital locations on behalf of the privatized company.”²⁵

As a result, after privatization, ITSO had no authority to offer satellite services, or to hold orbital filings. Instead, “ITSO’s role [was] limited to monitoring Intelsat LLC’s public service obligations,”²⁶ which are set forth in the PSA. As recently confirmed by the FCC, the PSA is a private contract governed by the laws of the District of Columbia

²² *2000 Licensing Order*, 15 FCC Rcd at 15471 (¶ 12).

²³ ITSO Agreement, art. XII(c).

²⁴ *2000 Licensing Order*, 15 FCC Rcd at 15511 (¶ 130).

²⁵ *Id.*

²⁶ *ORBIT Act Compliance Order*, 16 FCC Rcd at 12285 (¶ 15).

between ITSO and Intelsat. The Commission is not a party to the PSA and plays no role in its enforcement.

The FCC already rejected essentially the relief ITSO requests here,²⁷ cautioning that ITSO’s conditions must be both mandated by the ITSO Agreement and promote U.S. foreign policy objectives—determinations within the expertise and sole province of the Department of State.²⁸ ITSO now recasts its arguments as reasons to modify Intelsat’s FCC licenses under Section 316 of the Communications Act.²⁹

III. STANDARD OF REVIEW, FCC DEFERENCE AND JURISDICTION

In the *Intelsat-PanAmSat Order*, the FCC denied ITSO’s request, finding that ITSO’s concerns were not merger-specific, as well as “speculative” and “not substantiated for the record.”³⁰ However, the Commission noted that Section 316 of the Communications Act allows it to modify Intelsat’s FCC licenses to further compliance with treaty obligations.³¹ At the same time, the Commission cautioned that – because ITSO’s concerns were grounded on treaty provisions and U.S. foreign policy objectives, which are the sole province of the Department of State – relief would require Department of State advice that ITSO’s proposed conditions were required by the ITSO Agreement and would promote U.S. objectives and obligations under that agreement.³²

²⁷ *Intelsat-PanAmSat Order*, at 34-35 (¶ 63) (ITSO’s concerns not merger-specific, “speculative” and “not substantiated for the record”).

²⁸ *Id.*, at 35-36 (¶ 65).

²⁹ 47 U.S.C. § 316(a)(1).

³⁰ *Intelsat-PanAmSat Order*, at 34 (¶ 63).

³¹ *Id.*, at 35-36 (¶ 65).

³² *Id.*

A. The Commission Is Not Required to Initiate Formal Modification Proceedings in Response to Third Party Requests That It Exercise Its Section 316 Authority

As stated in the Commission’s public notice, the purpose of this proceeding is for the *Commission* to decide if it should initiate a hearing addressing the modifications requested by ITSO under its Section 316 authority, which provides, in relevant part, that:

Any station license or construction permit may be modified *by the Commission ... if in the judgment of the Commission* such action will promote the public interest, convenience and necessity, or the provisions of this [Act] or of any treaty ratified by the United States will be more fully complied with.³³

The D.C. Circuit has explained that the determination to invoke Section 316 is committed to the Commission’s discretion.³⁴

By its terms, Section 316 does not grant third parties such as ITSO the right to formally propose license modifications. If the Commission decides to modify a license only the “holder of the license or permit” is statutorily provided with the opportunity to comment.³⁵ Should it propose a license modification, Section 316 demands that the Commission bear the burden of production and proof with respect to any contemplated license modification.³⁶

Commission practice confirms that the agency need not entertain third party requests asking it to exercise its Section 316 authority. Typically, the FCC classifies

³³ 47 U.S.C. § 316(a)(1) (emphasis added).

³⁴ *See Rainbow Broadcasting Co. v. FCC*, 949 F.2d 405, 410 (D.C. Cir. 1991).

³⁵ As the Commission has noted, this provision is in contrast to the provisions of Section 309 of the Act, which permits any “party in interest” to participate in a license application proceeding. *Establishing Rules and Policies for the Use of Spectrum for Mobile Satellite Services in the Upper and Lower L-band*, Report and Order, 17 FCC Rcd 2704, 2714 (¶ 25) (2002).

³⁶ 47 U.S.C. § 316; 47 C.F.R. § 1.87(e).

petitions for modification of another party's license as "informal requests" under Section 1.41 of its rules,³⁷ and has done so here.³⁸ The Commission has great discretion over informal requests. It is not required to entertain them at all,³⁹ and has declined to do so if "it would be an inefficient use of [FCC] resources to consider the request."⁴⁰

B. The Commission Properly Defers to Executive Branch Evaluations of the United States' Treaty Obligations, and Should Do So In This Case

The Commission already confirmed it would consider proposing modifications to Intelsat's licenses to "more fully comply with" U.S. treaty obligations only "if advised by the U.S. Department of State that such action would promote the provisions of the ITSO Agreement and U.S. fulfillment of obligations under the ITSO Agreement."⁴¹ The FCC already has requested the "comments and advice" of the Department of State on the ITSO Petition.⁴²

ITSO disagrees, demanding the Commission independently determine the responsibilities of the United States government as the Notifying Administration under

³⁷ 47 C.F.R. § 1.41. See *Rayfield Communications, Inc.*, 16 FCC Rcd 19513, 19515 (¶ 7) (2001).

³⁸ See *ITSO Section 316 Public Notice*.

³⁹ *JPJ Electronic Communications, Inc. for Informal Request to Modify Station KNNQ312, Licensed to the Town of Clay, New York*, Memorandum Opinion and Order, 17 FCC Rcd 5512, 5516 (¶ 9) (2002); see *Automobile Club of Southern California, For Reconsideration of Dismissal of Informal Request to Rescind Grant of Station WPOZ617, Licensed to Metro Wireless Communications, Walnut, California*, 16 FCC Rcd 2934, 2936 (¶ 6) (2001) (noting that the Commission "may consider informal pleadings, though [it is] not required to consider them.").

⁴⁰ *Charles T. Crawford Licensee of Conventional Business Station WPRL470, Santa Inez, California, et al.*, Memorandum Opinion and Order, 17 FCC Rcd 19328, 19330 (¶ 6) (2002).

⁴¹ *Intelsat-PanAmSat Order* at 35 (¶ 65); *ITSO Section 316 Public Notice*.

⁴² Letter from John V. Giusti, Acting Chief, International Bureau, to Steven W. Lett, Deputy United States Coordinator, International Communications and Information Policy, U.S. Department of State (July 27, 2006).

the ITSO Agreement.⁴³ ITSO supplies neither Constitutional nor statutory authority for such an independent obligation.

There is no merit to ITSO's claim. The allocation of responsibility within the U.S. government for evaluating and complying with international treaty obligations is an internal matter, not be dictated by intergovernmental organizations. Given its primacy in foreign affairs, should the Department of State not support ITSO's requests, the FCC would be obliged to dismiss the ITSO Petition.

It is axiomatic that independent administrative agencies, like courts,⁴⁴ must give great deference to the Executive Branch in interpreting the treaty obligations of the United States for the purpose of applying those obligations as U.S. law.⁴⁵ Consistent with this principle, the Commission routinely defers to the Department of State with respect to issues implicating treaty interpretation or other foreign policy concerns.⁴⁶ For example, in implementing its effective competitive opportunities test for evaluating foreign ownership of licensees subject to Section 310(b) of the Communications Act, the FCC stated:

⁴³ ITSO Petition at 9-10.

⁴⁴ *See United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 319 (1936).

⁴⁵ *Restatement 3d of the Foreign Relations Law of the United States*, § 326(2).

⁴⁶ *See, e.g., In re Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee; For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, 15 FCC Rcd 14032, 14218-19 (¶ 410) (deferring to Department of State interpretation of applicability of WTO Agreement to Gibraltar); *Cable and Wireless USA, Inc., Application for Authority to Operate as a Facilities--based Carrier in Accordance with the Provisions of Section 63.18(e)(4) of the Rules between the United States and Bermuda*, File No. ITC-214-19990709-00412, Order, Authorization and Certificate, 15 FCC Rcd 3050, 3052 (¶ 7) (Tel. Div. Feb. 18, 2000) (deferring to State Department interpretation of applicability of WTO Agreement to Bermuda).

We also recognize, however, that other federal agencies have developed specific expertise in matters that may be relevant in particular cases, such as international trade, national security, law enforcement, and foreign policy. In any given case, a requested departure from the statutory benchmark may implicate any one or a combination of those concerns by, for example, conflicting with or having other consequences under this country's international treaty obligations ... The Commission has no desire to run afoul of any such legitimate concerns. Our goal is to complement and support Executive Branch policies in these areas and, therefore, we will coordinate with appropriate executive agencies to make sure that our actions are consistent with national policy. Accordingly, in making our public interest determination, we will accord deference to the views of the Executive Branch on ... the interpretation of international agreements.⁴⁷

The case for deference to the Department of State is particularly compelling here, as it is the Department that represents the United States in ITSO and is intimately familiar with the text and history of the relevant instruments relating to Intelsat's privatization. Accordingly, the Commission has properly deferred to the Department of State in determining whether to open a proceeding under Section 316.

C. The FCC Should Not Enforce Private Contracts, Especially Where There Are Available Contract Remedies

ITSO also asks the FCC to condition Intelsat's licenses so that the Commission could enforce the Core Principle obligations in the PSA.⁴⁸ But, as the FCC already has confirmed in the *Intelsat-PanAmSat Order*,⁴⁹ ITSO's argument is contrary to "the

⁴⁷ *Market Entry and Regulation of Foreign-Affiliated Entities*, Report and Order, 11 FCC Rcd 3873, 3955 (¶ 219) (1995), *on recon.* 12 FCC Rcd 23891 (1997)

⁴⁸ ITSO Petition at 16 (proposed Condition 1).

⁴⁹ *Intelsat-PanAmSat Order*, at 34-35 (¶ 63) ("It has been the Commission's longstanding practice to defer to judicial decisions regarding the interpretation of contracts that do not give rise to more general public interest concerns under the Act") (citing *Regents of University System of Georgia v. Carroll*, 338 U.S. 586, 602 (1950)); *Applications of Nextel Communications, Inc. and Sprint Corporation*, File Nos.

Commission’s long standing policy [not] to adjudicate private contract[ual disputes],” especially claims governed by state law within the competence of alternative forums.⁵⁰ The determination that the PSA is outside the FCC’s jurisdiction should be treated as “law of the case,” and not re-litigated here.

Even were the Commission to concern itself with the obligations of the PSA, ITSO’s failure to exercise the PSA’s contractual remedies counsels against taking the extraordinary step of initiating a Section 316 proceeding. The ITSO Agreement makes clear that the PSA is intended to be the *exclusive mechanism* through which ITSO exercises formal supervision over Intelsat. Indeed, Article III(a) provides that “the main purpose of ITSO is to ensure, *through the Public Services Agreement*, that the Company provides, on a commercial basis, international public telecommunications services, in order to ensure performance of the Core Principles.”⁵¹ Notably absent is any mention of resort to a Notifying Administration as an enforcement vehicle. Indeed, proposals of this kind were rejected during the privatization negotiations.⁵²

Moreover, the treaty plainly relies upon the arbitration mechanism as the means of resolving disagreements under the PSA: Article X empowers ITSO’s Director General to “commence arbitration proceedings against [Intelsat] pursuant to the Public Services

0002031766., *For Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 20 FCC Rcd 13967, 14034 (¶ 181) (2005).

⁵⁰ See, e.g., *Listeners Guild, Inc. v. FCC*, 813 F.2d 465, 469 (D.C. Cir. 1987) (citing *Agreements Between Broadcast Licensees and the Public*, 57 F.C.C.2d 42 (1975); *Carnegie Broadcasting Co.*, 5 F.C.C.2d 882, 884 (1966)); *Telemundo Communications Group, Inc. (Transferor) and TN Acquisition Corp. (Transferee)*, *For Consent to the Transfer of Control of Estrella License Corporation*, 17 FCC Rcd 6958, 6966 (¶18) (2002) (holding that “the Commission is not the proper forum for resolving” private contractual disputes subject to an ongoing arbitration proceeding).

⁵¹ ITSO Agreement art. III(a) (emphasis added).

⁵² See Section IV.A.2, *infra* and accompanying footnotes.

Agreement.”⁵³ The PSA itself lays out the mechanism to arbitrate disputes between Intelsat and ITSO.⁵⁴ To date, ITSO has never invoked arbitration. The Commission should not supersede the prescribed arbitral forum for dispute resolution under the PSA.

IV. EVEN IF THE COMMISSION CONSIDERS ITSO’S REQUEST ON ITS MERITS, IT SHOULD BE REJECTED AS UNJUSTIFIED UNDER THE ITSO AGREEMENT AND U.S. LAW

Even when considered on its merits, ITSO’s Petition lacks legal support and misstates the history and logic of the privatization process. The proposed conditions would, at a stroke, vitiate the Intelsat privatization and take satellite telecommunications back to the IGO era. The FCC should dismiss or deny ITSO’s proposals as both unlawful and inconsistent with the public interest.

A. The United States’ Obligations as Notifying Administration Under the ITSO Agreement Are Limited to Licensing Intelsat and Representing Intelsat in International Coordination Activities

ITSO’s first two conditions – “linking” Intelsat’s licenses and any Intelsat “successor” to the Core Principles⁵⁵ – would oblige the FCC to regulate Intelsat’s, but no other satellite licensee’s, adherence to contractual responsibilities. ITSO’s request would expand the Commission’s duties well beyond its mandate from Congress, and, as proposed by ITSO, force the Commission, rather than the arbitral tribunal, to act as an enforcement vehicle for ITSO. There is no foundation in the ITSO Agreement for this request. Indeed, as demonstrated below, the obligations of the United States as Notifying Administration are limited to licensing Intelsat under U.S. domestic regulations, and representing Intelsat internationally at the ITU with respect to its orbital filings.

⁵³ ITSO Agreement, art. X(h); *Intelsat-PanAmSat Order*, at 34 (¶62).

⁵⁴ Public Services Agreement, art. VI.

⁵⁵ ITSO Petition at 2.

1. **The Text of the ITSO Agreement Clearly Established that the Role of a Notifying Administration is Limited to Licensing and Coordination**

There is no basis for ITSO’s assertion that Article XII of the ITSO Agreement causes a Notifying Administration to become a “trustee for the transferred orbital locations” and to “become[] directly responsible to ITSO’s Parties for ensuring the continued fulfillment of the Core Principles.”⁵⁶ The text says nothing of the sort.⁵⁷ And ITSO’s concept of “trustee” necessarily implies a “grantor” that has a continuing interest in the property with which the trustee is entrusted. Given that the Parties explicitly declined to provide ITSO with any authority over the Common Heritage locations, ITSO’s assertion that it “retained interests in [the] Common Heritage assets in accordance with the ITSO Agreement”⁵⁸ is plainly incorrect.

Rather, Article XII(c) of the ITSO Agreement clearly confines the obligations of notifying Administrations to two: in the domestic sphere, licensing former and future Intelsat satellite locations; and internationally, protecting and maintaining the ITU filings necessary to protect and use such locations:

Any party selected to act as [Intelsat’s] Notifying Administration shall, under applicable domestic procedure:

(i) authorize the use of such frequency assignment by [Intelsat] so that the Core Principles may be fulfilled; and

⁵⁶ ITSO Petition at 7.

⁵⁷ Under Article 31 of the Vienna Convention on the Law of Treaties (“Vienna Convention”), a treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Vienna Convention on the Law of Treaties, art. 31(1), 8 I.L.M. 679, 691-92 (1969). The Vienna Convention is the primary source of international law on treaties, which serves as a guide to interpreting and implementing treaty provisions.

⁵⁸ ITSO Petition at 2.

(ii) in the event that such use is no longer authorized, or [Intelsat] no longer requires such frequency assignment(s), cancel such frequency assignment under the procedures of the ITU.⁵⁹

On its face, Article XII(c) gives the U.S., as Notifying Administration, a role to be fulfilled in Geneva--maintaining and protecting the ITU frequency registrations and notification transferred to the U.S. national jurisdiction. The text includes a second role—licensing Intelsat’s use of the transferred and future filings. Both roles clearly are conditions precedent to Intelsat’s provision of services. (The United States has fully carried out these responsibilities.) But the fact that Notifying Administrations act for Intelsat at the ITU, and license Intelsat domestically, “so that the Core Principles may be fulfilled” does not convey authority or oversight to ITSO to instruct the Notifying Administration on how or whether Core Principle obligations are appropriately met.

As ITSO correctly notes,⁶⁰ Article XII(e)(iv) also addresses the role of Notifying Administrations vis-à-vis fulfillment of the Core Principles.⁶¹ But ITSO never

⁵⁹ ITSO Agreement, art. XII(c).

⁶⁰ ITSO Petition at 7.

⁶¹ ITSO Agreement, art. XII(e) provides that:

(e) Each Party selected to act as a Notifying Administration pursuant to paragraph (c) shall:

(i) *report* at least on an annual basis to the Director General on the treatment afforded by such Notifying Administration to the Company, with particular regard to such Party’s adherence to its obligations under Article XI(c);

(ii) *seek the views* of the Director General, on behalf of ITSO, regarding actions required to implement the Company’s fulfillment of the Core Principles;

(iii) *work with* the Director General, on behalf of ITSO, on potential activities of the Notifying Administration(s) to expand access to lifeline countries;

(iv) *notify and consult* with the Director General on ITU satellite system coordinations that are undertaken on behalf of the Company to assure that global connectivity and service to lifeline users are maintained; and

acknowledges that this obligation demands only that the U.S. “notify and consult with the Director General on ITU satellite system coordinations that are undertaken on behalf of the Company to assure that global connectivity and service to lifeline users are maintained.”⁶² This narrow duty is entirely consistent with a Notifying Administration’s *limited* treaty responsibilities at the ITU and in domestic licensing. The related Article XII(e)(ii) reference to “implement[ing] the Company’s fulfillment of the Core Principles” is only the *benefit* that is expected to arise from the consultation.

It is telling that the ITSO Petition provides little analysis of the text of Article XII. It is equally significant that ITSO spotlights no Article XII language allegedly breached by the United States. Perhaps recognizing the narrow scope of the provision, ITSO instead leaps from licensing and coordination to the unsupported contention that each Notifying Administration “serves as trustee for the orbital locations for which they have been selected,” which somehow makes the U.S. and U.K. “directly responsible to ITSO’s Parties for ensuring the continued fulfillment of the Core Principles.”⁶³ The ITSO Agreement does not support such a reading.

Ironically, ITSO’s assertions run counter to its own authority. The Agreement allots the responsibility for monitoring and maintaining Intelsat’s compliance with the PSA to ITSO itself, and the PSA further recognizes LCO contracts which have their own enforcement provisions. As the treaty states:

(v) *consult* with the ITU regarding the satellite communications needs of lifeline users.

(emphasis added).

⁶² *Id.*

⁶³ ITSO Petition at 7.

Taking into account the establishment of the Company, the main purpose of ITSO is to ensure, *through the Public Services Agreement*, that the Company provides, on a commercial basis, international public telecommunications services, in order to ensure performance of the Core Principles.⁶⁴

Put simply, ITSO must seek performance of Intelsat's public service obligations through the mechanisms of the PSA.

In sum, Article XII imposes no specific obligations on the Notifying Administration vis-à-vis Intelsat, except the obligation to authorize the use of – and protect internationally – the ITU filings formerly held by the IGO. In light of the extensive and careful negotiations required to craft the ITSO Agreement, had the Parties truly intended the Notifying Administration to take on the expansive role of guarantor of Intelsat's performance of the Core Principles advocated by ITSO, or act as legal trustee, it stands to reason that they would have made this responsibility explicit. The fact that the text of the treaty does not indicate such a role for the selected Notifying Administration is a clear indication that no such role was envisioned by the Parties.

2. An Analysis of the Negotiating History of the ITSO Agreement Confirms the Nature of the United States' Role as Notifying Administration

The extensive negotiating history of the ITSO Agreement⁶⁵ further confirms that the United States' obligations are only to license privatized Intelsat to use the transferred filings and to protect those filings at the ITU.

⁶⁴ ITSO Agreement, art. III(a) (emphasis added).

⁶⁵ Article 32 of the Vienna Convention further provides that “[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31.” Vienna Convention on the Law of Treaties, art. 32, 8 I.L.M. at 692. Recourse to supplementary means of interpretation is also permitted where the text of a treaty, interpreted in light of its purpose and context, is ambiguous. *Id.* As noted above, the text of the ITSO Agreement clearly sets forth the obligations of the

In the privatization negotiations leading up to the Twenty-Fifth Assembly of Parties Meeting, the Penang Working Party (“PWP”) developed recommendations for the privatization and restructuring of INTELSAT. It specifically considered a proposal for a *separate agreement* between ITSO and the selected Notifying Administration(s) to safeguard the Core Principles. The PWP elected not to accept this proposal, noting concerns that “[s]uch an agreement would, in particular, require that each host jurisdiction assume obligations that could interfere with its sovereign prerogatives.”⁶⁶ Obligating the Notifying Administration to act as guarantor of Intelsat’s performance of the Core Principles was thus specifically considered and rejected by the Parties. Under the well-known canon of construction *expressio unius est exclusio alterius*,⁶⁷ the PWP debates make clear that ITSO’s rights and remedies with respect to Intelsat’s adherence to the Core Principles lie in the PSA, not Section 316.

The debate at the 25th Assembly of Parties over the selection of the United States and United Kingdom as the Notifying Administrations for Intelsat further confirms that the selected Notifying Administration’s role was to be that of *facilitator* of Intelsat’s performance of the Core Principles, not that of *guarantor*.⁶⁸ The discussion focused on the commitment and ability of the United States to ensure Intelsat’s continued use of the

United States with respect to the frequency assignments formerly assigned to INTELSAT. Even if these provisions were considered to be ambiguous, however, the negotiating history discussed below forecloses the interpretation propounded by ITSO.

⁶⁶ Report of the Penang Working Party to the Twenty-Fifth (Extraordinary) Assembly of Parties, AP 25-7E W/11/00 at 33 (¶¶ 83-84) (June 27, 2000).

⁶⁷ Norman J. Singer, *Sutherland Statutory Construction*, § 47:23 (6th ed. 2000).

⁶⁸ INTELSAT Assembly of Parties, Summary Minutes of Discussions of the Twenty-Fifth (Extraordinary) Meeting, AP-25-4E Final W/11/00 at 29-41 (¶¶ 153-225) and 58-63 (¶¶ 311-328) (Nov. 13-17, 2000).

frequency assignments following privatization.⁶⁹ Nowhere in that debate, however, is there any suggestion that the selected Notifying Administrations would be obligated to act as guarantor of Intelsat’s performance of its obligations under the PSA. The process produced an objective analysis of fourteen criteria, none of which related to the potential Notifying Administration’s willingness or ability to guarantee Intelsat’s performance of the Core Principles.⁷⁰ Indeed, the Board of Governors’ statement that “the licenses offered by the U.S. *will not hamper the ability of privatized Intelsat to honor its commitments under the Public Services Agreement*” is fundamentally inconsistent with ITSO’s position that the ITSO Agreement obligates the United States, through its licensing process, to somehow ensure that Intelsat honors its commitments under the PSA.

3. The United States’ Obligations as a Notifying Administration Are Fully Implemented by the Existing Licenses and FCC Regulatory Oversight

The United States was chosen as a Notifying Administration based on the Commission’s experience at the ITU, the stable U.S. regulatory environment, and the Commission’s commitment not to impair Intelsat’s public service obligations.⁷¹ The United States has fully complied with its obligations under the ITSO Agreement. The

⁶⁹ See, e.g., *id.* at 30 (¶¶ 156-161) (comments of representative of the Party of France).

⁷⁰ See *id.* at 29-31 (¶ 96). The fourteen criteria were: 1. WTO membership; 2. Commitment to market access for satellite operators; 3. Commitment to accept INTELSAT’s existing USA-IT registrations; 4. Experience representing satellite operators at the ITU; 5. Commitment to license privatized Intelsat to use all of the transferred USA-IT registrations on a non-temporary basis; 6. Stable and predictable regulatory environment; 7. Ownership and governance requirements compatible with Intelsat’s structure; 8. Ability to pursue market access on behalf of Intelsat; 9. Ability to obtain additional orbital locations for Intelsat; 10. Substantial commercial presence; 11. Significant trading nation; 12. Political and economic stability; 13. Tax efficiency; and 14. Flexible corporate governance requirements. Report of the Board of Governors to the Twenty-Fifth (Extraordinary) Assembly of Parties Regarding the Restructuring of INTELSAT, AP-25-10E W/11/00 at p. 24, ¶ 85 n.6 (Sept. 26, 2000).

⁷¹ See *2000 Licensing Order*, 15 FCC Rcd at 15472-74 (¶¶ 25-29).

Commission has licensed Intelsat to operate at the orbital locations and in the spectrum formerly used by INTELSAT IGO, and has maintained those frequency assignments at the ITU. Moreover, the *2000 Licensing Order* explicitly incorporates the accord on relinquished or voided Intelsat licenses, promising to “cancel any transferred frequency assignments and orbital locations . . . should Intelsat LLC or its successors no longer be authorized by the licensing jurisdiction to use such frequency assignments and orbital locations.”⁷² This condition is sufficient to implement the Commission’s role in fulfilling the United States’ obligations under Article XII of the ITSO Agreement.⁷³

In orders addressing post-privatization Intelsat from the *Intelsat Licensing Order* to the present, the FCC never mentions any obligation to act as a guarantor of Intelsat’s responsibilities under the Public Services Agreement. ITSO notes the FCC’s comment in the *Intelsat Licensing Order* that “[t]he final Assembly decision to privatize INTELSAT will depend on receiving assurances from the prospective licensing jurisdictions that the privatized entity will continue to operate in accordance with these principles.”⁷⁴ But consistent with the treaty text discussed above, the FCC has never mentioned any requirement to *ensure* Intelsat’s compliance with the Core Principles, but rather that “U.S. satellite licenses will *allow* Intelsat LLC to continue to provide global coverage and connectivities on a commercial and non-discriminatory basis so as to protect lifeline users and global connectivities.”⁷⁵ In the *Intelsat/PanAmSat Order* just two months ago, the

⁷² See *id.*, 15 FCC Rcd at 15511-15513 (¶¶ 130-136).

⁷³ See Section IV.A.1 *supra*.

⁷⁴ ITSO Petition at 4 (*quoting 2000 Licensing Order* ¶ 25).

⁷⁵ *2000 Licensing Order*, 15 FCC Rcd at 15474 (¶ 28) (emphasis added). See also *id.* at 15462 (¶ 3) (“Upon effect, the licenses will *permit* Intelsat LLC to operate pursuant to the” Core Principles) (emphasis added).

Commission reiterated that it “neither was requested to condition nor did it condition Intelsat’s license on the fulfillment of Intelsat’s commitments under the Public Services Agreement subsequently entered into by ITSO and Intelsat.”⁷⁶

B. ITSO’s Proposed Condition Violates the ITSO Agreement’s National Treatment Obligation

In selecting a Notifying Administration, the INTELSAT Parties sought to ensure that Intelsat would be regulated in a manner comparable to any other commercial satellite operator. Treating Intelsat in a manner different from other Commission licensees would be directly contrary to the “national treatment” of satellite providers required by the ITSO Agreement, and cannot result in U.S. obligations under that Agreement being “more fully complied with.”⁷⁷

In this case, ITSO insists the FCC enforce the provisions of the PSA, including in the event of a bankruptcy. But the agency does not scrutinize a satellite licensee’s present balance sheet or future financial health⁷⁸ – except Intelsat’s, were ITSO’s conditions adopted. Even the FCC’s public policy goal of minimizing service interruptions does not turn licensees into sureties forced to fund some speculative post-bankruptcy transferee. ITSO does not explain why it, alone of all entities in contractual privity with FCC licensees, should get a performance guarantee,⁷⁹ much less suggest any FCC authority to do so.

⁷⁶ *Intelsat-PanAmSat Order*, at 33 (¶ 60).

⁷⁷ 47 U.S.C. § 316(a)(1).

⁷⁸ In fact, the Commission no longer even scrutinizes the financial qualifications of satellite applicants. See *Amendment of the Commission’s Space Station Licensing Rules and Policies, Mitigation of Orbital Debris*, First Report and Order, 18 FCC Rcd 10760, 10824 (¶¶164-165) (2003).

⁷⁹ To use ITSO’s own example, while the Commission recognizes the important public safety and disaster response functions played by telecommunications carriers, the FCC does not condition licenses

C. ITSO’s Proposed Acquisition and Operation of Satellites Would Directly Contradict the Privatization Objectives Embedded in the ITSO Agreement

Not only is ITSO’s proposal to re-acquire and operate satellites devoid of any basis in the ITSO Agreement, it would reverse the fundamental objective of the privatization process resulting in the ITSO Agreement. As discussed above, the entire purpose of privatization was to transfer the operational assets and activities of the unsustainable INTELSAT IGO to a private corporation.⁸⁰ The Parties explicitly concluded that:

[A]s presently structured and constrained by the International Telecommunications Satellite Organization Agreement (the INTELSAT Agreement) and the Operating Agreement Relating to the International Telecommunications Satellite Organization (the Operating Agreement), INTELSAT is unlikely to succeed in fulfilling the core principles embodied in the public service and lifeline connectivity obligations, over the long term, unless INTELSAT space segment assets are transferred to and operated by a commercial entity.⁸¹

Accordingly, the former INTELSAT Agreement was unanimously amended to delete all provisions relating to the operational role of the INTELSAT IGO, and the INTELSAT Operating Agreement was terminated.⁸²

upon carriers’ compliance with their contractual obligations to provide service to customers during natural disasters or at any other time.

⁸⁰ Indeed, this is explicitly recognized in the Preamble of the ITSO Agreement, which states that: “[I]ncreas[ing] competition in the provision of telecommunications services has made it necessary for the International Telecommunications Satellite Organization to transfer its space system to [Intelsat] in order that the space system continues to be operated in a commercially viable manner.”

⁸¹ INTELSAT Assembly of Parties, Record of Decisions of the Twenty-Fifth (Extraordinary) Meeting, AP-25-3E Final W/11/00 at 5 ¶ 7(c)(ii) (Nov. 27, 2000).

⁸² See Amendments to the INTELSAT Agreement and Operating Agreement, AP-25E W/11/00 (Sept. 22, 2000).

The ITSO Secretariat now asks the Commission to go “back to the future” by creating a financial vehicle through which ITSO could repurchase the Intelsat satellites and resume operations in the event of a bankruptcy, thus re-creating the IGO as an operating entity. This proposal would undermine the very letter and purpose of the ITSO Agreement.

V. ITSO’S PROPOSED BANKRUPTCY-RELATED CONDITIONS ARE UNNECESSARY

A. ITSO’s Bankruptcy Concerns are Hypothetical and Unsupported

ITSO’s second and third proposed conditions are premised upon unfounded speculation that Intelsat’s debt levels could cause it to enter into bankruptcy and in that process seek to renounce its public service obligations. ITSO raised similar concerns in the Intelsat-PanAmSat proceeding. In the *Intelsat-PanAmSat Order*, the Commission held that ITSO had “not substantiated for the record” that the obligations set out in the PSA “factually are at significant risk” or that “Intelsat, as a result of the merger, is likely to enter bankruptcy or default on its contractual obligations.” Instead, the FCC called ITSO’s concerns “speculative.”⁸³

ITSO fails to establish that such a bankruptcy is any more likely or imminent than it was two months ago.⁸⁴ In ITSO’s own words, “it is *presently unknowable* whether Intelsat will, in fact, default ... on its financial or contractual obligations, or ... fail to have sufficient access to capital to replace satellites currently occupying Common Heritage orbital locations.”⁸⁵ The “facts” presented in the petition consist largely of

⁸³ *Intelsat-PanAmSat Order*, at 35 (¶ 63).

⁸⁴ See generally discussion in *Intelsat-PanAmSat Order*, at 28-36 (¶¶ 53-68).

⁸⁵ ITSO Petition at 11 (emphasis added).

assertions, previously made in ITSO's comments in the Intelsat-PanAmSat merger docket, that "major financing rating agencies have expressed significant concerns about the financial viability of a post-merger Intelsat."⁸⁶ The Commission found in the *Intelsat-PanAmSat Order* that such allegations prove little more than the truism that "bankruptcy can be a risk in a business venture."⁸⁷

Furthermore, putting aside ITSO's questionable tactic in comparing a corporate bankruptcy to one of the worst natural disasters in U.S. history,⁸⁸ bankruptcy is a legal condition that does not in itself mandate disruption of service. Commission licensees routinely enter into bankruptcy without interrupting the operation of their licensed facilities. For example, Loral Ltd., and certain of its subsidiaries continued to operate their satellites after filing for Chapter 11 bankruptcy in 2003.

Regardless of whether Intelsat sought reorganization under Chapter 11 of the Bankruptcy Code or was liquidated pursuant to Chapter 7 of the Code, the company's satellites and orbital slots would have to be transferred to a new entity – either a trustee or debtor-in-possession, or a third party purchaser of the assets. Such transfers, of course, would require approval by the Commission.⁸⁹ It would be in the context of such an approval proceeding, and only if a transferee did not declare itself bound as a successor under the terms of the PSA, that the Commission would have to evaluate the hypothetical issue raised by ITSO in its petition – i.e., whether the new entity's adherence to the PSA was necessary for it to qualify as a licensed successor to Intelsat and thus be eligible for

⁸⁶ *Intelsat-PanAmSat Order*, at 30 (¶ 57).

⁸⁷ *Intelsat-PanAmSat Order*, at 35 (¶ 63).

⁸⁸ ITSO Petition at 10-12.

⁸⁹ *See* 47 C.F.R. § 25.119.

continued authorization to use the transferred orbital locations. Moreover, by the time of such hypothetical event, the PSA itself might expire were the Parties to determine not to continue ITSO under Article XXI of the ITSO Agreement.⁹⁰

B. The PSA and Intelsat’s Licenses Already Incentivize Adherence to the PSA by Any Intelsat Transferee

ITSO’s second request that the Commission “ensure that any successor to Intelsat, or any other satellite operator that uses the Parties’ Common Heritage assets, is bound by the Core Principles in the ITSO Agreement through the execution of a public services agreement with ITSO”⁹¹ is also unnecessary. Existing provisions of the ITSO Agreement, the PSA, and Intelsat’s licenses strongly incentivize any “successor” to Intelsat that emerges from a potential future bankruptcy to remain bound to the existing company’s obligations under the PSA, even though it would have the legal right under bankruptcy law to reject executory contracts.

Contrary to ITSO’s contention that “the nature of an Intelsat ‘successor’ was not defined in the privatization agreements, nor was the relationship between an Intelsat successor and the Public Services Agreement specified,”⁹² the PSA *explicitly provides* that it “shall inure to the benefit of, and be binding upon, the parties hereto and their respective successors and the permitted assigns of Intelsat.”⁹³ Thus, unless a third party that succeeded to Intelsat’s assets explicitly decided to reject the PSA, which would carry with it independent remedies under bankruptcy law, it would be bound by the PSA.

⁹⁰ ITSO Agreement, art. XXI.

⁹¹ ITSO Petition at 16.

⁹² *Id.* at 17.

⁹³ Public Services Agreement, art. 13.

Any rejection of the PSA could raise serious questions about status as a “successor” to the license assignments of Intelsat, potentially jeopardizing the ITU filings that were transferred at privatization. The ITSO Agreement requires the United States to cancel of the filings for the orbital locations formerly held by the INTELSAT IGO and currently licensed to Intelsat in the event their use by the Company is no longer authorized, a term defined to include Intelsat’s successors in interest.⁹⁴ The Commission incorporated this requirement as a condition on Intelsat’s licenses: “in the event that any of the orbital locations identified in Appendix A of the *Intelsat Licensing Order* are no longer assigned for use by Intelsat or *its successors*, such orbital locations shall be cancelled in accordance with procedures of the International Telecommunications Union.”⁹⁵ Any hypothetical debtor-in-possession or purchaser seeking to operate Intelsat’s assets post-bankruptcy would have an incentive to remain a “successor” in the eyes of the FCC.

C. ITSO’s Proposal to Acquire and Operate Intelsat Assets is Against Commission Policy and is Unworkable

Despite the protection already afforded to ITSO’s interest in the PSA by existing Intelsat licenses, ITSO further requests that the Commission require Intelsat to place a “lien, letter of credit, third party guarantee or other legal instrument” on its satellites in order to finance ITSO’s acquisition of five satellites in the event of an Intelsat bankruptcy. Needless to say, ITSO cites no treaty provision supporting this request.

⁹⁴ ITSO Agreement, art. XII(c)(ii); art. I(d) (defining “Company” as “the private entity or entities established under the law of one or more States to which the international telecommunications satellite organization’s space system is transferred and includes their successors-in-interest”).

⁹⁵ *Intelsat-PanAmSat Order*, at 36 (¶ 66) (emphasis added).

Moreover, it would be unprecedented for the Commission to impose a license condition that requires the licensee to guarantee sufficient funds to permit a contracting party like ITSO to acquire the licensee's assets in the event of bankruptcy. Just recently, the Commission rejected an analogous request from spectrum lessees that it "provide more protection for lessees in the event of a licensee bankruptcy," including requests to "require the leased spectrum to be partitioned/disaggregated to the lessee, or require the new licensee to assume the lease on substantially the same terms as the original licensee."⁹⁶ The Commission noted that parties "are of course free to obtain certain appropriate contractual protections from licensees when they enter into spectrum leasing arrangements," but refused to impose any conditions on license holders in order to protect spectrum lessees.⁹⁷ It should take the same approach here.

Even if law and policy allowed such a condition, ITSO provides no detail on how such an instrument would be structured. As ITSO's outside counsel has conceded, a lien requires an obligation that can be valued.⁹⁸ ITSO has not provided the Commission with valuation for Intelsat's public service obligations nor proffered any method for doing so. Intelsat respectfully submits that there is no practicable method to discern the value of the PSA obligations at a hypothetical future date.

⁹⁶ See *Promoting Efficient Use of Spectrum Through the Elimination of Barriers to the Development of Secondary Markets*, Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking, 19 FCC Rcd 17503, 17568-69 (¶141) (2004).

⁹⁷ *Id.*, 19 FCC Rcd at 17569 (¶ 143).

⁹⁸ See Legal Opinion of Kirkpatrick & Lockhart Nicholson Graham LLP on the Risk of U.S. Bankruptcy Laws to the Continuity of Public Service Obligations, Attachment No. 1 to AP-29-11E W/01/06, at 11 (attached to March 27, 2006 letter from Steven W. Lett, Deputy United States Coordinator, International Communications and Information Policy, to Donald Abelson, Chief, International Bureau, FCC).

Similarly, if the Commission were to require Intelsat to obtain a replacement cost bond on five of its satellites triggered by an event of bankruptcy, the Commission would have to determine the exact amount necessary at some future, unknown date to allow ITSO to “obtain control of, and finance replacements for” these satellites. Presumably, if Intelsat went into Chapter 7 liquidation, ITSO would seek to purchase these satellites from the Intelsat estate. In that case, the proposed bond would have to be for a sufficient amount to outbid *every other bidder* in the asset auction for these satellites. Needless to say, it is impossible to determine the amount necessary for ITSO to obtain these satellites in that scenario.⁹⁹ Even if the Commission picked some arbitrary amount, there is no guarantee that another bidder would not outbid ITSO – in which case the FCC would have provided ITSO with hundreds of millions of dollars for no reason. What is certain is that ITSO has provided no evidence that such a bond could be obtained, has provided no estimate of the cost of such a bond, and has given no consideration to how that cost would impact what, according to ITSO, is Intelsat’s delicate financial condition.

Ironically, if ITSO were able to obtain control of Intelsat’s satellites, it could not be licensed by the Commission to operate them at the Common Heritage locations. Because the ORBIT Act required Intelsat or a “successor” to be a “privatized” entity created from the privatization or assets of INTELSAT, ITSO could not be deemed a licensable “successor” of Intelsat.¹⁰⁰ Therefore, the FCC would be required to cancel the

⁹⁹ Given that fact that ITSO does not have the necessary workforce, facilities, or authorization to manufacture, launch, and operate a fleet of satellites, it seems unlikely that ITSO would attempt to launch new satellites to ensure global connectivity. Nevertheless, it would be equally difficult to determine the amount ITSO would require to do so.

¹⁰⁰ 47 U.S.C. § 769(a)(7).

orbital filings under the terms of Intelsat's licenses. Without access to the locations, ITSO would have no method of utilizing the satellites.

VI. CONCLUSION

For the above-stated reasons, Intelsat respectfully requests that the Commission dismiss ITSO's Petition, and decline to initiate a Section 316 proceeding.

Respectfully submitted,

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