

**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
	)	

**REPLY OF INTELSAT**

Intelsat North America LLC (“Intelsat”<sup>1</sup>) hereby responds to the Reply Comments of the International Telecommunications Satellite Organization (“ITSO”)<sup>2</sup> in this proceeding. ITSO’s July 10, 2006 Petition<sup>3</sup> requested that the Commission commence a Section 316<sup>4</sup> modification proceeding to: (1) “link” the licensing of certain of Intelsat’s space stations to performance of Intelsat’s contractual obligations under the Public Services Agreement (“PSA”); (2) ensure that any “successor” to Intelsat would be bound by the PSA; and (3) mandate the establishment of an undefined lien or financial instrument which would permit ITSO, in the speculative event of an Intelsat bankruptcy,

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<sup>1</sup> Intelsat North America LLC holds the satellite licenses that are the subject of this proceeding. Throughout this Reply, 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.”

<sup>2</sup> Reply Comments of the International Telecommunications Satellite Organization (“ITSO”), IB Docket No. 06-137, filed Aug. 28, 2006 (“*ITSO Reply*”).

<sup>3</sup> Petition of the International Telecommunications Satellite Organization Under Section 316 of the Act, IB Docket No. 06-137, filed Jul. 10, 2006, *available at* [http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6518400563](http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518400563) (“*ITSO Petition*”).

to “obtain control of, and finance replacements for, five ‘global coverage and connectivity satellites.’”<sup>5</sup>

Intelsat’s Opposition demonstrated that: (1) the requested “link” would require the Commission, contrary to all established precedent and the exclusive arbitration remedy of the PSA, to inject itself into the enforcement of contractual obligations;<sup>6</sup> (2) the requested PSA continuity, as a practical matter, was already ensured by existing conditions on the licenses at issue;<sup>7</sup> and (3) the requested financial protection was a remedy for a remote and speculative contingent harm, financially burdensome, unprecedented and, in its operational intent, directly contradicted ITSO’s treaty-powers and the fundamental concept of privatization.<sup>8</sup>

In its August 28 reply comments, ITSO (1) abandoned its request for “linkage” and, in fact, any reliance on the PSA as a basis for FCC 316 action; (2) ignored, and thus tacitly admitted, the PSA safeguards established by existing conditions; and (3) abandoned its request to be a beneficiary of any contingent financial benefit. Instead ITSO now seeks a “clarification,” in direct disregard of the ITSO treaty, that any entity entering into a PSA (presumably of ITSO’s design) will be considered a “successor” to Intelsat.<sup>9</sup> ITSO further requests that, by some unspecified means, the Commission require that the undefined, bankruptcy-related financial benefit that Intelsat should be forced to establish “*be for the benefit of Intelsat or any successor entity having a public*

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<sup>4</sup> 47 U.S.C. § 316 (2000).

<sup>5</sup> *ITSO Petition* at 19.

<sup>6</sup> Opposition of Intelsat, IB Docket No. 06-137, filed Aug. 17, 2006, at 13-14 (“*Opposition*”).

<sup>7</sup> *Opposition* at 27-28.

<sup>8</sup> *Opposition* at 25-32.

<sup>9</sup> *ITSO Reply* at 7.

*services agreement with ITSO . . . .*”<sup>10</sup> ITSO argues that these requests are somehow necessary to meet U.S. obligations under the ITSO treaty.

As further explained below, ITSO’s fallback requests no more warrant commencement of a Section 316 proceeding than its original requests. ITSO has abandoned all pretense that the Commission’s regulatory and Notifying Administration responsibility to license Intelsat on the same basis as all other satellite operators supports ITSO’s request. ITSO also has chosen to ignore Intelsat’s careful examination of the relevant treaty provisions and failed to point out any provision which supports its request. In addition, ITSO has failed to demonstrate that an Intelsat bankruptcy is other than a remote contingency; that there is any practical possibility that the PSA would be rejected in the event of a bankruptcy; or that there is any practical means of establishing or administering the financial guarantee ITSO requests. In these circumstances, the Commission must dismiss ITSO’s Petition.

**I. THE COMMISSION HAS NO OBLIGATION TO MODIFY INTELSAT’S LICENSES**

ITSO complains that Intelsat’s Opposition ignores the duties of the United States (including the FCC) as the Notifying Administration and unduly focuses on the PSA between ITSO and Intelsat.<sup>11</sup> ITSO never responds to Intelsat’s showing that the Commission’s preferred course of action is to defer to the State Department on the interpretation of treaty obligations. Furthermore, Intelsat devoted a full third of its Opposition to describing the obligations of a Notifying Administration.<sup>12</sup> As shown therein, the ITSO Agreement clearly limits such obligations to two main duties: (1)

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<sup>10</sup> *ITSO Reply* at 9.

<sup>11</sup> *ITSO Reply* at 3.

<sup>12</sup> *Opposition* at 15-25.

licensing the transferred orbital and frequency assignments in accordance with applicable domestic procedure; and (2) maintaining and protecting the transferred assignments at the International Telecommunication Union (“ITU”). The continued fulfillment of the Core Principles is a *benefit* of the Notifying Administration’s compliance with its obligations, not a *duty* of the Notifying Administration under the ITSO Agreement.

Instead of responding to Intelsat’s arguments, ITSO simply ignores them. Instead, ITSO repeats the same claims from its Petition, using the same selective quotations.<sup>13</sup> ITSO fails to rebut in any way Intelsat’s showing that the Commission has fully complied with its obligations under the ITSO Agreement by promising to cancel any transferred frequency assignments and orbital locations if no longer authorized for use by Intelsat or its successors, and explicitly incorporating that condition into Intelsat’s licenses.

As for the PSA, ITSO’s first requested modification was that the FCC “ensure” that Intelsat’s licenses were “linked to the Core Principles.”<sup>14</sup> Therefore, Intelsat was required to explain in its Opposition that the ITSO Agreement makes clear that the PSA is the *exclusive* mechanism through which ITSO is to exercise formal supervision over Intelsat. The ITSO Agreement makes no mention of, and the Parties rejected, the use of a Notifying Administration as an enforcement vehicle for the Core Principles. Instead, the PSA provides for arbitration as sole remedy for violations. ITSO appears to concede in its Reply that the first modification is unnecessary, given that it never responds to this portion of Intelsat’s Opposition.

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<sup>13</sup> *ITSO Reply* at 2-4; *cf. ITSO Petition* at 4, 8-9.

<sup>14</sup> *ITSO Petition* at 2.

## **II. ITSO'S REQUESTED CLARIFICATION OF "SUCCESSOR" IS INCONSISTENT WITH THE ITSO AGREEMENT**

ITSO seeks to have the Commission, in some unspecified manner, ensure that “any entity entering into a public services agreement with ITSO that incorporates the Core Principles<sup>15</sup>” be considered a “successor” to Intelsat for licensing purposes.<sup>16</sup> Although ITSO’s request is far from clear, it appears that ITSO is seeking to detach successorship from ownership of the space system now owned by Intelsat - i.e., to permit an unrelated entity to be a “successor” if it complies with ITSO’s PSA demands and thus to permit ITSO, rather than the bankruptcy process, to select the “successor” to Intelsat. ITSO has failed to point to any treaty basis for transforming ITSO into a licensing authority or overriding bankruptcy laws of general applicability.

Whether, in a hypothetical bankruptcy proceeding, 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. These transfers would require approval by the Commission.<sup>17</sup> It would be in the context of such an approval proceeding that the Commission would determine whether the new entity qualified as a licensed successor to Intelsat, and was thus eligible for continued authorization to use the transferred orbital locations. ITSO’s attempt to usurp the

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<sup>15</sup> *ITSO Reply* at 8.

<sup>16</sup> Although ITSO quotes from the 30<sup>th</sup> (Extraordinary) Assembly of Parties (“AP”) in support of its proposal (*ITSO Reply* at 7), significantly, ITSO fails to note that the United States disassociated itself from this statement by the AP. Moreover, the AP was less than fully informed on this issue since Intelsat was denied the opportunity to participate in the relevant deliberations.

<sup>17</sup> *See* 47 C.F.R. Section 25.119 (2005).

Commission's licensing role in the context of a hypothetical bankruptcy proceeding must be rejected.

In any case, the term "successor" has clear legal meaning and a foundation in the ITSO Agreement. The ITSO Agreement provides that the Notifying Administration must authorize the use of the transferred orbital and frequency assignments "by the Company" and cancel the assignments if the "Company" is no longer authorized to use, or no longer requires, the assignments.<sup>18</sup> "Company" is defined as the entity or entities "to which the international telecommunications satellite organization's space system is transferred and includes their successors-in-interest."<sup>19</sup> Therefore, the Commission must license the entity acquiring the space system assets to use the transferred orbital locations, or else cancel the ITU registrations. Any effort by ITSO to override the clear definition of "successor" in the ITSO Agreement must be rejected.

In short, there is simply no basis for ITSO's request for a Section 316 proceeding to deal with hypothetical issues of "successor" definition.

### **III. ITSO'S RESTATED REQUEST FOR FINANCIAL SAFEGUARDS IS UNWARRANTED, UNNECESSARY AND UNWORKABLE**

The Commission has no obligation under the ITSO Agreement or as a Notifying Administration to require Intelsat to establish a bankruptcy-related benefit on behalf of entities having a public services agreement with ITSO. The Agreement says nothing about an Intelsat bankruptcy, whether in reference to the Notifying Administration's obligations or in any other context. The INTELSAT Parties understood that a privatized Intelsat would face the same risk of bankruptcy as any other commercial entity, and indeed an express purpose of the privatization process, as mandated by Congress in the

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<sup>18</sup> ITSO Agreement, art. XII(c)(i) (appended to the *ITSO Petition*).

ORBIT Act,<sup>20</sup> was to put the privatized Intelsat on the same footing as other commercial entities, including presumably with respect to the risk – faced by all private sector companies – that insolvency or bankruptcy might occur in the future.

Furthermore, ITSO provides no new evidence that an Intelsat bankruptcy is anything but speculative. Exhibit 1 to ITSO’s Reply states: “Intelsat today is a bigger, better-run outfit than it has ever been... Over the past decade, it has been transformed ... to one of the strongest players in a privatized global industry.”<sup>21</sup> This is hardly the description of a company in dire danger of bankruptcy. And just two months ago, the world’s leading banks, mutual funds, and other financial institutions loaned Intelsat over \$3 billion to conclude the PanAmSat acquisition. It is far from clear why ITSO, or the Commission at ITSO’s urging, is better qualified than the financial markets to make judgments about Intelsat’s financial soundness.

Under the Communications Act or its own precedent, the Commission has no obligation to take preemptive action to remedy a hypothetical licensee bankruptcy. ITSO has not pointed to a single instance where the Commission has so acted. To do so, moreover, would be contrary to a fundamental prudential aspect of U.S. jurisprudence, applicable in regulatory as well as judicial contexts: that a decisionmaking body should not reach out to decide hypothetical outcomes on a hypothetical state of facts, but should instead wait until an actual “case or controversy” is before it.

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<sup>19</sup> ITSO Agreement, art. I(d).

<sup>20</sup> Open-Market Reorganization for the Betterment of International Telecommunications Act (“ORBIT Act”), 47 U.S.C. §§ 761-769.

<sup>21</sup> *ITSO Reply*, Exh. 1 (quoting from Steven Pearlstein, *Sweet Deals Buried Intelsat in Debt*, The Washington Post, Aug. 18, 2006, at D1).

ITSO's sole concern about an Intelsat bankruptcy is receiving assurance that any entity seeking to operate the assets and claim successor rights to Intelsat's licenses be bound by the PSA. As explained in Intelsat's opposition, the PSA and the FCC licenses effectively ensure that result because the licenses limit the use of the heritage assets to an Intelsat "successor" and the PSA binds all Intelsat "successors."<sup>22</sup> ITSO's Petition does not consider this effect of the license conditions imposed by the FCC, nor did its bankruptcy counsel. Instead, the latter only determined that, under bankruptcy law, there is a theoretical possibility of rejection of the PSA in bankruptcy.<sup>23</sup>

ITSO's invocation of a "maelstrom" is a red herring, as is its attempt to invoke the specter of the *NextWave* proceeding.<sup>24</sup> ITSO never shows that the Commission would have any need to become directly involved in the hypothetical Intelsat bankruptcy process.<sup>25</sup> Rather, as noted above, the Commission would merely rule on the transfer or assignments of the Intelsat authorizations under its Section 309 authority, taking account of the ownership and contractual decisions made in the bankruptcy process as part of its

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<sup>22</sup> *Opposition* at 27-28.

<sup>23</sup> 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-29-3E W/01/06 (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, filed in the FCC 05-290 docket).

<sup>24</sup> *ITSO Reply* at 10.

<sup>25</sup> The position of the Commission with regard to Intelsat's licenses here is fundamentally different from that of the Commission in the *NextWave* proceeding. In the *NextWave* proceeding, the Commission was a creditor of NextWave and became directly involved in the bankruptcy process to protect its interest in controlling the auctioned licenses at issue through its regulations. Here the Commission is not a creditor of Intelsat and, in the hypothetical event of an Intelsat bankruptcy, will have ample opportunity to protect any interest it has through the normal licensing process. See *FCC v. NextWave Personal Communications Inc.*, 537 U.S. 293, 296-99 (2003).

public interest evaluation. The FCC routinely handles such bankruptcy-related license transfers.

Finally, after promising to “work with the Commission during the course of this section 316 proceeding to elaborate the detailed elements,”<sup>26</sup> ITSO has failed to submit a single viable proposal for the financial guarantee. ITSO initially requested a lien on Intelsat’s satellites, but now acknowledges that Intelsat’s existing debt instruments prohibit it from imposing such liens.<sup>27</sup> Rather than submitting alternative proposals, ITSO is now trying to shift the burden of formulating a workable instrument to Intelsat, thereby asking Intelsat to assume its own hypothetical bankruptcy, to assume at the time a failure by the bankruptcy court and the FCC to protect the PSA obligations, and to formulate in advance a burdensome remedy to be imposed on itself to address these hypothetical possibilities.<sup>28</sup>

It is also unclear who would benefit from the guarantee, as ITSO now claims that it has “no intention... to operate any satellites.”<sup>29</sup> Instead, ITSO now asserts that the guarantee would “*be for the benefit of Intelsat or any successor entity having a public services agreement with ITSO that would provide for operation of the satellites to meet the Core Principles following an Intelsat bankruptcy or default.*”<sup>30</sup> But if the guarantee is for the benefit of Intelsat, it will be considered an asset of the bankruptcy estate and subject to Intelsat’s creditors. If the guarantee is for the benefit of a third party, one would need to specify that third party for purposes of the guarantee. ITSO has failed to

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<sup>26</sup> *ITSO Petition* at 19.

<sup>27</sup> *ITSO Reply* at 9.

<sup>28</sup> *ITSO Reply* at 9-10.

<sup>29</sup> *ITSO Reply* at 8.

<sup>30</sup> *ITSO Reply* at 9.

provide that specificity, and has provided no assurance that this hypothetical, unspecified third-party entity would obtain the Intelsat satellites, a prerequisite for licensing of the orbital locations.

**IV. CONCLUSION**

For the reasons stated above and in Intelsat's Opposition, the Commission should deny ITSO's request and dismiss its Petition.

Respectfully submitted,

INTELSAT NORTH AMERICA LLC

By: /s/ Phillip Spector

Phillip Spector  
Executive Vice President and  
General Counsel  
Intelsat Holdings, Ltd.  
Wellesley House North, 2nd Floor  
90 Pitts Bay Road  
Pembroke, HM 08, Bermuda

Bert W. Rein  
Carl R. Frank  
Chin Kyung Yoo  
WILEY REIN & FIELDING LLP  
1776 K Street, N.W.  
Washington, D.C. 20006  
(202) 719-7000

Kalpak Gude  
Vice President & Deputy General Counsel  
Susan H. Crandall  
Assistant General Counsel  
Intelsat Corporation  
3400 International Drive, N.W.  
Washington, DC 20008

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