

**Before the**  
**FEDERAL COMMUNICATIONS COMMISSION**  
**Washington, DC 20554**

In the Matter of	)	
	)	
Federal Communications Commission's Report	)	IB Docket No. 10-70
to Congress as Required by the ORBIT Act	)	
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**SURREPLY OF ARTEL, INC.**

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ARTEL, Inc. (“ARTEL”) submits this surreply in response to reply comments<sup>1</sup> filed by Intelsat LLC and its affiliated entities (“Intelsat”) in connection with the Federal Communications Commission (“Commission”) annual report to Congress regarding the progress made to achieve the objectives and carry out the purposes and provisions of the Open-Market Reorganization for the Betterment of International Telecommunications Act (“the ORBIT Act”).<sup>2</sup>

Intelsat’s Reply does little to contribute to the Commission’s effort but instead confuses the record by (1) arguing that comments filed by ARTEL and others are outside the purview of the Commission’s ORBIT Act requirements, (2) overstating the competitiveness of current market conditions of the relevant satellite industry market segment and (3) misstating ARTEL’s request for considered Commission action. It is significant that when afforded an opportunity to address facts directly related to the

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<sup>1</sup> See Reply Comments of Intelsat, IB Docket No. 10-70 (filed Apr. 21, 2010) (“*Intelsat Reply*”).

<sup>2</sup> 47 U.S.C. § 646. ARTEL submits this surreply pursuant to the permission granted in International Bureau Report to Congress Regarding the ORBIT Act, *Order Establishing Period for Surreply*, DA 10-681, IB Docket No. 10-70 (rel. Apr. 22, 2010).

Commission's annual report, Intelsat was conspicuously silent. As more specifically detailed below, Intelsat does not deny or refute the anticompetitive actions noted by ARTEL and others occurred but merely obfuscates by contending that such information is inappropriate and unrelated to the instant proceeding. ARTEL strongly disagrees.

## **I. INTELSAT DOES NOT DENY ITS ANTICOMPETITIVE ACTIONS**

The most telling aspect of Intelsat's reply is what Intelsat *does not* say. ARTEL's initial comments identified several anticompetitive and discriminatory actions taken by Intelsat's wholly owned subsidiary, Intelsat General Corporation ("IGC").<sup>3</sup> Nowhere in Intelsat's Reply does Intelsat deny that such actions occurred or take issue with the characterization of those events. Specifically, Intelsat does not deny that:

- IGC is denying access to the Intelsat fleet by refusing to provide pricing – at any rate – to wholesale distributors and system integrators that have directly competed against IGC in the past.
- IGC has retaliated against distributors that competed against it by refusing to provide pricing and terms for *ongoing*, established space segment leases.
- Other distributors have been asked to refrain from bidding on projects of interest to IGC and were denied pricing for later opportunities in retaliation for failing to comply with IGC's request.
- IGC entered into exclusive relationships with other satellite operators that prevent or discourage those operators from working with IGC's competitors.

Intelsat's position is, apparently, that it is not constrained from engaging in anticompetitive behavior, and that its bad acts are simply of no concern to the FCC or the report to Congress.

ARTEL finds Intelsat's audacity incredible given the express purposes of the ORBIT Act. Intelsat was not permitted to pursue a path toward privatization in order for

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<sup>3</sup> See Comments of ARTEL, Inc., IB Docket No. 10-70, pp. 5-6 (filed Apr. 7, 2010) ("*ARTEL Comments*")

it to leverage its exclusive control over legacy orbital locations and space segment to the detriment of the satellite market and the U.S. distributors who “dare” to compete with Intelsat or its proxy IGC. Instead, privatization was intended to provide a level playing field.<sup>4</sup> Intelsat’s actions are contrary to and frustrate that intent. Accordingly, the Commission must include in its report to Congress Intelsat’s anticompetitive and discriminatory conduct identified by ARTEL and other commenters.

## **II. ARTEL’S ORBIT ACT COMMENTS ARE APPROPRIATE**

As noted in ARTEL’s initial comments, the purpose of the ORBIT Act is to promote a fully competitive global market for satellite communications services for the benefits of consumers, providers of satellite services and manufacturers of equipment by fully privatizing Intelsat.<sup>5</sup> Apart from its licensing obligations related to Intelsat’s privatization, the Commission is also required to report annually on the progress made to achieve the objectives and carry out the purposes and provisions of the ORBIT Act. To this end, the annual report is to include views of industry and consumers on privatization and the impact privatization has had on U.S. industry, U.S. jobs, and U.S. industry’s access to the global marketplace.<sup>6</sup>

Despite Intelsat’s repeated assertions in its Reply, the input provided by ARTEL and the other commenters regarding Intelsat’s anticompetitive and discriminatory actions

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<sup>4</sup> See, e.g., 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*, 15 FCC Rcd 15460, at ¶ 8 (rel. Aug. 8, 2000) (noting that due to “the desire of governments to promote a more level playing field, INTELSAT and investing Signatories decided to restructure as a private commercial entity.”).

<sup>5</sup> See *Open-Market Reorganization for the Betterment of International Telecommunications Act*, Pub. Law 106-180, 114 Stat. 48, § 2 (2000), most recently amended Pub. Law 108-371, 118 Stat. 1752 (2004) (“ORBIT Act”).

<sup>6</sup> 47 U.S.C. § 765e(b)(3)-(4).

in the satellite market, particularly the international fixed satellite services market, are fully responsive to the Commission's Public Notice and the ORBIT Act reporting requirements. Those facts were presented to inform the Commission about the impact that Intelsat's privatization has had on the current state of the market. Contrary to the Commission's basic reporting obligations, Intelsat urges the Commission to discount or even disregard the statements of ARTEL and others from the ORBIT Act record. However, doing so would not fulfill the Commission's obligation to provide a full and unbiased report of the situation and would deny Congress a complete picture of the marketplace. As such, the Commission should not acquiesce to Intelsat's demands.

ARTEL specifically stated that the intended purpose of its comments was to "inform[] the Commission of specific distortions that have developed in the market after a decade of privatization and ongoing Intelsat behavior that is contrary to the intent and obligations of the ORBIT Act."<sup>7</sup> Thus, contrary to Intelsat's insinuations, ARTEL was not attempting to inappropriately interject the Commission into other processes.<sup>8</sup> Instead, ARTEL was simply citing examples of Intelsat's bad acts for the Commission's report to Congress. Accordingly, ARTEL's comments are perfectly appropriate for inclusion in this proceeding and submission with the Commission's ORBIT Act report.

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<sup>7</sup> *ARTEL Comments*, p.4.

<sup>8</sup> Intelsat, not ARTEL, was the first to state that some of ARTEL's facts were based on a pending government contract dispute and were an effort to interject the Commission into that process. ARTEL does not deny the existence of such a dispute and agrees with Intelsat that ORBIT Act comments are not the proper forum to adjudicate that issue. At the same time, ARTEL can and should be permitted to identify the underlying anticompetitive conduct and relative market conditions which gave rise to that complaint as such information forms the basis upon which to understand the impact of Intelsat's privatization.

### **III. CURRENT FIXED SATELLITE SERVICES MARKET STRUCTURE ENABLES INTELSAT TO ENGAGE IN ANTICOMPETITIVE ACTS**

ARTEL contends that the current fixed satellite services market structure has enabled Intelsat to engage in anticompetitive acts. When not complaining that such statements were improperly filed in this proceeding, Intelsat criticizes ARTEL and the other commenters for not addressing how the satellite marketplace has been affected by Intelsat's privatization. In turn, Intelsat claims that the comments "distort the current state of the satellite industry."<sup>9</sup>

Intelsat tries to distract the Commission from examining the current state of the satellite market by asserting extraneous or inaccurate facts, non-relevant reports, and misrepresented comments. ARTEL is confident that the Commission will discount such transparent and fallacious arguments.

For example, Intelsat claims that as a result of the ORBIT Act and Commission action, private entities have "direct access" to Intelsat.<sup>10</sup> While that may have at one time been the case, it is currently incorrect. As ARTEL previously discusses, for the first time since privatization, non-discriminatory direct access is being denied to the Intelsat system in the U.S. market – a fact that Intelsat ignores. Customers can no longer acquire space segment directly from Intelsat, and are instead directed to its subsidiary, IGC, who routinely declines requests to use the Intelsat fleet made by ARTEL and other service providers perceived by IGC as potential competition. As a result, longstanding customers that need space segment to serve thin-routes and underserved areas of the world are being denied access, at any price.

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<sup>9</sup> *Intelsat Reply*, p. 6.

<sup>10</sup> *Intelsat Reply*, p.4.

Intelsat also claims that the “satellite industry is increasingly competitive.”<sup>11</sup> In fact, quite the opposite is true. Intelsat’s dominance and the lack of reasonable alternative facilities on numerous routes enables it to engage in its current pattern of anticompetitive behavior and bad acts.

- As described in ARTEL’s comments, high-bandwidth, fixed satellite communications between the contiguous U.S. and locations outside the western hemisphere require transmission to and from AOR or POR orbital locations, and Intelsat controls the vast majority of these locations.
- Intelsat’s perpetual control of the space-based assets needed to communicate with other remote parts of the world enable it to engage in behavior that can only occur in a failed market.
- Intelsat enjoys a perpetual right to operate from these orbital locations.
- There is no realistic prospect of new alternative facilities: 2-degree spacing limitations prevent new competitors from launching satellites in the gaps between Intelsat’s fleet.

In furtherance of its contentions, Intelsat lists a few alternative satellite providers and proclaims that the market is consequently competitive without meaningful analysis or evaluation.<sup>12</sup> Intelsat is mistaken – market alternatives do not exist for many intercontinental routes. In fact, Intelsat’s examples are red herrings as Intelsat does not provide a single example of a new or planned satellite that will ease the capacity crunch for space segment capable of supporting communications between the U.S. and remote points outside the western hemisphere.

- The AMC-21 has a footprint that covers North America, Hawaii and the Caribbean, and is positioned at 125 west longitude, an orbital location that makes it ideal for domestic broadcast applications, not intercontinental

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<sup>11</sup> *Intelsat Reply*, p.6.

<sup>12</sup> *Intelsat Reply*, pp. 6-7.

communications. SES's own literature describes the satellite as ideal for "DTH and broadcast services."<sup>13</sup>

- The NSS-12 is an Asian satellite with absolutely no ability to establish communications between the U.S. or its territories and any foreign country.
- Hispasat's fleet is designed principally to serve the Americas. The AOR satellites in the Hispasat fleet only provide Ku-band coverage of Europe, and cannot support thin routes between the U.S. and Africa, the Mid-East and Central Asia.
- The Ciel-2 satellite, which is positioned at 129 west longitude, has a footprint that covers only Canada and the U.S.
- The Quetzsat-1, which is positioned at 77 west longitude, will serve only the U.S., Mexico and Central America when it is ultimately launched.
- OverHorizon, which is using Cypress as its notifying administration, has made a preliminary coverage map available that indicates its proposed fleet of satellites will serve the U.S. from an orbital position near the U.S. domestic arc incapable of supporting intercontinental communications.<sup>14</sup>
- The recently launched Chinese built Venesat-1, which is positioned at 78 west longitude, only serves Venezuela and South America.
- Although few specifics are available on the Chinese built and subsidized satellite proposed by Bolivia, based on statements made by Bolivian authorities it is expected to serve only Bolivia and South America from an orbital location over the Americas, not an AOR or POR location.<sup>15</sup>
- Lastly, it is ARTEL's understanding that Colombia has abandoned its efforts to launch a Russian built satellite that would have served the domestic market and other parts of Latin America.<sup>16</sup>

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<sup>13</sup> See SES World Skies AMC-21 Datasheet, available at: [http://www.ses-worldskies.com/worldskies/satellites/information\\_sheets/amc\\_21\\_v1.pdf](http://www.ses-worldskies.com/worldskies/satellites/information_sheets/amc_21_v1.pdf) (last visited Apr. 26, 2010).

<sup>14</sup> Available at: <http://www.ovzon.com/abo/coverage> (last visited Apr. 26, 2010).

<sup>15</sup> See Bolivia, China Sign Satellite Launching Agreement, SpaceDaily, April 6, 2010 ("Bolivian Public Works Minister Walter Delgadillo [confirmed the satellite will] cover not only Bolivia but also the whole Latin America").

<sup>16</sup> See Colombia to Remain Without Satellite, Colombia Reports, Nov. 23, 2009 (noting that a Russian proposal to construct and launch a domestic satellite was "rejected because its conditions did not comply with those set by Colombian authorities, and furthermore violated legal principles of transparency and objectivity").

Although Intelsat holds out the above satellites as its supposed new competition, none of the above offers even a single megahertz of C-band space segment capable of supporting intercontinental communications. Certainly none of the above satellites is capable of replicating Intelsat's coverage over thin-route countries such as Iraq, nor do they aspire to provide this type of service.

The existing satellites and "integrated" satellite systems that Intelsat argues create competition only have a handful of aggregate AOR and POR orbital locations. As discussed in ARTEL's comments, Eutelsat, SES and Telesat operate fleets principally designed to serve the North American, European and Asian land masses, not intercontinental routes. Moreover, even if Eutelsat, SES or another competitor wanted to begin constructing AOR and POR spacecraft to serve thin-routes between the U.S. and other countries, 2-degree spacing limitations will prevent them from mounting a meaningful challenge to Intelsat, which has operational satellites parked in most of the viable AOR and POR locations.

Finally, in support of its contention that the satellite marketplace is competitive, Intelsat references "the most recent" FCC report as evidence.<sup>17</sup> What Intelsat fails to state is that the Commission's most recent satellite industry report focused on calendar year 2007 – a time period before any of the anticompetitive acts raised by ARTEL and other commenters had even occurred. For example:

- Intelsat's bad acts only began after its acquisition of PanAmSat, which was its principal competitor on AOR and POR routes.
- The Commission's most recent satellite competition report analyzed calendar year 2007, and was unable to thoroughly evaluate the impact of the recent

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<sup>17</sup> *Intelsat Reply*, pp. 7-8.

Intelsat/PanAmSat merger. That report, at times, treated Intelsat and PanAmSat as separate entities for its analysis of the FSS market.<sup>18</sup>

- Given the dramatic changes that have occurred since 2007, the next report cycle will provide an opportunity for updated industry feedback on the state of competition in the fixed satellite market.

Accordingly, relying on a Commission report about a historical market is hardly instructive for the Commission's current reporting obligation to Congress and certainly cannot support Intelsat's arguments that the current market is competitive.

#### **IV. OPTIONS FOR FCC CONSIDERATION**

ARTEL's suggestions of potential actions to address the competitive harm incurred by the satellite industry at the hands of Intelsat are simply points for the Commission to consider. ARTEL is not suggesting that the Commission through its ORBIT Act responsibilities institute specific changes. However, ARTEL does contend that the Commission's ORBIT Act report to Congress would be more comprehensive if it not only reflected the stated problems with the current satellite market but also included industry suggestions that could potentially remedy the situation.

ARTEL urges that the Commission consider what must be done to level the playing field and return the market to a more competitive structure. At a minimum, ARTEL suggests that the Commission should undertake a thorough examination of Intelsat's position as a dominant provider with market power, particularly on critical intercontinental routes. The Commission should also inquire into industry practices that could be deemed to be anticompetitive, including collusive behavior, intimidation, price fixing, retaliation, and any other acts designed to prevent competitors, distributors or

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<sup>18</sup> See, e.g., Second Annual Report and Analysis of Competitive Market Conditions with Respect to Domestic and International Satellite Communications Services, *Second Report*, 23 FCC Rcd 15170, at ¶ 44 (rel. Oct. 16, 2008).

wholesalers from accessing fixed satellite capacity that may have occurred that undermine competition.

The Commission should also examine what remedies are necessary to effectively target and deter unlawful behavior. This could include greater transparency in the terms and conditions upon which U.S. providers are able to gain access to Intelsat's international satellite capacity and, in particular, the publication of the rates, terms, and conditions under which Intelsat makes its services available to its affiliates or subsidiaries. ARTEL further suggests that the potential to mandate the creation of a separate wholesale channel required to deal with Intelsat on an arms-length basis, with reporting obligations regarding the Intelsat/IGC relationship, should be fully considered as a means to protect against anticompetitive behavior by the market's dominant provider. As a part of that analysis, ARTEL urges the Commission to examine the divestiture of orbital assets or positions, and/or the divestiture of vertically integrated assets, including IGC.

Respectfully submitted,

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