

**Before the
Federal Communications Commission
Washington, DC 20554**

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| In the Matter of |) | |
| |) | |
| Fourth Annual Report and Analysis of |) | IB Docket No. 10-99 |
| Competitive Market Conditions with Respect |) | |
| to Domestic and International Satellite |) | |
| Communications Services |) | |

**REPLY COMMENTS OF INTELSAT GLOBAL S.A.
(Corrected Version)**

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SUMMARY

Intelsat hereby replies to comments in the Satellite Competition proceeding. Though no satellite users expressed concerns about the competitiveness of the satellite industry, three middle-man resellers, CapRock, Spacenet, and Microcom, argue that some segments of the satellite industry are not subject to effective competition. CapRock in particular claims a lack of effective competition for international fixed satellite service (“FSS”) space segment capacity and proposes several remedial measures. This reply demonstrates that CapRock, Spacenet, and Microcom have mischaracterized conditions in the highly competitive satellite industry.

CapRock is inappropriately attempting to inject into this proceeding a private dispute involving its loss of a large government contract. CapRock’s complaints actually illustrate that end users of satellite services have benefitted from having more competitive choices available. Intelsat has helped to expand those choices, subsequent to privatization, by offering satellite services directly to end users. Intelsat’s vertical integration has not conferred upon it any anticompetitive advantage in the highly competitive communications services industry in which it participates.

In arguing that a lack of effective competition exists, CapRock and Spacenet disregard long-standing measures of competitive analysis and attempt to define an excessively narrow relevant market. When defining relevant markets, the Commission follows principles of antitrust law and Department of Justice and Federal Trade Commission guidelines, which focus on consumer choices. CapRock and Spacenet improperly attempt to define a relevant market in terms of their own particular customers and service offerings. In reality, Intelsat competes with numerous providers using diverse satellite and terrestrial-based technologies in a broad market for communications network services. Satellite operators compete directly with fiber networks,

which now provide many of the same types of services traditionally offered by satellite, and have been extended to many places once primarily accessible only by satellite. And FSS operators increasingly vie directly with MSS providers for many of the same types of services despite differing technologies.

Even if, contrary to fact, FSS capacity did constitute a relevant product market, Intelsat has no market power in such a market. CapRock fails to account for the many sources of competition faced by FSS operators, including at least a dozen other FSS operators in every region, and foreign and regional operators that are expanding to attain a global footprint. Planned and potential new capacity must also be considered, especially in the newer Ka-band. Ka-band satellites are capable of offering the same services as those in the traditional C- and Ku-bands, carry enormous amounts of capacity, and are being launched at a tremendous rate. Indeed, the claims of constrained FSS capacity are refuted by CapRock's own data showing significant capacity currently available and by the numerous opportunities for new entrants willing to make the necessary capital investment and take the entrepreneurial risks that current operators do.

CapRock's suggested remedies are not within the Commission's authority to implement and would actually harm competition and consumer interests. CapRock's proposals would impose heavy new regulations on operators and are not appropriate for non-common carriers such as Intelsat. Finally, Microcom's recommendation to treat Alaska and Hawai'i as separate markets is aimed at imposing additional, unnecessary regulatory burdens on operators in these states, to the benefit of Microcom.

TABLE OF CONTENTS

I. SPACENET’S AND CAPROCK’S COMPLAINTS ARISE FROM AN INCREASE IN COMPETITION IN PROVIDING SATELLITE SERVICES RATHER THAN FROM ANY COMPETITIVE RESTRAINT 3

 A. CapRock is attempting improperly to inject private concerns into a Commission report directed at the public international service sector. 3

 B. Intelsat has enhanced competition by offering satellite services directly to end users. 6

II. FSS SPACE SEGMENT CAPACITY IS NOT A RELEVANT MARKET 8

 A. CapRock and Spacenet inappropriately focus exclusively on a subset of FSS/GSO capacity in claiming market concentration. 9

 B. Space segment capacity is not a relevant market; the relevant market is global competition for communications network services. 12

III. EVEN EXCLUDING TERRESTRIAL AND MSS COMPETITION, INTELSAT HAS NO MARKET POWER IN FSS 18

 A. Intelsat faces significant and increasing competition from numerous FSS operators 19

 B. Any market assessment of FSS capacity must include planned and potential new capacity..... 20

 C. CapRock’s own data belie its claims of insufficient FSS capacity..... 25

 D. Spacenet and CapRock fail to support their claim that available capacity has been constrained by increased consumer demand and barriers to entry..... 27

IV. CAPROCK’S SUGGESTED REMEDIES ARE OUTSIDE THE COMMISSION’S AUTHORITY AND WOULD BE ADVERSE TO COMPETITION, EFFICIENCY, AND CONSUMER INTERESTS..... 30

V. MICROCOM MERELY SEEKS SPECIAL ADVANTAGE IN AREAS WITH ADEQUATE COMMUNICATIONS SERVICES..... 36

VI. CONCLUSION..... 38

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REPLY COMMENTS OF INTELSAT GLOBAL S.A.

Intelsat Global S.A. and its affiliated entities (collectively “Intelsat”) hereby reply to certain comments filed in the above-captioned proceeding, which posit the existence of a fixed satellite capacity “market,” claim it to be less than fully competitive, and propose various, allegedly remedial, regulatory interventions. In contrast, the majority of comments responding to the Commission’s Public Notice¹ affirm that communications consumers are benefiting from competing service offerings from a variety of converging technological platforms, including fixed satellite service, mobile satellite service, fiber optic cable, and terrestrial wireless.² As demonstrated in comments filed by the Satellite Industry Association (“SIA”), this competition benefits both U.S. domestic and U.S. international users.³ Significantly, none of the many

¹ International Bureau Invites Comment for Fourth Annual Report to Congress on Status of Competition in the Satellite Services Industry, Public Notice, DA 10-1353, IB Docket No. 10-99 (July 22, 2010) (“Public Notice”).

² See Comments of the Satellite Industry Association (filed Aug. 23, 2010) (representing the “unified voice of the U.S. satellite industry”) (“SIA Comments”); Comments of Globalstar Licensee, LLC at 1; Comments of Spacenet Inc. at 3-4 (“Spacenet Comments”). Unless otherwise indicated, all cited comments were filed in IB Docket No. 10-99 on Aug. 23, 2010.

³ See SIA Comments at 3-20.

thousands of end users has raised any concern about the state of competition for satellite communications services.

The three dissenting voices are niche value-added providers of communication services using satellite capacity—CapRock, Spacenet, and Microcom.⁴ Each of these companies views itself as a competitor of satellite capacity providers as well as their customer.⁵ Spacenet acknowledges that it participates in a communications services market that is subject to “extreme competition” but complains of concentration in what it calls the “domestic satellite transponder market.”⁶ CapRock and Microcom suggest that the Commission intervene to enhance their private business interests without regard to the interests of end users or market-driven efficiencies.⁷

The Commission should continue to honor the distinction between the interests of competition and the interests of competitors, which is a central tenet of U.S. antitrust policy.⁸ Looked at from any perspective, domestic and international satellite communications services continue to be delivered in a highly competitive environment. Regulatory intervention to serve the special interests of individual competitors is neither warranted by consumer interests nor wise public policy. Accordingly, the Commission should reject the arguments of CapRock, Spacenet, and Microcom and report to Congress that competitive conditions in the communications satellite industry warrant no further regulatory intervention.

⁴ See Spacenet Comments; Comments of CapRock Communications, Inc. (“CapRock Comments”); Comments of Microcom (“Microcom Comments”) (filed Aug. 20, 2010).

⁵ See Spacenet Comments at 3; CapRock Comments at 2.

⁶ Spacenet Comments at 4, 8-9.

⁷ See CapRock Comments at 13; Microcom Comments at 1.

⁸ See, e.g., *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

I. SPACENET’S AND CAPROCK’S COMPLAINTS ARISE FROM AN INCREASE IN COMPETITION IN PROVIDING SATELLITE SERVICES RATHER THAN FROM ANY COMPETITIVE RESTRAINT

CapRock claims that the Commission’s recent ORBIT Act inquiry⁹ established that sellers of FSS space segment capacity are not subject to effective competition.¹⁰ To the contrary, the ORBIT Act proceeding demonstrated that congressional and FCC actions enhanced competition for satellite-based network services, leading to lower prices and more competitive choices for consumers. CapRock’s and others’ complaints in that proceeding, repeated here, stem from having to face that increased competition.

The ORBIT Act proceeding established in particular that CapRock and other providers began to question the competitiveness of the satellite industry only after losing a certain large government contract to Intelsat. These providers have had three previous opportunities—in each of the comment periods for the first three annual satellite competition reports—to raise concerns over competition, yet did not do so. The only difference between then and now is that they have lost a customer contract due to increased competition and expanded consumer choice.

A. CapRock is attempting improperly to inject private concerns into a Commission report directed at the public international service sector.

CapRock’s comments inappropriately attempt to inject a private commercial dispute into this proceeding. For this report, Congress specifically directed the Commission to provide the number and size of competitors in the satellite industry, an analysis of whether there is effective competition, and a list of foreign nations restricting competition.¹¹ In other words, Congress charged the Commission with reporting on areas within its purview or subject to action by the

⁹ FCC Report to Congress as Required by the ORBIT Act, Eleventh Report, FCC 10-112 (rel. June 15, 2010) (“Eleventh ORBIT Act Report”).

¹⁰ See CapRock Comments at 4-6.

¹¹ 47 U.S.C. § 703(b)(1)-(3).

Commission or the relevant committees of Congress. CapRock’s comments, in contrast, ask the Commission to take cognizance of CapRock’s grievances in a commercial dispute over its unsuccessful bid on a large U.S. government contract.¹² This dispute arises from a third-party commercial decision¹³ outside the scope of the Commission’s jurisdiction.¹⁴

If anything, the dispute illustrates the highly competitive environment in which satellite network services are provided to end users and how the removal of historic restraints on Intelsat’s ability to serve end users directly has benefitted consumers. When the U.S. Department of Defense was able to open its bidding process to satellite network operators such as Intelsat, the result was lower prices and greater efficiency. A government official explained the rationale behind the expansion of competitive opportunities:

[It is] expected to produce significant economies of scale and cost savings, while also simplifying administration for both users and suppliers. . . . It shouldn’t drastically affect the three companies in

¹² See CapRock Comments at 5-6. CapRock’s grievances in that dispute have already been considered and ruled upon by the U.S. Government Accountability Office. See GAO Decision, *CapRock Government Solutions, Inc.; ARTEL, Inc.; Segovia, Inc.*, File Nos. B-402490; B-402490.2; B-402490.3; B-402490.4; B-402490.5 (May 11, 2010), available at <http://www.gao.gov/decisions/bidpro/402490.pdf> (last visited Sept. 23, 2010).

¹³ See Defense Information Systems Agency, U.S. Department of Defense, *Commercial Broadband Satellite Program (CBSP) Commercial Telecommunications Services*, Comsatcom Scoop (Aug. 2010), available at http://www.disa.mil/satcom/sco/newsletter/july2010_cb.html (last visited Sept. 22, 2010).

¹⁴ The United States Supreme Court has determined that “the Communications Act [does not] give authority to the Commission to determine the validity of contracts between licensees and others.” *Regents of Univ. System of Georgia v. Carroll*, 338 U.S. 586, 602 (1950). See also *Loral Corp. Request for a Declaratory Ruling Concerning Section 310(b)(4) of the Commc’ns Act of 1934 and R/L DBS Company For Assignment of Continental Satellite Corp.’s Direct Broad. Satellite Construction Permit*, Memorandum Opinion and Order, 12 FCC Rcd 24,325, 24,332 (¶ 13) (1997) (noting that the Commission has “consistently declined to involve ourselves with commercial disputes”); *Sonderling Broad. Co.*, 46 RR 2d 889, 894 (¶ 16) (1979) (“The Commission has consistently taken the position that it is not the proper forum for the resolution of private contractual disputes and that such matters are appropriately left to the courts or other forums which have the jurisdiction to resolve them.”).

the current program. They can bid and be members on the contracts. But what it does do is cut some of the middlemen out, especially from the transponder services. It gives us some flexibility and enables more than just three companies to help us out in developing our future capabilities.¹⁵

Thus, by offering satellite services directly to end users, Intelsat has increased the number of competitive choices, increased efficiency by facilitating system integration and capacity planning, and created cost savings for end users.

Notably absent from CapRock's comments is any explanation of how the alleged lack of competition has harmed consumers.¹⁶ Consumer welfare is the primary aim of the Commission in promoting competition.¹⁷ As the Commission has declared, "Competition . . . is the cornerstone of our modern communications policy because it is well recognized that competition . . . has the greatest potential to bring consumer welfare gains of lower prices and more innovative services."¹⁸ None of the comments in this proceeding claims that end users of satellite services lack competitive choices or that consumer welfare has suffered as a result of competitive choices. To the contrary, Spacenet affirms that the enterprise customers for which it

¹⁵ See Harrison Donnelly, Comsatcom Alliance, *Agencies Unify Buying Power And Leverage In The Marketplace To Get Newer, More Advanced Satellite Technologies Into The Field Faster*, Military Information Technology (Oct. 9, 2009) (quoting Bruce T. Bennett, Director of Satellite Communications, Teleport and Services for the Defense Information Systems Agency), available at <http://www.military-information-technology.com/mit-archives/206-mit-2009-volume-13-issue-9/2073-comsatcom-alliance.html>.

¹⁶ CapRock baldly asserts that market conditions are "detrimental to major SNSP customers, such as the U.S. Government," CapRock Comments at 12, but offers no details or evidence of how such customers have been harmed. Significantly, the U.S. Government did not complain.

¹⁷ See, e.g., *Application of Echostar Commc 'ns Corporation, Gen. Motors Corp., and Hughes Elecs. Corp. (Transferors) and Echostar Commc 'ns Corp. (Transferee)*, Hearing Designation Order, 17 FCC Rcd 20,559, 20,662 (¶ 276) (2002) ("EchoStar-DirecTV HDO").

¹⁸ *Id.*

competes can choose amongst “multiple companies offering to provide service,” including satellite, fiber, DSL, cable modem, and terrestrial wireless providers.¹⁹

B. Intelsat has enhanced competition by offering satellite services directly to end users.

CapRock ignores the increase in competition resulting from privatization and Intelsat’s vertical expansion into offering direct services to end users. As the Commission concluded in its Eleventh Report to Congress under the ORBIT Act, privatization has enabled Intelsat “to compete freely . . . , led to more competitive choices in the U.S. . . . , and continues to encourage the development of service offerings to U.S. customers.”²⁰

This expansion of competition is precisely what Congress intended the ORBIT Act and privatization to accomplish²¹ and constitutes a major success story for the FCC and other U.S. policymakers.²² The stated aim of the ORBIT Act was to “promote a fully competitive global market . . . for the benefit of consumers and providers of satellite services.”²³ This goal has been accomplished.

¹⁹ Spacenet Comments at 3-4.

²⁰ Eleventh ORBIT Act Report at 30.

²¹ See Open-Market Reorganization for the Betterment of International Telecommunications Act, Pub. L. No. 106-180, 114 Stat. 48 (2000), § 2, as amended, Pub. L. No. 107-233, 116 Stat. 1480 (2002), as amended, Pub. L. No. 108-228, 118 Stat. 644 (2004), as amended, Pub. L. No. 108-371, 118 Stat. 1752 (2004), as amended, Pub. L. No. 109-34, 119 Stat. 377 (2005) (“ORBIT Act”).

²² See *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 Commc’ns System in Geostationary Orbit*, Memorandum Opinion, Order and Authorization, 15 FCC Rcd 15,460, 15,462 (¶ 3) (2000) (“*Intelsat Licensing Order*”) (“Our action here will promote competition in the provision of satellite communications services through the privatization of INTELSAT in a manner consistent with U.S. law.”).

²³ ORBIT Act § 2.

Even as end users have seen both competitive choices and cost savings increase,²⁴ no competitive restraints have resulted from the vertical integration of Intelsat. CapRock argues that Intelsat has somehow been able to engage in “anticompetitive practices” through its ownership of “substantial” satellite capacity.²⁵ But marketplace realities demonstrate that being both a satellite operator and a direct service provider to end users has not endowed Intelsat with any anticompetitive advantages.

First, Intelsat’s ownership and operation of satellite assets confers no advantage, apart from integration efficiency, where multiple operators using a variety of space and terrestrial platforms are in competition for end users. If Intelsat were unable to provide a value-added component as efficiently as independent middle men, it would be handicapping itself and losing space segment sales to providers employing the many alternative platforms available for long haul transmission. Abundant and admitted competition for end users will inevitably force Intelsat to seek maximum value-added efficiency in providing communications services.

Second, value-added resellers such as CapRock and Spacenet are equally free to compete as vertically integrated providers if they are prepared to take the risk of investing in satellite capacity by pre-launch leasing. Indeed, several providers already take this approach. EchoStar, for example, has committed to lease capacity prior to launch on several SES satellites²⁶ as well as a Telesat satellite,²⁷ and has reoffered that capacity in direct competition with satellite

²⁴ See Donnelly, *supra* note 15.

²⁵ CapRock Comments at 4, 7.

²⁶ Press Release, EchoStar, SES Affiliate Sistemas Satelitales De México (SSM) Receives Approval from Mexico to Expand Satellite Services with EchoStar (Mar. 19, 2010), *available at* <http://www.echostar.com/NewsEvents/PressReleases/PressRelease.aspx?prid={1EA12B77-9B9C-4773-BCCA-AC5AA1EA37B8}> (last visited Sept. 22, 2010).

²⁷ Press Release, EchoStar, Telesat Completes Agreements for Satellite Capacity with Bell TV and EchoStar Corporation (Sept. 17, 2009), *available at* <http://www.echostar.com/NewsEvents/>

operators. Similarly, Hughes Network Systems (“HNS”) purchases transponder capacity on Intelsat satellites and is able to compete with Intelsat on a vertically integrated basis.²⁸

CapRock and Spacenet thus should seek to succeed by enhancing their value added services and considering vertical integration rather than attempting to impose regulatory burdens on their vertically integrated competitors. Effectively forcing Intelsat to reach end users only through resellers, as CapRock seeks to mandate through regulatory limitations, would merely remove Intelsat as a valuable competitive option for consumers—a patently self serving goal for a competitor to seek.

II. FSS SPACE SEGMENT CAPACITY IS NOT A RELEVANT MARKET

CapRock and Spacenet claim a lack of effective competition in the “market for international fixed satellite service space segment” capacity.²⁹ In thus confining their description of a relevant market, these commenters disregard standard competition analysis, the competitive realities faced by satellite providers in the marketplace, and nearly thirty years of Commission precedent.³⁰ Satellite operators face rigorous and increasing competition from numerous satellite and terrestrial-based capacity providers, leading to lower prices and greater consumer choice. No valid competitive analysis can ignore the many reasonably available substitutes for satellite

PressReleases/PressRelease.aspx?prid={9B80F4F8-CAF7-4B86-B6A6-FBA91CCC15CA} (last visited Sept. 22, 2010).

²⁸ Press Release, Hughes Network Systems LLC, Hughes Expands Satellite Capacity with Intelsat in Latin American Market (Oct. 20, 2008), *available at* http://www.hughes.com/HNS_Library_Press_Release/10-20-08_Hughes_Expands_Satellite_Capacity_with_Intelsat_in_Latin_American_Market.htm (last visited Sept. 22, 2010).

²⁹ CapRock Comments at 6; *see also* Spacenet Comments at 4 (describing a “wholesale satellite capacity market for coverage of the United States”).

³⁰ *See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Fourth Report and Order, 95 FCC 2d 554, 564 (¶ 14) (1983) (“*Fourth Competitive Carrier R&O*”) (finding that “all interstate, domestic, interexchange telecommunications services [including domestic satellite] comprise a single relevant product market with no relevant submarkets”).

capacity or limit a relevant market definition to fit the specific business models of a particular class of competitors.

A. CapRock and Spacenet inappropriately focus exclusively on a subset of FSS/GSO capacity in claiming market concentration.

CapRock’s and Spacenet’s comments are fundamentally flawed because they disregard proper standards of competition analysis. The Commission has made clear that “the first step in assessing whether ‘effective competition’ . . . exists in a market” is to describe “the ‘relevant market,’ a concept drawn from antitrust law.”³¹ In defining relevant markets, the Commission relies on “antitrust law, economic theory, and the U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines” (“DOJ Guidelines”).³² The Commission has explained that it relies on the DOJ Guidelines, even when not analyzing a proposed merger, because they “provide useful principles for the analysis of competition” with regard to satellite communications.³³ CapRock’s and Spacenet’s arguments are at odds with the Commission’s analytical standards.

³¹ *Annual Report & Analysis of Competitive Market Conditions with Respect to Domestic & International Satellite Communications Services*, First Report, 22 FCC Rcd 5954, 5964 (¶ 28) (2007) (“*First Satellite Competition Report*”).

³² *Id.* at 5964, ¶ 29 & n.52 (citing U.S. Dep’t of Justice and Fed. Trade Comm’n, Horizontal Merger Guidelines, 57 Fed. Reg. 41552 (dated Apr. 2, 1992, revised Apr. 8, 1997)); *See also Second Annual Report and Analysis of Competitive Market Conditions with Respect to Domestic and Int’l Satellite Commc’ns Servs.*, Second Report, 23 FCC Rcd 15,170, 15,175 (¶ 20 & nn.22-23) (2008) (“*Second Satellite Competition Report*”); *Constellation, LLC and Intelsat Holdings, Ltd., Consol. Application for Authority to Transfer Control of PanAmSat Licensee Corp.*, Memorandum Opinion and Order, 21 FCC Rcd 7368, 7379, ¶ 19 (2006) (“*Intelsat-PanAmSat Order*”). Revised DOJ-FTC Horizontal Merger Guidelines, issued in August 2010, basically reaffirm the established method adopted by the FCC for defining relevant markets. *See* U.S. Dep’t of Justice & Fed. Trade Comm’n, Horizontal Merger Guidelines § 4.1.1 (Aug. 19, 2010) (“2010 DOJ Guidelines”), available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf> (last visited Sept. 22, 2010)

³³ *First Satellite Competition Report*, 22 FCC Rcd at 5964 (¶ 29).

In accordance with the DOJ Guidelines, the Commission defines relevant product markets based “on a consumer-oriented view . . . regardless of the regulatory classification” of particular services.³⁴ Thus “[w]hen one product is a reasonable substitute for the other in the eyes of consumers, it is to be included in the relevant product market even though the products themselves are not identical.”³⁵ To evaluate whether a group of products constitute a relevant product market for antitrust purposes, the DOJ and FTC inquire whether “a hypothetical profit-maximizing firm . . . likely would impose at least a small but significant and non-transitory increase in price (‘SSNIP’) on at least one product in the market.”³⁶ Under this “SSNIP” test, the Commission considers the “availability of substitutes that would enable a customer to defeat an attempted increase in price or lowering in quality by a firm in the market.”³⁷ In other words, if consumers view alternate products as sufficiently good substitutes to make the SSNIP unprofitable for the hypothetical monopolist, then the market definition must be expanded by adding alternate products until a SSNIP would be profitable.

CapRock and Spacenet ignore consumer perceptions of reasonable substitutes and attempt to define a relevant market to match their own business strategies. CapRock describes the relevant product market as FSS space segment capacity available for what it calls U.S.-based “satellite network service providers” (“SNSPs”) to serve government and enterprise users.³⁸

³⁴ *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile, Wireless, Including Commercial Mobile Services*, Fourteenth Report, WT Docket No. 09-66, FCC 10-81, at 21, ¶ 5 n.12 (May 20, 2010) (“*Fourteenth CMRS Report*”),

³⁵ *Id.* (quoting *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20606, ¶ 106).

³⁶ 2010 DOJ Guidelines § 4.1.1; *see also First Satellite Competition Report*, 22 FCC Rcd at 5964-65 (¶ 30).

³⁷ *First Satellite Competition Report*, 22 FCC Rcd at 5965 (¶ 30).

³⁸ CapRock Comments at 6-9.

Spacenet specifies, in describing the relevant market, that it uses “exclusively leased bandwidth on FSS Ku-band geostationary satellites operating in the 14.0 to 14.5 GHz earth-to-space band and 11.7 to 12.2 GHz in the space-to-earth band.”³⁹ Neither considers what consumers of their resale-based services might view as reasonable substitutes.

Compounding this error, CapRock and Spacenet attempt to contrive a yet more limited market definition by excluding certain satellite resources—regardless of whether those resources offer competitive alternatives for other providers and end users—that do not meet their specific tailored requirements. For example, CapRock whittles down the number of available geostationary satellites by excluding those currently used for services other than what CapRock offers.⁴⁰ CapRock also excludes satellites “controlled by foreign governments or [that] only provide coverage over ‘closed’ markets,”⁴¹ even if available for commercial offerings, because they do not suit CapRock’s specific business plan—selling to the U.S. government. And Spacenet avers that the ability of satellite capacity providers other than Intelsat and SES to serve the U.S. is, vaguely, “far from robust.”⁴²

CapRock’s and Spacenet’s descriptions of geographic markets are similarly limited, vague, and inconsistent. The Commission describes relevant geographic markets (again looking to the DOJ Guidelines and antitrust law principles) as “the area within which buyers can practically turn for alternative sources of supply.”⁴³ For satellite users, that area is likely “greater

³⁹ Spacenet Comments at 4 n.5.

⁴⁰ CapRock Comments at 8.

⁴¹ *Id.* at 9.

⁴² Spacenet Comments at 4 n.6.

⁴³ *First Satellite Competition Report*, 22 FCC Rcd at 5965 (¶ 31 n.56) (citing *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 359 (1963); *Tampa Elec. Co. v. Nashville Coal Co.*, 365

than nationwide,” as the Commission has noted, “because buyers may consider purchasing services on any satellite that can reach their particular geographic [location] . . . regardless of its ownership or physical location in space.”⁴⁴ While Spacenet refers to services that cover the United States,⁴⁵ CapRock limits its description to “addressable” markets for FSS, which it says are found only “in areas or regions with little pre-existing telecommunications infrastructure.”⁴⁶ CapRock also makes oblique references to markets involving “international” space segment,⁴⁷ “U.S.-based” providers,⁴⁸ or “addressable regions” for satellite services,⁴⁹ but never delineates the boundaries of any relevant geographic market.

B. Space segment capacity is not a relevant market; the relevant market is global competition for communications network services.

Under the Commission’s paradigm for defining relevant markets from a consumer-based viewpoint,⁵⁰ FSS capacity and all reasonable alternative platforms for network services must be considered part of the same relevant product market. FSS operators compete directly with numerous providers that use various satellite and terrestrial-based technologies for customers

U.S. 320, 327 (1961); *Spirit Airlines, Inc. v. Northwest Airlines, Inc.*, 431 F.3d 917, 932-33 (6th Cir. 2005)).

⁴⁴ *Id.*

⁴⁵ Spacenet Comments at 4.

⁴⁶ CapRock Comments at 7-8.

⁴⁷ *Id.* at 6.

⁴⁸ *Id.* at 8.

⁴⁹ *Id.* at 9.

⁵⁰ *See supra* notes 31-37 and accompanying text.

seeking communication network services.⁵¹ In fact, as early as 1983, the Commission recognized this competition, stating:

The availability of terrestrial alternatives provides a competitive check on the quality/price mix offered for many satellite services. . . . [A]ll satellite services are in the same relevant product market [and] that relevant product market includes terrestrial carriers.⁵²

Today, the competition across modes of transmission is increasing with advances in technology and especially with the enormous expansion of high-speed, high-capacity fiber networks.⁵³ The Commission has specifically recognized that Intelsat “faces competition globally from . . . fiber optic submarine cable systems.”⁵⁴ These competing offerings constitute part of the relevant product market.

Even Spacenet acknowledges that satellite service providers—which include vertically integrated operators such as Intelsat—compete directly with terrestrial-based network providers. Spacenet notes that in bidding for “enterprise customers,” it competes with “multibillion dollar communications carriers, including AT&T, Verizon and Sprint” and that “the widespread deployment of fiber, DSL, cable modem and terrestrial wireless means that [operators of these networks] may also be competing” for the same customers.⁵⁵

As Spacenet’s comments accurately illustrate, distinctions among communications technologies have blurred from a consumer standpoint. Technological advances have lead to a

⁵¹ See SIA Comments at 14-20.

⁵² *Fourth Competitive Carrier R&O*, 95 F.C.C.2d at 567-68 (¶¶ 19, 20).

⁵³ This expansion is having a significant competitive impact. See *International Internet Traffic Soars, While Transit Prices Tumble*, Telegeography CommsUpdate (Sept. 16, 2010) (showing that, globally, IP transit prices are falling and that capacity is increasing), available at http://www.telegeography.com/cu/article.php?article_id=34443 (last visited Sept. 22, 2010).

⁵⁴ *Intelsat Licensing Order*, 15 FCC Rcd at 15,463-64 (¶ 6).

⁵⁵ Spacenet Comments at 3-4.

convergence of services, especially as different technologies transition to a single IP format.⁵⁶

With the proliferation of broadband-enabled IP services, FSS providers now compete with “high speed Internet and video providers such as cable broadband, DSL, and next generation fixed and mobile terrestrial wireless providers.”⁵⁷

Disregarding the significant role of fiber and other terrestrial networks would distort the competitive analysis by ignoring what consumers view as competitive alternatives. These views are evidenced, as SIA shows, by a number of enterprise customers moving from satellite to terrestrial-based networks.⁵⁸ Thus, from a consumer standpoint, the choice is not simply between different satellite providers, but among numerous satellite and terrestrial-based

⁵⁶ See, e.g., Federal Communications Commission, Connecting America: The National Broadband Plan at 59 (2010) (“Increasingly, broadband is not a discrete, complementary communications service. Instead, it is a platform over which multiple IP-based services—including voice, data and video—converge.”), available at <http://download.broadband.gov/plan/national-broadband-plan-chapter-4-broadband-competition-and-innovation-policy.pdf> (last visited Sept. 22, 2010).

⁵⁷ SIA Comments at 18.

⁵⁸ See SIA Comments at 17-18 (noting that General Motors, AutoZone, and Burger King have recently moved from satellite to terrestrial-based networks and that Right Aid, TJ Maxx, CVS, and others have switched from using exclusively satellite to mostly terrestrial networks); see also Glen Dickson, *ESPN's Wide-Area World Cup: Sports giant creates global fiber network for 2010 coverage*, *Broadcasting and Cable* (July 18, 2009), available at http://www.broadcastingcable.com/article/315666-ESPN_s_Wide_Area_World_Cup.php (last visited Aug. 22, 2010) (describing ESPN’s decision to use fiber rather than satellite to transmit its coverage of the 2010 World Cup in South Africa to the United States); Carol Wilson, *Burger King gets its way with MegaPath*, *Connected Planet* (Oct. 3, 2006) (discussing Burger King’s decision to use a terrestrial network with DSL connections and a secure managed service), available at http://connectedplanetonline.com/broadband/marketing/burger_king_megapath_100306 (last visited Aug. 20, 2010); Matt Hamblen, *Satellite Network Stops Paying Off for Edward Jones*, *ComputerWorld* (Feb. 5, 2007) (discussing Edward Jones’ decision to switch from using a satellite network to a terrestrial IP network), available at http://www.computerworld.com/s/article/281577/Satellite_Network_Stops_Paying_Off_for_Edward_Jones (last visited Aug. 22, 2010); Press Release, Sprint, *Enterprise Rent-A-Car Selects Sprint to Help Drive Network Redesign* (Jan. 22, 2004) (discussing Enterprise Rental Car’s decision to switch its network from satellite to a terrestrial IP service delivered over broadband local access); Paul Travis, *Ford Dealers Move to IP Network*, *Information Week* (Oct. 5, 2004) (explaining that Ford Motor Company also now favors IP communications services, provided by large terrestrial carriers), available at <http://www.networkcomputing.com/data-networking-management/ford-dealers-move-to-ip-network.php> (last visited Sept. 22, 2010).

providers. By extension, Spacenet’s argument that switching between satellite providers can be costly⁵⁹ is immaterial because such one-time costs do not permanently constrain end users, who have many viable terrestrial alternatives.⁶⁰ Thus, terrestrial capacity, especially fiber optic cable, cannot be ignored in defining the relevant market.

Fiber networks and satellites compete in the same product market, as commenters make clear. SIA, for example, explains that fiber networks provide “many of the same types of services traditionally offered by satellite.”⁶¹ SIA’s comments also demonstrate how the extensive recent deployment of fiber-to-the-premises⁶² allows fiber to compete for many point-to-multipoint video services.⁶³ Fiber networks, especially using TCP/IP, are also highly competitive with satellite on a cost basis.⁶⁴ CapRock concedes that fiber competes in the same

⁵⁹ See Spacenet Comments at 7-8.

⁶⁰ Moreover, Spacenet’s argument that switching costs are prohibitively high would seem to suggest that each satellite should be viewed as constituting its own distinct product market—a notion that is neither credible nor consistent with any past Commission decision.

⁶¹ SIA Comments at 16.

⁶² See, e.g., Press Release, Fiber to the Home Council, All-Fiber Networks Now Pass 20 Million North American Homes (Sept. 2, 2010) (“FTTH networks are continuing to expand beyond Verizon’s \$23 billion deployment of its FiOS fiber to the home network, with hundreds of smaller telecoms across the continent now moving forward with FTTH upgrades. . . . In addition, our earlier surveys show that the vast majority of the remaining telecoms are seriously considering going all-fiber in the next several years.”), available at <http://www.ftthcouncil.org/en/newsroom/2010/09/14/all-fiber-networks-now-pass-20-million-north-american-homes> (last visited Sept. 22, 2010).

⁶³ SIA Comments at 16-17 (detailing the rapid expansion of FTTP networks, including Verizon’s FiOS network, AT&T’s U-Verse, and Allied Fiber’s recent announcement of a nationwide network-neutral fiber system).

⁶⁴ See, e.g., Gemma Ware, *Satellite vs fibre*, The Africa Report (May 20, 2010) (demonstrating that fiber capacity is highly competitive with satellite on a cost-per-Mbps basis in many instances) available at <http://www.theafricareport.com/special-reports/sector-reports/satellite/3291154-satellite-vs-fibre.html> (last visited Sept. 22, 2010).

product market as satellite, going so far as to claim, erroneously, that satellite is essentially “rendered non-competitive” in areas with “substantial telecommunications infrastructure.”⁶⁵

Fiber networks and satellites also compete in essentially all the same geographic areas. CapRock concedes that satellite providers compete with terrestrial networks for “data networking services” in “urban markets like the U.S. and Europe.”⁶⁶ CapRock argues that terrestrial technologies do not offer a competitive alternative in “addressable markets for FSS-based satellite technologies,” which it defines as areas with “little or no existing terrestrial-based infrastructure”—i.e., “thin route” markets.⁶⁷ As SIA’s comments show, however, virtually all the thin route countries identified in the Commission’s 1998 Comsat Order are now served by fiber cables.⁶⁸

Rapidly expanding fiber networks further demonstrate that fiber and satellites increasingly participate in the same relevant market. SIA notes for example that from 1999 to 2008, the number of Africans depending exclusively on satellites for international connectivity fell from 80.2 percent to 39.5 percent,⁶⁹ and that ten or so new cables are being built or planned for the African continent,⁷⁰ leaving only the Democratic Republic of the Congo without high-

⁶⁵ CapRock Comments at 8.

⁶⁶ *Id.* at 7-8.

⁶⁷ *Id.* at 7.

⁶⁸ See SIA Comments at 15-16 (showing in a chart that of the sixty-one thin route countries listed in the Commission’s 1998 Comsat Order, fifty-six have or will have fiber cable connectivity by next year) (citing *Comsat Corp., Petition Pursuant to Section 10(c) of the Commc’ns Act of 1934, as amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier, Policies and Rules for Alternative Incentive Based Regulation of Comsat Corp.*, Order and Notice of Proposed Rulemaking, 13 FCC Rcd 14,083, 14,106-110 (¶¶ 41-48) (1998) (“*Comsat Order*”)).

⁶⁹ *Id.* at 14-15 (citing Ware, *supra* note 64).

⁷⁰ *Id.* at 15 (citing *Undersea cable set to boost West Africa broadband*, Reuters (July 2, 2010) available at <http://www.reuters.com/article/idUSTRE66122520100702>).

capacity fiber connectivity.⁷¹ SIA also describes the growth in international fiber connectivity in South America, on trans-Pacific routes between the United States and Asia, and among Pacific islands.⁷²

As fiber networks continue to expand in developing regions, they will both stimulate demand for and compete with satellite-based services.⁷³ In fact, fiber deployment in so-called “thin route” countries has been so rapid that some analysts question whether the pace of fiber build out is sustainable.⁷⁴ While both satellite and fiber use in Africa are expected to increase in the next few years, and numerous satellite launches are being planned to meet that demand, consumers are expected increasingly to view fiber as a viable competitive alternative to satellite.⁷⁵

Nor can MSS capacity be ignored in defining the relevant market. The Commission has recognized that FSS and MSS operators increasingly compete directly for many of the same types of services despite differing technologies, noting that the line between the two “has

⁷¹ *Id.* (citing *Satellite to fibre – Africa’s big change is really under way, says new report*, Balancing Act (April 15, 2010), available at <http://www.balancingact-africa.com/news/en/issue-no-500/top-story/satellite-to-fibre -Africa’s-big-change-is-really-under-way>).

⁷² See SIA Comments at 15.

⁷³ See, e.g., Maxime Baudry, *Beam... The Race To Ultra Broadband... A Major Challenge For Satellite Players*, SatMagazine (Sept. 2010), available at http://www.satmagazine.com/cgi-bin/display_article.cgi?number=1404623932 (last visited Sept. 22, 2010).

⁷⁴ *Cable & Wireless warns against submarine price war*, TechCentral (July 13, 2010), available at <http://www.techcentral.co.za/cable-wireless-warns-against-submarine-price-war/15450/> (last visited Sept. 22, 2010).

⁷⁵ *Satellite to fibre – Africa’s big change is really under way, says new report*, Balancing Act (April 15, 2010) (citing *African Fibre and Satellite Markets* (2d ed. 2010)), available at <http://www.balancingact-africa.com/news/en/issue-no-500/top-story/satellite-to-fibre -Africa’s-big-change-is-really-under-way> (last visited Sept. 22, 2010).

blurred.”⁷⁶ SIA notes several examples of how, with greater throughput on newer satellites, MSS operators have been able to offer connectivity services to both fixed and temporary fixed users.⁷⁷ FSS capacity, in turn, is used to provide MSS services to maritime, vehicular, and aeronautical users.⁷⁸ And SIA describes how VSAT services using FSS capacity is viewed by many as a “practical alternative” to services using MSS systems.⁷⁹ Failure to include MSS resources when defining the relevant market would thus lead to an inaccurate picture of the status of competition faced by FSS operators.

III. EVEN EXCLUDING TERRESTRIAL AND MSS COMPETITION, INTELSAT HAS NO MARKET POWER IN FSS

CapRock and Spacenet allege in effect that satellite operators such as Intelsat have exercised market power to restrict the supply of satellite capacity, raise prices, and engage in other anticompetitive behavior.⁸⁰ Their claims are refuted, however, by the fact that Intelsat has no market power in any properly defined relevant market. Even if the relevant product market were limited to FSS capacity, Intelsat does not have the ability to exclude competitors required to exercise market power.

⁷⁶ *SkyTerra Commc’ns, Inc. and Harbinger Capital Partners Funds*, Memorandum Opinion and Order and Declaratory Ruling, 25 FCC Rcd 3059, 3080, (¶ 39 n.136) (2010) (“*SkyTerra-Harbinger Order*”).

⁷⁷ SIA Comments at 11-12.

⁷⁸ *Id.* at 12.

⁷⁹ *Id.* at 13-14.

⁸⁰ *See* CapRock Comments at 6-7.

A. Intelsat faces significant and increasing competition from numerous FSS operators

In assessing whether market power exists, the Commission again looks to principles of antitrust law.⁸¹ For antitrust purposes, “market power is the ability (1) to price substantially above the competitive level” by restricting output, and “(2) to persist in doing so for a significant period without erosion by new entry or expansion.”⁸² After defining the relevant product and geographic markets as discussed above, the Commission’s next step in determining whether market power exists is to identify the market participants.⁸³ Participants include firms currently selling the relevant product as well as firms that have not yet entered if “entry is shown to be certain and significant or to influence the behavior of the firms that are currently producing or selling.”⁸⁴ Failing to account for all the market participants can thus result in a mistaken finding of market power where none exists.

Here, even assuming, counterfactually, that FSS capacity constitutes a relevant product market, CapRock fails to account for all the viable alternatives and sources of competition faced by FSS operators. This fundamental error leads CapRock to exaggerate the level of market concentration. As SIA documents, Intelsat competes with at least a dozen other FSS operators in every region of the globe.⁸⁵ And competition among operators continues to increase as new and existing providers expand their networks and services. SIA provided in its comments a chart

⁸¹ See *First Satellite Competition Report*, 22 FCC Rcd at 5964 (¶ 28 n.51).

⁸² Areeda & Hovenkamp, *Antitrust Law* ¶ 501, at 111 (3d ed. 2007); see also *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956); *United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001); *First Satellite Competition Report*, 22 FCC Rcd at 5964 (¶ 28 n.51).

⁸³ *First Satellite Competition Report*, 22 FCC Rcd at 5965 (¶ 32).

⁸⁴ *Id.*

⁸⁵ See SIA Comments at 3-9.

showing that between approximately 95 and 130 C- and Ku-band FSS satellites currently compete in each region.⁸⁶ Newer FSS satellites operating in the Ka-band are also being launched, offer identical services, and should be included as market participants.

Foreign and “regional” satellite operators must also be included as market participants. Many satellite operators that may once have provided service primarily on a regional basis are now expanding their networks to compete globally. SIA identifies, for example, smaller satellite operators based in Asia that now provide coverage to Europe, Africa, and the Middle East.⁸⁷ By aggregating regional satellite coverage, operators can assemble a global network that serves customers in every region. Thus, global competition for satellite services includes operators that traditionally may have provided only regional coverage but now are capable of providing inter-regional and worldwide coverage.

B. Any market assessment of FSS capacity must include planned and potential new capacity.

Under principles of antitrust law, the Commission must consider in its analysis satellites and operators that are planning to add FSS capacity or could do so in the near term.⁸⁸ As SIA’s comments demonstrate, satellite operators are deploying new satellites and services at a tremendous rate.⁸⁹ A recent economic study of the satellite industry (covering FSS and MSS, NGSO and GSO) observes that:

an estimated 1,200 satellites will be built for launch over the next decade. The average of 122 satellites to be launched per year is up

⁸⁶ *See id.* at 9.

⁸⁷ *See id.* at 5.

⁸⁸ *See* 2010 DOJ Guidelines § 9.1.

⁸⁹ *See* SIA Comments at 3-9.

significantly from the annual average of 77 satellites launched in the previous decade.⁹⁰

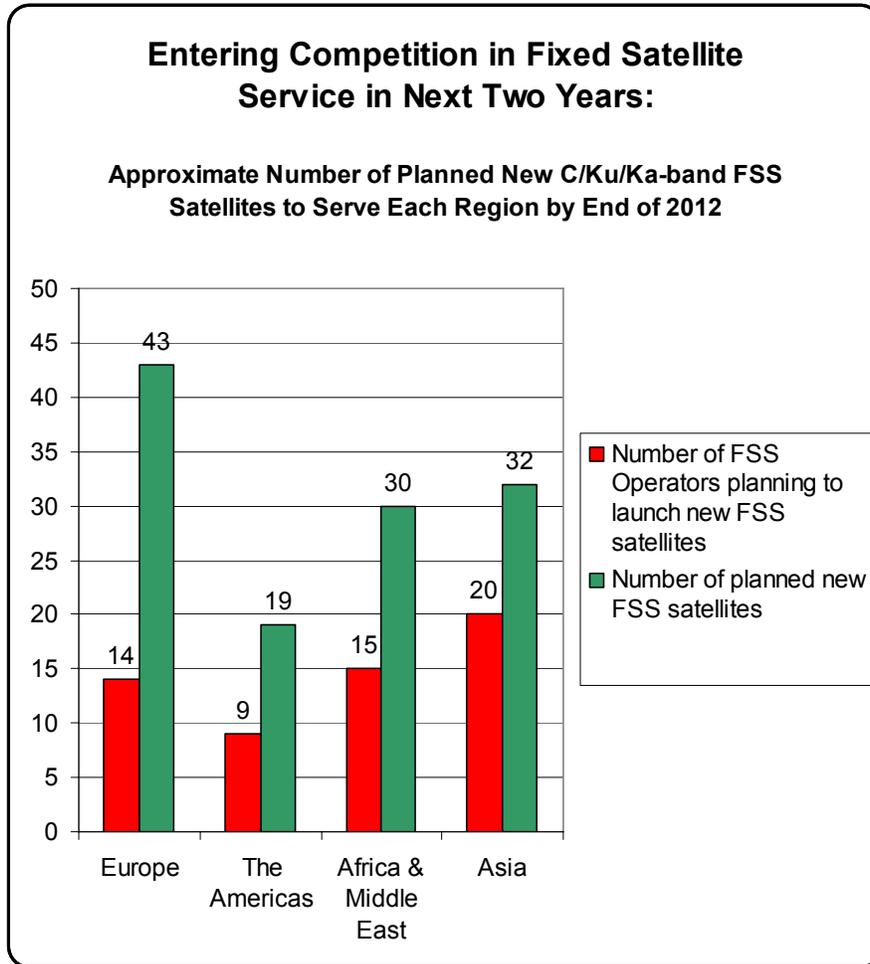
Capital expenditures show that operators are investing heavily in upgrading and expanding their networks to remain viable and competitive.⁹¹ SIA also notes that many new operators are launching their first satellites,⁹² and that “new market entrants from around the world have been able to make the significant investment required to build, launch, and operate their own satellite systems even in these challenging economic times.”⁹³ Thus, the potential for, and relative ease of, market entry would effectively deter any attempts to exercise market power. As the following chart demonstrates, the dozens of new FSS satellites planned for the next two years will provide additional choices for consumers and add further competitive restraints on current FSS operators:

⁹⁰ Press Release, Euroconsult EC, *More than 1,200 satellites to be launched over the next 10 years* (Sept. 6, 2010), available at http://www.euroconsult-ec.com/news_press_release/download?name=37-1-200-satellites-to-be-launched-over-the-next-10-years-press-release.pdf (last visited Sept. 23, 2010).

⁹¹ See SIA Comments at 3 & n.7 (citing Annual Reports of Intelsat and SES, showing enormous capital expenditures of over \$940 million for Intelsat in 2009 and over EU 1 billion for SES).

⁹² See *id.* at 8-9.

⁹³ *Id.* at 8.



Note: This chart is based on Intelsat's internal marketing data. A satellite or operator that serves more than one region is included in each region it serves.

New and potential entrants impose a significant competitive restraint on existing operators. Advancements in satellite technology enable small new entrants to compete effectively with larger, more established operators. SIA points out that new satellites often are able to carry greater capacity.⁹⁴ Hence, the actual competitiveness of the satellite industry is even greater than the sheer number of new satellites suggests.⁹⁵

⁹⁴ *Id.* at 3 n.8.

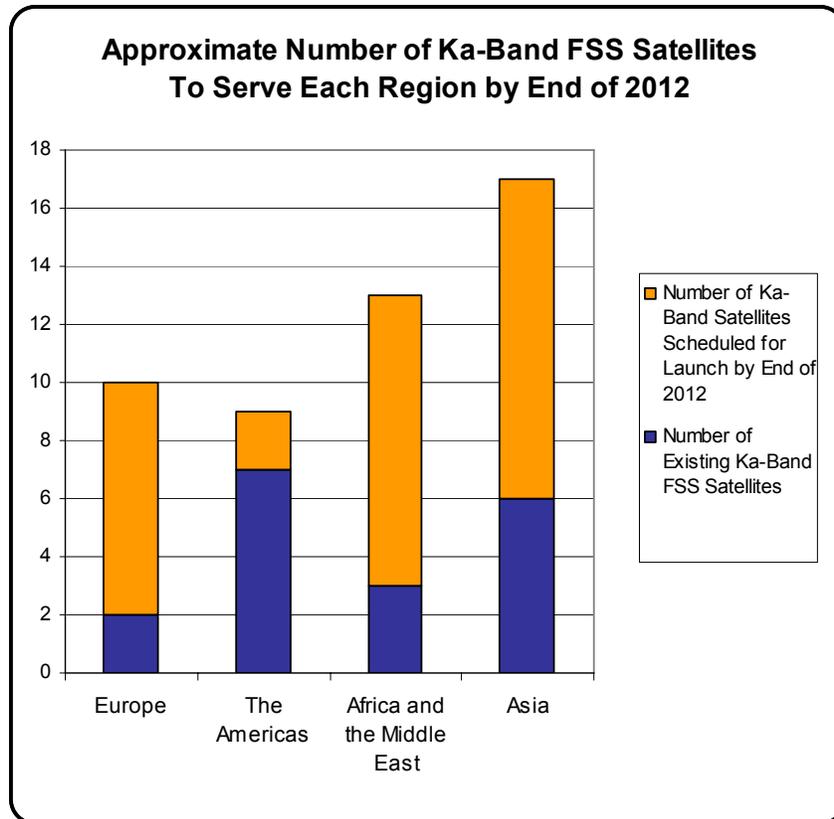
⁹⁵ Press Release, Euroconsult EC, *More than 1,200 satellites to be launched over the next 10 years*, *supra* note 90 (“Because technology advances allow construction of GEO satellites of ever increasing capacity, operators can expand satellite services with fewer satellites.”).

Ka-band satellite operators in particular must be included as market participants. FSS operations in the traditional C- and Ku-bands are facing significant and increasing competition in the Americas and elsewhere from the newer operations in the Ka-band.⁹⁶ One Ka-band operator even predicted that new high-capacity Ka-band satellites “will make Ku-band satellites now used for broadband obsolete.”⁹⁷ Certainly, satellite use of the Ka-band is growing enormously with numerous new Ka-band satellites being launched or planned over the next two years.⁹⁸

⁹⁶ See, e.g., Mary Kirby, *ViaSat keeps Ka-band connectivity in sights for aviation industry*, FlightGlobal (June 30, 2009), available at <http://www.flightglobal.com/articles/2009/06/30/329035/viasat-keeps-ka-band-connectivity-in-sights-for-aviation.html> (last visited Sept. 23, 2010).

⁹⁷ Peter B. de Selding, *ViaSat Plans to Order a Second Satellite*, Space News (Sept. 15, 2010), available at http://www.spacenews.com/satellite_telecom/100915-viasat-plans-order-second-satellite.html (last visited Sept. 23, 2010).

⁹⁸ See Lyngsat.com, *Satellite Launches, Ka band*, at <http://www.lyngsat.com/launches/ka.html> (last visited Sept. 23, 2010).



Note: This chart is based on Intelsat's internal marketing data. A satellite that serves more than one region is included in each region it serves.

Ka-band operations will offer even greater competitive resources of capacity than these numbers suggest because of the huge throughput on some of the newer Ka-band satellites. For example, Hughes' Jupiter satellite, planned for launch in 2012, will be capable of over 100 Gbps, representing ten times the capacity of existing satellites.⁹⁹ ViaSat-1, a high capacity Ka-band satellite planned for launch in 2011, will carry 140 Gbps throughput capacity and be able to host 1.5 million subscribers.¹⁰⁰ This one new satellite alone will thus carry more capacity "than all

⁹⁹ Press Release, Hughes Network Systems LLC, Barrett Xplore Inc. and Hughes Sign Landmark Agreement for High-Throughput Satellite Capacity over Canada (Oct. 28, 2009), available at http://www.hughes.com/HNS_Library_Press_Release/10-28-09_Barrett_Xplore_Inc_and_Hughes_Sign_Landmark_Agreement_For_High-Throughput_Satellite_Capacity_over_Canada.pdf (last visited Sept. 23, 2010).

¹⁰⁰ See ViaSat, ViaSat-1 FAQ, available at http://www.viasat.com.au/files/assets/web/ViaSat-1_FAQ_1_10.pdf (last visited Sept. 23, 2010).

current Ku-, Ka-, and C- band satellites over North America combined (including those used for broadcast TV).”¹⁰¹ ViaSat also recently announced plans to order a second, similar satellite for launch in 2014, which will carry more than fourteen times the capacity of any current Ka-band satellite covering North America.¹⁰²

Ka-band satellites also provide greater opportunities for both existing C- and Ku-band operators and to new entrants to offer more competitive choices to consumers.¹⁰³ Eutelsat, for example, a current C- and Ku-band operator, plans to launch a Ka-band satellite next year.¹⁰⁴ And Inmarsat announced a new generation of Ka-band satellites to supplement its L-band MSS fleet, which also reflects the continued blurring of the line between FSS and MSS services.¹⁰⁵

C. CapRock’s own data belie its claims of insufficient FSS capacity.

CapRock claims that, as part of alleged anticompetitive behavior, FSS operators “have not added meaningful incremental supply [of FSS capacity] to the market.”¹⁰⁶ CapRock attempts

¹⁰¹ *Id.*; see also Press Release, ViaSat, *ViaSat-1 to Transform North American Satellite Broadband Market* (Jan. 7, 2008), available at <http://www.viasat.com/news/viasat1-transform-north-american-satellite-broadband-market>.

¹⁰² See de Selding, *supra* note 97.

¹⁰³ See *The Sky’s the Limit*, Digital TV Europe.net (May 25, 2010) (quoting Eutelsat’s CEO as stating that Eutelsat’s planned Ka-band satellite will “deliver a cost per bit that will be significantly lower than regular Ku-band satellite”), available at http://www.digitaltveurope.net/feature/25_may_10/the_skys_the_limit (last visited Sept. 23, 2010); *FSS Giants Discuss Future Growth Strategies*, Satellite Today (Sept. 8, 2010), available at <http://www.satellitetoday.com/satn/features/34993.html> (last visited Sept. 23, 2010).

¹⁰⁴ See Press Release, Eutelsat Communications, *Eutelsat to Drive Satellite Broadband to New Frontiers with First Full Ka-Band Satellite Infrastructure* (Jan. 7, 2008), available at <http://www.eutelsat.com/news/compress/en/2008/pdf/PR0108-KaSat.pdf> (last visited Sept. 23, 2010).

¹⁰⁵ Press Release, Inmarsat, *Inmarsat to invest US\$1.2bn in Ka-band network* (Aug. 6, 2010), available at <http://www.inmarsat.com/Services/Land/News/00036138.aspx> (last visited Sept. 23, 2010).

¹⁰⁶ CapRock Comments at 6.

to support this assertion with data that it says shows a shortage of available capacity for the United States. In fact, the cited data support the opposite proposition.

CapRock’s own data shows that the United States is served by a majority of the GEO satellites, that a fair portion of new satellites represents incremental capacity, and that substantial excess capacity exists. First, CapRock claims that “only” 169 of the 287 GEO satellites in orbit are usable to serve the U.S.¹⁰⁷ This statement indicates—quite favorably for the Commission’s report on the state of competition in the U.S. satellite services industry—that about 60 percent of in-orbit GEO satellites have a geographic footprint focused on the 6.5 percent of the world’s landmass that is the United States. The U.S. enjoys this coverage by 60 percent of GEO satellites while hosting only approximately 35 percent of the world’s communications traffic.¹⁰⁸

Second, CapRock claims that operators are not adding sufficient “incremental” capacity because “[m]any new launches are merely replacements for existing satellites being retired.”¹⁰⁹ But in the two examples CapRock itself provides on page 11 of its comments, 33 percent of future SES satellites and 27 percent of future Intelsat satellites will represent new incremental capacity.¹¹⁰

Third, CapRock claims that “the usable supply for FSS space segment remains increasingly constrained” because the utilization rate of existing C- and Ku-band capacity is close to 80 percent for the industry. Thus, over 20 percent of industry capacity—the equivalent, as CapRock points out, of 33 FSS satellites—is fallow. This means that, at an average cost of approximately \$200-300 million to construct and launch a satellite, operators have invested

¹⁰⁷ CapRock Comments at 8.

¹⁰⁸ Wilson P. Dizard, *Digital Diplomacy: U.S. Foreign Policy in the Information Age* at 4 (2001).

¹⁰⁹ CapRock Comments at 10.

¹¹⁰ *Id.*

somewhere between \$6.6 billion and \$9.9 billion on which they will receive no return unless and until the capacity is purchased. CapRock does not specify the amount of unused capacity that must exist before the supply is not “constrained,” but 20 percent excess capacity is certainly more than enough to ensure vigorous competition. While CapRock can easily foist the billions of dollars in carrying costs upon operators without regard to financial implications, operators cannot ignore those costs.

D. Spacenet and CapRock fail to support their claim that available capacity has been constrained by increased consumer demand and barriers to entry.

Spacenet and CapRock argue that strong demand for satellite capacity, combined with difficulty for new operators to enter the market, have allowed existing operators to constrain the available supply of capacity and raise prices.¹¹¹ Apart from the failure to offer any support for the assertion that prices have risen above a competitive level, numerous flaws and inaccuracies undermine these allegations.

Spacenet largely bases its claim of constrained capacity on an assertion of strong worldwide growth in demand for capacity, but independent researchers’ forecasts show that Spacenet’s assertion is not accurate with regard to North America—the geographic area Spacenet complains about. For example, Northern Sky Research (NSR) forecasts that demand for C-band capacity will be essentially flat over the next several years, with a small amount of growth for Ku-band demand.¹¹² Similarly, Euroconsult forecasts flat Ku-band demand with some small

¹¹¹ See Spacenet Comments at 5; CapRock Comments at 6-7.

¹¹² See NSR Global Assessment of Satellite Demand at 447 (6th ed. Sept. 2009).

growth for C-band capacity.¹¹³ Based on its own research, Intelsat believes both NSR's and Euroconsult's demand forecasts to be overly optimistic.

The current weakness in demand for North American capacity is evidenced by recent actions taken by satellite operators serving that region. Specifically, SES relinquished a license to operate a C-band satellite at 85° W.L.,¹¹⁴ and Intelsat withdrew an application to put a satellite there.¹¹⁵ Satellite operators will not add—and may remove—capacity where there is not sufficient demand to ensure that such capacity will be utilized.

Spacenet next argues that capacity is likely to remain constrained because “it is difficult, if not impossible today, to enter the satellite communications industry as a satellite operator serving the U.S. domestic market.”¹¹⁶ This is because, Spacenet claims, every Ku-slot between 70° W.L. and 131° W.L. is either assigned to an operator or “subject to the superior rights of another country.”¹¹⁷ There are several problems with this argument. First, Spacenet ignores the many orbital locations outside the 70°-131° W.L. range from which the U.S. can be served. Indeed, multiple operators currently serve the U.S. from satellites outside this range.¹¹⁸ In

¹¹³ See Euroconsult Satellite Communications & Broadcasting Markets Survey, Forecasts to 2018 (2009 ed.).

¹¹⁴ See *SES Americom, Inc. Stamp Grant*, File Nos. SAT-MOD-20080124-00030 and SAT-AMD-20080311-00070 (AMC-2 reassignment from 85 W.L. to 101 W.L.) (May 19, 2008).

¹¹⁵ See *Policy Branch Info.: Actions Taken*, Public Notice, File No. SAT-MOD-20080523-00113, 24 FCC Rcd 5823 (2009).

¹¹⁶ Spacenet Comments at 6.

¹¹⁷ *Id.*

¹¹⁸ See FCC International Bureau, Permitted Space Station List, at <http://www.fcc.gov/ib/sd/se/permited.html>.

addition, Ka-band slots are thus available for any willing entrant to apply for and provide the same types of data services offered via Ku-band with high-speed Ka-band links.¹¹⁹

Second, another nation's higher ITU priority for some orbital slots does not prevent an operator from seeking foreign licenses for those slots and launching a satellite. Foreign-licensed satellites easily can serve the United States. Indeed, 29 foreign-licensed satellites are currently on the FCC's Permitted List,¹²⁰ and additional foreign-licensed satellites that will serve the U.S. have been announced.¹²¹ ITU priority assignments simply do not present a barrier to entry.

Third, even if no U.S-coverage orbital locations were available for a new satellite, the provider could build ground infrastructure to connect to multiple satellites currently offering such coverage. Such investment would, of course, entail financial risks similar to—but much smaller than—those associated with funding and launching a new satellite. But resellers cannot always rely on others to assume all the risk of building space or ground infrastructure when demand is uncertain. Indeed, satellite operators cannot make \$200-300 million satellite investment decisions based solely on niche market demands and must instead base capital expenditure decisions on projected returns from the overall global satellite industry. In any event, capital expenditures and entrepreneurial risks are not by themselves barriers to entry.¹²²

¹¹⁹ The Commission streamlined the process several years ago for satellite license applications, eliminating processing rounds and granting applications on a first-come, first-served basis. *See Amendment of the Comm'n's Space Station Licensing Rules and Policies; Mitigation of Orbital Debris*, First Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 10760 (2003).

¹²⁰ *See id.*

¹²¹ *See, e.g.*, HNS License Sub, LLC SPACEWAY 3 Modification Application Narrative at 2, File No. SES-MFS-20100419-00452 (Apr. 19, 2010) (“HNS intends to convert SPACEWAY 3 from a U.S. licensed satellite to one that serves the U.S. under a U.K. authorization held by HNS.”)

¹²² *See, e.g.*, IIB Phillip E. Areeda, Herbert Hovenkamp, *Antitrust Law* ¶ 421b at 81 (3d ed. 2007).

Rather, they are the cost of doing business in a capital-intensive industry and accepted by Intelsat each time it constructs and launches a satellite.¹²³

Finally, CapRock's point that much new satellite capacity is pre-sold has no significance in a competitive analysis. Operators pre-sell capacity in order to hedge against the heavy investment in new satellites. CapRock itself is free to pre-purchase such capacity; if it elects not to, it cannot then complain—as in its comments—that the capacity is no longer available. CapRock may be reluctant to pre-commit to substantial capacity because its principal customer, the U.S. government, is constrained by the current budget appropriations situation in Congress that prevents long-term service commitments. CapRock is not alone—any network services provider that has the government as a customer suffers from the same problem; this fact does not reflect a failure of satellite competition. Moreover, CapRock itself shows that about 20 percent of capacity on existing FSS satellites is not being utilized,¹²⁴ meaning that pre-sold capacity on to-be-launched satellites has not crowded out any potential customers.

IV. CAPROCK'S SUGGESTED REMEDIES ARE OUTSIDE THE COMMISSION'S AUTHORITY AND WOULD BE ADVERSE TO COMPETITION, EFFICIENCY, AND CONSUMER INTERESTS.

CapRock seeks draconian measures to remedy what CapRock views as a lack of effective competition in the “market for international space segment capacity.”¹²⁵ In effect, CapRock seeks to have the Commission impose structural and behavioral regulations on satellite operators

¹²³ Barriers to entry have been defined as costs that “must be borne by a firm which seeks to enter an industry but is not borne by firms already in the industry.” *Id.* ¶ 420c at 77 (quoting George A. Stigler, *The Organization of Industry* 67 (1968)); *see also, e.g., East Portland Imaging Center v. Providence Health System-Oregon* 280 Fed. Appx. 584, 586, 2008 WL 2128022 (9th Cir. May 20, 2008) (affirming summary judgment in favor of antitrust defendants because plaintiffs did not provide any evidence that “new entrants face long-run costs that were not or will not be incurred by incumbent providers”).

¹²⁴ CapRock Comments at 12.

¹²⁵ *Id.* at 13.

that would reverse decades of Commission policy, impose burdensome, common carrier-type regulation on private carriers, and impair the ability of operators such as Intelsat to compete on an equal basis, all to CapRock's advantage.

CapRock recommends the following Commission actions and policy changes as structural remedies: (1) not allow "further consolidation in the satellite space segment industry"; (2) require that, when "affiliates of dominant satellite operators compete as providers of satellite network services, all requests for FSS space segment capacity should be received and handled by the satellite operator," not by its affiliate¹²⁶; and (3) prohibit satellite operators from "resell[ing] space segment capacity of other satellite operators." CapRock also recommends the following behavioral remedies: (1) "one or more Commission proceedings" to redistribute orbital slots and to take slots away from operators that fail to "deploy replacement satellites that increase aggregate capacity and utilize spectrally efficient satellite technology"; and (2) prohibit satellite operators from offering to service providers "pre-determined bundles of FSS space segment capacity either in terms of minimum commitments of aggregate capacity or in terms of a fixed combination of their own and/or another satellite operator's capacity".¹²⁷ These proposed structural and behavioral remedies would only harm competition.

Taken together, these proposed remedies would subject Intelsat and other satellite operators that function as private carriers to burdensome regulations traditionally used in connection with Title II common carriers, and only when justified. They would also act as a proxy for price controls on private carriers.

¹²⁶ Although the FCC declared Intelsat to be "dominant" for certain limited service offerings between the United States and thin route countries where terrestrial infrastructure was unavailable, *see Comsat Order*, 13 FCC Rcd at 14106-10 (¶¶ 41-48), SIA's comments demonstrate that this term is outdated because fiber is now available to nearly all of the areas designated as thin-route countries. *See SIA Comments* at 15-16.

¹²⁷ CapRock Comments at 13.

Imposing such regulations would be inappropriate and impermissible. Intelsat has been declared to be a non-common carrier¹²⁸ and does not currently provide common carrier services to customers; it thus cannot be yoked with common carrier-type regulations. The Commission does not have the discretion “to confer or not confer common carrier status on a given entity, depending upon the regulatory goals it seeks to achieve.”¹²⁹ Nor does the Commission have the authority to impose the remedies CapRock suggests on non-common carrier operators such as Intelsat.¹³⁰

To be classified as common carriers, service providers must “hold themselves out to serve indifferently those who seek to avail themselves of their particular services.”¹³¹ In making this determination, the D.C. Circuit held in *NARUC I* that the test is to inquire “first, whether there will be any legal compulsion thus to serve indifferently, and if not, second, whether there are reasons implicit in the nature of [the] operations to expect an indifferent holding out to the

¹²⁸ See Satellite Communications Service Information, Public Notice, Report No. SES-00751, at 16-29 (Sept. 21, 2005) (approving by public notice application by Intelsat to change regulatory classification of earth stations from common carrier to non-common carrier service only); Letter from Susan H. Crandall, Assistant General Counsel, Intelsat Global Service Corp., to Marlene H. Dortch, Secretary, FCC (June 8, 2005) (notifying the Commission of Intelsat’s decision to change, pursuant to the Commission’s *DISCO I* Order, the regulatory status of its FSS space station licenses to non-common carrier) (citing *Amendment to the Commission’s Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems*, Report and Order, 11 FCC Rcd 2429, 2436 (¶ 50) (1996)). Although one subsidiary, Intelsat USA License Corp., is authorized as a common carrier for certain limited services for certain limited connectivities, Intelsat currently has no customers for such common carrier services.

¹²⁹ *Nat’l Ass’n of Regulatory Utility Comm’rs v. FCC*, 525 F.2d 630, 644 (D.C. Cir. 1976) (“*NARUC I*”).

¹³⁰ See *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) (holding that the FCC does not have the authority to regulate a (non-common carrier) Internet service provider’s network management practices, which it would otherwise be able to if the provider were a common carrier).

¹³¹ *NARUC I*, 525 F.2d at 644.

eligible user public.”¹³² CapRock has not attempted to show that Intelsat satisfies this test for common carrier status, and in fact Intelsat does not, nor is it required to, “hold [itself] out indifferently.”¹³³

Intelsat cannot be classified as a common carrier based on the legal standard. A carrier that makes “individualized decisions, in particular cases, whether and on what terms to deal” is not a common carrier.¹³⁴ Thus, CapRock’s complaint that Intelsat does not make capacity available in whatever increment CapRock may choose, confirms that Intelsat does not operate as a common carrier. Similarly, the Commission has held that “the sale or long-term lease” of satellite assets that involve “the establishment of medium-to-long term relations” does not constitute a common carrier service.¹³⁵ Treating Intelsat as a common carrier would thus be contrary to law and Commission precedent.

CapRock’s first proposed structural remedy—an ex-ante prohibition on all future satellite corporate transactions—is not only outside the scope of this proceeding, but would also be purely hypothetical and speculative. No such transaction is pending and there is no reason to address this issue absent specific facts.

For its second proposed structural remedy, CapRock would have the Commission interfere, without economic justification, in the internal organizations of private companies

¹³² *Id.* at 642.

¹³³ *Id.* at 643-44; *see also supra* note 128.

¹³⁴ *Id.* at 641.

¹³⁵ *Domestic Fixed-Satellite Transponder Sales*, Memorandum Opinion, Order and Authorization, 90 F.C.C.2d 1238, 1256 (¶¶ 42-44) (1982), *aff’d Wold Commc’ns v. FCC*, 735 F.2d 1465 (1984) (permitting satellite transponder sales on a private carrier basis); *see also Tel-Optik Ltd.; Application for a license to land and operate in the United States a submarine cable extending between the United States and the United Kingdom*, Memorandum Opinion and Order, 100 F.C.C.2d 1033, 1046-48 (¶¶ 27-31) (1985) (permitting domestic international fiber cable operations on a private carrier basis)

through vertical separation. Prohibiting operators from choosing to sell through their subsidiary service providers, such as Intelsat General Corp.,¹³⁶ would effectively undo Intelsat’s vertical integration along with the benefits to competition and consumers.¹³⁷ Such internal structural regulation has never been imposed on non-common carriers.

CapRock’s third proposed structural remedy—not to allow satellite operators to “resell” capacity of other operators¹³⁸—is entirely unwarranted when, as shown above, the environment in which they compete is competitive. Moreover, this sweeping proposal would actually harm competition by reducing the number of competitors, discouraging market entry, and disproportionately hurting smaller operators. CapRock’s proposal would prohibit all operators from offering any capacity to customers from other than their own satellites. An FSS operator, for example, could not resell MSS capacity, thus reducing competition to MSS operators. Entry would also be deterred because as soon as a new operator launched its first satellite, it would perversely be prohibited from providing service with capacity leased on any other satellite. New entrants and smaller operators thus would be foreclosed from providing services over a global network and from competing effectively with larger operators. While CapRock is free to lease capacity from any operator, it would deny that right to all vertically integrated competitors.

¹³⁶ Intelsat General Corp. was created as a subsidiary of Intelsat Global S.A. to provide services to certain customers, such as the U.S. government, with classified business, which the parent company, as a partly foreign-owned entity, does not qualify to serve.

¹³⁷ See R.W. Crandall, J.A. Eisenach & R.E. Litan, *Vertical Separation of Telecommunications Networks: Evidence from Five Countries*, 62 Fed. Commc’ns L.J. 493, 505-09 (2010) (“Telecommunications networks display virtually all of the characteristics economists associate with strong vertical efficiencies.”).

¹³⁸ Although CapRock uses the term “resell”—a term that implies common carriage, see *Reg. Policies Concerning Resale and Shared Use of Common Carrier Servs. and Facilities*, Report and Order, 60 F.C.C.2d 261, 271 (¶ 17) (1976)—satellite operators actually lease capacity from other operators on a private carrier basis.

As its first proposed behavioral remedy, CapRock would have the Commission, rather than market forces, determine the optimal capacity and type of technology to be deployed in each orbital location. Such regulation would inevitably lead to less efficient allocations of satellite resources, reverse the thrust of Intelsat's privatization, and run counter to over 25 years of sound Commission policy. The Commission has long left decisions of the amount and timing of capacity deployment to market forces, and for good reason. The Commission has emphasized that "long-range traffic forecasting is an inherently uncertain undertaking . . . [and] especially difficult in an industry as technologically volatile as telecommunications."¹³⁹ The Commission thus affirmed in 1985 its "goal to rely on market forces to establish the optimal mix of services, rates and facilities" and that "market forces could be employed to encourage the efficient use of existing facilities and the development of the most efficient facilities in the future" because the communications services industry was by then sufficiently competitive.¹⁴⁰ In addition, the Commission is not in the practice of dictating capital expenditure decisions of private enterprises. CapRock would reverse these successful, long-standing policies.

CapRock's second proposed behavioral remedy is to regulate the terms of capacity sales agreements by prohibiting satellite operators from offering FSS capacity in pre-determined increments.¹⁴¹ CapRock's requested relief would apparently allow any purchaser of space

¹³⁹ *Am. Tel. and Tel. Co. et al., Application for authorization under Section 214 of the Commc 'ns Act of 1934, as amended, to construct and acquire a high capacity, digital, submarine cable system between the United States and both the United Kingdom and France*, Memorandum Opinion, Order and Authorization, 98 F.C.C.2d 440, 465 (¶ 70) (1984) ("TAT-8 Order").

¹⁴⁰ *Inquiry into the Policies to be Followed in the Authorization of Common Carrier Facilities to Meet N. Atl. Telecomms. Needs During the 1985-1995 Period*, Second Report and Order, 101 FCC 2d 1259, 1262-64 (¶¶ 6, 8) (1985).

¹⁴¹ CapRock complains about Intelsat's "bundling." Intelsat, having no duty to deal with CapRock, chose to make an offer consistent with its existing system and capacity constraints. Were the Commission to involve itself in reviewing the terms of that offer, it would exceed its authority in regulating a private carrier and force it to substitute its judgment on a commercial

segment capacity to obtain capacity in whatever amount it desired—but such regulation of rates, terms, or conditions is beyond FCC authority over non-common carrier offerings.¹⁴² This proposal too would inhibit the ability of operators to make the most efficient, optimal use of their available capacity.

V. **MICROCOM MERELY SEEKS SPECIAL ADVANTAGE IN AREAS WITH ADEQUATE COMMUNICATIONS SERVICES.**

Microcom, another value-added reseller, argues that for purposes of this report and when reviewing and approving satellite space station applications, the Commission should view Alaska and Hawai'i as markets separate from the rest of the United States. Microcom argues that the Commission's current review process does not effectively consider the impact of new satellites on Alaska and Hawai'i and that, as a result, these areas have insufficient satellite coverage to support their communications needs.¹⁴³ Microcom ignores the significant satellite and wireline communications capacity already provided in both Alaska and Hawai'i and the new satellite bandwidth that is scheduled to become available to those states as soon as 2011. Essentially, Microcom's proposal would impose new restrictions on satellite operators, not to rectify any actual lack of current communications capacity in Alaska and Hawai'i, but to serve its own private interests.

Hawai'i's population receives significant communications coverage both from terrestrial and satellite sources. Hawai'i serves as a landing site for numerous trans-Pacific fiber-optic

issue for the judgment of Intelsat management. CapRock was under no duty to accept Intelsat's offer and could have sought to take advantage of its commercial alternatives rather than seeking regulatory intervention.

¹⁴² See *Comcast*, 600 F.3d at 655.

¹⁴³ See Comments of Microcom (filed Aug. 20, 2010).

cables, including the newly constructed, high capacity Asia America Gateway.¹⁴⁴ These cables provide the residents and businesses with high speed connections to the mainland United States, Asia, and the rest of the globe. In addition, Hawai'i is within the footprint of several Pacific region satellites, which provide residents and businesses throughout the islands with access to a full array of satellite communications services.¹⁴⁵

The vast majority of Alaska is also served by multiple satellites transmitting in the C- and Ku-bands.¹⁴⁶ While Microcom is correct in stating that some northern remote areas of Alaska may not receive as much satellite coverage in the Ku-band as other areas of the country, this is largely due to the technical difficulty of covering such areas. Given the Earth's curvature, it would be impossible for a satellite located in the equatorial GSO arc to serve the northern pole region. Moreover, positioning a GSO satellite to serve the relatively small population location in northern Alaska would necessitate leaving a portion of the densely populated continental U.S. uncovered. It is difficult to make a business case for this trade-off if an operator does not receive sufficient customer pre-commitments to make such a satellite position economically feasible.

¹⁴⁴ See International Cable Protection Committee, Eastern Pacific Region, *available at* http://www.iscpc.org/cabledb/Eastern_Pacific_Cable_db.htm (providing information on all in-service trans-pacific cables, including landing sites) (last visited Sept. 23, 2010); abs-cbnNEWS.com, *Asia-America gateway cable network goes live* (Nov. 11, 2009), *available at* <http://www.abs-cbnnews.com/business/11/11/09/asia-america-gateway-cable-network-goes-live> (announcing the opening of the Asia America Gateway, including its landing site in Hawai'i) (last visited Sept. 23, 2010).

¹⁴⁵ See, e.g., Pacific Business News, *New satellite coverage for Hawai'i* (Aug. 16, 2005), *available at* <http://www.bizjournals.com/pacific/stories/2005/08/15/daily14.html> (last visited Sept. 23, 2010) (reporting on the launch of Galaxy-14 which provides C-Band services throughout Hawai'i); Intelsat Satellite Guide (June 2010), *available at* <http://www.intelsat.com/files/network/satellites/Satellite-Guide.pdf> (last visited Sept. 23, 2010) (showing the footprints of Intelsat's satellite fleet, many of which provide C- and Ku-band service to Alaska and Hawai'i).

¹⁴⁶ See Intelsat Satellite Guide, *supra* note 145.

Nevertheless, Alaska has significant coverage in the C- and Ku-bands from multiple satellites and even more capacity, including Ka-band coverage, will come online in the near future.¹⁴⁷

Given that both Alaska and Hawai'i are adequately covered by terrestrial and/or satellite communications services, it is clear that Microcom's request springs from a desire to gain a private advantage, rather than from any genuine concern over the sufficiency of communications services in these two states. The Commission should reject the arguments of Microcom.

VI. CONCLUSION

The communications services market in which satellite capacity providers operate is highly competitive. The Commission should not credit the allegations of CapRock and Spacenet, whose sole purpose is to promote their private interests by imposing regulatory burdens on Intelsat. These commenters contrive an artificially narrow relevant market definition in an awkward and ineffective attempt to depict the market as overly concentrated. Even apart from the significant competitive impact of fiber optic cable and other terrestrial networks on

¹⁴⁷ See ViaSat, ViaSat-1, available at <http://www.viasat.com/broadband-satellite-networks/viasat-1> (last visited Sept. 23, 2010); <http://www.ssloral.com/html/satexp/viasat.html> (last visited Sept. 23, 2010) (announcing the early 2011 launch of ViaSat-1, which will provide Ka-band service to both Alaska and Hawai'i).

FSS, Intelsat does not possess any market power among FSS providers. The Commission should therefore conclude—as it has previously done—that satellite operators, as well as other participants in the satellite industry, are subject to effective competition.

Respectfully submitted,

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