

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Direct Access to the INTELSAT System

IB Docket No. 98-192
File No. 60-SAT-ISP-97

REPORT AND ORDER

Adopted: September 15, 1999

Released: September 16, 1999

By the Commission: Commissioner Furchgott-Roth issuing a separate statement

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## I. Introduction

1. By this Report and Order, we adopt a policy to allow direct access to the International Telecommunications Satellite Organization ("INTELSAT") from earth stations located within the United States, for the purpose of providing international satellite services. "Direct access" refers to the means by which users of the INTELSAT satellite system may obtain space segment capacity directly from INTELSAT rather than having to go through an INTELSAT Signatory.

2. In our *Notice*, we requested comment on whether Level 3 direct access would result in benefits to carriers, other users, and end users, and whether it would enhance competition.<sup>1</sup> We also

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<sup>1</sup> *In the Matter of Direct Access to the INTELSAT System*, IB Docket No. 98-192, File No. 60-SAT-ISP-97, 13 FCC Rcd 22013, 22035-22042 (1998) ("*Notice*").

tentatively concluded that the Commission has authority under the Communications Satellite Act of 1962, as amended ("Satellite Act"),<sup>2</sup> and the Communications Act of 1934, as amended ("Communications Act"),<sup>3</sup> to permit United States carriers and users contractual, or Level 3 direct access to the INTELSAT system.<sup>4</sup> Level 3 direct access permits a customer to enter into a contractual agreement with INTELSAT for the purpose of ordering, receiving, and paying for INTELSAT space segment capacity at the same rates that INTELSAT charges its Signatories. The *Notice* requested comment on the legal, economic and policy ramifications of permitting U.S. carriers and users direct access to the INTELSAT satellite system, *in lieu* of having to go through Comsat Corporation ("Comsat"), the U.S. Signatory to INTELSAT. We initiated this proceeding as a result of requests in an earlier proceeding by U.S. carriers and other users of INTELSAT that we condition reclassification of Comsat as a non-dominant carrier in its provision of INTELSAT services, on the implementation of direct access in the United States.<sup>5</sup> Although we did not require that direct access be permitted as a condition to granting Comsat non-dominant status, we committed to initiating this proceeding "expeditiously to explore the legal, economic and policy ramifications of [allowing] direct access."<sup>6</sup>

3. In this Report and Order, we affirm our tentative conclusion that the Commission has the authority under both the Satellite Act and the Communications Act to permit Level 3 direct access to INTELSAT from the United States. We also conclude that permitting Level 3 direct access is in the public interest, as it will result in increased competition by enhancing the competitiveness of U.S. telecommunications service providers in the global market. We, therefore, require Comsat, as the United States Signatory to INTELSAT, to inform INTELSAT, pursuant to established INTELSAT procedures, that Level 3 direct access to INTELSAT is available in the United States to U.S. carriers and users, consistent with the terms of this Report and Order. We will permit Comsat to file a tariff with the Commission that will require Level 3 direct access customers in the United States to reimburse Comsat for certain costs it must incur in its unique role as U.S. Signatory to INTELSAT that are not recoverable by Comsat under an INTELSAT Level 3 direct access regime. We also require that under certain limited circumstances, INTELSAT waive its immunities to provide Level 3 access in the United States. We deny the requests made by carriers in this proceeding for "fresh look" of their long-term contracts with Comsat for INTELSAT space segment. We also find that the record does not support at this time requests by carriers advocating "portability" of INTELSAT space

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<sup>2</sup> Communications Satellite Act of 1962, as amended, 47 U.S.C. § 701 *et seq.* (1962).

<sup>3</sup> Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.*

<sup>4</sup> *Notice*, 13 FCC Rcd at 22014 and 22022-22029.

<sup>5</sup> *Comsat Corporation Petition Pursuant to Section 10(c) of the Communications Act of 1934, as amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier*, Order and Notice of Proposed Rulemaking, 13 FCC Rcd 14083 (1998) ("*Comsat Non-Dominant Order*"). See also *Notice*, 13 FCC Rcd at 22014.

<sup>6</sup> *Comsat Non-Dominant Order*, 13 FCC Rcd at 14087-14088 & 14160. See *Notice*, 13 FCC Rcd at 22014.

segment capacity that is held by Comsat.<sup>7</sup> If necessary, we would, however, consider such relief at a later date to assure the benefits of direct access, if supported with sufficient evidence and commercial solutions appear unavailable.<sup>8</sup> Finally, in order to eliminate an incentive of Signatories to reduce prices for direct access to uneconomic levels, we will not authorize any Signatory, other than Comsat, to purchase direct access in the United States for service to or from any specific foreign country in which the Signatory in question controls 50 percent or more of all INTELSAT capacity consumed in that respective country.<sup>9</sup>

4. We recognize that Congress may consider legislation on the issue of direct access to INTELSAT. Comprehensive bills were passed in 1998 by the House<sup>10</sup> and by the Senate this year,<sup>11</sup> that would rewrite the Satellite Act. While our decision in this proceeding is based on current law, Congress retains the prerogative to legislate in this area. Congressional action clearly would supersede any inconsistent interim action taken in this proceeding.

## II. Background

5. INTELSAT is a 143-member cooperative that owns and operates a global satellite system over which, since 1964, much of the world's international telephone, video, data and other communications have been and continue to be transmitted. It operates 19 satellites, serving over 99 percent of the globe and accessed by over one thousand earth stations.<sup>12</sup> INTELSAT had nearly \$1 billion in revenues in 1998.<sup>13</sup> INTELSAT is an intergovernmental organization in which an Assembly of Parties, comprised of government representatives, determines overall policy, and a Board of Governors, comprised of Signatories who are the investors in the system, make commercial decisions. Comsat is the U.S. Signatory to INTELSAT. It was created pursuant to the Satellite Act, which made

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<sup>7</sup> "Portability" refers to the right of a current customer of Comsat to obtain the transponder capacity it currently receives through Comsat and use it under a direct access to INTELSAT regime.

<sup>8</sup> Unless stated otherwise, all references herein to "direct access" refer to "Level 3 direct access." *See infra* at ¶ 8 for a description of the four types of direct access to INTELSAT.

<sup>9</sup> *See infra* ¶¶ 95-100 (discussion of direct access by dominant INTELSAT Signatories).

<sup>10</sup> H.R. 1872, "Communications Satellite and Privatization Act of 1998," was passed by the House on March 13, 1998.

<sup>11</sup> S. 376, "Open-market Reorganization for the Betterment of International Telecommunications Act," was passed by the Senate on July 1, 1999.

<sup>12</sup> Prior to November 1998, when it transferred five operating satellites to its spin-off, New Skies Satellites, N.V., INTELSAT was perennially the largest satellite capacity provider in the world.

<sup>13</sup> *See* INTELSAT Web Page: <http://www.INTELSAT.com/about/INTELSAT.htm>.

it U.S. policy to create the global satellite system that became INTELSAT.<sup>14</sup> Currently, access to INTELSAT satellites from the United States requires carriers and other users to go through Comsat.

6. INTELSAT operates as a cost sharing cooperative on a commercial basis with the long term objective of providing services at prices which meet its revenue requirements. Each Signatory investor contributes capital to INTELSAT and receives capital repayments and compensation for the use of capital in proportion to its investment share.<sup>15</sup> Capital repayments are calculated so as to return all surplus cash to investors. Compensation for the use of capital is calculated based on a target rate or range of return, which is established by the INTELSAT Board of Governors (that includes Comsat).<sup>16</sup> All investors are entitled to the target rate of return. In 1997, the INTELSAT Board of Governors decided to establish a range of 14-18 percent as the target rate of return and to review the range annually. During 1997, the actual return on shareholders' invested capital was approximately 18 percent.<sup>17</sup>

7. INTELSAT provides space segment capacity to users of its global satellite system. These users then provide telecommunications services to the public. The users include Signatories, Duly Authorized Telecommunication Entities ("DATES"),<sup>18</sup> and direct access users. INTELSAT charges for use of space segment capacity are determined by the INTELSAT Board of Governors and are termed "INTELSAT utilization charges" ("IUCs"). IUCs are based on several factors, including beam coverage, spectrum capacity or data rates, and lease periods. They are listed in the INTELSAT Tariff Manual.<sup>19</sup> Comsat's charges to users include the IUC component, plus an additional mark-up.

8. In 1992, INTELSAT introduced new procedures for gaining direct access to INTELSAT satellites by non-Signatory carriers and users. INTELSAT offers four types or "levels" of direct access

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<sup>14</sup> 47 U.S.C. § 701(a)-(c).

<sup>15</sup> See Agreement Relating to the International Telecommunications Satellite Organization, "INTELSAT", 23 U.S.T. 3813; TIAS No. 7532, (February 12, 1973). See also Operating Agreement Relating to the International Telecommunications Satellite Organization, "INTELSAT", 23 U.S.T. 4091, (August 20, 1971). The investment share required by a Signatory is equal to its usage. A Signatory also may make additional investments above this required level, as Comsat has historically done.

<sup>16</sup> *Id.*

<sup>17</sup> INTELSAT 1997 Annual Report at 30 and 37.

<sup>18</sup> DATES are entities from non-member INTELSAT countries authorized by INTELSAT to use the INTELSAT satellite system.

<sup>19</sup> See Notice, 13 FCC Rcd at Appendix B.

by non-Signatories.<sup>20</sup> The first two levels involve access to information while the third and fourth levels involve access to communications services. Level 1 direct access permits customers to receive operational and technical information and attend global traffic meetings as an operation representative. Level 2 direct access permits customers to meet with INTELSAT management and staff regarding capacity availability, commercial and INTELSAT tariff matters. Level 3 direct access permits customers to enter into a contractual agreement with INTELSAT for ordering, receiving, and paying for INTELSAT space segment capacity at the same rates that INTELSAT charges its Signatories. Level 4 direct access permits customers, in INTELSAT member countries only, to make a capital investment in INTELSAT in proportion to its utilization of the INTELSAT system, as well as obtain INTELSAT space segment capacity at INTELSAT tariff rates. A Level 4 customer is not accorded rights to participate in the INTELSAT governance process unless special arrangements are made by the Party and the official Signatory representing its country.

9. INTELSAT permits direct access only in countries where it is authorized by the Signatory representative. Signatory authorization may be on an individual customer basis or by "blanket authorization," whereby entities within the stated jurisdiction are authorized to directly access INTELSAT without first having to obtain specific approval from the Signatory. For both Level 3 and Level 4 direct access, a customer is required to enter into a service agreement with INTELSAT that sets forth the general terms and conditions by which INTELSAT will supply space segment capacity.<sup>21</sup> So long as the service agreement remains in effect, a customer is able to access INTELSAT space segment directly. Level 3 customers have no investment obligations or rights to participate in the operation of the INTELSAT system. Furthermore, a Signatory permitting Level 3 direct access will earn a return on its investment in space segment capacity used by the Level 3 customer (currently between 14 and 18 percent).<sup>22</sup>

10. Level 3 direct access is now available in 65 countries and Level 4 direct access is available in 29 countries -- for a total of 94 countries that allow direct access. Neither Level 3 nor Level 4 direct access is available in the United States. INTELSAT satellite service is only available to U.S. customers through Comsat. Comsat provides INTELSAT services to U.S. customers on a common carrier basis through tariffs and long-term contracts filed with the Commission.

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<sup>20</sup> Notice, 13 FCC Rcd at 22016, n.21, citing *Accessing INTELSAT . . . Directly*, reprinted in Record of Hearing Before the Subcommittee on Telecommunications, Trade, and Consumer Protection on H.R. 1872 at 135-141, "<http://www.intelsat.com/cmc/connect/access.htm>"; See also INTELSAT AP-21-E Report by the Board of Governors on *INTELSAT Access Arrangements*, March 18, 1997.

<sup>21</sup> Copies of the service agreements are available on INTELSAT's world-wide-web page: <http://www.intelsat.com/cmc/connect/servform.htm>.

<sup>22</sup> Comsat, therefore, would earn an investment return on any Level 3 direct access to INTELSAT from the United States in proportion to the use of space segment capacity.

11. In 1984, the Commission concluded a separate proceeding on direct access to the INTELSAT system, prior to INTELSAT developing any procedures for direct access.<sup>23</sup> In that proceeding the Commission considered whether United States carriers should be permitted direct access to INTELSAT space segment capacity through two alternative forms: (1) capital leases; and (2) an indefeasible right of use ("IRU").<sup>24</sup> In terminating the proceeding, the Commission concluded that neither alternative would provide substantial benefits. The Commission indicated, however, that it would be amenable to reconsidering the issue of direct access at a future date.<sup>25</sup>

12. In 1998, we reclassified Comsat as a non-dominant carrier in the provision of INTELSAT switched-voice, private line, and occasional-use video services to markets deemed "competitive."<sup>26</sup> We also declared Comsat non-dominant in the provision of INTELSAT full-time video and earth station services in all markets. As a result of this finding, rate of return regulation was eliminated in those markets. In that same decision we denied Comsat's request for reclassification as a non-dominant carrier in other INTELSAT services markets that were deemed "non-competitive." A number of parties in the *Comsat Non-Dominant* proceeding asked that direct access to INTELSAT be made a condition to granting the regulatory relief that Comsat was then seeking.

13. In initiating the instant proceeding, we incorporated by reference the relevant portions of the record from the *Comsat Non-Dominant* proceeding into this proceeding.<sup>27</sup> We identified legal, economic, and policy issues for comment by interested parties. We tentatively concluded that the Satellite Act and Communications Act afforded the Commission discretion to permit direct access in the United States and that exercise of this discretion would not violate the Fifth Amendment.<sup>28</sup> We

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<sup>23</sup> See *Regulatory Policies Concerning Direct Access to INTELSAT Space Segment for U.S. International Service Carriers*, Notice of Inquiry, 90 FCC 2d 1446 (1982) ("1982 Direct Access Inquiry"); *Regulatory Policies Concerning Direct Access to INTELSAT Space Segment for the U.S. International Service Carriers*, Report and Order, 97 FCC 2d 296 (1984) ("1984 Direct Access Order"), *aff'd Western Union Int'l, Inc. v FCC*, 804 F.2d 1280 (D.C. Cir. 1986).

<sup>24</sup> *1982 Direct Access Inquiry*, 90 FCC 2d at 1452-1454. See also *Notice*, 13 FCC Rcd at 22015. Under a capital lease, Comsat would have leased space segment facilities to the carriers on a "cost-pass-through" basis, plus a "ministerial fee" to cover administrative and maintenance costs incurred by Comsat in connection with the provision of the particular facilities leased to them. Under an IRU, the end-to-end carriers would have purchased investment interests in a specific number of circuits in the INTELSAT system through Comsat. Under this approach, the carriers, in addition to their investments, would have paid Comsat a fee to cover its costs of providing satellite service and carrying out its functions as U.S. Signatory.

<sup>25</sup> *1984 Direct Access Order*, 97 FCC 2d at 298 and 326.

<sup>26</sup> *Comsat Non-Dominant Order*, 13 FCC Rcd at 22013.

<sup>27</sup> *Notice*, 13 FCC Rcd at 22014.

<sup>28</sup> *Id.* at 22020-22035.

further asked for comment on issues related to (1) the potential benefits of direct access;<sup>29</sup> (2) competitive concerns raised by direct access;<sup>30</sup> and (3) the effect of direct access on United States efforts to privatize INTELSAT.<sup>31</sup> As to the question of potential benefits, we requested comment on several issues, including: (1) whether Comsat should be entitled to recover costs that would not be covered by INTELSAT IUC rates and return on investment under Level 3 direct access;<sup>32</sup> (2) what effect permitting Comsat such cost recovery would have on potential savings to U.S. carriers and users from Level 3 direct access;<sup>33</sup> (3) whether the availability of Level 3 direct access from INTELSAT might lead us to different conclusions than the Commission made in its *1984 Direct Access Order*;<sup>34</sup> (4) whether permitting Level 3 direct access for services to non-competitive markets would result in consumer alternatives and benefits that do not exist now;<sup>35</sup> and (5) whether it would be desirable to permit Level 3 direct access to competitive markets where Comsat is found to be non-dominant.<sup>36</sup>

### III. Pleadings

14. a. Eighteen parties filed initial comments in response to our *Notice* in this proceeding.<sup>37</sup> Twelve parties filed reply comments.<sup>38</sup> Fourteen parties fully support permitting Level 3 direct access

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<sup>29</sup> *Id.* at 22035-22040.

<sup>30</sup> *Id.* at 22040-22041.

<sup>31</sup> *Id.* at 22041-22042.

<sup>32</sup> *Id.* at 22037.

<sup>33</sup> *Id.* at 22038.

<sup>34</sup> *Id.* at 22037-22038.

<sup>35</sup> *Id.* at 22039.

<sup>36</sup> *Id.* at 22039-22040.

<sup>37</sup> The parties filing comments are: Americatel, AT&T Corp., ("AT&T"), BT North America ("BTNA"), Cable & Wireless (includes Cable & Wireless plc and Cable & Wireless USA) ("C&W"), Comsat Corporation ("Comsat"), Columbia Communications Corp., ("Columbia"), Ellipso, Inc. ("Ellipso"), GE American Communications ("GE Americom"), GlobeCast North America Inc., ("GlobeCast"), ICG Satellite Services ("ICG"), IT&E Overseas ("IT&E"), Lockheed Martin ("Lockheed"), Loral Space & Communications ("Loral"), MCI WorldCom, Inc., ("MCI WorldCom"), Networks (ABC, CBS, NBC and Turner) ("Network"), PanAmSat Corporation ("PanAmSat"), Sprint Communications Company ("Sprint"), Three Angels Broadcasting Network ("Three Angels").

<sup>38</sup> Reply comments were filed by: AT&T, BT North America, C&W, Comsat, GE Americom, GlobeCast, ICG, INTELSAT, Lockheed Martin, MCI WorldCom, Networks, and PanAmSat.



in the United States.<sup>39</sup> Among others, these supporters include the Networks (ABC, CBS, NBC, and Turner); U.S. long distance carriers AT&T, MCI WorldCom, and Sprint; satellite service providers GE Americom, Loral, and Ellipso; and U.S. affiliates of United Kingdom service providers, BT North America and Cable & Wireless U.S.A. PanAmSat supports Level 3 direct access under certain conditions.<sup>40</sup> Columbia expresses strong reservations about direct access and requests that we consider the impact on competition and the imposition of conditions to prevent harm to competition in the U.S. market.<sup>41</sup> Comsat and Lockheed Martin oppose permitting Level 3 direct access.<sup>42</sup> INTELSAT does not take an official position on direct access in this proceeding but submits reply comments in response to certain matters raised in the initial comments.<sup>43</sup>

15. Comsat and Lockheed Martin oppose allowing direct access to INTELSAT by other users within the United States. Comsat also contends that there is no economic and policy basis for Level 3 direct access. It asserts that: (1) the findings in the Commission's 1984 decision still apply;<sup>44</sup> (2) growth in competition and recent Commission findings about the current market place show no need for direct access in the United States;<sup>45</sup> (3) competitive harm in the United States market would result from allowing INTELSAT to directly enter this market;<sup>46</sup> and (4) any benefits from direct access would be *de minimis* and short lived.<sup>47</sup> Comsat also contends that implementation of Level 3 direct access would require a substantial surcharge to fairly compensate Comsat for Signatory costs not covered by INTELSAT IUC rates. Lockheed Martin asserts that any benefits from direct access would be short lived and that there is no evidence that it would promote competition.<sup>48</sup> Instead, it emphasizes the need for the Commission to focus on privatization of INTELSAT.<sup>49</sup> Both Comsat and Lockheed Martin contend that United States policy goals in privatizing INTELSAT would be put in

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<sup>39</sup> Comments of Americatel, AT&T, BT North America, C&W, Ellipso, GE Americom, GlobeCast, ICG, IT&E, Loral, MCI WorldCom, Network, Sprint, and Three Angels.

<sup>40</sup> PanAmSat comments at 1-2.

<sup>41</sup> Columbia comments at 4-8.

<sup>42</sup> Comsat comments at 1-3 and Lockheed Martin comments at 2-4.

<sup>43</sup> INTELSAT reply. INTELSAT did not submit initial comments.

<sup>44</sup> Comsat comments at 44-61.

<sup>45</sup> *Id.* at 50-60.

<sup>46</sup> *Id.* at 62-68.

<sup>47</sup> *Id.* at 73-76.

<sup>48</sup> Lockheed Martin comments at 5-13.

<sup>49</sup> *Id.* at 4.

jeopardy if the Commission adopts Level 3 direct access in the United States.<sup>50</sup> Comsat also opposes direct access as (1) a violation of the 1962 Satellite Act,<sup>51</sup> and (2) an "unconstitutional taking" of property requiring compensation by the United States Government.<sup>52</sup>

16. Parties advocating implementing Level 3 direct access support the tentative conclusions reached in the *Notice*. Several parties maintain that permitting direct access will promote competition and result in: (1) greater customer choice due to the availability of competitive alternatives for accessing INTELSAT (where INTELSAT is their system of choice);<sup>53</sup> (2) opportunity for substantial cost savings as a result of competition for accessing INTELSAT, resulting in reduced end user prices;<sup>54</sup> (3) greater customer control over service provision (involving service quality, performance costs, connectivity and redundancy);<sup>55</sup> and (4) efficiencies in system planning and set up of circuits.<sup>56</sup> Several parties assert that these commercial benefits will make United States carriers more competitive in global telecommunications markets where use of INTELSAT circuits is part of their commercial strategy.<sup>57</sup> Three parties also argue that the availability of Level 3 direct access would eliminate an

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<sup>50</sup> Comsat comments at 69-72; Lockheed comments at 13-15.

<sup>51</sup> Comsat comments at 4-32.

<sup>52</sup> *Id.* at 34-41.

<sup>53</sup> See Americatel comments at 1; AT&T comments at ii and 11-12 and reply at iii and 1; BT North America reply at 4 and 22-23; C&W comments at 2; Ellipso comments at 7 and 9; GE Americom comments at 7 and reply at 5-6 and 8; ICG comments at 3 and reply at 6 and 8-9; IT&E comments at 2; Loral comments at 4-6; MCI WorldCom comments at 14; Network comments at 7; PanAmSat reply at 5; Sprint comments at 7; and Three Angels comments at 2-3.

<sup>54</sup> See Americatel comments at 1; AT&T comments at ii and 11-12 and reply at i, iii, and 13-14; BT North America comments at 5-6 and reply at 4 and 22-23; C&W comments at 2 and at 3-4; Ellipso comments at 3 and 6; GE Americom comments at 7-10 and reply at 8; GlobeCast comments at 3; ICG comments at 3 and reply at 6; Loral Orion comments at 5; MCI WorldCom comments at ii-iii, 14, and 18 and reply at 12 and 16-17; Network comments at 7; PanAmSat reply at 5 and 13; Sprint comments at 7; and Three Angels comments at 2-3.

<sup>55</sup> See Americatel comments at 1; AT&T at ii and 11-12 and reply at iii and 1; C&W comments at 2 and reply at 4; Ellipso comments at 6-7 and 9; GE Americom comments at 7 and 9; Loral Orion comments at 5; MCI WorldCom comments at 14; Network comments at 7-8; and Three Angels comments at 2-3.

<sup>56</sup> See AT&T comments at ii and 11-12; C&W comments at 2; Ellipso comments at 3, 6, and 16; GE Americom comments at 9 and 11; ICG comments at 3; Loral Orion comments at 5; and MCI WorldCom comments at 20.

<sup>57</sup> See Americatel comments at 1; AT&T comments at 12-13; BT North America reply at 4 and 25-26; C&W comments at 3 and reply at 4-5; Ellipso comments at 2, 8, and 15-19; GE Americom comments at 8 and reply at 11; Globecast comments at 3-4 and reply at 4; ICG comments at 3 and reply at 6-7; IT&E comments at 2-3; Loral Orion comments at 4 and 6; and MCI WorldCom

unnecessary and artificial incentive to send traffic over fiber to foreign earth stations to obtain lower cost INTELSAT access from locations outside the United States.<sup>58</sup> Several contend that the benefits just described are available in many countries to INTELSAT users and should also be made available to United States users of the INTELSAT system.<sup>59</sup> They urge the Commission to make direct access available on all routes.<sup>60</sup> Furthermore, several parties challenge Comsat's contention that direct access will result in competitive harm in the United States market.<sup>61</sup> They emphasize their support of privatization of INTELSAT and disagree that direct access will adversely affect United States efforts to achieve this goal.<sup>62</sup> Some parties also disagree with Comsat that a surcharge must be imposed to allow Comsat to recover costs not recoverable under Level 3 direct access.<sup>63</sup> The carriers request, that in its implementation of Level 3 direct access in the United States, the Commission permit a "fresh look"<sup>64</sup> of existing long-term contracts with Comsat and "portability"<sup>65</sup> of the INTELSAT capacity now being accessed through Comsat. Finally, most parties assert that we have authority under the Satellite

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comments at iii, 16, and 18 and reply at 17; and PanAmSat reply at 5.

<sup>58</sup> See Loral Orion comments at 6-7; MCI WorldCom comments at 16-17; and Sprint comments at 8.

<sup>59</sup> See AT&T comments at 13; BT North America comments at 1, 3-4, and 7-8 and reply at 22; C&W comments at 2; GE Americom comments at 2 and reply at 7-9; ICG reply at 5; INTELSAT reply at 2; MCI WorldCom comments at 16 and reply at iii and 20-21; and Network reply at 9 and 12-13.

<sup>60</sup> See Loral Orion comments at 4; MCI WorldCom comments at iii and 17-21; Network comments at iii, 6, and 13-14; PanAmSat comments at 1, 5, and 10; and Sprint comments at 7-9.

<sup>61</sup> See BT North America reply at 23-25; C&W comments at 8; Ellipso comments at 10-12; MCI comments at iii and 21-23 and reply at 25-26; and Network comments at 14.

<sup>62</sup> See C&W reply at 3; Ellipso comments at 12-13; GE Americom comments at 12-14 and reply at 2, 5, and 9-11; Globecast reply at 4; ICG comments at 8; INTELSAT reply at 7-8; MCI WorldCom comments at iv and 23-24 and reply at 26-27; and Network reply at iii and 11-12.

<sup>63</sup> See AT&T reply at ii, 1, and 14-15; BT North America reply at 27-30; C&W comments at 3-6 and reply at 2 and 5; GE Americom comments at 10-12 and reply 2 and 6-9; Globecast reply at 4; MCI WorldCom reply at iii-iv, 15-16, 18, and 21-25; Network reply at iv and 15-19; and PanAmSat comments at 6-7 and reply at 6-7.

<sup>64</sup> See AT&T comments at 13-15; Globecast reply at 5-6; ICG comments at 5-6; IT&E reply at 1-3; Loral Orion comments at 8-9; MCI WorldCom comments at iv and 24-28 and reply at i and 13-14; Network reply at iv and 19-20; PanAmSat comments at 7-10 and reply at 7; and Sprint comments at 10-13.

<sup>65</sup> See MCI WorldCom comments at 24-30 and reply at i, and 13-14; Sprint comments at 10 and 13-14.

Act to permit direct access to INTELSAT satellites in the United States,<sup>66</sup> and that such action would not violate the Fifth Amendment as an uncompensated taking.<sup>67</sup>

17. PanAmSat supports ending Comsat's monopoly over the provision of INTELSAT services in the United States, but believes that the issue should be resolved by Congress.<sup>68</sup> Nevertheless, PanAmSat contends that if we were to implement Level 3 direct access we should permit direct access in all markets and all routes and regulate INTELSAT as a regular commercial satellite operator.<sup>69</sup> PanAmSat also believes that the Commission should apply "fresh look" with respect to Comsat's long-term contracts with U.S. carriers.<sup>70</sup> PanAmSat opposes any Comsat surcharge (over IUC rates) on Level 3 direct access users.<sup>71</sup> Finally, PanAmSat maintains that the Commission has the legal authority to permit Level 3 direct access in the United States and that such action would not constitute an uncompensated taking in violation of the Fifth Amendment.<sup>72</sup>

18. Columbia is concerned about the competitive concerns raised by direct access. It maintains that, at a minimum, INTELSAT should be required to waive its immunity from lawsuit and exemption from taxation as a condition of imposing any type of direct access.<sup>73</sup> Columbia also asserts that we should grant direct access to INTELSAT in the United States only in the context of a pro-competitive privatization that subjects a privatized INTELSAT to U.S. competition laws and promotes open markets, consistent with the World Trade Organization Agreement on Basic Telecommunications

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<sup>66</sup> See AT&T comments at i and 1-3 and reply at i and 2-7; BT North America comments at 3 and 9-11 and reply at 1-3, 5, and 11; C&W comments at 6-8 and reply at 1; Ellipso comments at ii and 5-6; GE Americom comments at i and 2-7 and reply at 3-6; GlobeCast comments at 2 and reply at 2-3; ICG reply at 2-6; IT&E comments at 1 and 3-4; Loral Orion comments at 1-2; MCI WorldCom comments at i-ii and 3-7 and reply at i-ii and 2-8; Network comments at iv, 6, and 14-18 and reply at iii and 3-9; PanAmSat comments at 2-4 and reply at 3-9; and Sprint comments at 3-5.

<sup>67</sup> See AT&T comments at i and 5-11 and reply at ii-iii and 11-12; C&W comments at 9-10 and reply at 1; GE Americom at 7 and reply at 4-5; GlobeCast reply at 3-4; IT&E comments at 3-4; Loral Orion comments at 2; MCI WorldCom comments at i-ii and 7-9 and reply at ii and 9-11; Network comments at iv, 6, and 14-16; PanAmSat comments at 2 and 4-5 and reply at 1 and 3-5; and Sprint comments at 6.

<sup>68</sup> PanAmSat comments at 1-3.

<sup>69</sup> *Id.* at 7-8.

<sup>70</sup> *Id.* at 9-10.

<sup>71</sup> *Id.* at 6.

<sup>72</sup> *Id.* at 3-5.

<sup>73</sup> Columbia comments at 3-5.

Services ("WTO Agreement").<sup>74</sup> Columbia suggests that we analyze INTELSAT's entry into the U.S. market based on our "DISCO II" standards.<sup>75</sup>

19. Finally, INTELSAT responds to certain comments of PanAmSat. It states that the Commission lacks authority to regulate INTELSAT as it would any other carrier and that its immunities remain intact, notwithstanding provisions in the recently passed International Anti-Bribery and Fair Competition Act of 1998 (the Anti-Bribery Act).<sup>76</sup> It also states that Commission action on direct access will not affect progress on INTELSAT privatization efforts.<sup>77</sup>

#### IV. Discussion

##### A. Economic, Competition, and Policy Issues

20. The issue posed in this proceeding is whether U.S. carriers and users of international telecommunications transmission facilities should be permitted the choice of obtaining satellite services directly from INTELSAT or continue to require that access in the United States occur only through Comsat, the U.S. Signatory to INTELSAT. The record demonstrates that foreign carriers and other users of INTELSAT in countries that permit direct access have realized greater cost savings, efficiencies, and service benefits by directly accessing INTELSAT rather than going solely through a Signatory. The availability of additional choices are increasingly important to U.S. carriers and users because they must compete on a global basis with their foreign counterparts who presently can obtain direct access, a choice available in 94 countries. In addition, we believe direct access will promote further competition in the international telecommunications market. The competitive nature of the global telecommunications market requires that we assure U.S. carriers and service providers the availability of choices that their foreign competitors now enjoy.

21. The Commission did not implement a direct access policy in 1984 because it determined that the options it was then considering would not result in significant cost savings or other benefits.<sup>78</sup>

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<sup>74</sup> *Id.* at 9. The commitments undertaken as a result of the WTO basic telecommunications services negotiations ending in 1997 are incorporated into the General Agreement on Trade in Services ("GATS") by the Fourth Protocol to the GATS. FOURTH PROTOCOL OF THE GENERAL AGREEMENT ON TRADE IN SERVICES (WTO 1997), 36 I.L.M. 354, 366 (1997). These commitments are referred to as the WTO Basic Telecom Agreement, although they are not technically contained in a stand-alone agreement.

<sup>75</sup> *Id.* at 5-7, citing *Amendment of the Commission's Regulatory policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States*, 12 FCC Rcd 24094, 24141-50 (1997) ("*DISCO II Order*").

<sup>76</sup> INTELSAT reply at 3-7.

<sup>77</sup> *Id.* at 7-8 (referencing the International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366 (1998)).

<sup>78</sup> *1984 Direct Access Order*, 99 FCC 2d at 313-319.

Instead, the Commission pursued a facilities-based competition policy between and among fiber optic cable and satellite providers. The INTELSAT system continues, however, to be a key source of international satellite transmission capacity for U.S. carriers or users which find it either commercially necessary or desirable to use INTELSAT. The record demonstrates that the direct access program formally created by INTELSAT in 1992, and available today, along with the greater sophistication of INTELSAT, U.S. carriers, and other users of INTELSAT, has eliminated many of the concerns that gave rise to the conclusion in 1984 that direct access would not yield significant cost savings and efficiencies. Therefore, as discussed below, we find that direct access in the United States will result in a variety of significant benefits (including cost savings for consumers, as well as contribute to a more competitive satellite service market in the United States) and authorize its implementation.

**(1) Benefits of Direct Access**

22. In the *Notice* we identified several user benefits generated by direct access (as described by INTELSAT): (1) improved responsiveness to customer inquiries on service implementation; (2) avoidance of mark-up costs charged to third parties; (3) greater control over service quality, performance costs, connectivity, redundancy, and earth station capabilities; and (4) more flexibility (than through third parties) in tailoring services in terms of bandwidth, time duration, performance standard, redundancy, and service applications.<sup>79</sup> The parties supporting direct access maintain that these benefits are substantial and desirable. Comsat and Lockheed Martin contend that any benefits would be insubstantial. The record in this proceeding demonstrates that Level 3 direct access will afford opportunities for U.S. customers who utilize the INTELSAT system to realize greater efficiency, flexibility, control, and cost savings. Affording customers the opportunity to enjoy these benefits will promote competition and thus strengthen U.S. competitiveness in global telecommunications markets.

**(a) Operational Benefits**

23. *Greater Efficiency.* The prior *1984 Direct Access Order* proceeding, found that adopting the direct access options then under consideration would not yield significant benefits in terms of increased efficiency.<sup>80</sup> We were concerned, at that time, that many functions Comsat then provided to U.S. carriers would have to be undertaken by the carriers. For example, in 1984, Comsat (rather than INTELSAT) provided most of the functions necessary to access INTELSAT, including coordination for special services, detailed billing, earth station certification and access arrangements, market research, customer surveys, and pricing analysis. Therefore, at that time, we were uncertain how U.S. carriers would achieve significant efficiencies if they had to duplicate these functions.

24. The advent of INTELSAT's formal direct access program, as well as the time that has passed since our consideration of direct access in 1984, justifies a revisiting of the 1984 conclusion. Direct access customers are now able to work exclusively with INTELSAT on all service needs -- from the initial planning stages through to the final end-to-end testing and implementation of service, without

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<sup>79</sup> See *Notice*, 13 FCC Rcd at 22035.

<sup>80</sup> *1984 Direct Access Order*, 99 FCC 2d at 318.

the need for any Signatory involvement. Since introducing direct access in 1992, INTELSAT has established Regional Service Centers that provide administrative, market, and technical support to direct access customers. INTELSAT now has Regional Directors and Customer Support teams that offer end-to-end billing services, consultation with customers to help them better understand the unique needs of their markets, and technical expertise, at any time, at no additional charge to IUC rates.

25. INTELSAT also now performs the administrative and technical functions to assure operational capability of earth stations with its satellites. The cost of these functions are included in the IUC rates. The technical functions include "link budget" analysis to verify the bandwidth to be used, the size of the earth station, and verification that earth station performance specifications meet INTELSAT standards. Following technical analysis, INTELSAT performs transmission or "carrier" line-up tests with the earth station to verify that the transmission performance meets the technical specifications, consistent with INTELSAT standards. The INTELSAT Operating Center monitors customer use of the satellites on a 24-hour-a-day basis to insure that satellite transmissions operate properly. If there are problems, INTELSAT will attempt to identify them, including the source, and contact all customers that might be affected.

26. Currently, Comsat technical assistance for accessing INTELSAT from the United States is minimal in most cases. U.S. carriers and other INTELSAT users own and operate the earth stations that communicate with INTELSAT satellites, or use the earth station facilities of operators that work directly, and essentially, exclusively with INTELSAT. MCI WorldCom states that although Comsat is not involved in arranging communication services in connection with MCI WorldCom's owned-and-operated earth stations, it must nonetheless pay Comsat's mark-up over IUC rates.<sup>81</sup> Similarly, the Networks note that they almost always access INTELSAT directly from their own earth stations and that Comsat provides no transmission facilities of its own, but merely acts as an unnecessary intermediary between INTELSAT and the customer.<sup>82</sup>

27. Unlike 1984, INTELSAT now offers three different on-line services for INTELSAT's direct access customers in order to allow it to respond quickly to their business needs: (1) The INTELSAT Business Network; (2) TVMax for on-line ordering; and (3) the Digital ESC for direct communication. The Business Network provides direct access customers 24-hour, seven-days-a-week access to INTELSAT service information regarding INTELSAT coverage and capacity, ordering and confirmation capabilities, cybercast training and INTELSAT launch videos, forums and discussion groups, and a wide range of technical information.<sup>83</sup> TVMax is a web-based booking and scheduling system which gives customers real-time access to INTELSAT's occasional-use video reservation system. The Digital ESC allows customers to use their web-browser to search and view on-line documents and databases from their desktop computer, and provides a gateway to a variety of on-line

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<sup>81</sup> See MCI WorldCom comments at 13.

<sup>82</sup> Network comments at 7-8.

<sup>83</sup> See <http://www.INTELSAT.Int/csc/online.htm>.

operational, technical and financial services.<sup>84</sup> In addition, a direct access customer can easily obtain all the information needed in order to place an INTELSAT capacity order by accessing INTELSAT's web page under the title "Become a Customer."<sup>85</sup> These on-line services allow INTELSAT to respond rapidly to customer inquiries on service implementation, while allowing INTELSAT users the ability to be more efficient in their planning and use of the INTELSAT system.

28. INTELSAT also has recently started a program to provide technical consulting and training assistance to customers so that they have an opportunity to utilize the new INTELSAT services and technologies more cost effectively. The program called, "The Advantage Program Mission," offers free consultation and training resources to present the latest developments and applications in satellite telecommunications technology, as well as training fellowships through the INTELSAT On-the-Job Training Program.<sup>86</sup>

29. In view of these changed circumstances since 1984, we conclude that permitting direct access will provide U.S. customers the opportunity to realize efficiencies in accessing INTELSAT satellites by obtaining administrative, market, and technical support directly through INTELSAT, from the initial planning stages for a service through service implementation, rather than having to use Comsat as an intermediary.

30. *Greater Flexibility and Control.* Direct access to INTELSAT from the United States today will permit greater flexibility and control for INTELSAT customers. INTELSAT states that direct access offers greater service flexibility than going through a Signatory because it is able to individually tailor services in terms of bandwidth, time duration, performance standards, redundancy and service applications.<sup>87</sup>

31. Commenters agree that direct access in the U.S. would generate such service flexibilities. C&W asserts that Comsat does not offer all of the services available from the INTELSAT Tariff Manual, thereby limiting the variety of services that carriers can then provide to their customers.<sup>88</sup> MCI WorldCom argues that Comsat has refused to resell services available from INTELSAT (noting a specific example in which Comsat has refused to offer preemptible leases on INTELSAT satellites).<sup>89</sup>

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<sup>84</sup> *Id.*

<sup>85</sup> See [www.INTELSAT.Int/csc/process.htm](http://www.INTELSAT.Int/csc/process.htm) (includes web site titled "Become a Customer").

<sup>86</sup> See <http://www.INTELSAT.com/products/iadp/advantage.htm>.

<sup>87</sup> See "Accessing INTELSAT...Directly", reprinted in Record of Hearing before the Subcommittee on Telecommunications, Trade, and Consumer Protection on H.R. 1872, at pp. 135-141.

<sup>88</sup> C&W comments at 2.

<sup>89</sup> MCI WorldCom comments at 14. In response, Comsat states that public service telephony network ("PSTN") service is not a preemptible service in nature. However, MCI WorldCom's trunking network includes more than the single satellite path and it can certainly reroute traffic to other paths in the event of an interruption on the satellite path. Thus, we believe that this kind of preemptible decision should be



32. In comparing INTELSAT's and Comsat's tariffs, we note that direct access customers have the flexibility to use leased transponders for any service application, i.e. voice. In contrast, Comsat leases capacity by individual service.<sup>90</sup> INTELSAT also offers customers greater flexibility with regard to the length of time a transponder can be leased. INTELSAT will lease a transponder for daily, monthly, and yearly time periods, or any pro-rated time period extending up to fifteen years.<sup>91</sup> In contrast, for long-term leases, Comsat offers only fixed terms of one, five, and ten year services for non-preemptible services and one, two, five, seven, and ten year terms for preemptible services.<sup>92</sup> With regard to bandwidth offerings, direct access customers may have greater flexibility in the amount of bandwidth they may purchase with direct access, as they may purchase bandwidth in units of 0.1 MHz to 150 MHz, and any proportion in between, regardless of its service type.<sup>93</sup> By contrast, Comsat provides a more limited offering of the various bandwidth configurations, except for internet service.<sup>94</sup> We particularly note that Comsat's video services are limited in terms of duration and bandwidth offerings, relative to INTELSAT.<sup>95</sup>

33. INTELSAT has also stated that direct access customers have the advantage of greater control over a number of elements that can affect their telecommunication services, such as service quality, performance costs, connectivity, redundancy, and earth station capabilities.<sup>96</sup> INTELSAT states that "depending on the level of direct access, coming to INTELSAT puts the customer in charge."<sup>97</sup> AT&T and C&W agree that direct access would offer it greater control over these service features and functions.<sup>98</sup> According to AT&T, by eliminating the Signatory as an intermediary, customers have greater control from the initial planning stages through the final end-to-end testing and start of

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made by carriers, the end-users themselves, rather than by Comsat for its customers.

<sup>90</sup> Comsat Corporation, Original Tariff FCC No. 3 Transmittal No. 125 (*effective* June 26, 1999) ("Comsat Tariff No. 3")

<sup>91</sup> INTELSAT Tariff Manual (July, 1998). Board of Governors 118-18 (May 8, 1997).

<sup>92</sup> Comsat Tariff No. 3 at 35-78.

<sup>93</sup> Comsat Tariff No. 3.

<sup>94</sup> In 1999, Comsat offered bandwidth units of .1, 1, 5, 9, 18, 24, 36, 72, 112, and 150 MHz, and does not allow its customers to purchase any other configurations. For example, a customer would not be able to purchase 12 MHz of capacity under Comsat's tariff plan. *See* Comsat Tariff No. 3 at 139-141.

<sup>95</sup> Comsat Tariff No. 3 at 35-78.

<sup>96</sup> *See* "Accessing INTELSAT...Directly", reprinted in Record of Hearing before the Subcommittee on Telecommunications, Trade, and Consumer Protection on H.R. 1872, at pp. 135-141.

<sup>97</sup> INTELSAT Direct Access Customer Brochure at 4.

<sup>98</sup> AT&T comments at 12; C&W comments at 2.

operation.<sup>99</sup> C&W asserts that direct access in the U.K. has meant that it has greater control over the quality and variety of satellite services it can then offer to its own customers -- an advantage especially important in the highly competitive U.K. telecommunications environment.<sup>100</sup>

34. The benefits of greater flexibility and control were unavailable when we considered direct access in 1984 because INTELSAT did not offer a direct access program.<sup>101</sup> INTELSAT did not then offer flexible tariffs. INTELSAT also did not offer no-limit transponder leases until the early 1990's and did not offer long term channel rates to its switched-voice customers before 1989. With the introduction of a formal direct access program in 1992, and the steps INTELSAT has taken to provide its customers with greater flexibility and control over the purchase of INTELSAT services, U.S. customers should benefit from direct access.

(b) Cost Savings

35. Another change since 1984 are the cost savings that now appear achievable from allowing direct access. The *Notice* stated that one of the main user benefits identified by INTELSAT for direct access is the avoidance of mark-up costs that a third party usually charges. We noted that AT&T and MCI WorldCom claim that Comsat's average margin over IUC rates is 68 percent, as well as an estimation that direct access would reduce this margin to 35 percent,<sup>102</sup> producing a cost savings of \$1 billion over a ten year period.<sup>103</sup> We also noted Comsat's contention that direct access would not generate any meaningful cost savings because a surcharge would be necessary to allow for (1) a proper return on its investment and (2) recovery of costs associated with its Signatory responsibilities and carrier functions.<sup>104</sup> The result of properly quantifying costs, asserted Comsat, would yield a savings of zero.<sup>105</sup>

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<sup>99</sup> AT&T comments at 12.

<sup>100</sup> C&W comments at 2.

<sup>101</sup> INTELSAT only offered monthly rates for voice circuit (\$390 per circuit per month) in the mid 1980's. Also around that time, it started offering long-term rates for voice circuits. For transponder leases it was restricted by certain service types. Today, INTELSAT offers a much more flexible tariff, as it indicates in its tariff manual under the footnote of its offerings "Leases are available for any intermediate period between 1 week and 15 years in allotment sizes from 0.1 MHz." Source: INTELSAT Tariff, July 1998.

<sup>102</sup> *Notice*, 13 FCC Rcd at 22036.

<sup>103</sup> *Id.* See also MCI WorldCom comments at 12 (The Satellite Users Coalition estimates a benefit to consumers of \$1,018.9 billion over a ten year period, or a present value is \$690.3 billion, on the assumption that Comsat reduces its margin over IUC rates to 33 percent from Comsat's average margin of 68 percent. This estimation also assumes that the FCC permits a fresh look policy which would allow customers to renegotiate their contracts.)

<sup>104</sup> *Notice*, 13 FCC Rcd at 22036.

<sup>105</sup> *Notice*, 13 FCC Rcd at 22036.

36. Most parties commenting on this issue maintain that allowing direct access will lead to substantial cost savings. They also contend that Comsat should be allowed no, or a limited, surcharge to IUC rates. C&W anticipates substantial savings in the first year of direct access in the United States, and that the savings will increase by 50 percent in each subsequent year.<sup>106</sup> GE Americom states it has experienced the cost savings of direct access in Germany, where prior to direct access, its Spacenet-Europe subsidiary paid approximately a 12 percent mark-up over INTELSAT rates.<sup>107</sup> Loral Orion states that direct access has reduced INTELSAT rates by 25 percent or more in Germany and the UK.<sup>108</sup> MCI WorldCom asserts that the excessive nature of Comsat's mark-ups is readily apparent from the fact that Comsat charges mark-ups for services for which it provides no facilities other than INTELSAT space segment.<sup>109</sup> BT North America states that the decline in Comsat's market share implies that its rates are too high and Comsat has not responded to competitive pressures.<sup>110</sup>

37. We conclude that allowing Level 3 direct access will lead to significant cost savings by INTELSAT users in the United States for the provision of international satellite services. We further conclude that users, in exchange for the option of direct access, must pay Comsat a surcharge to allow it to recoup certain costs associated with its unique Signatory functions. As discussed below, we find that a Comsat surcharge of 5.58 percent over IUC rates would allow Comsat to recover Signatory-related costs not otherwise recoverable through IUC rates. While the cost savings over IUC rates will vary among different users and services, we estimate that direct access users will be able to avoid most of the mark-up currently imposed by Comsat for most services.<sup>111</sup> The table in Appendix D demonstrates a range of cost savings from 16 percent to 71.4 percent for switched voice ("IDR") and private line ("IBS") leased service under a direct access regime, even after permitting Comsat to recoup a 5.58 percent surcharge.<sup>112</sup> Under the longer-term IDR leases (normally 10-15 years), cost savings will range from 23.2 percent to 52 percent.<sup>113</sup> Under the most often used shorter-term IBS leases (normally 1-3 years), cost savings will range from 16 percent to 42 percent. For video services, the range of cost savings under a direct access regime that includes a Signatory expense surcharge, will be from 10.7 percent to 35.2 percent.<sup>114</sup>

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<sup>106</sup> C&W comments at 3.

<sup>107</sup> GE Americom comments at 9.

<sup>108</sup> Loral comments at 7.

<sup>109</sup> MCI WorldCom comments at 13.

<sup>110</sup> BT North America reply at 26.

<sup>111</sup> See Appendix D.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> See Appendix E.

38. We anticipate that carriers and users will pass through any cost savings from direct access to consumers. For example, recent decreases in international settlement rates have led to significant price decreases of international telephone calls from 1997 to 1998.<sup>115</sup> Loral Orion states, that by avoiding Comsat's mark-ups of between 9 and 15 percent, it would be able to pass on such savings to its customers.<sup>116</sup> IT&E states that given the substantial competition it faces from other carriers, it would have every incentive to pass along the cost savings it would receive by the elimination of Comsat's mark-up to its consumers.<sup>117</sup> We also conclude that in a competitive telecommunications environment, U.S. carriers and service providers will have incentives to pass through cost savings to end-users.

39. In addition, direct access will potentially lead to lower costs for all users, including low volume users. We note that, based on current Comsat tariff filings, low volume users pay a much higher margin over INTELSAT IUC rates than high volume users. Direct access will likely offer low volume users a lower rate -- even with the surcharge discussed below -- for the following reasons. First, we agree with MCI WorldCom and GlobeCast that direct access will spawn numerous potential providers of INTELSAT space segment to low volume users, thus offering greater choice.<sup>118</sup> Second, like MCI WorldCom and GE Americom, we find no merit in Comsat's claim that direct access will reduce economies of scale, thus producing harm to low volume users who do not purchase directly from INTELSAT. The relevant economies of scale, we believe, are those experienced by INTELSAT, and not Comsat.<sup>119</sup>

40. In the prior 1984 *Direct Access Order* proceeding the Commission concluded that adopting direct access would yield very little cost savings. The basis for this conclusion was that direct access, at best, would redistribute, rather than reduce the costs of providing INTELSAT satellite service. However, in view of the technical and operational services now available since 1984 from INTELSAT, as well as other customer support functions now available since 1984 as described above, we find that allowing direct access will promote cost savings rather than merely causing cost shifting.<sup>120</sup> We agree with the Networks and MCI WorldCom that the speculation that was required to analyze cost savings in 1984 is no longer necessary because INTELSAT has adopted formal

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<sup>115</sup> MCI WorldCom reply at 16-17. *See also* FCC International Bureau, Report on International Telecommunications Markets 1997-1998 (prepared for Senator Ernest F. Hollings) (Dec. 7, 1998).

<sup>116</sup> IT&E comments at 2. Loral comments at 6.

<sup>117</sup> IT&E comments at 2.

<sup>118</sup> MCI WorldCom comments at 15-16. GlobeCast comments at 3.

<sup>119</sup> MCI WorldCom comments at 15-16. GE Americom comments at 9.

<sup>120</sup> GE American concurred. Based on its subsidiary Spacenet -Europe, it "has found that INTELSAT's sales force is very responsive and keeps direct access customers well-informed regarding the availability of INTELSAT space segment." GE Americom comments at 9. *See also* C&W comments at 2.

procedures for direct access.<sup>121</sup> We further agree with the Networks that "[it is not] possible to know precisely -- nor should it be -- the extent of the 'cost savings' that may be realized by customers until further competition engendered by direct access develops, [and that] the point is to allow the additional competition which does develop to wring out whatever cost saving may be achieved . . . ." <sup>122</sup>

(c) Increased Competition

41. There have been significant positive changes in the international telecommunications market since 1984. Notably, the market is now largely competitive in terms of availability of alternative suppliers of international transmission capacity.<sup>123</sup> The existence of competitive alternatives of transmission capacity, however, is not, as Comsat suggests, a basis for precluding additional customer choice available through direct access. United States policy, both as reflected in Commission decisions and by Congress in the Telecommunications Act of 1996, is to promote competition in the provision of communications services.<sup>124</sup> Competition is the underlying goal of the 1997 WTO Agreement, which resulted in market opening commitments for basic telecommunications services by many countries. Of the 72 such Signatories, the United States is one of only three WTO members that signed the WTO Agreement that took a market access limitation for direct access to INTELSAT.<sup>125</sup>

42. While making Level 3 direct access available does not add another facilities-based competitor, the additional choice, flexibility, and cost savings made available by direct access to U.S. customers in use of an existing facilities-based provider -- INTELSAT -- would result in increased competition. Level 3 direct access would place competitive pressures on other satellite operators in terms of service, price, and quality. In addition, it would place competitive pressures on Comsat, particularly with respect to services for which Comsat has a markup substantially higher than INTELSAT IUC rates.

43. The benefit of direct access is especially relevant in the non-competitive switched voice, private line, and occasional use video markets, where Comsat is still dominant. In the *Comsat Non-Dominant Order* we determined, with respect to thin route markets, that U.S. customers must, by default, choose Comsat for services in these markets; that Comsat retains a significant cost advantage over other authorized U.S. carriers in these markets; and that it exercises market power and is

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<sup>121</sup> Network comments at 12; MCI WorldCom comments at 10.

<sup>122</sup> Network comments at 12. Although we estimate percentages of cost saving in appendix D & E to this document based on the data we now have available to us, we note that it is impossible to know the exact percentage of cost savings in the future as many variables could cause the predicted cost savings to change.

<sup>123</sup> See *Comsat Non-Dominant Order*, 13 FCC Rcd at 14147-14149.

<sup>124</sup> *Telecommunications Act of 1996*, 47 U.S.C. § 153 *et seq.*

<sup>125</sup> See MCI WorldCom comments at 11.

dominant in the provision of services to these markets.<sup>126</sup> Direct access offers an opportunity to introduce competition in these markets where it clearly does not now exist. This is especially significant given that thin route countries potentially represent some of the growth markets for telecommunication services.<sup>127</sup> Imposing Level 3 direct access would serve the Satellite Act's purpose of promoting growth in communications between the U.S. and economically less developed countries by promoting competition and expanding user choice for U.S. services to these markets. We conclude that permitting Level 3 direct access to thin route markets would: (1) reduce Comsat's bottleneck over access to U.S. INTELSAT capacity that is the only service of international transmission capacity serving these markets; (2) give U.S. carriers the option of using another supplier; and (3) reduce Comsat's market power in these markets.

44. We also conclude that direct access should be made available for services to competitive markets as well as to non-competitive markets. Every party commenting on this issue, other than Comsat and Lockheed Martin, argue that direct access should be permitted in all markets.<sup>128</sup> We recognize, as MCI WorldCom asserts, that direct access to competitive or thick route markets is especially significant where fiber optic cable: (1) does not provide a viable alternative to INTELSAT; (2) transmission involves complex or inefficient routing; (3) it does not reach the entire country; and (4) there is insufficient cable capacity to meet demand, or only one cable is available and satellite capacity is required to minimize the effects of network outages. In addition, permitting Level 3 direct access to all markets will give U.S. carriers more flexibility in assuring efficient utilization of satellite and cable facilities.<sup>129</sup> For example, if direct access is only allowed on thin routes, then carriers would likely purchase thin route capacity from INTELSAT and be forced to purchase thick route capacity from Comsat. This approach may undermine carriers' flexibility in shifting capacity among routes and in buying transponder leases under Level 3 direct access that permit service to both "thin route" and "thick route" countries.

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<sup>126</sup> *Comsat Non-Dominant Order*, 13 FCC Rcd at 14141-14146.

<sup>127</sup> In particular, we note that the Satellite Act's stated purpose includes: (a) "[M]aintain[ing] and strengthen[ing] competition in the provision of communications services to the public," 47 U.S.C. § 701(c); and (b) direct[ing] "care and attention . . . toward providing such services to economically less developed countries." 47 U.S.C. § 701(b). *See also Notice* at 22028-22029. Many of the countries deemed to be in non-competitive markets for switched voice and private line services and for occasional use video services are designated by the International Telecommunication Union ("ITU") as "least developed countries" ("LDCs"). Telecommunications Indicators for the Least Developed Countries, First Edition, 1995, at 1-3. Of the 48 listed LDCs, 38 are included on our list of thin route countries for switched voice and private line service. *Comsat Non-Dominant Order*, at paras. 41-42 and Appendix A. We found in our *Comsat Non-Dominant Order* that the thin route market accounts for approximately ten percent of international traffic and concluded that it was not *de minimis* for purposes of deciding whether to forebear from dominant carrier regulation of Comsat. *Comsat Non-Dominant Order*, 13 FCC Rcd at 14158-14159.

<sup>128</sup> Loral Orion comments at 4; MCI WorldCom comments at 17-21; Network comments at 13-14; PanAmSat comments at 5 and 10; and Sprint comments at 7-9.

<sup>129</sup> *Id.* at 20.

45. We agree with the Networks that the fact that we deemed markets competitive in reclassifying Comsat non-dominant for purposes of tariff regulation does not preclude us from permitting direct access in all markets where there are public interest benefits in doing so.<sup>130</sup> Certainly, we have no policy precluding new entrants from markets that are already competitive. We find, based on the record before us, that there will be significant benefits to Level 3 direct access, as pointed out by the major commercial users of INTELSAT capacity in the United States. Choice by U.S. carriers and users as to how they access the INTELSAT system will result in competition in currently non-competitive markets and enhance competition in competitive markets. We find that the public interest is served by the competition in all markets that will result from additional choice.

46. *Promoting Competition.* We further find that the customer benefits and added competition that will result from introducing Level 3 direct access in the United States will promote U.S. competitiveness in the global telecommunications market. In 1962, when the Satellite Act was enacted, there existed only eight U.S. international carriers providing international voice and record communications using undersea cable of limited capacity (non-fiber) and radio facilities.<sup>131</sup> AT&T was the dominant U.S. international provider. By 1984, voice and record services were provided over both higher capacity undersea cables and satellites provided by INTELSAT through Comsat in the United States. AT&T continued to be the dominant provider of international voice services with MCI, Sprint, and other carriers beginning to make progress in entering international markets.<sup>132</sup> There are now over 77 U.S. facilities-based carriers operating in the United States, providing a wide array of voice, data and video services over fiber optic cable and satellite.<sup>133</sup> These carriers compete on a global basis against the emerging multinational carriers, as well as traditional national telecommunications providers.<sup>134</sup> They are competing to capture public, multinational business and government customers in national telecommunications markets opening around the world as a result of the WTO Agreement.<sup>135</sup> In some cases, their competitors are still dominant service providers in their

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<sup>130</sup> Network comments at 13-14 and reply at 14. *See also* Sprint comments at 7.

<sup>131</sup> *See* Testimony of Newton Minow, Chairman, Federal Communications Commission, before the House Committee on the Judiciary, Anti-trust Subcommittee, June 18, 1961.

<sup>132</sup> *See Earth Station Ownership* at 267 (noting introduction of new entrants for the provision of international voice and record services).

<sup>133</sup> Compiled from Circuit Status Reports filed by U.S. carriers covering 1998.

<sup>134</sup> *See* FCC International Bureau, *Report on International Telecommunications Markets 1997-1998*, Attachments 1 and 2; (Dec. 7, 1998) (available at <http://www.fcc.gov/Bureaus/International/Reports/ritm9798.pdf>).

<sup>135</sup> *See Foreign Participation Order*, 12 FCC Rcd 23,891 (1997), *recon. pending*; 1998 Biennial Regulatory Recon; *Reform of the International Settlements Policy and Associated Filing Requirements*, Docket No. 98-148, FCC 99-73 at 5.

national markets.<sup>136</sup> Many of the foreign competitors of U.S. carriers either are Signatories to INTELSAT or have direct access to INTELSAT available in the national markets in which they operate. The public interest is served by bringing the advantages of increased competition to U.S. consumers in terms of lower prices and better service.

47. U.S. telecommunication service providers face a competitive disadvantage compared to foreign carriers that can obtain INTELSAT capacity at IUC rates, either because they are INTELSAT Signatories or are operators from countries that permit direct access. The comments we have received to our *Notice* demonstrate that the anticipated benefits of direct access -- lower costs, greater efficiency, flexibility, and control over facility use, as well as competitive pressures on the rates of Comsat and competing satellite operators -- should enable U.S. industry to better compete with foreign competitors.<sup>137</sup> And, in view of the potential for direct access to enhance U.S. competitiveness, we do not believe that any special regulatory measures are necessary to assume that cost savings resulting from direct access are passed on to customers. The increased competition resulting from direct access is more likely to result in savings to consumers than what may be realized in the absence of direct access.

48. Two examples provided by commenters that show U.S. competitiveness will be enhanced are particularly illuminating. MCI WorldCom states that the competitive advantage enjoyed by foreign carriers in being able to acquire INTELSAT capacity at IUC rates resulted in its loss of a contract for international Internet services to a foreign carrier because of an inability to match the foreign carriers pricing of INTELSAT satellite links.<sup>138</sup> Similarly, Loral Orion and C&W point out that the Canadian Signatory, Teleglobe, has a competitive advantage because it can purchase INTELSAT capacity in Canada at IUC rates and deliver traffic to the United States via Teleglobe fiber links.<sup>139</sup> Loral Orion and C&W state that this competitive advantage would be negated if direct access were to become available in the United States.

49. Additionally, Loral Orion and other commenters point to their experience in operating in foreign markets where direct access is available, as demonstrating its competitive benefits. Loral Orion states that it has been able to expand into markets because direct access made it economical to

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<sup>136</sup> See International Bureau Report on International Telecommunications Markets 1997-1998 at 5.

<sup>137</sup> See Americatel comments at 1; AT&T comments at 12-13; BT North America reply at 25-26; C&W comments at 3 and reply at 4-5; Ellipso comments at 2, 6, and 15-19; GE Americom comments at 8 and reply at 11; GlobeCast comments at 3-4 and reply at 4; ICG comments at 3 and reply 6-7; IT&E comments at 2-3; Loral Orion comments at 6-7; MCI comments at 16-18 and reply at 17; and PanAmSat comments at 5.

<sup>138</sup> MCI WorldCom comments at 16.

<sup>139</sup> Loral Orion comments at 6-7.; C&W comments at 3.



initiate service in these countries.<sup>140</sup> BT North America states that direct access has reduced costs of INTELSAT access in the United Kingdom far below the equivalent charges in the United States, while at the same time increasing competition in the United Kingdom satellite services market.<sup>141</sup> We noted above the cost savings of the GE Americom affiliate in Germany.<sup>142</sup> C&W echoes other comments regarding cost savings realized from direct access in the United Kingdom, but also points out that direct access has enabled it to respond to customer needs and add flexibility to its operations to the benefit of U.K. telecommunications users.<sup>143</sup> C&W, as well as other commenters, point out that a beneficiary of direct access in the U.K. is a Comsat affiliate, Comsat General (U.K.).<sup>144</sup> The Networks state that the availability of direct access in other countries has provided benefits such as avoiding substantial "add-on fees" and facilitating "operational arrangements for through circuits."<sup>145</sup>

50. Comsat argues that U.S. companies are already obtaining INTELSAT capacity through the Canadian company Teleglobe as an alternative to Comsat.<sup>146</sup> Teleglobe offers lower rates and service alternatives for U.S. firms wishing to use INTELSAT facilities, despite having to go through land line facilities and Canadian earth stations in order to use Teleglobe.<sup>147</sup> Comsat asserts that the availability of Teleglobe to U.S. carriers and users provides U.S. customers with a competitive alternative to use of INTELSAT for both competitive and non-competitive markets and demonstrates that there are "no market place facts" that justify Level 3 direct access in the United States.<sup>148</sup> We disagree. U.S. customer use of Teleglobe demonstrates a clear market demand for lower rates for the use of INTELSAT facilities. Current U.S. policy that causes U.S. customers to satisfy commercial needs by routing traffic through another country is not in the public interest. Introduction of Level 3 direct access in the United States will provide an alternative for U.S. customers to satisfy their need superior to routing traffic through Canada.

## (2) Cost Recovery

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<sup>140</sup> See Loral comments at 7 noting, for example, that direct access in Germany and United Kingdom has reduced rates for INTELSAT space segment capacity by 25 percent.

<sup>141</sup> BT North America reply at 23.

<sup>142</sup> See GE Americom comments at 9.

<sup>143</sup> C&W comments at 5.

<sup>144</sup> *Id.*

<sup>145</sup> Network comments at 14-19.

<sup>146</sup> Comsat comments at 59-60 and reply at 38.

<sup>147</sup> See Loral Orion comments at 6; C&W comments at 3; and GlobeCast comments at 4.

<sup>148</sup> Comsat comments at 60.

51. The *Notice* noted Comsat's contention that INTELSAT IUC rates do not reflect many costs that it would continue to incur on behalf of direct access customers.<sup>149</sup> We asked Comsat to specify which of these costs it believes should be added to IUC rates to allow for fair recovery, and to specify the activities or transactions that give rise to these costs and the magnitude of these costs. We also asked parties to respond to Comsat's argument that if the Commission allows direct access we should provide for a "surcharge" to allow Comsat to recover expenses that it alleges are not recoverable through IUC rates, and to comment on the cost information that Comsat provides. We sought comment from all parties on which costs, if any, should be recovered by Comsat by means of a surcharge imposed on U.S. direct access users.<sup>150</sup>

52. Comsat maintains that IUC rates do not represent the true "cost" or "price" of providing INTELSAT space segment service. Comsat asserts that IUC rates do not reflect the following expenses that it will continue to incur on behalf of direct access customers: (1) direct costs undertaken in performing its Signatory functions on behalf of the U.S. government and all users of INTELSAT service; (2) corporate tax liabilities; and (3) indirect costs associated with Comsat's investment and operating liabilities.<sup>151</sup> Comsat also argues that IUC rates do not provide Comsat a fair after-tax return on its statutorily-mandated investment.<sup>152</sup>

53. Comsat states that the appropriate surcharge should range, on average, from 28.67 percent to as much as 45.55 percent of the applicable IUC, depending upon whether the Commission allows Comsat to earn a rate-of-return of 12.48 percent, which represents the after-tax level of return allowed by the Commission under rate-base rate of return regulation, or 15.64 percent of the weighted average rate of return earned by price cap companies.<sup>153</sup> These numbers are based on 1997 data and Comsat notes that these numbers serve as proxies, and should not be substituted for a full-blown analysis.<sup>154</sup>

54. Most proponents of direct access oppose imposition of any surcharge. A few parties state they would support a very limited surcharge for direct Signatory-related expenses only.<sup>155</sup>

(a) Signatory-Related Expenses

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<sup>149</sup> Comsat "Joint Response to Satellite Coalition Analysis" at 13.

<sup>150</sup> *Notice*, 13 FCC Rcd at 25.

<sup>151</sup> Comsat comments at 65-66.

<sup>152</sup> Comsat comments at 68-69.

<sup>153</sup> Comsat comments at 83-84.

<sup>154</sup> Comsat comments at 84.

<sup>155</sup> See Network comments at 7-8; AT&T comments at 15.

55. Comsat asks that the Commission permit a surcharge for expenses Comsat believes are incurred in performing its role as U.S. Signatory to INTELSAT. These expenses, asserts Comsat, include both Signatory function expenses and insurance expenses.<sup>156</sup>

(i) Signatory Function Expenses

56. Comsat identifies the following activities and functions as Signatory function expenses: (1) attending and preparing for INTELSAT meetings; (2) participating in the U.S. Government instructional process; (3) protecting its investment in INTELSAT; (4) representing the interests of U.S. carriers and users within INTELSAT; and (5) observing the implementation of procedures for assigning space segment capacity to users.<sup>157</sup> Comsat asserts that IUC rates do not cover these expenses, which amounted to \$3.005 million in 1998.<sup>158</sup>

57. Comsat also identifies certain capitalized headquarter expenses attributable to carrying out the Signatory function. These include expenses for computer equipment, software, and communications equipment.<sup>159</sup> Since some costs which Comsat believes should be recoverable may be incurred by functions which also generate non-recoverable costs, we asked in our *Notice* that Comsat discuss how it would assign its costs. In its response, Comsat stated that it had allocated 25 percent of these capitalized headquarter expenses to the Signatory function, based on the expectation that significant staffing would still be required to carry out statutorily-mandated Signatory activities under a Level 3 direct access regime.<sup>160</sup> These total capitalized expenses amount to \$330,000, and are in addition to the \$3.005 million figure listed above.<sup>161</sup>

58. Proponents of direct access have mixed views about whether the Commission should permit a surcharge for expenses identified by Comsat as Signatory function expenses. The Networks, AT&T, and MCI WorldCom state that the Commission should, at most, allow Comsat to recover costs directly attributable to its official role as the U.S. Signatory to INTELSAT.<sup>162</sup> MCI WorldCom argues that a Signatory surcharge should be limited to U.S. government instructional process expenses, and should

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<sup>156</sup> Comsat comments at 65-66.

<sup>157</sup> See *Ex Parte* letter from Comsat, Keith Fagan, to the Federal Communications Commission Secretary, Magalie Roman Salas, June 11, 1999 ("*Comsat June 11 Ex Parte*") at 13-14.

<sup>158</sup> See Comsat comments, Attachment 1 at Exhibit 4 (Theodore Boll).

<sup>159</sup> Comsat June 11 *Ex Parte* at 13-14.

<sup>160</sup> Comsat June 11 *Ex Parte* at 11.

<sup>161</sup> *Id.*

<sup>162</sup> See AT&T reply at 15; MCI WorldCom reply at 24; and Network reply at 17.

not include expenses for Comsat participation in INTELSAT governance in order to protect its commercial interest in INTELSAT.<sup>163</sup>

59. In contrast, PanAmSat argues that INTELSAT's investment return to Comsat is more than adequate to compensate Comsat for its Signatory-based costs.<sup>164</sup> BT North America states that British Telecom ("BT") does not impose a surcharge for costs associated with its Signatory and carrier functions because the costs associated with the administrative burden in separating Signatory costs from purely commercial costs would outweigh the benefits.<sup>165</sup> BT North America states that it finds astounding that Comsat records as a direct Signatory cost 25 percent of the total costs of its headquarters facilities. Before implementing direct access in the United Kingdom, BT only added a seven percent surcharge to IUC rates to recover costs it incurred in placing orders.<sup>166</sup>

60. In determining whether Comsat should be allowed to recover a particular operating expense, our functioning principle is that Comsat should not be allowed to recover any discretionary expenses unrelated to its unique Signatory functions. However, Comsat should recover costs that are unavoidable, non-discretionary Signatory-related functions and expenses that Comsat will continue to incur even after the implementation of direct access. We believe such expenses should be included in a surcharge because they are incurred as a result of the role Congress gave Comsat and mandated by the Satellite Act, and because they are likely to produce value for those customers who take advantage of direct access.

61. Based on the record before us, we find that the activities identified by Comsat constitute unavoidable, non-discretionary Signatory-related functions that Comsat cannot proportionally reduce after the implementation of direct access. We agree with the Networks' assessment that such Signatory costs are unique to Comsat. In addition, these Signatory activities directly benefit potential users of direct access because Comsat must represent all U.S. interests in connection with INTELSAT decision-making.

62. We disagree with PanAmSat that the INTELSAT return before tax is more than adequate to compensate Comsat for Signatory-related costs. Despite PanAmSat's assertion, we find that it is appropriate that Comsat be compensated for direct Signatory-related expenses in addition to IUC payments. It would be unfair to Comsat to allow an unavoidable, non-discretionary expense, such as those incurred by the Signatory function, to reduce that return. While we recognize that British Telecom does not impose a surcharge for Signatory expense to direct access users in the United Kingdom, this factor alone does not justify requiring Comsat to act as the U.S. Signatory without compensation for its unavoidable costs.

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<sup>163</sup> MCI WorldCom reply at 24.

<sup>164</sup> PanAmSat reply at 7.

<sup>165</sup> BT North America comments at 5-7.

<sup>166</sup> C&W comments at 5-6; BT North America comments at 3-4.

## (ii) Insurance Expense

63. Comsat also requests that the Commission include a surcharge for insurance expenses that Comsat has incurred on the deployment of INTELSAT satellites. Comsat states that it has traditionally purchased space-segment insurance on its own because, until very recently, INTELSAT did not fully insure total satellite deployment costs.<sup>167</sup> Comsat states that it has purchased launch and post-separation insurance coverage to protect against possible losses associated with a launch or in-orbit failure of a satellite, to the extent INTELSAT had not fully purchased such insurance.<sup>168</sup> Comsat also states that it purchased insurance to provide coverage against the cost of insurance premiums, to the extent INTELSAT has not chosen to cover the insurance premiums.<sup>169</sup> According to Comsat, INTELSAT has underinsured or not insured the costs of satellite deployment in the past because INTELSAT did not have to raise equity in the capital market, and thus did not manage its investment risk in the same way that commercial companies do.<sup>170</sup> Comsat states that as an equity investor, it bears a portion of the risk of INTELSAT launch failures or malfunctions in orbit, and thus has consistently purchased insurance to the extent INTELSAT has not.<sup>171</sup> Otherwise, Comsat states, losses associated with uninsured portions of INTELSAT's space segment would reduce IUC-provided returns.<sup>172</sup> Comsat argues that absent a surcharge, U.S. direct access users would obtain a free ride on Comsat's insurance payments.

64. Comsat filed a schedule listing the satellites that have been under-insured, along with the depreciation life for how much insurance expense remains capitalized on its financial statements.<sup>173</sup> Comsat states it has \$31 million of capitalized insurance remaining as of December 31, 1998. Comsat asserts that the actual expenses attributed to this capitalized insurance would be \$13.158 million, which includes the following components: \$3.872 million representing the rate of return on the capitalized insurance, assuming a 12.48 percent rate of return that Comsat asserts it could have earned; \$7.777 million for depreciation expense; \$1.510 million for Comsat's corporate tax liability on the \$3.872 million. The total amount of \$13.158 million would represent approximately 8.5 percent of Comsat's 1998 IUC payments to INTELSAT.

65. The Networks argue they should not bear the burden of Comsat's insurance expense when it is not clear why most "satellite insurance costs" are not already recovered in INTELSAT's operating

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<sup>167</sup> See Comsat comments at Appendix, Brattle Group Study at 35.

<sup>168</sup> See Comsat June 11 *Ex Parte* at Exhibit C (letter) and Brattle Group Study at 35.

<sup>169</sup> See Comsat comments at Appendix, Brattle Group Study at 35.

<sup>170</sup> Comsat June 11 *Ex Parte* at 9-10.

<sup>171</sup> Comsat reply comments at 44.

<sup>172</sup> Comsat comments at Appendix, Brattle Group Study at 35.

<sup>173</sup> See Comsat June 11 *Ex Parte* at Exhibit C.

expenses.<sup>174</sup> MCI WorldCom and BT North America assert that INTELSAT already fully insures its satellites and launches, and thus argue against a surcharge for insurance expense.<sup>175</sup> BT North America further states that BT does not incur any additional costs associated with satellite launch and insurance.<sup>176</sup>

66. We find that Comsat should be entitled to a surcharge that recovers that part of Comsat's insurance expenditures attributed to INTELSAT not purchasing, or fully purchasing, launch and post-separation insurance. As we discuss below, Comsat was created by the Satellite Act to plan, initiate, construct, own, manage and operate with foreign governments a commercial communications satellite system.<sup>177</sup> That system became INTELSAT. As the U.S. Signatory in this intergovernmental organization, Comsat is required to make capital investments in the satellite system under the terms of the INTELSAT Operating Agreement.<sup>178</sup> In carrying out obligations particular to its role, Comsat must insure that the purposes of the Satellite Act are fulfilled. This may include taking steps to protect its investment if not otherwise protected by INTELSAT. We believe Comsat's action to purchase launch and post-separation coverage, to the extent INTELSAT does not, is prudent given the high risk nature of launching and operating satellites and the large amount of capital committed to the development, launch, and operation of INTELSAT's satellites. Otherwise, a launch or in-orbit failure could significantly jeopardize Comsat's investment in INTELSAT. As the U.S. Signatory to INTELSAT, we believe Comsat has a duty to protect its INTELSAT investment in order to serve the interests of the U.S. government and INTELSAT users in the United States. As a result, we find Comsat's action to fully insure against launch and in-orbit failures to be reasonably related to its Signatory responsibilities, and do not find this insurance expense to be discretionary in nature.<sup>179</sup> We believe direct access users that will gain access to INTELSAT facilities that have been partially insured by Comsat should, in turn, partially compensate Comsat for its insurance expenses.

67. Cable and Wireless states that the Commission has found in the past that permitting carriers to recover "embedded" or "opportunity" costs from rivals stifles the very consumer benefits that

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<sup>174</sup> Network comments at 10-11.

<sup>175</sup> MCI WorldCom reply at 23; BT North America reply at 27.

<sup>176</sup> BT North America comments at 5-7.

<sup>177</sup> See discussion in paragraphs 158-162, *infra*.

<sup>178</sup> INTELSAT Operating Agreement at Article 6.

<sup>179</sup> We further note that Comsat's unique status as the U.S. Signatory to INTELSAT distinguishes Comsat from other common carriers. Therefore, our treatment of Comsat's insurance expense in this Report and Order is not binding precedent for our treatment of any cost incurred by any other common carrier. The Commission has determined on at least one occasion that regulations applicable to domestic local exchange carriers (LECs) are not suited to Comsat, in part, because of the differences between Comsat and domestic LECs. See Comsat Corporation, Policies and Rules for Alternative Incentive Based Regulation of Comsat Corporation, IB Docket No. 98-60, Report and Order, 14 FCC Rcd 3065, 3072 (para. 20) (1999) (declining to extend LEC price cap regulation to Comsat).

competition is intended to produce.<sup>180</sup> The argument here by Cable and Wireless, however, is not persuasive. Comsat explains that, in the past, INTELSAT did not have to raise capital itself in the financial markets. Thus, INTELSAT faced different incentives in managing its risks, and so had an incentive to be underinsured.<sup>181</sup> Each INTELSAT Signatory was left to decide for itself how much risk it would choose to bear and how much to protect itself through purchase of insurance. Further, because the size of Comsat's ownership interest in INTELSAT is not affected by customers' decisions to access INTELSAT satellites directly or through Comsat, Comsat's investment obligations in INTELSAT to fund replacement for any in-orbit failure also remains the same. Therefore, because Comsat has this continuing investment obligation, its insurance of the risk associated with any in-orbit failure can be properly viewed as a Signatory expense that Comsat continues to bear, even if all its current customers were to use direct access.

68. We do not, however, include a surcharge for any insurance purchased to provide coverage against the cost of the insurance itself in the event of a launch or in-orbit failure. Of the \$30 million worth of total capitalized insurance amount stated by Comsat, approximately \$8.5 million represents insurance on insurance premiums. While we recognize the importance of purchasing insurance when INTELSAT has failed to fully do so, we find that Comsat did not need to fully insure the insurance premiums. The risk associated with the need to purchase insurance on insurance premiums could have reasonably been absorbed in the course of normal business operations.

(iii) Calculating Reasonable Surcharge for Signatory-Related Expenses

69. In the *Notice*, we asked Comsat to specify how it would allocate these recoverable costs between itself and Level 3 users if such expenses were allowed.<sup>182</sup> We also asked Comsat to specify how any recoverable costs should be allocated among the different INTELSAT services.

70. Comsat submitted a variety of schedules depicting surcharge calculations.<sup>183</sup> As noted above, Comsat calculated the surcharge percentages based on what portion these expenses represented of the IUC payments, using 1998 data.<sup>184</sup> In its further response, Comsat argues that calculating the surcharge will be difficult, and will mirror the complex type of rate regulation that the Commission determined was unnecessary in the *Non-Dominant Order*, and it will necessarily entail periodic visits.<sup>185</sup> Comsat argues that if the surcharge falls short, the result would be below cost access by U.S.

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<sup>180</sup> C&W comments at 4.

<sup>181</sup> Comsat *Ex Parte* letter, July 11, 1999, at 9-10.

<sup>182</sup> *Notice*, 13 FCC Rcd at 22037.

<sup>183</sup> See Comsat comments at Attachment 1 and Comsat June 11 *Ex Parte*.

<sup>184</sup> See Comsat comments at Exhibit 4.

<sup>185</sup> Comsat comments at 83.

carriers for INTELSAT space segment, and potentially divert traffic to INTELSAT from more efficient satellite service providers.

71. We find that a surcharge should be calculated by determining what percentage a given expense constitutes of the total IUC payments made by Comsat in a given year, and then applying this uniform percentage to IUC rates in the forward year. While we understand that Comsat's Signatory-related expenses and IUC revenues may change, thus affecting the size of the surcharge that Comsat receives from direct access users, we do not now anticipate any material changes in these factors.<sup>186</sup> In addition, we agree with several parties who argue that the Commission should not conduct a rate proceeding to determine the reasonableness of Comsat's potentially recoverable costs. Comsat has failed to provide any evidence on how a potentially insignificant shortage in the surcharge would lead to below cost access by U.S. carriers for INTELSAT space segment, or potentially divert traffic to INTELSAT from more efficient satellite service providers.

72. We find that a uniform surcharge of 5.58 percent over IUC rates would be reasonable, for any particular service, in order to compensate Comsat for these unavoidable Signatory function expenses. This surcharge is based on the finding that Comsat's Signatory function expenses represented 1.94 percent of Comsat's IUC payments to INTELSAT in 1998. We also will allow a surcharge of .05 percent for headquarter account expenses. Likewise, for Comsat's allowable insurance expenses, we find that a uniform surcharge of 3.59 percent over IUC rates be permitted in order to compensate Comsat for these insurance expenses. In total, we find a surcharge of 5.58 percent over IUC rates to be reasonable for the purpose of compensating Comsat for Signatory-related expenses. Appendix B, hereto, provides the information on calculating this surcharge.

73. Comsat also asks the Commission to consider the additional costs that it will incur by having to necessarily wait longer for payment from U.S. users of direct access since INTELSAT will first receive the funds. It argues that this poses additional costs on Comsat<sup>187</sup> We do not find this argument to have merit, as customers will pay the surcharge at the time they pay IUC rates to INTELSAT.

(b) Return on Investment

74. Comsat asserts that IUC rates do not provide Comsat a reasonable, after-tax return on its investment.<sup>188</sup> Comsat states that the 18 percent provided through the IUC mechanism, as cited in the *Notice*, actually translates into a return well below that earned by other telecommunication services companies after taking into account a number of considerations. First, Comsat argues that the 18 percent return represents a pre-tax return, and thus ignores the corporate tax liability that Comsat

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<sup>186</sup> However, as we explain below in paragraph 90, Comsat's initial surcharge tariff will be in effect for no more than one year. If Comsat wishes to continue imposing a surcharge it will have to file a tariff revision for the following year.

<sup>187</sup> Comsat reply at 48.

<sup>188</sup> Comsat comments at 68.



incurs on the return. After considering tax implications, Comsat states the post-tax return on its Signatory equity amounts to 11.2 percent. Second, the 18 percent return is on the book value of invested equity and ignores a capital base that should also include Comsat's liability for the portion of INTELSAT's debt which Comsat finances. Comsat asserts that when considering total capital, or the sum of equity and Comsat's share of INTELSAT's debt, the effective after-tax return will be less than 11.2 percent. Furthermore, asserts Comsat, when considering return on net plant as the measure for total capital employed, the post-tax return on net plant amounts to 9.2 percent. In sum, Comsat argues that whether the rate of return is based on equity, equity and debt, or net plant, the IUC-provided return is well below a compensatory return for a private firm subject to corporate tax liability,<sup>189</sup> and below the return that Comsat has been allowed to earn under the Commission's rate of return policies. For these reasons, Comsat requests that the Commission permit a surcharge to allow Comsat to earn a reasonable rate of return.

75. In response, most parties contend that IUC rates already include a generous rate of return.<sup>190</sup> MCI WorldCom states that INTELSAT pays Comsat an after-tax return on Signatory equity of 10.37-12.81 percent, which falls within the 11.48 - 12.48 percent return that Comsat has been permitted to earn under rate of return regulation.<sup>191</sup> In addition, MCI WorldCom states that the relevant rate of return the Commission needs to consider is Comsat's pre-tax annual rate of return of 14-18 percent on Comsat's investment in INTELSAT, and not INTELSAT's rate of return on assets.

76. MCI WorldCom asserts that Comsat's election to have excess investment in INTELSAT demonstrates the attractiveness of this return.<sup>192</sup> MCI WorldCom includes a press statement made by the Comsat CEO, that discusses Comsat's recent decision to increase its investment share in INTELSAT by approximately two percent. The press release states that "Comsat's increased share in INTELSAT makes good business sense, and the corporation expects to see a strong return on this investment."<sup>193</sup>

77. In the *Notice*, we requested comment from Comsat and other parties on how our recent decision to reclassify Comsat to non-dominant carrier status for most of its services, as well as our pending consideration of incentive-based rather than rate of return regulation of Comsat's remaining dominant services, should affect our consideration of Comsat's cost recovery beyond those costs associated with its "statutorily imposed official Signatory functions."<sup>194</sup> BT North America responded that is ironic that Comsat seeks surcharges designed to provide a secure rate of return when in the

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<sup>189</sup> *Id.*

<sup>190</sup> GE Americom comments at 11.

<sup>191</sup> MCI WorldCom comments at 20.

<sup>192</sup> MCI WorldCom reply at 19.

<sup>193</sup> MCI WorldCom *Ex Parte* letter, May, 21, 1999.

<sup>194</sup> *See supra* at ¶ 47.

*Non-Dominant* proceeding Comsat sought to end rate of return regulation and sought to price its services according to the demands of the marketplace.<sup>195</sup>

78. Based on the record before us, we do not believe Comsat's request to permit a surcharge that would guarantee a particular rate of return above that already provided by IUC rates is reasonable for the following reasons. First, the return provided by IUC rates, which was between 14 and 18 percent in 1998, provides a market-based rate of return for Signatories, as determined by the INTELSAT Board of Governors, of which Comsat is a member. The INTELSAT Board of Governors acknowledges that a Signatory's ownership of INTELSAT may exceed its usage of INTELSAT services, and in such circumstances, IUC rates provide the only source of income on this excess ownership. We assume that the Board will establish IUC rates that reflect a market rate of return.<sup>196</sup> If IUC rates yield an unreasonably low rate of return, the INTELSAT Board would have every incentive to change its pricing strategy or cost management practices to increase this return. INTELSAT evidently considers the competitive environment and the needs of its customers in determining its prices.<sup>197</sup> For example, INTELSAT stated in its 1997 Annual Report that "over the past year, INTELSAT has worked to ensure that its pricing strategy is attractive to its increasingly diverse customer base."<sup>198</sup>

79. Second, we agree that Comsat's election to have excess investment in INTELSAT demonstrates, at least to some degree, the attractiveness of IUC-based returns.<sup>199</sup> Comsat clearly has attributed Comsat's decision to increase its investment share in INTELSAT by approximately two percent to expecting a strong return on this investment, even though it had greater ownership than its usage required at the time. While Comsat states in its comments that it holds this surplus ownership to enhance its voting power (and the influence of the United States) within INTELSAT, and not solely for investment purposes, Comsat (in a March 30, 1999 press release titled, "Comsat Increases Ownership of INTELSAT System") strongly suggests that obtaining a reasonable return is also part of this business decision to maintain excess ownership.

80. As discussed in this Report and Order, our regulatory treatment of Comsat has changed considerably since the last time we considered direct access in 1984. In the *1984 Direct Access Order*, we found direct access would constrain Comsat to a post-tax rate of return well below that recognized by the Commission as necessary to its financial well-being. During that period, and up to

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<sup>195</sup> BT North America reply at 29.

<sup>196</sup> Article 8(c) of the INTELSAT Operating Agreement provides that: in determining the rate of compensation for use of the capital of Signatories, the Board of Governors shall include an allowance for the risks associated with investment in INTELSAT and, taking into account such allowance, shall fix the rate as close as possible to the cost of money in the world markets.

<sup>197</sup> See 1997 Annual Report at 2 and 4.

<sup>198</sup> *Id.*

<sup>199</sup> MCI WorldCom reply at 19.

its recent reclassification as a non-dominant carrier, Comsat had been authorized to earn between 11.48-12.48 percent, post-tax, on its INTELSAT investment.<sup>200</sup>

81. That authorization changed, however, in April of 1998, when we reclassified Comsat as a non-dominant carrier on many routes, and eliminated rate-of-return regulation, so Comsat could price its services according to the demands of the marketplace. We found Comsat non-dominant after concluding that Comsat no longer held market power for services to the vast majority of its routes, and that the increasingly competitive international telecommunications market would best serve to prevent Comsat from charging unreasonable prices. Therefore, we agree with BT North America that it would not be appropriate to grant Comsat's request to permit a surcharge to secure a particular rate of return, as it is inconsistent with Comsat's request to end rate of return regulation in order to allow it the freedom to determine appropriate prices in these competitive markets.<sup>201</sup>

82. In addition, we have no evidence of any Signatory receiving a surcharge so it could secure a higher rate of return than that provided by IUC rates. Parties note that there is no mark-up or surcharge to IUC rates in other countries that have permitted Level 3 direct access, such as Chile, France, Germany, the Netherlands, and the U.K.<sup>202</sup> PanAmSat notes that Canada recently adopted a direct access system that does not include any surcharge fee on direct access customers. Based on PanAmSat's knowledge, no other administrations assess a surcharge.<sup>203</sup>

83. Comsat also asserts that two other direct access-related factors increase Comsat's risk and thereby reduce its market return in INTELSAT. First, the limited liquidity faced by INTELSAT Signatories further increases the costs of its investment. Second, INTELSAT Signatories are jointly and individually liable for the entire system. These factors increase the risk, and the corresponding necessary market return, asserts Comsat.<sup>204</sup> We do not find either of these factors to lie outside the normal business risks already assumed by Comsat today.

84. In sum, we believe that IUC rates are designed by INTELSAT to provide a reasonable rate of return. Furthermore, INTELSAT established IUC rates with the understanding that Signatories may own a greater part of INTELSAT than they actually use, and thus IUC-based returns would represent the only source of return on this excess investment. In addition, our decision to reclassify Comsat to non-dominant carrier status in April of 1998 underlies our conviction that rates should be determined by what the market will support. If Comsat believes that an IUC rate is too low, then it may work

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<sup>200</sup> 1984 Direct Access Order, 97 FCC 2d at 24.

<sup>201</sup> In those markets and routes where Comsat has continued to be dominant, we have replaced rate of return regulation with an alternative incentive based price regulation scheme. See *In the Matter of Comsat Corporation Policies and Rules for Alternative Incentive Based Regulation of Comsat Corporation*, IB Docket No. 98-60, 14 FCC Rcd 3065 (1999) ("*Comsat Incentive Based Order*").

<sup>202</sup> MCI reply at 18.

<sup>203</sup> PanAmSat reply at 7.

<sup>204</sup> Comsat reply at 48.

within its capacity as a Board member of INTELSAT to address any concerns it has with the return on investment provided by IUC rates.

(c) Corporate Tax Liability

85. Comsat also asserts that IUC rates do not allow Comsat to recover the corporate tax expenses that it will incur on any income derived through direct access. Comsat states that its marginal corporate income tax rate in the year 1998 was approximately 37.31 percent and its effective income tax rate was 25.95 percent.<sup>205</sup> This includes federal, state, and local taxes. Comsat requests that a surcharge be added to IUC rates of 7.11 percent to 13.82 percent, depending on the rate of return Comsat is allowed to earn, in order to allow Comsat to recoup its corporate income tax expenses incurred on income derived through direct access.<sup>206</sup> Other commenters in the proceeding, while generally opposing any surcharge, do not address the effects of corporate tax liability on Comsat's return.

86. We decline to adopt Comsat's suggestion to include a surcharge for Comsat's corporate income tax expense that it will incur on the income produced by direct access. It is true that as a tax-paying entity, Comsat cannot avoid paying federal, state and local income taxes on income derived from INTELSAT for direct access. The rate of return on equity which INTELSAT pays to its signatories, which is currently set at between 14 and 18 percent before tax by the INTELSAT board, is equivalent to a rate of return on equity to Comsat of about 8.78 to 11.28 percent after tax, based on Comsat's marginal income tax rate of 37.31 percent. Historically, as a dominant carrier, Comsat was rate regulated and was permitted to earn a rate of return of about 11.48-12.48 percent after tax.<sup>207</sup> However, in 1998 we declared Comsat to be non-dominant and eliminated rate regulation for most services on most routes.<sup>208</sup> Later we replaced Comsat's rate of return regulation on its remaining services along dominant routes with incentive based price regulation. In doing so, we allowed Comsat much greater flexibility to lower prices to meet competitive service providers, but we also clearly intended that Comsat not be guaranteed any particular rate or return on its Signatory equity or rate base.<sup>209</sup> For this reason, we do not see any need to explicitly compensate Comsat by an addition to its surcharge for the taxes it would have to pay on the income it receives from INTELSAT.

(3) Implementation Procedures for Direct Access

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<sup>205</sup> See Comsat June 11 *Ex Parte* letter at Exhibit E.

<sup>206</sup> Boll Affidavit Exhibits 1 and 3.

<sup>207</sup> See *Communications Satellite Corporation Investigation into Charges, Practices, Classifications, Rates and Regulations*, Memorandum Opinion and Order, 68 FCC 2d 941 (1978).

<sup>208</sup> *Comsat Non-Dominant Order*, 13 FCC Rcd 14083 (1998).

<sup>209</sup> *Comsat Incentive Based Order*, 14 FCC Rcd at n. 200.

87. We have determined that a Comsat surcharge of 5.58 percent over IUC rates for INTELSAT service offerings would be reasonable for purposes of compensating Comsat for Signatory function expenses and insurance expenses related to its Signatory role.<sup>210</sup> As pointed out in our *Notice*, Comsat's current tariff "markup" (over the INTELSAT tariff rate) varies widely across services. Comsat's mark-up is based on factors such as the service provided, the length of the contract term, and the amount of capacity being purchased.<sup>211</sup> The specific tariff examples cited in the *Notice* showed markups that varied from 18 to 63 percent for full-time video service, 38 to 270 percent for voice-international digital service, and 26 to 88 percent for data - international business service.<sup>212</sup> For switched-voice service, the markup is highest for shorter term contracts, while the markup for full-time video and data - international business services is highest in long term contracts. Thus, the impact of a uniform markup of 5.58 percent may be particularly effective in lowering the rates for relatively short term switched-voice traffic contracts and long term full-time video and data contracts.

88. We conclude that, while a surcharge calculated as set forth in this Order is reasonable, based on the record in this proceeding, we do not prescribe this surcharge. Comsat may file a tariff for a different surcharge, provided its proposed surcharge is just and reasonable within the meaning of Section 201 of the Communications Act,<sup>213</sup> *i.e.*, that the surcharge will not recover more than the share of its expenses for the direct Signatory-related expenses and its insurance expense that Comsat reasonably incurs as a result of its role as the U.S. Signatory to INTELSAT.<sup>214</sup> Accordingly, if any direct access customer believes that the surcharge is unjust and unreasonable, we will consider a complaint filed by that customer.<sup>215</sup> If we find that the surcharge is unjust and unreasonable, we will require Comsat to issue refunds as warranted.

89. The procedures for implementing direct access to the INTELSAT system from the United States, including the surcharge element, will consist of several elements. Following release and publication in the Federal Register of this Report and Order, the International Bureau shall issue a Public Notice establishing a 21-day period (from the date of the public notice) for eligible carriers and users to notify the Commission in writing that they want Level 3 direct access to INTELSAT. The

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<sup>210</sup> Appendix B hereto provides the analysis calculating this surcharge.

<sup>211</sup> See *Notice*, 13 FCC Rcd at 22050-22051 (Appendix B).

<sup>212</sup> *Id.* Percentage mark-ups can be derived from Appendix B of the *Notice*. For example, the "tariff ratio" for a 5 year term, 2.048 MB/s IDR, 0-270 ckts, hemi/zone/spot coverage, is shown as 3.70. This is equivalent to a 270 percent mark-up ( $[(3.70-1)/1]*100=270\%$ )

<sup>213</sup> 47 U.S.C. § 201.

<sup>214</sup> Our action here is not a prescription merely because it specifies a particular surcharge level that we find reasonable. "No principle of law requires the Commission to engage in a pointless charade in which carriers are required to submit and resubmit tariffs until one finally goes below an undisclosed maximum point of reasonableness and is allowed to take effect." *In re Trans-Alaska Pipeline Rate Cases*, 436 U.S. 631, 653 (1978).

<sup>215</sup> See 47 U.S.C. § 208.

public notice also will specify the name and address for filing any such notification. The International Bureau will forward the names of all the eligible U.S. carriers and users to Comsat. Comsat shall be required to inform INTELSAT within ten days of receiving these eligible names that they are authorized to obtain Level 3 direct access from INTELSAT without further approval of the U.S. Signatory -- Comsat -- consistent with the procedures established by INTELSAT that permits "blanket authorizations" for Level 3 direct access.<sup>216</sup> Any eligible carriers and users, not part of the initial "blanket authorization" request sent to INTELSAT, may request that Comsat add them to the list of carriers and users eligible for Level 3 direct access "blanket authorizations." Comsat will be required to inform INTELSAT within ten days of receiving each such subsequent request. Within 60 days after publication in the Federal Register of this Report and Order, Comsat may file, on one day's notice, a tariff of the terms and conditions of surcharges applicable to U.S. Level 3 direct access customers, consistent with the findings in this Report and Order.<sup>217</sup> The carriers and users obtaining Level 3 direct access from INTELSAT shall pay Comsat the surcharge specified in Comsat's effective tariff that is applicable to the services obtained from INTELSAT. Finally, Comsat may establish reporting mechanisms with INTELSAT for the limited purpose of assuring that Comsat can identify the appropriate surcharge that U.S. direct access customers must pay Comsat upon receipt of service from INTELSAT under Level 3 direct access. Comsat may take appropriate steps through INTELSAT to terminate a customer's Level 3 direct access status for failure to pay the appropriate surcharge.

90. We also conclude that Comsat's initial surcharge rates should be in effect for no more than one year. A surcharge that is reasonable today may or may not be reasonable in the future. Comsat's Signatory-related expenses may vary from year to year, and its level of recovery of those expenses may also vary. Accordingly, we require Comsat to limit its initial surcharge to one year. If Comsat wishes to continue to impose a surcharge after that date, it may file a tariff revision reflecting a new surcharge that recovers no more than the share of direct Signatory-related expenses and its insurance expense that Comsat reasonably incurs as a result of its role as the U.S. Signatory to INTELSAT.

91. We also require Comsat to state in its tariff that this surcharge will not apply upon privatization of INTELSAT. This surcharge is intended to enable Comsat to recover its reasonable, prudently-incurred costs associated with acting as the U.S. Signatory to INTELSAT, direct Signatory-related expenses and Comsat's insurance expense reasonably incurred as a result of its role as the U.S. Signatory to INTELSAT. Once INTELSAT has been privatized, Comsat will no longer incur any costs associated with acting as the U.S. Signatory to INTELSAT, and so continuing to impose its surcharge will no longer be just and reasonable at that point.

92. In summary, we reach the following conclusions with respect to Comsat's surcharge: (1) a surcharge is just and reasonable, provided that it recovers no more than the share of direct Signatory-related expense and insurance expense that Comsat reasonably incurs as a result of its role as the U.S. Signatory to INTELSAT; (2) if Comsat wishes to impose a surcharge, it must file a tariff; (3) we find that a surcharge calculated as set forth in the appendices to this Report and Order are just and

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<sup>216</sup> See *supra* at ¶ 9.

<sup>217</sup> In essence, Comsat will subsequently be allowed to charge a uniform surcharge of 5.58 percent over IUC rates charged by INTELSAT.

reasonable but Comsat is free to attempt to show that some other surcharge to cover the same expenses would also be just and reasonable; (4) Comsat's tariff must state that this surcharge will be in effect for no more than a year after the date that its tariff takes effect; and (5) if a Comsat customer believes that Comsat's surcharge recovers more than the direct Signatory-related expense and its insurance expense that Comsat reasonably incurs as a result of its role as the U.S. Signatory to INTELSAT, we will consider a complaint filed pursuant to Section 208 of the Communications Act.

93. Finally, a decision by Comsat not to file a tariff reflecting a surcharge to direct access users will not preclude the availability of Level 3 direct access to U.S. carriers and users of INTELSAT. Comsat's failure to file a tariff will result in direct access customers obtaining service from INTELSAT without a surcharge to Comsat.

#### (4) Potential Competitive Concerns Raised by Direct Access

94. The *Notice* requested comments on whether permitting direct access would result in competitive distortions in the U.S. market.<sup>218</sup> An important issue that we must consider is, to the extent that we do authorize direct access to INTELSAT, should we impose any limitations on which companies should be allowed to obtain direct access within the United States? In addition, the *Notice* specifically requested parties to address the potential effect of INTELSAT's immunities from suit and process and its immunity from Commission jurisdiction over rates and practices. Parties commenting on this issue address four areas: (1) foreign Signatory operation in the U.S. market through direct access; (2) immunity from suit and process; (3) immunity from Commission jurisdiction; and (4) immunity from taxation.

##### (a) Direct Access by Dominant INTELSAT Signatories

95. Comsat contends that with the introduction of direct access in the United States, foreign Signatories, and possibly U.S. carriers, could manipulate INTELSAT IUC rates to their advantage and cause competitive distortions in the U.S. market.<sup>219</sup> Comsat is concerned that a sufficient number of foreign Signatories could be enlisted by large international carriers to depress future IUCs in order to enjoy below cost access to INTELSAT.<sup>220</sup> BT North America notes to the contrary, however, that downward pressure on prices, *in lieu* of artificially preserving high supply costs to carriers, is precisely the result the Commission would want to achieve.<sup>221</sup> In any event, the INTELSAT Board of

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<sup>218</sup> *Notice*, 13 FCC Rcd at 22040-22041.

<sup>219</sup> Comsat comments at 67.

<sup>220</sup> Comsat comments attaching "An Economic Assessment of the Risks and Benefits of Direct Access to INTELSAT in the United States," Professors Jerry Green and Hendrick S. Houthakker, Harvard University, and Johannes P. Pfeifenberger, The Brattle Group, December 21, 1998.

<sup>221</sup> *See Ex Parte Notification* from Cheryl L. Schneider and Eric H. Loeb, BT Group Legal Services, to Magalie Roman Salas, Secretary, Federal Communications Commission, (June 11, 1999) at 2.

Governors would ensure that carriers with "significant bargaining power" would not be able to negotiate "preferential IUC rates" with INTELSAT.<sup>222</sup>

96. While direct access will benefit U.S. carriers and users of INTELSAT services and, in turn, U.S. consumers, foreign Signatory operation in the U.S. market via direct access will pose competition concerns. There may be potential incentives for Signatories to depress IUC rates for direct access to uneconomically low levels, *i.e.* to levels that do not reflect INTELSAT's full costs of providing direct access in the U.S. market. As Comsat has argued, foreign Signatories desiring to begin or expand operations in the U.S. market may themselves wish to purchase direct access from INTELSAT in the United States.<sup>223</sup> As such, they will find low prices for direct access in the U.S. to be in their economic interest. Because these same companies that might purchase direct access also have the ability, through their Signatory status, to influence direct access prices, they may be able to develop their U.S. activities at artificially low prices, which could have an adverse competitive impact on Comsat and other international service providers operating in the United States. The fact that the Signatories share in INTELSAT's costs and revenues will not likely offset the incentive to underprice direct access. Unlike Comsat, most foreign Signatories are vertically integrated firms for whom access to INTELSAT is not in itself the end product they sell to customers, but instead an input into telecommunications services they sell to retail consumers. Access for such Signatories is more a source of costs than a source of revenues. IUC rates are for them primarily a transfer price they pay to INTELSAT for access they use themselves, and any returns they lose due to a lower IUC they can, in turn, be made up by the lower "price" they pay for usage of INTELSAT. So long as their usage shares and ownership shares of INTELSAT are roughly balanced, Signatories who are also retail service providers will be unaffected by low IUC rates and have no incentive to resist lowering IUC rates where to do so is otherwise advantageous.

97. As we explained above, a dominant Signatory may have the opportunity to participate in an effort to reduce direct access prices to uneconomic levels based on its opportunity to exercise a vote in the INTELSAT Board of Directors. Under ordinary circumstances, such activities might raise antitrust concerns. However, in any discussions regarding reducing the IUC, this incentive is not tempered by potential antitrust liability since all Signatories enjoy immunity from antitrust liability for their Signatory related activities.

98. Because of the incentives for vertically integrated Signatories to favor artificially low direct access prices in markets where they themselves want to be direct access customers, we adopt restrictions on the participation of those Signatories in the U.S. market for direct access to INTELSAT. Specifically, we will not authorize any Signatory, other than Comsat, to purchase direct access in the U.S. for service to or from any specific foreign country in which the Signatory itself uses 50 percent or more of all INTELSAT capacity consumed in that country. This restriction will also apply to affiliates that are more than 50 percent owned by the respective Signatory. Thus, a Signatory carrier affiliate that takes for its own use 75 percent of the total INTELSAT capacity sold in a

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<sup>222</sup> *Id.*

<sup>223</sup> Green, Houthakker, and Pfeifenberger, "An Economic Assessment of the Risks and Benefits of Direct Access to INTELSAT in the United States," December 21, 1998 at 20.



particular foreign country would, along with any more than 50 percent-owned affiliate, be unable to purchase direct access from INTELSAT in the United States for the purpose of originating or terminating traffic to that country. The purpose of this approach is to limit Signatories' incentives to reduce prices for direct access to uneconomic levels. Signatories that do not bear a cost from uneconomic direct access prices by virtue of competition in their home markets, and that can benefit from such prices by consuming direct access in the U.S. market, will have incentive to favor low direct access charges by INTELSAT. That incentive is reduced when such Signatories cannot immediately benefit in their role as direct access consumers, and is greatly weakened (regardless of whether the Signatories purchase direct access in the U.S.) when low direct access pricing is a greater benefit to their competitors than it is to themselves.

99. We limit this restriction to cover Signatories' purchases of direct access for service from the United States into territories where they are dominant, i.e., use 50 percent or more of the INTELSAT capacity consumed in that territory. Nothing in this Report and Order prevents them from using direct access to provide service between the United States and countries in which the Signatory is not the dominant provider of INTELSAT service. The ability to provide such service likely presents a far weaker incentive for the Signatory to favor uneconomic pricing because of the reduced traffic it is likely to carry between the U.S. and areas where it is not a dominant incumbent telecommunications service provider.<sup>224</sup> We therefore find the potential benefits for American consumers to outweigh the risks of uneconomic pricing in such cases. However, if our competitive concerns regarding dominant Signatories are not likely to be realized, we will reevaluate this decision. However, we will continue to monitor developments regarding direct access and INTELSAT privatization to determine whether

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<sup>224</sup> We recognize that for transport of telecommunications traffic between the United States and many countries there are alternatives to INTELSAT. The existence of such alternatives which include non-INTELSAT satellite services and undersea cables, could effect a dominant Signatory's incentive to reduce direct access prices to uneconomic levels. Thus, to the extent major traffic routes are likely to have the most communications transport alternatives, it is possible to argue that direct access to INTELSAT will be most desirable for transporting traffic not to major Signatory countries, but to smaller, so-called "thin-route" countries. Under such a theory, where transport alternatives are available to a dominant Signatory into its home country, it is possible that the Signatory's incentive to reduce direct access prices to uneconomic levels will be muted regarding traffic between the United States and its home country. On the other hand, in theory, such a Signatory could have a stronger incentive to reduce direct access prices for traffic between the United States and thin-route countries where the Signatory is not dominant.

Although this argument is not illogical, we think the small amount of traffic that carriers are likely to transport between the United States and thin-route countries where they are not dominant is unlikely to provide strong incentives to reduce direct access prices to anticompetitive levels. The greater traffic at stake between the U.S. and the home markets of dominant Signatories—and the enormous growth in such traffic as data markets expand—is more likely to provide non-trivial incentives to reduce direct access prices to uneconomic levels even in the presence of alternative means of communications transport. For that reason we adopt dominant Signatory limitation on buying direct access in the United States to serve their home markets and any other market where they use more than 50 percent of the INTELSAT capacity consumed, rather than prohibiting them from serving markets—many of them thin-route markets—in which they are not dominant.

the restriction we impose in this Report and Order on dominant Signatories should be modified or eliminated.

100. We note that, as explained in this *Order*, our analysis in this rulemaking proceeding is based on the long-established public interest standard.<sup>225</sup> Pursuant to that standard, and as exemplified in a history of cases,<sup>226</sup> our public interest analysis includes consideration of competition issues. The U.S. obligations under the 1997 WTO Basic Telecommunications Agreement do not affect the Commission's statutory obligation to apply a public interest analysis,<sup>227</sup> and we are "entitled to apply competitive safeguards consistent with U.S. obligations."<sup>228</sup> Thus, the approach we take here is not only a lawful exercise of our public interest authority, but it is also based on previous public policy in which we explained the necessity of maintaining the public interest by avoiding competitive harm.

(b) Immunity from Suit and Process

101. INTELSAT and its Signatories, including Comsat, enjoy three categories of immunities: (1) Immunity from jurisdiction, which prevents courts from considering lawsuits of any type against INTELSAT; (2) archival and testimonial immunity, which protects INTELSAT from being compelled to provide documents or testimony of its employees; and (3) immunity of assets, which prevents courts from enforcing monetary judgments against INTELSAT. INTELSAT's immunities derive from its status as an intergovernmental organization conferred upon it by the INTELSAT Agreement and by INTELSAT Headquarters Agreement. In *Alpha Lyracom Space Communications v. Comsat Corp.*, the court found that Comsat was a "representative of the Parties" under the INTELSAT Headquarters Agreement and, therefore, was immune from any type of suit and legal process in the U.S. for acts

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<sup>225</sup> "[A] public interest analysis is a valid exercise of U.S. domestic regulatory authority, required by the Communications Act and consistent with U.S. international obligations." *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket Nos. 97-142, 95-22, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891, 24040 (1997) (*Foreign Participation Order*).

<sup>226</sup> "The Commission has applied a public interest analysis as part of its regulatory structure since the Communications Act was passed in 1934. In fact, consideration of the public interest is fundamental in carrying out the general powers of the Commission. We apply the public interest test in a number of different contexts to domestic and foreign applicants." *Foreign Participation Order*, 12 FCC Rcd at 24040-41. See also *Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States*, Report and Order, 12 FCC Rcd 24094, 24185 (1997) (*"DISCO II"*).

<sup>227</sup> *Foreign Participation Order* 12 FCC Rcd at 24041; *DISCO II*, 12 FCC 2d at 24185.

<sup>228</sup> *Foreign Participation Order* 12 FCC Rcd at 24040-41.

taken in its official capacity as a Signatory, but not for those actions taken in its role as a common carrier.<sup>229</sup>

102. We have twice addressed the question of Comsat's immunity as relates to the U.S. market and determined that it is a clear advantage over competitors that do not enjoy similar protection.<sup>230</sup> The 1997 *DISCO II Order* and our 1998 *Comsat Non-Dominant Order* found that Comsat's immunity protects Comsat in its broad Signatory activities from suits based on antitrust, tort and contract claims. Also, these immunities protect substantial commercial activities. As the U.S. Signatory, Comsat sits on the INTELSAT Board of Governors and participates in decision making on all matters related to the commercial operation of a satellite system. INTELSAT's financial, legal, operational, commercial, and strategic decisions provide the basis upon which Comsat offers service to U.S. consumers. These decisions entail the planning and procurement of satellites and development and pricing of services to be provided over the satellites to INTELSAT Signatories and direct access users. These are the same types of commercial activities undertaken by Comsat's competitors with one key difference: Comsat's competitors have no immunity from suit and legal process for these types of activities and are subject to U.S. competition laws, including U.S. antitrust laws. As a result, absent an appropriate waiver, we declined in our *DISCO II* decision to permit Comsat to provide INTELSAT services into the U.S. domestic market.<sup>231</sup>

103. Several parties addressed the effect of INTELSAT's immunity from suit and process on the U.S. market if we permit direct access in the United States. PanAmSat maintains that the Commission should rely on recent amendments to the Foreign Corrupt Practices Act and declare that INTELSAT has no immunity from legal process in the United States.<sup>232</sup> Columbia argues that, at a minimum, the Commission should require INTELSAT to waive its immunity from law suits filed in U.S. courts if we permit direct access in the United States.<sup>233</sup> Ellipso states that the U.S. should "encourage" such a waiver from INTELSAT and reserve the right to withdraw direct access if anti-competitive practices

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<sup>229</sup> See *Alpha Lyracom Space Communications v. Comsat Corp.*, 968 F. Supp. 876, 877 (S.D.N.Y. 1996), *aff'd.*, 113 F.3d 372 (2d Cir. 1997). See also Headquarters Agreement between the Government of the United States of America and the International Telecommunications Satellite Organization, effective November 24, 1976, 28 U.S.T. 2248 (the "Headquarters Agreement") that provides that INTELSAT and the representatives of the parties and of the Signatories shall be immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions, except as such immunity is waived by INTELSAT.

<sup>230</sup> See *Comsat Non-Dominant Order*, 13 FCC Rcd at 14161-14163.

<sup>231</sup> *DISCO II*, 12 FCC Rcd at 24149. Comsat filed a petition for review of the Commission's *Report and Order* in the U.S. Court of Appeals for the D.C. Circuit (File No. 98-101). Comsat is challenging the Commission's authority to require it to waive its immunities as a condition to entry into the U.S. domestic market.

<sup>232</sup> PanAmSat comments at 7.

<sup>233</sup> Columbia comments at 3 and 7-8.

result.<sup>234</sup> Lockheed Martin states that because of INTELSAT's immunities, direct access could result in unfair competition and that this concern supports its contention that the U.S. should pursue privatization of INTELSAT rather than direct access.<sup>235</sup> INTELSAT comments that, contrary to PanAmSat's assertion, INTELSAT's immunities remain intact under the recently passed amendments to the Foreign Corrupt Practices Act.<sup>236</sup> Comsat concurs with other parties that market distorting and anti-competitive effects would result from INTELSAT's immunities if direct access were permitted in the United States.<sup>237</sup> Comsat further contends that the Commission has no authority to abrogate these immunities and the amendments to the Foreign Corrupt Practices Act do not eliminate INTELSAT's immunities.<sup>238</sup>

104. MCI WorldCom contends that direct access would not raise competitive concerns for the U.S. market.<sup>239</sup> MCI WorldCom states that it is the U.S. direct access customers who would be most affected by INTELSAT's immunities and INTELSAT provides recourse to these customers through arbitration in its standard direct access service agreement.<sup>240</sup> MCI WorldCom also points out that, while Comsat argues against direct access based on INTELSAT's immunities, Comsat continues to maintain that the existence of its own derivative immunities should not deter the Commission from authorizing Comsat to provide INTELSAT services in the U.S. domestic market.<sup>241</sup> Finally, MCI WorldCom contends that the amendments to the Foreign Corrupt Practices Act provides for reduction or elimination of INTELSAT's immunities.<sup>242</sup>

105. In view of INTELSAT's immunities, we agree that we must protect competition in the U.S. international market upon implementation of Level 3 direct access. Protections are necessary, however, only to the extent introduction of direct access into the U.S. market for international services results in competitive distortions greater than already exist as a result of Comsat's immunities. Through Comsat, INTELSAT already is in the U.S. market providing space segment capacity for

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<sup>234</sup> Ellipso comments at 11.

<sup>235</sup> Lockheed Martin comments at 14-15.

<sup>236</sup> INTELSAT reply at 3-5.

<sup>237</sup> Comsat reply at 28.

<sup>238</sup> *Id.* at 28-33.

<sup>239</sup> MCI WorldCom comments at 21-23.

<sup>240</sup> *Id.* at 22.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 22-23; *See also* Comsat comments in Docket No. 990405086-9086-01 proceeding of NTIA, dated May 12, 1999, in which Comsat strongly disagrees there are competitive advantages. Comsat argues that its Signatory immunity concerns its conduct in INTELSAT, subject to government instruction and not its conduct in the market place.

international communications to U.S. carriers and users on a wholesale basis, by virtue of the Satellite Act and the INTELSAT Agreement.<sup>243</sup> Comsat enjoys the same immunities as INTELSAT in its role as the U.S. Signatory to INTELSAT, but not in its role as a common carrier supplier of INTELSAT services. Both are protected from suit and process (including antitrust actions) in connection with INTELSAT commercial decisions described above that include development and pricing of services. The services and their prices are reflected in INTELSAT IUCs. However, U.S. carriers and users would pay IUC rates in order to take service from INTELSAT under Level 3 direct access.

106. Because immunity for the same activities extend to both Comsat and INTELSAT, we conclude that permitting Level 3 direct access in the United States is not likely to lead to any additional competitive distortions in the U.S. market for international services than already exists as a result of Comsat's provision of INTELSAT services in the U.S. market. Level 3 direct access customers would use the same services over the same facilities that result from commercial decisions for which both INTELSAT and Comsat are immune. These services are provided at IUC rates to direct access customers pursuant to standard agreements. Only if INTELSAT engages in additional commercial activities -- such as marketing to U.S. carriers services outside the terms of IUC rates -- could the current competitive situation possibly be further distorted. Any such activities, however, are consistent with that which Comsat performs in its common carrier role and for which it has no immunity.<sup>244</sup> We would expect INTELSAT to voluntarily waive its immunity to cover the direct marketing of services and negotiation of agreements with U.S. carriers that would lead to the provision of services and rates not included in IUC rates or pursuant to the service agreements different from what INTELSAT generally offers under Level 3 direct access.<sup>245</sup> We believe that this approach is consistent with our *DISCO II* decision in which we precluded Comsat from entering the U.S. domestic satellite market without a waiver of its privileges and immunities.<sup>246</sup> Here, we permit Level 3 direct access only for services to and from the United States, and not for domestic service within the United States.

107. Comsat contends that its immunity as a Signatory can be distinguished because it allegedly does not involve marketplace conduct and is subject to government instruction. We have previously rejected this argument.<sup>247</sup> Comsat's Signatory role entails substantial commercial decisions and

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<sup>243</sup> See *DISCO II*, 12 FCC Rcd at 24149.

<sup>244</sup> See above discussion on Level 1 and Level 2 direct access arrangements. As noted above, Level 3 direct access would also allow customers to receive operational and technical information and meet with INTELSAT staff regarding capacity availability and tariff matters. However, these functions do not entail negotiations for new services and rates.

<sup>245</sup> INTELSAT normally waives its immunities when entering into contracts or other commercial relationships, including procurement of satellites and financial arrangements with banks and financial institutions.

<sup>246</sup> *DISCO II*, 12 FCC Rcd at 21149.

<sup>247</sup> *Comsat Non-Dominant Order*, 13 FCC Rcd at 14161-14163; See also *DISCO II*, 12 FCC Rcd at 21149.

activities that are necessary and common to participation in the market place. The government instructional process was neither designed nor is it capable of supplanting the antitrust law as a deterrent to anti-competitive behavior. The instructional process is intended to assure fulfillment of U.S. policy goals under the Satellite Act of 1962.<sup>248</sup>

108. Finally, the provisions of the recently passed amendments to the Foreign Corrupt Practices Act ("the Anti-Bribery Act") cited by PanAmSat do not appear relevant to this proceeding.<sup>249</sup> The Anti-Bribery Act amends the Securities Exchange Act of 1934 and the Foreign Corrupt Practices Act of 1977 to implement the OECD "Convention on Combating Bribery to Foreign Officials in International Business Transactions." The law includes Section 5, entitled "Treatment of International organizations providing Commercial Communications Services." Section 5 subjects INTELSAT to provisions of the Securities Exchange Act and Foreign Corrupt Practices Act until the President certifies they have been privatized in a pro-competitive manner. Section 5 also states that INTELSAT and Inmarsat shall not be accorded immunity from suit or legal process, except as required by international agreements to which the United States is a party. It requires the President to "expeditiously take full appropriate actions necessary to eliminate or to reduce substantially" all privileges and immunities of INTELSAT and Inmarsat not eliminated by the section (that is, privileges and immunities that remain as a result of existing international agreements). The President is to determine which agreements constitute international agreements for purposes of the section. In this proceeding the Commission is not authorized to make that determination.

(c) Immunity from Commission Jurisdiction over Rates and Practices

109. As an intergovernmental organization, INTELSAT is not subject to the jurisdiction of any national regulatory authority. In our *Notice* in this proceeding, we requested comments as to the potential effect on competition in the U.S. market in view of INTELSAT's immunity from Commission jurisdiction over rates and practices. We asked whether our authority to license earth stations pursuant to the *DISCO II* regulatory structure would be a sufficient means of overseeing INTELSAT direct access operations in the U.S. market, or whether other regulatory protections might have to be imposed.<sup>250</sup>

110. PanAmSat responded that, if we permit direct access in the United States, we should treat INTELSAT as any other similarly situated carrier, requiring it to file Title III applications with appropriate fees, subjecting it to Title II dominant carrier regulation with cost based tariff filing requirements, and enforcing our *DISCO II* "no special concessions policy."<sup>251</sup> Columbia requests that we require INTELSAT to demonstrate that its provision of services directly to U.S. customers will not

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<sup>248</sup> See *Communications Satellite Corporation*, 3 FCC Rcd 7108, 7109 (1988).

<sup>249</sup> International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366 (1998).

<sup>250</sup> *Notice*, 13 FCC Rcd at 22041.

<sup>251</sup> PanAmSat comments at 8.

have an adverse impact on competition.<sup>252</sup> Columbia contends that INTELSAT only would be able to make such a demonstration upon privatization. And Columbia contends that Commission earth station licensing authority would be inadequate to assure no competitive harm results in the U.S. market.<sup>253</sup>

111. INTELSAT, in response to PanAmSat, states that it does not operate as a carrier providing communications services, but "provides space segment required for international public telecommunications services" to Signatories and direct access users.<sup>254</sup> INTELSAT also points out that it is not subject to Commission regulatory procedures with respect to use of orbital location and frequencies.<sup>255</sup> MCI WorldCom contends that the Commission has statutory authority to regulate and impose any needed license conditions on the U.S. entities that have direct access to INTELSAT.<sup>256</sup> Ellipso points out that the Commission has the right to withdraw direct access if it results in anti-competitive practices by INTELSAT.<sup>257</sup>

112. We disagree with PanAmSat that we should apply the full panoply of Commission regulatory authority to INTELSAT if we permit direct access in the United States. We decided in our *DISCO II* decision to permit foreign satellites to access the United States through earth station licenses.<sup>258</sup> Our authority over earth station licensing provides the means by which to protect competition in the U.S. market. This is an approach readily applicable to INTELSAT in connection with direct access. Additionally, there is no basis for imposing common carrier regulation on INTELSAT. INTELSAT's operation as a provider of space segment capacity is a role similar to that of PanAmSat and other competing U.S. satellite systems. PanAmSat and other U.S. competing systems are not required to operate as common carriers.<sup>259</sup> Nor do we impose common carrier regulation on non-U.S. licensed satellite operators providing service in the United States. PanAmSat provides no convincing argument why INTELSAT should be treated any differently if U.S. customers choose to obtain services directly from INTELSAT via Level 3 direct access. As MCI WorldCom noted, U.S. carriers obtaining service through Level 3 direct access will continue to be subject to the Commission's Title II jurisdiction.

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<sup>252</sup> Columbia comments at 6.

<sup>253</sup> *Id.* at 6-7.

<sup>254</sup> INTELSAT reply comments at 7, citing the INTELSAT Operating Agreement, 23 U.S.T. 4091.

<sup>255</sup> *Id.* at 6, citing the INTELSAT Agreement.

<sup>256</sup> MCI WorldCom comments at 21-22.

<sup>257</sup> Ellipso comments at 11.

<sup>258</sup> *DISCO II*, 12 FCC Rcd at 24174.

<sup>259</sup> *Establishment of Satellite Systems Providing International Communications*, 101 FCC 2d 1046 (1985), *recon.*, 61 Rad. Reg. 2d (P&E) 649 (1986), *further recon.*, 51 Fed. Reg. 17631 (1986) (summary only), *further recon.* 1 FCC Rcd 439 (1986).

113. We recognized in *DISCO II* that use of the INTELSAT system in the United States for international services is grounded in the policies of the Satellite Act, and concluded that we would continue to consider applications by Comsat to provide international services via INTELSAT on a case by case basis.<sup>260</sup> In view of our findings above as to the limited effect of INTELSAT's immunities on the U.S. market under a direct access regime, and the need for INTELSAT to voluntarily waive these immunities in any situations in which it chooses to provide services not covered by IUC rates, we believe that we can protect competition in the U.S. market through our earth station licensing authority. We have the additional means through the U.S. government instructional process to require Comsat to inform INTELSAT that direct access must be discontinued in specific instances where competition problems arise. We therefore do not find it necessary, as Columbia contends, to await privatization of INTELSAT before allowing it direct access to the U.S. market.

(d) Immunity from Taxation

114. Comsat argues that INTELSAT's tax-exempt status under U.S. law would distort competition in the United States market since INTELSAT would enjoy an artificial cost advantage over Comsat and other U.S. satellite providers. Specifically, Comsat asserts that INTELSAT's exemption from property taxes, payroll taxes, corporate income taxes, and customs duties allows it to pass along cost savings in the form of artificially lower rates.<sup>261</sup> Because of this cost advantage, INTELSAT would likely capture business from other U.S. providers of space segment capacity, irrespective of whether INTELSAT is truly the most efficient services provider.<sup>262</sup> Columbia argues that the Commission should require INTELSAT to remove its tax exempt status from local, state, and federal taxes on its revenues, as well as assets, before offering Level 3 direct access service to U.S. users.<sup>263</sup>

115. We agree that direct access might create a temporary competitive distortion by allowing INTELSAT to provide service to U.S. users while being exempt from income taxes. However, we believe that U.S. customers of INTELSAT capacity and ultimately final consumers will gain from obtaining direct access to INTELSAT at low prices. Furthermore, by virtue of its treaty with the U.S., INTELSAT is exempt from U.S. taxes and the U.S. does not have authority to impose such taxes on INTELSAT. We are not aware of any other country in which INTELSAT pays taxes, and yet we have noted that 94 other countries permit direct access and that most of them do not impose any surcharge above the IUC for direct access. Hence, those countries have apparently found that allowing INTELSAT to have direct access even though it does not pay taxes does not raise problems sufficient to require either a tax surcharge or to prevent direct access. Thus, we do not see why INTELSAT's tax immunity in the U.S. should be sufficiently worrisome to either deny direct access or to cause us to require a surcharge payment to Comsat for taxes. In addition, when INTELSAT is privatized, it

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<sup>260</sup> *DISCO II*, 12 FCC Rcd at 24149.

<sup>261</sup> Comsat comments at 62.

<sup>262</sup> *Id.* at 63.

<sup>263</sup> Columbia comments at 8.



will become subject to taxes just like any other company doing business in the United States or the country in which it is incorporated.

116. We do not believe it would be appropriate to adjust for INTELSAT's immunity from taxes by adding a surcharge for those taxes that would be payable to Comsat. The only appropriate adjustment for INTELSAT's tax immunity would be for it voluntarily to make payments in lieu of taxes to the appropriate federal and state taxing authorities, something which it has not agreed to do. Because we view any competitive distortion as being small, and of short duration, and because we believe the benefits of direct access far outweigh the costs, we are authorizing direct access without requiring a surcharge for taxes.

#### (5) Fresh Look

117. A number of proponents of direct access ask that the Commission permit a "fresh look" at long term carrier contracts between Comsat and AT&T and MCI WorldCom for the acquisition of INTELSAT space segment capacity.<sup>264</sup> Fresh look would allow these carriers to either renegotiate or terminate those contracts in view of the availability of direct access to INTELSAT. Fresh look proponents contend that the full benefits of direct access will not be achieved if AT&T and MCI WorldCom remain bound by contractual obligations secured by Comsat when it was the only provider of INTELSAT service in the United States.<sup>265</sup>

118. The Commission has permitted the extraordinary remedy of fresh look in limited circumstances, to promote consumer choice and eliminate barriers to competition in markets where long-term business arrangements have essentially "locked up" service with a former monopoly telecommunications carrier. For example, the Commission initially applied fresh look in the *800 Portability Order*,<sup>266</sup> where it allowed AT&T customers to terminate inbound 800 service from AT&T without termination liability within 90 days of 800 numbers becoming portable. This prevented AT&T from leveraging its market power in 800 service to sell other services to its customers. As a further example, the Commission also permitted fresh look in the *Special Access Expanded Interconnection Order*, which permitted special access customers to terminate certain long-term special access arrangements with LECs if those customers wish to obtain the benefits of new, more competitive alternatives. There, the Commission recognized that previously established long-term access arrangements would prevent customers from obtaining benefits of the new, more competitive interstate access environment.

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<sup>264</sup> AT&T comments at 13-14; ECG comments at 6; GlobeCast Reply at 5-6; ICG comments at 6; Loral Orion comments at 8; MCI comments at 24-28 and reply at 13-14; Network reply at 20; PanAmSat comments at 9-10; and Sprint comments at 10-13.

<sup>265</sup> AT&T comments at 14-15. MCI WorldCom comments at 27-28.

<sup>266</sup> Comsat reply at 59. See also *Special Access Expanded Interconnection Order*, 8 FCC Rcd at 7342 and 7346-7348.

119. In applying the fresh look doctrine in these instances, the Commission considered: (1) whether the entity holding the long-term contracts has market power and has exercised that power to create long term contracts to "lock up" the market in such a way so as to create unreasonable barriers to competition; and (2) whether the contractual obligations can be nullified without harm to the public interest.

120. Fresh look proponents argue that a direct access policy meets these standards because: (1) Comsat's provision of INTELSAT would have been open to competition through direct access; and (2) pre-existing contracts or arrangements would prevent customers from obtaining the benefits of direct access, thus inhibiting the development of a competitive market.<sup>267</sup> With elimination of Comsat's *de facto* monopoly on the provision of INTELSAT space segment service in the United States, fresh look would allow customers to break their commitment to long-term contracts offering terms that are much less favorable than those under direct access.<sup>268</sup> Absent fresh look they contend that full competition will unlikely develop until after these contracts expire, which extend up to 15 years.<sup>269</sup> They also contend that Commission implementation of fresh look in this proceeding would be consistent with its previous decisions in the *800 Portability Order* and *Special Access Expanded Interconnection Order*.<sup>270</sup>

121. Comsat opposes the adoption of fresh look.<sup>271</sup> Comsat argues that prior Commission decisions allowing fresh look are inapplicable here and that the proponents of fresh look do not demonstrate that the criteria established by the Commission in applying fresh look in previous instances have been satisfied. Comsat states that the first test is not met because the Commission has determined that it lacks market power in most markets and that courts have also found that Comsat lacked power to compel carriers to enter into long term agreements.<sup>272</sup> Comsat argues that the second test is not satisfied because imposing fresh look will not serve the public interest. First, Comsat argues that negating these contracts would undermine its own and INTELSAT's planning and procurement of the global satellite system, since this planning was based on customer commitments under these long-term contracts. It also contends that eliminating these contracts would also undermine the benefits that these contracts have served in helping lower prices for all customers.

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<sup>267</sup> Loral comments at 8.

<sup>268</sup> MCI WorldCom comments at 25-26.

<sup>269</sup> *Id.* at 28.

<sup>270</sup> See Loral comments at 8; MCI WorldCom comments at 26; and AT&T comments at 14.

<sup>271</sup> Comsat reply at 56. Comsat contends that because fresh look was not raised in the *Notice*, adoption would violate Administrative Procedure Act ("APA") procedures. See Administrative Procedure Act, 5 U.S.C. §§ 551-559. Comsat also maintains that Commission application of fresh look and portability, as discussed below, would constitute an unconstitutional taking. We do not address these contentions since we are not taking these actions in this proceeding.

<sup>272</sup> Comsat reply at 60-61.

122. Comsat also contends that prior decisions in which fresh look was granted suggest fresh look is not applicable here. Comsat states that fresh look was applied in the *Expanded Interconnection* proceeding because customers lacked competitive alternatives when they entered into contracts and required relief from their long-term obligations in order to be able to benefit from competition. In contrast, Comsat states that competitive alternatives to INTELSAT have been available for many years, and INTELSAT users have entered into alternative arrangements with fiber optic submarine cable operators as well as other space segment providers. Lockheed Martin states that fresh look was granted in the *800 Number Portability* proceeding so customers who were dependent on a specific 800 number could not be leveraged by AT&T into long-term commitments. Lockheed Martin states, in contrast to individualized 800 numbers, international satellite capacity is fungible.<sup>273</sup>

123. AT&T and MCI WorldCom entered into contracts with Comsat that expire in 2003.<sup>274</sup> The contracts provide AT&T and MCI WorldCom with discounted rates for space segment capacity over Comsat's regular rates. The contracts represent approximately 50 percent of Comsat's revenues from the provision of INTELSAT service. We recognize that these long-term contracts prevent these carriers from taking full advantage of the benefits of direct access for that traffic already committed to long-term contracts. We find, however, that permitting Level 3 direct access does not meet the standards for applying fresh look.

124. Proponents of fresh look fail to meet the first test because the contracts have not "locked up" the market to such an extent that they create unreasonable barriers to competition. In the *Comsat Non-Dominant Order*, we noted that Comsat estimates that the three contracts represent approximately 25 percent of the U.S. switched voice service market. On a global basis Comsat now accounts for no more than a 15 percent average global market share of the transmission capacity utilized for switched-voice and private line services. This relatively low market share suggests that these long-term contracts have not acted as a barrier to further competition through fiber optic cable and satellite alternatives. While we found in the *Comsat Non-Dominant Order* that Comsat continues to be dominant in 63 thin route countries for switched voice and private line service, there is no evidence on the record in this proceeding to conclude that the existence of Comsat's long-term contracts create an unreasonable barrier to competition in these markets.<sup>275</sup> We noted in the *Comsat Non-Dominant Order*, that the contracts only obligate AT&T and MCI WorldCom to transmit part of their international switched voice traffic using Comsat. We confirmed an earlier finding that Comsat's switched voice customers possessed significant bargaining power giving them the flexibility to route a significant portion of their switched voice traffic to their own transmission facilities or those of alternative carriers as they choose.<sup>276</sup>

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<sup>273</sup> Lockheed Martin reply at 15-16.

<sup>274</sup> Agreement between AT&T and Comsat executed July 27, 1993, as amended; Agreement between Comsat and MCI executed April 8, 1993, as amended.

<sup>275</sup> *Comsat Non-Dominant Order*, 13 FCC Rcd at 14141-14149. See also *infra* Appendix A.

<sup>276</sup> *Comsat Non-Dominant Order* at 13 FCC Rcd at 14121.

125. We also find that the public interest is not served by nullifying MCI WorldCom and AT&T contractual obligations to Comsat. The long-term contracts between AT&T, MCI WorldCom and Comsat represent the current agreements that resulted from our 1988 decision to eliminate imposition of circuit distribution guidelines on AT&T's use of international transmission circuits in undersea cable and satellite facilities.<sup>277</sup> The purpose of the guidelines had been to require U.S. international carriers to use INTELSAT in order to assure fulfillment of the objective of the Communications Satellite Act of 1962 -- establishment and operation of a global communications satellite system. Until 1988, the Commission required substantial use of INTELSAT by AT&T and other carriers which also had investment interests in submarine cables. It abandoned this policy in favor of long-term contracts between Comsat and U.S. carriers that assured continued use of INTELSAT based on carrier need, free of regulatory interference. Reliance on long-term contracts *in lieu* of circuit distribution guidelines was jointly proposed by Comsat and AT&T, supported by other carriers and by the Executive Branch.<sup>278</sup> Accordingly, these contracts have been the basis for Comsat to in turn make commitments to INTELSAT on the acquisition of space segment capacity to be used to fulfill capacity requirements under the contracts. In view of this history, we will not apply fresh look to these contracts. AT&T and MCI WorldCom entered into them on their own accord based on business judgment, their benefit in terms of the elimination of a Commission policy they found undesirable, and for the ability to obtain discounted rates for commitments to purchase capacity over a period of years. Direct access clearly will result in significant additional benefits to U.S. carriers in use of INTELSAT. Therefore, we do not believe it would be reasoned decision-making to upset previous commitments freely entered into by all parties that formed the basis of a change in longstanding Commission policy. The historical basis for these contracts makes the issue before us here distinguishable from other instances in which we imposed fresh look.

#### (6) Portability

126. MCI WorldCom and Sprint ask the Commission to require portability of the INTELSAT space segment capacity controlled by Comsat.<sup>279</sup> They argue that portability is needed to ensure that commitments for space segment capacity between Comsat and INTELSAT do not impair the implementation of direct access because Comsat has ownership of the vast majority of INTELSAT capacity accessible by U.S. users. Without direct access carriers and users being able to obtain sufficient space segment capacity to provide INTELSAT services, Comsat will maintain its *de facto* monopoly status. MCI WorldCom states that requiring portability is consistent with the Commission's obligation under the Satellite Act to "ensure that all present and future authorized carriers shall have

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<sup>277</sup> See *Policy for the Distribution of United States International Carrier Circuits Among Available Facilities during the Post-1988 Period*, 3 FCC Rcd 2156 (1988) ("*Circuit Distribution Decision*").

<sup>278</sup> *Circuit Distribution Decision* at 2157.

<sup>279</sup> MCI WorldCom comments at 29-30 and reply at 14; Sprint comments at 13. "Portability" refers to the right of a current customer of Comsat to obtain the transponder capacity it currently receives through Comsat and use it under a direct access to INTELSAT regime.

nondiscriminatory use of, and equitable access to" INTELSAT.<sup>280</sup> It contends that portability of INTELSAT capacity is even more essential than number portability for local telephone service because a direct access customer cannot operate at all without availability of INTELSAT capacity.<sup>281</sup>

127. Comsat opposes the Commission consideration of portability because the issue was not raised in the *Notice*, and thus would violate APA procedures.<sup>282</sup> Comsat also maintains that since there is no factual case for fresh look, by definition there is no case for portability either.<sup>283</sup> Both Comsat and Lockheed Martin note that portability has not been required in other countries where direct access has been authorized. While INTELSAT has established procedures for direct access, nowhere in these procedures are applicants for direct access permitted to assume a right to the existing capacity allotments of Signatories.<sup>284</sup> Comsat states that portability would mean that Comsat would be forced to surrender INTELSAT capacity which it has already reserved for its own use under long-term "take or pay" contractual commitments to INTELSAT. Comsat states that neither the Commission nor any other national regulatory authority has the ability to abrogate the service arrangements between INTELSAT and its Signatories.<sup>285</sup> Finally, Comsat argues that other cases of portability are not comparable. It asserts that 800 number portability and local number portability are not similar to direct access, as capacity on INTELSAT satellites is entirely fungible with capacity on rival satellite or cable systems.<sup>286</sup>

128. We find that the record in this proceeding does not support at this time requiring the portability of INTELSAT space segment capacity controlled by Comsat. The proponents of portability have provided no evidence to support their contention that INTELSAT will be unable to provide sufficient capacity to U.S. direct access customers. Absent evidence that INTELSAT has insufficient capacity, we do not wish to interfere with Comsat's service agreements with INTELSAT. We would, however, be concerned if Comsat control of INTELSAT space segment capacity effectively denies U.S. carriers and users the benefits of direct access, or if Comsat moves to increase its control of INTELSAT capacity in order to deny availability of capacity to U.S. direct access users. We therefore may revisit this issue if there is evidence of insufficient capacity available to direct access customers or that Comsat is using its Signatory status to buy future or additional INTELSAT space segment capacity without any U.S. customer requirements. If INTELSAT capacity proves insufficient to serve U.S. direct access user needs because Comsat acquires capacity available for U.S. service, direct access users should first pursue commercial solutions with Comsat to resolve the matter. We would entertain

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<sup>280</sup> MCI WorldCom comments at 29, *citing* 47 U.S.C. § 201(c)(2).

<sup>281</sup> MCI comments at 30.

<sup>282</sup> Comsat reply at 5 and 56.

<sup>283</sup> *Id.* at 57.

<sup>284</sup> Lockheed Martin reply at 17.

<sup>285</sup> Comsat reply at 65.

<sup>286</sup> *Id.* at 64-65.

petitions for a regulatory solution if commercial solutions are unavailable and the full benefits of direct access are denied to U.S. users of INTELSAT. We also would entertain such petitions if the benefits of direct access are denied to U.S. users following privatization of INTELSAT.

**(7) Potential Effects on INTELSAT Privatization**

129. INTELSAT is now in the process of deciding whether and how to change from an intergovernmental cooperative to a private commercial enterprise. Privatization is a goal supported by the United States. The parties in this proceeding express firm support for privatization. Some parties, however, contend that Commission action permitting direct access would undermine U.S. efforts to privatize INTELSAT and state that, in any event, privatization will achieve the goals that we are seeking in this proceeding. Other parties dispute these contentions and urge us to move forward with direct access. INTELSAT regards direct access in the United States as a domestic matter and therefore does not take a position on whether the United States should permit direct access. It firmly states, however, that privatization "will continue to proceed on an accelerated basis, in all circumstances."<sup>287</sup>

130. Comsat and Lockheed Martin both maintain that Commission action permitting Level 3 direct access would place in jeopardy the U.S. policy goal to privatize INTELSAT. Comsat argues that: (1) direct access is the principle leverage the U.S. has in the privatization process; (2) U.S. carriers taking advantage of direct access could directly influence the privatization process in favor of their cable interests; and (3) non-compensatory prices attributable to direct access users may require Comsat to reduce its current investment share and lose influence in INTELSAT.<sup>288</sup> Lockheed Martin maintains that we should only go forward with direct access if such action would help secure a pro-competitive restructuring of INTELSAT, and argues Commission action permitting direct access would have a deleterious impact on U.S. efforts to achieve this end.<sup>289</sup> Lockheed Martin urges that we not pursue direct access, but rather use the record developed in this proceeding to refine U.S. objectives with respect to INTELSAT privatization.<sup>290</sup> Columbia also contends that INTELSAT's access to the U.S. market provides the U.S. leverage in privatization discussions which should not be given to INTELSAT until it completes the process of privatizing in a manner that does not distort competition.<sup>291</sup>

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<sup>287</sup> INTELSAT reply at 8.

<sup>288</sup> Comsat comments at 69-73; See also "An Economic Assessment of the Risks and Benefits of Direct Access," prepared for Comsat by Professors Jerry R. Green and Hendrick S. Houthakker, Harvard University and Johannes P. Pfeflenberger, the Brattle Group, December 21, 1998, at 17-21.

<sup>289</sup> Lockheed Martin comments at 14; reply comments at 7-10.

<sup>290</sup> *Id.* at 16.

<sup>291</sup> Columbia comments at 8.

131. Other parties contend that Commission action permitting direct access would not adversely affect efforts to privatize INTELSAT. They state that they support privatization of INTELSAT and collectively argue that: (1) direct access in the United States would not be inconsistent with nor delay privatization; (2) Comsat's influence in INTELSAT would not be reduced and may be increased as a result of Level 3 direct access; (3) claims that other INTELSAT signatories may forego support for privatization if direct access becomes available in the United States are unsupported and speculative; (4) initiation of direct access in the United States may speed up privatization; (5) claims that U.S. carriers would have incentive to influence INTELSAT to delay privatization are misplaced in view of the additional benefits privatization will entail; and (6) the only result of delaying direct access pending future privatization would prolong Comsat's current monopoly and deny U.S. carriers and users the benefits of direct access available in other countries.<sup>292</sup>

132. INTELSAT asserts that its Management and Board of Governors "are actively considering, on an accelerated basis, options for continued restructuring and privatization."<sup>293</sup> INTELSAT has been making significant progress toward privatization since the closing of the formal pleading in this proceeding on January 29 of this year. In March, the INTELSAT Board of Governors authorized INTELSAT Management to focus on privatization as opposed to non-privatization restructuring options and prepare detailed analysis of privatization options to be presented at the June Board meeting.<sup>294</sup> In April, the INTELSAT Meeting of Signatories endorsed the Board's continuing focus on privatization options. The Meeting of Signatories confirmed the need for INTELSAT to restructure as early as possible, and requested the Board to perform studies that will enable it to select in September 1999 a single restructuring option for recommendation to the October 1999 Assembly of Parties meeting. At its June meeting, the Board and INTELSAT management committed to an intensive multi-level schedule focused on fleshing out a "corporate" structure and developing a detailed business plan for the September 1999 Board of Governors meeting.<sup>295</sup>

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<sup>292</sup> See AT&T reply comments at 14; BT North America reply comments at 25-26; Ellipso comments at 12-13; GE American comments at 12-14 and reply comments at 10-11; Globecast reply comments at 5; ICG reply comments at 8-9; MCI comments at 23-24 and reply comments at 25-27; and Network reply comments at 11-12. See also letter from Satellite Users Coalition (AT&T, MCI Worldcom and Sprint) dated May 21, 1999 attaching testimony of AT&T, MCI Worldcom and Sprint submitted to the Senate Committee on Commerce, Science, and Transportation, Subcommittee on Communications, dated April 30, 1999; and letter on behalf of BT North America, dated May 3, 1999, attaching testimony of BT submitted to the Senate Committee on Commerce, Science, and Transportation, Subcommittee on Communications, dated March 25, 1999.

<sup>293</sup> INTELSAT reply comments at 8.

<sup>294</sup> Comsat Report to the U.S. Government on the 126th Meeting of the INTELSAT Board of Governors, March 29, 1999.

<sup>295</sup> Comsat Report to the U.S. Government on the 127th Meeting of the INTELSAT Board of Governors, June 23, 1999.

133. INTELSAT's Director General has made it clear that "it is global market forces that compel commercialization and privatization of INTELSAT" and that "privatization should go forward because it is necessary for INTELSAT's survival in the increasingly competitive market that we face."<sup>296</sup> The United Kingdom Signatory representative, who served as the Board of Governors Chairman from June 1998 to June, 1999 states that "direct access and privatization are separate issues," and that he is "not aware of any evidence suggesting that these issues are linked in the records of any other INTELSAT Signatory or Party."<sup>297</sup> He further states:

BT strongly believes that implementation of direct access in the United States would send a positive signal to INTELSAT members regarding the whole privatization process. With over 90 countries having already implemented some form of direct access, there is considerable confusion around the world regarding the apparent reticence of the United States to do likewise. The overall U.S. policy approach and recent WTO commitments favoring open markets and competitive provision of telecommunications facilities and services only serve to underline this confusion.<sup>298</sup>

Finally, in testimony before Congress, the Administration, while noting early statements by some Signatories that privatization may be less urgent if direct access becomes available in the United States, believes "the overall risk to privatization is small."<sup>299</sup>

134. The record before us, however, provides no credible basis to conclude that permitting Level 3 direct access in the United States to U.S. carriers and users unaffiliated with INTELSAT Signatories will slow down or otherwise adversely affect the progress being made toward INTELSAT privatization. There is nothing in either the Board or Meeting of Signatories record of decisions that indicates that progress toward this goal would cease if direct access becomes available to users in the United States to U.S. entities. Nor do we agree with Comsat that Level 3 direct access somehow will imbue U.S. carriers with such influence within INTELSAT that they will be able to threaten the privatization process. U.S. carriers have made clear their support for privatization of INTELSAT -

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<sup>296</sup> Testimony of Conny Kullman, Director General and CEO of INTELSAT, before Senate Committee on Commerce, Science and Transportation, Subcommittee on Communications, March 25, 1999 at 3.

<sup>297</sup> See March 28, 1999 Testimony of Richard Vos, British Telecommunications at 3.

<sup>298</sup> *Id.*

<sup>299</sup> See Statement of Administration Position by Ambassador Vonya B. McCann, United States Coordinator, International Communications and Information Policy, Department of State, before Senate Committee on Commerce, Science and Transportation, Subcommittee on Commerce, dated March 25, 1999, at p.5. At the September 1998 Board of Governors meeting, a few signatories, with small investment shares in INTELSAT, made statements linking direct access and privatization. These comments have not since then been repeated and signatories have supported subsequent Board and Meeting of Signatories decisions to develop privatization recommendations for the Assembly of Parties.



based on the benefits they foresee from privatization. Comsat presents no convincing evidence that the cable interests of U.S. carriers would give them incentive to act inconsistently with their public statements. Signatories within INTELSAT also have cable investment interests and, as we have described, are supporting INTELSAT privatization. Moreover, even if U.S. carriers had both the incentive and opportunity, it is doubtful that they could successfully harm the privatization process given the support for privatization by INTELSAT, its Signatories and the U.S. government including the Executive Branch and this Commission.<sup>300</sup>

135. In addition, we reject Comsat's argument that Level 3 direct access to U.S. carriers and service providers may require Comsat to reduce its ownership share in INTELSAT as a result of non-compensatory costs and therefore lose influence in the organization. First, as discussed above, we are providing for a surcharge to enable Comsat to recover Signatory-related costs not recoverable through INTELSAT's Level 3 direct access regime. Second, Level 3 direct access may result in an increase in Comsat's voting share on the Board of Governors if it results in an increase in overall U.S. traffic on INTELSAT. This is because all INTELSAT traffic generated by U.S. direct access users would be attributed to Comsat for purposes of voting on the Board of Governors as the U.S. Signatory. To the extent direct access promotes additional use of INTELSAT for U.S. traffic beyond Comsat's current proportionate use of capacity, Comsat's voting power on the Board would increase. Comsat recently increased its ownership share in INTELSAT beyond the level of ownership that would be attributable to U.S. traffic generated over INTELSAT,<sup>301</sup> with the expectation of "a strong return on this investment."<sup>302</sup>

136. Additionally, we do not agree with Lockheed Martin that the appropriate standard for permitting direct access is whether it will help secure a pro-competitive privatization of INTELSAT. The appropriate standard is the public interest. We have found that there would be public interest benefits in permitting Level 3 direct access. We are also unpersuaded by Lockheed Martin's argument that we can best achieve our policy goals in this proceeding through the INTELSAT privatization process.<sup>303</sup> We believe that a privatized INTELSAT should be free to provide service to U.S. carriers and users, as well as to enter into non-exclusive, non-preferential distribution agreements as may be

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<sup>300</sup> The Administration is on record as favoring privatization and Congress is considering legislation requiring privatization. See Statement of Administration Position, March 25, 1999.

<sup>301</sup> The INTELSAT Operating Agreement permits Signatories to invest in INTELSAT beyond their utilization rate in the system to cover investment that other Signatories do not desire to take up based on their usage share. See INTELSAT Operating Agreement, Article 6.

<sup>302</sup> Comsat News Release, "Comsat Increases Ownership of INTELSAT System," dated March 30, 1999, quoting statement from Betty C. Alewine, President and CEO, Comsat Corporation.

<sup>303</sup> Lockheed Martin reply at 3.

commercially appropriate.<sup>304</sup> Access to the system is an issue that will be subject to negotiation as privatization discussions in INTELSAT move forward. There is no reason, however, to deny U.S. carriers and users the benefits they may find available at this time through Level 3 direct access under the terms we are outlining in this decision. We conclude that U.S. customers should not have to wait to exercise this choice.

## B. Legal Issues

137. The *Notice* also requested comment on two legal tentative conclusions that: (1) the Commission has authority to permit United States carriers and users Level 3 direct access to INTELSAT; and (2) that exercising our discretion to permit direct access would not violate the "takings" provision of the Fifth Amendment. In light of the record developed in this proceeding on those issues, we affirm the tentative conclusions reached in our *Notice*.

### (1) Commission Authority Under the Satellite Act of 1962

#### (a) Background

138. The Satellite Act declares it the policy of the United States to establish a commercial communications satellite system with global coverage "in conjunction and in cooperation with other countries."<sup>305</sup> It directs that "care and attention" be directed toward providing services to economically less developed countries and areas, as well as more highly developed countries.<sup>306</sup> The Satellite Act provides that "United States participation in the global system shall be in the form of a private corporation subject to appropriate government regulation."<sup>307</sup> That corporation -- Comsat -- is required to "be so organized and operated as to maintain and strengthen competition in the provision of communications services to the public."<sup>308</sup> The Satellite Act also requires that "all authorized users have nondiscriminatory access to the system"<sup>309</sup> and that authorized carriers have "nondiscriminatory use of and equitable access to the satellite system."<sup>310</sup>

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<sup>304</sup> INTELSAT currently is studying options for distribution of INTELSAT services in national markets. It has made no decisions as to a variety of issues associated with distribution agreements.

<sup>305</sup> 47 U.S.C. § 701(a). The *Notice* also reviewed the basic provisions of the Satellite Act, which we incorporate by reference. *See Notice*, 13 FCC Rcd at 22022-22024.

<sup>306</sup> 47 U.S.C. § 701(b).

<sup>307</sup> 47 U.S.C. § 701(c).

<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> 47 U.S.C. § 721(c)(2)

139. Additionally, the Satellite Act requires the Commission to exercise certain regulatory functions over Comsat in its administration of the Communications Act, as supplemented by the Satellite Act. Specifically, it empowers the Commission to "make rules and regulations to carry out the provisions of the Satellite Act."<sup>311</sup> The Commission is required to ensure carriers nondiscriminatory use of and equitable access to the system, and regulate the manner in which available facilities are allocated to such uses.<sup>312</sup> The Commission also is to "prescribe such ratemaking procedures as will ensure that any economies made possible by a communications satellite system are appropriately reflected in rates for public communication services."<sup>313</sup>

140. The *Notice* stated that the Satellite Act clearly created Comsat to undertake the role as the United States participant in the global satellite system that became INTELSAT -- that role consisting of Comsat's governance and investment in the INTELSAT system. We tentatively found in our *Notice* that: (1) Level 3 direct access would not be inconsistent with Comsat's role as sole U.S. participant in the global system;<sup>314</sup> (2) provisions in the Satellite Act that authorize Comsat to undertake certain activities, including furnishing "for hire channels of communication," is not expressed in terms of exclusivity;<sup>315</sup> (3) it is the Federal Communications Commission and not Comsat that is mandated by the Satellite Act to insure "non-discriminatory use of, and equitable access to" the global satellite system;<sup>316</sup> (4) neither the language nor legislative history of the Satellite Act mandate that Comsat be the sole provider of access to the satellite system;<sup>317</sup> and (5) permitting Level 3 direct access in the United States would be a permissible exercise of Commission discretion under the

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<sup>311</sup> 47 U.S.C. §§ 721(c)(4) and (c)(11). In addition, the Satellite Act places additional requirements on the Commission to: (1) ensure competitive bidding in procurement for the system; (2) upon advice of the Secretary of State, institute proceedings under Section 214(d) of the Communications Act to require establishment of communications links to a foreign point; (3) ensure technical compatibility of system facilities with existing communications facilities; (4) approve system technical characteristics; (5) authorize construction and operation of satellite terminal stations; (6) authorize Comsat to issue capital stock, borrow money, or assume security obligations; (7) ensure that proposed additions to the system are in the public interest; and (8) in accordance with Section 214 of the Communications Act, require additions to the system where such additions would serve the public interest. See 47 U.S.C. § 721(c).

<sup>312</sup> 47 U.S.C. § 721(c)(2).

<sup>313</sup> 47 U.S.C. § 721(c)(5).

<sup>314</sup> *Notice*, 13 FCC Rcd at 22022.

<sup>315</sup> *Id.*

<sup>316</sup> *Id.* at 22024-22025.

<sup>317</sup> *Id.* at 22025. See 47 U.S.C. § 701 *et. seq.*

Satellite Act to insure "non-discriminatory use of and equitable access to" the system.<sup>318</sup> And we further tentatively found that permitting Level 3 direct access would serve the Satellite Act's purpose of promoting growth in communications between the United States and economically less developed countries by promoting competition and expanding user choice for services to those markets.<sup>319</sup> We tentatively concluded that we do not have authority to permit Level 4 direct access in view of Comsat's statutorily mandated role as the U.S. investor in the global satellite system under the Satellite Act.

141. Of the 18 parties submitting responses to the *Notice*, 13 support the tentative conclusion that we have authority under the Satellite Act to permit Level 3 direct access in the United States.<sup>320</sup> One - - Comsat -- disagrees with this tentative conclusion while four parties do not directly address the issue of Commission authority to permit direct access.<sup>321</sup>

142. Comsat maintains that: (1) it was created as the sole participant in INTELSAT and that role includes an exclusive franchise over access to the proposed satellite system,<sup>322</sup> (2) this exclusive franchise is vested through the language, structure, and context of the Satellite Act,<sup>323</sup> (3) the legislative history of the Satellite Act confirms that an exclusive franchise was granted,<sup>324</sup> (4) the Commission and courts have recognized this exclusive franchise,<sup>325</sup> and (5) contrary to our tentative finding in our *Notice*, the 1978 Maritime Satellite Act, which designates Comsat as the sole operating

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<sup>318</sup> *Notice*, 13 FCC Rcd at 22024-22025. See 47 U.S.C. § 721(c).

<sup>319</sup> *Notice*, 13 FCC Rcd at 22028-22029. See 47 U.S.C. § 701.

<sup>320</sup> The tentative conclusion is supported by AT&T, BT North America, C&W, Ellipso, GE Americom, Globecast, ICG, IT&E, Loral Orion, MCI WorldCom, Network, PanAmSat and Sprint.

<sup>321</sup> Lockheed Martin, Columbia, Three Angels and INTELSAT do not directly address the Commission's tentative conclusions here. Along with its comments, Comsat also filed an analysis of the Satellite Act and its history to support its contention that the Commission lacks authority to permit direct access. See "The FCC Lacks the Statutory Authority to Permit Level 3 Direct Access to the INTELSAT System," filed by Lawrence W. Secrest III, William B. Baker, and Rosemary C. Harold of Wiley Rein & Fielding (December 22, 1998) ("Comsat Legal Analysis"). We have also considered Comsat's various *ex parte* filings on these legal issues. We refer to both the comments and legal analysis discussing these issues.

<sup>322</sup> Comsat comments at 4-14; Comsat Legal Analysis at 13-41.

<sup>323</sup> Comsat comments at 15-23; Comsat Legal Analysis at 42-66.

<sup>324</sup> Comsat comments at 23-27; Comsat Legal Analysis at 13-41.

<sup>325</sup> Comsat comments at 28-29; Comsat Legal Analysis at 67-75.

entity for participation in Inmarsat, confirms that Congress intended in 1962 to grant Comsat an exclusive franchise over access to INTELSAT.<sup>326</sup>

143. The parties supporting our tentative conclusion generally agree that the Satellite Act confers upon Comsat the right to be the sole United States "participant" in the global satellite system that became INTELSAT.<sup>327</sup> There is disagreement, however, on the scope of Comsat's exclusive role. BT North America and C&W believe that exclusive participation is limited to Comsat's role as the U.S. government representative in INTELSAT, which includes participating on the Board of Governors, the Meeting of Signatories, and related functions. They assert that it does not include the right to exclusive ownership or investment in the INTELSAT system. They therefore urge us to reconsider our conclusion in the *Notice* that the Satellite Act does not authorize the allowance of Level 4 direct access.<sup>328</sup>

144. All of these parties agree with our tentative conclusion that the Satellite Act does not give Comsat exclusivity in access to the global satellite system, INTELSAT. They collectively contend that: (1) the plain language and context of the Act do not give Comsat exclusive access to INTELSAT;<sup>329</sup> (2) the legislative history of the Satellite Act does not support a conclusion that Comsat has exclusive access to the system;<sup>330</sup> (3) provisions in the Satellite Act requiring the Commission to ensure "non-discriminatory use of and equitable access to" the satellite system empower the Commission to permit Level 3 direct access;<sup>331</sup> (4) the Commission has discretion to permit direct access in the United States based on circumstances that exist today;<sup>332</sup> (5) the 1978 Maritime Satellite

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<sup>326</sup> Comsat comments at 30-32; Comsat Legal Analysis at 76-86. See 47 U.S.C. § 751.

<sup>327</sup> See 47 U.S.C. §§ 731-735.

<sup>328</sup> BT North America comments at 16 and C&W comments at 10; Globecast reply at 2-3. See also AT&T reply at 6-7; MCI WorldCom reply at 4-5.

<sup>329</sup> AT&T comments at 4-5; reply comments at 2-7; BT North America at 14-18; reply comments at 9-11; C&W comments at 6-7; Ellipso comments at 5; GE Americom comments at 4; Globecast comments at 2; ICG comments at 2-3; IT&E comments at 3; Loral Orion comments at 7; MCI WorldCom comments at 4; Network comments at 15-16 and reply comments at 3-4; PanAmSat reply comments at 2-3; Sprint comments at 3.

<sup>330</sup> AT&T reply at 8-11; BT North America reply at 12-13; GE Americom comments at 4-5 and reply at 3; IGC reply at 2; MCI WorldCom reply at 6-8; Network comments at 14-16 and reply at 4-6.

<sup>331</sup> AT&T comments at 3 and reply at 2-4; BT North America comments at 12-13; C&W comments at 7; GE Americom comments at 4; Globecast comments at 2; Loral Orion comments at 2; MCI WorldCom comments at 5-7 and reply at 4-6; Sprint comments at 4.

<sup>332</sup> AT&T comments at 2-3 and reply at 2-7; BT North America comments at 9-14 and reply at 5-9; C&W comments at 7; GE Americom comments at 4; Ellipso comments at 5-6; Globecast comments at 2; Loral Orion comments at 1; MCI WorldCom comments at 3-7 and reply at 6; Network comments at 15; PanAmSat comments at 3-4; Sprint comments at

Act confirms that Comsat was not granted exclusive access to the satellite system in 1962<sup>333</sup> and no previous Commission nor court decision has held that the Commission does not have authority under the Satellite Act to permit direct access.<sup>334</sup>

145. In construing whether the Satellite Act permits direct access to INTELSAT satellites from the United States by entities other than Comsat, we first look to the relevant language of the governing statute.<sup>335</sup> Analysis of the statutory language includes determining "whether Congress has spoken directly to the precise question at issue."<sup>336</sup> This inquiry may be characterized as a search for the plain meaning of the statute. If after "employing traditional tools of statutory construction . . . the intent of Congress is clear, that is the end of the matter."<sup>337</sup>

146. On the other hand, if "Congress has not directly addressed the precise question at issue" or "if the statute is silent or ambiguous with respect to the specific issue," the agency's interpretation should be "based on a permissible construction of the statute."<sup>338</sup> This inquiry is applicable in situations where Congress has not expressed itself unequivocally or where a specific provision is ambiguous. As to what would be a "permissible construction" of a statute, the courts have given

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<sup>333</sup> BT North America reply at 20-21; C&W comments at 7; Ellipso comments at 6; GE Americom comments at 5; ICG reply at 3-4; Network comments at 16.

<sup>334</sup> BT North America reply at 17-19; C&W comments at 7-8; GE Americom comments at 6-7; ICG reply at 4-5; MCI World Com comments at 6 and reply at 7-8; Network reply at 6-9; PanAmSat comments at 4; Sprint comments at 5-6.

<sup>335</sup> *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*").

<sup>336</sup> *Chevron*, 467 U.S. at 842.

<sup>337</sup> The traditional tools of statutory construction may include an examination of the statute's text, structure, purpose, and legislative history. See *Chevron* 467 U.S. at 842-43 (an agency must give effect to the "unambiguously expressed intent of Congress"). See also *Bell Atlantic Tele. Co. v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997) ("*Bell Atlantic*"); *Natural Resources Defense Council, Inc. v. Browner*, 57 F.3d 1122, 1125 (D.C. Cir. 1995) (quoting *Chevron*, 467 U.S. at 843 n.9); *Hammontree v. NLRB*, 894 F.2d 438, 441 (D.C. Cir. 1990) (deference by a court or regulatory agency would not be appropriate in this situation); *Southern Cal. Edison Co. v. Fed. Energy Regulatory Comm.*, 116 F.3d 507, 515 (D.C. Cir. 1997); *First Nat'l Bank & Trust Co. v. Nat'l Credit Union*, 90 F.3d 525, 529-30 (D.C. Cir. 1996). In *Bell Atlantic*, the Court indicated that legislative history may prove useful in determining if the text and purpose of the statute is clear. In that case, two provisions appeared unclear. Although the court concluded that the statutory provision at issue was ambiguous it referred to the legislative history in determining whether the Commission's interpretation of the ambiguous statutory provision was reasonable.

<sup>338</sup> *Chevron*, 467 U.S. at 843.

regulatory agencies the freedom to interpret them in a flexible manner.<sup>339</sup> However, the meaning of statutory language must be considered in the context of the whole statute.<sup>340</sup> "If the agency's reading fills a gap or defines a term in a reasonable way in light of the legislature's design . . . even if it is not the answer 'the court would have reached if the question initially had arisen in a judicial proceeding,' it will be upheld."<sup>341</sup>

(b) Text and Purposes of the Satellite Act

147. We first note that there is little disagreement among parties in this proceeding that United States "participation" in the global satellite system was intended to be through the private corporation -- Comsat -- created by the Satellite Act. There is, however, disagreement over the nature of that participation and the extent of Commission discretion under the Satellite Act to modify an existing regulatory structure. All parties specifically addressing this issue, with the exception of Comsat, contend that Comsat's participation in INTELSAT does not entail a grant of exclusive access to INTELSAT, requiring carriers and users to obtain space segment capacity through Comsat (in lieu of directly accessing INTELSAT). Comsat maintains that when read in light of its statutory history and background, and when "read in the context of a coherent whole," the Satellite Act must be interpreted as vesting in Comsat an exclusive franchise to access INTELSAT.<sup>342</sup> As to the language of the Satellite Act, Comsat contends that the statutory grant of authority to Comsat under Section 735(a) of the Satellite Act, when read with other provisions, implies the absence of similar authority to other carriers and a grant of exclusivity to Comsat.<sup>343</sup> Comsat states that Congress "directed Comsat alone" to provide channels of communication and gave "only Comsat" the power to contract with authorized users to access the system.<sup>344</sup> It further contends that statutory protections against common carrier control of Comsat in Sections 733-734 would not have made sense had Comsat not been granted exclusive access to the system.<sup>345</sup>

148. We agree that all provisions of the Satellite Act must be read in the context of the entire Act. We begin, therefore, by considering the declared policy and purpose of the Satellite Act in Section 701(a):

(a) The Congress hereby declares that it is the policy of the United States to establish, in conjunction and in cooperation with other countries, as

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<sup>339</sup> *Id.* at 863.

<sup>340</sup> *Bell Atlantic*, 131 F.3d at 1044.

<sup>341</sup> *See Regions Hosp. v. Shalala*, 118 S. Ct. 909, 915 (1998) (quoting *Chevron*).

<sup>342</sup> Comsat's comments at 14; Comsat Legal Analysis 42-65.

<sup>343</sup> Comsat comments at 16-20.

<sup>344</sup> Comsat comments at 10; Comsat Legal Analysis at 8-10 and 44-52.

<sup>345</sup> Comsat comments at 10; Comsat Legal Analysis at 66.

expeditiously as practicable a commercial communications satellite system, as part of an improved global communications network, which will be responsive to public needs and national objectives, which will serve the communication needs of the United States and other countries and which will contribute to world peace and understanding.<sup>346</sup>

Section 701(c) provides for the creation of Comsat:

(c) In order to facilitate this development and to provide for the widest possible participation by private enterprise, United States participation in the global system shall be in the form of a private corporation, subject to appropriate governmental regulation. It is the intent of Congress that all authorized users have non-discriminatory access to the system; that maximum competition be maintained in the provision of equipment and services utilized by the system; that the corporation created under this Act be so organized and operated as to maintain and strengthen competition in the provision of communications services to the public; and that the activities of the corporation created under this Act and of the persons or companies participating in the ownership of the corporation shall be consistent with the Federal antitrust laws.<sup>347</sup>

Section 735(a) authorizes Comsat to engage in particular activities:

(a) In order to achieve the objectives and to carry out the purposes of this Act, the corporation is authorized to

(1) plan, initiate, construct, own, manage, and operate itself or in conjunction with foreign governments or business entities a commercial communications satellite system;

(2) furnish, for hire, channels of communication to United States communications common carriers and to other authorized entities, foreign and domestic; and

(3) own and operate satellite terminal stations when licensed by the Commission under 201(c)(7).<sup>348</sup>

Finally, Section 735(b) elaborates more specifically on the activities in which Comsat is authorized to engage:

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<sup>346</sup> 47 U.S.C. § 701(a).

<sup>347</sup> 47 U.S.C. § 701(c).

<sup>348</sup> 47 U.S.C. § 735(a).



(b) Included in the activities authorized to the corporation for accomplishment of the purposes indicated in subsection (a) of this section, are, among others not specifically named

(1) to conduct or contract for research and development related to its mission;

(2) to acquire the physical facilities, equipment and devices necessary to its operations, including communications satellites and associated equipment and facilities, whether by construction, purchase, or gift;

(3) to purchase satellite launching and related services from the United States Government;

(4) to contract with authorized users, including the United States Government, for the services of the communications satellite system; and

(5) to develop plans for the technical specifications of all elements of the communications satellite system.<sup>349</sup>

149. As we observed in the *Notice*, the Satellite Act's authorization of Comsat to undertake the activities specified in Section 735, including furnishing "for hire, channels of communication," is not expressed in terms of exclusivity.<sup>350</sup> That section authorizes Comsat to furnish channels of communication to common carriers and other authorized entities, but does not confer on Comsat an exclusive franchise to do so. Comsat argues that use of such terms in the legislation would have been redundant and that concepts of exclusivity suffuse the statute.<sup>351</sup> Comsat points out that the Satellite Act does not grant authority to other entities "to furnish" for hire, channels of communication," and it notes that we recognized in our *Notice* that Comsat is the sole United States entity in INTELSAT to "plan, initiate, construct, own, manage and operate" the satellite system.<sup>352</sup> Comsat therefore argues that, because one provision in Section 735(a) grants exclusivity, we must read a similarly worded provision in the same section as also granting exclusivity.<sup>353</sup> Comsat further argues that this reading is

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<sup>349</sup> 47 U.S.C. § 735(b).

<sup>350</sup> *Notice*, 13 FCC Rcd at 22024.

<sup>351</sup> Comsat comments at 15-16.

<sup>352</sup> *Id.* at 17-20; Comsat Legal Analysis at 9-11.

<sup>353</sup> Comsat comments at 19; Comsat Legal Analysis at 8-9.

confirmed by Section 735(b)(4), which Comsat states authorizes "only" it "to contract with authorized users . . . for the services of the communications satellite system."<sup>354</sup>

150. The clear purpose of the Satellite Act is to foster creation of the global satellite system, that became INTELSAT, through a single corporation, that became Comsat. The terms of the Satellite Act, however, do not, as Comsat contends, grant Comsat an exclusive right to furnish "for hire channels of communications" or empower "only" Comsat to contract with authorized users to access the system. Rather, the Act authorizes Comsat to perform these and other functions without reference to principles of exclusivity in order to "achieve the objectives and carry out the purposes" of the Satellite Act.<sup>355</sup>

151. To determine whether any authority granted to Comsat is exclusive, we look to each function "authorized" in Section 735 separately and in context. We regard as exclusive Comsat's authorization to "plan, initiate, construct, own, manage, and operate itself or in conjunction with foreign governments or business entities a commercial communications satellite system." Our view is based on the purpose for creating the corporation, as stated in Section 701(c). Section 701(c) provides that U.S. participation in the global satellite system "shall be in the form of a private corporation" (Comsat). Section 735(a)(1) reflects the activities in which Comsat engages in its role as the sole U.S. participant in INTELSAT. In comparison, we regard as non-exclusive Comsat's authorization to "own and operate satellite terminal stations" under Section 735(a)(3).<sup>356</sup> The Satellite Act permits the Commission to license satellite terminal stations to the corporation or carriers or both jointly.<sup>357</sup> The Commission initially licensed joint Comsat and common carrier ownership of earth stations, but later adopted a policy to license carriers separate from Comsat.<sup>358</sup>

152. While Section 735(a)(2) authorizes Comsat to furnish "for hire channels of communication," it does not specify exclusivity.<sup>359</sup> When viewed within the context of other provisions of the Act, we do not believe that the grant of authority to Comsat to furnish channels for hire gives it an exclusive

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<sup>354</sup> Comsat comments at 19-20.

<sup>355</sup> 47 U.S.C. § 735. See AT&T reply at 5; BT North America reply at 9-11; GE Americom reply at 4; MCI WorldCom reply at 4-5; Network reply at 4.

<sup>356</sup> 47 U.S.C. § 735(a)(3).

<sup>357</sup> 47 U.S.C. § 721(c)(7). Section 721(c)(7) requires the Commission to "grant appropriate authorization or the construction and operation of each satellite terminal station, either to the corporation or to one or more authorized carriers or to the corporation and one or more such carriers jointly, as will best serve the public interest, convenience, and necessity. It gives the Commission discretion to "authorize the construction and operation of such stations by communications common carriers or the corporation without preference to either."

<sup>358</sup> See *Earth Station Ownership*, 100 FCC 2d 250 (1984).

<sup>359</sup> 47 U.S.C. § 735(a).

franchise. To the contrary, the language of the Satellite Act points to an opposite result. Congress intended that "all authorized users have non-discriminatory access to the system."<sup>360</sup> Congress required the Commission to insure that all present and future authorized carriers shall have "non-discriminatory use of, and equitable access to," the system and to "regulate the manner in which available facilities of the system and stations are allocated among users."<sup>361</sup> It is the Commission, and not Comsat, that is required by the language of the Satellite Act to insure "non-discriminatory use of and equitable access to" INTELSAT.<sup>362</sup> The Satellite Act does not specify that customer access to the INTELSAT satellite system must be through Comsat space segment, but rather applies its nondiscrimination and equitable access requirements to the communications satellite system -- INTELSAT.<sup>363</sup> Further, the Satellite Act defines the "communications satellite system" in general and technical terms, without referencing Comsat space segment.<sup>364</sup> In view of these provisions, and the fact that Section 735(a)(2) does not specify exclusivity, we view the provision as ambiguous to the question of whether it gives Comsat exclusive access to the INTELSAT system. Given the specified goals of the Satellite Act, that the corporation created to participate in the global system "be so organized and operated as to maintain and strengthen competition in the provision of communications services to the public,"<sup>365</sup> we find no basis for implying exclusivity where none is specifically given.

153. Congress directed the Commission to implement its mandate to insure authorized carriers "nondiscriminatory use of, and equitable access to" the system under Section 721(c)(2) in its "administration of the Communications Act, as amended."<sup>366</sup> The Communications Act gives the Commission broad authority and discretion to regulate communications to, from, and within the United States according to public interest standards.<sup>367</sup> Thus, Commission exercise of this authority under the Satellite Act must take into account circumstances that have changed since 1962, and may require new

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<sup>360</sup> 47 U.S.C. § 701(c).

<sup>361</sup> 77 U.S.C. § 721 (c)(2).

<sup>362</sup> 47 U.S.C. § 721(c)(2). *See also Notice*, 13 FCC Rcd at 22025.

<sup>363</sup> *Notice*, 13 FCC Rcd at 22025. *See* 47 U.S.C. § 721(c).

<sup>364</sup> The statute defines the term "communications satellite system" as "a system of communications satellites in space whose purpose is to relay telecommunication information between satellite terminal stations, together with such associated equipment and facilities for tracking, guidance, control and command functions as are not part of the generalized launching, tracking, control, and command." 47 U.S.C. § 702(1).

<sup>365</sup> 47 U.S.C. § 701(c).

<sup>366</sup> 47 U.S.C. § 721(c).

<sup>367</sup> *See* 47 U.S.C. §§ 151, 152, 154(i), 303 and 309. *See, e.g., Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355 (1986); *AT&T Corp. v. Iowa Util. Bd.*, 119 S. Ct. 721 (1999); and *City of New York v. FCC*, 486 U.S. 57 (1998), regarding the Commission's broad authority under the Communications Act.

approaches to "insure non-discriminatory use of and equitable access to" the INTELSAT system.<sup>368</sup> We conclude that the Satellite Act gives the Commission discretion to permit direct access in the United States to insure "non-discriminatory use of and equitable access to" the satellite system under circumstances that exist today, if such action is in the public interest. Such action is permissible under the Satellite Act as long as it is not inconsistent with and does not hinder or interfere with the objectives and purposes of the Satellite Act.<sup>369</sup> We find that Level 3 direct access will result in increased competition and enhance the competitiveness of U.S. carriers and users of INTELSAT in today's global telecommunications market. We also find that direct access can be implemented in a manner that is consistent with Comsat's role as the sole U.S. governing participant in INTELSAT through the imposition of a surcharge on U.S. direct access users. Under these circumstances we conclude that we may permit Level 3 direct access consistent with and as a means of carrying out the provisions of the Satellite Act.

154. We reject various arguments Comsat makes in support of its position that the language and context of the Satellite Act give it exclusive access to the INTELSAT system. First, Comsat points out that while the Satellite Act expressly permits competition: (1) in earth station ownership and operation;<sup>370</sup> (2) for procurement of equipment and services;<sup>371</sup> and (3) from other satellite systems, the Satellite Act does not expressly permit competition in access to INTELSAT.<sup>372</sup> The provisions cited by Comsat, however, each give the Commission discretion in implementing the competition goals of the Satellite Act. We similarly view the requirement imposed on the Commission to insure "non-discriminatory use of and equitable access to" INTELSAT as giving us discretion in how to implement equitable access.

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<sup>368</sup> 47 U.S.C. § 721(c)(2).

<sup>369</sup> See *Communications Satellite Corporation*, 77 FCC 2d 564 (1980) ("*Comsat Study*"); *Communications Satellite Corporation*, 81 FCC 2d 287 (1980) ("*Comsat Structure Rulemaking*"); *Changes in the Corporate Structure and Operations of the Communications Satellite Corporation*, 90 FCC 2d 1159 (1982) ("*First Structure Order*"), recon., 93 FCC 2d 701 (1983); *Changes in the Corporate Structure and Operations of the Communications Satellite Corporation*, 97 FCC 2d 145 (1984) ("*Second Structure Order*"), recon., 99 FCC 2d 1040 (1984). The Commission determined that Comsat may engage in non-INTELSAT/Inmarsat businesses as long as such activities are "not inconsistent with, do not hinder or interfere with the purposes and objectives of the Satellite Act." *Comsat Study* 77 FCC 2d at 618.

<sup>370</sup> See 47 U.S.C. § 721(c)(7).

<sup>371</sup> *Id.*

<sup>372</sup> Comsat comments at 20-21; Comsat Legal Analysis at 58-65. We note that Comsat originally opposed, as contrary to the Satellite Act, competition in earth station construction and operation as well as the authorization of competing satellite systems. See *Modification of Policy on Ownership and Operations of U.S. Earth Stations*, 100 FCC 2d 250, 264 (1984); *Establishment of Satellite Systems Providing International Communications*, Report and Order, 101 FCC 2d 1046 (1985), recon., 61 Rad. Reg. 2d 649 (1986).

155. Second, Comsat argues that the restrictions in Section 733 on common carrier ownership of Comsat would be meaningless if Comsat does not have exclusive access to the satellite system.<sup>373</sup> While the Satellite Act restricts common carrier ownership of Comsat, it did so at a level initially intended to attract the substantial common carrier investment needed to ensure success of the system.<sup>374</sup> The Commission stated in 1969:

Congress so structured the Corporation as to establish a dichotomy between the carrier stockholders on the one hand, and the stock-owning members of the public on the other hand. In so doing, it placed the carriers in a preferred position within the Corporation vis-a-vis the members of the general investing public. Its purpose in doing so was to induce the carriers to invest in the Corporation and actively participate in its affairs, in order to facilitate the realization and success of its vital mission.<sup>375</sup>

The Commission noted in a later decision that Congress made provisions for communications common carriers to own up to 50 percent of Comsat stock "in order to assure that the fledgling corporation -- Comsat -- received needed communications expertise and guidance."<sup>376</sup> Thus, as noted above, the ownership provisions of the Satellite Act effectively require carrier participation in the planning, initiating, contracting, owning, and managing the satellite system, through Comsat. Comsat fails to present persuasive evidence that exclusive access to the INTELSAT system was considered necessary for Comsat to effectuate the purpose of these provisions. Moreover, Comsat's role as the sole United States investor in INTELSAT would not be altered under a Level 3 direct access regime.<sup>377</sup>

156. Third, Comsat argues that direct access by U.S. carriers would have undermined the rapid construction and private financing of the global satellite system and would have made no sense.<sup>378</sup> In particular, Comsat contends that AT&T would not have routed its traffic through Comsat if it could have accessed the system directly from the beginning. We believe it is mere speculation by Comsat as to what AT&T may or may not have done over 37 years ago had direct access been available to it. There is no reason to believe that AT&T and other carriers would not have undertaken the same level of investment and participation in development of the system to assure its success. Upon the

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<sup>373</sup> 47 U.S.C. § 733(b) and (c). Comsat comments at 21-22; Comsat Legal Analysis at 55-57.

<sup>374</sup> See *Report of the Committee on Aeronautical and Space Sciences* to accompany S.2814, "Communications Satellite Act of 1962," Senate 87 Cong. 2d Session, Report No. 1319 (April 2, 1962); *Report of the Committee of Commerce* to accompany H.R. 11040, "Communications Satellite Act of 1962", Senate, 87 Cong. 2d Session, Report No. 1584 (June 11, 1962) at 21-22.

<sup>375</sup> *Transfer of Stock in Comsat*, 2 RR 2d 1718, 1719-1720(1964).

<sup>376</sup> *Domestic Communications Satellite Facilities*, 38 FCC 2d 665, 679-680 (1972).

<sup>377</sup> See *Notice*, 13 FCC Rcd at 22024.

<sup>378</sup> Comsat comments at 22-23; Comsat Legal Analysis at 65-67.

formation of Comsat, U.S. carriers invested in Comsat, in the aggregate, up to a 50 percent limit of stock, which was the maximum amount of Comsat stock permitted to be owned by carriers.<sup>379</sup> Comsat fails to present credible evidence that direct access would have changed investor interest in the new corporation that, from its inception, benefited from United States Government sponsorship and substantial taxpayer research and development on satellite technology that was used in developing the INTELSAT system.

157. Finally, Comsat argues that direct access would make no sense if Comsat would have had to construct and own the satellite system itself -- that is, if the international community did not join the United States and Comsat in building the satellite system. However, such a scenario, in effect, would have resulted in the equivalent of direct access because United States customers would have obtained service directly from the system owner and operator -- Comsat. If this result is permissible under the Satellite Act, then we see no reason why U.S. customers should not be able to obtain service directly from the current owner and operator of the satellite system - INTELSAT - with Comsat the U.S. investor in the system. The Satellite Act did not require the creation of an intergovernmental cooperative in the nature of INTELSAT, which through its members obtain and resell space segment to U.S. customers. The key provisions of the Satellite Act -- creation of a commercial global satellite system by a private U.S. corporation with other countries, non-discriminatory access by authorized users, maintenance and promotion of competition, and government oversight of Comsat to assure achievement of national objectives and purposes -- could have been satisfied through creation of a different, more traditional commercial mechanism in which Comsat was the sole U.S. investor and participant in its management and operation but U.S. customers obtained service directly from the system operator. The fact that the intergovernmental mechanism was adopted should not change Comsat's role under the Act to one affording exclusive access to the system nor restrict Commission discretion in carrying out its mandate under the Satellite Act.

(c) Legislative History

158. Comsat asserts that the legislative history of the Satellite Act indicates that exclusive access to INTELSAT by Comsat was intended by Congress. Evidence of this intent, according to Comsat, is apparent by (1) the fact that the parties involved in the legislative process recognized it;<sup>380</sup> (2) references to the "United States participant" as a "carrier's carrier" and "monopoly" would make no sense if direct access were contemplated;<sup>381</sup> and (3) Congress' rejection of a carrier consortium alternative, in light of its fear that control over access to the satellite system could be exploited, demonstrates an intent to grant an exclusive franchise.<sup>382</sup>

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<sup>379</sup> See *Implementation of Inmarsat*, 74 FCC 2d 59, 66-67 (1979); *Communications Satellite Corporation (Comsat Study)* 77 FCC 2d 564, 587, n. 17 (1980), citing *Domestic Communications Satellite Facilities* 38 FCC 2d at 679-680.

<sup>380</sup> Comsat comments at 23-25; Comsat Legal Analysis at 13-19.

<sup>381</sup> Comsat comments at 25-26; Comsat Legal Analysis at 17-31.

<sup>382</sup> Comsat comments at 27; Comsat Legal Analysis at 31-37.

159. Various parties disagree with Comsat's view of the legislative history.<sup>383</sup> They assert that: (1) Comsat relies on selective statements by witnesses at Congressional hearings; (2) references to Comsat as a "carrier's carrier" and "monopoly" by particular witnesses relate to assumptions they were making about Comsat's role and do not indicate a prohibition on direct access;<sup>384</sup> and (3) the legislative history indicates an intent by Congress to give the Commission flexibility and discretion in its administration of services from INTELSAT.<sup>385</sup>

160. The legislative history referenced by Comsat, however, at most depicts an expectation or predictions primarily from non-legislators regarding Comsat's role during the early years of the satellite system's development. Comsat heavily relies on references in hearing testimony of Comsat's role as a "carrier's carrier" as indicative of Congressional intent that carriers obtain service only through Comsat. Such statements by non-legislators at Congressional hearings cannot be "accorded any weight" for statutory construction purposes.<sup>386</sup> Committee reports are recognized as the "most persuasive indicia of congressional intent when enacting a statute."<sup>387</sup> Witness statements at committee hearings are not statements by Congress as to its intent.<sup>388</sup> Further, references by witnesses to "carriers carrier" and "monopoly" were not subsequently incorporated into the Satellite Act.<sup>389</sup> As noted in the *Notice*, our review of the committee reports show no intent by Congress to grant Comsat an exclusive

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<sup>383</sup> AT&T reply at 8-11; BT North America reply at 12-21; GE Americom reply at 3; MCI WorldCom reply at 6; and Network reply at 4-6

<sup>384</sup> BT North America reply at 14.

<sup>385</sup> AT&T reply at 8-11; BT America reply at 12-17; MCI WorldCom reply at 6; and Network reply at 4-6.

<sup>386</sup> See, e.g., *Kelly v. Robinson*, 479 U.S. 36, 50-51, n.13 (1986) and *McCaughn v. Hershey Chocolate Co.*, 283 U.S. 488, 493 (1931). See also 2A Norman J. Singer, *Sutherland Statutory Construction* § 48.10 at 343 (5th ed. 1992). See also AT&T reply at 9.

<sup>387</sup> See Singer, *supra* at 332. See also *Mills v. United States*, 713 F.2d 1249 (7th Cir. 1983).

<sup>388</sup> As noted in our *Notice*, the legislative reports accompanying the Satellite Act neither require that Comsat maintain its own space segment for purposes of providing service to United States customers, nor be structured in such a way that its investors are the sole distributors of services from the system. *Notice* at 22025, citing *Report of the Committee on Interstate and Foreign Commerce* to accompany H.R. 11040, "Communications Satellite Act of 1962", House of Representatives, 87th Congress, 2d Session, Report No. 1636, dated April 24, 1962; *Report of the Committee on Aeronautical and Space Sciences* to accompany S. 2814, "Communications Satellite Act of 1962," Senate 87th Congress, 2d Session, Report No. 1584, dated June 11, 1962. *Report of the Committee on Commerce* to accompany H.R. 11040, "Communications Satellite Act of 1962," Senate, 87th Congress, 2d Session, Report No. 1584, dated June 11, 1962. See also AT&T reply at 8-9; BT reply at 14-15.

<sup>389</sup> AT&T reply at 9; BT North America reply at 12-13; GE Americom comments at 5; MCI WorldCom reply at 6; Network reply at 4-6.

right of access to INTELSAT in perpetuity.<sup>390</sup> We note that Comsat argued (and the Commission agreed) in 1984 that it was not limited to a "carrier's carrier" role under the Satellite Act, but had authority to serve the public directly on a retail basis.<sup>391</sup> Comsat has for years been in the retail business as a result of Commission action years ago. It cannot now persuasively argue that its "carrier's carrier" role is indicative of Congressional intent to grant it exclusivity in access to INTELSAT.

161. In *ITT World Communications v. F.C.C.*,<sup>392</sup> the Court viewed statements like Comsat being referred to as a "carriers carrier" as only "predictions" as to Comsat's role, and not restrictive on Commission discretion in implementing the statute where changed circumstances justify such action.<sup>393</sup> In particular, these references were based on assumptions by particular Congressional hearing witnesses of what they believed would be Comsat's role in the satellite system, at least in the short term. The Court further found that statements made in the legislative process must be considered in light of the practical realities and expectations of the day and that the broader purposes of a statute should guide interpretation.<sup>394</sup> We are not persuaded by Comsat's reliance on outdated assumptions of hearing witnesses which have now lost their relevance.<sup>395</sup> We agree with other parties in this proceeding that the Satellite Act history depicts an expectation by some witnesses as to Comsat's role, at least during the early years of system development, but should not be interpreted as reflecting Congressional intent to grant Comsat permanent exclusivity in access to INTELSAT. Nor should it be read as foreclosing Commission flexibility at a later date to carry out its mandates under the Satellite Act in a manner responsive to changing circumstances.

(d) Other Issues

(i) Subsequent Legislative Actions

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<sup>390</sup> Notice, 13 FCC Rcd at 13 ("Our review of the legislative reports accompanying the Satellite Act does not reveal a Congressional requirement that Comsat maintain its own space segment within the satellite system for purposes of providing service to United States customers. Neither do the legislative reports require the global satellite system to be structured in such a way that its investors are the sole distributors of services from the system.").

<sup>391</sup> See *Modification of Authorized User Policy*, 90 FCC 2d 1394 (1982) ("*Authorized User II*").

<sup>392</sup> *ITT World Communications, Inc. v. FCC*, 725 F.2d 732 (D.C. Cir. 1984) ("*ITT World*") (the Court determined that the Commission had discretion to designate non-common carriers as authorized users under the Satellite Act and thus permitted Comsat to provide retail services to United States customers). See also *NAB v. FCC*, 740 F.2d 1190, 1203 (D.C. Cir. 1984).

<sup>393</sup> *ITT World* at 742-745. See also BT North America reply at 16.

<sup>394</sup> *ITT World* at 743-744.

<sup>395</sup> See BT North America reply at 14.



162. As was stated in our *Notice*, Congress amended the Satellite Act in 1978 designating Comsat "as the sole operating entity of the United States for participation in Inmarsat for the purpose of providing international maritime satellite telecommunications services."<sup>396</sup> In this case, the Commission has and continues to view the provision of Inmarsat space segment for the provision of maritime services via United States earth stations by Comsat as an exclusive role within the United States by virtue of the Maritime Satellite Act.<sup>397</sup> In contrast, the Satellite Act specified no such exclusive role for Comsat with respect to access to INTELSAT satellites nor did it make any reference to Comsat space segment in the system.<sup>398</sup>

163. Comsat argues that the language of the 1978 amendment applicable to Inmarsat confirms that the Satellite Act that led to creation of INTELSAT granted Comsat an exclusive franchise over the INTELSAT system.<sup>399</sup> Comsat contends that the use of more explicit language in the 1978 amendment "may be explained by virtue of the fact that the drafter of the Inmarsat Act benefitted from the knowledge gained through the years of implementation of the Satellite Act and the creation, deployment and operation of the INTELSAT system."<sup>400</sup> Other parties disagree. They contend that Congress' use of the language "sole operating entity in the United States" that appears in the 1978 amendment is a grant of exclusivity not present in the Satellite Act, and that Congress' choice of language in 1978 confirms an intent in 1962 to grant discretion to the Commission in connection with INTELSAT.<sup>401</sup>

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<sup>396</sup> *Notice*, 13 FCC Rcd at 22027-22028 citing 47 U.S.C. § 752(a)(1) (emphasis added); *See also* H.R. Rep. No. 95-1134, Part 1, 95th Cong., 2d Sess. 15 (1978); H.R. Rep. No. 95-1134, Part II, 95th Cong. 2d Sess. 12 (1978); S. Rep. No. 95-1036, 95th Cong., 2d Sess. 20 (1978).

<sup>397</sup> *Notice*, 13 FCC Rcd at 22028, citing *Provision of Aeronautical Services in the Inmarsat System*, 2 FCC Rcd 390 (1987) ("*Aeronautical Services Order I*"), Dkt. No. 87-1077/78 (D.C. Cir. February 12, 1987), *remanded* November 22, 1988 per November 15, 1988 Commission request; *In the Matter of Provision of Aeronautical Services via the Inmarsat System*, 4 FCC Rcd 6072 (1989) ("*Aeronautical Services Order II*"); *See also Participation by Comsat Corporation in a New Satellite System Designed to Provide Service for Hand-held Communications Devices*, 9 FCC Rcd 7693 (1994) ("*Inmarsat-P Declaratory Ruling*"), *motion for temporary relief denied*, 10 FCC Rcd 1061 (Int'l. Bur. 1993); *petition for review denied, Comsat Corporation v. FCC*, 77 F.3d 1419 (D.C. Cir. 1996).

<sup>398</sup> *Notice*, 13 FCC Rcd at 22028.

<sup>399</sup> Comsat comments at 32-34; Comsat Legal Analysis at 76-87.

<sup>400</sup> Comsat comments at 33.

<sup>401</sup> BT North America reply at 20-21; C&W reply at 7; ICG reply at 3-4; MCI WorldCom reply at 8-9; Network reply at 4.

164. The 1978 amendments demonstrate that when Congress intended to give Comsat an exclusive rôle in the operations of a satellite system, it used specific language to make that intent clear.<sup>402</sup> We do not agree with Comsat that Congress' use of specific language in 1978 was simply a reaffirmation of Congressional intent in 1962. Comsat's position is based on the argument that the 1978 amendment is patterned after the Satellite Act and specific language in the 1978 amendment is comparable to language in the Satellite Act. In particular, Comsat compares the 1978 amended language "sole operating entity in the United States for participation in Inmarsat" with Satellite Act language, which states that "United States participation in the global system shall be in the form of a private corporation," and implies that both establish the same exclusive franchise.<sup>403</sup> However, Comsat fails to make the full comparison by leaving out language completing the sentence in the 1978 amendment of, "for purposes of providing international maritime satellite services."<sup>404</sup> In giving exclusive access in regard to Inmarsat, the same section specifically refers to Comsat "space segment" which the Satellite Act does not. Considering the language of the 1978 amendment in its full context, it is clear that Congress was granting an exclusive franchise explicitly to provide international maritime services. Comsat correctly observes that the 1978 amendment does not use the word "exclusive" in referencing Comsat space segment just as the Satellite Act does not use the word when referring to "channels of communications."<sup>405</sup> Nevertheless, Section 752, titled "Designated Operating Entity" assigns Comsat the role of "sole operating entity" . . . for the purpose of providing international maritime satellite telecommunications service.<sup>406</sup> The term "sole" means "only" and clearly connotes exclusivity. In comparison, the language in the Satellite Act referring to "channels of communication" is not similarly modified by terms of exclusivity.

165. Nothing in the legislative reports accompanying the 1978 amendment states that the arrangement being adopted was the same as that reflected in the Satellite Act. In fact, the approach taken by Congress in 1978 appears to have been based on specific consideration of how maritime satellite communications services would most efficiently be delivered by United States carriers to United States customers.<sup>407</sup> We note that Comsat once again primarily relies upon testimony at

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<sup>402</sup> *Notice*, 13 FCC Rcd at 22027.

<sup>403</sup> Comsat comments at 33 and Comsat Legal Analysis at 83, each comparing 47 U.S.C. § 752(a)(1) with 47 U.S.C. § 701(c).

<sup>404</sup> *See* 47 U.S.C. § 752(a)(1).

<sup>405</sup> Comsat comments at 33-34 and Comsat Legal Analysis at 83-84 (comparing 47 U.S.C. § 752(a)(4) with 47 U.S.C. § 735(a)(2)).

<sup>406</sup> 47 U.S.C. § 752.

<sup>407</sup> *See* Senate Commerce Committee Report No. 95-1036 at 8-9; House Interstate and Foreign Commerce Committee Report No. 95-1134 at 10-11. The 1978 amendment left to the Commission's discretion to determine operational arrangements between Comsat and earth station operators for interconnection of service to United States carriers but the Committee reports made it clear that a "carrier's carrier" arrangement was not necessarily the optimal approach for distribution of maritime satellite services. *See* 47 U.S.C. § 752(1). As

hearings as support for its contention that the 1978 amendment reflects Congressional intentions in the Satellite Act. We are not persuaded that the views of witnesses in 1978 should be given any weight in assessing what Congress intended to do in passing legislation in 1962.<sup>408</sup> We believe that the 1978 amendment is relevant here only to the extent it demonstrates that when Congress wants to confer exclusive status, it does so with explicit language.

(ii) Previous Commission and Court Decisions

166. Comsat contends that previous Commission and Court decisions recognized Comsat as having an exclusive franchise for access to the INTELSAT system.<sup>409</sup> Other parties respond that Comsat has misread these decisions; that neither the Commission nor the Courts have despositively ruled on the issue; and that past Court decisions lend support to the tentative finding in our *Notice* that the Satellite Act does not confer an exclusive franchise on Comsat.<sup>410</sup>

167. Comsat points to the Commission's *Authorized User I* decision as an early Commission recognition of an exclusive franchise.<sup>411</sup> *Authorized User I* stated that Comsat has a virtual monopoly position in the operation of the INTELSAT space segment and that the Commission lacks authority to authorize other carriers to operate space segment facilities from INTELSAT.<sup>412</sup> However, as we explained in the *Notice*, the issue before the Commission in that decision was whether the Satellite Act allowed Comsat to provide services directly to entities other than carriers. The particular issue of whether Comsat has exclusive access to the INTELSAT space segment under the Satellite Act was not before the Commission. Further, *Authorized User I* included virtually no analysis of the statutory language or legislative history relevant to the direct access issue. We stated in the *Notice* that we regard these statements as dicta and we are not now foreclosed from considering our authority under the Satellite Act to permit direct access.<sup>413</sup> Contrary to Comsat's assertions,<sup>414</sup> we find that the

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enacted, the 1978 amendment provided for FCC licensing of both Comsat and other entities. 47 U.S.C. § 752(c)(2). We also note that there was disagreement between the House and Senate as to whether the Commission would be permitted to license only Comsat or other entities to operate earth stations.

<sup>408</sup> See *United States v. Gonzales*, 520 U.S. 1 (1997).

<sup>409</sup> Comsat comments at 28-30; Comsat Legal Analysis at 67-76.

<sup>410</sup> BT North America reply at 17-20; ICG reply at 4-5; MCI WorldCom reply at 7-8; Network reply at 6-9.

<sup>411</sup> *In re Authorized Entities and Authorized Users Under the Communications Satellite Act*, 4 FCC 2d 421 (1966) ("*Authorized User I*").

<sup>412</sup> *Id.* at 428.

<sup>413</sup> *Notice*, 13 FCC Rcd at 22026-22027.

<sup>414</sup> Comsat Legal Analysis at 67-70.

Commission was not deciding whether or not it had legal authority to permit direct access under the Satellite Act.<sup>415</sup> If it had decided in 1966 that it lacked authority to permit direct access, then it would not have later initiated a proceeding in 1982 to consider permitting direct access.

168. Similarly, the Commission was not making such a decision in 1970 when it adopted a policy to permit United States carriers to use non-Comsat space segment when using foreign earth stations for transit traffic. In rejecting Comsat's argument that United States carriers should use Comsat, the Commission, referring to its *Authorized User I* decision, concluded that "there is no doubt the Satellite Act provides that Comsat is the chosen instrument to provide space segment facilities to licensees of earth stations in the United States."<sup>416</sup> The Commission, however, also noted that "there are no specific words in Section 305 which indicate exclusivity as to any of the powers set out therein."<sup>417</sup> These observations were essentially carried over from the *Authorized User I* decision in which the issue of Comsat's exclusive access to INTELSAT was not at issue. Moreover, the decision taken by the Commission in the *Satellite Transiting Order* turned on the Commission's exercise of its discretion under the Satellite Act in determining the public interest "in light of subsequent developments in a newly and rapidly development technology."<sup>418</sup> We do not regard the comments as determinative that the Commission lacks authority to permit direct access.

169. Parties supporting our tentative conclusion that we have discretion to permit Level 3 direct access point to a series of Commission actions and court decisions, subsequent to *Authorized User I* and the *Satellite Transiting Order*. They contend that these decisions illustrate evolving Commission views on Comsat's role under the Satellite Act and application of agency discretion in implementing the Act's provisions.<sup>419</sup> BT North America points out that the Commission in its 1980 *Comsat Study* envisioned permitting forms of direct access by United States carriers to INTELSAT.<sup>420</sup> The *Comsat*

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<sup>415</sup> See BT North America reply at 6 and Network reply at 6.

<sup>416</sup> See *Satellite Facilities for Handling Transiting Traffic*, 23 FCC 2d 9, 12 (1970) ("*Satellite Transiting Order*").

<sup>417</sup> *Id.* referencing 47 U.S.C. § 305.

<sup>418</sup> *Satellite Transiting Order*, 23 FCC 2d at 12-13.

<sup>419</sup> BT North America reply at 19; ICG comments at 4-5; MCI WorldCom reply at 6-8; Network reply at 6-9.

<sup>420</sup> BT North America reply at 17-19, citing the *Comsat Study*, 77 FCC 2d at 758. Comsat cites the *Comsat Study* for a statement made referencing "Comsat's current monopoly in INTELSAT and provider of INTELSAT space segment capacity to U.S. international communications common carriers and other authorized users". Comsat comments at 29, citing *Comsat Study*, 77 FCC 2d at 693. This statement was made in the context of discussion about the policy benefits and detriments of disenfranchising Comsat of its role as the wholesale provider of space segment in favor of new U.S. signatory in INTELSAT for investment purposes and having Comsat compete with other U.S. carriers on the retail level. The discussion did not state that Comsat's monopoly was attributed to the Satellite Act.

*Study* was a report to Congress required by the 1978 amendments to the Satellite Act and entailed Commission review of Comsat's corporate structure and operating activities to determine whether any changes were required to ensure Comsat's fulfillment of its obligations under the Satellite Act.<sup>421</sup> Following the *Comsat Study*, the Commission undertook several proceedings in view of its findings in the report. Those actions included the concurrent initiation of a proceeding to modify *Authorized User I* to permit Comsat to compete with United States carriers in the retail market.<sup>422</sup> The Commission later changed its policy for licensing earth stations to permit carriers to own and operate earth stations separate from Comsat,<sup>423</sup> and the Commission began an inquiry as to whether to permit United States carriers direct access to INTELSAT and allow them to compete with Comsat in the wholesale market.<sup>424</sup> Each of these proceedings involved exploration of policy options available to the Commission in carrying out its responsibilities under the Satellite Act and the Communications Act.

170. In the 1982 *Authorized User II* decision, the Commission abandoned its 1966 *Authorized User I* policy of permitting only carriers to offer INTELSAT services directly to the public and permitted Comsat to enter the retail market through a separate subsidiary.<sup>425</sup> The Commission's decision was remanded by the Court in 1984. The Court ruled that the Satellite Act affords the Commission discretion to allow Comsat to compete at the retail level, and to consider a policy favoring competition (i.e., competition between cable and satellite transmission modes), but that the agency failed to consider adequately relevant factors in implementing its *Authorized User II* policy. One such factor identified by the Court was direct access to INTELSAT which retail carriers argued was necessary to promote intermodal competition.<sup>426</sup> The Court required the Commission to consider direct access before implementing a change in the *Authorized User II* policy. In so requiring, the Court did not suggest that direct access was not permissible under the Satellite Act. The Commission initiated a Notice of Inquiry and subsequently decided in 1984 not to pursue direct access options

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Comsat inaccurately states that the Commission recognized that Congressional action would be required to change the corporation's exclusive position (Comsat's Legal Analysis at 73). In fact, the Commission did not address the question of Congressional action in the context of any aspect of the option under review. See *Comsat Study* 77 FCC 2d at 693-695. As noted above, in the same report, the Commission discussed permitting a form of direct access under its own authority without need for change in legislation.

<sup>421</sup> *Comsat Study*, 77 FCC 2d at 564.

<sup>422</sup> *Aeronautical Radio, Inc., et al*, Notice of Proposed Rulemaking, 77 FCC 2d 535 (1980).

<sup>423</sup> *Earth Station Ownership*, 100 FCC 2d 250 (1984).

<sup>424</sup> *1982 Direct Access Inquiry*, 90 FCC 2d 1146.

<sup>425</sup> *Modification of Authorized User Policy*, 90 FCC 2d 1394 (1982) ("*Authorized User II*").

<sup>426</sup> *ITT World*, 725 F. 2d at 746, 752-755.

based on public interest considerations; it did not, however, address its legal authority to require direct access under the Satellite Act.<sup>427</sup>

171. The Commission's 1984 *Direct Access Order* was affirmed by the Court in 1986 in its review of three related Commission decisions: (1) *Authorized User III* in which the Commission essentially re-adopted its *Authorized User II policy*;<sup>428</sup> (2) the *Earth Station Ownership* decision in which the Commission permitted carriers to own and operate earth stations separate from Comsat;<sup>429</sup> and (3) the 1984 *Direct Access Order*. The Court's opinion focused on review of the Commission's public interest analysis in exercise of its discretion under the Satellite Act and the Communications Act. The Court did not address nor did it suggest that the Commission lacked authority to permit direct access to INTELSAT had the Commission determined that it was required in the public interest.

172. Finally, Comsat cites various statements made in several judicial decisions as evidencing recognition of its exclusive right to access the INTELSAT system.<sup>430</sup> Other parties argue that the decisions and statements cited by Comsat are not relevant to the issue before us in this proceeding -- access to the INTELSAT system.<sup>431</sup> We agree. The decisions in question neither turned on, nor analyzed, nor interpreted the issue of Commission discretion under the Satellite Act to permit access to INTELSAT other than through Comsat. The *National Ass'n of Broadcasters* decision involved review of the reasonableness of the Commission's interim DBS regulations and the NAB's challenge to Comsat's ability to provide such services. The *Alpha-Lyracom* case involved an anti-trust suit brought against Comsat by PanAmSat and turned, in part, on Comsat's immunity in its role as the U.S. Signatory to INTELSAT. Neither case turned upon an analysis of whether Comsat has exclusive access to INTELSAT under the Satellite Act.

(e) Conclusions on Commission Authority Under the Satellite Act

173. We find that the Commission has authority under the Satellite Act to ensure "non-discriminatory use of and equitable access to" and to regulate allocation of available facilities on the INTELSAT system. We also find that the Satellite Act neither expressly nor by implication grants

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<sup>427</sup> Notice, 13 FCC Rcd at 22015, citing *1984 Direct Access Order*, *aff'd Western Union*, 814 F.2d 1280.

<sup>428</sup> *Authorized User III*.

<sup>429</sup> *Earth Station Ownership*, 100 FCC 2d 250 (1984).

<sup>430</sup> Comsat comments at 29-30 and Comsat Legal Analysis at 73-76, citing *National Ass'n of Broadcasters*, 740 F.2d at 1214; *Communications Satellite Corporation v. FCC*, 836 F.2d 623, 625 (D.C. Cir. 1988), *Alpha Lyracom Space Communications, Inc. v. Communications Satellite Corporation*, 946 F.2d 168 (2nd Cir. 1991), *aff'd in part, rev'd and remanding in part, Alpha Lyracom Space Communications, Inc. v. Communications Satellite Corp.*, 1990-2 Trade Cas. (CCH) ¶ 69, 188 (S.D.N.Y. 1990).

<sup>431</sup> BT North America reply comments at 19; ICG reply comments at 4-5; Network reply comments at 7.

Comsat an exclusive franchise to access the INTELSAT space segment. The provisions cited by Comsat as giving it exclusive access are ambiguous, and a reasonable construction is that Congress did not intend exclusivity where it did not so expressly state exclusivity. We base these findings on a reading of all relevant provisions of the Satellite Act in context. We reject Comsat's view of the legislative history of the Satellite Act as allegedly being dispositive of the issue of direct access. We do so on the basis that there is no clear intent reflected in accompanying House and Senate reports to grant exclusive access to Comsat, and also based upon court determinations that statements by witnesses in hearings as to Comsat's role can only be viewed as "predictions." We further find that Commission statements in decisions made shortly after passage of the Satellite Act are not dispositive of the issues then before the Commission and should be considered dicta. Judicial decisions involving specific review of our past decisions on direct access and related issues as to Comsat's role under the Satellite Act do not suggest that the Commission lacks authority under the Satellite Act to permit direct access.

174. For these reasons, we conclude that the Satellite Act does not confer upon Comsat an exclusive franchise to access the INTELSAT system. We further conclude that we have discretion under the Satellite Act to permit Level 3 direct access upon a finding that such a policy is necessary in the public interest and is not otherwise inconsistent with the objectives and purposes of the Act. We also conclude that we do not have authority to permit Level 4 direct access because, as discussed above, the Satellite Act provides that U.S. participation in the global satellite system shall be in the form of a private corporation (Comsat) and that carrier investment in Comsat is the means by which carriers participate in the ownership and management of INTELSAT.

## 2. Constitutional Considerations

175. A Fifth Amendment "takings" issue may arise when the Commission or any government action affects a private property right.<sup>432</sup> In our *Notice*, we addressed Comsat's assertion that permitting Level 3 direct access to the INTELSAT system by United States carriers, other than Comsat, would constitute an uncompensated "taking" in violation of the Fifth Amendment.<sup>433</sup> Comsat maintained that a property right existed by way of a contract between it and the United States Government, which gave it an exclusive right to access INTELSAT satellites from the United States.<sup>434</sup> Comsat contended that direct access to INTELSAT satellites by other United States carriers would

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<sup>432</sup> *U.S. CONST. amend. V. See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 420 (1982) ("*Loretto*"); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978) ("*Penn*"); *American Continental Corp. v. United States*, 22 Cl. Ct. 692, 696 (1991) ("*American*"); *Dolan v. Tigard*, 512 U.S. 374 (1994); *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003 (1992); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

<sup>433</sup> *Notice*, 13 FCC Rcd at 17-23.

<sup>434</sup> *Id.* at 17.

deny it of its "exclusive INTELSAT franchise without just compensation," as well as deprive its shareholders of a return on their investment.<sup>435</sup>

176. We disagreed with Comsat's arguments, tentatively concluding that permitting other United States carriers Level 3 direct access to INTELSAT satellites would not violate the Fifth Amendment's "takings" clause, which prohibits government from taking private property for public use without just compensation.<sup>436</sup> More specifically, the Commission made several tentative conclusions: (1) the Satellite Act and its regulatory scheme do not result in a regulatory contract between the United States Government and Comsat that conferred on Comsat an exclusive (property) right to access to INTELSAT satellites from the United States; and (2) Comsat possessed no contractual property right with respect to access to INTELSAT satellites that could be considered vested property within the meaning of the Fifth Amendment. Further, we tentatively concluded that even assuming there may be a property right, Level 3 direct access would not result in a permanent physical occupation, physical invasion, or economic regulation of Comsat's private property that would constitute a "taking" requiring "just compensation." Additionally, even assuming that permitting direct access to INTELSAT satellites could be considered a "taking" under the Fifth Amendment, "just compensation" would not be an issue since Comsat's opportunity to earn a reasonable return from its INTELSAT investment would be preserved.<sup>437</sup>

177. Comsat disputes these tentative conclusions.<sup>438</sup> Comsat maintains its previous position that: (1) Level 3 direct access by carriers other than Comsat would infringe on a Comsat property right (obtained by way of a regulatory contract); and (2) that Level 3 direct access would constitute a permanent physical occupation or economic invasion of its' property and, thus, constitute a taking, obligating the United States Government to pay "just" compensation.

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<sup>435</sup> *Id.*

<sup>436</sup> *Id.*

<sup>437</sup> See C&W comments at 9; Loral comments at 2; MCI WorldCom comments at 8-9; and PanAmSat comments at 4-5.

<sup>438</sup> Along with its comments, Comsat submits 37 pages of additional "comments" by Gregory Sidak, of whom it commissioned to write an opinion for Comsat. See Opinion of Law Concerning the Constitutionality of the Commission's Proposal in Direct Access to the INTELSAT System to Require Level 3 Direct Access to Space Segment Capacity on the INTELSAT System, Letter from J. Gregory Sidak to Warren Zeger, Vice President and General Counsel, Comsat Corporation (Dec. 22, 1998) ("Comsat Opinion Letter #1"). In its reply comments, Comsat submits 11 pages of additional "comments" by Mr. Sidak. See Opinion of Law Concerning the Constitutionality of the Commission's Proposal in Direct Access to the INTELSAT System to Require Level 3 Direct Access to Space Segment Capacity on the INTELSAT System, Letter from J. Gregory Sidak to Warren Zeger, Vice President and General Counsel, Comsat Corporation (Jan. 29, 1999) ("Comsat Opinion Letter #2").



178. The 13 other parties addressing this issue disagree with Comsat.<sup>439</sup> They maintain that: (1) Comsat possesses no property right which gives it exclusive access to INTELSAT satellites; (2) permitting Level 3 Direct Access to INTELSAT satellites by United States carriers other than Comsat is not an unconstitutional "taking"; and (3) that even if it were a "taking" under the Fifth Amendment, Comsat's continued financial return would be "just compensation" within the meaning of the Fifth Amendment.

(a) Comsat Possesses No Property Right

179. The Fifth Amendment to the United States Constitution declares that private property shall not be taken by the government for public use, without just compensation.<sup>440</sup> Accordingly, before we may consider whether a "taking" has occurred we must first address whether Comsat actually holds a property right from which a "taking" can occur.

180. Comsat claims that the United States Government awarded it an exclusive property right to access to INTELSAT satellites from the United States by way of a regulatory contract.<sup>441</sup> It states that Congress, by way of the Satellite Act, "charged Comsat with helping finance the global satellite system . . . and required it to serve, at considerable expense, as U.S. Signatory to INTELSAT."<sup>442</sup> In exchange, Comsat contends, it was given a property right for such exclusive access to INTELSAT from the United States. Comsat asserts that it would not have invested in a global satellite system without the assurance of an exclusive access contract and "the opportunity to recover its costs."<sup>443</sup>

181. Comsat specifically argues that we failed to acknowledge in our *Notice* the existence of this enforceable legal relationship and that the *United States v. Winstar* decision supports its position that a breach of a regulatory promise has occurred.<sup>444</sup> It contends that the Commission erred in its

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<sup>439</sup> See comments and/or replies of AT&T Corp., BT North America, C&W, GlobeCast, ITE Overseas, Loral Orion, MCI WorldCom, Network, PanAmSat, and Sprint Communications

<sup>440</sup> *United States Const. amend. V*. A taking occurs when government action directly interferes with or substantially disturbs the owner's use and enjoyment of the property. See e.g., *Brothers v. United States*, 594 F.2d 740, 741 (9th Cir. 1979) (To constitute a taking, within constitutional limitation, it is not essential that there be physical seizure or appropriation, and any actual or material interference with private property rights constitutes a taking.); *Aris Gloves, Inc. v. United States*, 420 F.2d 1386 (Ct. Cl. 1970) ("just compensation" means the full monetary equivalent of the property taken); *United States v. Reynolds*, 397 U.S. 14 (1970) (it is the fair market value of property taken at the time of the taking); *Danforth v. United States*, 308 U.S. 271 (1939).

<sup>441</sup> Comsat comments at 34.

<sup>442</sup> *Id.* at 35-36.

<sup>443</sup> *Id.* at 35.

<sup>444</sup> *United States v. Winstar Corp.*, 518 U.S. 839 (1996).

interpretation of *The Binghampton Bridge*<sup>445</sup> and *Winstar* cases in the *Notice*.<sup>446</sup> Comsat states that by way of the Satellite Act and accompanying regulations, the United States induced Comsat to invest in INTELSAT.<sup>447</sup> In exchange, asserts Comsat, it was offered a return on its investment by way of a promise for an exclusive franchise or, in the alternative, a promise to compensate Comsat if "the United States changes its mind."<sup>448</sup> Comsat insists that it would have been "irrational" for it to commit to the necessary investments without a promise by the Government for either an exclusive franchise or compensation if it changed its mind.<sup>449</sup> Comsat claims that "[w]ell-established case law supports the fact that Comsat's exclusive right to sell access in the United States to INTELSAT's space segment 'was a contract, the obligation of which cannot be impaired by subsequent legislation, or by a change in her organic law,' without just compensation."<sup>450</sup> It maintains that not having "an express promise" "does not vitiate this conclusion" or mean that no contract was created.<sup>451</sup> Finally, Comsat contends that the *Notice* errs by relying on Congress' reservation of the right to "repeal, alter, or amend" the Satellite Act as justification.<sup>452</sup> It asserts that this "does not give it the power to violate the Constitution by taking Comsat's property without compensation."<sup>453</sup>

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<sup>445</sup> *The Binghampton Bridge*, 70 U.S. 51, 74 (1865).

<sup>446</sup> Comsat comments at 35. *See Notice* at 18 (Commission description of *Binghampton Bridge* and *Winstar*). In the cases cited by Comsat in support of its argument, the Supreme Court concluded that express promises made by the government had been breached. In *The Binghampton Bridge* case, the Court held that a state breached an express statutory provision conferring geographical exclusivity on a bridge builder when the state subsequently permitted another bridge builder to construct a bridge in violation of the first bridge builder's exclusive rights. In *Winstar*, the Court concluded that the U.S. Government was liable for breach of contract when a Federal statute and implementing regulations invalidated a specific provision in contracts previously negotiated between thrifts and U.S. bank regulatory authorities permitting the thrifts to count supervisory goodwill and capital credits toward their regulatory capital requirements. Comsat fails to specifically show how the Commission erred in its interpretations of these cases.

<sup>447</sup> Comsat comments at 37-38.

<sup>448</sup> *Id.* at 38.

<sup>449</sup> *Id.* at 38.

<sup>450</sup> *Id.* at 36-37 (quoting *New Orleans Water-Works v. Rivers*, 115 U.S. 674, 681 (1885)). Comsat does not demonstrate how this "well-established case law" applies here. *See also* Comsat Opinion Letter #1.

<sup>451</sup> Comsat comments at 37 and 39.

<sup>452</sup> *See* 47 U.S.C. § 732.

<sup>453</sup> Comsat comments at 38.

182. We recognized in our *Notice* that a vested property right may be conferred upon a private party by the United States Government.<sup>454</sup> Whether a property right has vested, however, depends upon the nature of the relationship between the United States Government and the private party.<sup>455</sup> The first inquiry considers whether a contract actually exists.<sup>456</sup> This inquiry focuses in part upon whether the relationship was one of governmental regulation of the private party as opposed to a one-on-one contractual undertaking with that private party.<sup>457</sup> As Comsat provides no evidence of an explicit contractual undertaking between it and the United States Government, analogous to what private parties might negotiate, any contract purporting to promise exclusive rights in this context would be in the form of a statutory or regulatory contract (between it and the United States Government). We find that Congress did not vest in Comsat an exclusive property right, by way of the Satellite Act and its regulatory structure, to access INTELSAT satellites from the United States. Since there is no government contract, there is no basis for finding that Comsat has a vested property right affording it exclusive access.<sup>458</sup>

183. "A party claiming a property right must be able to demonstrate the abrogation of an express contract by statute or the existence of a contractual relationship between the private party and the government."<sup>459</sup> In *Binghampton*, the Court held that a state breached an express statutory provision for exclusivity.<sup>460</sup> We have found here that there is no express provision in the Satellite Act that confers on Comsat an exclusive right to access INTELSAT satellites in the United States. *Winstar* held that the United States Government was liable for breach of contract as a result of a new federal statute and implementing regulation that invalidated a specific provision in a contract previously

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<sup>454</sup> See, e.g., *Lynch v. United States*, 292 U.S. 571 (1934). See *Notice* at 18. We again note that we incorporate by reference the Commission's arguments in the *Notice* and herein, in support of direct access.

<sup>455</sup> See *Notice*, 13 FCC Rcd at 22018.

<sup>456</sup> See *Winstar*, 518 U.S. at 860-861.

<sup>457</sup> *Winstar*, 518 U.S. at 861-64, 896-97. See also *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 55 (1986) (alleged contract right at issue was part of a regulatory program over which the Congress retained its right to amend a statute in the exercise of its power to provide for the general welfare).

<sup>458</sup> AT&T comments at 6-7; AT&T Reply at 11; C&W comments at 9; Loral Orion comments at 2; GE comments at 7; PanAmSat comments at 4; MCI WorldCom comments at 8; MCI WorldCom Reply at 10.

<sup>459</sup> AT&T comments at 6. See *The Binghampton Bridge*, 70 U.S. 51 (New York legislature expressly established a charter (i.e., a contract) by statute, granting specific bridge companies the right to build a bridge.) See also *Winstar*, 518 U.S. 839 (regarding claim that government had taken away through legislation a right conferred by contract.)

<sup>460</sup> *Notice*, 13 FCC Rcd at 22018.

negotiated by the respective parties.<sup>461</sup> Here, there is no contract that has been negotiated between Comsat and the U.S. Government so there can be no invalidation of a contractual provision by way of statute or regulations. Although Comsat disputes the Commission's view of *Binghampton* and *Winstar*, it does not show where and how we erred. Moreover, it fails to show how the circumstances here are consistent with the circumstances in either of those cases. Beyond its general reliance on the Satellite Act, Comsat cites no other statutory provision or regulatory program that amounts to a contractual undertaking by the U.S. Government with respect to Comsat's access to INTELSAT satellites.<sup>462</sup> Thus, we affirm the tentative conclusion in our *Notice* that there is no commitment by the U.S. Government relating to Comsat's access to INTELSAT satellites that amounts to a governmental contract

184. In our *Notice* we said that Comsat failed to demonstrate that consideration of "special rules," such as those identified by the Court in *Winstar*, require a finding of a vested contractual right. We said there was no showing that there was an unmistakable or unambiguous surrender of sovereign authority, or that there was an express delegation to an agent to surrender such authority, that effectively vested a property right in Comsat with regard to access to INTELSAT satellites. Comsat provides no new information in response to our *Notice* that would cause us to change our position on this. Accordingly, we affirm the findings in the *Notice*.

185. In this proceeding, Comsat generally repeats much of the same reasoning that we rejected in our *Notice*, or simply makes conclusory statements without specifically rebutting the Commission's prior arguments.<sup>463</sup> It also relies upon its view of what the Satellite Act and regulatory regime gave it, but fails to show when and how the bequeath occurred. In particular, Comsat cites to no particular statutory or regulatory provision that amounts to an exclusive contractual undertaking by the United States Government with Comsat regarding access to INTELSAT satellites. Although it alleges that no express promise is necessary, it does not show an implied promise or contract. Furthermore, it does not otherwise demonstrate a property right of exclusive access to INTELSAT satellites.<sup>464</sup> Accordingly, we affirm our determination in the *Notice* that Comsat has no legitimate expectation that Congress granted it a contract-like right of exclusivity.<sup>465</sup> As there is no property right for exclusive access, the Fifth Amendment cannot be violated.

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<sup>461</sup> *Id.*

<sup>462</sup> We pointed out in the *Notice* that, by contrast, in *Winstar*, the Court found a number of specific commitments by the U.S. Government which were identified by petitioners that amounted to contractual undertakings. *Winstar*, 518 U.S. at 860-64. For example, the Court found that the U.S. Government had expressly agreed to indemnify the private party for costs associated with regulatory change. *Id.* at 886-87. See also *PanAmSat Reply* at 3.

<sup>463</sup> We incorporate by reference the Commission's arguments. *Notice*, 13 FCC Rcd at 22020.

<sup>464</sup> AT&T comments at 4; Sprint comments at 5; GE comments at 4; BT North America comments at 14. See *RCA Global Communications, Inc., et. al.*, 3 FCC Rcd 2814 (1988).

<sup>465</sup> Network comments at 18. MCI WorldCom comments at 4-5. AT&T comments at 6.

## (b) Comsat Establishes No Fifth Amendment "Taking"

186. In light of our finding that Comsat possesses no vested property right giving it exclusive access to INTELSAT satellites from the United States, there can be no issue regarding a Fifth Amendment "taking" of private property. Therefore, it is unnecessary to further address the issue. Nevertheless, if we assume that Comsat possesses a property right, we would then have to consider whether allowing Level 3 direct access to INTELSAT satellites in the United States constitutes a permanent physical occupation, physical invasion, or economic regulation that would establish a "taking" under the Fifth Amendment. For the reasons discussed below, we find, even assuming Comsat has a property right, that no violation of the Fifth Amendment "takings" clause has been established.<sup>466</sup>

187. Comsat asserts that Level 3 direct access would deny it, as one holding a property right, the right to exclude third parties from the use of Comsat's property.<sup>467</sup> This infringement, says Comsat, would constitute a "permanent physical occupation authorized by state law and, therefore, a 'taking' of private property by the government."<sup>468</sup> Comsat also asserts that government allowance of Level 3 direct access would deny it the "economically viable use" of its property -- exclusive access to INTELSAT satellites.<sup>469</sup> It disputes the characterization, made in our *Notice*, of a Level 3 arrangement as voluntary.<sup>470</sup> In particular, Comsat contends that since it would not be involved with the arrangements involving INTELSAT -- except to the extent the Commission required it to consent to such arrangements -- the arrangement would not be voluntary.<sup>471</sup> Comsat argues that it is irrelevant, contrary to the Commission's view in our *Notice*,<sup>472</sup> that "the U.S. would not be a party to the service agreement or in such an arrangement."<sup>473</sup> Finally, it contends that Comsat and its investors "bought their property in reliance on a state of affairs that did not include" a Level 3 direct access regime.<sup>474</sup>

## (i) No Permanent Physical Occupation

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<sup>466</sup> See Sprint comments at 6; MCI WorldCom comments at 7-8; Loral Orion Comments at 2; IT&E comments at 4; C&W at 1; and AT&T comments at 5 and 7.

<sup>467</sup> Comsat comments at 40.

<sup>468</sup> *Id.* at 40-41.

<sup>469</sup> *Id.* at 39. See *Penn Cent.*, 438 U.S. at 124, n.198.

<sup>470</sup> Comsat comments at 41.

<sup>471</sup> *Id.* Comsat does not elaborate on this assertion further.

<sup>472</sup> *Notice*, 13 FCC Rcd at 22020.

<sup>473</sup> Comsat comments at 41.

<sup>474</sup> *Id.* at 40. See also *Loretto*, 458 U.S. at 434-35.

188. As stated in our *Notice*, a taking will be found where the character of the governmental action results in a "permanent physical occupation" of property.<sup>475</sup> In *Loretto*, the Supreme Court held that if the "character of the government action" results in a "permanent physical occupation" a "taking" occurs to the extent of the occupation, regardless of whether the public gains some benefit or the economic impact is minimal.<sup>476</sup> However, a court will not find a "taking" where an agency simply regulates the terms of a voluntary commercial relationship.<sup>477</sup>

189. Although, Comsat is correct that "just compensation" would likely be forthcoming where a permanent physical occupation of a property right occurs, permitting other United States carriers and users to obtain Level 3 direct access to INTELSAT satellites would not result in a permanent physical occupation of Comsat's INTELSAT property. Under a Level 3 direct access regime, a voluntary contractual arrangement would be created between a United States carrier or user and INTELSAT. This contractual arrangement permits "use" but not a "permanent occupation."<sup>478</sup> The U.S. Government is not a party to the service agreement between INTELSAT and a Level 3 direct access customer. As we pointed out in our *Notice*, under a Level 3 direct access agreement other carriers would be allowed to use but not to permanently (physically) occupy INTELSAT satellites.<sup>479</sup> In return, INTELSAT would receive payment for that use from the customer.<sup>480</sup> Comsat has provided nothing further in its comments that would cause us to alter our position on this point. Under these circumstances, a direct access customer's use of INTELSAT satellites does not result in a permanent physical occupation of Comsat's property that would constitute a "taking" within the meaning of the Fifth Amendment.

(ii) No "Taking" by Partial Physical Occupation or Economic Regulation

190. Where government action does not result in a "permanent physical occupation," yet raises "takings" issues or where regulation denies its property owner "economically viable use" of that

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<sup>475</sup> *Notice*, 13 FCC Rcd at 38. See *Lucas*, 505 U.S. at 1015-16; *Loretto*, 458 U.S. at 434-35 (a taking occurs to the extent of the occupation without regard to whether the governmental action achieves an important public benefit or has only minimal impact on the owner.)

<sup>476</sup> *Loretto*, 458 U.S. at 434-435, n.200. AT&T cites a number of court cases that address the taking issue, AT&T reply at 11-12.

<sup>477</sup> See *FCC v. Fla. Power Corp.*, 480 U.S. 245, 251 (1987) (Supreme Court held that the relief from overcharging on pole attachment leases, pursuant to the Pole Attachment Act, between cable and utility companies did not constitute a permanent physical occupation; the Court noted that the Pole Attachment Act neither gives cable companies the right to attach to utility poles nor requires utility companies to enter into attachment agreements with cable operators.); See also *Yee v. Escondido*, 503 U.S. 519 (1992); *Nixon v. United States*, 978 F.2d 1269, 1286 (D.C. Cir. 1992).

<sup>478</sup> Loral Orion comments at 2.

<sup>479</sup> See *Notice*, 13 FCC Rcd at 20.

<sup>480</sup> INTELSAT Service Agreement (May 1, 1997), <http://www.intelsat.int/cc/connect/servform.htm>.

property, the courts will weigh the facts in an ad hoc manner.<sup>481</sup> Specifically, as noted in our *Notice*, a physical invasion of property (short of a permanent physical occupation), or a regulation that merely affects the use of property, will lead to the application of three factors noted previously.<sup>482</sup> Applying these three factors, we conclude that allowing carriers other than Comsat to access INTELSAT satellites in the United States through Level 3 direct access would not give rise to a taking under the Fifth Amendment.

191. We consider first whether the character of the governmental action indicates that a "taking" has occurred. "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."<sup>483</sup> In this case, the nature of the government action serves Commission objectives.<sup>484</sup> As discussed above, the Commission has the authority under Section 201(c)(2) and (11) of the Satellite Act to adopt a rule or policy that assures U.S. carriers and users to obtain nondiscriminatory and equitable access to INTELSAT satellites.<sup>485</sup> INTELSAT, in its normal business operations, provides procedures for direct access to INTELSAT satellites by non-Signatories. A rule or policy permitting other U.S. carriers and users to obtain Level 3 direct access would not compel physical use of Comsat's INTELSAT facilities. Rather, such a rule or policy would be permissive because Level 3 direct access to INTELSAT's facilities would be based on a voluntary contractual arrangement entered into between a carrier or user and INTELSAT. In addition, as discussed below, the rule or policy would, among other objectives,

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<sup>481</sup> See *Penn Cent.*, 438 U.S. 104. See also AT&T Comments at 7; Loral comments at 2. A Fifth Amendment uncompensated "taking" can be supported under two situations. One, the property is physically occupied, destroying the owner's right to "possess, use and dispose of it." See, e.g., *Loretto*, 458 U.S. at 435 (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945)). Direct access will not prohibit continued access by Comsat to the INTELSAT system. AT&T comments at 8. Two, an unconstitutional taking occurs when the property has been physically invaded and the owner has been denied of all economically beneficial use of the property. See *Lucas*, 505 U.S. at 1015-16. (The factors analyzed by courts in determining whether there is a physical invasion are: (1) the character of the government action, (2) the economic impact of the regulation on the claimant, and (3) the extent to which the regulation has interfered with distinct investment-backed expectations.); See *Penn Cent.*, 438 U.S. at 124; *Preemption of Local Zoning Regulation of Satellite Earth Stations*, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 11 FCC Rcd at 19302 (¶ 43)." AT&T comments at 8.

<sup>482</sup> *Supra n.* at 252. *Notice*, 13 FCC Rcd at 20-21. See *Ruckelshaus v. Monsanto Company*, 467 U.S. 986, 1005 (1984). See also *Loretto*, 458 U.S. at 426 (the degree of interference with investment-backed expectations is of particular significance); *Penn Cent.*, 438 U.S. at 124; *Lucas*, 505 U.S. at 1015. See also *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). Comsat insists that the third prong is the "key to this analysis." Comsat comments at 39.

<sup>483</sup> *Penn Cent.*, 438 U.S. at 124.

<sup>484</sup> See AT&T comments at 9-11.

<sup>485</sup> 47 U.S.C. § 721(c)(2) and (11).

serve the important Commission objective of promoting competition and U.S. competitiveness in the global telecommunications market. The character of the Commission's action is reasonably related to an important Commission objective and is likely to produce a widespread public benefit. Further, it carries out the goals of the Satellite Act.

192. Secondly, we consider whether the economic impact of government action to the property demonstrates a "taking" by government. Under a Level 3 direct access contractual arrangement, customers will be required to compensate INTELSAT for the use of INTELSAT satellites. In turn, Comsat and its shareholders would continue to receive a 14-18 percent investment return from INTELSAT for the communications traffic attributable to INTELSAT's United States Level 3 direct access customers. In addition, as we discussed above, we are requiring U.S. direct access customers to pay Comsat a reasonable surcharge to cover certain Signatory-related costs. We also are denying U.S. carriers "fresh look" relief for their current long-term contracts with Comsat, so Comsat may maintain its current customer arrangements which allow it an opportunity to recoup its investment. Level 3 direct access may result in some of Comsat's customers switching to competing carriers for switched voice, private line and occasional-use video service due to service and pricing competition. Comsat, however, would have the opportunity to price and package its services in response to these competitive market conditions to counter any adverse economic effect from new competition.<sup>486</sup>

193. Finally, we consider whether the degree of interference of the governmental action on an owner's reasonable investment-backed expectations amounts to a "takings." We find that the Satellite Act, regulatory structure implementing the Act, and recent changes in the way INTELSAT conducts its business with customers provided reasonable notice to Comsat and its shareholders that direct access to INTELSAT satellites in the United States was a possibility and reasonably foreseeable. First, we found above that the Satellite Act affords the Commission discretion to permit Level 3 direct access. Second, the Satellite Act reserves to Congress the "right to repeal, alter, or amend" its provisions,<sup>487</sup> as well as make it subject to appropriate regulation by the Commission.<sup>488</sup> Regulatory agencies historically have ordered access to common carrier bottleneck facilities for the purpose of increasing competition and facilitating the development of new services<sup>489</sup> or they have imposed other

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<sup>486</sup> See *Concrete Pipe and Products of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 645 (1993) ("[O]ur cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking.").

<sup>487</sup> 47 U.S.C. § 732.

<sup>488</sup> 47 U.S.C. § 701(c).

<sup>489</sup> See, e.g., *United States v. Terminal Railroad Ass'n of St. Louis*, 224 U.S. 383 (1912) (antitrust court ordered railroads to provide competitors equivalent access to bottleneck railway terminal facilities), *appeal after remand*, 236 U.S. 194 (1915); *Cellular Communications Systems*, 86 FCC 2d 469, 495-96 (1981) (Commission required telephone companies to furnish interconnection to cellular systems upon terms no less favorable than those used by or offered to wireline carriers), *modified*, 89 FCC 2d 58 (1982), *further modified*, 90 FCC 2d 571 (1982); *Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, 59 RR 2d 1275 (1986), *clarified*, 2 FCC 2d 2910 (1987), *aff'd on recon.*, 4 FCC Rcd 2369 (1989) (Commission clarified policies regarding interconnection of cellular and other radio



requirements to satisfy statutorily-mandated public interest objectives.<sup>490</sup> In fact, the Commission addressed this very issue in 1984, but decided at that time not to implement a direct access scheme for reasons unrelated to whether it had legal authority to order direct access.<sup>491</sup> Third, Comsat was involved with the process that sanctioned Level 3 and other forms of direct access in many cases to the INTELSAT system worldwide, by virtue of its participation as the U.S. Signatory in INTELSAT. For all of the foregoing reasons, Comsat and its shareholders certainly should have been on notice that, in light of the regulatory structure Comsat has been under, direct access might someday be permitted in the United States. Consequently, we conclude that neither Comsat nor its shareholders could have reasonably maintained an expectation that Comsat's access to INTELSAT satellites from the U.S. would be exclusive in perpetuity.<sup>492</sup>

(c) Comsat Establishes No Case for "Just Compensation"

194. Having concluded that no Fifth Amendment "taking" has been established, we need not address whether "just compensation" is an issue. Nevertheless, even assuming that a Fifth Amendment "taking" has occurred, we do not believe that under the circumstances before us, compensation by the United States Government would be due Comsat.<sup>493</sup>

195. Comsat asserts that if Level 3 direct access to INTELSAT satellites in the United States is allowed, the United States Government must compensate it for damages. Comsat specifically contends that because it and its investors "bought their property in reliance on a state of affairs that did not include" anything resembling Level 3 direct access, the Commission's imposition of Level 3 direct access would represent a "taking" and require "just compensation," including expectation damages.<sup>494</sup>

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common carrier facilities to landline network); *Lincoln Tel. & Tel. Co. v. FCC*, 659 F.2d 1092, 1103 (D.C. Cir. 1981) (court upheld Commission's order requiring Lincoln to provide interconnection facilities to MCI).

<sup>490</sup> For example, the Commission required AT&T to de-tariff and sell its customer premises equipment (CPE). *CPE De-tariffing (Computer II)*, 95 FCC 2d 1276, 1295-96, *recon. denied*, 100 FCC 2d 1290 (1983). We rejected AT&T's Fifth Amendment claim because we found that the sale requirement was reasonably related to our legitimate objective of protecting the ratepayer's equitable share of the gains on regulated assets and the public's interest in the availability of reasonably priced CPE. 95 FCC 2d at 1295.

<sup>491</sup> *1982 Direct Access Inquiry*.

<sup>492</sup> *See Concrete Pipe and Products*, 508 U.S. at 645 (readjusting rights and burdens in a particular field subject to federal regulation is not unlawful solely because it "upsets otherwise settled expectations" even if new duties or liabilities are imposed).

<sup>493</sup> We do not address here the proper forum for Comsat to pursue compensation should a taking be established.

<sup>494</sup> Comsat comments at 40.

196. The Fifth Amendment "takings" clause requires "just compensation" for a government "taking" of private property. This has generally meant an amount that is fair to all parties concerned or a monetary equivalent of the property taken.<sup>495</sup> Other courts have described "just compensation" as adequate compensation<sup>496</sup> or an amount that leaves one no poorer or richer than before the property was taken. It has also been held that the Fifth Amendment protects private investors from being limited to a rate that is so unjust as to be confiscatory.<sup>497</sup>

197. The essence of Comsat's "taking" claim, which would require "just compensation," rests with the contention that the gain by other carriers of Level 3 direct access to INTELSAT satellites is loss for Comsat, for which it must be compensated.<sup>498</sup> The specific loss Comsat refers to would be the ability of carriers and users within the United States to "physically occupy the circuit and transponder capacity of INTELSAT's satellites of which Comsat is co-owner."<sup>499</sup>

198. Although Level 3 direct access would allow carriers and users to obtain INTELSAT satellite space segment capacity, which Comsat claims as a property right based on its investment in INTELSAT, United States direct access customers would be obtaining capacity, as discussed above, under a voluntary business arrangement with INTELSAT for a monetary consideration. The price and other terms of this business arrangement are set by all INTELSAT Signatory investors, including Comsat. Comsat is thus part of the INTELSAT governing body that establishes the prices and terms of service under the INTELSAT IUC and the return on Signatory investment in the satellites. Therefore, Comsat and other Signatories have presumably set what they consider to be "just compensation" for Level 3 direct access to INTELSAT satellites. In addition, as discussed above, United States direct access customers will be required to pay a reasonable surcharge to cover certain Signatory-related costs.

199. Furthermore, Comsat would still retain space segment capacity that it acquires from INTELSAT and the right to sell all of this capacity to other carriers and users.<sup>500</sup> Comsat would also have an opportunity to retain its current long-term contracts with other carriers, because, as discussed below, we reject the "fresh look" proposal of some parties. In other words, Comsat would retain the same financial gain opportunity as a "middleman" (go-between) or "retail seller" of INTELSAT satellite capacity. Level 3 direct access will increase the competition and hence may pressure Comsat

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<sup>495</sup> See *Reynolds*, 397 U.S. 14; *Danforth*, 308 U.S. 207.

<sup>496</sup> See *State v. Hale*, 96 S.W.2d 135, 141 (Tex. Civ. App.-Austin, 1936).

<sup>497</sup> *Duquense Light Co. v. Barasch*, 488 U.S. 299, 307 (1989) (citing *Covington & L. Turnpike Road Co. v. Sandford*, 164 U.S. 578, 597 (1896)).

<sup>498</sup> Comsat comments at 40-42.

<sup>499</sup> *Id.* at 40.

<sup>500</sup> Comsat currently has agreements with INTELSAT for transponder capacity. An actual physical use of Comsat's alleged property would not be apparent as Comsat would continue to retain its complete contractual reservation -- by way of long-term contracts -- of capacity on INTELSAT.

to lower its retail prices. As demonstrated in the *Notice*, Comsat charges a mark-up of IUC rates ranging from 18-270 percent, depending on the service.<sup>501</sup> The opportunity made available through Level 3 direct access for carriers and users to purchase capacity at the much lower IUC rate could lead to a lowering of Comsat's prices for INTELSAT access.<sup>502</sup> Nevertheless, Comsat would still continue to have a reasonable opportunity to earn a fair return ("just compensation") on both the wholesale and retail aspect of its participation in INTELSAT.<sup>503</sup>

(d) Conclusion on Fifth Amendment Issue

200. We find that Comsat has not provided new information that would warrant a change in our tentative conclusion in the *Notice* that no Fifth Amendment violations would occur if Level 3 direct access were permitted. Specifically, we conclude that: (1) Comsat possesses no property right which would confer on it an exclusive right to access INTELSAT satellites from the United States; (2) assuming that Comsat may have a property right, that permitting Level 3 direct access would not result in a permanent physical invasion or an economic regulation of Comsat's private property that would constitute a "taking" requiring just compensation under the Fifth Amendment; and (3) assuming a "taking" has actually occurred, Comsat has and will continue to have the opportunity to receive "just compensation" by virtue of other United States carriers being allowed Level 3 direct access to INTELSAT satellites.<sup>504</sup>

## V. SUMMARY OF FINDINGS AND CONCLUSIONS

201. We find that making Level 3 direct access available in the United States would result in substantial public interest benefits for U.S. carriers and users of the INTELSAT system for the provision of international services. The record in this proceeding demonstrates that the lower rates, additional customer choice and benefits resulting from Level 3 direct access should be available in all

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<sup>501</sup> See *Notice*, 13 FCC Rcd at 22036 and 22050-22051 (Appendix B). See also, *supra*, n. 212. See also Sprint comments at 4; Network comments at 9; and C&W comments at 2.

<sup>502</sup> Comsat has benefited from a regulatory structure that shielded it from full competition and guaranteed it a very high return on its invested capital. PanAmSat comments at 4.

<sup>503</sup> See *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194-95 (1985) (it is only necessary that a reasonable, certain and adequate provision for obtaining compensation exist at the time of the taking; "[i]f the government has provided an adequate process for obtaining compensation, and if resort to that process [results in compensation], then the property owner [has no takings claim]").

<sup>504</sup> Comsat, in any event, has not presented a detailed analysis of the extent of any alleged "taking" resulting from the Commission's allowance of Level 3 direct access. To the extent Comsat argues that allowing Level 3 direct access will cause economic harm, resulting in a "taking", it is speculative at this point. Therefore, any alleged taking claim may be premature. In addition, there is also the legal issue of whether the Commission or the U.S. Court of Claims would be the proper entity to determine what constitutes just compensation in a Fifth Amendment "takings" claim.

markets and services and not only to those in which competition does not yet exist. Additional customer choice in all markets and services is necessary to enhance U.S. competitiveness in the global telecommunications market. The availability of direct access to INTELSAT in 94 countries places U.S. carriers and users at a competitive disadvantage with their foreign counterparts. We therefore conclude that permitting Level 3 direct access in the United States would serve the public interest.

202. We also conclude, however, that certain conditions must be imposed in implementing Level 3 direct access in the United States to prevent competitive distortions in the U.S. market. First, we will prevent any INTELSAT Signatory other than Comsat from obtaining Level 3 direct access in the United States for service to or from any specific foreign country in which the Signatory itself uses 50 percent or more of all INTELSAT capacity consumed in that country. Second, we find that U.S. carriers and users must pay Comsat a reasonable surcharge when obtaining INTELSAT services under Level 3 direct access. A surcharge of 5.58 percent will enable Comsat to recover certain Signatory-related costs. Even with the surcharge, there will be substantial cost savings available to carriers and users in the range of 10.7 to 71.4 percent of Comsat's current tariff rates. Third, in order to protect competition in the U.S. market, we expect that INTELSAT will voluntarily waive its immunity from suit and process to cover any instance in which it negotiates with U.S. carriers or users for the provision of space segment capacity not available under the terms of INTELSAT IUC rates. INTELSAT need not waive its immunities in those instances where U.S. carriers and users obtain capacity under the standard Level 3 direct access contract pursuant to terms and conditions of INTELSAT's IUC. In addition, we find it unnecessary to impose full common carrier regulatory authority over INTELSAT as requested by some parties. For purposes of implementing Level 3 direct access, we will treat INTELSAT the same as a non-licensed U.S. satellite system and use our authority to license earth stations within the *DISCO II* regulatory structure, as a means of overseeing INTELSAT's Level 3 direct access operations in the United States.

203. We deny the requests of certain U.S. carriers for "fresh look" of their long-term contracts with Comsat for the use of INTELSAT space segment capacity. Our decision to permit Level 3 direct access is intended as a forward-looking policy that permits U.S. carriers additional choice in future decisions on obtaining INTELSAT space segment capacity. We do not in this proceeding grant carrier requests for portability of INTELSAT space segment. Such a measure should be considered only if the benefits of direct access are not realized because non-Comsat-owned space segment capacity capable of serving the United States proves to be unavailable to U.S. carriers and other authorized users. The record in this proceeding does not demonstrate that such action is necessary at this time to assure future benefits. We will, however, consider again the issue of portability if direct access customers show evidence that Comsat's control of INTELSAT capacity prevents realization of direct access benefits.

204. We affirm the tentative conclusion in our *Notice* that the Commission has the discretion under the Satellite Act and the Communications Act to permit Level 3 direct access in the United States. We find that the Satellite Act neither explicitly nor implicitly grants Comsat exclusive access to the INTELSAT system. Discretion to permit Level 3 direct access is based on its authority granted to the Commission under the Satellite Act, to insure that carriers have "non-discriminatory use of and equitable access to" the global system and to "regulate the manner which available facilities of the system . . . are allocated among users." We further find that we may exercise this discretion: (1) taking into account factors not existing in 1962, or in 1984, when we decided not to move ahead with

direct access; and (2) upon a finding that doing so is in the public interest and is not otherwise inconsistent with the purposes of or any provision in the Satellite Act. The record in this proceeding demonstrates that substantial benefits will accrue to U.S. carriers and users from Level 3 direct access and that permitting Level 3 direct access would be in the public interest. Under Level 3 direct access, Comsat will remain the sole U.S. investor and participant in the management and operation of the INTELSAT system. Comsat will earn a return on its investment attributable to U.S. direct access use of the system - both as a result of the percent return it will receive from INTELSAT and the surcharge we are requiring U.S. direct access users to pay to cover certain Signatory-related costs. Under these circumstances, we also conclude the Level 3 direct access is permissible under the Satellite Act of 1962. Finally, as discussed above, we conclude that permitting direct access in the United States under the circumstances outlined in this order would not constitute an uncompensated "taking" in violation of the Fifth Amendment.

## VI. REGULATORY FLEXIBILITY ACT

205. As required by Section 603 of the Regulatory Flexibility Act ("RFA"),<sup>505</sup> an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *Notice*. The Commission then sought written public comment in that proceeding, including comments on the IRFA. No party filed comments in response to the IRFA. Further, this *Report and Order* promulgates no new rules and our action here does not affect the previous analysis in the *Notice*. The Commission certifies that there will be no significant effect on a substantial number of small entities.

## VII. ORDERING CLAUSES

206. Accordingly, IT IS ORDERED, that, pursuant to Sections 102 and 201(c)(2), (7) and (11) of the Communications Satellite Act of 1962, as amended, 47 U.S.C. 701 and 721(c)(2), (7) and (11), and Sections 1, 2, 4(c), 201, 202, 214, 301, 303, 307, 308 and 309, of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(c), 201, 202, 214, 301, 303, 307, 308 and 309 that 60 days after publication of this Report and Order in the Federal Register Level 3 direct access to INTELSAT shall be available to carriers and users authorized to obtain INTELSAT space segment capacity for the provision of telecommunications services to and from the United States in accordance with the terms and conditions of this Report and Order and those established by INTELSAT to implement Level 3 direct access.

207. IT IS FURTHER ORDERED, that, upon publication in the Federal Register of this Report and Order, the International Bureau shall release a Public Notice requesting authorized carriers and users desiring to obtain Level 3 direct access to INTELSAT to so inform the Commission within 21 days of the release of the Public Notice.

208. IT IS FURTHER ORDERED, that, in its capacity as the U.S. Signatory to INTELSAT, and in accordance with procedures established by INTELSAT permitting "blanket authorizations" for Level 3 direct access, Comsat shall inform INTELSAT in writing within ten calendar days of receiving the information from the International Bureau that the identified authorized carriers and users responding to the Public Notice may obtain Level 3 direct access from INTELSAT on the effective date of this Report and Order, as provided in paragraphs 206 and 216, without further approval of the U.S. Signatory.

209. IT IS FURTHER ORDERED, that, authorized carriers and users, not identified as part of the initial "blanket authorization" sent to INTELSAT by Comsat, may request Comsat to request adding them to the list of named carriers and users eligible for Level 3 direct access and Comsat shall so inform INTELSAT within ten days of receiving each such subsequent request.

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<sup>505</sup> See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) ("CWAAA"). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").

210. IT IS FURTHER ORDERED, that, within 60 days of publication in the Federal Register of this Report and Order, Comsat may file, on one day's notice, a tariff of the terms and conditions of the surcharge applicable to U.S. Level 3 direct access customers which shall be consistent with findings in the Report and Order.

211. IT IS FURTHER ORDERED, that, authorized carriers and users obtaining Level 3 direct access from INTELSAT shall pay Comsat the surcharge specified in Comsat's effective tariff that is applicable to the services obtained from INTELSAT.

212. IT IS FURTHER ORDERED, that, in its role as the U.S. Signatory, Comsat may establish reporting mechanisms with INTELSAT for the limited purpose of assuring that Comsat can identify the appropriate surcharge that U.S. direct access customers must pay Comsat upon receipt of service from INTELSAT under Level 3 direct access.

213. IT IS FURTHER ORDERED, that, Comsat's tariff may provide that failure to pay the appropriate surcharge will result in loss of a customer's Level 3 direct access privileges.

214. IT IS FURTHER ORDERED, that the Comsat Corporation MOTION TO STRIKE the *ex parte* filing submitted by counsel for the Satellite Users Coalition, IS DENIED.<sup>506</sup>

215. IT IS FURTHER ORDERED, that, the Commission's Office of Managing Director shall send a copy of this Report and Order, including Final Regulatory, Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

216. IT IS FURTHER ORDERED, that, policies, rules and requirements established in this Report and Order shall take effect 60 days after publication in the Federal Register, or in accordance with the requirements of 5 U.S.C. § 801(a)(3) and 44 U.S.C. § 3507, whichever occurs later.

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<sup>506</sup> Comsat moves to strike the filing on September 9, 1999 by the Satellite Users Coalition giving notice of an *ex parte* presentation it made to Commission staff the previous day, prior to release of the Sunshine Notice. See Letter from Comsat Corporation to the Secretary, Federal Communications Commission, dated September 9, 1999. See also Opposition to Motion to Strike by Satellite Users Coalition, IB Docket No. 98-192, File No. 60-SAT-ISP-97 (Sept. 13, 1999). See also Comsat Reply to Opposition to Motion to Strike, IB Docket No. 98-192, File No. 60-SAT-ISP-97 (Sept. 14, 1999). Comsat contends that receipt of this required filing the following day, by staff not present at the September 8, 1999 meeting, constituted a violation of our *ex parte* rules which prohibits presentations to decision-makers on matters listed on the Commission's Agenda. See 47 C.F.R. § 1.1203(a). However, the oral and other information provided by the Satellite Users Coalition on September 8, 1999, was constructively available to all Commission decision-makers on that date. In addition, the Satellite Users Coalition was required to file this information for the public record by the end of the next day in accordance with Section 1.1206(b) of our rules. 47 C.F.R. § 1.1206(b). As a result, service on decision-makers not present at the September 8 meeting did not constitute a violation of Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary



## **Appendix A**

We allow Comsat to impose upon users of direct access a surcharge of up to 5.58% over INTELSAT's IUC. The components of the surcharge include an amount for certain Signatory related expenses (1.94%) , recovery of past insurance expenses (3.59%), and recovery of headquarters expenses (0.05%). The calculations used to support these surcharges are explained in Appendix B and C.

**Table - A**  
**Total Surcharge**

**% of the IUC**

**Components of Surcharges**

Signatory Related Expenses (see Appendix B)	1.94%
Recovery of Past Insurance Expenses (see Appendix B)	3.59%
Recovery of Comsat Headquarters Expenses (see Appendix B)	0.05%
Total Surcharge	5.58%

## Appendix B

### Calculation of Surcharge for Signatory Related Expenses

Appendix B illustrates the methodology used to determine the permitted surcharge for certain Signatory-related expenses.

As discussed in the Order, the Commission permits Comsat to recover Signatory function expenses, capitalized insurance expense for launches and satellites not insured by INTELSAT, and headquarters account expenses. We find that a surcharge should be calculated by determining what percentage a given expense constitutes of the total IUC payments attributed to U.S. usage and then apply this uniform percentage to the IUC rate. We use the year 1998 as the base year from which to estimate a surcharge. Note: IUC payments for the year 1998 totaled \$154.77 million, as provided by Comsat.

#### Signatory Function Expenses

Comsat incurred \$3.005 million in Signatory function expenses. This translates into Signatory function expenses representing 1.94% of total IUC payments made by Comsat in 1998. Assuming 1998 data represents a reasonable estimate of the Signatory function expenses to be incurred by Comsat in the future, Comsat would incur a Signatory function expense of 1.94 cents for each IUC dollar generated in the U.S. for the year 1998. Or, in another sense, Signatory function expenses represent a rate of 1.94% for each IUC dollar attributed to U.S. usage. We therefore conclude that a surcharge of 1.94% for Signatory function expenses would be reasonable.

#### Insurance Expense

Comsat has \$22.21 million in capitalized insurance expense attributed to INTELSAT not insuring, or under-insuring, the costs of satellite deployment. This number was calculated by FCC staff as shown in Appendix C. We permit Comsat to include a surcharge for depreciation on this insurance.

The depreciation expense is based on depreciating the capitalized insurance over four years, using a straight line depreciation method. This methodology results in a depreciation expense of \$5.55 million per year. (Note that the depreciation method we use here parallels Comsat's annualized depreciation rate.)

The total expenses for insurance expense recovery amount to \$5.553 million, which represents 3.59% of the IUC payments attributed to U.S. usage in 1998. Therefore, we conclude that a surcharge of up to 3.59% for insurance expense recovery would be reasonable.

#### Headquarters Account Expense

Comsat has \$330,000 in its capitalized headquarters account expense. We permit Comsat to include a surcharge for depreciation of those capitalized expenses.

The depreciation expense is based on depreciating the capitalized insurance over four years, using a straight line depreciation method. This methodology results in a depreciation expense of \$82,500 per year ( $\$333,000/4$  years).

The total expenses for capitalized headquarters account expense amounts to \$82,500 which represents

.05% of the IUC payments attributed to U.S. usage in 1998. Therefore, we find that a surcharge of up to .05% for headquarters account expenses would be reasonable.

Total Surcharge for Signatory-Related Expenses

The total surcharge for Signatory-related expenses amounts to 5.58%, which represents the sum of the surcharges for: Signatory function expenses (1.94%), insurance recovery (3.59%), and Headquarters Account Expenses (.05%).

**Table - B**  
**Calculation of Surcharge Signatory Related Expenses**

	1998 Data	1998 % of IUC
Estimated 1998 IUC to INTELSAT *	\$154,770,000	
Signatory - Related Expenses:		
Signatory Function Expenses *	\$3,004,603	1.94%
Insurance Expense Recovery		
Capitalized Insurance (see Appendix C)	\$22,212,000	
Annual Depreciation Insurance Expenses	\$5,553,000	3.59%
Headquarters Account Expense		
Capitalized Headquarters Expense **	\$330,000	
Depreciation Expenses	\$82,500	0.05%
Total signatory Related Expenses	\$8,640,103	5.58%

Sources:

\* COMSAT - Ted Boll Original Affidavit, 12/29/1998

\*\* COMSAT Ex Parte Statement, June 11, 1999

## Appendix C

### Calculation of Capitalized Insurance

The table in Appendix C illustrates the methodology used to determine capitalized insurance attributed to INTELSAT not insuring, or under-insuring, the costs of satellite deployment.

Comsat provided the Commission data about the insurance it has purchased on launch and post-separation, as well as top-off insurance. It did not provide the Commission a detailed depreciation schedule for insurance. As a result, Comsat failed to illustrate the calculation to support the \$31 million of insurance it claims remains capitalized, or undepreciated.

Commission staff calculated the undepreciated amount of Comsat's insurance expenses for each satellite, excluding Comsat's expenditures for insurance on the original insurance. The calculation only includes insurance purchased by Comsat and does not include insurance purchased by INTELSAT. Column 12 in the table shows the Commission's estimation of the undepreciated amount of insurance. The amount in Column 12 is based on calculating the total amount of insurance payments incurred by Comsat after excluding insurance on insurance, (Column 9), and then calculating the depreciation expense per year based on the life of the satellites (Column 10). The depreciation per year is then multiplied by years remaining for the different satellites (Column 11) to arrive at the total estimated undepreciated amount (Column 12). The total is \$22.212 million.

Table - C

## Calculation of Capitalized Insurance

COMSAT Provided Data							FCC Staff Estimate *					
Satellite	Launch Date (1)	Comsat (CQ) Insurance Premium (\$M)				Depr. Year (7)	Insurance's Ins % (8)=(9)/(5)	CQ Adjusted Own Ins. w/o Ins.'s Ins. (9)=(5)-(2)-(6)	Estimated Ins Depr.Yr. (w/o Ins.'s Ins.) (10) = (9)/(7)	Remaining Life years (manual count) (11)=(7)-(1)	Estimated Undepr. Ins. (12)= (9)- ((10)+ ((7)-(11)))	
		Share of INTELSAT (2)	Comsat's Own Ins. Launch (3)	Post-Sep. (4)	Total (Incl. top-off Ins.) (5)=(2+3+4)							Comsat Ins.'s Ins. part (6) **
601	Oct-91	Not Insured										
602	Oct-89	Not Insured										
603	Mar-90	Not Insured										
603 Reboost	May-92	Not Insured	Lump Sum Insurance									
604	Jun-90	Not Insured										
605	Aug-91	Not Insured										
6 Series Total		Not Insured			\$54.800	\$7.978	10	14.55%	\$48.824	\$4.682	3.0	\$14.047
IS K	Jun-92	Not Insured	\$7.525	\$1.475	\$9.000	\$1.299	10	14.43%	\$7.701	\$0.770	4.0	\$3.080
701	Oct-93	\$4.191	\$0.712	\$0.422	\$5.325	\$0.488	11	8.79%	\$0.668	\$0.061	6.0	\$0.363
702	Jun-94	\$4.218	\$0.712	\$0.422	\$5.352	\$0.471	11	8.80%	\$0.663	\$0.060	6.5	\$0.392
703	Oct-94	\$4.605	\$0.888	\$0.422	\$5.915	\$0.622	11	10.52%	\$0.688	\$0.083	7.0	\$0.438
704	Jan-95	\$4.621	\$0.888	\$0.422	\$5.931	\$0.624	11	10.52%	\$0.688	\$0.082	7.0	\$0.437
705	Mar-95	\$4.408	\$0.888	\$0.422	\$5.718	\$0.601	11	10.51%	\$0.709	\$0.084	7.0	\$0.451
706	May-95	\$4.910	\$1.041	\$0.645	\$6.596	\$0.548	11	8.31%	\$1.138	\$0.103	7.5	\$0.776
707	Mar-96	\$5.010	\$1.173	\$0.645	\$6.828	\$0.638	11	9.34%	\$1.180	\$0.107	8.5	\$0.912
709	Jun-96	\$2.894	\$0.811	\$0.645	\$4.150	\$0.389	11	8.89%	\$0.687	\$0.081	8.5	\$0.685
Total 7 series		\$34.855	\$8.913	\$4.045	\$45.813	\$4.341		9.48%	\$8.617	\$0.802		\$4.454
801	Mar-97	\$4.831	\$0.514	\$0.809	\$6.154	\$0.811	11	13.18%	\$0.512	\$0.047	9.0	\$0.419
802	Jun-97	\$5.029	\$0.526	\$0.471	\$6.026	\$0.794	11	13.18%	\$0.203	\$0.018	9.5	\$0.175
803 ***	Sep-97	\$2.495	N/A		\$2.495	\$0.000	11	12.75%	\$0.000	\$0.000	10.0	\$0.000
804 ***	Dec-97	\$2.549	N/A		\$2.549	\$0.000	11	12.75%	\$0.000	\$0.000	10.0	\$0.000
805 ***	Jun-98	\$6.103	N/A		\$6.103	\$0.000	11	12.75%	\$0.000	\$0.000	10.5	\$0.000
806	Feb-98	\$3.087	\$0.309	(combined)	\$3.396	\$0.289	11	7.92%	\$0.040	\$0.004	10.0	\$0.036
Total 8 series		\$24.094	\$1.349	\$1.280	\$26.723	\$1.874		7.01%	\$0.755			\$0.631
Total		\$58.949	\$15.787	\$8.800	\$136.336	\$15.490		11.36%	\$61.897	\$6.054		\$22.212

Comsat filing - 6/11/99 Ex Parte

\$30.700

Difference - after Staff adjustment of top-off insurance

\$8.488

\* Due to insufficient information provided by Comsat, we have to make our own calculation based on the information on hand. However, we have tested our model by using the total insurance amount as Comsat used (including top-off insurance). The model generated total undepreciated capital insurance of \$29.3 M, which is very close to the number Comsat provided in their statement - \$30.7 M (Comsat June 11, 1999 Ex Parte Statement). Therefore, we feel comfortable using this model to calculate an adjusted capitalized insurance amount, i.e. without top-off insurance.

\*\* Top-off insurance is already included in Comsat's total insurance column, Comsat Ex Parte Statement, June 28, 1999.

\*\*\* Comsat did not list any direct insurance (outside INTELSAT's insurance), yet it listed top-off insurance amount.

## Sources:

Comsat Ex Parte Statement, June 11, 1999

Comsat Ex Parte Statement, June 28, 1999

## **Appendix D**

### **Savings After Permitting Surcharge for Switched Voice and Private Line Services**

The savings are calculated by comparing Comsat's current tariff rates to Intelsat's tariff rates, after including a surcharge of 5.58% (see Appendix A). Using the first line item in Voice IDR as an example, Comsat's current rate is \$1000 per month. The rate under direct access is \$295 per month. The rate under direct access after permitting a surcharge of 5.58% is \$311 per month. For an INTELSAT user that takes advantage of direct access, the user would save \$689 per month. This translates into a savings of 68.9% ( $\$689/\$1000$ ). Savings for the major IDR and IBS services after the direct access surcharge are shown in the table in Appendix D.



**Table - D**  
**Major IDR and IBS Services Savings After D-A Surcharge**

Coverage	Capacity/ Data rate	Term	Earth Station Standard By Antenna Size		INTELSAT (IS) Tariff (IUC) (\$/mo.)	Comsat (CQ) Tariff (\$/Mo.)	After D-A Surcharge 5.58% above IUC	Direct Access Savings 1-(Adj. IUC/CQ) (%)
			Std A=15-18 Meters	Std B=10-13 Meters Std C=11-14 Meters				
Voice - IDR (International Digital Route):								
Hemi/Zone/ Ku-band	0 - 270 Ckts:							
	IDR - 64 kb/s	5-Year	A/C		\$295	\$1,000	\$311	68.9%
	IDR - 64 kb/s	7-Year	A/C		\$265	\$640	\$280	56.3%
	IDR - 64 kb/s	10-Year	A/C		\$250	\$515	\$264	48.7%
	IDR - 64 kb/s	15-Year	A/C		\$240	\$475	\$253	46.7%
	271 - 630 Ckts:							
	IDR - 64 kb/s	5-Year	A/C		\$295	\$1,000	\$311	68.9%
	IDR - 64 kb/s	7-Year	A/C		\$265	\$580	\$280	51.8%
	IDR - 64 kb/s	10-Year	A/C		\$250	\$460	\$264	42.6%
	IDR - 64 kb/s	15-Year	A/C		\$240	\$425	\$253	40.4%
	631 - 1080 Ckts:							
	IDR - 64 kb/s	5-Year	A/C		\$295	\$1,000	\$311	68.9%
	IDR - 64 kb/s	7-Year	A/C		\$265	\$525	\$280	46.7%
	IDR - 64 kb/s	10-Year	A/C		\$250	\$410	\$264	35.6%
	IDR - 64 kb/s	15-Year	A/C		\$240	\$375	\$253	32.4%
	Above 1080 Ckts:							
IDR - 64 kb/s	5-Year	A/C		\$295	\$1,000	\$311	68.9%	
IDR - 64 kb/s	7-Year	A/C		\$265	\$475	\$280	41.1%	
IDR - 64 kb/s	10-Year	A/C		\$250	\$365	\$264	27.7%	
IDR - 64 kb/s	15-Year	A/C		\$240	\$330	\$253	23.2%	
Hemi/Zone/ Ku-band	0 - 270 Ckts:							
	IDR - 1.544 Mb/s	5-Year	A/C		\$6,270	\$23,040	\$6,620	71.3%
	IDR - 1.544 Mb/s	7-Year	A/C		\$5,745	\$14,760	\$6,066	58.9%
	IDR - 1.544 Mb/s	10-Year	A/C		\$5,425	\$11,880	\$5,728	51.8%
	IDR - 1.544 Mb/s	15-Year	A/C		\$4,750	\$10,440	\$5,015	52.0%

**Table - D**  
**Major IDR and IBS Services Savings After D-A Surcharge**

Coverage	Capacity/ Data rate	Term	Earth Station Standard By Antenna Size		INTELSAT (IS) Tariff (IUC) (\$/mo.)	Comsat (CQ) Tariff (\$/Mo.)	After D-A Surcharge 5.58% above IUC	Direct Access Savings 1-(Adj. IUC/CQ) (%)
			Std A=15-18 Meters	Std B=10-13 Meters Std C=11-14 Meters				
	271 - 630 Ckts:							
	IDR - 1.544 Mb/s	5-Year	A/C		\$6,270	\$23,040	\$6,620	71.3%
	IDR - 1.544 Mb/s	7-Year	A/C		\$5,745	\$13,320	\$6,066	54.5%
	IDR - 1.544 Mb/s	10-Year	A/C		\$5,425	\$10,680	\$5,728	46.4%
	IDR - 1.544 Mb/s	15-Year	A/C		\$4,750	\$9,360	\$5,015	46.4%
	631 - 1080 Ckts:							
	IDR - 1.544 Mb/s	5-Year	A/C		\$6,270	\$23,040	\$6,620	71.3%
	IDR - 1.544 Mb/s	7-Year	A/C		\$5,745	\$12,120	\$6,066	50.0%
	IDR - 1.544 Mb/s	10-Year	A/C		\$5,425	\$9,480	\$5,728	39.6%
	IDR - 1.544 Mb/s	15-Year	A/C		\$4,750	\$8,280	\$5,015	39.4%
	Above 1080 Ckts:							
	IDR - 1.544 Mb/s	5-Year	A/C		\$6,270	\$23,040	\$6,620	71.3%
	IDR - 1.544 Mb/s	7-Year	A/C		\$5,745	\$10,920	\$6,066	44.5%
	IDR - 1.544 Mb/s	10-Year	A/C		\$5,425	\$8,400	\$5,728	31.8%
	IDR - 1.544 Mb/s	15-Year	A/C		\$4,750	\$7,320	\$5,015	31.5%
Hemi/Zone/ Spot	0 - 270 Ckts:							
	IDR - 2.048 Mb/s	5-Year	A/C		\$7,790	\$28,800	\$8,225	71.4%
	IDR - 2.048 Mb/s	7-Year	A/C		\$7,180	\$18,450	\$7,581	58.9%
	IDR - 2.048 Mb/s	10-Year	A/C		\$6,785	\$14,850	\$7,164	51.8%
	IDR - 2.048 Mb/s	15-Year	A/C		\$5,985	\$13,050	\$6,319	51.6%
	271 - 630 Ckts:							
	IDR - 2.048 Mb/s	5-Year	A/C		\$7,790	\$28,800	\$8,225	71.4%
	IDR - 2.048 Mb/s	7-Year	A/C		\$7,180	\$16,650	\$7,581	54.5%
	IDR - 2.048 Mb/s	10-Year	A/C		\$6,785	\$13,350	\$7,164	46.3%
	IDR - 2.048 Mb/s	15-Year	A/C		\$5,985	\$11,700	\$6,319	46.0%

**Table - D**  
**Major IDR and IBS Services Savings After D-A Surcharge**

Coverage	Capacity/ Data rate	Term	Earth Station Standard By Antenna Size		INTELSAT (IS)	Comsat (CQ)	After D-A Surcharge 5.58% above IUC	Direct Access Savings 1-(Adj. IUC/CQ) (%)
			Std A=15-18 Meters	Std B=10-13 Meters	Tariff (IUC) (\$/mo.)	Tariff (\$/Mo.)		
631 - 1080 Ckts:								
	IDR - 2.048 Mb/s	5-Year	A/C		\$7,790	\$28,800	\$8,225	71.4%
	IDR - 2.048 Mb/s	7-Year	A/C		\$7,180	\$15,150	\$7,581	50.0%
	IDR - 2.048 Mb/s	10-Year	A/C		\$6,785	\$11,850	\$7,164	39.5%
	IDR - 2.048 Mb/s	15-Year	A/C		\$5,985	\$10,350	\$6,319	38.9%
Above 1080 Ckts:								
	IDR - 2.048 Mb/s	5-Year	A/C		\$7,790	\$28,800	\$8,225	71.4%
	IDR - 2.048 Mb/s	7-Year	A/C		\$7,180	\$13,650	\$7,581	44.5%
	IDR - 2.048 Mb/s	10-Year	A/C		\$6,785	\$10,500	\$7,164	31.8%
	IDR - 2.048 Mb/s	15-Year	A/C		\$5,985	\$9,150	\$6,319	30.9%
Data - IBS (INTELSAT Business Services):								
Hemi/Zone/ (C-band)	IBS - 64 kb/s	1-Year	A/B		\$370	\$465	\$391	16.0%
	IBS - 64 kb/s	2-Year	A/B		\$350	\$460	\$370	19.7%
	IBS - 64 kb/s	3-Year	A/B		\$320	\$425	\$338	20.5%
	IBS - 64 kb/s	5-Year	A/B		\$295	\$395	\$311	21.1%
	IBS - 64 kb/s	7-Year	A/B		\$265	\$370	\$280	24.4%
	IBS - 64 kb/s	10-Year	A/B		\$250	\$350	\$264	24.6%
	IBS - 1.544 Mb/s	1-Year	A/B		\$7,980	\$10,305	\$8,425	18.2%
	IBS - 1.544 Mb/s	2-Year	A/B		\$7,580	\$9,930	\$8,003	19.4%
	IBS - 1.544 Mb/s	3-Year	A/B		\$6,945	\$9,435	\$7,333	22.3%
	IBS - 1.544 Mb/s	5-Year	A/B		\$6,270	\$8,515	\$6,620	22.3%
	IBS - 1.544 Mb/s	7-Year	A/B		\$5,745	\$8,130	\$6,066	25.4%
	IBS - 1.544 Mb/s	10-Year	A/B		\$5,425	\$7,420	\$5,728	22.8%
	IBS - 2.048 Mb/s	1-Year	A/B		\$9,975	\$13,740	\$10,532	23.4%
	IBS - 2.048 Mb/s	2-Year	A/B		\$9,475	\$13,245	\$10,004	24.5%
	IBS - 2.048 Mb/s	3-Year	A/B		\$8,680	\$12,580	\$9,164	27.2%
	IBS - 2.048 Mb/s	5-Year	A/B		\$7,790	\$11,350	\$8,225	27.5%
	IBS - 2.048 Mb/s	7-Year	A/B		\$7,180	\$10,840	\$7,581	30.1%
	IBS - 2.048 Mb/s	10-Year	A/B		\$6,785	\$9,895	\$7,164	27.6%

**Table - D**  
**Major IDR and IBS Services Savings After D-A Surcharge**

Coverage	Capacity/ Data rate	Term	Earth Station Standard By Antenna Size			INTELSAT (IS) Tariff (IUC) (\$/mo.)	Comsat (CQ) Tariff (\$/Mo.)	After D-A Surcharge 5.58% above IUC	Direct Access Savings 1-(Adj. IUC/CQ) (%)
			Std A=15-18 Meters	Std B=10-13 Meters	Std C=11-14 Meters				
Spot (Ku-band)	IBS - 64 kb/s	1-Year	C		\$370	\$585	\$391	33.2%	
	IBS - 64 kb/s	2-Year	C		\$350	\$570	\$370	35.2%	
	IBS - 64 kb/s	3-Year	C		\$320	\$535	\$338	36.8%	
	IBS - 64 kb/s	5-Year	C		\$295	\$495	\$311	37.1%	
	IBS - 64 kb/s	7-Year	C		\$265	\$460	\$280	39.2%	
	IBS - 64 kb/s	10-Year	C		\$250	\$435	\$264	39.3%	
Spot (Ku-band)	IBS - 1.544 Mb/s	1-Year	C		\$7,980	\$12,885	\$8,425	34.6%	
	IBS - 1.544 Mb/s	2-Year	C		\$7,580	\$12,415	\$8,003	35.5%	
	IBS - 1.544 Mb/s	3-Year	C		\$6,945	\$11,745	\$7,333	37.6%	
	IBS - 1.544 Mb/s	5-Year	C		\$6,270	\$10,640	\$6,620	37.8%	
	IBS - 1.544 Mb/s	7-Year	C		\$5,745	\$10,105	\$6,066	40.0%	
	IBS - 1.544 Mb/s	10-Year	C		\$5,425	\$9,275	\$5,728	38.2%	
	IBS - 2.048 Mb/s	1-Year	C		\$9,975	\$17,180	\$10,532		
	IBS - 2.048 Mb/s	2-Year	C		\$9,475	\$16,555	\$10,004	39.6%	
	IBS - 2.048 Mb/s	3-Year	C		\$8,680	\$15,660	\$9,164	41.5%	
	IBS - 2.048 Mb/s	5-Year	C		\$7,790	\$14,185	\$8,225	42.0%	
	IBS - 2.048 Mb/s	7-Year	C		\$7,180	\$13,475	\$7,581	43.7%	
	IBS - 2.048 Mb/s	10-Year	C		\$6,785	\$12,365	\$7,164	42.1%	

\* Due to unlimited combinations of service offerings, depending on parameters, such as transponder type, beam coverage, data rate, earth station type, and transmission power, this table only lists the most popular combinations at various available service duration offerings among major services - Voice (IDR), Data (IBS), and Video services (full-time and occasional use).

Sources:

- (1) INTELSAT Tariff - BG 118-18, May 8, 1997.
- (2) COMSAT Tariff ( FCC No.3 ) :
  - IDR - June 26, 1999, p. 96.
  - IBS - June 26, 1999, p. 118.

## **Appendix E**

### **Savings After Permitting Surcharge for Full Time and Occasional-Use Video Services**

The savings are calculated by comparing Comsat's current tariff rates to Intelsat's tariff rates, after including a surcharge of 5.58% (see Appendix A). Using the first line item in listed in the Appendix E table, Comsat's current rate is \$1,972,800 per year. The rate under direct access is \$1,440,000 per year. The rate under direct access after permitting a surcharge of 5.58% is \$1,520,352 per year. For a INTELSAT user that takes advantage of direct access, the user would save \$452,448 per year (\$1,972,800 - \$1,520,352). This translates into a savings of 22.93% ( $\$452,448/\$1,972,800$ ). Savings for the major video services after the direct access surcharge are shown in the table in Appendix E.

**Table - E**  
**Major Video Leases Savings After D-A Surcharge**

Frequency Band	Capacity	Power (Standard/High)	Term	Preemptible (P - cancelable) or Non-Preempt. (N/P) (non-cancelable)	INTELSAT (IS) Tariff (IUC) (\$/Yr.)	Comsat (CQ) Tariff ** (\$/Yr.)	After D - A Surcharge 5.58% above IUC	Direct-Access Savings 1-(Adj. IUC / CQ) (%)
Full-Time Video:								
C/Hemi/Zone	36 MHz	Std	5-Year	N/P	\$1,440,000	\$1,972,800	\$1,520,352	22.93%
C/Hemi/Zone	36 MHz	Std	10-Year	N/P	\$1,200,000	\$1,786,800	\$1,268,960	29.09%
C/Hemi/Zone	72 MHz	Std	5-Year	N/P	\$2,375,000	\$3,646,920	\$2,507,525	31.24%
C/Hemi/Zone	72 MHz	Std	10-Year	N/P	\$1,985,000	\$3,233,640	\$2,095,763	35.19%
C/Global	36 MHz	Std	5-Year	N/P	\$2,455,000	\$3,105,840	\$2,591,989	16.54%
C/Global	36 MHz	Std	10-Year	N/P	\$2,110,000	\$2,753,640	\$2,227,738	19.10%
Ku	36 MHz	Std	5-Year	N/P	\$1,770,000	\$2,239,200	\$1,868,766	16.54%
Ku	36 MHz	Std	10-Year	N/P	\$1,510,000	\$1,980,000	\$1,594,258	19.48%
Ku	72 MHz	Std	5-Year	N/P	\$2,840,000	\$3,732,000	\$2,998,472	19.66%
Ku	72 MHz	Std	10-Year	N/P	\$2,425,000	\$3,300,000	\$2,560,315	22.41%
INTELSAT K (H5-H8 Transponders)								
(IS Std Rate)	27 MHz	Std	5-Year	N/P	\$1,770,000	\$2,192,040	\$1,868,766	14.75%
	27 MHz	Std	10-Year	N/P	\$1,510,000	\$1,980,000	\$1,594,258	19.48%
(IS Std Rate)	54 MHz	Std	5-Year	N/P	\$2,840,000	\$3,639,000	\$2,998,472	17.60%
	54 MHz	Std	10-Year	N/P	\$2,425,000	\$3,300,000	\$2,560,315	22.41%
C-Hemi	36 MHz	Std	1-Year	P	\$1,000,000	\$1,182,840	\$1,055,800	10.74%
C-Hemi	36 MHz	Std	2-Year	P	\$955,000	\$1,135,680	\$1,008,289	11.22%
C-Hemi	36 MHz	Std	5-Year	P	\$810,000	\$1,005,000	\$855,198	14.91%
C-Hemi	36 MHz	Std	7-Year	P	\$755,000	\$945,720	\$797,129	15.71%
C-Hemi	36 MHz	Std	10-Year	P	\$675,000	\$863,280	\$712,665	17.45%
C-Hemi	72 MHz	Std	1-Year	P	\$1,610,000	\$1,971,480	\$1,699,838	13.78%
C-Hemi	72 MHz	Std	2-Year	P	\$1,540,000	\$1,892,760	\$1,625,932	14.10%
C-Hemi	72 MHz	Std	5-Year	P	\$1,335,000	\$1,674,960	\$1,409,493	15.85%
C-Hemi	72 MHz	Std	7-Year	P	\$1,250,000	\$1,576,200	\$1,319,750	16.27%
C-Hemi	72 MHz	Std	10-Year	P	\$1,115,000	\$1,438,800	\$1,177,217	18.18%

**Table - E**  
**Major Video Leases Savings After D-A Surcharge**

Frequency Band	Capacity	Power (Standard/High)	Term	Preemptible (P - cancelable) or Non-Preempt. (N/P) (non-cancelable)	INTELSAT (IS) Tariff (IUC) (\$/Yr.)	Comsat (CQ) Tariff ** (\$/Yr.)	After D - A Surcharge 5.58% above IUC	Direct-Access Savings 1-(Adj. IUC / CQ) (%)
Ku - Spot	36 MHz	Std	1-Year	P	\$1,485,000	\$1,881,840	\$1,567,863	16.68%
Ku - Spot	36 MHz	Std	2-Year	P	\$1,440,000	\$1,806,720	\$1,520,352	15.85%
Ku - Spot	36 MHz	Std	5-Year	P	\$1,300,000	\$1,598,880	\$1,372,540	14.16%
Ku - Spot	36 MHz	Std	7-Year	P	\$1,225,000	\$1,504,560	\$1,293,355	14.04%
Ku - Spot	36 MHz	Std	10-Year	P	\$1,110,000	\$1,373,400	\$1,171,938	14.67%
Ku - Spot	72 MHz	Std	1-Year	P	\$2,380,000	\$3,136,440	\$2,512,804	19.88%
Ku - Spot	72 MHz	Std	2-Year	P	\$2,310,000	\$3,011,160	\$2,438,898	19.00%
Ku - Spot	72 MHz	Std	5-Year	P	\$2,085,000	\$2,664,720	\$2,201,343	17.39%
Ku - Spot	72 MHz	Std	7-Year	P	\$1,965,000	\$2,507,520	\$2,074,647	17.26%
Ku - Spot	72 MHz	Std	10-Year	P	\$1,785,000	\$2,289,000	\$1,884,603	17.67%
C/Global	36 MHz	Std	1-Year	P	\$1,595,000	\$1,989,360	\$1,684,001	15.35%
C/Global	36 MHz	Std	2-Year	P	\$1,545,000	\$1,909,920	\$1,631,211	14.59%
C/Global	36 MHz	Std	5-Year	P	\$1,400,000	\$1,690,200	\$1,478,120	12.55%
C/Global	36 MHz	Std	7-Year	P	\$1,320,000	\$1,590,480	\$1,393,656	12.38%
C/Global	36 MHz	Std	10-Year	P	\$1,205,000	\$1,451,880	\$1,272,239	12.37%
<b>Full-Time Video:</b>								
C-Hemi	24 MHz	High	1-Year	P	\$1,065,000	\$1,301,280	\$1,124,427	13.59%
C-Hemi	24 MHz	High	2-Year	P	\$1,015,000	\$1,249,200	\$1,071,637	14.21%
C-Hemi	24 MHz	High	5-Year	P	\$835,000	\$1,105,560	\$881,593	20.26%
C-Hemi	24 MHz	High	7-Year	P	\$800,000	\$1,040,280	\$844,640	18.81%
C-Hemi	24 MHz	High	10-Year	P	\$715,000	\$949,680	\$754,897	20.51%
C-Hemi	36 MHz	High	1-Year	P	\$1,500,000	\$1,774,320	\$1,583,700	10.74%
C-Hemi	36 MHz	High	2-Year	P	\$1,430,000	\$1,703,520	\$1,509,794	11.37%
C-Hemi	36 MHz	High	5-Year	P	\$1,215,000	\$1,507,560	\$1,282,797	14.91%
C-Hemi	36 MHz	High	7-Year	P	\$1,135,000	\$1,418,640	\$1,198,333	15.53%
C-Hemi	36 MHz	High	10-Year	P	\$1,015,000	\$1,294,920	\$1,071,637	17.24%
Ku - Spot	36 MHz	High	1-Year	P	\$1,855,000	\$2,352,360	\$1,958,509	16.74%
Ku - Spot	36 MHz	High	2-Year	P	\$1,795,000	\$2,258,400	\$1,895,161	16.08%
Ku - Spot	36 MHz	High	5-Year	P	\$1,625,000	\$1,998,600	\$1,715,675	14.16%
Ku - Spot	36 MHz	High	7-Year	P	\$1,530,000	\$1,880,760	\$1,615,374	14.11%
Ku - Spot	36 MHz	High	10-Year	P	\$1,385,000	\$1,716,720	\$1,462,283	14.82%

**Table - E**  
**Major Video Leases Savings After D-A Surcharge**

Frequency Band	Capacity	Power (Standard/High)	Term	Preemptible (P - cancelable) or Non-Preempt. (N/P) (non-cancelable)	INTELSAT (IS) Tariff (IUC) (\$/Yr.)	Comsat (CQ) Tariff ** (\$/Yr.)	After D - A Surcharge 5.58% above IUC	Direct-Access Savings 1-(Adj. IUC / CQ) (%)
Ku - Spot	72 MHz	High	1-Year	P	\$2,975,000	\$3,920,520	\$3,141,005	19.88%
Ku - Spot	72 MHz	High	2-Year	P	\$2,880,000	\$3,763,920	\$3,040,704	19.21%
Ku - Spot	72 MHz	High	5-Year	P	\$2,605,000	\$3,330,960	\$2,750,359	17.43%
Ku - Spot	72 MHz	High	7-Year	P	\$2,455,000	\$3,134,400	\$2,591,989	17.31%
Ku - Spot	72 MHz	High	10-Year	P	\$2,225,000	\$2,861,280	\$2,349,155	17.90%
C/Global	24 MHz	High	1-Year	P	\$1,700,000	\$2,188,320	\$1,794,860	17.98%
C/Global	24 MHz	High	2-Year	P	\$1,650,000	\$2,100,960	\$1,742,070	17.08%
C/Global	24 MHz	High	5-Year	P	\$1,490,000	\$1,859,280	\$1,573,142	15.39%
C/Global	24 MHz	High	7-Year	P	\$1,405,000	\$1,749,600	\$1,483,399	15.21%
C/Global	24 MHz	High	10-Year	P	\$1,280,000	\$1,597,200	\$1,351,424	15.39%
C/Global	36 MHz	High	1-Year	P	\$2,395,000	\$2,984,040	\$2,528,641	15.26%
C/Global	36 MHz	High	2-Year	P	\$2,320,000	\$2,864,880	\$2,449,458	14.50%
C/Global	36 MHz	High	5-Year	P	\$2,100,000	\$2,535,360	\$2,217,180	12.55%
C/Global	36 MHz	High	7-Year	P	\$1,980,000	\$2,385,720	\$2,090,484	12.38%
C/Global	36 MHz	High	10-Year	P	\$1,805,000	\$2,177,880	\$1,905,719	12.50%
Occasional TV -								
Frequency Band	Capacity		Down Link (DL)	Preemptible (P)/ Non-Preempt. (N/P)	INTELSAT Tariff \$/ Minute	COMSAT Tariff \$/ Minute		
C/Globe Beam	18 MHz		Single DL	N/P	\$6.50	\$9.70	\$7	29.25%
C/Globe Beam	24 MHz		Single DL	N/P	\$9.00	N/A.		
C/Globe Beam	36/41 MHz		Single DL	N/P	\$13.00	\$19.40	\$14	29.25%

\*\* INTELSAT offers the "whole" transponder rate. To make a comparable comparison, the Comsat's tariff (which expressed in monthly charge for 1/2 transponder) has been converted to an annualized rate (i.e. multiple Comsat's monthly charges by 12\*2).

Sources:

- (1) INTELSAT Tariff - BG 118-18, May 8, 1997, also July, 1998.
- (2) COMSAT Tariff - COMSAT Tariff F.C.C. No. 3, June 26, 1999  
 Full - Time Video - p. 55, 56, 57, 70, 71  
 Occ. TV. - p. 29



**Separate Statement of Commissioner Harold W. Furchtgott-Roth**

**In the Matter of Direct Access to the INTELSAT System (IB Docket No. 89-182, File No. 60-SAT-ISP-97)**

Today's decision by the Commission to permit Level 3 direct access to the INTELSAT system is, in virtually all aspects, a sound conclusion that will inure to the benefit of U.S. carriers and consumers. I write separately to note that I would have gone further than the Commission has gone in one particular respect. As a part of today's order, the Commission restricts direct access for a certain class of carriers, namely, carriers (other than Comsat) who are INTELSAT signatories. Such signatories are prohibited from utilizing direct access for service to any foreign country in which that signatory uses 50 percent or more of all INTELSAT capacity used in that particular country.

This restriction is founded, as the argument goes, on concerns that signatories have potential incentives to act anticompetitively in the setting of the INTELSAT utilization charge (IUC) for direct access. Artificially low IUCs would be in these signatories' economic interest as purchasers of direct access in the U.S. On the other hand, low IUCs would be injurious to Comsat, which as a "carrier's carrier" relies heavily on revenues from access to INTELSAT (as opposed to access being simply a component of the retail price charged for an end product, as is the case for most foreign signatories).

As an economic matter, I find this argument to be at a minimum debatable. Further, I have concerns about our ability to police compliance with the restriction. I support today's decision, however, because it is a further step in opening U.S. markets to the global satellite marketplace (and a step, I might add, that goes above and beyond our commitments under the WTO Basic Telecom Agreement). Simply put, I would have preferred to go even further than we have done today in championing open markets by not adopting this restriction.

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