

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

In the Matter of	)	
	)	
<b>COMSAT CORPORATION</b>	)	
	)	
Petition Pursuant to Section 10(c) of the	)	File No. 60-SAT-ISP-97
Communications Act of 1934, as amended, for	)	
Forbearance from Dominant Carrier	)	
Regulation and for Reclassification	)	
as a Non-Dominant Carrier	)	
	)	
Policies and Rules for Alternative	)	
Incentive Based Regulation of	)	IB Docket No. 98-60
Cosat Corporation	)	
	)	
<b>COMSAT CORPORATION</b>	)	
	)	
Petition for Partial Relief From the Current	)	File No. 14-SAT-ISP-97
Regulatory Treatment of Cosat World	)	
Systems' Video and Audio Services	)	
	)	
<b>COMSAT CORPORATION</b>	)	
	)	
Petition for Partial Relief From the Current	)	RM-7913
Regulatory Treatment of Cosat World	)	
Systems' Switched Voice, Private-Line,	)	
and Video and Audio Services	)	
	)	
<b>PANAMSAT CORPORATION</b>	)	
	)	
Petition to Reopen Changes in the Corporate	)	CC Docket No. 80-634
Structure and Operations of the	)	
Communications Satellite Corporation	)	

**ORDER AND NOTICE OF PROPOSED RULEMAKING**

Adopted: April 24, 1998

Released: April 28, 1998

Comment Date: Fifteen days from the date of publication of the Commission's request for comments in the Federal Register (IB Docket No. 98-60).

Reply Comment Date: Ten days after the Comment Date

By the Commission: Commissioner Furchtgott-Roth issuing a separate statement.

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## I. Introduction

1. Since 1985, the Commission has regulated Comsat Corporation ("Comsat") as a dominant common carrier in the provision of its International Telecommunications Satellite Organization ("INTELSAT") services. Comsat now petitions the Commission seeking reclassification as a non-dominant common carrier for its provision of INTELSAT services and, therefore, elimination of rate of return regulation and structural separation requirements for its INTELSAT services.<sup>1</sup> Alternatively, Comsat requests forbearance, under Section 10 of the Communications Act of 1934, as amended (the "Communications Act"),<sup>2</sup> from continued dominant common carrier regulation of its tariffed INTELSAT services<sup>3</sup> and from structural separation and rate of return regulation of its INTELSAT services. The action we take today is the third action taken by the Commission within the past two years to grant regulatory relief to Comsat in connection with its INTELSAT services.<sup>4</sup>

2. In this Order and Notice of Proposed Rulemaking ("Order"), we grant Comsat's request for reclassification as a non-dominant carrier in its provision of INTELSAT: (a) switched voice and private line services between the U.S. and those countries not listed on Appendix A to this Order; (b) occasional-use video service<sup>5</sup> between the U.S. and those countries not listed on Appendix B to this Order; and (c) full-time video service and earth station services between the U.S. and all geographic markets. The markets in which we reclassify Comsat as a non-dominant common carrier are collectively referred to as the

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<sup>1</sup> See Petition of Comsat Corporation filed on April 24, 1997; File No. 60-SAT-ISP-97 ("Comsat Petition").

<sup>2</sup> 47 U.S.C. § 160.

<sup>3</sup> Although Comsat does not define "INTELSAT services" in its pleadings, we refer to "INTELSAT services" as those switched voice, private line, full-time video, occasional-use video and earth station services provided by Comsat using INTELSAT satellites.

<sup>4</sup> See Comsat Corporation Petition for Partial Relief From the Current Regulatory Treatment of Comsat World Systems' Switched Voice, Private Line, and Video and Audio Services, *Order*, RM-7913, FCC 96-349, ¶ 36 (1996) ("August 1996 Order"); See Comsat Corporation Petition for Partial Relief From the Current Regulatory Treatment of Comsat World Systems' Video and Audio Services, *Order*, File No. 14-SAT-ISP-97, DA 97-1741, ¶ 51 (rel. August 14, 1997) ("August 1997 Order").

<sup>5</sup> Full-time video service and occasional-use video service are defined *infra* at nn. 37 and 39.

"competitive markets." We deny Comsat's reclassification request with respect to the provision of INTELSAT: (a) switched voice and private line service between the U.S. and the 63 countries listed on Appendix A to this Order; and (b) occasional-use video service between the U.S. and the 142 countries listed on Appendix B to this Order. The markets in which we deny Comsat's request for reclassification as a non-dominant common carrier are collectively referred to as the "non-competitive markets."

3. With respect to Comsat's provision of switched voice, private line and occasional-use video services to non-competitive markets, where we find Comsat continues to be dominant, we also deny Comsat's alternative request for forbearance from enforcement of Sections 61.58 and 61.38 of the Commission's dominant common carrier tariff rules. We find that enforcement of these rules is necessary to ensure just and reasonable rates for these services, to protect consumers and to be consistent with the public interest.

4. By virtue of our decisions finding Comsat non-dominant in the provision of switched voice, private line, full-time video, occasional-use video and earth station services to competitive markets, we eliminate the Commission's rate of return regulations as they apply to these services in the competitive markets. In addition, we find that continued rate of return regulation that would be applicable to Comsat's switched voice, private line and occasional-use video services to non-competitive markets may not create adequate efficiency incentives for Comsat and requires administratively burdensome cost allocation rules to enforce. In light of these concerns, we will consider replacing existing rate of return regulation of Comsat in these dominant markets with an alternative form of incentive based regulation and invite public comment on the Commission's tentative conclusions with respect to an alternative incentive based regulation plan for Comsat on an expedited basis.

5. We conclude that elimination of the structural separation requirements for Comsat's INTELSAT services is justified by our finding that Comsat is non-dominant in five product markets, which, in the aggregate, accounted for approximately 85 percent of Comsat's revenues from INTELSAT services in 1996. We further find that Comsat's continued dominance in the provision of switched voice, private line and occasional-use video services to non-competitive markets is an insufficient basis for continuing to require structural separation because the costs of imposing such a requirement would exceed any potential benefits to competition. We retain, however, the requirement that Comsat maintain existing cost allocation and accounting requirements.

6. We deny the following PanAmSat Corporation petitions, motion and application for review filed in connection with related pending proceedings: (a) application for review of the International Bureau's decision granting streamlined tariff relief for Comsat's full-time video and

for its occasional-use video services;<sup>6</sup> (b) petition for reconsideration of our decision granting streamlined tariff relief for Comsat's switched voice and private line services in 1996;<sup>7</sup> and (c) petition to reopen proceedings regarding changes in the corporate structure of Comsat.<sup>8</sup> In addition, PanAmSat filed a motion requesting that the Commission apply the "fresh look" doctrine to Comsat.<sup>9</sup> We will address the issues raised in PanAmSat's motion separately and not in this Order. In addition, we will initiate a proceeding expeditiously to explore the legal, economic and policy ramifications of direct access to the INTELSAT system.

## II. Background

7. The Communications Satellite Act of 1962 (the "Satellite Act") authorized the formation of Comsat as a non-governmental for-profit stock corporation for the purpose of creating a single global commercial telecommunications satellite network that would provide expanded telecommunications services to all areas of the world and contribute to world peace and understanding.<sup>10</sup> The Satellite Act authorizes Comsat to participate in the planning, construction, ownership, management and operation of that global system. The global system became the International Telecommunications Satellite Organization ("INTELSAT"), which was

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<sup>6</sup> See In re Petition of Comsat Corporation For Partial Relief from the Current Regulatory Treatment of Comsat World Systems' Video and Audio Services, PanAmSat Corporation Application for Review, dated September 15, 1997, File No. 14-SAT-ISP-97.

<sup>7</sup> See Comsat Corporation Petition or Partial Relief From the Current Regulatory Treatment of Comsat World Systems' Switched Voice, Private Line and Video and Audio Services, PanAmSat Corporation Petition for Reconsideration, dated September 16, 1996, RM-7913.

<sup>8</sup> See Changes in the Corporate Structure and Operations of the Communications Satellite Corporation, Petition to Reopen Proceedings, CC Docket No. 80-634 (May 12, 1992).

<sup>9</sup> See Motion Pursuant to Sections 201 and 205 of the Communications Act of 1934 to Apply the "Fresh Look" Doctrine to Comsat, dated April 25, 1995, File No. 108-SAT-MISC-95. See also Letter dated February 19, 1998, from The Satellite Users Coalition, to Ms. Magalie Roman Salas, Secretary, Federal Communications Commission ("The Satellite Users Coalition Letter").

<sup>10</sup> See 47 U.S.C. §§ 731 and 701.

established on August 20, 1971.<sup>11</sup> On the same date, Comsat and INTELSAT entered into the Operating Agreement Relating to the International Telecommunications Satellite Organization "INTELSAT" (the "INTELSAT Operating Agreement"), which sets forth Comsat's rights and obligations as the U.S. Signatory to INTELSAT. Comsat, as the U.S. Signatory to INTELSAT, was authorized to, among other things, furnish for hire INTELSAT's channels of communication to authorized carriers and other authorized entities.<sup>12</sup>

8. The Satellite Act deems Comsat to be a common carrier within the meaning of Section 3(10) of the Communications Act, and fully subject to the provisions of Title II and Title III of the Communications Act.<sup>13</sup> Title II of the Communications Act, among other things, requires that a common carrier file with the Commission a schedule of charges ("tariffs") for its communications services and grants the Commission authority to issue regulations related thereto.<sup>14</sup> Title III of the Communications Act gives the Commission broad authority to grant radio licenses for uses of the electromagnetic frequency spectrum that are in the public interest, convenience and necessity.<sup>15</sup> As a common carrier, Comsat must file tariffs for its INTELSAT services in accordance with Title II and is required to be licensed under Title III to use specific radio frequencies for the transmission of those services to and from the U.S. via INTELSAT satellites. The Commission is authorized to regulate Comsat in its administration of the Communications Act and to prescribe rules to carry out the provisions of the Satellite Act.<sup>16</sup>

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<sup>11</sup> In 1964, the U.S. and other nations formed the organization that became INTELSAT. *See* Agreement Establishing Interim Arrangements for a Global Commercial Communications Satellite System, dated Aug. 20, 1964. 15 U.S.T. 1705. In 1971, the Agreement Relating to the International Telecommunications Satellite Organization "INTELSAT," dated Aug. 20, 1971, was concluded forming the INTELSAT organization. 23 U.S.T. 3813 (the "INTELSAT Agreement"). The INTELSAT Agreement entered into force on Feb. 12, 1973.

<sup>12</sup> *See* 47 U.S.C. § 735(a)(2).

<sup>13</sup> *Id.* § 741.

<sup>14</sup> *See id.* § 203.

<sup>15</sup> *Id.* § 301 *et seq.*

<sup>16</sup> *Id.* at §§ 721(c). The Commission has exercised its regulatory authority over Comsat under the Satellite Act and the Communications Act in a number of decisions that remain in effect today. After Comsat was established, the Commission designated Comsat as the manager of a consortium of international satellite carriers that owned the earth stations that, at the time,

9. In a series of orders, beginning in 1980, the Commission distinguished two kinds of carriers -- those with market power ("dominant common carriers") and those without market power ("non-dominant common carriers").<sup>17</sup> Under the Commission's Rules, a dominant carrier is defined as "...a carrier found by the Commission to have market power."<sup>18</sup> Control of bottleneck facilities is "*prima facie* evidence of market power requiring detailed regulatory scrutiny."<sup>19</sup> Dominant common carriers are required to file explanatory materials and data

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provided the sole access to the INTELSAT system. *See* Ownership and Operation of Earth Stations, 5 FCC 2d 812 (1966). Almost two decades later, the Commission eliminated the consortium's monopoly over earth station access to INTELSAT's satellites and Comsat's role as its manager. Modification of Policy on Ownership and Operations of U.S. Earth Stations, 100 FCC 2d 250, 264 (1984). Instead, other U.S. carriers were permitted to own and operate earth stations and Comsat was required to own its earth station operations through a structurally separated subsidiary. Initially, Comsat was restricted from marketing its INTELSAT services to end-users, but this restriction was subsequently removed in the 1980's. *See* Authorized Entities and Authorized Users Under the Communications Satellite Act of 1962, 4 FCC 2d 421, 428 (1966), *recon.*, 6 FCC 2d 593 (1967), *modified*, 90 FCC 2d 1394 (1982), *vacated sub nom. ITT World Communications v. FCC*, 725 F.2d 732 (1984); Proposed Modification of the Commission's Authorized User Policy, 100 FCC 2d 177 (1985), *aff'd*, *Western Union Int'l. v. FCC*, 804 F.2d 1280 (1986).

<sup>17</sup> *See* Policy & Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, CC Docket 79-252, *First Report & Order*, 85 FCC 2d 1 (1980); *Second Report & Order*, 91 FCC 2d 59 (1982); *recon.* 93 FCC 2d 54 (1983); *Third Report & Order*, 48 Fed. Reg. 46,791 (1983); *Fourth Report & Order*, 95 FCC 2d 544 (1983); *vacated*, *AT&T v. FCC*, 978 F.2d 727 (1992), *cert. denied*, *MCI Telecommunications Corp. v. AT&T*, 113 S.Ct. 3020 (1993); *Fifth Report & Order*, 98 FCC 2d 1191 (1984); *Sixth Report & Order*, 99 FCC 2d 1020 (1985), *rev'd*, *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985).

<sup>18</sup> 47 C.F.R. § 61.3(o).

<sup>19</sup> *See* In the Matter of International Competitive Carrier Policies, *Report and Order*, 102 FCC 2d 812, CC Docket No. 85-107, FCC 85-585, ¶¶ 57-58 (1985) ("*International Competitive Carrier Order*").



supporting a new or changed tariff.<sup>20</sup> Their tariff filings are subjected to longer notice periods<sup>21</sup> that must expire before their tariffs can become effective. In contrast, the Commission eased its regulatory requirements for non-dominant common carriers because it concluded that non-dominant common carriers lacked the incentive to charge rates or engage in practices that contravene the requirements of the Communications Act.<sup>22</sup> Consequently, the Commission granted non-dominant common carriers streamlined tariff relief, which presumed the lawfulness of their filed tariffs and reduced the notice periods for tariff effective dates.<sup>23</sup> Non-dominant common carriers' tariff filings now are effective on one-day's notice.<sup>24</sup>

10. In 1985, the Commission's *International Competitive Carrier Order* determined that Comsat was a dominant common carrier in the provision of INTELSAT space segment, international video transmission, and multi-purpose earth station services.<sup>25</sup> The Commission concluded, however, that Comsat was non-dominant in the provision of IBS, a form of private line service. Pursuant to the *International Competitive Carrier Order*, Comsat was subject to regulation as a dominant common carrier under Sections 61.38 and 61.58 of our Rules, requiring that data submissions and 45 days advance notice be provided to the Commission in connection with any new tariff or change to an existing tariff.<sup>26</sup>

11. In the 13 years since adoption of the *International Competitive Carrier Order*, the international telecommunications market has experienced the entry of new carriers and unprecedented growth. In 1984, the U.S. permitted the operation of U.S.-licensed international satellite systems other than Comsat ("separate satellite systems"), and subsequently the Commission authorized separate satellite systems to provide international telecommunications

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<sup>20</sup> See 47 C.F.R. § 61.38.

<sup>21</sup> See, e.g., 47 C.F.R. § 61.58(c) (requiring tariff filing with 45 days' prior notice).

<sup>22</sup> See *First Report and Order* ¶ 23.

<sup>23</sup> See *International Competitive Carrier Order* ¶ 92.

<sup>24</sup> See *id.* § 61.58.

<sup>25</sup> See *International Competitive Carrier Order* ¶¶ 63-68.

<sup>26</sup> Comsat is required to file tariffs with the Commission on 45 days' prior notice, except for services for which we have granted streamlined tariff relief. See *August 1996 Order* ¶ 11.

services.<sup>27</sup> Today, several U.S. separate satellite systems provide service to many foreign nations. In addition, U.S. cable carriers have expanded their transoceanic fiber-optic cable capacity and geographical coverage to provide a competitive alternative to satellites for international switched voice and private line service users.<sup>28</sup> In light of the increased competition developing in international telecommunications service markets, Comsat requests that the Commission reduce its regulation of Comsat.

12. In 1996, the Commission waived the application of Sections 61.38 and 61.58 of our Rules and granted streamlined tariff relief<sup>29</sup> to Comsat's provision of switched voice and private line services.<sup>30</sup> The Commission concluded that the existence of substantial competition in the market for switched voice and private line services was an adequate substitute for the Commission's dominant common carrier tariff regulations and that a waiver was appropriate under the circumstances.<sup>31</sup> The Commission declined to extend the waiver and streamlined tariff relief to the provision of Comsat's international video transmission services.<sup>32</sup> In addition, the Commission conditioned the waiver on Comsat filing space segment<sup>33</sup> tariffs with supporting material sufficient to demonstrate that the filing does not restrict the availability of any service to thin route markets and that it has the same rate impact on thin route customers as on non-thin route customers.<sup>34</sup> Granting Comsat streamlined tariff relief was in the public interest because

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<sup>27</sup> See Establishment of Satellite Systems Providing International Communications, *Report and Order*, 101 FCC 2d 1046 (1985), *recon.*, 61 Rad. Reg. 2d 649 (1986).

<sup>28</sup> United States General Accounting Office Report to the Chairman, Committee on Commerce, Science and Transportation, U.S. Senate "Telecommunications Competition Issues in International Satellite Communications," October 1996 at 16-17.

<sup>29</sup> Streamlined tariff relief permits Comsat to file tariffs for these services on 14 days' prior notice, with a presumption of lawfulness and accompanied by minimal cost support data.

<sup>30</sup> See *August 1996 Order* ¶ 38.

<sup>31</sup> *Id.* ¶ 35.

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

<sup>33</sup> "Space segment" refers to Comsat's use of the transmission capacity of INTELSAT's satellites.

<sup>34</sup> See *id.* ¶ 36. The *August 1996 Order* found that there were approximately 80 countries not linked to the U.S. by cable, served by satellites only and that exhibited low traffic density that

less burdensome tariff requirements would avoid delays in the implementation of new services and price reductions.<sup>35</sup>

13. After the release of the *August 1996 Order*, Comsat petitioned the International Bureau for a waiver of the Commission's dominant common carrier tariffing rules and streamlined tariff relief for its provision of international video services.<sup>36</sup> In that proceeding, Comsat provided updated market information analyzing the state of competition in the international video services markets. On delegated authority, the International Bureau concluded that substantial competition existed in the full-time video transmission service ("full-time video service")<sup>37</sup> market to warrant waiving Sections 61.38 and 61.58 of our Rules and granting Comsat streamlined tariff relief for this service.<sup>38</sup> The Bureau extended streamlined tariff relief to Comsat's occasional-use video transmission service and short-term video transmission service (collectively "occasional-use video service")<sup>39</sup> rate decreases.<sup>40</sup> The

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it referred to as "thin routes."

<sup>35</sup> *Id.* ¶ 35.

<sup>36</sup> In the Matter of Comsat Corporation Petition for Partial Relief from the Current Regulatory Treatment of COMSAT World Systems' Video and Audio Services filed October 25, 1996, File No. 14-SAT-ISP-97.

<sup>37</sup> "Full-time video service" means the provision of satellite transmission capacity to third parties for their video and associated audio transmissions 24 hours per day, seven days per week. Full-time video satellite circuits can be leased for a minimum of 3 months up to lease terms from 1 to 10 years. Full-time video services are generally used by third parties to transmit news and other program materials over high traffic routes and generally originate and terminate from the same geographic origination and termination points. This service does not include the provision of broadcast services, including, but not limited to, direct broadcast satellite and direct-to-home television services.

<sup>38</sup> *See August 1997 Order* ¶ 48.

<sup>39</sup> "Occasional-use video service" means the provision of satellite transmission capacity to third parties for their video and associated audio transmissions on short notice and for a short period of time. Occasional-use video service is typically ordered in one-minute increments (after a minimum period of service has been paid for, e.g., 10 minutes) and can originate and terminate from different geographic origination and termination points from one day to the next. Satellite circuits can also be leased by third parties on a short-term basis for a minimum of one

Bureau, however, declined to waive the Commission's dominant common carrier tariff rules or grant streamlined tariff relief for Comsat's occasional-use video service rate increases.<sup>41</sup>

14. Comsat now petitions the Commission seeking reclassification as a non-dominant common carrier in the provision of its INTELSAT switched voice, private line and international video transmission services and the elimination of structural separation and rate of return regulation of its INTELSAT services. Alternatively, Comsat requests that the Commission forbear, under Section 10 of the Communications Act, from dominant common carrier regulation of its tariffs for INTELSAT services and from structural separation and rate of return regulation of its INTELSAT services. According to Comsat, the regulations applied to Comsat are based on market conditions that have changed significantly since enactment of the Satellite Act and the Commission should lift this uneven regulatory burden immediately.<sup>42</sup>

15. Comsat's Petition was placed on public notice and objections and comments were received from several parties.<sup>43</sup> Almost all of Comsat's competitors and a number of U.S. users of INTELSAT services oppose, in part or whole, reclassifying Comsat as a non-dominant common carrier or forbearance from regulating Comsat as a dominant common carrier because, they assert, Comsat continues to exercise market power in the provision of INTELSAT services.<sup>44</sup> Only one commenter, the Competitive Telecommunications Association, supports

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week up to three months for coverage of special or fast breaking events. The term "occasional-use video service" is used herein to describe both occasional-use video transmission service and short-term video transmission service because these two services are sufficiently similar in nature. As used herein, "occasional-use video service" does not include the provision of broadcast services, including, but not limited to, direct broadcast satellite and direct-to-home television services.

<sup>40</sup> See August 1997 Order ¶ 48.

<sup>41</sup> *Id.*

<sup>42</sup> See Comsat Petition at 18.

<sup>43</sup> See Public Notice Report No. SPB-79, May 1, 1997.

<sup>44</sup> See Comments of AT&T Corp., ABC, Inc., CBS Inc., National Broadcasting Company, Inc. and Turner Broadcasting System, Inc. (collectively, the "Networks"), Columbia Communications Corporation, Competitive Telecommunications Association, Hughes Telecommunications & Space Company, Independent Satellite Telecommunications

Comsat's request for forbearance; it suggests that the Commission defer resolution of Comsat's request for non-dominant status until the year 2000.<sup>45</sup>

16. Comsat replies to these objections, stating that the commenters fail to offer any justification for retaining dominant carrier regulation of Comsat's rates, earnings and structure with respect to its INTELSAT services.<sup>46</sup> It contends that the concerns raised by commenters regarding its "thin route" and occasional-use video services are alleviated by its proposal to cap rates for these services for three years and to continue charging uniform prices for all geographic routes.<sup>47</sup> In addition, Comsat proposes to abide by the non-discrimination provisions of the *August 1996 Order* and, after expiration of the three-year rate cap, to file tariffs for occasional-use video service and for service to thin routes on 14 days' prior notice for any rate increases or reductions in service terms and conditions that effectively operate as a price increase.<sup>48</sup>

17. Comsat's competitors and users filed reply comments reiterating their opposition to Comsat's reclassification and forbearance requests and urging the Commission to require Comsat to waive its immunity from suit and legal process and to permit other U.S. providers and users to obtain direct access to INTELSAT before non-dominant relief is granted.<sup>49</sup>

### III. Discussion

18. In the *International Competitive Carrier Order*, the Commission determined that Comsat was a dominant common carrier possessing market power in the provision of INTELSAT space segment, television and multi-purpose earth station services.<sup>50</sup> The

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Companies, Keystone Communications Corporation, PanAmSat Corporation, Washington International Teleport, Inc. and WorldCom, Inc.

<sup>45</sup> See Comments of Competitive Telecommunications Association at 1-2.

<sup>46</sup> Reply of Comsat at 11.

<sup>47</sup> *Id.* at 29.

<sup>48</sup> *Id.*

<sup>49</sup> See Reply Comments of Networks at 9-11; see also The Satellite Users Coalition Letter.

<sup>50</sup> See *International Competitive Carrier Order* ¶¶ 63-67.

Commission further decided that Comsat was non-dominant in the provision of non-IMTS, private line data services ("private line service") because there were many competitors providing service in the private line service market.<sup>51</sup> At the time of our decision, Comsat was the only commercial provider of international switched voice and video services via satellite. AT&T and other smaller telecommunications service suppliers provided these international services via cables, which we did not consider at the time to be a substitute for service by satellite. Comsat's monopoly over the provision of international telecommunications services by satellite was a key factor underlying our 1985 assessment of Comsat's market power in the provision of its INTELSAT services.

19. More than a decade has transpired since the adoption of the *International Competitive Carrier Order*. Because of the unprecedented growth in the industry during that time, Comsat is no longer the sole commercial provider of international switched voice and video transmission services via satellites. Today, other satellite companies effectively compete against Comsat and the INTELSAT satellite system for the provision of full-time video. On a more limited basis, these satellite systems also offer international switched voice, private line, and occasional-use video services. Columbia, Orion, GE American Communications and Hughes/PanAmSat are a few of the companies that provide these services. In the future, new voice, data and video services authorized by the Commission will be available to consumers via low Earth orbiting, non-geosynchronous satellite systems. For example, Iridium's Big LEO voice and data global mobile satellite system is scheduled to be operational in September 1998; eventually, other systems will join the competitive field.<sup>52</sup> These new services will compete against existing satellite services, thereby providing consumers with more choice for their international telecommunications needs. Moreover, the transoceanic capacity and geographical coverage of fiber-optic cables has burgeoned since 1985, and they now provide a highly competitive transmission alternative for providers of international switched voice and private line services. The emergence of competitors to Comsat has likewise increased the supply of satellite transmission capacity for the provision of these services.

20. The *August 1996 Order* and the International Bureau's *August 1997 Order* recognized the increase in competition that has occurred in the international telecommunications marketplace over the past decade. These decisions focused on whether good cause existed under the Commission's Rules to justify waiving our dominant common carrier tariff rules

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<sup>51</sup> See *id.*

<sup>52</sup> Other Big LEO ("low Earth orbiting"), Little LEO and wideband satellite systems authorized by the Commission are expected to begin providing service in the 2000-2002 timeframe.

applicable to Comsat's INTELSAT services. The Commission and the Bureau determined that there was sufficient competition in the international switched voice, private line, and full-time video service markets to warrant waiving our dominant carrier regulations and granting Comsat streamlined tariff relief for these services. These decisions also found that the markets for switched voice service along thin routes (i.e., those countries served only by satellite and where Comsat is the dominant provider of such service) and occasional-use video service were not substantially competitive. Consequently, special conditions and restrictions were imposed on the streamlined tariff relief granted to Comsat for service in these markets.<sup>53</sup>

21. Comsat's Petition for reclassification as a non-dominant carrier necessitates a more comprehensive inquiry than was undertaken in the *August 1996 Order* and *August 1997 Order*. In this proceeding, the focus is on whether Comsat has the ability to exercise market power in each of the relevant markets in which it provides INTELSAT services. If Comsat no longer possesses market power in a relevant market, we must reclassify it as non-dominant in that market. If the record demonstrates that Comsat continues to possess market power in a relevant market, we must deny Comsat's request for reclassification as a non-dominant carrier in that market. Comsat has also requested that we forbear under Section 10 of the Communications Act from dominant common carrier regulation in those markets where it remains dominant. Consequently, we will undertake such an analysis with respect to any markets in which we find that Comsat remains dominant. We also address Comsat's request for elimination of the Commission's rate of return regulation and structural separation policies as they apply to Comsat's INTELSAT services.

22. PanAmSat asserts that we lack authority to reclassify Comsat as a non-dominant common carrier because such a reclassification would directly conflict with a provision contained in the Satellite Act.<sup>54</sup> Specifically, PanAmSat raises concerns that eliminating the dominant carrier tariff notice, cost support and rate of return regulations with respect to Comsat would be at odds with Section 401 of the Satellite Act, which requires that Comsat be fully subject to common carrier regulation.<sup>55</sup> We find that reclassifying Comsat as a non-dominant

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<sup>53</sup> The *August 1996 Order* required Comsat to demonstrate that its tariff filings did not restrict service to "thin route" countries and had the same rate impact on "thin route" users as on high-volume users. *August 1996 Order* ¶ 26. The *August 1997 Order* granted streamlined tariff relief to Comsat's occasional-use video service rate decreases but maintained dominant carrier regulation for occasional-use video rate increases. *August 1997 Order* ¶ 46.

<sup>54</sup> Comments of PanAmSat at 6.

<sup>55</sup> *Id.* at 6-7.

common carrier, subject to the Commission's determination that Comsat no longer holds market power for a particular service, is within our authority and fully consistent with the requirements of the Satellite Act.

23. Section 401 of the Satellite Act provides that "[Comsat] shall be deemed a common carrier within the meaning of Section 3(h) of the Communications Act of 1934, as amended, and as such shall be fully subject to the provisions of Title II and Title III of that Act."<sup>56</sup> It continues that "[w]henver the application of the provisions of this Act shall be inconsistent with the application of the provisions of the Communications Act, the provisions of this Act shall govern." Our authority to reclassify Comsat as a non-dominant common carrier is consistent with the provisions of Section 401. Even if Comsat is reclassified as non-dominant in a market, Comsat will remain fully subject to the provisions governing common carriers under Title II and radio licensees under Title III of the Communications Act. It would still be required to file just, reasonable and non-discriminatory rates pursuant to Section 201 of the Communications Act and obtain a license for radio transmission under Title III of the Communications Act. In addition, the Commission would retain jurisdiction to suspend and investigate tariffs, prescribe just and reasonable charges and hear complaints filed against Comsat.<sup>57</sup> Thus, by reclassifying Comsat as a non-dominant common carrier in a product or geographic market and eliminating rate of return regulation of Comsat with respect to those markets in which it is found to be a non-dominant common carrier, we are not abandoning common carrier regulation of Comsat. To the contrary, we will continue regulating Comsat as a non-dominant common carrier under the provisions of Title II and a radio licensee under Title III of the Communications Act. Thus, our authority to reclassify Comsat as a non-dominant common carrier is consistent with the requirements of Section 401 of the Satellite Act.

#### **A. Market Power**

24. Our analysis of Comsat's ability to exercise market power focuses on: (a) identifying the relevant product and geographic markets in which Comsat provides INTELSAT services; (b) identifying the market participants in each relevant market; and (c) determining whether Comsat continues to possess market power in each relevant market identified. In making our determination, we consider the pleadings and other studies, information and data submitted in the record by Comsat and the other parties in this proceeding.

##### 1. Relevant Markets

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<sup>56</sup> 47 U.S.C. § 741.

<sup>57</sup> *See id.* §§ 204-209.



25. Our first step in analyzing Comsat's market power is to identify the product markets in which it provides INTELSAT services. In the *International Competitive Carrier Order*, the Commission relied both on demand and supply substitutability in defining relevant product markets. Since then, however, the Commission has adopted in the *LEC Classification Order* an analytical framework that relies exclusively on demand considerations to define the relevant product market for domestic and international services.<sup>58</sup> For our analysis in this proceeding, we follow the *LEC Classification Order* approach, which defined a relevant product market as a service or group of services for which there are no close demand substitutes.<sup>59</sup>

26. Comsat and the commenters generally identify four product markets in which Comsat provides INTELSAT services for which they provide market data: switched voice service, private line service, full-time video service and occasional-use video service. Historically, Comsat participated in a fifth product market: the provision of earth station services for accessing INTELSAT satellites. In 1987, however, Comsat sold this business and today it does not participate in this product market.<sup>60</sup> Based on the relevant market analyses in the *International Competitive Carrier Order*, the *August 1996 Order* and the *August 1997 Order* and the comments in the record in this proceeding, we conclude that Comsat currently

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<sup>58</sup> Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Market Place, CC Docket Nos. 96-149, 96-61, *Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61*, 12 FCC Rcd 15756, ¶¶ 41 and 54 ("*LEC Classification Order*"), *Order on Reconsideration*, 12 FCC Rcd 8730 (1997), *Order*, DA 98-556 (rel. March 24, 1998), *further recon. pending*. Supply substitutability (the degree to which services provided by different companies can serve the same group of customers) is a factor that should be considered when assessing a carrier's market power in a relevant service market. *See also August 1997 Order* ¶ 16; *LEC Classification Order* ¶ 40; In the Matter of The Merger of MCI Communications Corporation and British Telecommunications plc, GN Docket No. 96-245, *Memorandum Opinion and Order*, FCC 97-302 ¶ 48 (rel. Sept. 24, 1997) ("*BT/MCI Order*"); In the Application of NYNEX Corporation and Bell Atlantic Corporation For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries, File No. NSD-L-96-10, *Memorandum Opinion and Order*, FCC 97-286 ¶ 50 (rel. August 14, 1997) ("*BellAtlantic/NYNEX Order*").

<sup>59</sup> *LEC Classification Order* ¶ 40.

<sup>60</sup> Comsat sold its INTELSAT earth station business in 1987 to American Satellite Company and AT&T.

provides INTELSAT services in four product markets. The product markets include the following INTELSAT services originating in the U.S. for termination abroad or originating abroad for termination in the U.S.: (a) switched voice service; (b) private line service; (c) full-time video service; and (d) occasional-use video service.

27. An analysis of Comsat's market power also necessitates that we identify relevant geographic markets to which it provides INTELSAT services. A relevant geographic market aggregates into one market those consumers with similar choices regarding a particular good or service in the same geographical area.<sup>61</sup> In the *LEC Classification Order*, the Commission found that each point-to-point market constituted a separate relevant geographic market.<sup>62</sup> The Commission went on to state, however, that "when a group of point-to-point markets exhibit sufficiently similar competitive characteristics (i.e., essentially the same set of carriers offer the same set of choices to customers on those point-to-point routes), we will examine that group of markets using aggregate data that encompasses all point-to-point markets in the relevant area, rather than each individual point-to-point market separately."<sup>63</sup> In the *Bell Atlantic/NYNEX Order*, the Commission clarified that it would treat as a single relevant geographic market, "an area in which all customers in that area will likely face the same competitive alternatives for a [relevant service]."<sup>64</sup> This approach allows for the assessment of the market power of a particular carrier based on unique market situations by recognizing, for example, that certain carriers may target particular types of customers, provide specialized services, or control independent facilities in specific geographic areas.<sup>65</sup> Below, we conclude that Comsat provides switched voice, private line and occasional-use video services to and from separate and distinct geographic markets, rather than in one global market, and we analyze Comsat's market power in each of these services' separate geographic markets.

28. Comsat provides switched voice and private line service to a large number of point-to-point routes between the U.S. and foreign countries that can be grouped into two separate and distinct geographic markets. Many of these routes are served by multiple cable and satellite carriers, in addition to Comsat, which provide switched voice and private line service. In

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<sup>61</sup> See, e.g., *Tampa Elec. Co. v. Nashville Co.*, 365 U.S. 320, 327 (1961).

<sup>62</sup> *LEC Classification Order* ¶ 64.

<sup>63</sup> *Id.* ¶ 66.

<sup>64</sup> *Bell Atlantic/NYNEX Order* ¶ 54.

<sup>65</sup> *BT/MCI Order* ¶ 51; *Bell Atlantic/NYNEX Order* ¶ 54; and *LEC Classification Order* ¶ 21.

addition to being served by multiple carriers, these routes appear to exhibit low barriers to entry for Comsat's competitors. These routes are primarily between the U.S. and the countries of Europe, the Americas, Asia and Australia. For the purposes of our analysis, we group these point-to-point routes exhibiting sufficiently similar competitive characteristics into one geographic market referred to as the "thick route market." The record also indicates that a second group of point-to-point routes also share some common competitive characteristics. The 63 countries listed on Appendix A to this Order are not linked to the U.S. by cable and, therefore, are served only by satellite carriers. In addition, generally Comsat is the only satellite carrier that provides switched voice and private line service to these countries from the U.S. These markets are primarily developing nations located in Africa and Eastern Europe as well as low density, remotely located island nations, such as Mauritius and New Caledonia, that might not justify the cost of a cable connection. In many of these countries, legal barriers to entry exist for U.S. cable and satellite carriers. Although the record offers little guidance on this point, some of these countries, however, may have low barriers to entry but insufficient demand may be the reason Comsat is not encountering competition in these markets from U.S. satellite carriers. Over time, we expect the number of these thin route countries to decrease as they become linked to the U.S. by fiber-optic cable and lower their barriers to entry. The record provides an insufficient basis for us to reasonably determine when this will happen. Because these 63 countries exhibit sufficiently similar competitive characteristics, for the purposes of our analysis, we group them into one geographic market referred to as the "thin route market."

29. A different geographic market distinction is useful for identifying separate geographic markets for occasional-use video service. At the present time, cable is not a significant competitor to satellites for the transmission of international video services, for example occasional-use video service, primarily because it is not as cost efficient.<sup>66</sup> Thus, cable carriers are not yet effective competitors for the provision of occasional-use video service using their own facilities. Satellites are, however, able to provide these services. The record indicates that there are 55 point-to-point routes between the U.S. and foreign countries where Comsat and its U.S. separate system competitors are able to provide occasional-use video service. Because these routes exhibit low barriers to entry and competition among service providers, for the purposes of our analysis, we group them into one geographic market referred to as the "occasional-use multiple carrier market." Comsat is the sole provider of occasional-use video service to and from the U.S. to many other countries. U.S. consumers have no competitive alternatives to Comsat for occasional-use video service to these countries. Thus, this other group of routes constitutes a separate geographic market for the provision of occasional-use video service which, for the purposes of our analysis, we refer to as the "occasional-use single carrier market." The 142 countries listed on Appendix B to this Order comprise the occasional-

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<sup>66</sup> See August 1997 Order ¶ 40.

use single carrier market. The occasional-use multiple carrier market and the occasional-use single carrier market are clearly differentiated by the degree of competition and choice that U.S. consumers can expect with regard to service to and from these geographic markets.

a. Switched Voice Service

30. The first relevant product market in which Comsat provides INTELSAT services is the international switched voice service market. The *International Competitive Carrier Order* referred to this service as INTELSAT space segment service, excluding non-IMTS service<sup>67</sup> for which Comsat was found non-dominant. The *August 1996 Order* referred to switched voice service as international switched voice service.

31. Comsat contends that both satellites and cables compete in the switched voice market as substitute services<sup>68</sup> and that the cost per circuit for a fiber-optic cable transmission is equal to or lower than the cost per circuit for a satellite transmission.<sup>69</sup> PanAmSat disagrees, suggesting that satellites and cables should not be considered as substitutes for one another in a relevant market if a foreign Postal Telephone and Telegraph ("PTT") owns or controls the satellite and cable connections to the foreign PTT's public switched network.<sup>70</sup> PanAmSat asserts that the existence of cables along a route may not matter because for many services satellite and cable are not close substitutes.<sup>71</sup> AT&T does not oppose the relief sought by Comsat for switched voice service to and from the U.S. and most foreign countries.<sup>72</sup> Moreover, WorldCom, another cable carrier, agrees that switched voice service to and from the U.S. and most foreign countries

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<sup>67</sup> IMTS refers to international message telephone service, which is another way of referring to switch voice service. Non-IMTS services are private line services.

<sup>68</sup> See The Economic Basis For Reclassification of Comsat As A Non-Dominant Carrier, The Brattle Group, April 1997, at 6 ("Reclassification Study").

<sup>69</sup> *Id.* at 9-10.

<sup>70</sup> Reply Comments of PanAmSat at 9; Reply Declaration of Leonard Waverman at 7 ("Reply Declaration of Leonard Waverman").

<sup>71</sup> Reply Declaration of Leonard Waverman at 8.

<sup>72</sup> Comments of AT&T at 2.

is competitive and that alternative facilities to Comsat are available.<sup>73</sup>

32. We find that both cables and satellites are utilized for switched voice service to and from the U.S. AT&T, WorldCom and other U.S. authorized carriers provide switched voice service via cable that they constructed and own and via INTELSAT satellites through Comsat. The record indicates that the cost per circuit for cable transmission is now lower than the cost per circuit for satellite transmission, which makes cable a lower cost transmission alternative for switched voice service to those countries linked by cable.<sup>74</sup> The record lacks any evidence that foreign PTTs owning or controlling both satellite and cable connections to their public switched networks are favoring the use of one transmission technology over the other for switched voice service to their countries. PTTs now own and are investing in fiber-optic cable networks for the transmission of switched voice service.<sup>75</sup> These investments suggest that fiber-optic cable is becoming the transmission medium of choice for switched voice transmission. As the Commission found in the *International Competitive Carrier Order*, we confirm in this Order that cable and satellite are fungible technologies utilized in the transmission of international switched voice service.<sup>76</sup> Therefore, the product market definition for switched voice service should include the transmission of this service using both of these technologies. As discussed below, we note satellites are the only means of providing switched voice service to the thin route market because the countries comprising this market are not linked to the U.S. directly by fiber-optic cable.<sup>77</sup>

33. Comsat submits market share data for its switched voice service on an international route basis identifying the trans-Atlantic route, trans-Pacific route and Latin American route as separate routes. It requests that we aggregate these international routes into one global geographic market for each INTELSAT service.<sup>78</sup> In the *AT&T International Order*, the Commission used AT&T's market position on a worldwide basis as a surrogate for a route-by-route analysis where there was no persuasive evidence that the market attributes of each

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<sup>73</sup> Comments of WorldCom at 1-2.

<sup>74</sup> See Comsat Petition at 63.

<sup>75</sup> Response of Brattle Group at 40.

<sup>76</sup> See *International Competitive Carrier Order* ¶ 65.

<sup>77</sup> See discussion of non-competitive markets *infra* ¶¶ 42-49.

<sup>78</sup> Comsat Petition at 36-37.

international route were different.<sup>79</sup> For the purposes of our analysis in this proceeding, we find that the provision of switched voice service constitutes one product market. This service, however, is provided along routes between the U.S. and foreign countries, some of which are competitive and some of which are not. We have identified two distinct geographic markets where switched voice service is provided based on the competitive alternatives available to U.S. consumers and users of this service: the thick route market and the thin route market. Switched voice service customers in the thick route market share similar characteristics. They are able to choose among multiple providers of switched voice service offering differentiated service. Switched voice service appears to be a commodity service and price and quality seem to be the key service characteristics on which U.S. consumers focus. Because Comsat and its competitors provide switched voice service along the same routes and these routes exhibit other similar competitive characteristics, we will treat the thick route market as one geographic market for switched voice service. As discussed below, switched voice service customers in the thin route market lack such competitive alternatives, which warrants grouping them into a separate geographic market.<sup>80</sup>

b. Private Line Service

34. A second product market that we identify is the market for private line service. In the *International Competitive Carrier Order*, the Commission found that private line service, referred to as non-IMTS service in that decision, was a separate product market because it was used primarily for the transmission of data services.<sup>81</sup> We explained that consumers demanded and used data services for different reasons than for voice services and, for this reason, private line service was considered a separate relevant service market. Neither Comsat nor the parties dispute this finding and nothing in the record causes us to revisit this finding. Accordingly, we confirm the Commission's decision in the *International Competitive Carrier Order* that private line service constitutes a separate product market. As we discuss below, however, we also find

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<sup>79</sup> In the Matter of Motion of AT&T Corp. to be Declared Non-Dominant for International Service, *Order*, 11 FCC Rcd 17963, FCC 96-209, ¶¶ 32 and 35 (1996) ("AT&T *International Order*").

<sup>80</sup> See *Bell Atlantic/NYNEX Order* ¶ 54 (treating as one geographic market areas where customers face the same competitive alternatives for a service).

<sup>81</sup> See *International Competitive Carrier Order* ¶ 25. In that decision we defined private line service as consisting of non-International message telephone services such as telex, telegram, TWX, private line, high and low speed data, video conferencing and International Business Service.

that the thick route market and the thin route market represent two separate geographic markets for private line service customers.<sup>82</sup>

c. Full-time and Occasional-Use Video Services

35. In the *August 1997 Order*, the International Bureau identified full-time video service and occasional-use video service as separate relevant service markets.<sup>83</sup> We affirm that finding.

36. As discussed in the *August 1997 Order*, users demand international video services for different reasons. Full-time video service is generally utilized to transmit programming from the U.S. to foreign markets. The origination point is usually in the U.S., and the receiving point is usually in a foreign market. On the other hand, occasional-use video services are generally utilized to transmit programming from any point on the globe, based on where an event requiring short-term coverage is occurring. Occasional-use video service often requires uplinking video from foreign countries where a fast-breaking news story may be originating that needs to be quickly transmitted to somewhere else on the globe.<sup>84</sup> Unlike full-time video service, which generally does not require approval from foreign governments for the reception of programming, occasional-use video, when used to uplink video from a foreign country, requires the approval of the foreign government. Receive-only occasional-use video service is generally much less valuable than transmit-receive occasional-use video service.<sup>85</sup>

37. Users of full-time video service plan ahead by entering into long-term contracts to secure the satellite capacity needed for full-time video service transmissions. For example, a full-time video user can enter into 5, 10 or 15 year transponder leases with Comsat for this service. Conversely, occasional-use video services are ordered on short notice and from different origination and termination points from one day to the next. Transponders can be leased for occasional-use video service transmissions for as short a period as 10 minutes or as

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<sup>82</sup> See *infra* ¶¶ 41-48. The *International Competitive Carrier Order* found Comsat non-dominant in the provision of private line product market but did not address this issue with respect to specific geographic markets.

<sup>83</sup> See *August 1997 Order* ¶¶ 23-25.

<sup>84</sup> *August 1997 Order* ¶ 23.

<sup>85</sup> "Market Power, Market Foreclosure, and INTELSAT," by the Economist Inc., February 16, 1998. "Receive-only" occasional-use video service refers to the one-way, downlink of a video transmission signal to a country on a spot or short-term basis.

long as three months. Demand for occasional-use video service arises the moment a newsworthy event occurs. Often these events are unpredictable. Thus, the demand for occasional-use video service is less predictable than it is for full-time video service. For the foregoing reasons, we continue to define full-time video as a different service market from occasional-use video.

38. Comsat's economic submissions include data identifying its share of the international video transmission services market for the trans-Atlantic, trans-Pacific and Latin American international routes. In the *August 1997 Order*, the Bureau analyzed competition in the full-time video and occasional-use video service markets on a worldwide basis because users demanded these services for the same reasons irrespective of their geographic location.<sup>86</sup> The record in this proceeding is consistent with the Bureau's finding in the *August 1997 Order* that the full-time video service market is a global market .

39. The record in this proceeding, however, provides updated information about the geographic markets in which Comsat and its U.S. satellite system competitors provide occasional-use video services. Generally, the record indicates that occasional-use video services are provided in two geographic markets: the occasional-use multiple carrier market and the occasional-use single carrier market. The occasional-use multiple carrier market consists of those routes between the U.S. and foreign countries where customers have competitive alternatives for occasional-use video services and barriers to entry are low. Comsat and at least one of its U.S. satellite system competitors are able to provide service in this market, which is concentrated primarily in Europe, North America, South America and the Far East. The occasional-use single carrier market consists of those routes between the U.S. and foreign countries where customers do not have a choice among suppliers of occasional-use video services. Comsat continues to be the sole provider of these services in this market.

d. INTELSAT Earth Station Service

40. In 1985, we identified Comsat's provision of earth station services utilized to transmit and receive signals via INTELSAT satellites as a separate product market in the *International Competitive Carrier Order*.<sup>87</sup> Today, many companies other than Comsat are licensed to operate earth stations and links to INTELSAT satellites are more broadly available. Earth stations, however, remain the sole means for connection to INTELSAT satellites. There

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<sup>86</sup> See *August 1997 Order* ¶¶ 23-24.

<sup>87</sup> See *International Competitive Carrier Order* ¶ 66.



are no substitutes for this service. Therefore, earth station services in connection with transmissions using INTELSAT satellites remain a separate product market.

e. Thin Route and Occasional-Use Single Carrier Geographic Markets

41. The thin route market is a significant one because generally Comsat is the sole supplier of switched voice and private line services to and from the U.S. and the 63 countries in this market. These 63 countries include those that are not linked to the U.S. by cable and are served by satellites only, sometimes referred to as "thin routes."<sup>88</sup> AT&T and PanAmSat contend that Comsat remains dominant to 72 thin route countries.<sup>89</sup> Comsat claims that today, it is the sole provider of INTELSAT services to 64 countries and that this number will decrease to 26 countries by next year.<sup>90</sup>

42. As discussed above, we find that switched voice and private line services are provided in two distinct geographic markets: the thin route market consisting of the 63 countries listed on Appendix A to this Order (these routes are not linked to the U.S. by cable and generally Comsat is the sole provider of service) and the thick route market (these routes are linked to the U.S. by cable and satellites and served by both Comsat and other U.S. authorized carriers). This distinction is particularly important when analyzing the state of competition and Comsat's market power in the provision of switched voice and private line services in the thin route market. U.S. cable carriers are unable to serve the countries in the thin route market directly and must rely on satellite providers to provide service to these countries.

43. In its comments, AT&T recommends that the definition of thin route countries be

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<sup>88</sup> The list of 63 countries is based on the Commission's *Report No. IN 97-2436*, 1996 Section 43.82 Circuit Status Data, December 1997, International Bureau ("1996 Circuit Status Report"). Excluded from the list of 63 countries are those countries to which Commission cable licenses have been issued and that are expected to be served by cable or U.S. separate satellite systems in the near-term (Costa Rica, Ecuador, French Guiana, Guatemala, Panama and Peru are expected to be served by June 1998; Georgia, Macau, Malta, Qatar, United Arab Emirates and Yemen are expected to be served in 1998).

<sup>89</sup> See Comments of AT&T at 4; Declaration of Leonard Waverman at 5 (stating that 73 countries lack access to transoceanic cable).

<sup>90</sup> Letter dated January 16, 1997, from Howard D. Polsky, Comsat Corporation, to Regina M. Keeney, Chief, International Bureau, Federal Communications Commission.

expanded to include those countries connected by satellite and only one cable.<sup>91</sup> WorldCom recommends that we classify as thin routes those countries in which Comsat holds at least an 80 percent market share for switched voice and private line services originating from the U.S.<sup>92</sup>

44. In the *August 1996 Order*, the Commission found that satellite service was the only means of providing telecommunications to approximately 80 countries.<sup>93</sup> In that order, the Commission classified countries served only by satellites as thin route countries. For Comsat's provision of services to thin route countries, we did not approve streamlined tariff relief because of our concern that Comsat could restrict service to thin route countries or charge thin route customers higher rates than non-thin route customers.<sup>94</sup> The thin route country classification was a useful way to identify those countries in which Comsat was dominant. For these countries, the Commission required Comsat to provide supporting data so that the Commission could confirm nondiscriminatory treatment to thin route customers.

45. We decline to adopt AT&T's and WorldCom's proposed definitions of thin route countries. Rather, we find the thin route and thick route market distinction we develop in this Order more adequately reflects the current state of competition in the geographic markets for switched voice and private line services. AT&T points out that 16 countries are served by satellite and only one cable and that these countries should be considered thin routes because failure of the cable would require use of Comsat/INTELSAT satellites to ensure uninterrupted service.<sup>95</sup> Based on the 1996 Circuit Status Report, three of the countries identified by AT&T are served by satellites only (Libya, Armenia and Azerbaijan). These countries already are included in our list of countries comprising the thin route market. Nine other countries are connected by one cable and will be connected by a second cable in the near future (Georgia, Guyana, Lebanon, Malta, Oman, Pakistan, Syria, Yemen and Vietnam). Four other countries that are connected by satellite and only one cable (Cuba, Fiji, Papua New Guinea and Serbia), appear to be served equally by cable and satellite circuits. Serbia is served by 34 cable circuits

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<sup>91</sup> Comments of AT&T at 7.

<sup>92</sup> Comments of WorldCom at 6.

<sup>93</sup> See *August 1996 Order* ¶ 25.

<sup>94</sup> We found in the *August 1996 Order* that although separate satellite systems may serve some of these non-competitive market countries, satellite providers provide less competition than cable services, in part because orbital positions may be more difficult to procure than cable licenses.

<sup>95</sup> Comments of AT&T at Affidavit of Dr. Gerard O'Reilley ¶ 5.

and 181 satellite circuits, but, it has a large number of unutilized cable circuits (136) which can be used for service by Comsat's competitors. AT&T does not provide any evidence to support a finding that cable outages are frequent generally or to these eight countries in particular. Our experience indicates that cable outages are infrequent. As a result, the risk of outage for these countries is low, even before they become linked by a second cable. Consequently, we exclude countries connected by one cable from our list of 63 countries comprising the thin route market.

46. We also decline to adopt WorldCom's proposed thin route definition. It proposes that countries in which Comsat has an 80 percent or higher market share should be part of the thin route market, even if such markets are served by cable as well as satellites. WorldCom's proposal would be difficult to implement and is unsupported by any economic justification for the 80 percent benchmark. For example, except for the thin route countries identified by Comsat, the record lacks evidence of Comsat's market share on a country-by-country, service-by-service basis. The 80 percent benchmark suggested by WorldCom is more relevant to an assessing Comsat's market power in a market, rather than as a factor for defining relevant markets. In addition, we also believe that Comsat's high market share in the switched voice and private line thin route market will decline as Internet usage increases. The expected increase in data volume from Internet usage is likely to be transmitted via fiber-optic cable due to its cost advantage over satellite transmission.<sup>96</sup> As a result, more telecommunications services will be transmitted via fiber-optic cable, thereby eroding Comsat's market share in the switched voice and private line thin route market. Consequently, we decline to adopt WorldCom's proposed definition.

47. Comsat has provided no substantive evidence that supports its assertion that as of next year there will remain only 26 countries in the thin route market. In large part, Comsat's assertion relies on the completion of manufacture, deployment and interconnection of a fiber-optic cable planned to link 38 African countries by 1999. Such a large project requires long lead times and currently construction has not commenced. As a result, we find it doubtful that Comsat's projected reduction in the number of countries comprising the switched voice and private line thin route market will occur in such a short time. Accordingly, we find that the 63 countries listed on Appendix A to this Order, rather than the proposals made by Comsat, AT&T and WorldCom, are the countries that should comprise the thin route market.

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<sup>96</sup> The addition of new fiber-optic cable systems has increased unutilized cable capacity to more than double the total utilized switched voice and private line capacity on both cable and satellite systems. See "Competition in Transoceanic Switched Voice and Private Line Services to and from the U.S. 1997 Update" by The Brattle Group, dated April 23, 1997, at 17 ("1997 Update").

48. The fact that some countries are and some countries are not connected to the U.S. by cable does not change our definition of the relevant geographic markets for full-time video and occasional-use video services. Cable generally is not cost-effective or suitable for video transmissions from one point to multiple locations, as is required for full-time and occasional-use video services.<sup>97</sup> The more relevant distinction for these video markets is whether a country permits U.S. separate satellite systems to provide full-time video and occasional-use video services between the U.S. and their home markets. As we discuss further below, Comsat provides both full-time and occasional-use video service to countries throughout the world via the INTELSAT system. With regard to full-time video service, we aggregate all countries into one global geographic market, as the record indicates that U.S. customers generally have a choice for obtaining full-time video service in countries worldwide. With regard to occasional-use video service, this market can be separated into two geographic markets according to whether U.S. customers have an alternative to using Comsat. We identify the occasional-use single carrier market as one where U.S. customers have to rely on Comsat for obtaining service, whereas the occasional-use multiple carrier market is comprised of countries where U.S. customers have competitive alternatives to Comsat.

f. Summary

49. We conclude, therefore, that there are five relevant product markets for INTELSAT services: switched voice, private line, full-time video, occasional-use video and earth station services. In addition, switched voice and private line service can be grouped into two separate geographic markets because U.S. consumers and users of switched voice and private line service face very different competitive alternatives in these two geographic markets: the thick route market and the thin route market. We also find that the presence of a cable connection between the U.S. and foreign countries is not relevant to determining geographic markets for international video services. We generally find that full-time video service is provided under similar competitive conditions in most countries and these countries can be grouped into one global geographic market. For occasional-use video service, two separate geographic markets exist. The occasional-use single carrier market is comprised of countries served only by Comsat satellites. U.S. consumers and users of occasional-use video service have no competitive alternative in this market. On the other hand, in the occasional-use multiple carrier market, U.S. consumers have competitive alternatives to Comsat. We next assess the competitors and Comsat's market power in each of these product and geographic markets identified.

2. Market Participants

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<sup>97</sup> See August 1997 Order ¶ 40.

50. After determining the relevant service and geographic markets, the next step in our competitive analysis is to analyze market structure by identifying those companies that are the most significant participants in each relevant market.<sup>98</sup> To the extent that we find that there are significant competitive alternatives to Comsat in a particular market, such competition will provide users with alternatives to Comsat's services, and thus should limit Comsat's ability to raise prices or act in other non-competitive ways. From the universe of actual, potential, and precluded competitors, we identify these significant participants based on an analysis of capabilities and incentives to compete effectively in the relevant market. Of particular interest are those market participants that are likely to be at least as significant a competitive force as Comsat.

51. We first identify "actual competitors" as market participants. We define "actual competitors" as firms that are now offering the relevant products in the relevant geographic market.<sup>99</sup> We also identify as potential market participants those firms that could have entered a market but have chosen not to do so. We also include firms that have been effectively "precluded" from the market. These "precluded competitors" are firms that are most likely to enter but have until recently been prevented or deterred from market participation due to barriers to entry.<sup>100</sup> Such barriers can be legal, regulatory, economic, or operational, and include: not receiving authority to transmit and receive from an earth station within a country (sometimes referred to as landing rights); limitations on obtaining operating agreements from certain foreign governments; bottlenecks to interconnecting to the public switched telephone network in foreign markets; and unreasonable access charges, licensing fees, or other taxes imposed by foreign governments on the use of domestic facilities.

52. Even as the international telecommunications marketplace becomes more competitive, however, significant entry barriers will remain for potential entrants. These barriers include: economic barriers such as obtaining access to financing in a capital intensive telecommunications industry; technical barriers such as certain technologies not being ready to be widely used for particular services; operational barriers such as obtaining and retaining personnel with necessary technical and business skills necessary to operate as a

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<sup>98</sup> See 1992 Horizontal Merger Guidelines, 57 Fed. Reg. at 41556 §1.3 ("1992 Merger Guidelines").

<sup>99</sup> *Id.*

<sup>100</sup> Barriers to entry represent anything that prevents an entrepreneur from instantaneously creating a new firm in a market. See Dennis W. Carlton and Jeffrey M. Perloff, *Modern Industrial Organization*, 919 (2d ed. 1994).

telecommunications vendor. Generally, the existence of competition indicates that relevant legal and operational barriers have been lowered. Competition, however, does not necessarily eliminate all legal and regulatory restrictions. For example, in some cases, INTELSAT Signatories are the spectrum licensing authorities and monopoly providers of satellite services in their home markets, so they have an incentive to minimize the spectrum licenses that they issue to independent satellite systems seeking to compete in their markets. These remaining entry barriers narrow the universe of significant market participants who will be able more quickly to enter and serve the relevant markets. Accordingly, we will also analyze the capabilities and incentives of each possible competitor to determine whether that possible competitor: (a) has the capabilities and incentives such that it would be reasonably likely to enter the relevant market as competition increases;<sup>101</sup> and (b) would likely exert pressure on competitors in the absence of regulation to lower prices, innovate or upgrade services.

53. In identifying the most significant market participants from the universe of actual and potential competitors, we identify the market participants that have, or are likely to gain speedily, the greatest capabilities and incentives to compete most effectively and soonest in the relevant market. Some of these capabilities are basic to the operation of a satellite system or international fiber-optic cable network, and concern access to the necessary facilities, "know how," and operational infrastructure such as sales, marketing, customer service, billing and network management. Other capabilities are less tangible. They include brand name recognition in the mass market, a reputation for providing high quality and reliable service, existing customer relationships, or the financial resources to obtain these intangible assets. Another factor is whether the potential or precluded competitor is making plans or has had plans to enter the relevant market. Such plans would represent probative evidence of whether a potential or precluded competitor has the capabilities and incentives necessary to affect the market. To the extent that we find sufficient competitive alternatives already existing in a market, it is unnecessary to go further and analyze in depth whether there are additional potential or precluded competitors who may likely enter the market in the near future.

54. In evaluating the relative significance of market participants, we also consider matters that would be material to the entry of all precluded competitors as a class, but not to any one entity in particular. Such factors would include the future growth and prevailing prices in the relevant market, and the availability of capital both generally and in the relevant market. Finally, in determining the most significant market participants from among the actual and precluded competitors, it is particularly relevant to identify which competitors are likely to be significant competitors to Comsat, the party seeking non-dominant classification.

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<sup>101</sup> In an appropriate case, we may consider precluded competitors by class, such as "all satellite companies."

55. Having defined our analytical framework for assessing actual, potential, and precluded competitors, we now identify and assess the relative strengths of actual, potential, and precluded competitors for the five relevant service markets for INTELSAT services and the thin route markets which are only served by satellite circuits.

a. U.S. Fiber-Optic Cable Carriers

56. *Switched Voice and Private Line Services.* Fiber-optic cable systems carry more traffic for switched voice and private line than satellite systems do. Excluding traffic carried to Mexico and Canada over terrestrial networks, markets Comsat does not serve, fiber-optic cable systems carried three times as much switched voice traffic and six times as much private line traffic than satellite networks in 1996.<sup>102</sup> AT&T, MCI, Sprint, and WorldCom are among the most significant participants in the mass market for switched voice and private line service to competitive markets. In terms of utilized circuits, we estimate that AT&T's fiber-optic cable network carries 38 percent of the total switched voice traffic and 14 percent of the total private line service market, excluding traffic carried to Mexico and Canada over terrestrial networks. Similarly, MCI, Sprint, and WorldCom, along with a handful of other smaller carriers, have a 37 percent market share of the total switched voice market and 72 percent of the total private line service market. As noted above, AT&T, MCI, Sprint and WorldCom do not provide service to the thin route market directly. They do, however, serve these markets through Comsat via the INTELSAT system, and to a limited degree, other U.S. satellite systems.

57. *Video Services.* Fiber-optic cable carriers are not significant participants in the full-time video service markets, as they generally do not compete in this market.<sup>103</sup> Fiber-optic cables currently carry some international video traffic, for example fiber links exist between the U.S. and Canada and the U.S. and United Kingdom carries occasional-use video transmissions, but the service is largely limited to point-to-point service.<sup>104</sup> Thus, we conclude that fiber-optic carriers, at least today, are not significant participants in the full-time and occasional-use video service markets.

b. Satellite Systems

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<sup>102</sup> See 1996 Circuit Status Report.

<sup>103</sup> PanAmSat 1996 Annual Report.

<sup>104</sup> See Competition in the Market For TransOceanic Video Services to and from the U.S., Prepared for Comsat World Systems by Professor Hendrik S. Houthakker and The Brattle Group, dated October 24, 1996, at 10-11.

58. *Switched Voice and Private Line Services.* U.S. satellite operators provide switched voice and private line service, but on a limited basis. PanAmSat offers switched voice service to eight countries and private line service to 42 countries.<sup>105</sup> Orion Network Systems, Inc. ("Orion") provides private line service to 34 countries.<sup>106</sup> Orion does not provide switched voice service. GE Americom provides private line service to seven countries.<sup>107</sup> Columbia Communications provides private line and switched voice minimally.<sup>108</sup>

59. One reason that U.S. separate satellite systems appear to offer switched voice service on a limited basis relative to fiber-optic carriers is because U.S. separate satellite systems were precluded from connecting with the public switched network in the U.S to provide switched voice service.<sup>109</sup> The Commission lifted this restriction effective January 1, 1997, and U.S. separate satellite systems are now permitted to provide switched voice and private line services interconnected to the U.S. public switched network.<sup>110</sup> Thus, satellite operators can be considered precluded competitors who are now free to offer switched voice and private line services to a number of markets. For many point-to-point markets, however, satellite operators still face legal and regulatory entry barriers. For example, PanAmSat states that in many countries, especially thin route countries, the PTT will not allow PanAmSat to access the domestic PSTN.<sup>111</sup> PanAmSat contends that such regulatory barriers prevent it from having substantial connectivity for switched voice and private line services.

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<sup>105</sup> See PanAmSat Letter. The letter indicates that PanAmSat provides full-time video service in the C-band in 128 countries and full-time video service in the Ku-band in 42 countries.

<sup>106</sup> See Orion Letter.

<sup>107</sup> See GE American Letter.

<sup>108</sup> See Columbia Letter.

<sup>109</sup> Under the 1984 Presidential Determination and associated Commission rulings, separate satellite systems were limited to providing services not interconnected with the public switched network, such as private line service. See *In the Matter of Permissible Services of U.S. licensed International Communications Satellite Systems Separate from the International Telecommunications Satellite Organization (INTELSAT)*, Order, 7 FCC Rcd 2313, FCC 92-92, ¶ 3 (1992).

<sup>110</sup> See *id.* ¶ 6.

<sup>111</sup> Comments of PanAmSat at 23.



60. *Video Services.* A number of satellite systems are significant competitors for the full-time video and occasional-use video service markets. These other satellite systems include U.S.-based systems, such as PanAmSat and Orion, as well as regional satellite service providers.

61. PanAmSat is the first U.S. satellite carrier to be authorized to provide satellite services outside the U.S. market.<sup>112</sup> PanAmSat's satellite network enables the company to operate multiple satellites in each ocean region worldwide.<sup>113</sup> Not including its Galaxy satellites, it currently operates six satellites, with three more satellites expected to be launched in the next two years.<sup>114</sup> PanAmSat's international satellite capacity has increased from 132 transponders (36 MHz equivalent bandwidth) in 1995 to 264 transponders at year-end 1997, and it expects 416 operating transponders by the end of 1999.<sup>115</sup> The increase in transponders yields an estimated compounded annual capacity growth rate of 33 percent from 1996 to 1999.<sup>116</sup> PanAmSat's international video services business, which accounted for approximately 83 percent of its total revenues for the year ended December 31, 1996. PanAmSat claims its satellites are the leading satellites for television and cable programming distribution in Latin America, the Asia-Pacific Region, South Asia, and Africa. PanAmSat provides full-time video service to 139 countries and occasional-use video service to 45 countries.<sup>117</sup> PanAmSat states that market entry barriers in many countries prevent it from uplinking signals because certain domestic PTTs have not allowed PanAmSat to construct an earth station or obtain landing rights.<sup>118</sup> PanAmSat has several hundred customers and, at December 31, 1996, had signed long-term contracts to provide satellite capacity on PAS-1, PAS-2, PAS-3, PAS-4, PAS-5 and PAS-6, aggregating approximately \$3.7 billion in revenues. Over the last three years, PanAmSat's and Hughes' satellites have captured 70 percent of the growth in international video

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<sup>112</sup> PanAmSat 1996 Annual Report.

<sup>113</sup> PanAmSat Worldwide Web Page at <http://www.panamsat.com>.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> This calculation does not include PanAmSat's Galaxy satellites.

<sup>117</sup> *See* PanAmSat Letter.

<sup>118</sup> Comments of PanAmSat at 23.

traffic to and from the U.S.<sup>119</sup>

62. A handful of other U.S. based satellite systems compete in this market. Orion provides full-time video service to eight countries and occasional-use video services to 24 countries.<sup>120</sup> GE Americom does not offer video services.<sup>121</sup> Columbia Communications provides video service on a very limited basis.<sup>122</sup> Also, in January 1996, the Commission abolished all distinctions between U.S. domestic satellites and international separate system satellites.<sup>123</sup> As a result, domestic satellite systems are no longer restricted from providing international satellite services and we consider them in our competitive analysis. The record indicates that the Galaxy Satellite System, owned by PanAmSat, is a significant competitor in the Latin American region.<sup>124</sup>

c. Other Potential Competitors

63. *Teleglobe, USA*. U.S. customers can receive international telecommunications services through Teleglobe USA, Inc., which is a subsidiary of Teleglobe Canada, Inc., Canada's INTELSAT Signatory ("Teleglobe"). Teleglobe has authority to acquire and operate facilities for the provision of switched voice, private line, and all other authorized services from the U.S. to Canada. For example, Teleglobe provides both full-time video and occasional-use video services to four major U.S. broadcast networks.<sup>125</sup> The record does not contain any market performance data, such as retail pricing and market share, that would allow us to assess whether Teleglobe can limit Comsat's ability to raise prices or act in other non-competitive ways. The

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<sup>119</sup> Reclassification Study at 19.

<sup>120</sup> See Orion Letter.

<sup>121</sup> See GE American Letter.

<sup>122</sup> See Columbia Letter.

<sup>123</sup> See In the Matter of Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems, IB Docket No. 95-41, 11 F.C.C.R. 2429 (1996).

<sup>124</sup> The Brattle Group's Video Study at A-7.

<sup>125</sup> Teleglobe Press Release, filed by Comsat, February 9, 1998.

record does indicate Teleglobe's prices for transit services to Latin America, but does not discuss how competitive Teleglobe's prices are for video, switched voice, and private line services for U.S. customers.<sup>126</sup> We presume the cost of service between the U.S. and a third country via Canada would include costs of transmission between the U.S. and Canada in addition to the costs between Canada and the third country. As Teleglobe continues to offer satellite services to U.S. customers, we invite parties to submit information regarding Teleglobe's retail pricing, market share, and other data that could help us assess whether Teleglobe is a significant competitive alternative to Comsat, especially for switched voice and private line service to the thin route market and occasional-use video service to the occasional-use single carrier market.

64. *Regional/Domestic Satellite Systems.* A number of non-U.S. regional satellite providers can be used to provide international video services. These systems and their regions include Arabsat (Middle East), Eutelsat (Europe), Astra (Europe), AsiaSat and APStar (Asia), and Palapa (Southeast Asia). These systems can be used by U.S. customers primarily for international video services.<sup>127</sup> Also, a number of countries are served by domestic satellite systems. These countries include Argentina, Australia, Brazil, Canada, China, France, Germany, India, Italy, Japan, Malaysia, Mexico, Russia, South Korea, Spain, Thailand, Turkey and the United States. Argentina, Brazil, Malaysia, Mexico and Thailand also obtain regional services on their domestic satellites.<sup>128</sup> A U.S. broadcaster can provide video service through these satellites by "double-hopping," which means uplinking the content to a satellite above the U.S. using PanAmSat, INTELSAT, or Orion, for example, and then downlinking the content to the teleport facilities of the regional or domestic satellite carrier. The content would then be re-uplinked to the regional or domestic satellite, and then downlinked to the intended market. Regional and domestic satellite systems can be thought of as competitors to Comsat/INTELSAT within their respective territories. Because the use of systems other than Comsat's requires uplinking to a U.S. based satellite system, however, we cannot conclude that they constitute an effective substitute for Comsat's provision of full-time video and occasional-use video services.

d. Summary

65. We conclude that four interexchange fiber-optic cable carriers -- AT&T, Sprint, MCI, and WorldCom -- are the most significant competitors for switched voice and private line service in the thick route market. U.S. satellite systems appear to be precluded competitors for

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<sup>126</sup> Comments of AT&T at 10.

<sup>127</sup> PanAmSat 1996 Annual Report.

<sup>128</sup> *Id.*

switched voice and private line service, since the regulatory restrictions which prevented them from offering switched voice and private line service expired in 1997. PanAmSat is Comsat's most significant competitor for full-time video service on a worldwide basis, and occasional-use video service in the occasional-use multiple carrier market. Other U.S. satellite systems also offer full-time video and occasional-use video service to these markets. PanAmSat's annual capacity growth rate suggests it has the capacity to provide occasional-use video service, but regulatory barriers currently prevent it from providing this service in many locations.

### 3. Market Power Analysis

66. We have recognized that aspects of dominant carrier regulation may hinder competition under current market conditions if applied to a carrier that no longer possesses market power. Market power refers to a dominant carrier's ability to raise or maintain prices above costs, control prices, or exclude competition.<sup>129</sup> The long tariff notice periods applicable to a dominant common carrier may have a potential anticompetitive effect once such a carrier is no longer dominant.<sup>130</sup> Long tariff notice periods enable non-dominant competitors, who are required to file tariffs on one-day's notice or not at all, to undercut a dominant carrier's filed rate or be first to market with a creative service offering even before a dominant carrier's tariff becomes effective.<sup>131</sup> This adversely affects competitive rivalry in a market because the bidding for significant business customers is a major competitive stimulus in any market.<sup>132</sup>

67. In assessing Comsat's market power in the relevant product and geographic markets identified in Section A.1, we are guided by principles of antitrust analysis to determine if Comsat remains dominant in these markets.<sup>133</sup> In making a determination about whether a firm is dominant in a relevant market, we analyze whether it can raise prices above competitive levels and maintain that price for a significant period, reduce the quality of the relevant product or

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<sup>129</sup> *AT&T International Order* ¶ 30; *see also International Competitive Carrier Order* ¶ 40 ("traditional antitrust analysis defines dominance as "the power to control prices or exclude competition" *citing U.S. v. E.I. du Pont de Nemours and Co.*, 351 U.S. 377, 391 (1956)).

<sup>130</sup> *Id.*

<sup>131</sup> *See id.*

<sup>132</sup> *Id.*

<sup>133</sup> *See AT&T International Order* ¶ 36; *International Competitive Carrier Order* ¶ 41.

service, reduce innovation or restrict output profitably.<sup>134</sup> We rely on several factors as part of this analysis. For example, when evaluating AT&T's market power in the international telecommunications services market, we focused on factors such as market share, the demand elasticity of customers, the supply elasticity of the market and the firm's cost, structure, size and resources.<sup>135</sup> Moreover, when examining demand and supply elasticities, the Commission considers competitors' capacity, entry barriers, the sophistication and relative bargaining power of customers in the marketplace, pricing trends, and loss of customers.<sup>136</sup> A key factor in evaluating supply elasticity is whether separate systems now competing with INTELSAT possess the global reach of INTELSAT in terms of connectivity (including ground segment infrastructure) and transponder capacity.<sup>137</sup> We consider these factors in assessing whether Comsat exercises market power in each of the relevant product and geographic markets identified.

a. Switched Voice Service

68. In 1985, we found that Comsat possessed market power in the provision of INTELSAT space segment services.<sup>138</sup> In 1996, we determined that the switched voice service market for which Comsat provides space segment capacity is substantially competitive.<sup>139</sup> Comsat now requests that we find it non-dominant in the provision of switched voice service. Below, we assess Comsat's market power in the provision of switched voice service to the thick route market. Further below, we undertake a similar assessment with respect to Comsat's market power in the provision of switched voice service to the thin route market.<sup>140</sup>

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<sup>134</sup> See, e.g., *BT/MCI Order* ¶ 124; *Bell Atlantic/NYNEX Order* ¶ 101.

<sup>135</sup> *AT&T International Order* ¶ 36.

<sup>136</sup> See *August 1997 Order* ¶ 17.

<sup>137</sup> *Id.*

<sup>138</sup> *International Competitive Carrier Order* ¶ 65.

<sup>139</sup> *August 1996 Order* ¶ 21.

<sup>140</sup> See *infra* ¶¶ 117-129.

69. Comsat's separate system satellite competitors oppose Comsat's request.<sup>141</sup> AT&T and WorldCom, two of Comsat's major cable competitors and, at the same time, major users of INTELSAT for switched voice service, do not oppose reclassifying Comsat as a non-dominant common carrier in the switched voice service market, except as to thin route markets.<sup>142</sup> ABC, Inc., CBS Inc., NBC Inc., and Turner Broadcasting Systems, Inc. (collectively, the "Networks"), also large users of Comsat's INTELSAT services, oppose Comsat's reclassification request for the occasional-use video product market, but they raise no objections to Comsat's request for non-dominance in the switched voice service market.<sup>143</sup>

70. As we did in the *August 1996 Order*, we analyze the state of competition in the switched voice service market by reviewing evidence of Comsat's demand and supply elasticities, cost advantages and access to resources to aid our determination of Comsat's ability to exercise market power in this service market. We conclude that Comsat no longer exercises market power in the provision of switched voice service to the thick route market .

(i) Demand Elasticity and Market Share

71. We refer to the willingness and ability of Comsat's customers to switch to another telecommunications service provider or otherwise change the amount of services they purchase from Comsat in response to a change in the price or quality of Comsat's switched voice service as "firm demand elasticity."<sup>144</sup> High firm demand elasticity indicates that customers are willing and have the ability to switch to another service provider in order to obtain price reductions or desired features. It also indicates that the particular service market is subject to competition.<sup>145</sup>

72. We find that high demand elasticity exists in the switched voice thick route

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<sup>141</sup> Comments of Columbia at 3-4; Comments of Keystone at 2; Comments of PanAmSat at 10; Comments of Independents at 3-4.

<sup>142</sup> AT&T and WorldCom only oppose Comsat's request for service to "thin route" countries. *See* Comments of AT&T at 2; Comments of WorldCom at 1-2.

<sup>143</sup> *See* Comments of Networks at 2-3.

<sup>144</sup> *See AT&T International Order* ¶ 42 ("[d]emand elasticity or responsiveness is the propensity of AT&T's customers to switch carriers or otherwise change the amount of services they purchase from AT&T in response to relative changes in price and quality.")

<sup>145</sup> *Id.*

market.<sup>146</sup> As determined in our *August 1996 Order*, Comsat's switched voice service customers are sophisticated users who engage in long-term planning and ordering. Neither of Comsat's two largest customers, AT&T and WorldCom, oppose Comsat's request for non-dominant treatment in the switched voice service market. PanAmSat contends, however, that Comsat's long-term contracts with its customers severely disadvantage its competitors in the market for switched voice service presumably because these customers are unable to switch to Comsat's competitors offering this service.<sup>147</sup> Comsat disagrees, contending that its long-term contracts represent less than 25 percent of the switched voice service market.<sup>148</sup>

73. We agree with Comsat for the reasons stated below. Comsat's long-term contracts do not impede Comsat's customers from switching service providers. It is true that AT&T and MCI have entered into contracts with Comsat that expire in 2003.<sup>149</sup> The record lacks evidence of any other long-term contracts between Comsat and its customers for switched voice service. Comsat estimates that the three contracts represent approximately 25 percent of the U.S. switched voice service market.<sup>150</sup> Given the growth rate in the switched voice service market,<sup>151</sup> AT&T's and MCI's long-term contracts are likely to represent an even smaller share of this market today. Additionally, the contracts only obligate AT&T and MCI to transmit part of their international switched voice traffic using Comsat. Based on our review of these contracts, we conclude that the contracts permit AT&T and MCI to use Comsat's competitors for services. Therefore, notwithstanding these long-term contracts, we confirm the finding in our *August 1996 Order* that Comsat's switched voice customers are sophisticated customers possessing 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.

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<sup>146</sup> See 1996 Circuit Status Report; see also 1997 Update at Table A7 (lists 113 non-thin route countries served by Comsat).

<sup>147</sup> Comments of PanAmSat at 11.

<sup>148</sup> Response of Brattle Group at 34.

<sup>149</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>150</sup> Response of Brattle Group at 34.

<sup>151</sup> From 1995 to 1996, the circuits deployed for switched voice service increased by 11 percent.

74. Comsat contends that its declining share in the switched voice service market evidences that it is no longer dominant in this market.<sup>152</sup> According to the Brattle Group's Reclassification Study (the "Reclassification Study")<sup>153</sup> submitted by Comsat, Comsat's share in the switched voice and private line service markets, taken together, has declined from 70 percent in 1988 to 21 percent in 1996.<sup>154</sup> Comsat further contends that its share of this market along the major trans-Atlantic and trans-Pacific routes has dropped to 12 percent.<sup>155</sup> According to Comsat, during this same period the volume of switched voice traffic in this market has increased significantly. Comsat contrasts its decreasing switched voice traffic volume and declining market share with AT&T, a carrier the Commission recently found to be non-dominant.<sup>156</sup> During this same period, Comsat asserts, AT&T's switched voice traffic volume has increased, despite a decline in its market share.<sup>157</sup>

75. PanAmSat argues that the market share data and economic studies submitted by Comsat should not be relied upon because they portray an incomplete and misleading view of Comsat's market power in the switched voice service market.<sup>158</sup> It asserts that the "satellite-delivered switched voice service market" is the proper market for measuring Comsat's market share. PanAmSat states that Comsat's share of the satellite-delivered switched voice service market is substantially greater than the 21 percent market share contended by Comsat. Moreover, because Comsat enjoys government-conferred exclusive access to the INTELSAT system, PanAmSat contends that INTELSAT's market share and market power should be considered when analyzing Comsat's non-dominant request. PanAmSat acknowledges Comsat's decline in market share but notes that INTELSAT's profits have been increasing for the last three

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<sup>152</sup> Comsat Petition at 32.

<sup>153</sup> "The Economic Basis For Reclassification of Comsat as a Non-Dominant Common Carrier," dated April 1997, by The Brattle Group at 2.

<sup>154</sup> Reclassification Study at 2.

<sup>155</sup> *Id.*

<sup>156</sup> *See AT&T International Order.*

<sup>157</sup> Reclassification Study at 7.

<sup>158</sup> Comments of PanAmSat at 14-15; Reply Declaration of Leonard Waverman at 4-5.



years.<sup>159</sup>

76. Comsat's share of the satellite switched voice service market is one factor that could be considered when assessing Comsat's market power in this market. As discussed above, however, intermodal competition, i.e., competition between satellite and cable carriers, clearly is present in this service market.<sup>160</sup> Intermodal competition leads us to believe that fiber-optic cables represent a substitute for satellites in the transmission of switched voice service. Therefore, we decline to adopt PanAmSat's suggestion that Comsat's market share should be measured using only the satellite-delivered switched voice segment of this market. We find instead that, because both satellite and cable networks are utilized for the transmission of switched voice traffic to the thick route market, the total capacity of cable and satellite circuits available for such transmission should form the basis for calculating a company's share of switched voice service traffic to the thick route market.<sup>161</sup>

77. We are also unpersuaded by PanAmSat that measuring INTELSAT's share of the switched voice service market "between two non-U.S. markets" will yield useful insight into Comsat's market power in the U.S. market. Comparing Comsat's share of the switched voice service market between the U.S. and another country to the share of Comsat's competitors' on these same routes is the relevant comparison. As the only U.S. common carrier providing switched voice service via INTELSAT, Comsat's market share will equal INTELSAT's market share between the U.S. and other countries. INTELSAT's market share between two non-U.S. markets is not relevant when assessing Comsat's market power because Comsat is not competing in the provision of service between two non-U.S. markets. Finally, we find that INTELSAT's increasing profitability is not relevant to the assessment of Comsat's market power. INTELSAT's increasing profitability could arise from improved performance in geographic markets not served by Comsat or from the growth in international telecommunications traffic in general. Consequently, PanAmSat has failed to demonstrate the significance of INTELSAT's profitability as related to Comsat's market share.

(ii) Supply Elasticity

78. Generally, supply elasticity refers to the ability of suppliers in a given market to increase the quantity of service supplied in response to an increase in price. In this case, we use

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<sup>159</sup> Reply Comments of PanAmSat at 11.

<sup>160</sup> See *supra* ¶ 32.

<sup>161</sup> See *supra* ¶ 26.

it to determine the ability of alternative suppliers in a relevant market to absorb a carrier's customers if such carrier raised the price of its service by a small but significant amount and its customers wished to change carriers in response.<sup>162</sup> Two factors determine supply elasticity in a market. One is whether existing competitors have or can relatively easily acquire significant additional capacity. If so, then supply elasticities tend to be high. The other factor is the existence of low barriers to entry. Barriers to entry may be legal (e.g., governmental imposed restrictions), economic (e.g., capital costs, economies of scale), technological (e.g., a new innovation protected by a patent),<sup>163</sup> or operational (e.g., lack of skilled workers). Even if existing competitors lack excess capacity, supply elasticity tends to be high if new suppliers can enter the market relatively easily because of low barriers to entry.<sup>164</sup>

79. In our *August 1996 Order*, we found that the idle capacity of other carriers in the switched voice and private line service market was sufficient to absorb most of Comsat's switched voice and private line traffic, except for thin route markets.<sup>165</sup> Comsat states that its competitors have sufficient available capacity to accommodate the needs of any Comsat customer who desires to switch to a competing carrier.<sup>166</sup> According to Comsat, AT&T, by itself, maintains 58,000 excess circuits and can immediately accommodate all of Comsat's switched voice service traffic to the thick route market.<sup>167</sup> The Brattle Group asserts that the cost of deploying and operating fiber-optic cable is falling, while the cost of launching and operating satellites has remained constant for the past eight years.<sup>168</sup>

80. PanAmSat suggests that supply elasticity is low in the switched voice service market for three reasons: Comsat controls the satellite-delivered capacity in this market, Comsat's customers are unable to switch to alternative carriers because they are locked in to long-term contracts with Comsat, and foreign Signatory PTTs impose barriers to entry that limit Comsat's

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<sup>162</sup> See generally *August 1996 Order* ¶ 23; *International Competitive Carrier Order* ¶ 31.

<sup>163</sup> See e.g., *August 1997 Order* ¶ 30.

<sup>164</sup> *Id.*

<sup>165</sup> *August 1996 Order* ¶ 23.

<sup>166</sup> Comsat Petition at 32.

<sup>167</sup> *Id.* at 46-47.

<sup>168</sup> *Id.* at 63.

satellite system competitors from accessing their markets.<sup>169</sup>

81. The record in this proceeding and Commission data confirm our finding in the *August 1996 Order* that the switched voice service market exhibits high supply elasticity. Our 1996 Circuit Status Report supports Comsat's assertion that sufficient excess capacity exists in the switched voice service market to absorb all of Comsat's switched voice traffic.<sup>170</sup> At the end of 1996, there were 76,779 total idle international cable, satellite and terrestrial circuits available for the provision of switched voice service. In 1996, idle circuits constituted approximately 53 percent of the total circuits in use in the switched voice service market. Thus, there appear to be sufficient idle circuits available to accommodate all of the switched voice satellite traffic carried by Comsat. As discussed above, the contracts Comsat has entered into with AT&T and MCI do not significantly limit their ability to use their own facilities or those of other carriers for switched voice service transmissions.

82. Legal barriers to entry in many countries make it difficult for a U.S. authorized carrier to offer switched voice service in a foreign market. Historically, the most significant entry barrier in international telecommunications has been obtaining an operating agreement with the monopoly telecommunications service provider before providing service to a particular country.<sup>171</sup> In the case of U.S. satellite service providers, obtaining the authority to provide service in a particular country, including the authority to transmit and receive from an earth station within a country (sometimes referred to as landing rights), remains a significant legal barrier to entry.<sup>172</sup>

83. PanAmSat contends that many of INTELSAT's foreign Signatories are also the regulatory authorities that control access to their home markets.<sup>173</sup> PanAmSat cites two examples to demonstrate that foreign Signatories do not permit PanAmSat and other separate satellite systems to enter their markets: (a) Telecom Thailand will interconnect only with Comsat for public switched network traffic; and (b) the Norwegian PTT has refused to give

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<sup>169</sup> Comments of PanAmSat at 11, 18-19; Reply Comments of PanAmSat at 11, 17; Declaration of Leonard Waverman at 5; and Reply Declaration of Leonard Waverman at 7.

<sup>170</sup> Report No. IN 97-2436 (December 2, 1997).

<sup>171</sup> See *International Competitive Carrier Order* ¶ 33.

<sup>172</sup> See *August 1997 Order* ¶ 32.

<sup>173</sup> Reply Comments of PanAmSat at 16, 17 and 19; Declaration of Leonard Waverman at 7.

PanAmSat market access since the 1994 Winter Olympics in Lillenhammer.<sup>174</sup> Comsat's satellite system competitors have presented evidence that they provide switched voice service in only a limited number of foreign markets. PanAmSat provides switched voice service in only eight countries.<sup>175</sup> In addition, neither GE Americom nor Orion provides switched voice service outside the U.S.<sup>176</sup> A review of our 1996 Circuit Status Report indicates, however, that with the exception of most African and Pacific Island nations, U.S. cable carriers have access to most foreign Signatory markets for the provision of switched voice service. Given the lower per circuit cost advantage that fiber-optic cable has over satellite facilities, it is not surprising that cables now link the U.S. with over 100 foreign countries and U.S. territories.<sup>177</sup> Thus, notwithstanding the limited number of foreign Signatory markets served by PanAmSat and the other U.S. satellite service providers, we find that U.S. cable carriers of switched voice service are able to provide such service in foreign Signatory countries in the thick route market.

84. We also expect the barriers to entry that U.S. satellite service providers currently face in INTELSAT foreign Signatory markets and in other foreign markets gradually to diminish in light of the World Trade Organization ("WTO") Basic Telecommunications Agreement ("WTO Agreement") concluded last year.<sup>178</sup> Under the WTO Agreement, 49 WTO member countries

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<sup>174</sup> Declaration of Leonard Waverman at 6, 8.

<sup>175</sup> See PanAmSat Letter.

<sup>176</sup> See Orion Letter and GE American Letter. Columbia provides international switched voice service to the United Kingdom. See Columbia Letter.

<sup>177</sup> Reclassification Study at 9-10; 1996 Circuit Status Report.

<sup>178</sup> The WTO came into existence on January 1, 1995, pursuant to the Marrakesh Agreement Establishing the World Trade Organization (the "Marrakesh Agreement"). 33 I.L.M. 1125 (1994). The Marrakesh Agreement includes multilateral agreements on trade in goods, services, intellectual property and dispute settlement. The General Agreement on Trade in Services ("GATS") is Annex 1B of the Marrakesh Agreement. 33 I.L.M. 1167 (1994). The specific commitments made by countries under the WTO Basic Telecom Agreement were concluded pursuant to Article XX of the GATS and form an integral part of the GATS. The schedules of specific commitments are accessible on the WTO's web page at [www.wto.org](http://www.wto.org). We note that the Peoples' Republic of China and the Russian Federation are not members of the WTO and, together, account for approximately 14 percent of the world's telecommunications services revenues. The U.S. is linked to China via 642 IMTS cable circuits and to Russia via 567 IMTS cable circuits.

(primarily countries in the switched voice and private line thick route market ) representing approximately 80 percent of WTO member countries' satellite service revenues agreed to permit market access for satellite services. PanAmSat points out that only 43 of INTELSAT's 139 Signatories committed to implementing the Reference Paper on Regulatory Principles ("Reference Paper") that was part of the WTO Agreement.<sup>179</sup> The Reference Paper is significant because it commits countries to establish independent regulatory bodies, guarantees that foreign companies will be able to interconnect with networks in foreign countries at fair prices, forbids anticompetitive practices such as cross-subsidization and mandates transparency of government regulations and licensing for basic telecommunications services. However, those INTELSAT Signatories committing to the Reference Paper, together with the other countries committing to the Reference Paper, account for approximately 90 percent of the world's basic telecommunications services revenues.<sup>180</sup> Consequently, with the implementation of the WTO Agreement, we expect that many markets in which it is currently difficult to obtain the required authorizations will open their markets to permit U.S. satellite service companies to provide end-to-end telecommunications services.

85. Economic barriers can also make it difficult for U.S. authorized carriers to enter foreign markets.<sup>181</sup> Typical economic barriers to entry are the high capital investment required to enter a market.<sup>182</sup> PanAmSat, however, suggests a different form of economic barrier to entry. PanAmSat contends that INTELSAT's foreign Signatories have a financial incentive not to permit U.S. satellite service providers to obtain market access to their home market.<sup>183</sup> Like Comsat, foreign Signatories receive a return from INTELSAT based on their investment share and usage of the INTELSAT system. If a foreign Signatory's usage of INTELSAT, i.e., the amount of traffic that it originates and terminates over the INTELSAT satellite system, is less than its investment share of the INTELSAT system for the prior year, it will receive a return from the INTELSAT system compensating it for other Signatories' and direct access customers' use of its investment in the INTELSAT system and vice versa. A foreign Signatory also

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<sup>179</sup> Declaration of Leonard Waverman at 5.

<sup>180</sup> See Statement of Ambassador Charlene Barshefsky, Basic Telecom Negotiations, February 15, 1997.

<sup>181</sup> See August 1997 Order ¶ 33.

<sup>182</sup> See *id.*

<sup>183</sup> Reply Declaration of Leonard Waverman at 14. Most foreign Signatory PTT's own less than one percent of INTELSAT. See Reply of Comsat at 23.

receives revenues from the telecommunications services that it provides in its home market. A foreign Signatory, however, receives no revenue on traffic provided by non-INTELSAT satellites to its country. Thus, the cost to a foreign Signatory for permitting U.S. satellite service providers to originate and terminate telecommunications traffic within its home market will depend on the economic impact this would have on its service revenues in its home market as well as on its return from the INTELSAT system. Thus, foreign Signatories have an incentive to prevent U.S. authorized carriers from entering their markets.

86. We are not persuaded, however, that this financial incentive is significant enough to alter our conclusion. Today, over 100 foreign countries permit U.S. cable carriers to access their switched voice service markets.<sup>184</sup> This number is expected to increase in light of the commitments made by INTELSAT's foreign Signatories under the WTO Agreement. Thus, many INTELSAT foreign Signatories have or will be permitting access to their home markets for the provision of switched voice service by U.S. authorized carriers. Consequently, we conclude that the financial incentive of INTELSAT foreign Signatories to use the INTELSAT system does not create a substantial barrier to entry in foreign Signatory countries in the thick route market for U.S. authorized carriers of switched voice service.

87. The issues identified by Comsat's satellite competitors about access to foreign Signatory markets raise legitimate trade concerns that are addressed for some markets by the WTO Agreement. Nevertheless, these concerns do not significantly affect the provision of switched voice service by Comsat's cable competitors in the switched voice and private line thick route market and do not affect our conclusion that high supply elasticity exists in the switched voice service market.

(iii) Cost Advantages and Possible Cross Subsidies

88. Comsat's competitors raise a number of concerns regarding Comsat's cost advantages. Columbia is concerned that a Comsat reclassified as a non-dominant common carrier would be able to cross-subsidize its competitive service offerings from its monopoly profits, which are immune from legal process in the U.S.<sup>185</sup> Similarly, PanAmSat argues that a deregulated Comsat could raise prices in some markets while lowering them in others.<sup>186</sup> Comsat responds that it would not be in a position to cross-subsidize its competitive service

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<sup>184</sup> 1996 Circuit Status Report.

<sup>185</sup> Comments of Columbia at 5.

<sup>186</sup> Declaration of Leonard Waverman at 6.

offerings in the manner suggested by its separate system competitors.<sup>187</sup> Comsat claims that it is at a cost disadvantage to U.S. cable carriers because the per circuit costs of launching and operating satellites has increased relative to the per circuit costs of deploying and operating cables.<sup>188</sup>

89. In the *August 1997 Order*, the International Bureau dismissed similar concerns raised by Hughes about Comsat's potential for cross-subsidizing its full-time video service with profits from its switched voice and private line services. The Bureau found that the switched voice and private line service markets were substantially competitive, which exerts competitive pressure on Comsat's ability to increase its rates for switched voice and private line services.<sup>189</sup> The fact that the costs of cable circuits are decreasing relative to satellite circuits utilized in the provision of switched voice and private line service tends to support this conclusion.<sup>190</sup>

90. Neither Columbia nor PanAmSat is explicit about which Comsat services would provide the cross-subsidy and which services would benefit from the cross-subsidy. It is unlikely that Comsat could extract cross-subsidies from its switched voice service since the competitive nature of the switched voice service market limits Comsat's ability to charge rates that could be used to cross-subsidize. It is also unlikely that Comsat could use other services to cross-subsidize its switched voice service rates. The Commission found in the *International Competitive Carrier Order* that the private line service market is competitive and we confirm that finding in this Order.<sup>191</sup> Similarly, the Bureau recently concluded that the full-time video service market is substantially competitive.<sup>192</sup> Competition in these service markets limits Comsat's ability to increase its rates for these services. Although competition is lacking in the provision of switched voice and private line service to the thin route market and occasional-use video service to the occasional-use single carrier market, we find it unlikely that the revenues from these markets, which constitute approximately 15 percent of Comsat's INTELSAT revenues, would represent a significant source of cross subsidy for Comsat's provision of

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<sup>187</sup> Reply of Comsat at 20.

<sup>188</sup> Comsat Petition at 63.

<sup>189</sup> *August 1997 Order* ¶ 34.

<sup>190</sup> See Comsat Petition at 63.

<sup>191</sup> See *International Competitive Carrier Order* ¶ 68; see *infra* ¶ 96.

<sup>192</sup> *August 1997 Order* ¶ 37.

switched voice service in the thick route market.<sup>193</sup>

(iv) Size and Access to Resources

91. Another factor we consider in determining whether Comsat has market power in the switched voice services market is whether Comsat enjoys special market power because of its size or access to resources. Comsat's separate satellite system competitors argue that Comsat, through INTELSAT, operates the world's largest international satellite system and has capacity far in excess of any private satellite operator.<sup>194</sup> In addition, as a member of INTELSAT, Comsat has access to an installed base of thousands of earth stations that communicate with INTELSAT satellites as well as access to the home markets of INTELSAT's foreign Signatories. They contend that these factors give Comsat a competitive advantage. Finally, PanAmSat contends that INTELSAT has a significant competitive advantage in gaining access to spectrum and orbital locations because it is free from national regulatory oversight in seeking these scarce resources through the International Telecommunications Union ("ITU"). In comparison, PanAmSat states that Comsat's separate systems competitors must first apply to the Commission paying a filing fee and subjecting their applications to public notice and comment proceedings.<sup>195</sup> Only after this process is initiated will the Commission then forward a Comsat competitor's advance publication, coordination and notification documents to the ITU.

92. We agree with PanAmSat and other commenters that Comsat through INTELSAT has a significant competitive advantage in obtaining spectrum and orbital locations. Comsat disputes PanAmSat stating that INTELSAT has no ability to register orbital locations directly with the ITU and relies on the U.S. as the notifying administration for purposes of ITU registration. Comsat states that:

INTELSAT must rely on the Commission to perform orbital slot registration on its behalf, and neither Comsat nor INTELSAT has any control over the Commission's actions in this regard. The FCC must submit INTELSAT Advance Publications just as it does any private company's Advance Publication. Once registered, INTELSAT is subject to the same ITU regulations and standards as apply to any other satellite

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<sup>193</sup> Comsat's occasional-use video service revenues equal 2.5-3 percent of Comsat World Systems Division's revenues. *See* Comsat Petition at 44; Response of Brattle Group at 23. In 1996, Comsat World Systems Division's revenues totaled \$264 million.

<sup>194</sup> Comments of Independents at 3-4.

<sup>195</sup> Reply Comments of PanAmSat at 13.



operator.<sup>196</sup>

Through special arrangements and longstanding practice, the U.S. formally serves as the notifying administration to the ITU of INTELSAT's assignments. ITU filings are prepared by INTELSAT, but are submitted to the Commission on behalf of INTELSAT's concurring administration members for transmission to the ITU. Comsat's statement, however, incorrectly implies that the Commission exercises its responsibilities as the notifying administration on behalf of INTELSAT in the same manner as it does on behalf of U.S. licensees. As the notifying administration on behalf of INTELSAT, the Commission does not assert any regulatory authority over INTELSAT's decision to register with the ITU for spectrum and orbital locations. The Commission only acts as a "copper wire" or "mail box" in officially submitting the filings to the ITU on INTELSAT's behalf. There is no regulatory review of INTELSAT's submissions; they are often transmitted to the ITU the day after being submitted to the Commission by INTELSAT. In comparison, ITU submissions on behalf of applicants for U.S. licenses are subject to rigorous review in connection with the licensing process.<sup>197</sup> Comsat's argument, therefore, does not address the concern raised by PanAmSat. INTELSAT is able to obtain spectrum and orbital locations through the ITU without being subject to any national regulatory review. We conclude that this is a competitive advantage over U.S. licensees.

93. Notwithstanding these competitive advantages, we find that Comsat does not have market power in the provision of switched voice service in competitive markets, particularly when competing cable systems are considered. The record indicates that Comsat's switched voice service competitors compare favorably to Comsat in terms of size and access to resources. Although Comsat is able to access INTELSAT's satellites, more satellites than any of its competitors, the number of cable and satellite switched voice circuits utilized to provide service from the U.S. is a better comparison of the resources of Comsat and its competitors in this market. For example, in 1996, Comsat's competitors utilized 57,319 cable circuits for the provision of switched voice service from the U.S.<sup>198</sup> In contrast, satellite carriers, including Comsat, utilized only 18,988 satellite circuits to provide switched voice service from the U.S.

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<sup>196</sup> Reply of Comsat at 17.

<sup>197</sup> Typically, an application for a satellite system will be filed with the Commission. The application will be placed on public notice. Interested parties will file comments supporting and opposing about the application. The Commission will review the comments and release an order granting or denying authority to the applicant for the satellite system.

<sup>198</sup> 1996 Circuit Status Report at 9, Table 2.

this same year.<sup>199</sup> Comsat's share of the switched voice satellite circuits was approximately 21 percent or 3,921 satellite circuits.<sup>200</sup> On the other hand, AT&T possessed 37,677 active cable circuits and 57,581 idle cable circuits capable of transmitting a switched voice call, a much larger number of circuits for this service.<sup>201</sup> Clearly, AT&T, rather than Comsat, has superior access to circuits capable of providing switched voice service in the thick route market. Other cable providers of switched voice service, like MCI, Sprint and WorldCom, also have access to more switched voice service circuits than does Comsat. Accordingly, we are not persuaded by the arguments raised by Comsat's competitors that INTELSAT's size and preferred access to resources provide Comsat with market power in the provision of switched voice service to the thick route market.

b. Private Line Service

94. We have identified private line service as a separate product market. Today, Comsat is not regulated as a dominant carrier in the provision of private line service (International Business Service and end-to-end service).<sup>202</sup> No comments were received urging the Commission to retain dominant carrier regulation of Comsat's private line service to the thick route market. Although the Commission's decision in the *International Competitive Carrier Order* found Comsat to be non-dominant in the private line service market, that decision did not address Comsat's market power in the thin route market. We separately address this issue below.<sup>203</sup> Consequently, we find that Comsat continues to be non-dominant in the provision of private line service to the thick route market for the reasons set forth in the *International Competitive Carrier Order*.

c. Full-time Video Service

95. In 1985, we found that Comsat possessed market power in the provision of

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<sup>199</sup> *Id.* at 15, Table 3.

<sup>200</sup> *See* Reclassification Study at Table A2.

<sup>201</sup> *Id.* at Table A3.

<sup>202</sup> *International Competitive Carrier Order* ¶ 68.

<sup>203</sup> *See infra* ¶¶ 117-129.

INTELSAT space segment services, including international video services.<sup>204</sup> Recently, we determined that the full-time video service market for which Comsat provides space segment capacity is substantially competitive.<sup>205</sup> Comsat now requests that we find it non-dominant in the provision of full-time video service. In support of this request, Comsat filed economic studies to substantiate its declining market share and competitors' excess capacity in the international video services market. PanAmSat asserts that Comsat possesses market power in the full-time video services market.<sup>206</sup> For reasons that follow, we conclude that Comsat no longer exercises market power in the provision of full-time video service in all geographic markets.

96. The International Bureau's *August 1997 Order* found that substantial competition existed in the full-time video service market warranting streamlined tariff relief for Comsat. In evaluating the competitiveness of this service, we analyzed demand and supply elasticities, Comsat's unique cost advantages, if any, and whether Comsat's size or access to resources to cloaked it with special market power. We found high demand elasticity as evidenced by the improved bargaining power of Comsat's customers and the decline in Comsat's market share in the international video transmission services market.<sup>207</sup> We also concluded that Comsat's decreasing market shares confirmed that Comsat was losing its customers. The Networks stated that they have become less reliant on INTELSAT for full-time video services, especially over dense routes, because these routes have become subject to more effective competition since 1994.<sup>208</sup>

97. With regard to supply elasticity, the record indicated that Comsat's competitors had excess capacity available to offer full-time video services to Comsat's current customers if Comsat raises its prices. Based on data in the 1996 Brattle Report, the unutilized transponder capacity for Comsat's competitors increased significantly from 1993 to 1996 on trans-Atlantic and trans-Pacific routes. The Brattle Study also concluded that this idle capacity provides Comsat's competitors with enough capacity to serve all of Comsat's customers should they choose to migrate away from Comsat because of a Comsat price increase. We also noted that

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<sup>204</sup> *International Competitive Carrier Order* ¶ 65.

<sup>205</sup> *See August 1997 Order* ¶ 37.

<sup>206</sup> Comments of PanAmSat at 25-27.

<sup>207</sup> *See id.* ¶ 27-29.

<sup>208</sup> *See id.* ¶ 28.

under the WTO Agreement, 49 WTO member countries, including most countries that constitute origination and termination points in the full-time video service market, had committed to offering market access for satellite service and facilities in their countries.<sup>209</sup>

98. We also found that Comsat did not possess any cost advantages that it could use to act anticompetitively. We found that substantial competition in the switched voice and private line service markets would make it unlikely that Comsat will be able to cross-subsidize its full-time video services with revenues from its satellite delivered public switched telephone network services or its private line services.<sup>210</sup>

99. We also concluded that Comsat did not enjoy special market power because of its size or access to resources. We found that PanAmSat, a significant competitor to Comsat for the full-time video services market, would be a formidable competitor from a size advantage as a result of its merger with a Hughes affiliate. We found that when Orion's and Columbia's satellites are considered, in the short-run, Comsat's competitors will have approximately 14 operational satellites compared to INTELSAT's 24 satellites.<sup>211</sup>

100. We find that the analysis of the full-time video set forth in the *August 1997 Order* remains valid today. The record before us contains substantially the same evidence that was submitted in that earlier proceeding. Comsat's market share for full-time video service has declined from an average of 80 percent in 1993 to less than 45 percent in 1996.<sup>212</sup> The Networks do not oppose Comsat's request for regulatory relief with regard to full-time video and audio leases because the market for these services has been subject to more competition since 1994.<sup>213</sup> PanAmSat states it has been successful in the provision of full-time video services because PTTs and INTELSAT Signatories do not control access for receive-only video service.<sup>214</sup> The additional evidence submitted by Comsat's competitors updating the record is consistent with our earlier findings. For example, PanAmSat provides full-time video service to

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<sup>209</sup> See *id.* ¶ 32.

<sup>210</sup> See *id.* ¶ 34.

<sup>211</sup> See *id.* ¶ 35.

<sup>212</sup> Reclassification Study at 12.

<sup>213</sup> Reply Comments of Networks at 2.

<sup>214</sup> Reply Comments of PanAmSat at 17-18.

139 countries, or approximately 72 percent of the total countries as of the end of 1997.<sup>215</sup> PanAmSat does not provide any reasons why it does not provide full-time video service to other remaining markets. Possible reasons include lack of customer demand or customers choosing an alternative provider. PanAmSat does not, however, indicate that market entry barriers specific to non-INTELSAT entities have prevented PanAmSat from providing full-time video service to these other markets. Also, the Commission has no reason to assume that market entry barriers specific to non-INTELSAT competitors prevent PanAmSat and other satellite competitors from providing receive-only full-time video service. We also note that Orion provides full-time video to eight countries.<sup>216</sup>

101. Consequently, we find that Comsat does not exercise market power in the provision of full-time video service market in all geographic markets. Therefore, Comsat should be classified as a non-dominant carrier in the provision of full-time video services in all geographic markets.

d. Occasional-Use Video Service

102. In 1985, the Commission found that Comsat possessed market power in the provision of INTELSAT space segment services, including occasional-use video services.<sup>217</sup> Recently, the Commission found that the occasional-use video services market was not substantially competitive.<sup>218</sup> Comsat now requests that we find it non-dominant in the provision of occasional-use video service, as it asserts that it does not possess market power in the provision of this service.<sup>219</sup> Comsat filed the Reclassification Study and the Video Study to substantiate its claim. The competing satellite providers contend that Comsat remains dominant in the occasional-use video service market. The Networks oppose eliminating dominant carrier

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<sup>215</sup> See PanAmSat Letter.

<sup>216</sup> We also understand that Teleglobe provides full-time video services via the INTELSAT system. The record does not, however, indicate the degree to which Teleglobe services U.S. customers. Information about Teleglobe's market share and pricing, for example, would allow us to assess Teleglobe's role as a competitor in the U.S. market for full-time video service.

<sup>217</sup> *International Competitive Carrier Order* ¶ 65.

<sup>218</sup> See *August 1997 Order* ¶ 38.

<sup>219</sup> Comsat Petition at 32.

regulation of Comsat's occasional-use video services until non-Signatories are permitted access to INTELSAT's facilities.<sup>220</sup>

103. We first summarize the findings from the *August 1997 Order* with regard to occasional-use video service. Then we assess any new claims that Comsat makes to support its assertion that it no longer has market power for occasional-use video service in the occasional-use multiple carrier and occasional-use single carrier geographic markets, along with the objections from the competing satellite providers and the Networks. We conclude that the occasional-use video services market is subject to competition in the 55 point-to-point markets within the occasional-use multiple carrier market, but in a greater number of point-to-point markets within the occasional-use single carrier market, Comsat is the only choice for transmit-receive occasional-use video service. Thus, we conclude that Comsat exercises market power in the provision of occasional-use video service within the occasional-use single carrier market. In the 55 countries where U.S. customers have a choice for transmit and receive occasional-use video service, we do not believe, however, that Comsat can exercise market power, and conclude that Comsat should be reclassified as non-dominant for occasional-use video service in the countries in the occasional-use multiple carrier market.

104. We concluded in the *August 1997 Order* that Comsat did not face substantial competition in the occasional-use video services market. In evaluating the competitiveness of the market, we assessed the supply elasticity and characteristics of Comsat's size and resources that are evident in this market in order to determine if substantial competition exists. We could not assess the demand elasticity as the record failed to detail separately Comsat's loss of customers, market share, and pricing trend data attributable to the occasional-use video service market.

105. We did find that this market lacked substantial competition because it is characterized by supply inelasticity due to both lack of capacity and the existence of market entry barriers. PanAmSat, the Networks and the GAO Report stated that Comsat's competitors have limited capacity to provide occasional-use video services and that users turn to INTELSAT for this service.<sup>221</sup> The Networks, relying on their own experience, stated that PanAmSat, the largest United States international satellite carrier, had little or no available capacity for occasional-use video service. As PanAmSat and other competitors prepare to launch new satellites that will provide additional transponder capacity, we determined the capacity on these

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<sup>220</sup> Comments of Networks at 2-3; Reply Comments of Networks at 9-10.

<sup>221</sup> See *August 1997 Order* ¶ 40.

satellites is likely to be pre-subscribed for full-time video service and therefore limited capacity would be available for occasional-use video service after satellite launch. We found that fiber-optic cable is neither cost-effective nor suitable for video transmissions from one point to multiple locations simultaneously as is required for occasional-use video service.<sup>222</sup> We also determined that the record did not support a finding that resellers in the occasional-use video services market provide substantial competition to Comsat.<sup>223</sup>

106. We also found that significant supply inelasticity existed in countries where Comsat's competitors lacked landing rights. The lack of landing rights is a market entry barrier that prevents Comsat's competitors from accessing its earth stations and effectively restricts the mobility of a user of occasional-use video service covering a fast-breaking news story or event in that location.<sup>224</sup> Thus, even sophisticated users like the Networks that possess significant bargaining power are left with little choice but to use the Comsat/INTELSAT system. Similar to full-time video services, we believe that as WTO member countries implement their market access commitments made under the WTO Agreement, these regulatory barriers to entry are likely to diminish.

107. Comsat states that a number of alternative satellite systems exert significant competitive pressure on Comsat.<sup>225</sup> It cites the Brattle Group study, which concludes that separate satellite systems are providing at least as much, if not more, occasional-use video services traffic, and probably generate more revenue than Comsat. Comsat argues that PanAmSat has elected not to pursue vigorously occasional-use service business, and has concentrated its video capacity for long-term services.<sup>226</sup> Comsat notes that, nevertheless, PanAmSat asserts in its marketing materials that it can and will provide occasional-use video services at any time and from any location.<sup>227</sup>

108. The Networks and the other satellite systems continue to argue that Comsat holds

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<sup>222</sup> See *id.*

<sup>223</sup> See *id.* ¶ 41.

<sup>224</sup> See *id.* ¶ 40.

<sup>225</sup> Reclassification Study at 3.

<sup>226</sup> Reply of Comsat at 38.

<sup>227</sup> *Id.*

market power in the provision of occasional-use video services. The Networks argue that the state of competition in this market has not changed since Comsat submitted the 1996 Brattle Group Report on international video services.<sup>228</sup> The Networks continue to find that the other satellite systems do not provide service to countries they wish to serve.<sup>229</sup> For example, the Networks claim that PanAmSat does not provide occasional use video services suitable for use by broadcasters for approximately 110 countries<sup>230</sup> for the same reasons discussed above. The Networks argue that the new satellites to be launched in the future may lack landing rights and the in-ground infrastructure to provide suitable service.<sup>231</sup> The Networks again counter Comsat's claims that fiber-optic cable has become a viable alternative for the transmission of occasional-use video service, for both operational and cost reasons.<sup>232</sup> The Networks state that fiber optic charges for occasional use video are one third higher than satellite charges.<sup>233</sup> The Networks also argue that the presence of resellers for occasional use video service does not by itself present evidence of a competitive market.<sup>234</sup> The Networks oppose eliminating dominant carrier regulation of Comsat's occasional-use video services until non-Signatories are permitted access to INTELSAT's facilities.<sup>235</sup>

109. PanAmSat, Columbia, GE Americom and Orion state that Comsat remains dominant in this market because it is the only choice for U.S. users seeking occasional-use video service to many markets.<sup>236</sup> Further, PanAmSat states that INTELSAT's foreign Signatories typically do

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228 *See* Comments of Networks at 13.

229 *See* Comments of Networks at iii..

230 *See id.* at 14.

231 *See id.* at 16.

232 *See id.* at 19; *see also* PanAmSat 1996 Annual Report.

233 *Id.*

234 *See* Comments of Networks at 19-20.

235 *Id.* at 2-3; Reply Comments of Networks at 9-10.

236 Comments of PanAmSat at 25; Comments of Independents at 3-4; and Waverman Declaration at 3.



not permit PanAmSat to access their markets.<sup>237</sup> We are aware that occasional-use video service often involves transmitting content from foreign countries to the U.S., and that authorization from foreign countries for uplinking occasional-use video service may be more difficult to obtain than authorization for full time video, which often involves downlinking video into a foreign country. In addition, INTELSAT's installed base of thousands of earth stations worldwide provides Comsat with superior access to foreign markets over its U.S. competitors.<sup>238</sup>

110. In this proceeding, the parties submitted information in the record identifying those countries where they are able to provide occasional-use video service. This information was not in the record when the *August 1997 Order* was released. This evidence demonstrates that there are market entry barriers and challenges in providing occasional-use video service to many countries. In 1997, U.S. satellite systems did not provide occasional-use video service to the majority of countries. U.S. satellite systems did, however, provide occasional-use video service in 55 countries.<sup>239</sup> PanAmSat offered transmit and receive (uplink and downlink) occasional-use video service signals in 45 foreign countries.<sup>240</sup> As of December 31, 1997, PanAmSat provided such service to the majority of countries in Western Europe, South America, and North America, and about half of the countries in the Far East. It did not, however, provide transmit/receive occasional-use video service to the majority of countries in Eastern Europe, Central America, the Pacific Rim, Central and South Asia, the Middle East, and Africa. Orion provided occasional-use video service in only 24 countries, which include 10 not served by PanAmSat.<sup>241</sup> GE Americom does not provide any occasional-use video service,<sup>242</sup> and

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<sup>237</sup> Reply Comments of PanAmSat at 17.

<sup>238</sup> Comments of Independents at 3-4.

<sup>239</sup> This number excludes several countries whose commitments under the WTO Agreement exclude market access for satellite services until after the year 2000.

<sup>240</sup> See PanAmSat Letter.

<sup>241</sup> See Orion Letter.

<sup>242</sup> See GE American Letter.

Columbia provides video service to four countries.<sup>243</sup>

111. The record still lacks specific data regarding Comsat and its competitors' market share and pricing strategies for the transmit and receive occasional-use video services market. Because U.S. separate satellite systems were able to provide transmit and receive occasional-use video services to 55 countries in 1997, they should be able to offer such service in the future to and from these markets. Thus, these 55 countries should be regarded as competitive markets for occasional-use video service. The market entry barriers discussed above do not apply to these markets. We also find that capacity constraints do not necessarily prevent other satellite systems from competing effectively with Comsat for the provision of occasional-use video service. The Networks fail to support their assertion that PanAmSat lacks capacity, in light of the fact that PanAmSat's transponders have doubled from 1995 to 1997. Moreover, as stated before, PanAmSat expects to have 416 operating transponders by the end of 1999.<sup>244</sup> PanAmSat states that this increase in transponders yields a predicted compounded annual capacity growth rate of 33 percent from 1995 to 1999.<sup>245</sup> Such growth may be a reason why PanAmSat has offered transmit/receive occasional-use video service in 45 countries as of December 31, 1997. Thus, we see no evidence of supply inelasticity in the occasional-use multiple carrier market.

112. We note that Comsat continues to have global connectivity, which gives them a global marketing advantage over its competitors. The record indicates that PanAmSat, for example, has served many countries in Western Europe, South America, North America, and the Far East. A showing of service to a number of countries within these regions may suggest that regional connectivity, and not necessarily global connectivity, can help a satellite system effectively compete in the occasional-use video market.

113. With regard to the other countries not served by competing U.S. satellite systems in 1997, we understand that market entry barriers may have prevented the U.S. satellite systems from uplinking video from many of these countries, and thus precluded their ability to provide occasional-use video service. It also may be true that U.S. satellite systems are capable of providing occasional-use video service to some of these countries, but did not do so due to lack of customer demand for occasional-use video service, or that U.S. customers chose Comsat or some other competitor. Absent a record demonstrating that these markets are free of market entry barriers, we deem these markets to be non-competitive. We also understand that Teleglobe

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<sup>243</sup> See Columbia Letter.

<sup>244</sup> PanAmSat Worldwide Web Page at <http://www.panamsat.com>.

<sup>245</sup> *Id.*

provides occasional-use video services via the INTELSAT system. The record does not, however, indicate the degree to which Teleglobe serves U.S. customers and carriers. Information on Teleglobe's market share and pricing, for example, would allow us to assess Teleglobe's role as a competitor in the U.S. market for occasional-use video service.

114. Thus, based on these findings, we find that consumers have a choice for transmit and receive occasional-use video service in the occasional-use multiple carrier market. We do not believe Comsat can exercise market power in this market. With regard to the occasional-use single carrier market, the record does not support a finding that other U.S. satellite systems can offer both transmit and receive occasional-use video service in this market. Until there is effective competition in this market, we cannot conclude that Comsat no longer exercises market power in this market for the provision of occasional-use video service. Therefore, we conclude that Comsat should remain classified as a dominant common carrier for this service in the occasional-use single carrier market where no competition to Comsat exists from U.S. separate satellite systems, and be classified as non-dominant in the occasional-use multiple carrier market where U.S. customers have an alternative provider of transmit and receive occasional-use video service.

d. INTELSAT Earth Station Service

115. In 1985, we found Comsat to be dominant in the provision of multi-purpose earth station services and television earth station services that connect with INTELSAT satellites.<sup>246</sup> Comsat sold its INTELSAT earth station business in 1987 to American Satellite Company and AT&T.<sup>247</sup> Comsat states that its share of this market is zero.<sup>248</sup>

116. AT&T, Washington International Teleport, Inc., Keystone and others now provide earth station access to INTELSAT satellites. In the *AT&T International Order*, we declared AT&T non-dominant in the multi-purpose earth station service market finding high supply elasticity because competitors could enter this market relatively easily and add existing capacity.<sup>249</sup> In addition, we found high demand elasticity because customers are able to switch among carriers and services. In light of Comsat's absence from this market, we see no reason to

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<sup>246</sup> See *International Competitive Carrier Order* ¶ 66.

<sup>247</sup> Comsat 1988 Annual Report.

<sup>248</sup> Reply of Comsat at 45.

<sup>249</sup> *AT&T International Order* ¶ 65.

continue regulating Comsat as a dominant common carrier in the provision of multi-purpose earth station services. Accordingly, we find Comsat non-dominant in the provision of multi-purpose earth station service in all geographic markets.

e. Switched Voice and Private Line Thin Route Market

117. As we discussed above, the switched voice and private line services are provided into two distinct geographic markets: the thick route market and the thin route market. In this section, we analyze Comsat's market power in the provision of switched voice and private line services to the thin route market. Most commenters contend that Comsat exercises market power in this market.<sup>250</sup> Comsat disputes this contention claiming that it faces significant competitive pressure from expanding fiber-optic cable systems and the threat of entry from its satellite competitors.<sup>251</sup> We conclude that Comsat continues to exercise market power and is dominant in the provision of switched voice and private line service to the 63 countries listed on Appendix A to this Order that comprise the thin route market.

(i) Demand Elasticity and Market Share

118. Neither Comsat nor the commenters submit any specific evidence regarding the demand characteristics of the customers utilizing Comsat's switched voice and private line services to the thin route market. Comsat offers switched voice and private line service in this market, and it concedes that its market share for switched voice and private line service in the countries comprising this market averaged 90 percent in 1996.<sup>252</sup> Based upon the evidence in the record, we cannot conclude that significant competitive alternatives exist for U.S. consumers seeking switched voice and private line service to countries in the thin route market.<sup>253</sup> Comsat

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<sup>250</sup> See, e.g., Comments of AT&T at 2; Comments of WorldCom at 5-6; Comments of PanAmSat at 24.

<sup>251</sup> Reply of Brattle Group at 8.

<sup>252</sup> Comsat's 1997 Update at 12; see also Comments of AT&T at 6. The record lacked any thin route market share data for the full-time video and occasional-use video service markets.

<sup>253</sup> None of Comsat's U.S. separate satellite system competitors provide both switched voice and private line service to a country within the thin route market. The record indicates that PanAmSat provides switched voice service to one country. In addition, PanAmSat and Orion provide private line service to a few countries in this market. GE Americom does not provide service to any and, other than a few government contracts, Columbia does not provide any

further asserts that, in addition to U.S. separate system competitors, non-U.S. licensed satellites, such as Intersputnik, also provide service to the thin route market from the U.S.<sup>254</sup> We are, however, unable to assess the competitive significance of Intersputnik because the record lacks information regarding the actual amount of use of Intersputnik's services. Consequently, we conclude that Comsat's substantially high market share between the U. S. and the thin route market and Comsat's satellite system competitors' low penetration of this same market evidences inelastic demand for the provision of switched voice and private line services to the thin route market.

(ii) Supply Elasticity

119. Comsat contends that the expanding supply of fiber-optic cable systems as well as the threat of entry into the thin route market from new satellite competitors, such as PanAmSat and Intersputnik, increase the supply of cable and satellite circuits available in this market.<sup>255</sup> For example, Comsat notes that a \$2.6 billion fiber-optic cable system is under construction that will encircle Africa ("Africa-One") and link 37 of its nations to each other and other cable systems by 1999.<sup>256</sup> In addition, it asserts that satellite service providers already have nondiscriminatory access to countries worldwide.<sup>257</sup> For instance, PanAmSat serves 110 countries and Globalstar, a non-voice, non-geostationary mobile-satellite service provider, has consummated service agreements with more than 90 countries. Comsat further suggests that the relative importance of the switched voice and private line thin route market is diminishing as evidenced by the increase in the growth of circuits to the thick route market compared to the decrease in circuit growth to the thin route market.<sup>258</sup> For these reasons, Comsat suggests that an adequate supply of non-Comsat circuits for all services exists to the thin route market to provide customers with ample choice when choosing a U.S. authorized carrier for service to this market.

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service within the thin route market.

<sup>254</sup> See Letter dated January 16, 1998 [sic], from Howard D. Polsky, Comsat Corporation, to Magalie Roman Salas, Secretary, Federal Communications Commission at attachment, p. 3, n.10.

<sup>255</sup> Response of Brattle Group at 8.

<sup>256</sup> Comsat's 1997 Update at 13, n.28.

<sup>257</sup> Comsat Petition at 53-54.

<sup>258</sup> *Id.* at 14-15.

120. As explained above, the countries comprising the thin route market are those not connected to the U.S. by cable and that are served by Comsat via INTELSAT satellites. Based on the record, we find little evidence that other satellite operators are currently able to supply any significant amount of switched voice and private line service to the thin route market. Under these circumstances, U.S. customers have little choice but to utilize Comsat's switched voice and private line services for communications to and from this market. The lack of competition and pressure on prices may be a reason for the decrease in the number of circuits between the U.S. and this market. Our objective should be, however, to develop policies that will spur competition and growth in this market.

121. Comsat's reliance on the Africa One fiber-optic cable project as an example of the competitive pressure building in the thin route market is misplaced. The Africa One project is not yet under construction, and we understand that its estimated completion date is more than two years away. Consequently, we are unable to verify Comsat's claim that only 26 thin route countries will exist by 1999.<sup>259</sup> Likewise, we are not persuaded by Comsat's contention that PanAmSat can provide switched voice and private line service to the thin route market because it provides full-time video to local broadcasters in this market. In most cases, PanAmSat's access to thin route market countries is limited to one-way, receive-only service (downlink access), without uplink capability.<sup>260</sup> The fact that Comsat's U.S. satellite competitors' satellite footprints overlap the geographic area encompassing the thin route market is not the same thing as having regulatory approval to transmit and receive switched voice and private line services to and from a country situated within that market. The record adequately demonstrates that Comsat's U.S. separate system satellite competitors are limited in their provision of services in this market.<sup>261</sup> WorldCom's contention that it is able to use Comsat's satellite competitors for switched voice and private line service in only two such countries --- the Dominican Republic and Bolivia --- further confirms the limited availability of non-Comsat satellite capacity to the thin route market.<sup>262</sup>

122. Therefore, we conclude that the thin route market is subject to an inelastic competitive supply, which requires U.S. customers to use Comsat, by default, when choosing a telecommunications service provider for the provision of switched voice and private line service

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<sup>259</sup> See Comsat Letter.

<sup>260</sup> Reply of Brattle Group at 40-41; *see also* Declaration of Leonard Waverman at 7-8.

<sup>261</sup> See PanAmSat Letter, Orion Letter and GE American Letter.

<sup>262</sup> Comments of WorldCom at 5-6.

in this market.

(iii) Cost Advantages and Barriers to Entry

123. AT&T refutes, as highly impractical and uneconomic, Comsat's claims that other satellite operators are available to provide services to the thin route market.<sup>263</sup> In AT&T's view, it is impractical to use separate satellite systems to provide services in this market because most foreign telecommunication carriers are Signatories of INTELSAT and have no incentive to let independent satellite companies provide service in their countries bypassing the INTELSAT system. PanAmSat agrees with AT&T's argument.<sup>264</sup> AT&T contends that using separate satellite systems is uneconomic because it would cost a thin route market country approximately \$7 million to construct new satellite antennas and associated equipment to communicate with an independent satellite system. Comsat disagrees that such an investment is uneconomic, stating that countries within this geographic market will ultimately be required to make such investments to support their economic growth and that innovative high-powered beams allow for smaller, lower-cost ground terminals.<sup>265</sup>

124. We agree that Comsat's satellite system competitors encounter difficulty providing a full range of telecommunications services in foreign markets where the monopoly telecommunications service provider is an INTELSAT Signatory. Foreign INTELSAT Signatories clearly have an interest in maintaining satellite traffic on INTELSAT facilities so that they can continue to earn a return on their investment in the INTELSAT system, and the related ground segment infrastructure required to communicate with INTELSAT satellites. Therefore, the return a Comsat satellite system competitor and a foreign Signatory could expect from service to a foreign market would need to be sufficient to justify the investment in terrestrial infrastructure required for communication with an independent satellite system. According to PanAmSat, thin route market countries account for one-third of the world's population and represent economically and competitively significant markets for U.S. separate satellite systems.<sup>266</sup> We are not persuaded by AT&T's argument that the cost of building the terrestrial infrastructure for communicating with independent satellite systems is a significant factor constraining such systems from providing switched voice, private line and other

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<sup>263</sup> Comments of AT&T at 2.

<sup>264</sup> Reply Comments of PanAmSat at 19.

<sup>265</sup> Response of Brattle Group at 10.

<sup>266</sup> Declaration of Leonard Waverman at 7.

telecommunications services to the thin route market. If the potential market returns justify the cost, separate satellite systems will bear the cost of constructing such infrastructure. Therefore, factors other than the cost of constructing ground infrastructure appear to be limiting separate satellite systems from providing service in this market.

125. AT&T also suggests that Comsat's direct access to INTELSAT provides Comsat with a cost advantage for switched transit service because Comsat can offer INTELSAT services for a lower price.<sup>267</sup> For example, Teleglobe, Canada's INTELSAT Signatory, offers transit services to Latin American countries at a rate of between \$400 and \$600 per month (close to its INTELSAT cost), but AT&T's cost of obtaining capacity from Comsat is \$700 per month.<sup>268</sup> Comsat claims that switched transit service is competitive because other Signatories compete with Comsat to provide international switched transit circuits.<sup>269</sup> AT&T and other U.S. carriers are able to provide switched transit service from the U.S. using Teleglobe link to INTELSAT. The record does not, however, contain any evidence regarding how competitive Teleglobe's prices are for switched voice and private line service to thin route market countries. We presume its prices also include the costs of the U.S.-Canada link. Consequently, based upon the evidence presented in the record we are unable to conclude that Teleglobe provides a competitive alternative to Comsat for U.S. customers desiring switched voice and private line service to thin route market countries.

126. Finally, Comsat claims that its uniform pricing policy results in competitive rates to thin route market countries.<sup>270</sup> In the *August 1996 Order*, the Commission expressed a concern that Comsat's volume discounts could be structured in such a way that customers using Comsat for service in this market could be paying higher rates than customers using Comsat for service to the thick route market. PanAmSat raises a similar concern in this proceeding.<sup>271</sup> The record lacks sufficient data for us to make a finding regarding the competitiveness of Comsat's rates in the switched voice and private line thin route market. We remain concerned, however, that the effect of Comsat's uniform pricing policy and volume discounts may be that some of its thin route market customers pay higher rates for switched voice and private line service than do thick

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<sup>267</sup> *Id.* at 10.

<sup>268</sup> Comments of AT&T at 10.

<sup>269</sup> Response of Brattle Group at 11.

<sup>270</sup> *Id.* at 12-13.

<sup>271</sup> Declaration of Leonard Waverman at 6.



route market customers.<sup>272</sup>

127. As a result, we find that Comsat through INTELSAT retains a significant cost advantage over other U.S. authorized carriers in the provision of switched voice and private line service to the thin route market .

(iv) Size and Resources

128. As an INTELSAT Signatory, Comsat can offer the full range of INTELSAT's services to 142 member countries, 44 percent of which are in the thin route market. Comsat's competitors in the switched voice and private line service markets lack access to most countries in the thin route market for the provision of these services. Comsat suggests that the Commission forbear from regulating the company as a dominant carrier in this market, in the same way that the Commission suspended dominant carrier regulation of AT&T to those markets where AT&T was the sole facilities provider.<sup>273</sup> In the *AT&T International Order*, we forbore from regulating AT&T as a dominant common carrier in four markets where AT&T had 100 percent market share but where there was evidence that: (a) more than one U.S. facilities based carrier would soon enter the market; (b) there were no evident substantial barriers to entry; (c) tariffed rates to these markets were not out of line with tariffed rates to other international locations; and (d) the total billed minutes to these four markets represented less than .0025 percent of the total U.S. outgoing minutes, which we found to be a *de minimis* amount of traffic.<sup>274</sup>

129. The countries in the thin route market that Comsat serves can be distinguished from the four countries found to be *de minimis* in the *AT&T International Order*. The thin route market consists of 63 countries, not just four countries that AT&T served when we forbore from dominant carrier regulation in the *AT&T International Order*. These countries represent approximately 10 percent of total international traffic to and from the U.S, as opposed to only a *de minimis* percentage of the traffic as was the case in the *AT&T International Order*.<sup>275</sup> Moreover, substantial barriers to entry continue to exist within thin route market countries and

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<sup>272</sup> See *infra* ¶¶ 145-46.

<sup>273</sup> Comsat Petition at 41.

<sup>274</sup> See *AT&T International Order* ¶¶ 96-97.

<sup>275</sup> Reply of Comsat at 30.

most did not make any commitments under the WTO Agreement. Thus, the entry of additional service suppliers into this market is uncertain.<sup>276</sup> Consequently, we find that the 63 countries making up the thin route market served by Comsat are neither *de minimis* nor sufficiently served by other U.S. authorized carriers. As a result, Comsat's Signatory status and unique access to these countries via the INTELSAT system enable it to offer switched voice and private line services there, while its competitors cannot. Therefore, we conclude that Comsat has market power and remains dominant in the provision of switched voice and private line service to the thin route market.

f. Summary

130. There is sufficient evidence in the record to conclude that substantial competition exists among the participants in the provision of switched voice and private line service to the thick route market, full-time video service in all geographic markets, and occasional-use video service in the occasional-use multiple carrier market. Today, although Comsat is not providing earth station services, we find that sufficient competition exists in this market as well. For these reasons, Comsat no longer possesses market power in these markets. Therefore, we reclassify Comsat as a non-dominant common carrier in the provision of switched voice, private line, full-time video, occasional-use video and earth station services to these markets. We conclude that these markets are competitive and hereafter collectively refer to them as the "competitive markets."

131. In view of our finding to reclassify Comsat as a non-dominant common carrier in the provision of INTELSAT services in competitive markets, we find that elimination of rate of return regulation for these services is justified. In a competitive environment, such continued regulation is not needed to encourage competitive prices once Comsat is no longer dominant. Competition, rather than rate of return regulation, provides Comsat with an incentive to reduce costs in order to earn greater profits. Reduced costs eventually will benefit rate payers in the form of lower rates. Moreover, eliminating rate of return regulation for Comsat is consistent with our treatment of AT&T when it was declared non-dominant.<sup>277</sup> In that decision, we not only freed AT&T from price cap regulation for its residential international switched voice service, but also removed the last vestiges of rate of return regulation such as the requirement that it submit cost support data. We took this action based on our finding that AT&T no longer had market power in international telecommunications markets. We, therefore, will eliminate

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<sup>276</sup> Bolivia, Cote d'Ivoire, Ghana, Mauritius and Senegal have made commitments under the WTO Agreement.

<sup>277</sup> See *AT&T International Order* ¶ 99.

rate of return regulation for Comsat's switched voice, private line, full-time video, occasional-use video and earth station services in competitive markets.

132. The record, however, does not support a finding that switched voice and private line service to the thin route market and occasional-use video service to the occasional-use single carrier market are substantially competitive. In these markets, Comsat continues to possess market power. These findings are consistent with our recent decisions analyzing the state of competition in these markets.<sup>278</sup> Accordingly, we deny Comsat's request for reclassification as a non-dominant common carrier in the provision of switched voice, private line and occasional-use video services to these markets. We conclude that these markets are not competitive and hereafter collectively refer to them as the "non-competitive markets."

133. PanAmSat filed a petition for reconsideration of the Commission's *August 1996 Order*, which granted streamlined tariff relief for Comsat's switched voice and private line services, and an application for review of the International Bureau's *August 1997 Order*, which granted streamlined tariff relief for Comsat's full-time video and occasional-use video services.<sup>279</sup>

134. Comsat opposed PanAmSat's requests for review of these decisions.<sup>280</sup> The Commission affirms its decision in the *August 1996 Order* and the International Bureau's decision in the *August 1997 Order*. We believe that the *August 1996 Order* and this Order are

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<sup>278</sup> See, e.g., *August 1997 Order* ¶ 37; *August 1996 Order* ¶ 21; *International Competitive Carrier Order* ¶ 68.

<sup>279</sup> In the Matter of Comsat Corporation Petition for Partial Relief From Current Regulatory Treatment of Comsat World Systems' Switched Voice, Private Line, and Video and Audio Services, Petition for Reconsideration of PanAmSat, RM-7913, filed September 16, 1996 and PanAmSat Reply to Comsat's Opposition, filed February 11, 1997; In re Petition of Comsat Corporation For Partial Relief from the Current Regulatory Treatment of Comsat World Systems' Video and Audio Services, Application For Review, filed September 15, 1997.

<sup>280</sup> In the Matter of Comsat Corporation Petition for Partial Relief From Current Regulatory Treatment of Comsat World Systems' Switched Voice, Private Line, and Video and Audio Services, Opposition of Petition for Reconsideration, 1997, RM-7913, filed January 30, 1997; In re Petition of Comsat Corporation For Partial Relief from the Current Regulatory Treatment of Comsat World Systems' Video and Audio Services, Opposition to Application For Review, filed September 30, 1997.

consistent with the pro-competitive, de-regulatory national policy framework designed to open telecommunications markets to competition established in the Telecommunications Act of 1996.<sup>281</sup> These Commission actions are authorized and serve to limit the application of unnecessary regulation where competition would serve as a better regulator.<sup>282</sup> We find that the specific concerns raised by PanAmSat regarding the Commission's definition of the switched voice market in the *August 1996 Order*, and the International Bureau prejudging Comsat's Petition by issuing its *August 1997 Order* based on an incomplete record, are rejected by our findings in this Order. Accordingly, we deny PanAmSat's petition and application.

## **B. Forbearance**

135. In the event that we deny Comsat's request for reclassification as a non-dominant carrier, Comsat urges us to exercise our forbearance authority under Section 10 of the Communications Act.<sup>283</sup> In effect, Comsat requests forbearance from the Commission's dominant carrier regulations and rate of return and structural separation requirements, despite continued dominant carrier status.<sup>284</sup> As discussed in Section A above, we find Comsat non-dominant in the provision of switched voice, private line, full-time video, occasional-use video and earth station services to the competitive markets. As a result of finding Comsat non-dominant to these markets, Comsat no longer is required to comply with the Commission's dominant common carrier tariff rules and rate of return regulations to these markets. Finally, we also grant Comsat's request that we eliminate the Commission's structural separation requirements as they apply to Comsat for all markets, as discussed in Section D below.

136. As discussed in Section A, we also find Comsat dominant in the provision of occasional-use video service to non-competitive markets and switched voice and private line service to thin route markets. Consequently, we will treat Comsat's forbearance request as one

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<sup>281</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 *to be codified at* 47 U.S.C. § 151 *et seq.*

<sup>282</sup> The Commission has granted other dominant common carriers streamlined tariff relief under the Communications Act and the Commission's dominant carrier tariff rules. *See* In the Matter of Section 402(b)(1)(A) of the Telecommunications Act of 1996, *Report and Order*, 12 FCC Rcd 2170, FCC 97-23 (1997)(permitting local exchange carriers to file tariffs on 7 days' notice for rate decreases and 15 days' notice for rate increases or changes in service terms).

<sup>283</sup> Comsat Petition at 6; Reply of Comsat at 1.

<sup>284</sup> *Id.* at 1.

for forbearance from enforcement of Sections 61.58 and 61.38 of the Commission's Rules and the streamlined tariff requirements imposed on Comsat in the *August 1996 Order* and *August 1997 Order* ("Comsat's forbearance request") with respect to the markets in which Comsat remains dominant. In assessing Comsat's forbearance request, we consider its proposals to: (a) cap its rates in these dominant markets for three years at their current levels and to file tariffs on 14 days' notice (for rate increases or reductions in service terms) after the expiration of the three-year period;<sup>285</sup> (b) continue uniform pricing on all geographic routes;<sup>286</sup> and (c) establish a sunset date of January 1, 2000 for ending dominant carrier regulation of Comsat.<sup>287</sup>

137. We deny Comsat's forbearance request with respect to the markets in which it remains dominant: the provision of switched voice, private line and occasional-use video service to non-competitive markets. The record indicates that Comsat remains dominant because it is in most cases the sole provider of these services to and from these markets for U.S. consumers. Absent competition and dominant carrier regulation in these markets, Comsat would be free to increase or maintain its current rates. Although the price cap proposed by Comsat freezes rates in these markets for three years, the record does not support a finding that this price cap proposal is consistent with the Communications Act. Therefore, we find that Comsat fails to satisfy the explicit requirements of Section 10 of the Communications Act.<sup>288</sup> Consequently, Comsat continues to be subject to dominant common carrier regulation in the markets in which it remains dominant.

1. Authority to Act on Comsat's Forbearance Request

138. Comsat's separate system satellite competitors argue that the Commission lacks the authority to forbear from regulating Comsat as a common carrier under Title II of the Communications Act because the Satellite Act requires that Comsat be regulated as a common carrier fully subject to the provisions of Titles II and III of the Communications Act.<sup>289</sup> They contend that forbearance from dominant common carrier regulation would conflict with Congress's mandate that Comsat be "fully subject to" common carrier regulation under the

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<sup>285</sup> Reply of Comsat at 29.

<sup>286</sup> *Id.* at 2.

<sup>287</sup> Comsat Petition at 29-30.

<sup>288</sup> *See infra* ¶¶ 141-166.

<sup>289</sup> Comments of PanAmSat at 5-6; Comments of Independents at 3-4.

Satellite Act and that the Satellite Act's provisions govern to the extent they are inconsistent with those of the Communications Act.

139. We find that the Commission has the authority to address Comsat's forbearance request under Section 10 of the Communications Act and that our exercise of this authority is consistent with the provisions of the Satellite Act. We treat Comsat's request as one for forbearance from enforcement of Sections 61.58 and 61.38 of the Commission's Rules and the streamlined tariff requirements imposed on Comsat in the *August 1996 Order* and *August 1997 Order* with respect to those markets in which Comsat remains dominant. Comsat does not, however, request forbearance from the specific provisions of Title II of the Communications Act regulating common carriers. For example, as a common carrier, Comsat must file rates pursuant to Section 201 of the Communications Act and the Commission retains jurisdiction to suspend and investigate tariffs, prescribe just and reasonable charges and hear complaints filed against Comsat.<sup>290</sup> These and all other provisions of the Communications Act will continue to apply to Comsat regardless of our decision with respect to Comsat's forbearance request. Consequently, we find that our consideration of Comsat's forbearance request is not inconsistent with the Satellite Act's requirement that Comsat be fully subject to the provisions of Title II of the Communications Act.

## 2. Requirements of Section 10

140. Section 10 of the Communications Act requires the Commission to forbear from applying any regulation or any provision of the Communications Act to a telecommunications carrier or telecommunications service in any or some of its or their geographic markets if the Commission determines that certain conditions are satisfied.<sup>291</sup> Under subsection (a), the Commission shall forbear from applying any regulation or provision of the Act "...if [it] determines that ---

- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
- (2) enforcement of such regulation or provision is not necessary for the protection of

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<sup>290</sup> See 47 U.S.C. §§ 204-209.

<sup>291</sup> *Id.* § 160.

consumers; and

- (3) forbearance from applying such provision or regulation is consistent with the public interest."<sup>292</sup>

"In making the determination under subsection (a)(3), the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest."<sup>293</sup>

### 3. Application of Section 10 Requirements

141. The Competitive Telecommunications Association supports interim forbearance relief for Comsat subject to Comsat's compliance with Comsat's proposals to cap its rates and maintain uniform pricing along all geographic routes.<sup>294</sup> AT&T and the Networks oppose granting Comsat's forbearance request with respect to service to the non-competitive markets, arguing that these markets are not yet subject to effective competition.<sup>295</sup>

142. We deny Comsat's forbearance request with respect to the provision of switched voice, private line and occasional-use video services to non-competitive markets. We find that our current dominant common carrier tariff rules and regulations applicable to Comsat's services in these markets remain necessary to ensure that Comsat is charging just and reasonable rates in the absence of competitive pressures in these markets; to protect consumers in the future from paying rates that are not just and reasonable for services in these markets; and to be consistent with the public interest. In light of Comsat's continuing dominance to these markets, forbearance from the Commission's dominant common carrier tariff rules would not be in the public interest.

#### a. Just and Reasonable Rates

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<sup>292</sup> *Id.* § 160(a).

<sup>293</sup> *Id.* § 160(b).

<sup>294</sup> Comments of Competitive Telecommunications Association at 1-2.

<sup>295</sup> Comments of AT&T at 2; Comments of Networks at 9.

143. As set forth above, the Communications Act requires the Commission to grant Comsat's forbearance request if it determines that the three statutory criteria are satisfied.<sup>296</sup> The first criterion requires that we determine that enforcement of Sections 61.58 and 61.38 of the Commission's Rules and the streamlined tariff requirements imposed on Comsat in the *August 1996 Order* and *August 1997 Order* are not necessary to ensure that charges, practices, classifications or regulations by Comsat are just and reasonable and are not unjustly or unreasonably discriminatory.<sup>297</sup> Comsat contends that its rates are just and reasonable because its customers would move their traffic to the unutilized capacity on competing facilities if it charged rates above competitive levels.<sup>298</sup> Comsat proposes capping its rates for three years at current rates in those markets where it is dominant. Comsat states that it charges a customer the same rate for service to competitive and non-competitive markets. Comsat refers to this as geographic rate averaging or uniform pricing. As a result, Comsat contends, non-competitive market customers receive the benefits of competitive rates.

144. We are unpersuaded by Comsat's argument that its rates should be deemed just and reasonable. We believe that enforcement of the Commission's dominant carrier tariff rules is necessary because Comsat's customers may not switch to other providers if Comsat charges rates above competitive levels. In competitive markets, other service providers possess sufficient unutilized capacity enabling Comsat's customers to switch if Comsat were to charge non-competitive rates. On the other hand, in non-competitive markets, we find that enforcement of the Commission's dominant carrier tariff rules is necessary to ensure that Comsat's rates are just and reasonable with respect to the provision of switched voice, private line and occasional-use video service. As the dominant provider to these markets, in most instances, U.S. consumers or authorized carriers must use Comsat for switched voice, private line and occasional-use video services to and from the U.S. market. U.S. consumers and authorized carriers are unable to switch to alternative suppliers because there are none. The only unutilized excess capacity to these markets to and from the U.S. is controlled by Comsat through INTELSAT. Due to the absence of price competition and choice among service providers in dominant markets, enforcement of the Commission's dominant carrier tariff rules and rate of return regulation is necessary to ensure that Comsat continues to charge just and reasonable rates in these dominant markets.

145. We are not convinced that Comsat's proposal to cap its current tariff rates and

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<sup>296</sup> See 47 U.S.C. § 160.

<sup>297</sup> See *id.* §160(a)(1) and (2).

<sup>298</sup> Comsat Petition at 21.



continue uniform pricing along all geographic routes results in competitive market rates for switched voice, private line and occasional-use video service in non-competitive markets is sufficient, absent enforcement of our rules, to ensure that rates are just and reasonable. The steep decline in Comsat's market share for switched voice, private line, full-time video and occasional-use video services in competitive markets raises some concern about Comsat's rates.<sup>299</sup> During this period of decline, Comsat has been uniformly pricing its INTELSAT services, but it generally has not lowered its INTELSAT tariff rates in either competitive or non-competitive markets.<sup>300</sup> Thus, Comsat's declining market share may be attributable to charging tariff rates above competitive levels in competitive markets. Moreover, Comsat offers high volume and large users, such as AT&T and MCI, significantly discounted tariff and contract rates for switched voice service. These discounted rates may reflect both the economies of scale inherent in providing high volume service and increased pressure on Comsat to match the lower rates offered by its competitors in competitive markets. It is unclear whether users seeking service to non-competitive markets are in a position to take advantage of such discounted or transaction rates or whether they generally must pay the higher non-discounted tariff rates. Thus, Comsat's uniform pricing for switched voice service, even if adopted as a commitment, would not necessarily lead to lower, more competitive rates for all users to non-competitive markets. Without more justification, the record fails to support a finding that Comsat's price cap and uniform tariff pricing proposals for markets where it remains dominant would ensure that rates would be just and reasonable and not unjustly or unreasonably discriminatory.

146. Comsat's proposed rate caps are not sufficient to ensure that rates for its INTELSAT services would remain just and reasonable and not unjustly or unreasonably discriminatory in the future. As an initial matter, in 1997, the Commission considered and rejected a similar proposal by U S West for regulating access service rates in the domestic market, because such a rate freeze would not provide customers with any benefits from productivity growth, and so

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<sup>299</sup> Comsat's market share in the switched voice and private line markets has decreased from 70 percent in 1988 to 21 percent by the end of 1996 and Comsat concludes that its market share in international video service markets has fallen from 80 percent in 1993 to less than 45 percent in 1996. *See* 1997 Update at 1; Comsat Petition at 39, 42.

<sup>300</sup> Comsat has not changed its digital switched voice service (IDR) rates in six years (most of Comsat's switched voice service customers use its digital switched voice service; Comsat has reduced its analog switched voice service rates but fewer customers use this service). Comsat's private line service (IBS) rates have not changed in two years. Comsat's full-time video service rates have not changed since 1994 and its occasional-use video service rates have not changed since 1995.

would not strike a reasonable balance between the interests of ratepayers and stockholders.<sup>301</sup> Comsat has not suggested any reason to reach a different result in this proceeding. Furthermore, the record in this proceeding is not adequate to enable us to develop a price cap regime that would ensure that Comsat's rates for switched voice, private line and occasional-use video service in non-competitive markets will be just and reasonable in the future. Specifically, there are no data in the record regarding reasonably expected future productivity growth in Comsat's provision of these services, and so we cannot determine what X-Factor would be appropriate.<sup>302</sup> In addition, there is nothing in the record regarding the appropriate number of price cap baskets, or whether any service categories would be appropriate.<sup>303</sup>

147. For the foregoing reasons, we conclude that enforcement of Sections 61.58 and 61.38 of the Commission's Rules, and the requirements set forth in the *August 1996 Order* and *August 1997 Order*, remain necessary to ensure just and reasonable rates that are not unjustly and unreasonably discriminatory.

b. Protection of Consumers

148. The second criterion under Section 10 requires that we find enforcement of the

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<sup>301</sup> Price Cap Performance Review for Local Exchange Carriers, CC Docket No. 94-1, Fourth Report and Order, 12 FCC Rcd 16642, ¶ 26 (1997) ("*Price Cap Fourth Report and Order*"). "Just and reasonable" rates have been defined as rates that strike a reasonable balance between ratepayer and stockholder interests. See *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

<sup>302</sup> See *Price Cap Fourth Report and Order*, 12 FCC Rcd 16642, 16693-98, ¶¶ 133-138. In the price cap regulations we applied to AT&T and certain dominant local exchange carriers ("LECs"), the price cap index limits the weighted average of rate increases to the rate of inflation minus the "X-Factor." *Price Cap Fourth Report and Order*, 12 FCC Rcd at 16648 (para. 7). The "X-Factor" is used to make annual adjustments to the price cap index to reflect the margin by which a carrier subject to price cap regulation is expected to improve its productivity relative to the economy as a whole. See 47 C.F.R. § 61.3(z). Currently, the X-Factor imposed on LECs subject to price cap regulation is 6.5 percent. See Section 61.45(b)(1) of the Commission's Rules, 47 C.F.R. § 61.45(b)(1).

<sup>303</sup> In LEC price cap regulation, baskets and service categories are designed to prevent LECs from shifting costs between services of different price elasticities of demand. See, e.g., Policy and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, CC Docket No. 91-115, *Second Report and Order*, 8 FCC Rcd 4478, ¶¶ 23-24 (1993), *recon. denied* 8 FCC Rcd 8798, ¶ 23.

regulation or provision unnecessary for the protection of consumers.<sup>304</sup> For the reasons discussed below, we find continued dominant carrier regulation of Comsat in the provision of switched voice, private line and occasional-use video service in non-competitive markets is necessary for the protection of consumers.

149. We have found that price cap regulation can be a more effective means of regulating service rates than rate of return regulation because it requires carriers to keep rates at reasonable levels without creating perverse disincentives against increasing productivity. Once set, a price cap should be increased or decreased based on several factors, including an appropriate X-Factor, to ensure that both the carrier, in this case Comsat, and its consumers benefit from price cap regulation relative to rate of return regulation. Because Comsat's proposed price caps lacks an appropriate X-Factor for adjusting the price cap, we cannot be assured that consumers will be protected. Moreover, the three year term of the proposed price cap provides Comsat with little incentive to adjust rates downward to reflect increases in efficiency, productivity or other factors bearing on rates in these markets. Because of these deficiencies, U.S. consumers might have to pay higher rates under Comsat's proposed price cap than they would pay under a price cap that was established with the appropriate X-Factor adjustments or under rate of return regulation.

150. For the foregoing reasons, we conclude that enforcement of Sections 61.58 and 61.38 of the Commission's Rules and the requirements set forth in the *August 1996 Order* and *August 1997 Order* imposed on these services remain necessary to protect consumers.

c. Public Interest

151. Subsection (a)(3) of Section 10 sets forth the third criterion for forbearance. It requires that we determine whether forbearance from applying a provision of the Communications Act or regulation is consistent with the public interest.<sup>305</sup> In making this determination, the Commission shall consider whether forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services.<sup>306</sup>

152. Comsat claims that continuing to regulate it as a dominant carrier results in

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<sup>304</sup> 47 U.S.C. § 160(a)(2).

<sup>305</sup> *Id.* § 160(a)(3).

<sup>306</sup> *See id.* § 160(b).

competitive distortions that do not serve the public interest.<sup>307</sup> Comsat asserts that competitive distortions include: continuing dominant common carrier regulation that will increase regulatory costs that it must pass through in the form of higher rates to consumers; and a competitive disadvantage arising from Comsat's compliance with dominant common carrier tariff filing notice periods, which gives its competitors time to underbid its filed rates and limits Comsat's ability to respond quickly and creatively to competition.<sup>308</sup> Comsat requests that it be automatically reclassified as non-dominant on January 1, 2000, unless evidence demonstrates that forbearance relief has harmed consumers and competition in these markets.<sup>309</sup>

153. We find that forbearance from Sections 61.58 and 61.38 of the Commission's Rules and the streamlined tariff requirements imposed by the *August 1996 Order* and *August 1997 Order* would not be consistent with the public interest for several reasons. First, Comsat retains market power in the provision of switched voice, private line and occasional-use video service to non-competitive markets. Because Comsat is the dominant service provider to these markets, the Commission's dominant carrier tariff rules and regulations serve to provide consumers with prior notice of changes in Comsat's rates or service offerings in these markets. Such prior notice is necessary particularly in markets where there is a dominant service provider because it permits consumers or the Commission to challenge potentially unlawful rates before they become effective. We believe that the public interest in maintaining dominant common carrier regulation under these circumstances outweighs the burdens that Comsat might experience by complying with our dominant common carrier regulations in these markets. In addition, the competitive distortions alleged by Comsat will not necessarily be present with regard to service to non-competitive markets because non-dominant reclassification and the elimination of rate of return with respect to competitive markets and the elimination of structural separation requirements for INTELSAT services will significantly reduce its regulatory costs.

154. A second reason that forbearance from our dominant common carrier tariff rules is not consistent with the public interest is that Comsat's provision of switched voice and private line service to non-competitive markets is not *de minimis*. This market constitutes approximately 10 percent of international telecommunications service traffic, 20 percent of Comsat's INTELSAT traffic, and seven percent of AT&T's total international switched traffic.<sup>310</sup>

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<sup>307</sup> Comsat Petition at 28-29.

<sup>308</sup> Reply of Comsat at 28-29.

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

<sup>310</sup> Reply of Comsat at 32; Comments of AT&T at 9-10.

The switched voice and private line non-competitive geographic market is not *de minimis* as it was when we forbore from dominant common carrier regulation of AT&T's international services along four, less dense routes.<sup>311</sup> We view the circuits provided by Comsat as the only channels of telecommunications between U.S. consumers and countries in the thin route and occasional-use single carrier markets. Moreover, unlike in the *AT&T International Order*, the record indicates that competitive alternatives for switched voice and private line service to non-competitive markets will not be available for consumers in the near future. Absent other competitive alternatives, we find it is consistent with the public interest that Comsat's control of these markets to and from the U.S. should continue to be subject to the current dominant common carrier rules applicable to Comsat's provision of the relevant services.

155. A third reason we conclude that Comsat does not satisfy the requirements of subsections (a)(3) and (b) of Section 10 is that forbearance from the Commission's dominant common carrier tariff rules would be inconsistent with the public interest as long as two competitive distortions persist from Comsat's relationship with INTELSAT. Currently, Comsat is the only carrier in the U.S. with direct access to INTELSAT satellites. If U.S. authorized carriers and users were permitted to obtain nondiscriminatory, contractual direct access to INTELSAT satellites ("Level-3 direct access"), Comsat would no longer be the sole provider of switched voice, private line and occasional-use video service in the non-competitive markets we have identified.<sup>312</sup> Level-3 direct access would reduce Comsat's control in the U.S. over the

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<sup>311</sup> Cf. *AT&T International Order* ¶ 94 (the Commission granted AT&T's request for forbearance from dominant common carrier regulation with respect to four countries where AT&T was the only U.S. facilities-based provider because these countries had *de minimis* U.S. billed revenues and minutes when compared to total U.S. billed revenues and minutes to all countries).

<sup>312</sup> INTELSAT offers four levels of direct access to INTELSAT: (a) Level-1 direct access permits a customer to receive operational and technical information and attend global traffic meetings as an operation representative; (b) Level-2 direct access permits a customer to meet with INTELSAT management and staff regarding capacity availability, commercial and INTELSAT tariff matters; (c) Level-3 direct access permits a customer to enter into a contractual agreement with INTELSAT for ordering, receiving and paying for INTELSAT space segment capacity at the same rate that INTELSAT charges its Signatories; no investment in INTELSAT is required and the Signatory would continue to earn a rate of return in INTELSAT facilities used by direct access customers; and (d) Level-4 direct access permits a customer to enter into the same contractual agreement with INTELSAT as a Level-3 direct access customer but also allows a user or carrier to make a capital investment in INTELSAT in proportion to that customer's utilization of the INTELSAT system and subjects a customer to the same financial obligations

supply of INTELSAT satellite capacity serving non-competitive markets and thereby reduce Comsat's market power in these markets. Level-3 direct access also gives U.S. authorized carriers and users a choice between using Comsat or accessing INTELSAT directly to serve these markets. More suppliers of service to these markets spurs competition among telecommunications service providers which promotes competitive market conditions. Such competitive conditions create the potential for price competition, service quality improvements and innovation and would serve the public interest.<sup>313</sup> In addition, unlike any of its competitors, Comsat uniquely benefits from immunity from suit and legal process in the U.S. arising from its status as the U.S. Signatory to INTELSAT. Comsat's immunity gives it an incentive to engage in potentially anticompetitive behavior unilaterally or with other market participants. An appropriate waiver by Comsat of its immunity would eliminate this anticompetitive incentive and promote competitive conditions in all markets in which it competes.

156. In any event, shortly we will initiate a proceeding to explore the legal, economic and policy ramifications of direct access. Although our action today does not require direct access to INTELSAT or a waiver by Comsat of its immunity, we believe that if Comsat voluntarily were to: (a) authorize other U.S. authorized carriers and users to obtain Level-3 direct access to INTELSAT satellites for the provision of switched voice, private line and occasional-use video service in non-competitive markets and such carriers were, in fact, permitted to obtain such Level-3 direct access on nondiscriminatory terms and conditions; and (b) make an appropriate waiver of its immunity from suit and legal process in the U.S., such steps would serve to promote competitive market conditions in the markets in which Comsat remains dominant. We would consider these actions favorably in our analysis of any forbearance request by Comsat.

157. Direct access currently is not available in the U.S. By contrast, 76 countries permit other users to obtain contractual direct access to the INTELSAT system, which enables them to secure service from INTELSAT directly rather than through Signatories.<sup>314</sup> Eighteen countries

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under the INTELSAT Operating Agreement as Signatories. Level-1 and Level-2 direct access do not, however, permit users or carriers to access INTELSAT satellites other than through a Signatory.

<sup>313</sup> Commenters argue that direct access would result in benefits to U.S. consumers and authorized carriers. *See* Satellite Users Coalition Letter.

<sup>314</sup> *See* "The Legal Authority of the Federal Communications Commission to Authorize Direct Access to the INTELSAT System" at 2, dated March 6, 1998, filed by the Satellite Users Coalition.

permit non-Signatories to invest in INTELSAT.<sup>315</sup> We are not persuaded by Comsat's contention that direct access in the U.S. will somehow delay or undermine U.S. influence in achieving a privatized INTELSAT. Level-3 direct access would neither dilute Comsat's voting power on the INTELSAT Board of Governors nor give Level-3 direct access customers the right to participate in the INTELSAT governance process. Level-3 direct access customers merely would have a contractual relationship to acquire service directly from INTELSAT. In addition, Comsat like any other company facing new competition, must control its costs to remain competitive. However, we are cognizant of Comsat's concern that it would not be adequately compensated for costs it incurs in carrying out its statutorily-imposed official Signatory functions if U.S. authorized carriers and users were permitted direct access to INTELSAT satellites. The record in this proceeding lacks specific information regarding these special costs. We will consider this issue in the proceeding on direct access that we will initiate. Similarly, in the direct access proceeding, we will consider PanAmSat's concern that permitting direct access to INTELSAT would permit a fully immune INTELSAT to operate at the retail level in the U.S. without any legal or regulatory constraint.<sup>316</sup>

158. INTELSAT and its Signatories, including Comsat, enjoy three categories of immunities: immunity from jurisdiction, which prevents courts from considering lawsuits of any type against INTELSAT; archival and testimonial immunity, which protects INTELSAT from being compelled to provide documents or testimony of its employees; and immunity of assets, which prevents courts from enforcing monetary judgments against INTELSAT. In *Alpha Lyracom Space Communications v. Comsat Corp.*, the court found that Comsat was a "representative of the Parties" under the Headquarters Agreement and, therefore, was immune from any type of suit and legal process in the U.S. for acts taken in its official capacity as a Signatory but not for those actions taken in its role as a common carrier.<sup>317</sup>

159. Comsat maintains that its immunity is limited to its Signatory activities which are

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<sup>315</sup> *Id.* at 2, n.3.

<sup>316</sup> Reply Comments of PanAmSat at 3.

<sup>317</sup> *See Alpha Lyracom Space Communications v. Comsat Corp.*, 968 F. Supp. 876, 887 (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 (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.

subject to the U.S. government's instructional process and that it has no antitrust immunity in its role as a common carrier competing head-to-head with its competitors in the marketplace.<sup>318</sup> PanAmSat states that if Comsat's immunity is as inconsequential as it contends, then the company should be amenable to waiving it.<sup>319</sup> PanAmSat would not object to Comsat's immunity if it were limited to actions undertaken by Comsat at the instruction of the U.S. government.<sup>320</sup> Columbia contends that Comsat's forbearance request should be resubmitted when Comsat no longer is the beneficiary of any special legal status.<sup>321</sup>

160. The immunity enjoyed by Comsat is a clear advantage over competitors that do not enjoy similar protection.<sup>322</sup> Comsat's immunity protects Comsat in its broad Signatory activities from suits based on antitrust, tort and contract claims. Moreover, as we have previously found, the INTELSAT activities of Comsat and the other Signatories entail substantial commercial activities that are protected by their immunity. As the U.S. Signatory, Comsat sits on the INTELSAT Board of Governors and Inmarsat Council and participates in decisionmaking on all matters related to the commercial operation of a satellite system. INTELSAT's financial, legal, operational and strategic decisions provide the basis upon which Comsat offers service to U.S. consumers. These are the same type 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 the antitrust laws.

161. Absent an appropriate waiver of immunity, nothing would prevent Comsat from engaging in unilateral or coordinated anticompetitive activities, such as tortious interference

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<sup>318</sup> Reply of Comsat at 20.

<sup>319</sup> Comments of PanAmSat at 17.

<sup>320</sup> Reply Comments of PanAmSat at 14-15.

<sup>321</sup> Reply Comments of Columbia at 3-4.

<sup>322</sup> Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the U.S., *Report and Order*, IB Docket No. 96-111, FCC 97-379 (rel. November 26, 1997). 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. *See also August 1997 Order* ¶ 36.



with contractual relations, trade libel, exclusive dealing, restraints of trade and other unfair trade practices. Permitting one participant in a market to be shielded from liability for its anticompetitive business and commercial behavior while holding its competitors subject to liability for those same acts is inconsistent with fair and competitive telecommunications markets and regulating in the public interest. We cannot determine under Section 10 of the Communications Act that forbearance from dominant common carrier tariff regulation with respect to the market in which Comsat remains dominant is consistent with the public interest as long as Comsat is uniquely cloaked with immunity from liability for any anticompetitive behavior in which it may engage.

162. We believe that an appropriate waiver by Comsat of its immunity, in form and substance satisfactory to the Commission, would eliminate the anticompetitive advantage that immunity confers on Comsat. We view an "appropriate" waiver as a written waiver applying to Comsat's unofficial, discretionary business and commercial decisions, but not to those non-discretionary official acts it is required to take as the U.S. Signatory to INTELSAT under the Satellite Act.<sup>323</sup> For example, we would not expect Comsat to waive its immunity when: (a) it acts in its capacity as a Signatory upon the instruction of the U.S. government; (b) it acts in its capacity as a Signatory in fulfilling its obligations under the INTELSAT Operating Agreement; or (c) it does not participate in INTELSAT Signatory activities that otherwise contravene or subject it to liability under U.S. laws. An appropriate waiver of immunity reflecting these considerations would be likely to promote competitive market conditions and the public interest.

#### 4. Summary

163. We conclude that we have the authority under Section 10 of the Communications

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<sup>323</sup> *BT/MCI Order* ¶ 328. In requiring Comsat to make such a waiver in connection with any application it files to provide domestic services via INTELSAT or the International Mobile Satellite Organization ("Inmarsat"), we recognized that Comsat should be able to retain its immunity when carrying out instructions received from the U.S. government as the U.S. Signatory. Similarly, in conditioning the approval of the proposed BT/MCI merger on BT waiving any immunity from U.S. antitrust laws that it might be entitled to as an INTELSAT Signatory in connection with its acquisition of MCI and provision of service in the U.S., in that instance, as well, we made it clear that we did not intend that such waiver affect BT in carrying out its official responsibilities as the U.K. Signatory to INTELSAT outside the jurisdiction of the U.S. or that such waiver affect any sovereign immunity claims to which BT would otherwise be entitled.

Act to act upon Comsat's forbearance request. In light of our determination that Comsat's forbearance proposal does not satisfy Section 10 of the Communications Act, however, we are unable to forbear from enforcement of Sections 61.58 and 61.38 of the Commission's Rules and the streamlined tariff requirements imposed in the *August 1996 Order* and *August 1997 Order* with respect to the markets in which Comsat remains dominant. Comsat's forbearance request does not satisfy the requirements of Section 10 of the Communications Act. Consequently, Comsat will remain subject to the Commission's dominant common carrier tariff rules and regulations as they apply to its provision of switched voice, private line and occasional-use video service in non-competitive markets.

### C. Alternative Incentive Based Regulation

164. In light of our finding denying Comsat's forbearance request, we believe that our current rate of return regulation that would be applicable to Comsat's dominant markets may no longer be an efficient or effective means of regulating Comsat's rates and may not create adequate efficiency incentives for Comsat. Based on similar concerns, the Commission moved away from traditional rate of return regulation and adopted price cap regulation for incumbent local exchange carriers in 1990.<sup>324</sup> In addition, rather than impose the price caps developed for large local exchange carriers on small and mid-size local exchange carriers, the Commission in 1993 permitted small and mid-size local exchange carriers to elect an optional incentive based regulation.<sup>325</sup> Incentive based regulation is intended to encourage growth and productivity by permitting a carrier to increase its productivity to earn higher profits while at the same time ensuring that consumers share in the benefits of higher productivity growth in the form of lower rates.<sup>326</sup> In view of our reclassification of Comsat as non-dominant in its major INTELSAT service markets and the benefits of incentive based regulation, we believe that implementing an alternative form of incentive based regulation with respect to Comsat's dominant markets may establish the proper efficiency incentives for Comsat, benefit consumers through lower rates in the dominant markets and relieve the Commission from administratively burdensome rate of return regulation of Comsat in these markets.

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<sup>324</sup> See *Price Cap Fourth Report and Order* ¶ 3.

<sup>325</sup> See *In the Matter of Regulatory Reform for Local Exchange Carriers Subject to Rate of Return Regulation, Report and Order*, 8 FCC Rcd 4545, CC Docket No. 92-135, FCC 93-253, ¶ 6 (1993).

<sup>326</sup> See *Price Cap Fourth Report and Order* ¶ 2.

165. Therefore, we will consider replacing traditional rate of return regulation with an alternative incentive based regulation plan for Comsat with respect to its provision of switched voice, private line and occasional-use video service to the non-competitive markets where we find it dominant. Specifically, we tentatively conclude that any alternative incentive based regulation plan that we would adopt for Comsat with respect to its services in dominant markets: (a) remain in effect for an indefinite period of time, rather than expiring after three years; (b) allow all users of Comsat's service to non-competitive markets to benefit from a competitive or "transaction" rate rather than the non-discounted tariffed rate that would result from Comsat's uniform pricing commitment; and (c) allow all users of Comsat's service to non-competitive markets to benefit from reduced rates due to increases in efficiency and productivity. We invite Comsat and other interested parties to comment on these tentative conclusions. The Commission looks forward to receiving comments and intends to proceed quickly in considering an alternative incentive based regulation plan for Comsat's services in the markets where it remains dominant.

#### **D. Structural Separation**

166. Comsat requests the elimination of the structural separation requirements as applied to its INTELSAT services.<sup>327</sup> Comsat seeks to offer all of its INTELSAT services on a structurally integrated basis. Structural separation refers to the Commission's policies requiring Comsat to: (a) provide its INTELSAT and Inmarsat services ("jurisdictional services") in an entity that is separate from the entity engaging in activities other than its jurisdictional services ("non-jurisdictional services"); (b) follow prescribed accounting procedures for its jurisdictional services; and (c) engage in "arms-length" dealings between its jurisdictional and non-jurisdictional entities.<sup>328</sup> Today, Comsat's INTELSAT jurisdictional services are provided through its World Systems Division. Although Comsat today does not provide earth station services, these services are required to be provided through a structurally separated subsidiary.<sup>329</sup> Below we discuss the policies underlying the Commission's structural separation

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<sup>327</sup> Comsat Petition at 7.

<sup>328</sup> See In the Matter of Comsat Corporation, *Memorandum Opinion and Order*, FCC 97-422, ¶ 3 (rel. February 3, 1998)(discussing the policy concerns giving rise to the Commission's structural separation policies).

<sup>329</sup> In the Matter of Comsat Corporation Changes in the Corporate Structure and Operations of the Communications Satellite Corporation, 90 FCC 2d 1159 (1982) ("*First Structure Order*"); see also Changes in the Corporate Structure and Operations of the Communications Satellite Corporation, 97 FCC 2d 145 (1984), *recon.*, 99 FCC 2d 1040 (1984).

requirements and their applicability to Comsat's provision of INTELSAT services. We conclude that the elimination of the structural separation requirements for Comsat's INTELSAT services is warranted in view of our finding that Comsat is non-dominant in four product markets. We find that Comsat's continued dominance in the provision of switched voice, private line and occasional-use video services in non-competitive markets is not sufficient reason to continue structural separation because the costs would exceed the benefits.

167. In 1980, the Commission determined that Comsat may engage in non-jurisdictional services so long as these services are consistent with, do not hinder, or do not interfere with its statutory missions.<sup>330</sup> The Commission recognized that if Comsat were permitted to offer competitive non-jurisdictional services, the following policy concerns would need to be resolved: (a) conflicts of interest between its jurisdictional and non-jurisdictional services; (b) competitive advantages in non-jurisdictional markets and opportunities for anticompetitive behavior (due to Comsat's unique status as the U.S. Signatory to INTELSAT and Inmarsat); and (c) potential misallocation of costs between jurisdictional and non-jurisdictional activities through cross-subsidization, which would harm its jurisdictional ratepayers. To address these policy concerns, the Commission required structural separation of Comsat's jurisdictional activities.<sup>331</sup> It also prescribed accounting procedures to properly allocate costs incurred by the respective business activities to the correct business unit and required "arms-length" dealing between jurisdictional and non-jurisdictional activities.<sup>332</sup> In 1984, our *Earth Station Ownership Order* also implemented these policies by requiring that Comsat's earth station activities be provided through a subsidiary separate from its space services segment.<sup>333</sup> This action required Comsat to transfer to a separate subsidiary all ownership interests in authorized international earth stations operating with the INTELSAT system, and to file separate, unbundled, cost-based tariffs for INTELSAT space segment and earth station services. In the Commission's view, these safeguards would not totally eliminate the incentive for Comsat to

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<sup>330</sup> See Communications Satellite Corporation, *Final Report and Order*, 77 FCC 2d 564 (1980) ("Comsat Study").

<sup>331</sup> See *First Structure Order* at 1198-1199.

<sup>332</sup> See *Comsat Study* and *First Structure Order*. See also Changes in the Corporate Structure and Operations of the Communications Satellite Corporation, 97 FCC 2d 145 (1984), *recon.* 99 FCC 2d 1040 (1984).

<sup>333</sup> Modification of Policy on Ownership and Operation of U.S. Earth Stations That Operate with the INTELSAT Global Communications Satellite System, *Order*, 100 FCC 2d 250 (1984) ("*Earth Station Ownership Order*").

behave in an anticompetitive manner, but the benefit to the public interest through better and expanded satellite services outweighed this concern.<sup>334</sup>

168. Comsat now requests that we eliminate the structural separation requirements as applied to its INTELSAT services because these requirements are not needed under today's competitive market conditions.<sup>335</sup> According to Comsat, structural separation requirements prevent Comsat from rapidly responding to customer needs and slows down its decision making process because it must first determine if a new service should be provided by its World Systems Division or a separate entity.<sup>336</sup>

169. Several commenters oppose the elimination of the structural separation requirements for Comsat's INTELSAT earth station services.<sup>337</sup> Keystone and Washington International Teleport, Inc. contend that without structural separation, Comsat could bundle wholesale priced INTELSAT space segment services with its own earth station services and offer a lower bundled price than its competitors which would have to pay Comsat's marked-up prices for INTELSAT space segment services.<sup>338</sup> Keystone states that requiring Comsat to unbundle and file separate INTELSAT space segment and earth station tariffs would not alleviate the policy concerns addressed by structural separation because Comsat could negotiate a new rate for a customer, start service, and then file the new rate on one day's notice with a presumption of lawfulness.<sup>339</sup> However, both commenters suggest that elimination of the structural requirement would be acceptable if other U.S. authorized carriers had direct access to INTELSAT satellites and Comsat waived its privileges and immunities.<sup>340</sup> The Networks, users of earth stations that link directly to INTELSAT satellites, do not oppose granting Comsat relief from structural separation for its

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<sup>334</sup> See In the Matter of Comsat Corporation, *Memorandum Opinion and Order*, FCC 97-422, ¶ 4 (rel. February 3, 1998).

<sup>335</sup> Reply of Comsat at 41.

<sup>336</sup> *Id.* at 41-42.

<sup>337</sup> Comments of Keystone at 3-4; Comments of Washington International Teleport, Inc. at 2; and Comments of Networks at 26-27.

<sup>338</sup> Comments of Keystone at 3-4; Comments of Washington International Teleport, Inc. at 4.

<sup>339</sup> Comments of Keystone at 4.

<sup>340</sup> *Id.*

INTELSAT services so long as the Commission continues to require that Comsat unbundle the rates, terms and conditions for its earth station services and its INTELSAT space segment services.<sup>341</sup>

170. In its reply Comsat states that it does not oppose the current Commission requirement that the company unbundle tariffs for INTELSAT earth station services from those for its INTELSAT space segment services.<sup>342</sup>

171. Our structural separation policy was developed in 1982 as Comsat was expanding lines of business beyond its INTELSAT and Inmarsat roles conferred on it by statute. We found then that Comsat's participation in competitive ventures outside its INTELSAT and Inmarsat roles would contribute to the development of satellite technology and provide public benefits.<sup>343</sup> However, we had a two-fold concern: (1) misallocation of costs to the detriment of then monopoly ratepayers and (2) use by Comsat of information (technology and marketing) derived from its INTELSAT and Inmarsat roles to gain competitive advantages in new ventures.<sup>344</sup> Now, in 1998, we believe those concerns are significantly reduced by changed circumstances.

172. Our finding that Comsat no longer has market power in five substantial product markets - the provision of switched voice, private line and occasional-use video services in competitive markets, and full-time video and earth station services to all geographic markets - reduces, if not eliminates, any incentive to misallocate costs to its INTELSAT ratepayers. As for the markets in which Comsat continues to be dominant, we recognize that there remains at least the potential for Comsat to misallocate costs in support of its competitive jurisdictional services and its competitive ventures outside of INTELSAT. We believe that our decision to maintain the existing cost allocation and accounting requirements placed on Comsat as a result of the Comsat structure proceedings (Comsat has not requested any changes in these procedures)<sup>345</sup> provides sufficient oversight of Comsat that we could take action if it appears that Comsat's customers for switched voice, private line and occasional-use video service to non-competitive

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<sup>341</sup> Comments of Networks at 26-27.

<sup>342</sup> Reply of Comsat at 42.

<sup>343</sup> See *First Structure Order* at 1172.

<sup>344</sup> *Id.* at 1173

<sup>345</sup> We also do not change the various information flow requirements imposed on Comsat. *First Structure Order* at 1154-1196.

markets, are bearing costs not properly attributable to service in these markets. Nothing in the record is persuasive that continued structural separation is necessary to provide this protection. To the extent that Comsat would attempt to cross-subsidize the services it provides in competitive markets by misallocating costs to its ratepayers in non-competitive markets, we believe it is unlikely that such a strategy would be successful. Comsat's cable competitors that utilize fiber-optic cable have a cost advantage over Comsat in competitive jurisdictional service markets because the cost per circuit for fiber-optic cable is less than the cost per circuit for satellite use. Moreover, Comsat's competitors in these markets have sufficient unutilized capacity to attract new customers at reduced rates in response to a Comsat cross-subsidization strategy. We are persuaded by Comsat that the cost of maintaining this policy with respect to INTELSAT services could inhibit Comsat's ability to introduce customer services.<sup>346</sup>

173. Our elimination of structural separation requirements for Comsat's INTELSAT services includes elimination of the structural separation requirement for Comsat's earth station services. Comsat will no longer be required to provide INTELSAT earth station services on a separated basis from the World Systems Division. We will, however, require that Comsat continue to unbundle its tariffs for earth station and INTELSAT space segment services by filing separate and distinct tariffs for these services. This is a condition requested by the commenters and agreed to by Comsat. Unbundling is necessary so that Comsat's earth station competitors only pay costs associated with provision of INTELSAT space segment services and not costs associated with Comsat's earth station services with which they compete.

174. Finally, in a separate proceeding, PanAmSat requests that the Commission require Comsat to structurally separate its monopoly jurisdictional services from its competitive jurisdictional services that compete with separate satellite systems.<sup>347</sup> PanAmSat contends that structural separation of Comsat's monopoly and competitive jurisdictional services is necessary to: (a) prevent monopoly jurisdictional revenues from subsidizing competitive jurisdictional services revenues; (b) lessen the conflicts of interest that are inherent in Comsat's dual roles as Signatory and competitive commercial enterprise; (c) prevent Comsat from escaping liability for anticompetitive behavior in the provision of competitive jurisdictional services by attributing the anticompetitive actions to Comsat's Signatory functions; and (d) permit Comsat to provide

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<sup>346</sup> Reply of Comsat at 41-42.

<sup>347</sup> See Changes in the Corporate Structure and Operations of the Communications Satellite Corporation, Petition to Reopen Proceedings, CC Docket No. 80-634 (May 12, 1992).

competitive jurisdictional services as a non-dominant carrier.<sup>348</sup> Recently, the Commission determined that PanAmSat's request should be addressed in this proceeding.<sup>349</sup>

175. We address above PanAmSat's concerns regarding monopoly jurisdictional services subsidizing competitive jurisdictional services through "padding" its rate base for switched voice, private line and occasional-use video service in non-competitive markets from expenses incurred by its competitive services or otherwise. We also note that the *August 1996 Order* requires Comsat to demonstrate that its tariff filings do not restrict service to thin route countries and that its tariffs have the same rate impact on non-competitive market users as on high volume users.<sup>350</sup> The *August 1997 Order* granted streamlined tariff relief to Comsat's occasional-use video service rate decreases but maintained dominant common carrier regulation for occasional-use video service rate increases.<sup>351</sup> These requirements also provide the Commission with the oversight necessary to protect consumers from such mispricing behavior.

176. PanAmSat raises additional concerns regarding the potential conflict of interest and competitive advantages Comsat reaps by not structurally separating monopoly and competitive jurisdictional services. However, PanAmSat fails to offer any examples of the conflicts of interest and competitive advantages that it is concerned about or how these advantages would benefit Comsat's competitive jurisdictional services.

#### **E. INTELSAT Restructuring**

177. Several of the commenters urge us to defer our consideration of Comsat's petition during the pendency of the INTELSAT restructuring.<sup>352</sup> These commenters state that any

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<sup>348</sup> *See id.*

<sup>349</sup> In the Matter of PanAmSat Corporation Petition to Reopen Changes in the Corporate Structure and Operations of the Communications Satellite Corporation, *Order*, CC Docket No. 80-634, FCC 97-422 (rel. Feb. 3, 1998).

<sup>350</sup> *See August 1996 Order* ¶ 26.

<sup>351</sup> *See August 1997 Order* ¶ 51.

<sup>352</sup> Comments of Hughes at 2; Comments of Columbia at 9; Comments of Keystone at 4-5; Comments of PanAmSat at 12; Comments of Networks at 22-23; and Comments of Independents at 2. By referring to the INTELSAT "restructuring" it is not clear if the commenters are referring to the spin-off of INC or the privatization of the residual INTELSAT.



regulatory relief granted to Comsat may prejudice the restructuring process, which they view as partially aimed at eliminating the competitive advantages that Comsat maintains in the marketplace as a result of its exclusive relationship with INTELSAT.

178. Comsat responds that Section 10 of the Communications Act establishes a one-year deadline for the Commission to render a decision on its petition regardless of the status of the INTELSAT restructuring process.<sup>353</sup> It further contends that the Commission's decision regarding Comsat's petition depends on the marketplace conditions facing Comsat now, rather than the future organizational structure of INTELSAT.<sup>354</sup>

179. The one-year statutory deadline in Section 10 of the Communications Act requires that we act upon the forbearance aspect of Comsat's petition before that date. INTELSAT's restructuring as it relates to the spin-off of INC has recently been concluded.<sup>355</sup> Any further restructuring of INTELSAT will be considered much later than our statutory deadline.

#### IV. Conclusion

180. We grant Comsat's request for reclassification as a non-dominant common carrier with respect to its provision of INTELSAT services in the switched voice, private line, full-time video, and occasional-use video services to competitive markets. We also find Comsat non-dominant in the provision of earth station services. As a non-dominant common carrier in the provision of switched voice, private line, full-time video and occasional-use video services to competitive markets, and earth station service to all markets, Comsat will be allowed to file tariffs on one day's notice, without economic cost support, in the same form as filed by other non-dominant common carriers, and the tariffs will be presumed lawful. We deny Comsat's request for reclassification with respect to switched voice, private line and occasional-use video services to non-competitive markets. We further deny Comsat's request that we forbear under Section 10 of the Communications Act from enforcing the Commission's dominant common carrier tariff rules and rate of return regulation applicable to Comsat's switched voice, private line and occasional-use video services to non-competitive markets. Even considering Comsat's

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<sup>353</sup> Reply of Comsat at 9.

<sup>354</sup> *Id.* at 10.

<sup>355</sup> INTELSAT Assembly of Parties, Record of Decisions of the Twenty-Second (Extraordinary) Meeting (AP22-3E Provisional), Salvador, Brazil, March 31, 1998.

price cap and uniform pricing proposals for these markets, we find that forbearance relief is not warranted under the circumstances. As a result, Comsat's provision of switched voice, private line and occasional-use video services to non-competitive markets will continue to be governed by the Commission's dominant common carrier tariff rules to the extent not waived by the *August 1996 Order* and the *August 1997 Order* granting Comsat streamlined tariff relief for its INTELSAT services.

181. We eliminate rate of return regulation as it relates to Comsat's switched voice, private line, full-time video and occasional-use video services to competitive markets, and earth station services to all geographic markets. We find that our existing rate of return regulation that would be applicable to Comsat's dominant markets may no longer be an efficient or effective means of regulating Comsat's rates and may not create adequate efficiency incentives for Comsat. We will consider replacing rate of return regulation with an alternative form of regulation with respect to Comsat's switched voice, private line and occasional-use video services to the non-competitive markets where we find it dominant. We invite comments from the public addressing our tentative conclusions for alternative incentive based regulation of Comsat's services in the dominant markets. We also grant Comsat's request for the elimination of structural separation for its INTELSAT services because structural separation is no longer necessary to safeguard Comsat's competitors from Comsat leveraging its monopoly jurisdictional services to gain an advantage in competitive markets that it was operating in. Comsat will still be required to adhere to the cost allocation and accounting requirements imposed in the *First Structure Order*. Comsat also will be required to file unbundled tariffs for its earth station and INTELSAT space segment tariffs.

182. Comsat will continue to be subject to regulation under Title II and Title III of the Communications Act. Specifically, Title II requires common carriers to offer international services under rates, terms and conditions that are just, reasonable and not unduly discriminatory (Section 201 and 202), and Title II common carriers are subject to the Commission's complaint process (Sections 206-209). Title II common carriers are also required to file tariffs pursuant to our streamlined tariffing procedures (Sections 203 and 205). Title III requires users or operators of the radio frequency spectrum to obtain a license under the provisions of the Communications Act (Section 301) and the Commission has authority over the grant of such licenses (Section 309) .

183. Comments and reply comments in connection with IB Docket 98-60 should be captioned using this docket number only. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary,

Federal Communications Commission, Washington, D.C. 20554. Parties submitting diskettes should submit them along with their formal filings to the Office of the Secretary. Submissions should be on a 3.5 inch diskette formatted in an DOS PC compatible form. The document should be saved in WordPerfect 5.1 for Windows format. The diskette should be submitted in "read only" mode. The diskette should be clearly labelled with the party's name, proceeding, type of pleading (comment or reply comment), Docket or Rulemaking number, and date of submission. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, of the Federal Communications Commission, Room 239, 1919 M Street, N.W., Washington, D.C. 20554. Electronically filed comments will be placed on the Commission's Internet server.

184. Interested parties may also file informal comments or an exact copy of your formal comments electronically via the Internet. Electronically filed comments that conform to the Commission's Rules will be considered part of the record in this proceeding. To file electronic comments, you must use the electronic filing interface available on the FCC's World Wide Web site at <<http://dettifoss.fcc.gov:8080/cgi-bin/ws.exe/beta/ecfs/upload.hts>>. Further information on the process of submitting comments electronically is available at that location and at <<http://www.fcc.gov/e-file/>>. You must note whether an electronic submission is an exact copy of formal comments on the subject line. You also must include your full name and Postal Service mailing address in your submission.

## V. Ordering Clauses

185. Accordingly, IT IS ORDERED, that, Comsat Corporation's Petition for reclassification as a non-dominant common carrier under Part 61 of the Commission's Rules is GRANTED with respect to its provision of the following INTELSAT services: (a) switched voice and private line services between the U.S. and those countries not listed on Appendix A to this Order; (b) full-time video service to all geographic markets; (c) occasional-use video service between the U.S. and those countries not listed on Appendix B to this Order; and (d) earth station services to all geographic markets. Comsat Corporation's Petition for reclassification as a non-dominant common carrier with respect to its provision switched voice and private line service between the U.S. and those countries listed on Appendix A to this Order and occasional-use video service between the U.S. and those countries listed on Appendix B to this Order, under Part 61 of the Commission's Rules, IS DENIED.

186. IT IS FURTHER ORDERED, that Comsat Corporation's Petition for forbearance from enforcement of Sections 61.58 and 61.38 and the streamlined tariff requirements imposed on Comsat Corporation in the *August 1996 Order* (FCC 96-349; RM-7913; rel. Aug. 15, 1996) and the *August 1997 Order* (DA 97-1741; File No. 14-SAT-ISP-97; rel. Aug. 14, 1997) with

respect to Comsat Corporation's provision of: (a) switched voice and private line service between the U.S. and those countries listed on Appendix A to this Order; and (b) occasional-use video service between the U.S. and those countries listed on Appendix B to this Order, pursuant to Section 10 of the Communications Act, as amended (47 U.S.C. § 160), IS DENIED.

187. IT IS FURTHER ORDERED, that Comsat Corporation's Petition for elimination of the Commission's structural separation policies as they apply to Comsat Corporation's INTELSAT services IS GRANTED to Comsat Corporation, leaving in place the existing cost allocation and accounting requirements as a result of the *First Structure Order* (90 FCC 2d 1159 (1982), *recon.* 93 FCC 2d 701 (1993)), and subject to the condition that Comsat Corporation shall file separate INTELSAT space segment and earth station service tariffs.

188. IT IS FURTHER ORDERED, that Comsat Corporation's Petition for elimination of the Commission's rate of return regulation as it applies to Comsat Corporation's switched voice, private line, full-time video and earth station INTELSAT services in competitive markets IS GRANTED, however, elimination of the Commission's rate of return regulation as it applies to Comsat Corporation's provision of: (a) switched voice and private line service between the U.S. and those countries listed on Appendix A to this Order; and (b) occasional-use video service between the U.S. and those countries listed on Appendix B to this Order, IS DENIED.

189. IT IS FURTHER ORDERED, that pursuant to the authority contained in Sections 4(i) and 201(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 201(b), and Sections 201(c)(5) and (c)(11) and 401 of the Communications Satellite Act of 1962, 47 U.S.C. §§ 721(c)(5) and (c)(11) and 741 and the applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, NOTICE IS HEREBY GIVEN of our intent to adopt the tentative conclusions set forth in paragraph 165 of this *Order and Notice of Proposed Rulemaking* and that interested parties may file comments within 15 days from the date of publication of the Commission's request for comments in the Federal Register (IB Docket No. 98-60) and reply comments within 10 days thereafter.

190. IT IS FURTHER ORDERED, that IB Docket No. 98-60 is a permit-but-disclose notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission Rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(b).

191. IT IS FURTHER ORDERED, that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this *Order and Notice of Proposed Rulemaking*, including the Initial Regulatory Flexibility Certification, to the Chief Counsel for

Advocacy of the Small Business Administration.

192. IT IS FURTHER ORDERED, that PanAmSat Corporation petitions, motion and application for review filed in connection with related pending proceedings: (a) September 15, 1997, application for review of the International Bureau's decision granting streamlined tariff relief for Comsat's full-time video and for its occasional-use video services (File No. 14-SAT-ISP-97); (b) September 16, 1996, petition for reconsideration of our decision granting streamlined tariff relief for Comsat's switched voice and private line services (RM-7913); and (c) May 12, 1992, petition to reopen proceedings regarding changes in the corporate structure of Comsat (CC Docket No. 80-634), ARE DENIED.

193. IT IS FURTHER ORDERED, that this Order is effective upon the date of its release.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary

## APPENDIX A

## List of Thin Route Market Countries

1. Algeria
2. American Samoa
3. Angola
4. Armenia
5. Azerbaijan
6. Benin
7. Bolivia
8. Bosnia & Herzegovina
9. Botswana
10. Burkina
11. Cameroon
12. Cape Verde
13. Central African Republic
14. Chad
15. Congo
16. Cote d'Ivoire
17. Estonia
18. Ethiopia
19. French Polynesia
20. Gabon
21. Ghana
22. Guinea
23. Iran
24. Iraq
25. Jordan
26. Kenya
27. Lesotho
28. Libya
29. Lithuania
30. Malawi
31. Mali
32. Maritime -Atlantic
33. Maritime -Pacific
34. Mauritania
35. Mauritius

- 36. Micronesia, Federated States of
- 37. Midway Atoll
- 38. Moldova
- 39. Mozambique
- 40. Namibia
- 41. Nauru

**APPENDIX A cont.**

- 42. New Caledonia
- 43. Nicaragua
- 44. Niger
- 45. Northern Mariana Islands
- 46. Pacific Islands (Palau)
- 47. Paraguay
- 48. Rwanda
- 49. Saint Helena
- 50. Senegal
- 51. Sierra Leone
- 52. Somalia
- 53. Sudan
- 54. Suriname
- 55. Swaziland
- 56. Tanzania
- 57. Togo
- 58. Tonga
- 59. Turks and Caicos Islands
- 60. Uganda
- 61. Western Samoa
- 62. Zaire
- 63. Zambia

**APPENDIX B**

**List of Occasional-Use Video Single Carrier Market Countries**

**South America**

**Central America/  
Caribbean**

Saint Kitts & Nevis  
Saint Lucia  
Saint Vincent  
Turks & Caicos

**Western Europe**

Cyprus  
Greenland  
Iceland  
Malta  
Norway

**Eastern Europe**

Albania  
Belarus  
Bulgaria  
Czech Republic  
Estonia  
Lithuania  
Macedonia  
Moldova  
Russia  
Serbia  
Slovenia



**Appendix B cont.**

**Middle East**

Bahrain  
Iran  
Israel  
Jordan  
Kuwait  
Lebanon  
Oman  
Qatar  
Saudi Arabia  
Syria  
United Arab Emirates  
Yemen

Columbia  
French Guiana  
Guyana  
Paraguay  
Suriname  
Trinidad & Tobago

**Central America/  
Caribbean**

Anguilla  
Antigua  
Aruba  
Bahamas  
Belize  
Bermuda  
British Virgin Islands  
Cayman Islands  
Chagos Archipelago  
Costa Rica  
Dominica

**Appendix B cont.**

Dominican Republic  
El Salvador  
Gibraltar  
Grenada  
Guadeloupe  
Guatemala  
Haiti  
Honduras  
Martinique  
Montserrat  
Netherlands Antilles  
Panama

**Africa**

Algeria  
Angola  
Benin  
Botswana  
Burkina Faso  
Cameroon  
Cape Verde  
Central African Republic  
Chad  
Congo  
Cote d'Ivoire  
Dem Rep Congo  
Djibouti  
Egypt  
Ethiopia  
Gabon  
Gambia  
Ghana  
Guinea  
Guinea Bissau  
Kenya  
Lesotho

**Appendix B cont.**

Liberia  
Libya  
Malawi  
Mali  
Mauritania  
Mauritius

**Africa (continued)**

Morocco  
Mozambique  
Namibia  
Niger  
Nigeria  
Rwanda  
Saint Helena  
Senegal  
Sierra Leone  
Somalia  
South Africa  
Sudan  
Swaziland  
Tanzania  
Togo  
Tunisia  
Uganda  
Zaire  
Zambia  
Zimbabwe

**Central Asia**

Armenia  
Azerbaijan  
Georgia  
Kazakhstan

**Appendix B cont.**

Kyrgystan  
Mongola  
Uzbekistan

**South Asia**

Bangladesh  
India  
Maldives  
Nepal  
Pakistan  
Sri Lanka

**Far East**

Brunei  
Cambodia  
Malaysia  
South Korea  
Thailand  
Vietnam

**Pacific Rim**

American Somoa  
Fiji  
French Polynesia  
Macau  
Marshall Islands  
Micronesia  
Midway Island  
Nauru  
New Caledonia  
New Zealand  
Palau  
Papua New Guinea

Tonga

**Appendix B cont.**

Western Samoa

## APPENDIX C

## Initial Regulatory Flexibility Certification

1. The Regulatory Flexibility Act (RFA)<sup>1</sup> requires that an initial regulatory flexibility analysis be prepared for notice-and-comment rulemaking proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."<sup>2</sup> The RFA generally defines "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."<sup>3</sup> In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.<sup>4</sup> A small business concern is one which: (a) is independently owned and operated; (b) is not dominant in its field of operation; and (c) satisfies any additional criteria established by the Small Business Administration ("SBA").<sup>5</sup>

2. The Order and Notice of Proposed Rulemaking ("*Notice*") pertains to the Comsat Corporation ("Comsat").<sup>6</sup> The *Notice* indicates that the Commission will consider replacing the current rate of return regulations applicable to Comsat's INTELSAT<sup>7</sup> switched voice, private line and occasional-use video services in the markets, where Comsat continues to be subject to dominant common carrier regulation, with an alternative form of incentive based regulation similar to a price cap. The *Notice* tentatively concludes: (a) that any alternative incentive based regulation plan that the Commission adopts for Comsat with respect to its services in dominant markets remain in effect for an indefinite period of time, rather than expiring after three years; and (b) that any alternative incentive based regulation plan that the Commission adopts for Comsat with respect to its services in dominant markets allow all users of Comsat's service in dominant markets to benefit from a competitive or "transaction" rate rather than the non-discounted tariffed rate that would result from Comsat's uniform pricing commitment. In addition, any alternative incentive based regulation plan that the Commission would adopt for Comsat should allow users of Comsat's service to non-competitive markets to benefit from rates that are reduced due to increases in efficiency and productivity. The *Notice* invites Comsat and other interested parties to comment on these tentative conclusions. If commenters believe that the proposed rules discussed in the *Notice* require additional RFA analysis, they should include a discussion of this in their comments.

3. The Commission has not developed a definition of small entities applicable to satellite service licensees. Therefore, the applicable definition of small entity is the definition under the SBA rules applicable to Communications Services "Not Elsewhere Classified." This definition provides that a small entity is one with \$11 million or less in annual receipts.<sup>8</sup> The proposed rules will apply only to Comsat's INTELSAT services in markets where the Commission finds Comsat dominant. Comsat's 1996 INTELSAT revenues were in excess of

\$11 million. Thus, Comsat does not qualify as a small entity under the SBA's definition. We therefore certify that the proposed rules in this *Notice* will not apply to any small entities.

4. The Commission's Office of Public Affairs, Reference Operations Division, will send a copy of this *Notice*, including this certification, to the Chief Counsel for Advocacy of the SBA.<sup>9</sup> A summary of the request for comments contained in the *Notice* will also be published in the Federal Register.

1. 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").
2. 5 U.S.C. § 605(b).
3. *Id.* § 601(6).
4. *Id.* § 601(3) (incorporating by reference the definition of "small business concern" in Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."
5. Small Business Act, 15 U.S.C. § 632.
6. The *Notice* is part of a Commission order reclassifying Comsat as a non-dominant common carrier in certain INTELSAT markets.
7. INTELSAT is an acronym for the International Telecommunications Satellite Organization ("INTELSAT").
8. 13 CFR § 121.201, Standard Industrial Classification (SIC) Code 4899.
9. 5 U.S.C. § 605(b).

**Separate Statement of Commissioner Harold W. Furchtgott-Roth****In re: Order and Notice of Proposed Rulemaking****Application of 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.**

Today's action on Comsat's petition for forbearance is not the end of the story; there are other issues that the Commission must address. Accordingly, we have pledged to expeditiously initiate a proceeding on competitors' direct access to INTELSAT satellites. More importantly, we recognize that interrelated issues currently are being addressed by Congress. I look forward to receiving guidance from Congress in the coming months and, of course, to following any statutory direction given to us.

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