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

In the Matter of	)	
	)	
Lockheed Martin Corporation,	)	
COMSAT Corporation, and	)	
COMSAT Digital Teleport, Inc.,	)	
	)	
Assignors	)	IB Docket No. 02-87
	)	
and	)	
	)	
Intelsat, Ltd., Intelsat (Bermuda), Ltd.,	)	
Intelsat LLC, and Intelsat USA License	)	
Corp.,	)	
	)	
Assignees	)	
	)	
Applications for Assignment of	)	
Earth Station Licenses and	)	
Section 214 Authorizations	)	

OPPOSITION OF LOCKHEED MARTIN CORPORATION, *ET AL.*, AND INTELSAT, LTD., *ET AL.* TO PETITIONS TO DENY AND PETITIONS TO CONDITION GRANT

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TABLE OF CONTENTS

Page

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	)	
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Lockheed Martin Corporation ("Lockheed Martin"), COMSAT Corporation, and COMSAT Digital Teleport, Inc. (collectively "COMSAT"), together with Intelsat, Ltd., Intelsat (Bermuda), Ltd., Intelsat LLC, and Intelsat USA License Corp (collectively "Intelsat") (COMSAT and Intelsat collectively the "Applicants") hereby submit their joint opposition to the petitions to deny and petitions to condition grant filed in the above-captioned proceeding. As a general matter, these petitions fail to identify any anticompetitive harms or other problems that can be fairly characterized as outgrowths of the proposed acquisition by Intelsat of COMSAT World Systems ("CWS"). Instead, they simply seek to leverage the pending assignment applications ("Application") to extract business concessions and benefits from CWS. In doing so, the petitions posit an unsupported and erroneous market definition and misconstrue the

meaning and implications of relevant provisions of the ORBIT Act, which stand as a bar to many of the unwarranted conditions sought.

I. INTRODUCTION AND SUMMARY

Three of the Applicants' carrier-customers—AT&T, WorldCom, and Sprint—as well as Verestar seek the imposition of conditions that, by government fiat, would radically alter the terms of their existing contractual relations with CWS. In addition, the requested conditions would hobble the private carrier operations of the now-privatized Intelsat through the imposition of a variety of stringent common carrier regulations, including rate prescriptions and structural separations.

Intelsat's proposed acquisition of CWS did not create the commercial arrangements that these carriers now seek to alter. The carriers are simply treating the pendency of the merger as a fortuity to be exploited in pursuit of a particular kind of "transaction tax"—a tactic that should be promptly and forcefully rejected by the Commission.

It is clear, moreover, that the demands put forth by these petitioners are devoid of supporting economic or legal analysis. For example, when Sprint and WorldCom characterize the provision of wholesale Intelsat services as a distinct product market, they do so without any effort to provide a serious economic analysis of the marketplace. In addition, they ignore established FCC precedent recognizing the existence of much broader markets that include multiple providers of both satellite and cable services (including their own undersea cable offerings).

In addition, in advancing arguments for imposition of common carriage obligations and structural separations, the petitioners ignore governing legal principles. In particular, certain petitioners attempt to find support for a common carriage mandate in the ORBIT Act provision establishing "Level III direct access" for Intelsat's treaty-based predecessor, the

intergovernmental organization ("IGO") known as INTELSAT.[1] These arguments fail to acknowledge that: (1) this provision ceased to be operative upon privatization; (2) the combination of Intelsat and CWS makes all access "direct"; and (3) a major post-privatization objective of the ORBIT Act was to enable Intelsat and its commercial satellite competitors to operate with a comparable degree of business flexibility.

The customer petitioners also ignore the fact that most of their claims and demands have been rejected in other FCC proceedings—specifically, those dealing with: (1) CWS's status as a non-dominant carrier, (2) direct access to the former IGO, and (3) the availability of capacity on the Intelsat system. Most recently, in the *Capacity Order*, the Commission rejected demands for abrogation of the existing CWS customer contracts and opted instead for a program of government-monitored commercial negotiations. As the agency is well aware, CWS has engaged (or sought to engage) in such negotiations, and has done so vigorously and in good faith. Indeed, in its most recent contract with COMSAT, WorldCom expressly acknowledged that the agreement represented "a satisfactory commercial solution of all current issues between the Parties relating to the provision of INTELSAT capacity" and affirmed that "further consideration of a regulatory solution of these issues is not required." Accordingly, there is no basis for further governmental intervention in these private contractual matters—and certainly no basis for such intervention in this assignment proceeding. Furthermore, consideration on the merits of these unfounded requests would force the Commission to confront the limitations of its authority under the ORBIT Act to abrogate contracts—and thereby also raise significant Fifth Amendment issues.

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[1] In keeping with the modification to the Intelsat name that accompanied its privatization, the fully capitalized term "INTELSAT" is used herein to refer to the pre-privatization IGO.

Finally, it should be noted that the rambling, 33-page petition submitted by LRT features a miscellaneous collection of claims, almost all of which previously have been considered and rejected by the Commission. The agency should firmly reject LRT's petition as meritless.

II. THE ASSIGNMENT IS CONSISTENT WITH RECENT STATUTORY AND REGULATORY DEVELOPMENTS

Petitioners' arguments for the imposition of conditions on the proposed transaction revive objections that they have repeatedly raised in earlier proceedings—all of which well predate the acquisition at issue here. Their omission of this highly relevant history warrants a brief review of the pertinent Commission and Congressional actions. As shown in the chronological summary below, government policymakers already have addressed the vast majority of petitioners' concerns or the underlying predicates for them. Still other issues already are being addressed in a separate pending FCC docket. The relevant developments are:

- ***COMSAT Non-Dominance Order* (1998)**[2]—As part of a series of deregulatory actions in the mid-1990s, the Commission determined that by virtue of vigorous competition in the U.S. international marketplace, COMSAT was a non-dominant carrier for the vast majority of the services it provided. In reaching that determination four years ago, the FCC recognized broad service market definitions that reflected the competition already flourishing. In the order, the agency concluded that COMSAT competed in the markets for switched voice and private line services against many submarine fiber optic cables and alternative satellite systems, while COMSAT's main competitors in the video services market were other satellite operators. The Commission at that time also recognized the potential for other satellite systems to compete more effectively for switched traffic and for cables to compete for video traffic—a development that has since come to pass.[3]

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[2] *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*, 13 FCC Rcd. 14083, 14099 (1998) (Order and Notice of Proposed Rulemaking) ("*COMSAT Non-Dominance Order*"). *See also Comsat Corporation Petition for Partial Relief From the Current Regulatory Treatment of Comsat World Systems' Video and Audio Services*, 12 FCC Rcd. 12059, 12084 (1997) (Order) ("*COMSAT Streamlined Video Order*"); *COMSAT Corporation; Petition for Partial Relief from the Current Regulatory Treatment of Comsat World Systems' Switched Voice, Private Line, and Video and Audio Services*, 11 FCC Rcd. 9622, 9623 (1996) (Order) ("*COMSAT Partial Relief Order*").

[3] *See COMSAT Non-Dominance Order*, 13 FCC Rcd. at 14122-23.

- ***Alternative Rate Regulation Order* (1999)**[4]—Shortly after deregulating COMSAT's thick-route services in the *Non-Dominance Order*, the Commission concluded that it also would be appropriate to streamline its requirements for regulating COMSAT's "thin route" traffic, which at the time generated only about 8 percent of the CWS revenues. In establishing this "alternative rate regulation" scheme, the FCC confirmed that the broad service market definitions identified in the *COMSAT Non-Dominance Order* remained valid. In addition, the agency recognized that the number of thin routes was declining as new competition emerged, and that the regulatory scheme should be adjusted over time to reflect marketplace changes.

- ***Direct Access Order* (1999)**[5]—From the beginning of its existence until late 1999, COMSAT was the exclusive provider of INTELSAT capacity to customers in the United States. When the Commission decided to implement "Level III direct access"—*i.e.*, to allow U.S. customers to take service directly from INTELSAT—COMSAT maintained its contractual rights to certain INTELSAT capacity and continued to serve existing customers and seek out new business. U.S. customers, on the other hand, obtained the option of dealing directly with the IGO to obtain new services, and to move their existing traffic pursuant to contracts with Intelsat once their agreements with COMSAT came to an end. During the Direct Access proceeding, carriers argued that they should be able to void their contracts with COMSAT and be granted a "fresh look" at renegotiating those contracts. In mandating direct access, however, the Commission concluded that the competitive state of the marketplace did not justify carriers' calls for fresh look.

- **Enactment of the ORBIT Act (2000)**[6]—Congress enacted this statute in order to eliminate the outdated regulatory scheme that had shaped INTELSAT as an IGO and COMSAT as the U.S. Signatory to that body. The legislation contained many provisions intended to spur the privatization of INTELSAT in a pro-competitive manner, including the elimination of privileges and immunities that once shielded INTELSAT and COMSAT from suit. The ORBIT Act also mandated that U.S. customers be allowed to purchase capacity directly from INTELSAT prior to privatization. Finally, one provision in the statute called upon the FCC to review opportunities for Level III access to the system's capacity while also explicitly denying the agency any power to abrogate contracts in connection with that review.

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[4] *Comsat Corporation; Policies and Rules for Alternative Incentive Based Regulation of Comsat Corporation*, 14 FCC Rcd. 3065, 3065 (1999) (Report and Order) ("*Alternative Rate Regulation Order*") (finding the percentage of COMSAT business subject to effective competition stood at 92 percent as of 1998). The Commission subsequently permitted COMSAT to exit the business of providing occasional-use video services, so that element of the thin-route regulatory scheme is no longer operative. *See Section 63.19 Application of COMSAT Corporation; For Authority under Section 214 of the Communications Act to Discontinue the Provision of Occasional-Use Television, Occasional-Use IBS and Part-Time IBS Services*, 16 FCC Rcd. 22396, 22399 (2001) (Memorandum Opinion and Order).

[5] *Direct Access to the Intelsat System*, 14 FCC Rcd. 15703, 15725 (1999) (Report and Order) ("*Direct Access Order*").

[6] *Open Market Reorganization for the Betterment of International Telecommunications Act*, Pub. L. No. 106-180, 114 Stat. 48 (March 17, 2000) ("ORBIT Act").

- ***Capacity Order* (2000) and Ongoing Capacity Proceeding**[7]—In conformance with an ORBIT Act directive, the Commission opened a proceeding to review whether there was "sufficient" opportunity for customers that desired to obtain capacity directly from INTELSAT to do so. In its initial *Order* in the docket, the FCC concluded that the appropriate way to deal with this issue was to require COMSAT and potential direct access customers to "negotiate in good faith to find commercial solutions." The agency also stated that it would monitor the negotiations and consider other "appropriate action" if warranted. Since 2000, the Commission's staff has been regularly consulted by Lockheed Martin/COMSAT as negotiations have continued.

- ***Intelsat Licensing Order* (2000)[8] and Subsequent Privatization (2001)**—The Commission reviewed and approved the issuance of U.S. space station licenses to Intelsat in the months prior to the IGO's formal privatization on July 18, 2001 (at which point the licenses became effective). In taking those actions, the FCC concluded that Intelsat had privatized in a pro-competitive manner. The Commission specifically recognized that, by the terms of its privatization, Intelsat would provide services through contractual vehicles—its Distribution Agreement and Wholesale Customer Agreement—that treat former Signatories and non-Signatories the same with respect to the provision of transmission capacity. The agency concluded that the privatized Intelsat thereby satisfied "the intent of the ORBIT Act" to "allow for equal access" to its system.[9] The Commission also rejected calls to impose common carrier obligations on Intelsat's services, finding that nothing in the company's offerings or current marketplace conditions triggered the *National Association of Regulatory Utility Commissioners v. FCC* ("*NARUC I*") standard for mandating common carriage.[10]

- **Intelsat Privatization and the 1998 WTO Agreement**—As part of the privatization process, Intelsat pledged not to seek exclusive access to the markets of its former

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[7] *Availability of INTELSAT Space Segment Capacity to Users and Service Providers Seeking To Access INTELSAT Directly*, 15 FCC Rcd. 19160 (2000) (Report and Order) ("*Capacity Order*").

[8] *Applications of Intelsat LLC; For Authority to Operate, and to Further Construct, Launch, and Operate C-band and Ku-band Satellites that Form a Global Communications System in Geostationary Orbit*, 15 FCC Rcd. 15460 (2000) (Memorandum Opinion Order and Authorization) ("*Intelsat Licensing Order*"), *recon.*, 15 FCC Rcd. 25234 (2000) (Order and Reconsideration); *see also Applications of Intelsat LLC; For Authority to Operate, and to Further Construct, Launch and Operate C-band and Ku-band Satellites that Form a Global Communications System in Geostationary Orbit*, 16 FCC Rcd. 12280 (2001) (Memorandum Opinion Order and Authorization) ("*Intelsat Privatization Order*").

[9] *Intelsat Privatization Order*, 16 FCC Rcd. at 12302.

[10] *See id.* 12300-02 (citing *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1976) ("*NARUC I*")). The Commission noted that Intelsat was not itself offering the kind of services subject to "thin route" tariff protections under the *Alternative Rate Regulation Order*. *See id.* 12302. The Applications submitted in this proceeding make clear that Intelsat, in acquiring the CWS thin-route business for switched voice/private line service, has committed to continue to offer those services on a common carriage basis and subject to the existing rate protections.

Signatories.[11] Similarly, the WTO Agreement has served to open formerly exclusive markets to new entrants: once WTO member nations allow Intelsat, LLC, a U.S. entity, to operate within their markets, they are obligated under the "Most Favored Nation" and "National Treatment" provisions to open their markets to all other providers from the United States and other WTO countries and to treat those foreign providers as they do their own domestic service providers.

The developments noted above reflect two intertwined forces at work in the U.S. international telecommunications marketplace during the last decade: the emergence of strong competition among providers of international telecommunications services, and policymakers' efforts to modify the laws and regulations governing INTELSAT and COMSAT to reflect these competitive changes. As a result, INTELSAT was encouraged to remake itself into the conventional private company that it now is—subject to the same market forces and regulatory obligations, and granted the same structural and operational flexibility, as other commercial satellite providers.

The *Intelsat Privatization Order* reflects the Commission's expectation that the new company, consistent with the goals of U.S. policymakers, would "have the same flexibility as any other commercial carrier to negotiate individual contracts with customers."[12] Since privatization, Intelsat has been moving forward on multiple fronts consistent with its new status. Like its satellite and fiber optic cable competitors, Intelsat currently operates as a private carrier and expects that it will respond to market demands in the future largely through private carriage offerings. Upon closing the CWS transaction, Intelsat like several of its rivals will offer some services on a common carrier basis (through a separate corporate entity). In addition, as explained in the Application, completion of the proposed transaction will result in the immediate termination of the existing capacity agreements between Intelsat and COMSAT for capacity not

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[11] *See Intelsat Privatization Order*, 16 FCC Rcd. at 12293-94, 12300, 12302-03.

[12] *Id.* 12302.

already sold by COMSAT. This means that any Intelsat capacity committed to COMSAT that becomes available as a result of the expiration of contracts with COMSAT's customers will be accessible for new business in a common pool of Intelsat capacity; this capacity pool will continue to expand as the existing contracts between COMSAT and its customers expire. All of these developments comport with and advance long-standing goals of U.S. policymakers.

III. THE CONDITIONS SOUGHT BY THE APPLICANTS' CUSTOMERS ARE PREMISED ON ANALYTICALLY DEFECTIVE FOUNDATIONS AND SHOULD BE CATEGORICALLY REJECTED

The extensive merger conditions requested by the customer petitioners in this proceeding are rooted in analytical foundations that are fundamentally flawed. First, the conditions sought clearly derive from parochial commercial motivations, none of which has even a remote connection to the proposed transaction. The Commission should flatly reject the petitions for this reason alone. In addition, all of these petitions are analytically flawed. WorldCom/Sprint build their entire case upon an absurdly narrow market definition—consisting solely of satellite capacity provided via the Intelsat system. Because this purported "market" is contradicted by a long line of Commission precedent and is unsupported by economic analysis, it follows that there is no basis for petitioners' related competitive concerns and proposed regulatory "conditions." Moreover, the petitions that cite to the ORBIT Act are anchored in legal standards that are irrelevant in today's regulatory environment and rest on a fundamental misunderstanding of the statute. Given the unsound premises on which these petitions rest, it necessarily follows that the conditions sought by the customer petitioners are equally flawed. The agency therefore should decisively reject them.

A. The Factual and Legal Underpinnings of the Customer Petitions Are Fundamentally Flawed

1. Petitioners Request Conditions That Have No Logical Connection to the Proposed Transaction

At the heart of the customer petitions are commercial matters that have no bearing on the proposed transaction. Rather than reflecting any legitimate competitive or policy-oriented concerns about the proposed combination of Intelsat and CWS, the complaints set forth in these petitions stem from a desire to achieve substantial government-mandated revisions to pre-existing contractual agreements that the petitioners voluntarily had accepted.[13] The proposed acquisition will have no impact on these contracts. In essence, these petitions were filed with the sole aim of altering past commercial agreements and gaining advantage in future negotiations.

The Commission has repeatedly recognized that there is no basis for imposing conditions on a proposed transaction that are not "merger specific." Specifically, the FCC has noted that its review must "focus[] on the potential for harms and benefits to the policies and objectives of the Communications Act that flow from the proposed transaction . . . ."[14] In this regard, the agency has emphasized that it "recognizes and discourages the temptation and tendency for parties to use the license transfer review proceeding as a forum to address or influence various disputes with one or the other applicants that have little if any relationship to the transaction. . . ."[15] These cautionary principles plainly apply to the matters raised by the petitions submitted here,

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[13] As support for the extensive conditions it requests, AT&T notes that such conditions can "provide[] important leverage in negotiations with Comsat." *See* AT&T Petition to Deny at 5 n.13, IB Docket No. 02-87 (filed May 28, 2002) ("AT&T Petition").

[14] *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc. to AOL Time Warner Inc.*, 16 FCC Rcd. 6547, 6550 (2001) (Memorandum Opinion and Order).

[15] *Id.*

particularly because these issues have been or can be addressed elsewhere, including in a separate rulemaking proceeding that is now pending.

2. The Market Definition Set Forth in the WorldCom/Sprint Petition Is Unsupported by Economic Analysis and Is Inconsistent with Well-Established FCC Precedent

WorldCom and Sprint premise their entire petition on contrived claims concerning the structure of the marketplace.[16] Without providing supporting legal precedent or economic analysis, they assert that the relevant product market for purposes of analyzing the proposed merger consists solely of "U.S. wholesale Intelsat services."[17] They thus exclude a plethora of vibrant commercial satellite and submarine cable enterprises that the Commission repeatedly has found to be competitive with Intelsat and COMSAT. Petitioners then claim that, within this artificially constructed product market, the proposed merger would result in a horizontal combination of the largest and second-largest providers—CWS and Intelsat—and in a purported "significant vertical integration" of wholesale space segment and retail businesses.[18]

The Commission has concluded on numerous occasions that Intelsat and COMSAT compete with many alternative vertically-integrated satellite and fiber optic submarine cable systems.[19] The FCC's competitive analysis in the *COMSAT Non-Dominance Order*, for example, confirmed prior findings that "cable and satellite are fungible technologies" that should be considered as part of the same "product market" for the transmission of international switched

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[16] Tellingly, none of the other petitioners or commenters in this proceeding even has attempted to tie its request for merger conditions to any type of market analysis.

[17] Petition of WorldCom and Sprint to Condition Grant at 2, 10, IB Docket No. 02-87 (filed May 28, 2002) ("WorldCom/Sprint Petition").

[18] *Id.* at 8, 9. This argument is not only flawed as a matter of competition analysis but also is contrary to an important policy underlying the ORBIT Act—to foster the transformation of Intelsat into a conventional private company that would compete, and be regulated, like its rivals in the marketplace.

[19] For a meaningful competitive analysis, "the relevant market must include all products 'reasonably interchangeable by consumers for the same purposes.'" *United States v. Microsoft*, 253 F.3d 34, 52 (D.C. Cir. 2001) (en banc) (quoting *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956)).

voice services.[20] In the *COMSAT Direct Access Order*, the FCC observed that "over 77 U.S. facilities-based carriers operating in the United States" were vigorously competing with COMSAT to provide "a wide array of voice, data and video services over fiber optic cable and satellite."[21] The agency similarly has recognized that Intelsat now "faces competition globally from both . . . satellite systems and fiber optic submarine cable systems."[22] Moreover, in recent merger proceedings involving U.S. international telecommunications service providers, the Commission has grouped both satellite and fiber optic cable providers into a broadly defined U.S. international telecommunications product market.[23]

Given the baseless nature of the WorldCom/Sprint market definition, it follows that the asserted "competitive concerns" that rest on this foundation are equally infirm.[24] Thus, there is no foundation for claims that the proposed transaction will result in any "horizontal" or

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[20] *COMSAT Non-Dominance Order*, 13 FCC Rcd. at 14103. As noted in the initial Application, although the FCC formerly categorized COMSAT and other satellite entities as competing in specific service-oriented markets—such as the "switched voice" and "private line" markets—the agency recently has suggested that it is more appropriate to conceive of satellite capacity as a broader product offering because of the ability to provide multiple services over the same satellite capacity. *See, e.g., Application of General Electric Capital Corp. and SES Global for Consent to Transfer Control of Licenses and Authorizations Pursuant to Sections 214(a) and 310(d) of the Communications Act*, 16 FCC Rcd. 17575, 17591-92 (2001) (Order and Authorization) ("*GE/SES Global Order*").

[21] *Direct Access Order*, 14 FCC Rcd. at 15725.

[22] *Intelsat Licensing Order*, 15 FCC Rcd. at 15463-64.

[23] *See, e.g., GE/SES Global Order*, 16 FCC Rcd. 17575; *Application of VoiceStream Wireless Corp., Poertel, Inc., Transferors, and Deutsche Telekom AG, Transferee, for Consent to Transfer Control of Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act*, 16 FCC Rcd. 9779 (2001) (Memorandum Opinion and Order) (*"Deutsche Telekom/VoiceStream Order"); ICO-Teledesic Global Limited; Application for Transfer of Control of Space Station License of Teledesic LLC to ICO-Teledesic Global Limited*, 16 FCC Rcd 6403, 6406 (2001) (Memorandum Opinion Order and Authorization; *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, 13 FCC Rcd 18025, 18039, 18070 (1998) (Memorandum Opinion and Order).

[24] WorldCom/Sprint Petition at 2.

"vertical" competitive concerns.[25] Accordingly, the Applicants have received "early termination" of the waiting period under the Hart-Scott-Rodino Antitrust Improvements Act.[26]

3. Several of the Petitions Are Built on Obsolete Legal Standards and a Fundamental Misunderstanding of the ORBIT Act

In order to bolster their requests for imposing extensive conditions on the proposed transaction, several of the petitions rely on legal standards that effectively have been superseded by the privatization of Intelsat. The AT&T petition is mired in antiquated legal assumptions that predate Intelsat's privatization and ignore today's regulatory environment.[27] The WorldCom/Sprint petition similarly attempts to use the now legally moot concept of "direct access" in support of its request for conditions.[28] In a one-paragraph argument, Verestar calls for fresh look rights with respect to its existing contracts with COMSAT, a request that would force the FCC to confront the limitations of its authority under the ORBIT Act to abrogate contracts.[29]

Put plainly, the ORBIT Act and the privatization of INTELSAT have converted the former IGO into a private company—designed to compete on an equal footing with other commercial satellite entities such as PanAmSat and SES Global. Recent law and policy changes, outlined above in Section II, demonstrate that there is no basis to claim that Intelsat should be subject to a different regulatory regime from that governing other satellite firms. To the contrary, imposing such inequitable obligations on Intelsat would be directly contrary to a

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25 *Id.* at 8-9.

26 *See* Early Termination Grant Letter from Sandra M. Peay, Senior Contact Representative, Federal Trade Commission, to Bert Rein, Wiley Rein & Fielding (April 5, 2002).

27 *See* AT&T Petition at 2-8.

28 *See* WorldCom/Sprint Petition at 3-5.

29 *See* Letter of Verestar, Inc. to Condition Grant, IB Docket No. 02-87 (filed May 24, 2002) ("Verestar Letter"). The Applicants admit that it is difficult to discern the legal basis for Verestar's request, because it specifies none.

critical purpose and intent of the ORBIT Act: creating parity in the regulatory treatment of Intelsat and competitive satellite operators.

AT&T in particular seriously misconstrues the terms of the statute. It contends that the ORBIT Act entitles it to "direct access to INTELSAT telecommunications services and space segment capacity" at "the level commonly referred to by INTELSAT . . . as 'Level III.'"[30] As a matter of statutory construction, AT&T is simply wrong. "Direct access" ceased to have any legal meaning or business significance when INTELSAT privatized in July 2001. Section 641 of the ORBIT Act, upon which AT&T relies, provides only for "direct access to *INTELSAT* telecommunications services."[31] The ORBIT Act carefully defines the term "INTELSAT" to mean the "International Telecommunications Satellite Organization established pursuant to the Agreement Relating to the International Telecommunications Satellite Organization."[32] In contrast, the private Intelsat is what ORBIT defines a "successor entity": "any privatized entity created from the privatization of INTELSAT."[33] ORBIT makes no provision for "direct access" to "successor entities." Thus, AT&T's entire argument lacks a statutory foundation. In any case, the proposed transaction will not change the fact that carriers already have the option of purchasing Intelsat capacity either directly from Intelsat itself or from any of its resellers—an option uniquely offered by Intelsat.

Recent Commission action is consistent with the language of the ORBIT Act. In its 2000 *Capacity Order*, the FCC acknowledged that the specific "direct access" provision in Section 641(b) of the ORBIT Act refers only to "INTELSAT," and that "INTELSAT" and "successor

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30 AT&T Petition at 2 (citing 47 U.S.C. § 765(a)) (emphasis omitted).

31 47 U.S.C. § 765(a) (emphasis added).

32 ORBIT Act, § 681(a)(1).

33 *Id.* § 681(a)(7).

entity" are separate legal entities.[34] Nevertheless, the agency—in *dictum* that AT&T now seizes upon—suggested that it might have some regulatory power post-privatization to ensure that the benefits of direct access are not lost.[35]

Although that legal issue is not resolved, subsequent events have addressed the Commission's concerns. As noted above in Section II, after thoroughly reviewing the final privatization documents, the FCC in the *Intelsat Licensing Order* held that the privatization would allow direct access users the same opportunities as former Signatories to obtain Intelsat capacity and, thus, would carry forward the intent of Section 641.[36] The Commission's later report to Congress reiterates the same finding.[37] Last but not least, AT&T ignores the record of successful commercial negotiations pursuant to the *Capacity Order*.[38] Thus, the factors giving rise to the Commission's reservations regarding the expiration of the ORBIT Act provisions related to INTELSAT IGO have been satisfactorily addressed.

Accordingly, AT&T's misconstruction of the ORBIT Act provides no more foundation for imposing conditions on the proposed transaction than does WorldCom's and Sprint's mischaracterizations of the competitive state of the marketplace. Moreover, AT&T's application of now-obsolete ORBIT Act terminology to a post-privatization environment should not obscure

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34 *Capacity Order*, 15 FCC Rcd. at 19180.

35 *Id.* This *dictum* falls far short of resolving the legal argument over the scope of the FCC's power to act post-privatization. In any event, the Commission itself deferred a definite interpretation until a later date, following its consideration of the final privatization and the result of the commercial negotiations pursuant to the *Capacity Order*.

36 *Intelsat Privatization Order*, 16 FCC Rcd. at 12302.

37 *FCC Report To Congress As Required By The ORBIT Act*, FCC 01-190, at 8 (June 15, 2001).

38 AT&T also refers to COMSAT's alleged mark-up over the former Intelsat Utilization Charge as support for its call for conditions in this proceeding. *See* AT&T Petition at 3 n.8. In addition to the fact that this issue has no relevance in the post-privatization era, the Commission has found that the alleged "mark-up" calculation is not a useful indicator for measuring COMSAT's profit margins. *See* Letter from FCC to Rep. Thomas Bliley, Chairman, House Telecommunications Subcommittee, December 22, 1997.

the fact that the policymakers' goal of obtaining the benefits of direct access has been achieved. AT&T and other customers can and do deal "directly" with Intelsat today, negotiating carriage terms just as customers do with any other satellite service provider. The proposed transaction will further enhance the benefits of direct access through the reversion of COMSAT capacity to Intelsat upon the expiration of COMSAT customer contracts.

B. The Conditions Requested by the Customer Petitioners Are Illogical and Should Be Flatly Rejected

As reflected in the preceding discussion, there is no legitimate basis for the extensive conditions that the Applicants' customers seek to impose on the proposed transaction. When the requested conditions are viewed under prevailing market conditions and the appropriate regulatory standards, it immediately becomes clear that none of them has any legal or logical foundation:

- The calls by WorldCom/Sprint and Verestar to modify their existing CWS contracts are groundless in light of the abundant competition for U.S. international facilities and the stringent Commission standard for imposing this extraordinary remedy (neither of which is discussed by the parties seeking these conditions).
- The requests of AT&T and WorldCom/Sprint for common carriage and other nondiscrimination conditions ignore the well-established legal test for imposing such burdensome regulations, as well as the FCC's prior decision to reject the imposition of such conditions on Intelsat.
- Likewise, the calls from WorldCom, Sprint, and AT&T for structural separation conditions are hopelessly devoid of legal or economic justification.
- Finally, WorldCom and Sprint do not even attempt to support their request to substantially modify the existing thin-route regulations.

The discussion below sets forth the bases upon which the Commission should reject each of these requests.

1. The Commission Should Reject Petitioners' Attempts to Use This Proceeding as a Vehicle for Achieving Governmental "Abrogation" of Existing Agreements

In their joint petition, WorldCom and Sprint ask the Commission to radically revise the circuit prices in their existing long-term carrier contracts with COMSAT.[39] Despite their careful avoidance of the term "fresh look" and their unsupported claim that their requested relief would not result in the "abrogation or modification" of existing contracts, there can be no legitimate dispute that these petitioners are asking the agency to reopen their existing carrier agreements—and either directly or indirectly force a change in the price terms. These thinly veiled calls for governmental modification of existing contractual arrangements, as well as Verestar's express request for fresh look, have no legitimate factual or legal basis. First, they plainly are not germane to the proposed transaction—and the Commission already is addressing the commercial disputes underlying petitioners' requests in a separate proceeding in any case. Furthermore, these petitioners do not even attempt to argue that their requests meet the rigorous standard for abrogating contracts or satisfy the rigorous procedural and substantive requirements that must be met to prescribe a carrier's rates. Nor do they confront the implications of Section 641(c) of the ORBIT Act, which provides an explicit bar on the abrogation of contracts.[40]

a. The FCC already is addressing petitioners' commercial complaints in a separate, ongoing proceeding

Even if the Commission were inclined to give some credence to WorldCom's and Sprint's desires to evade their contractual obligations, this is not the proper proceeding in which to consider the issue. A separate FCC proceeding has been open for more than two years to

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39 *See* WorldCom/Sprint Petition at 12.

40 ORBIT Act, §641(c). Because COMSAT has a recognized property interests in these contracts, grant of the requested conditions would violate the Takings Clause of the Fifth Amendment to the United States Constitution.

evaluate the opportunities for accessing Intelsat capacity directly.[41] During the course of the Capacity Proceeding, the Commission has found no reason to grant WorldCom and Sprint the heavy-handed regulatory remedies that they once again seek here—indeed, as noted below, WorldCom abandoned its concerns in that proceeding some time ago. No different result is warranted by virtue of Intelsat's proposed acquisition of CWS.

The Commission opened the Capacity Proceeding in May 2000, as required by the ORBIT Act, to determine "if users or providers of telecommunications services have sufficient opportunity to access INTELSAT space segment capacity directly from INTELSAT."[42] Both WorldCom and Sprint have participated in the proceeding.[43] In September 2000, the FCC concluded that users and providers at that time did not have sufficient opportunity to access INTELSAT capacity—largely due to a capacity shortage resulting from high demand—but the agency could not make a determination as to the "near future."[44] Due to the myriad business issues involved, the agency prudently chose to rely on commercial discussions between COMSAT and other interested parties to address this capacity-related matter. Notably, of the

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41 *See Availability of INTELSAT Space Segment Capacity to Users and Service Providers Seeking To Access INTELSAT Directly*, 15 FCC Rcd 10606 (2000) (Notice of Proposed Rulemaking) ("Capacity Proceeding"); *see also* ORBIT Act, § 641(b).

42 *Capacity Order*, 15 FCC Rcd. at 10608 (quoting ORBIT Act, §641(b)).

43 Repeating assertions from the Capacity Proceeding, WorldCom and Sprint claim in their petition that "most orders for direct access were rejected by Intelsat because COMSAT already has already cornered nearly all of the capacity," some of which "was sitting idle in COMSAT's capacity pool." WorldCom/Sprint Petition at 5. As COMSAT already has explained to the Commission, this claim has no factual basis. COMSAT has not "warehoused" capacity by "rolling extensions" of the capacity leased from Intelsat and has not reserved future capacity without first having a commitment from an identified customer. *See* Response of Lockheed Martin Corporation at 9, IB Docket No. 00-91 (filed July 25, 2000).

44 *Capacity Order*, 15 FCC Rcd. at 19175. COMSAT has sought judicial review of this decision due to certain erroneous factual findings made by the Commission therein. *See COMSAT Corp. v. FCC*, Case No. 00-1509 (D.C. Cir. filed Dec. 1, 2000).

more than 200 COMSAT customers, only a handful expressed any interest in this opportunity for regulatory intervention in business negotiations.[45]

The Commission's decision to rely on "commercial negotiations" in the Capacity Proceeding has proven to be completely justified. Lockheed Martin has been in continuous contact with FCC staff, and has kept it closely apprised of the developments in these business negotiations. Indeed, per the Commission's request, COMSAT submitted a detailed report on the progress of these discussions more than a year ago,[46] and has supplemented the record from time to time since then.[47]

With respect to WorldCom, COMSAT undertook a concerted effort to pursue commercial negotiations. As a result, the parties resolved the only issue that WorldCom raised at that time, which did not concern the prices charged under WorldCom's contracts with COMSAT.[48] In its most recent contract with COMSAT, WorldCom expressly acknowledged that the agreement "was the product of good-faith negotiations between itself and COMSAT as contemplated by the FCC's September Report and Order in IB Docket No. 00-91."[49] It further recognized that the agreement "represent[ed] *a satisfactory commercial solution of all current issues between the Parties relating to the provision of INTELSAT capacity*" and that "further

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[45] Notably, AT&T was not among these few customers.

[46] Letter from Howard D. Polsky to Magalie Roman Salas, IB Docket No. 00-91 (March 13, 2001) ("Polsky Letter").

[47] In particular, Lockheed Martin has requested early termination of the Capacity Proceeding in light of the sufficient opportunity for users and service providers to obtain capacity directly from INTELSAT. *See* Response of Lockheed Martin Corporation at 1, IB Docket No. 00-91 (filed July 25, 2000).

[48] *See* Polsky Letter at 3. Rather, the issue was WorldCom's desire that COMSAT educate foreign correspondent Signatories about the lawfulness of direct access in the United States.

[49] Amendment No. 1 to Agreement, between COMSAT Corporation and WorldCom, Inc., ¶ 16, dated March 8, 2001 (on file with the Commission).

consideration of a regulatory solution of these issues is not required."[50] Thereafter, WorldCom voluntarily decided to transfer *to* COMSAT several hundred circuits that WorldCom had previously leased directly from INTELSAT.[51] In light of the terms of the agreements and WorldCom's own characterization of the contract, the claim WorldCom now makes—that COMSAT, and indeed the Commission itself, left it with no alternatives—strains credibility.

As for Sprint, COMSAT in March 2001 reported that commercial negotiations—involving substantial contacts between the parties over a period of time—had successfully identified Sprint's legitimate capacity needs and concerns and were providing potentially viable means of addressing them. CWS continues to pursue these options with Sprint, but has found that Sprint has little interest in engaging in further negotiations. Sprint apparently simply wants relief from a 10-year contract for IDR circuits that it signed in 1993 admittedly "to get the best rates available at that time."[52] Sprint's desire to deprive COMSAT of the benefits of a commercial bargain that Sprint voluntarily entered into a decade ago plainly does not justify the regulatory intervention it seeks in the Capacity Proceeding, and it certainly does not justify importing Sprint's contractual issues into this assignment proceeding.

Finally, the Commission should reject WorldCom's and Sprint's request that the agency prescribe new contract rates based on the old INTELSAT Utilization Charge ("IUC") in effect at

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50 *Id.* (emphasis added).

51 WorldCom's claim that it was forced to novate its circuits to COMSAT "to satisfy its volume commitments that COMSAT had been able to impose on WorldCom" is belied by the facts. *See* WorldCom/Sprint Petition at 6 n.9. Novation was not a requirement of WorldCom's agreement with COMSAT. These volume commitments were made after the advent of direct access, in two separate contracts (not one, as WorldCom misleadingly states), which were executed in May 2000 and March 2001. The novation was part of the 2001 contract but was not something that COMSAT demanded; rather, it was expressly presented as a further option to already agreed upon terms for that 2001 agreement—one that WorldCom readily accepted. Moreover, at the time the circuits were novated, WorldCom was significantly above its contractually required minimum circuit obligations to COMSAT. WorldCom transferred the capacity to COMSAT because of COMSAT's proven superior ability to manage it, a key ability that Intelsat is seeking to acquire through this transaction.

52 WorldCom/Sprint Petition at 6.

the time the circuits were first purchased. Their request is merely for a retroactive rate prescription for contracts into which they freely entered, and their "buyer's remorse" is not a matter of public interest concern.

Furthermore, as the Applicants already have explained, the proposed transaction will have a positive impact on the amount of Intelsat capacity that will be available for new business going forward—a goal that Sprint and WorldCom have long claimed to seek.[53] Once the acquisition closes, any capacity that becomes available through the expiration of a COMSAT customer contract will become immediately available for Intelsat's use in pursuing new business. As existing contracts with COMSAT's customers continue to expire, more and more capacity will move into the common pool to accommodate new customers—and existing customers who wish to enter into new agreements. In short, the transaction will alleviate the effects of any putative lack of capacity available directly from Intelsat.

b. Petitioners' requests do not meet the stringent test for abrogating existing contracts

Even if Section 641(c) of the ORBIT Act did not already bar the relief that the petitioners seek,[54] their requests manifestly fail to meet the established test required to take such action. The FCC considers fresh look to be an "extraordinary remedy" used only to open markets that otherwise have been closed to competition by virtue of long-term contracts held by a dominant player.[55] Specifically, before subjecting existing contracts to fresh look, the agency must find

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53 Application at 25 n.39. Both WorldCom and Sprint (as well as AT&T) recently have reduced the number of circuits that they route on satellites. That is the only reason why they have been unable to "take advantage of direct access." WorldCom/Sprint at 4. But to the extent that their complaint is that they are having difficulty meeting their existing circuit commitments to COMSAT, they could easily solve this "problem" simply by rerouting a small number of circuits from the fiber-optic cables that they own. There is no reason for the Commission to intervene and release the carriers from commitments into which they voluntarily entered.

54 The Applicants maintain that this statutory provision is an explicit bar to the calls for fresh look here.

55 *Direct Access Order*, 14 FCC Rcd. at 15751.

that: (1) the entity holding the long-term contracts has market power and has exercised that power to create long term contracts to "lock up" the market in such a way that creates unreasonable barriers to competition; and (2) the contractual obligations can be nullified without harm to the public interest.[56]

In its *Direct Access Order*, the Commission rejected earlier calls by customers for fresh look, concluding that COMSAT's provision of INTELSAT space segment capacity satisfied neither prong of this test. The FCC first determined that COMSAT's contracts had not locked up the market for U.S. international capacity: "[o]n a global basis Comsat now accounts for no more than a 15 percent average global market share of the transmission capacity utilized for switched-voice and private line services."[57] The agency noted that "[t]his relatively low market share suggests that these long-term contracts have not acted as a barrier to further competition through fiber optic cable and satellite alternatives."[58] The Commission discounted any "lock up" suggestion in light of the fact that COMSAT's "switched voice customers possess[] 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."[59]

With respect to the second prong of the fresh look standard, the *Direct Access Order* states that the public interest would not be served by nullifying carriers' contractual obligations to COMSAT.[60] Noting that the carriers "entered into [the contracts] on their own accord based

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56 *Id.* at 15752.

57 *Id.* at 15753.

58 *Id.*

59 *Id.* (citing *COMSAT Non-Dominance Order*, 13 FCC Rcd. at 14121).

60 *Id.* at 15754.

on business judgment. . . .," the Commission determined that it would not be "reasoned decision-making to upset previous commitments freely entered into by all parties."[61]

None of the circumstances surrounding Intelsat's proposed acquisition of CWS changes this analysis. In light of the exponential growth of U.S. international services in recent years,[62] COMSAT certainly has come no closer to "locking up" that marketplace since the Commission issued its *Direct Access* decision in 1999. Similarly, the Commission's observation that carriers, such as WorldCom, have significant bargaining power that generally will ensure them sufficient access to U.S. international facilities still holds true.[63]

The contracts that WorldCom, Sprint, and Verestar seek to modify were legal at the time the parties voluntarily entered into them, and they remain so today.[64] Despite WorldCom's and Sprint's unsupported assertions to the contrary,[65] modifying the terms of these agreements unquestionably would constitute an abrogation of existing contracts. Moreover, if the petitioners opt to enter into new contracts with Intelsat, those agreements will be based on prevailing marketplace prices—just as they would be for any customer. Finally, the assertion that there will be pricing "discrepancies" between pre-existing common carrier contracts with COMSAT and new private carriage agreements with Intelsat does not raise a question concerning the

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61 *Id.*

62 *See* Application of COMSAT Corporation, et. al.; For Consent to Assignments, at 26-28, IB Docket No. 02-87 (filed April 5, 2002) ("Application").

63 WorldCom's claim that it neither seeks nor requires COMSAT value-added services is contradicted by its recent behavior. *See* WorldCom/Sprint Petition at 4. When direct access was implemented, WorldCom began purchasing capacity from Intelsat because it offered lower prices than CWS, but subsequently opted to novate all of their circuits to COMSAT specifically because it wanted the level of network management services that it previously had received from COMSAT.

64 The Verestar filing is particularly dismissive of the stringent legal standard: it explicitly requests fresh look in a one-paragraph letter that is substantiated only with an unsupported statement that Verestar would be "unfairly disadvantaged" by the transaction because its existing contracts are at "tariff rates." *See* Verestar Letter.

65 WorldCom/Sprint Petition at 12.

nondiscrimination principles in Section II of the Communications Act. Indeed, the Title II common carrier services offered by COMSAT are not identical to the private carriage options available from Intelsat. WorldCom and Sprint cite no precedent showing otherwise.[66]

2. The Proposed Transaction Provides No Basis for Subjecting Intelsat to Common Carriage or Other Nondiscrimination Obligations

Among their calls for conditions, WorldCom and Sprint ask the Commission to impose certain "nondiscriminatory pricing" obligations on Intelsat's future carriage agreements.[67] AT&T goes even further, asking the Commission to impose nondiscriminatory pricing mandates on the combined Intelsat/CWS and to regulate it as a common carrier.[68] Neither petition seriously addresses the well-established legal standard set forth in *National Association for Regulatory Utility Commissioners v. FCC* ("*NARUC I*") for subjecting a communications entity to common carriage regulation—a particularly notable omission given that their calls for common carriage obligations would apply to only one non-dominant provider in a crowded marketplace.[69] Moreover, petitioners provide no basis for overturning FCC precedent that rejected previous requests to subject Intelsat to such regulation.

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66 WorldCom/Sprint Petition at 7.

67 WorldCom/Sprint Petition at 12-13. Among their requests for nondiscriminatory treatment, WorldCom and Sprint specifically ask that the Commission require the new Intelsat to provide the same "IDR-IBS exchangeability . . . given to Intelsat's own customers." *Id.* at 13. This request is baseless, as COMSAT currently offers greater flexibility in this regard than Intelsat, and this level of flexibility will continue to be available after the transaction is completed so long as there is a commercial market for such flexibility.

68 AT&T Petition at 7-8.

69 Instead of basing its argument on evidence, AT&T simply assumes that Intelsat shareholders would ignore all other considerations out of a motivation to favor the former COMSAT unit in order to enhance its profitability. As an economic matter, AT&T's interests are protected here by the competitive state of the marketplace. Intelsat post-transaction will have no power in any "upstream" market that it could use to unfairly advantage any "downstream" affiliate. *See also infra* notes 80-85 and accompanying text. In any event, as a business matter, CWS will no longer be a stand-alone unit once the proposed transaction closes except as a matter of corporate form. How Intelsat may internally account for different profit-generating activities raises no public interest concern because the entire enterprise, either whole in any of its part, lacks market power.

In *NARUC I*, the D.C. Circuit established a two-part analysis that the Commission must undertake before imposing common carrier regulation.[70] First, the agency must analyze the likelihood that the services in question will be offered indifferently to the public. Second, if no such likelihood exists, the FCC must determine whether there are sufficient policy reasons to place the service provider under a legal compulsion to serve the public indifferently.[71] The only reference made in the petitions to this well-established standard is an unsupported statement in an AT&T footnote claiming that the mandate is somehow justified by the "significant change in circumstances" brought about by the proposed transaction.[72]

Furthermore, the Commission recently rejected regulating Intelsat as a common carrier in the Intelsat privatization proceeding.[73] Because the privatized company would be able "to assign capacity to users on a case-by-case basis, considering the individualized needs and requirements of each user," the FCC found that there was "no basis on which to conclude that Intelsat LLC will offer capacity indifferently to the public."[74] The agency further concluded that there was no public policy reason to compel Intelsat to act as a common carrier. In making this finding, the Commission noted that, for certain services on the "non-competitive" thin routes, COMSAT

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70 *NARUC I*, 525 F.2d 630, 642 (D.C. Cir. 1976).

71 *See id.; see also Intelsat Privatization Order,* 16 FCC Rcd. at 12301.

72 *See* AT&T Petition at 7 n.18. Section 641 of the ORBIT Act provides no more foundation for a common carriage mandate than does the unsupported reference to *NARUC I.* The language, design, and legislative history of the ORBIT Act make obvious lawmakers' expectations that the privatized Intelsat would be treated like any other private company. To bootstrap Section 641 into singling out Intelsat for common carrier treatment would be a gross distortion of Congressional intent.

73 *See Intelsat Privatization Order,* 16 FCC Rcd. at 12300-02; *see also* Satellite Policy Branch Information; Intelsat LLC; File Nos. SAT-A/O-20000119-00002, et al., FCC Public Notice, Report No. SPB-164 (released March 23, 2001).

74 *Id.* 12301.

would continue to be subject to the common carrier regulations set forth in the *Alternative Rate Regulation Order*.[75]

The proposed transaction will do nothing to change this analysis. Intelsat currently offers private carrier services; COMSAT currently offers customers a combination of common carrier and private carrier services. After closing on the transaction, Intelsat will maintain both types of services, as do many of its competitors. Moreover, in offering the thin route services formerly provided by CWS under the terms of the *Alternative Rate Regulation Order,* Intelsat will abide by the terms therein. As the Applicants already have explained, this will further assure that the proposed acquisition can raise no anticompetitive issues for customers using those services.[76]

For the bulk of its business, Intelsat already affords nondiscriminatory treatment to similarly situated customers pursuant to the Distribution and Wholesale Customer Agreements. These contractual benefits certainly exceed the treatment afforded to customers by Intelsat's private-carrier rivals—who are allowed to rely solely on the competitive state of the marketplace to justify their operations as private carriers. Moreover, none of Intelsat's customers expressed concerns regarding these standard Agreements in the Intelsat Privatization Proceeding, even though the Commission expressly provided them with the opportunity to do so.[77] Petitioners offer no valid reason to single out Intelsat for more restrictive treatment now, especially given that government-imposed nondiscrimination mandates would largely duplicate Intelsat's contractual commitments to its customers.

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75 *Id.* 12302.

76 *See* Application at 31.

77 *See Intelsat Privatization Order,* 16 FCC Rcd. at 12281, 12301, 12302-03.

3. Petitioners' Calls for Structural Safeguards Have No Competitive or Legal Basis

WorldCom, Sprint, and AT&T contend that the combined Intelsat/CWS should be subject to a variety of structural separation requirements. AT&T requests that sweeping separation conditions be imposed on the post-transaction company, including requirements that Intelsat operate CWS as a separate corporate subsidiary with separate books of account and its own switching and transmission facilities.[78] WorldCom and Sprint likewise ask that the new Intelsat be required to publicly file the prices offered to such a "retail affiliate."[79] Neither petition offers any market-based or legal analysis in support of these burdensome conditions. The reason for these omissions is obvious: the rationale underlying the imposition of structural separations is wholly inapplicable in the context of this transaction because neither applicant holds market dominance or controls a bottleneck facility.[80] Moreover, because Intelsat as a business matter plans to fully integrate the former CWS business into the company's operations, rather than run CWS as a stand-alone subsidiary, petitioners' calls for structural separations would require radical government intervention for no public interest purpose.

Historically, the Commission has imposed structural separations in order to prevent dominant carriers from using their market power in so-called "upstream markets" (such as local exchange service) to harm competition in a "downstream market" (such as enhanced services)—

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[78] AT&T Petition at 7.

[79] WorldCom/Sprint Petition at 13. As a preliminary matter, there is no basis for WorldCom's and Sprint's assertion that accounting safeguards "should not be a significant burden for Intelsat, given that representatives of Lockheed Martin . . . have informed WorldCom that Intelsat intends to operate separate wholesale and retail subsidiaries after its merger with COMSAT." WorldCom/Sprint Petition at 13. Lockheed Martin has made no statements to this effect.

[80] *See Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer III)*, Phase I, 104 F.C.C. 2d 958, 998-999 (1986), *recon.*, 2 FCC Rcd. 3035 (1987), *further recon.*, 3 FCC Rcd 1135 (1988), *second further recon.*, 4 FCC Rcd 5927 (1989), *vacated sub nom. California v. FCC*, 905 F.2d 1217 (9th Cir. 1990); Phase II, 2 FCC Rcd. 3072 (1987), *recon.*, 3 FCC Rcd. 1150 (1988), *further recon.*, 4 FCC Rcd. 5927 (1989), *vacated sub nom. California v. FCC*, 905 F.2d 1217 (9th Cir. 1990).

an especially heightened concern when the downstream competitors had to rely on the facilities of the dominant carrier to reach customers.[81] The rationale for structural safeguards was to prevent the dominant carrier from discriminating against its rivals in downstream markets and also to block the dominant carrier from cross-subsidizing its downstream offerings based upon its upstream market power.[82] Among the most prevalent examples of structural safeguards are those imposed by the agency and Congress on the Bell Operating Companies with respect to their provision of enhanced and domestic long-distance services.[83] Yet these examples date back more than a decade. In the absence of statutory mandates, moreover, the Commission has chosen to eliminate structural separation requirements since that time, finding that the significant costs of imposing the restrictions outweigh any benefits.[84] Even when such structural separation requirements have been statutorily mandated, the FCC has taken advantage of provisions allowing for them to sunset.[85]

Here, the necessary factual premise for imposing structural separations is not present, even if the Commission still favored this regulatory approach. Intelsat and CWS, either singly or

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81 *See id.* at 998-999, 1001 (Structural separations appropriate "[g]iven AT&T's vast size and resources, its vertically integrated structure, and its ability to engage in anticompetitive cross-subsidization and discrimination through its control of bottleneck facilities." The Commission concluded that "even if structural separation has a net positive benefit in an absolute sense, if alternative safeguards are on the whole more beneficial to society," then those structural separations should be replaced.).

82 *See id.*

83 *See Amendment to Sections 64.702 of the Commissions Rules and Regulations* (*Second Computer Inquiry*), 84 F.C.C. 2d 50, 71 (1980) (Memorandum Opinion and Order), *mod. on further recon.*, 88 F.C.C. 2d 512 (1981), *mod. on further recon.*, 56 Rad. Reg. 2d (P&F) 301 (1984), *aff'd sub nom. Computer & Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C.Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

84 *Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies*, 2 FCC Rcd. 143, 148 (1987) (eliminating structural separations requirements for customer premises equipment operations); *Second Computer Inquiry*, 84 F.C.C. 2d 50, 71 (Structural separations seen as approach to be used as Commission "gain[s] more experience in [a] very complex area of communications regulation.").

85 *See Request for Extension of the Sunset Date of the Structural, Nondiscrimination, and Other Behavioral Safeguards Governing Bell Operating Company Provision of In-Region, InterLATA Information Services*, 15 FCC Rcd. 3267, 3268 (2000) (declining to extend sunset of structural separations).

together, lack power in any market that is legitimately identified. Moreover, neither controls a bottleneck facility upon which any of their rivals must rely—a fact that is indisputable in the cases of AT&T, WorldCom, and Sprint, who all own undersea fiber-optic facilities.[86]

Even the old structural separation requirements that once applied to COMSAT were eliminated years ago because of significant competitive changes in the marketplace. The Commission in the 1998 *COMSAT Non-Dominance Order* eliminated the mandates that separated COMSAT's then-existing "jurisdictional" and "non-jurisdictional" services. It found that the requirements were no longer necessary because COMSAT was "non-dominant" in markets "account[ing] for approximately 85 percent of [its] revenues from INTELSAT services...."[87] And even for the CWS services subject to thin-route regulation, the FCC concluded that COMSAT's position there still did not justify "continuing to require structural separation because the costs of imposing such a requirement would exceed any potential benefits to competition."[88]

With the growth of capacity available for U.S. international services since the *COMSAT Non-Dominance Order*, the petitioners present no cause for resurrecting outdated and unnecessary structural requirements and imposing them on Intelsat post-transaction. Furthermore, the requests for separate subsidiary safeguards are entirely unnecessary in light of the Commission's determination that the post-privatization Distribution and Wholesale Customer agreements do not afford former Signatories, including COMSAT, any protections or privileges

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86 *See* Application at 27-32; *infra* at Section III.A.2.

87 *COMSAT Non-Dominance Order*, 13 FCC Rcd. at 14087. When the Commission released its Alternative Rate Regulation Order in 1999, it found that COMSAT's traffic on competitive "thick" routes was up to 92 percent. *Alternative Rate Regulation Order*, 14 FCC Rcd. at 3065. This percentage is even higher today.

88 *COMSAT Non-Dominance Order*, 13 FCC Rcd. at 14087.

unavailable to other customers.[89] Nothing about this transaction voids those agreements. Although AT&T asserts that "different incentives" purportedly arising from the proposed transaction would somehow undermine that determination,[90] it fails to cite a single fact to support its conclusion, much less satisfy the evidentiary burden required by Section 309 of the Communications Act.[91] While it may be understandable that the petitioners would find it advantageous to have Intelsat effectively compete against itself for their business, there is no public interest benefit that would be served thereby. Accordingly, the FCC summarily should reject arguments for structural arrangements that the petitioners would not want imposed upon themselves, nor have sought to have imposed on any competitor to Intelsat.

4. The FCC Should Reject WorldCom's and Sprint's Backhanded Attempt to Expand the Existing Thin-Route Regulations

In another effort to use this proceeding as a vehicle for gaining private commercial advantages, WorldCom and Sprint make a circuitous request for the Commission to dramatically transform the existing thin-route rate regulation scheme by mandating the substitution of Intelsat prices for CWS' tariffed rates.[92] Yet they do not even attempt to dignify this demand with any evidentiary support. This stands in sharp contrast to the factual foundation upon which the thin-route rate regulations stand—which, as the FCC well knows, grew out of a lengthy agency

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89 *Intelsat Privatization Order,* 16 FCC Rcd. at 12302. The Commission reaffirmed this finding in a subsequent report to the Congress. *FCC Report to Congress As Required By The ORBIT Act*, FCC 01-190 (June 15, 2001).

90 AT&T Petition at 6.

91 47 U.S.C. § 309(d)(1) (requiring affidavit to support factual dispute).

92 WorldCom/Sprint Petition at 13. *See also* AT&T Petition at 8-9.

proceeding involving extensive market analyses.[93] Accordingly, the agency should flatly reject WorldCom's and Sprint's unsubstantiated request.

The Application here plainly states that after closing the transactions, Intelsat will comply with the terms of the *Alternative Rate Regulation Order*.[94] The obligations set forth there ensure that customers who take switched voice or private line services on those routes will enjoy the pricing benefits of competition.[95] Extension of these mandates to other Intelsat services, along whatever route, is not warranted by current competitive conditions.[96]

Furthermore, wholly apart from the existing *Alternative Rate Regulation* obligations, customers seeking switched voice or private line services on thin routes may rely upon another existing safeguard: the terms of the standard Intelsat Distribution Agreement or Wholesale Customer Agreement both provide nondiscriminatory pricing protections. Consequently, there can be no risk that the combined Intelsat/CWS will be able to raise prices above competitive levels on the remaining thin routes—because any customer interested in thin-route services may sign one of the Agreements to guarantee that it receives the contractual nondiscrimination benefit.

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93 *See Alternative Rate Regulation Order,* 14 FCC Rcd. at 3071-75. *See also COMSAT Non-Dominance Order*, 13 FCC Rcd. at 14118-49; *COMSAT Streamlined Video Order* at 12 FCC Rcd. at 12060; *COMSAT Partial Relief Order* 11 FCC Rcd. at 9629-36.

94 *See* Application at 31.

95 *See Alternative Rate Regulation Order*, 14 FCC Rcd. at 3069-70.

96 The Applicants also note that, due to the existence of pro-competitive WTO commitments, there are few, if any, legal barriers to competitive entry by additional U.S. providers along the remaining thin routes. *See supra* note 11 and accompanying text.

IV. LRT RESURRECTS LONG-STANDING COMPLAINTS THAT THE FCC ALREADY HAS REJECTED OR THAT REMAIN PENDING IN OTHER PROCEEDINGS

LRT's "provisional" petition to deny this Application repeats almost verbatim the arguments contained in its provisional petition to deny the recent Telenor-COMSAT assignment application.[97] (Indeed, the name Telenor mistakenly appears in the caption of LRT's petition in this proceeding.) The Commission, however, has already considered and rejected those arguments.[98] In addition, LRT's petition repeats—again, almost verbatim—various arguments that LRT has made in other Commission proceedings involving COMSAT and Lockheed Martin.[99] Those arguments are likewise without merit.

As a threshold matter, COMSAT and Lockheed Martin note that they previously have submitted materials to the Commission demonstrating that LRT's pleadings are not filed for any legitimate purpose, but rather for purposes of harassment and extracting a settlement. Rather than repeat the facts again here, COMSAT and Lockheed Martin respectfully direct the Commission's attention to the record in the Telenor-COMSAT docket.[100] LRT's submission here should be evaluated in light of this record.

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97 *See* Provisional Petition of Litigation Recovery Trust to Deny and Petition of Litigation Recovery Trust for Protective Orders, File Nos. SES-ASG-20010504-00896 *et al.* (filed June 22, 2001) (Telenor-COMSAT transaction).

98 *See Applications of Lockheed Martin Global Communications et al. and Telenor Satellite Mobile Services, Inc. et al.*, FCC 01-369 (rel. Dec. 18, 2001) (Order and Authorization) ("*Telenor-COMSAT Order*"); *stay denied*, DA 02-190 (rel. Jan. 24, 2002) ("*Telenor-COMSAT Stay Denial Order*"); *pet. for recon. pending.*

99 *See, e.g.*, Petition of Litigation Recovery Trust for Reconsideration, File Nos. ITC-97-222 *et al.* (dated Oct. 24 2001) (Inmarsat domestic service proceeding); Petition of Litigation Recovery Trust for Reconsideration, File Nos. 39-SAT-P/LA-98 *et al.* (dated Aug. 31 2001) (Lockheed Martin Ka-band proceeding); Petition of Litigation Recovery Trust for Reconsideration, File Nos. SAT-T/C-2000323 *et al.* (dated Aug. 28, 2000) (*Lockheed Martin/COMSAT* merger proceeding).

100 *See* Opposition of Telenor Satellite Services Holdings, Inc., et al, and Lockheed Martin Global Telecommunications, et al., at 5-7, FCC File No. SES-ASG-20010504-00896 (filed Jan. 28, 2002) (discussing various court findings and sanctions against individual members of LRT arising out of "campaign of harassment" against COMSAT and its former subsidiary, BelCom Inc., which was sold in December 2001). LRT's alleged

As for the merits, LRT's arguments are baseless. The Commission has already considered and rejected most of the arguments in LRT's petition in the context of the Telenor-COMSAT proceeding. It concluded there, for example, that LRT had raised no substantial and material fact as to COMSAT's qualifications as assignor of Commission licenses and authorizations.[101] The same is true in this proceeding. In particular, there is no merit to LRT's claim that the licenses and authorizations at issue here cannot be assigned because the *Lockheed Martin/COMSAT Merger Order* is not final (in light of the petition for reconsideration filed in that proceeding by LRT).[102] The merger order was duly adopted and released[103] and has not been stayed, and is therefore in full force and effect. Accordingly, these licenses and authorizations are fully assignable.

The Commission also concluded unequivocally in the Telenor-COMSAT proceeding that the sale by Lockheed Martin of one of COMSAT's former jurisdictional businesses does not violate the ORBIT Act.[104] Further, the FCC declined to consider LRT's argument that COMSAT's Inmarsat and INTELSAT interests should be regarded as assets of the United States and not commercial assets belonging to COMSAT and, therefore, Lockheed Martin.[105] As the Commission noted, this matter was originally raised in a 1998 proceeding in which the FCC

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business grievances plainly fall into the category of private contractual disputes in which the Commission will not intervene. *See, e.g., Telenor-COMSAT Stay Denial Order* at n.33.

101 *See Telenor-COMSAT Order* at ¶ 19.

102 *See* Provisional Petition to Deny at 4, IB Docket No. 02-87 (filed May 24, 2002) ("LRT Petition").

103 *See Applications of Lockheed Martin Corporation et al. and COMSAT Corporation et al.*, 15 FCC Rcd. 22910 (2000) (Order and Authorization).

104 *See Telenor-COMSAT Order* at ¶ 16 ("We do not agree with LRT that the ORBIT Act, or the expectations of Congress in enacting the ORBIT Act, intended that the government have an ongoing interest, control, or involvement in Lockheed Martin Corporation's management of COMSAT Corporation's assets."); *see also id.* at ¶ 19.

105 *See id.* at n.22.

denied a variety of petitions and complaints filed by LRT against COMSAT. LRT appealed the denial to the U.S. Court of Appeals for the Second Circuit, and the court dismissed the appeal.[106] Thus, the agency need not readdress this claim.

The *Telenor-COMSAT Order* also concluded that LRT's arguments with respect to foreign ownership (and in particular foreign government ownership) were groundless.[107] The Commission need not dwell for long on LRT's almost word-for-word rehash of those arguments. LRT's continued attacks on the *Deutsche Telekom-VoiceStream Order* are completely unpersuasive, and LRT barely addresses the fact (discussed at length in the Application[108]) that the FCC repeatedly has found that subsidiaries of Intelsat, Ltd. are fully qualified to be U.S. licensees.[109] More importantly, LRT provides absolutely no evidence that approval of the proposed transaction would pose any risk, let alone a very high one, to competition. LRT makes no effort to counter the Applicants' showings that: (1) the relevant markets are already competitive and will remain so post-transaction; (2) Intelsat and COMSAT historically held different roles in the marketplace; and (3) the transaction will serve the public interest by speeding the transformation of Intelsat into a conventional commercial satellite entity better able to compete as an efficient service provider.[110] Instead, LRT merely posits a competitive scenario that is "hardly as rosy" as that described in the Application,[111] and asserts that the Commission

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106 *See Whitely v. FCC*, Case No. 00-4207, *Order* (2d Cir. filed Mar. 13, 2002).

107 *See Telenor-COMSAT Order*, ¶¶ 21-36.

108 *See* Application at 5-10.

109 *See, e.g., Intelsat Licensing Order*, 15 FCC Rcd. 15460; *Intelsat Licensing Order Reconsideration*, 15 FCC Rcd. 25234; *Intelsat Privatization Order*, 16 FCC Rcd. 12280.

110 Application at 17-32.

111 LRT Petition at 29.

needs to collect more data. Such sheer speculation cannot overcome the presumptions reflected in the FCC's policies with respect to the pro-competitive effects of foreign investment.

Similarly, LRT's national security arguments are virtually identical to those it made in the Telenor-COMSAT proceeding; in fact, at one point, LRT refers to "Inmarsat related activities conducted by CWC [sic]" when it clearly means Intelsat related activities conducted by CWS. LRT makes no reference, however, to the *Telenor-COMSAT Order*, in which the Commission acknowledged that it pays an appropriate level of deference to Executive Branch expertise on national security and law enforcement issues.[112] Nor does LRT mention the GE/SES proceeding,[113] or the Applicants' showing that, like GE/SES, they do not provide switched services directly to individual customers and thus do not pose the same network security issues as, for example, those addressed in Telenor-COMSAT.[114]

Finally, there is no merit to LRT's assertion (which it omitted from its petition in the *Telenor-COMSAT* proceeding, but has included in its petitions in at least four other proceedings) that COMSAT and Lockheed Martin are unfit to be Commission licensees because they failed to disclose the fact that COMSAT's former subsidiary, ElectroMechanical Systems, Inc. ("EMS"), was under investigation by the Justice Department for allegedly mischarging on government contracts with the Navy.[115] As COMSAT and Lockheed Martin have repeatedly demonstrated, even the Commission's most stringent reporting requirements for a particular class of licensees—that applied to broadcast licensees, which COMSAT is not—requires reporting only

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112 *Telenor-COMSAT Order* at ¶ 50.

113 *See GE/SES Global Order*, 16 FCC Rcd. 17575.

114 Application at 32-34.

115 LRT Petition at 4-10.

once the matter has been adjudicated.[116] That is exactly what COMSAT has done, both here and in previous proceedings.[117] Accordingly, there is no basis for any of the sanctions that LRT proposes.

V. CONCLUSION

The record now before the Commission in this proceeding demonstrates that Intelsat's proposed acquisition of the CWS licenses and authorizations will benefit the public interest. Intelsat already is a U.S. satellite licensee, and it is fully qualified to hold the earth station licenses and other authorizations at issue here as well. The facts before the agency show that the proposed transaction will help speed the transformation of Intelsat into a more efficient, effective service provider better able to compete in the robust U.S. international marketplace. The record also reveals that the petitioners' calls for conditions on the transaction, or the submission of more information, are meritless. The issues about which they complain plainly have no relationship to this acquisition or the current competitive state of the marketplace. The FCC already has addressed most of these unrelated issues, and others remain the subject of pending proceedings.

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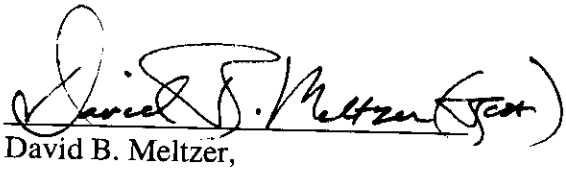
116 *Policy Regarding Character Qualifications in Broadcast Licensing*, 1 FCC Rcd. 421, 424 (1986) (Memorandum Opinion and Order); *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 F.C.C . 2d 1179, 1204-05 (1986) (Report, Order and Policy Statement); *Policy Regarding Character Qualifications in Broadcast Licensing*, 5 FCC Rcd. 3252 (1990) (Policy Statement and Order); Cablecom-General, Inc., 87 F.C.C. 2d 784, 788-91 (1981) (Applications).

117 Comsat first disclosed the EMS matter in August 2000, in an amendment to the Lockheed Martin/COMSAT merger application. *See* Application of Lockheed Martin Corporation and COMSAT Corporation, et al., File Nos. SAT-T/C-20000323, et al. (filed Mar. 23, 2000) ("Lockheed/COMSAT Application"); *see e.g.*, Lockheed/COMSAT Application, Consolidated Opposition of Lockheed Martin Corp., LMGT LLC and COMSAT Corp. at 5-8 (filed Sept. 12, 2000); Lockheed/COMSAT Application, Comments of "Newly Discovered Evidence" Submitted by Litigation Recovery Trust at 2-3 (filed Apr. 6, 2001). Out of an abundance of caution, COMSAT also referenced the EMS matter in the Telenor/COMSAT assignment application and in the instant applications. *See* Lockheed Martin Corporation, et al. and Telenor Satellite Mobile Services, Inc., et al. Applications for Assignment of Section 214 Authorizations, Private Land Mobile Radio Licenses, and Earth Station Licenses, File Nos. SES-ASG-20010504-00896, et al. (filed May 4, 2001); Application, Exhibit V to FCC Forms 312.

Accordingly, the Commission should promptly deny the petitioners' requests and grant the Application.

Respectfully submitted,

By: 

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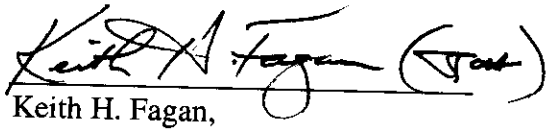
By: 

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June 7, 2002

CERTIFICATE OF SERVICE

I, Charlotte R. Waller, hereby certify that on June 7, 2002, I caused a copy of the foregoing OPPOSITION OF LOCKHEED MARTIN CORPORATION, *et al.*, and INTELSAT, ltd., *et al.* to petitions to deny to be mailed via first-class postage prepaid mail to the following:

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