

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

In the Matter of
Availability of INTELSAT Space Segment
Capacity to Users and Service Providers Seeking
To Access INTELSAT Directly
IB Docket No. 00-91

REPORT AND ORDER

Adopted: September 13, 2000

Released: September 19, 2000

By the Commission:

I. INTRODUCTION

1. This Order is issued pursuant to Section 641 of the Communications Satellite Act of 1962 (Satellite Act), as amended by the Open-Market Reorganization for the Betterment of International Telecommunications Act (ORBIT Act). The ORBIT Act is intended to promote a fully competitive global market for satellite communications services by fully privatizing the International Telecommunications Satellite Organization (INTELSAT) and the International Mobile Satellite Organization (Inmarsat). To further that goal, the ORBIT Act permits direct access to users or providers of telecommunications services to obtain "Level 3" direct access from INTELSAT. Level 3 direct access permits non-Signatory users and service providers to enter into contractual agreements with INTELSAT for space segment capacity at the same rates that INTELSAT charges its Signatories. The ORBIT Act directs the Commission to determine whether "users or providers of telecommunications services have sufficient opportunity to access INTELSAT space segment capacity directly from INTELSAT to meet their service or capacity requirements." The ORBIT Act also requires the Commission to take "appropriate action to facilitate such direct access" if sufficient opportunity to access INTELSAT capacity does not exist.

II. BACKGROUND

1 Communications Satellite Act of 1962, 47 U.S.C. §§ 701 et seq.; Open-Market Reorganization for the Betterment of International Telecommunications Act, Pub. L. No. 106-180, 114 Stat. 48 (2000), to be codified at 47 U.S.C. § 761 et seq. The ORBIT Act adds Title VI to the Satellite Act, entitled "Communications Competition and Privatization."

2 Section 641(a) of the Satellite Act, as amended by the ORBIT Act, 47 U.S.C. § 765(a).

3 Availability of INTELSAT Space Segment Capacity to Users and Service Providers Seeking To Access INTELSAT Directly, Notice of Proposed Rulemaking, IB Docket No. 00-91, 15 FCC Rcd 10606, 10607 (para. 6) (2000) (Notice); Direct Access to the INTELSAT System, IB Docket No. 98-192, Report and Order, 14 FCC Rcd 15703, 15708 (para. 8) (1999) (Direct Access Order).

4 Section 641(b) of the Satellite Act, as amended by the ORBIT Act, 47 U.S.C. § 765(b).

5 Id.

A. Level 3 Direct Access

2. Level 3 direct access permits non-Signatory users and service providers to enter into contractual agreements with INTELSAT for space segment capacity at the same rates that INTELSAT charges its Signatories.⁶ INTELSAT is a 143-member intergovernmental cooperative that operates 17 satellites providing telecommunications services to over 99 percent of the world population.⁷ As the U.S. Signatory to INTELSAT under the Satellite Act, Comsat is the U.S. investor and participant in INTELSAT commercial decisions. Comsat was the only company permitted to access INTELSAT satellites and distribute its services in the United States until 1999, when the Commission permitted users and service providers to obtain Level 3 direct access to INTELSAT space segment capacity.⁸

B. Requirements of ORBIT Act

3. The ORBIT Act provides for users and service providers in the United States to obtain Level 3 direct access to INTELSAT. Section 641(b) provides:

(b) RULEMAKING -- Within 180 days after the date of enactment of this title, the Commission shall complete a rulemaking, with notice and opportunity for submission of comment by interested persons, to determine if users or providers of telecommunications services have sufficient opportunity to access INTELSAT space segment capacity directly from INTELSAT to meet their service or capacity requirements. If the Commission determines that such opportunity to access does not exist, the Commission shall take appropriate action to facilitate such direct access pursuant to its authority under this Act and the Communications Act of 1934. The Commission shall take such steps as may be necessary to prevent the circumvention of the intent of this section.

Further, Section 641(c) provides:

(c) CONTRACT PRESERVATION -- Nothing in this section shall be construed to permit the abrogation or modification of any contract.⁹

C. Procedural Background

4. We issued a Notice of Proposed Rulemaking on May 24, 2000, to carry out the requirements of Section 641(b). In the *Notice*, we directed Comsat to provide data on the extent of INTELSAT capacity

⁶ *Notice*, 15 FCC Rcd at 10607 (para. 6); *Direct Access Order*, 14 FCC Rcd at 15708 (para. 8).

⁷ *Direct Access Order*, 14 FCC Rcd at 15706 (para. 5).

⁸ *Direct Access Order*, 14 FCC Rcd at 15706-07 (para. 5). Comsat receives a 5.58 percent surcharge from direct access users on the rates they pay to INTELSAT. *See Direct Access Order*, 14 FCC Rcd at 15739-41 (paras. 89-93).

⁹ Section 641(c) of the Satellite Act, as amended by the ORBIT Act, 47 U.S.C. § 765(c).

availability, and invited users and service providers to discuss their service and capacity requirements, in order to determine whether users and service providers have "sufficient opportunity" to access INTELSAT directly. We also solicited comment on what "appropriate actions" we could or should take if we determine that users and service providers do not have "sufficient opportunity" to access INTELSAT directly. Finally, we noted that INTELSAT was in the process of privatization, and invited comment on what effect, if any, that privatization might have on our analysis in this rulemaking proceeding.

5. The *Notice* required Comsat to submit information on available uncommitted capacity and capacity subject to Comsat reservations on each of 13 existing and seven planned INTELSAT satellites capable of accessing all or part of the continental United States (CONUS).¹⁰ The *Notice* stated that, if Comsat regards some of this committed capacity information as commercially sensitive, the Commission would consider a request for confidential treatment.¹¹ On June 23, 2000, Comsat filed its comments, and requested confidential treatment of its capacity information. On July 5, 2000, the International Bureau (Bureau) required Comsat to provide capacity information to interested parties pursuant to a protective order.¹² The *Comsat Confidentiality Order* also extended the deadline for filing replies from July 6 to July 19, 2000, and the deadline for filing responses to reply comments from July 11 to July 24, 2000.¹³

6. Five parties filed comments, three filed replies, and two filed responses to replies.¹⁴ ATC, Cable & Wireless, and, together in a joint filing, Sprint and WorldCom (Sprint/WorldCom) argue that they do not have "sufficient opportunity" for direct access because Comsat controls too much of INTELSAT's U.S.-accessible capacity. They recommend a variety of regulatory solutions to require Comsat to allow some of its capacity to become available for direct access. Alternatively, Comsat and Lockheed Martin maintain that there is sufficient opportunity for direct access because a number of direct access orders have been filled in the past. They also contend that the Commission has no basis for concluding that there is insufficient opportunity for direct access because Comsat is not "warehousing" the INTELSAT capacity it controls, and because any unfilled direct access orders are the result of short-term INTELSAT capacity

¹⁰ *Notice*, 15 FCC Rcd at 10614 (paras. 20, 22). These satellites are listed in Appendix B to this Order.

¹¹ *Notice*, 15 FCC Rcd at 10614 (para. 22), *citing* 47 C.F.R. § 0.459 (governing requests for confidential treatment).

¹² Availability of INTELSAT Space Segment Capacity to Users and Service Providers Seeking To Access INTELSAT Directly, Order Adopting Protective Order, IB Docket No. 00-91, DA 00-1428 (Int'l Bur., rel. July 5, 2000) (*Comsat Confidentiality Order*).

¹³ *Comsat Confidentiality Order* at para. 6. On July 24, 2000, Comsat filed a motion to extend the time to file its Response, and for Lockheed Martin to file its response, from July 24 to July 25, 2000. The Commission does not grant motions for extension of time routinely. 47 C.F.R. § 1.46(a). In this case, however, Comsat explained that computer system "crashes" caused its attorneys significant difficulties with word processing and printing Comsat's response, and for sharing drafts with Lockheed Martin's attorneys. Comsat Motion at 1. Because Comsat provided good cause for an extension, and because this one-day extension does not prejudice any other party in this proceeding, we grant Comsat's motion.

¹⁴ The parties submitting pleadings are listed in Appendix A to this Order. Appendix A also lists the letters and *ex parte* statements on which we rely in this proceeding.

shortages rather than anticompetitive behavior by Comsat. They contend that short-term capacity shortages will be resolved by introduction of new planned capacity in the future. Finally, they recommend a commercial solution rather than a regulatory solution to any problems, and assert that the ORBIT Act precludes certain regulatory solutions from Commission consideration.

7. For the reasons discussed below, we find that users and service providers do not have "sufficient opportunity" for direct access "to meet their service or capacity requirements." To facilitate opportunities for direct access, we will require Comsat and direct access customers to negotiate in good faith to find commercial solutions. Although we conclude that such commercial solutions constitute appropriate action to facilitate direct access at this time, we will consider other "appropriate action" if we find that commercial solutions do not create a sufficient opportunity for direct access users and service providers to meet their service or capacity requirements.

III. SUFFICIENT OPPORTUNITY FOR DIRECT ACCESS

8. We discuss below the factors we take into account in determining what direct access "opportunity" is "sufficient" within the meaning of the ORBIT Act. We assess the availability of capacity to direct access users on the 13 existing and seven planned INTELSAT satellites with CONUS or partial CONUS coverage. We determine whether INTELSAT's capacity reservation policies disadvantage U.S. users and service providers seeking direct access. We also discuss INTELSAT's post-privatization distribution arrangements, and issues related to the need to "match" U.S. half-circuits with the half-circuits of foreign correspondents. Finally, we determine whether users and service providers have "sufficient opportunity" for direct access.

A. Factors Underlying "Sufficient Opportunity" Determination

9. In our *Notice*, we requested comment on the factors we should consider to determine what direct access "opportunity" is "sufficient" within the meaning of the ORBIT Act.¹⁵ In particular, we directed Comsat to provide detailed information on the committed and uncommitted capacity on existing and future INTELSAT satellites that could be accessed from the United States.¹⁶ We also noted that, "[i]n considering whether 'sufficient opportunity' exists, we must also take into account how current distribution arrangements for INTELSAT impact the availability of current and planned capacity to U.S. users and service providers."¹⁷

10. Sprint/WorldCom and ATC assert that there would be insufficient opportunity for direct access if Comsat has reserved an excessive amount of INTELSAT capacity for its own use, thereby leaving too little INTELSAT capacity available for direct access.¹⁸ They also assert that current

¹⁵ *Notice*, 15 FCC Rcd at 10614 (para. 21).

¹⁶ *Notice*, 15 FCC Rcd at 10614 (para. 20).

¹⁷ *Notice*, 15 FCC Rcd at 10609 (para. 10).

¹⁸ *See* Sprint/WorldCom Reply at 6-7; ATC Reply at 3.

INTELSAT procedures inhibit the ability of direct access users to obtain capacity.¹⁹ Comsat maintains that it has not reserved an excessive amount of INTELSAT capacity because it uses almost all the capacity it has purchased from INTELSAT to provide service to its customers.²⁰ Comsat also maintains that it has no incentive to pay for INTELSAT capacity or reservations on INTELSAT capacity without the prospect of timely cost recovery through resale to a customer.²¹

11. Comsat also argues that the Commission should use a "rule of reason" when determining whether there is sufficient opportunity for direct access. According to Comsat, a "rule of reason" requires Comsat only to make a reasonable effort to make direct access available, subject to capacity availability.²² Lockheed Martin maintains that this proceeding should be limited to determining whether there is sufficient INTELSAT capacity available to meet actual customer requirements.²³ Lockheed Martin argues further that we should conclude that there is sufficient opportunity unless (1) Comsat is holding capacity that is unique to the needs of a user or service provider's requirements, (2) Comsat has not negotiated in good faith, and (3) Comsat is holding INTELSAT capacity for the purpose of extending its prior exclusive access rather than meeting current or anticipated service requests.²⁴ Sprint/WorldCom replies that it is not relevant whether direct access is unavailable due to INTELSAT capacity constraints rather than Comsat misconduct, because the ORBIT Act requires the Commission to take "appropriate action" regardless of the reasons for the lack of direct access opportunities.²⁵

12. We conclude that we should consider two factors in determining whether direct access users have "sufficient opportunity." The first is how much capacity exists on the INTELSAT satellite systems that could be used to provide service to and from the United States. We would conclude that U.S. users and service providers do not have sufficient opportunity for direct access if the INTELSAT system does not have enough capacity to satisfy all users' capacity requirements. The second is whether and to what extent INTELSAT's distribution arrangements may preclude users and service providers from having reasonable access to whatever INTELSAT capacity is available. We tentatively concluded in the *Notice* that those distribution arrangements might place direct access users seeking satellite capacity at a disadvantage to the extent that those distribution arrangements "tie up" that capacity.²⁶

13. We find that the issue of whether Comsat is "warehousing" INTELSAT capacity is not wholly

¹⁹ See Sprint/WorldCom Reply at 6-7; ATC Reply at 3.

²⁰ Comsat Comments at 15. See also Lockheed Martin Response at 7-9.

²¹ Comsat Comments at 18 n.22. See also Lockheed Martin Comments at 16-17.

²² Comsat Comments at 23-25, Comsat Response at 20-21.

²³ Lockheed Martin Comments at 7-9.

²⁴ Lockheed Martin Comments at 12.

²⁵ Sprint/WorldCom Reply at 4-6. See also ATC Reply at 6 (dismissing rule of reason as irrelevant).

²⁶ *Notice*, 15 FCC Rcd at 10610-11 (para. 15).

relevant to our determination of whether "sufficient opportunity" exists. We disagree with Comsat and Lockheed Martin that the Act requires us to assess Comsat's intent or conduct in holding space segment.²⁷ We interpret the "sufficient opportunity" determination required by Section 641(b) to be a fairly narrow factual inquiry. Whether Comsat is warehousing INTELSAT capacity may be relevant to determining what "appropriate action" would be required under Section 641(b). If Congress intended us to consider Comsat's "state of mind," for example, Section 641(b) presumably would have required us to determine whether Comsat had acted reasonably, or negotiated in good faith. Section 641(b), however, does not include any language of this nature. Rather, Section 641(b) directs us to determine only whether users and service providers have "sufficient opportunity" for direct access.

14. In assessing capacity availability, we do not interpret Section 641 to require Comsat or INTELSAT to launch new satellites to create more capacity and more opportunities for direct access. Comsat's arguments regarding a "rule of reason" analysis seem misplaced. The "rule of reason" is an antitrust law concept, under which a business arrangement is not *per se* prohibited by the Sherman Act, but rather reviewed to determine whether the arrangement is likely to have an anticompetitive effect.²⁸ This proceeding is focused on fulfilling our Congressional mandate in Section 641, not whether any commercial conduct by Comsat violates any antitrust law.

15. We conclude that direct access customers would not have "sufficient opportunity" for direct access if (1) there is insufficient capacity available on INTELSAT satellites to reasonably satisfy U.S. direct access users' needs, or (2) if INTELSAT distribution arrangements allow Comsat to limit unreasonably the INTELSAT capacity that would otherwise be available to U.S. direct access users. We address both these factors below. We consider whether Comsat has warehoused capacity or acted in bad faith only in determining whether regulatory action may be "appropriate" should we determine that there not be "sufficient opportunity."

B. Availability of INTELSAT Capacity

16. The Commission directed Comsat to obtain information from INTELSAT on the availability of INTELSAT space segment capacity. The Commission also required Comsat to provide information on INTELSAT's "uncommitted" capacity, *i.e.*, capacity not subject to "Guaranteed Reservations" (GRs) or "First Refusal Reservations" (FRRs). A GR sets aside certain capacity, and ensures the customer that its capacity will be available at the start date for service.²⁹ An FRR also sets capacity aside for a customer, but requires the customer to upgrade to a guarantee reservation, switch to other capacity, or relinquish its

²⁷ Lockheed Martin Comments at 12.

²⁸ See, e.g., *Open Video System Second Report and Order*, 11 FCC Rcd at 18320 n.430; *MCI/BT Merger Order*, 9 FCC Rcd at 3970 (para. 48).

²⁹ GRs are available for both "operational" and "non-operational" capacity. *Notice*, 15 FCC Rcd at 10610 (para. 13), *citing* INTELSAT Tariff Manual, July 1999, at 96-99. Operational capacity is capacity on a satellite currently operational at a specific orbit location, or on a replacement satellite with the same or similar characteristics as the satellite it will replace. Non-operational capacity is capacity on a satellite at a new orbit location, and capacity on a replacement satellite with significantly different characteristics from the satellite it will replace. *Notice*, 15 FCC Rcd at 10609-10 (para. 12).

"first refusal" if another customer seeks access to that capacity.³⁰ All in-service long-term leases are considered as "automatic" FRRs for purposes of lease renewal, and current leaseholders may upgrade their reservations to GRs at any time.³¹ The *Notice* required Comsat to submit information on available uncommitted capacity on each of the 13 existing and seven planned INTELSAT satellites with CONUS or partial CONUS coverage.³²

17. The *Notice* also directed Comsat to identify, for each of the 13 existing and seven planned INTELSAT satellites listed in Appendix B of this Order, the capacity that Comsat (1) now has in service; (2) holds but does not have in service; (3) holds under a GR; and (4) holds under an FRR.³³ The *Notice* also required Comsat to identify capacity on future satellites intended to satisfy existing long-term contracts.³⁴ In addition, Comsat was required to explain the extent to which it reserves capacity in anticipation of renewal of existing long-term contracts.³⁵ Finally, we requested Comsat to identify capacity on future satellites for which it has no explicit customer requirements.³⁶ We tentatively concluded that, to the extent that capacity is tied up by GRs or FRRs, new direct access users are at a disadvantage in obtaining capacity.³⁷

18. Our findings are displayed in the tables in Appendix C to this Order. Based on the information Comsat provided in its confidential appendices, as supplemented by subsequent letters in response to Commission inquiries, we find that INTELSAT's satellites currently provide about 257 transponder units³⁸ of capacity accessible from the United States. Comsat has contracted for or has reserved about 59 percent of that capacity, 153 transponder units. U.S. direct access users now have about 4 percent of INTELSAT's U.S.-accessible capacity, 10 transponder units.³⁹ About 25 percent of INTELSAT's current U.S.-accessible capacity, 64 transponder units, is uncommitted. This currently uncommitted capacity is, however, spread over the 13 satellites accessible from the United States, and the capacity on each of those satellites is further fragmented.⁴⁰ A small but significant portion of this capacity,

³⁰ FRRs are available for operational capacity only. *Notice*, 15 FCC Rcd at 10610 (para. 13).

³¹ *Notice*, 15 FCC Rcd at 10610 (para. 14).

³² *Notice*, 15 FCC Rcd at 10614 (para. 20).

³³ *Notice*, 15 FCC Rcd at 10614 (para. 22).

³⁴ *Notice*, 15 FCC Rcd at 10614 (para. 22).

³⁵ *Notice*, 15 FCC Rcd at 10614 (para. 22).

³⁶ *Notice*, 15 FCC Rcd at 10614 (para. 22).

³⁷ *Notice*, 15 FCC Rcd at 10610-11 (para. 15).

³⁸ For purposes of this Order, a "transponder unit" provides 36 MHz of capacity.

³⁹ *See* Comsat Comments at 4 (Fig. 1); Comsat *Ex Parte* Statement.

⁴⁰ Very few of INTELSAT's U.S.-accessible transponders, 73 of 489 or 15 percent, have more than

twelve 36-MHz-equivalents, are on satellites not identified by the commenters in this proceeding as key to satisfying their needs.⁴¹ Furthermore, it appears that only four INTELSAT satellites in the Atlantic Ocean Region, and two in the Pacific Ocean Region, are used to meet the primary needs of telephony providers operating with existing foreign correspondents.⁴² Those six INTELSAT satellites have a total of 42 transponder units available for direct access. Comsat recognizes the current shortage of capacity, stating that over 80 percent of existing INTELSAT capacity that could be accessible from the United States is in use, with some of the systems' most desirable connectivities already in use by customers.⁴³ It states that, of the remaining 20 percent, only 8 percent are subject to high demand from a customer requirements perspective.⁴⁴

19. INTELSAT's U.S.-accessible capacity will likely increase from 257 transponder units to approximately 430 transponder units by 2003, based on INTELSAT's current deployment plan.⁴⁵ For several reasons, however, the record in this proceeding cannot support any conclusions on whether this

6 MHz of uncommitted capacity. In other words, 85 percent of INTELSAT's U.S.-accessible transponders have less than 6 MHz of available capacity. In Table 1 of its comments, Comsat lists 14 service orders which INTELSAT denied. All but one of those orders were for customers ordering capacity from Comsat in segments of 6 MHz or greater. This suggests that capacity which is divided up into segments of less than 6 MHz is likely to be too fragmented to be useful in many cases. In addition, each beam provides capacity only in one direction, either from the United States to other countries or other countries to the United States. Thus, even in cases where 6 MHz of capacity is available, it is possible that it could not be useful for some purposes, such as telephony, unless there is an equal amount of capacity available for the return path on the same satellite.

⁴¹ WorldCom identifies 10 of the 13 INTELSAT satellites accessible from the United States that carry its traffic. Sprint/WorldCom *ex parte* statement at 12. Sprint states that it accesses 9 of the 10 INTELSAT satellites that WorldCom accesses from earth stations owned or leased by Sprint, but it also "uses capacity on certain other INTELSAT satellites that is purchased by earth station owners with which Sprint contracts." Sprint/WorldCom *ex parte* statement at 11. There are twelve 36-MHz equivalent transponder units of uncommitted capacity on the three satellites that neither Sprint nor WorldCom identify as carrying their traffic.

⁴² In INTELSAT's BG-129-13E (17 November 1999), INTELSAT describes its satellite deployment plans, and identifies four Atlantic Ocean Region satellites and two Pacific Ocean Region satellites in its "Nominal Satellite Deployment Plan" as slated for public switched network or public data network services. We do not identify those satellites here because BG-129-13E is an "INTELSAT Restricted" document, *i.e.*, proprietary to INTELSAT Signatories and the Commission.

The direct access user commenters do not identify the specific satellites or locations that are used to meet their primary needs. Only Sprint/WorldCom discusses this issue at all. In their *ex parte* statement, Sprint reports that it uses nine INTELSAT satellites, and WorldCom reports that it uses ten, but neither identify the satellites that meet their primary needs. In their comments, Sprint claims that it uses about 4400 circuits, the equivalent of about nine transponder units, and WorldCom more than 10,000 circuits, or about 19 transponder units, but again do not identify specific satellites. Sprint/WorldCom Comments at 7. (We equated 540 circuits to one 36 MHz transponder unit.)

⁴³ Comsat Comments at 7-8.

⁴⁴ Comsat Comments at 7.

⁴⁵ See App. C to this Order.

projected growth is likely to generate sufficient opportunity for direct access. Given other demand for use of the transponders by foreign Signatories, we have no reason to believe that all of that new INTELSAT capacity not contracted for by Comsat would become available for U.S. direct access users.⁴⁶ Moreover, even if the remainder of the transponders were available to direct access users within the next three years, it is unclear on the basis of this record the extent to which these transponders will be on satellites at orbital locations that will be useful to U.S. direct access users in providing services to their customers. In addition, even if we could conclude at this time that direct access users will have sufficient opportunities for direct access by the end of 2003, we might still conclude that some "appropriate action" is warranted under Section 641(b) because sufficient opportunities for direct access do not appear to exist at the current time. To the extent that there is insufficient opportunity for direct access today, U.S. customers in the satellite services market do not receive the full benefits of competition that might otherwise be generated by direct access. Furthermore, U.S. common carriers that must compete with current INTELSAT Signatories in the global telecommunications market will continue to be competitively disadvantaged in terms of INTELSAT rates and services.⁴⁷ The opportunity costs resulting from allowing such a situation to continue for three years could be substantial.⁴⁸

20. Comsat asserts that INTELSAT's capacity will increase by about 45 percent between 2000 and 2003, as a result of the launch of new satellites and the redeployment of existing satellites.⁴⁹ Sprint/WorldCom responds that the projected 45 percent increase in capacity will do no more than keep up with projected demand growth.⁵⁰ The Commission staff requested Comsat to explain the basis for this 45 percent increase estimate in more detail.⁵¹ Based on Comsat's response to that request,⁵² it appears that Comsat's projection includes satellite capacity, at least some portion of which, cannot be used to provide service to the United States.⁵³ We also conclude that some of the capacity included in Comsat's projections

⁴⁶ Other INTELSAT Signatories in the Western Hemisphere own about 15.87 percent of INTELSAT. See Applications of INTELSAT LLC for Authority to Operate, and to Further Construct, Launch, and Operate C-Band and Ku-band Satellites That Form a Global Communications System in Geostationary Orbit, Memorandum Opinion, Order and Authorization, FCC 00-287 (rel. Aug. 8, 2000) (*INTELSAT Order*), at App. B. Comsat owns about 20.42 percent. If Signatories' use of INTELSAT capacity is approximately proportional to their ownership shares, then about 16 percent of INTELSAT capacity accessible from the United States will probably be reserved to other INTELSAT Signatories.

⁴⁷ *Direct Access Order*, 14 FCC Rcd at 15720-27 (paras. 35-50).

⁴⁸ ATC Reply at 5.

⁴⁹ Comsat Response at 6 and Att. A.

⁵⁰ Sprint/WorldCom *Ex Parte* Statement at 2.

⁵¹ Letter from Thomas S. Tycz, Chief, Satellite and Radiocommunication Division, to Lawrence W. Secret III, Counsel for Comsat Corporation (dated Aug. 10, 2000).

⁵² See *Comsat August 16 Letter* at 4.

⁵³ For example, a satellite which could provide 500 MHz of dual-polarized C-band bandwidth, and 500 MHz of singly-polarized Ku-band bandwidth to the United States, would provide a maximum of 36 transponders outgoing and 36 transponders incoming to the United States at any one time, if no capacity were

will be used by foreign Signatories or owners to provide service to Central or South America, Europe, or Africa rather than the United States.⁵⁴ Even if we were to rely on Comsat's latest calculations, however, we note that over half of Comsat's projected increase is limited to three orbital locations, two of which are now unused, and the other of which is currently served by an inclined orbit satellite.⁵⁵ The *Notice* did not direct Comsat to provide any information on the uncommitted capacity that will be placed at these two vacant orbital locations. We assume that 40 to 60 percent of those satellites' capacity will be accessible from the United States.⁵⁶ Furthermore, of the 45 percent increase Comsat anticipates, about 36 percent is in the Atlantic Ocean Region.⁵⁷ Sprint/WorldCom reports that INTELSAT capacity shortages are least severe in the portion of the Atlantic Ocean Region composed of routes between the United States and Western Europe.⁵⁸

21. In sum, existing INTELSAT capacity availability to U.S. direct access users is limited. There will be increases in capacity in the near term, but it is unclear whether much of that increased capacity will be on satellites useful to U.S. direct access users from a customer requirements standpoint. In any case, the availability of future capacity cannot by itself create sufficient opportunities for direct access now.

C. Effect of INTELSAT Distribution Policies on Capacity Availability

22. According to Comsat, INTELSAT provides capacity in two ways, "bulk capacity" and "standardized circuits."⁵⁹ Although the classifications "bulk capacity" and "standardized circuits" are

provided to Canada and Latin America. In its letter, Comsat suggests that such a satellite can provide 88 transponders to the United States.

⁵⁴ In a later *ex parte* statement, Comsat admits that not all of the transponders addressed in the *Comsat August 16 Letter* include the United States in their coverage area at this time. *Comsat August 25 Letter* at 3. We note, however, that nothing in our rules now prevents U.S. carriers from contracting with Signatories in foreign countries to carry the INTELSAT traffic from U.S. earth stations to INTELSAT satellites using foreign signatories' capacity.

⁵⁵ In the *Notice*, the Commission observed that the satellite at inclined orbit, currently located at 29.5° W.L., is of marginal use because of the inclined orbit and because the connectivity is limited to a single spot beam. *Notice*, 15 FCC Rcd at 10613 (para.18). Satellites in inclined orbits are of limited usefulness because they are not fully geostationary.

⁵⁶ The 40 percent assumption is based on the fact that Comsat owns about 20 percent of INTELSAT. Therefore, we assume that Comsat will use about 20 percent of INTELSAT's capacity to carry traffic from the United States to foreign countries, and other Signatories will use another 20 percent to carry traffic from foreign countries to the United States. The 60 percent assumption is based on Comsat's claim that about 500 of the 827 transponders on the satellites listed in the appendices in the *Notice*, or about 60 percent, can be used to provide service to the United States. *Comsat August 25 Letter* at 4.

⁵⁷ See *Comsat August 16 Letter* at 4.

⁵⁸ Sprint/WorldCom *Ex Parte* Statement at 2.

⁵⁹ Comsat characterizes bulk capacity as "raw" transmission capacity that is tailored to satisfy the particular needs of an individual customer. Comsat Comments at 16. Comsat describes standardized circuits as circuits not reserved on an individual basis, but assigned to particular frequencies and transponder units on certain

useful in understanding the types of services Comsat provides with the capacity it obtains from INTELSAT, they are not helpful in assessing the INTELSAT capacity available for direct access. This is because the INTELSAT reservation policy is applicable only to Bulk Capacity, not Standardized Circuits.⁶⁰ Both Bulk Capacity and Standardized Circuits, however, are subject to a long-term commitment program that provides for discounts of up to 15 percent for commitments of up to 15 years.⁶¹ Comsat states that about 30 percent of Comsat space segment capacity is in the form of Standardized Circuits, which are not reserved on an individual basis, but are assigned to particular frequencies and transponder units on certain INTELSAT satellites earmarked for public switched satellite service.⁶²

23. We expect the capacity amounts purchased as Standardized Circuits to remain fairly stable over the next three years because Comsat states in its *August 9 Letter* that its long-term contracts on bandwidths equivalent to only about 11.5 transponder units are scheduled to expire over the next three years, and Comsat states further that it is likely to renew some of those contracts.⁶³ In addition, the data in Comsat's confidential appendices show that about 29 of the transponder units Comsat has purchased are subject to some kind of reservation. Thus, three years from now, the capacity Comsat will have under contract will be roughly 170 transponder units.

24. As a result of Comsat's long-term contracts, and of reservations of capacity on INTELSAT's planned satellites, INTELSAT Signatories, including Comsat, will continue to have long-term control of a substantial fraction of INTELSAT's U.S.-accessible capacity. Comsat notes that it has renewal rights in all its long-term contracts.⁶⁴ Furthermore, INTELSAT's Tariff Manual does not place any restrictions on the number of times Signatories can renew their contracts.⁶⁵ In addition, U.S.-accessible capacity subject to a long-term lease is subject to the INTELSAT Tariff Manual, which gives long-term leaseholders an

INTELSAT satellites earmarked for use in providing public switched services. Comsat Comments at 19. The terms "bulk capacity" and "standardized circuits" are not defined or used in INTELSAT's July 2000 tariff manual. "Bulk capacity" appears to be the term used with respect to Transponder Lease Services in Section II of INTELSAT's Tariff Manual. The INTELSAT Tariff Manual explains that Transponder Leases offer more flexibility than other INTELSAT leases, and can be used to implement a number of other services, including domestic/regional video, Internet, data, public switched and cable restoration. INTELSAT Tariff Manual, July 2000, at 66. "Standardized circuits" appear to be the Channel/Carrier Services discussed in Section I of INTELSAT's Tariff Manual. These services are voice and data services, and include Intermediate Data Rate (IDR) service, INTELSAT Business Service (IBS), and Time Division Multiple Access (TDMA) service. We use the terms "bulk capacity" and "standardized circuits" to be consistent with the pleadings.

⁶⁰ INTELSAT Tariff Manual, July 2000, at 100.

⁶¹ INTELSAT Tariff Manual, July 2000, at 63-65.

⁶² Comsat Comments at 19.

⁶³ *Comsat August 9 Letter* at 3. See also *Comsat July 13 Letter* at 2-3.

⁶⁴ *Comsat August 9 Letter* at 2.

⁶⁵ See INTELSAT Tariff Manual, July 2000, at 63-65.

"automatic" FRR.⁶⁶

25. None of the arguments raised by Comsat or Lockheed Martin compel us to reach a different result. For example, Comsat maintains that it has not exercised its automatic FRR or renewed contracts merely to limit opportunities for direct access.⁶⁷ We cannot conclude that INTELSAT capacity currently subject to a Comsat long-term contract or lease will necessarily become available for direct access in the future merely because Comsat has not exercised those rights to prevent direct access in the past. Comsat also argues that its FRRs cannot "tie up" INTELSAT capacity in any case because direct access customers can challenge for that capacity.⁶⁸ Under the INTELSAT Tariff Manual, however, Comsat may convert an FRR to a GR in response to a challenge; Comsat is not required to relinquish that capacity.⁶⁹ Finally, Comsat observes that direct access users can take advantage of INTELSAT's reservation policy on a going-forward basis.⁷⁰ Comsat's point is persuasive only up to a point, because direct access users can use the reservation policy only to the extent that capacity is available for direct access.

D. Matching

26. The *Notice* requested comment on whether Comsat holds or has reservations for capacity that is the only capacity useful to the user or service provider.⁷¹ Users and service providers were asked to explain why only capacity held by Comsat is sufficient to meet their needs.⁷² The Commission specifically sought examples of cases in which a user or service provider requires specific capacity because nothing else would "match" with the capacity held by its foreign correspondent.⁷³ The *Notice* further explained that, in order to assess capacity availability, the Commission must determine the amount of uncommitted capacity, and whether that capacity can be matched with the user's or service provider's foreign correspondent.⁷⁴ The Commission also requested cases in which a user's or service provider's earth stations

⁶⁶ INTELSAT Tariff Manual, July 2000, at 105.

⁶⁷ Comsat Comments at 17 (automatic FRR); Comsat Comments at 22 (contracts for Standardized Circuits).

⁶⁸ Comsat also maintains that INTELSAT does not inform Comsat who the challenger is. Comsat Comments at 17-18.

⁶⁹ INTELSAT Tariff Manual, July 2000, at 103.

⁷⁰ Comsat Response at 6-7.

⁷¹ *Notice*, 15 FCC Rcd at 10614-13 (para. 23).

⁷² *Notice*, 15 FCC Rcd at 10614-15 (para. 23).

⁷³ *Notice*, 15 FCC Rcd at 10614-15 (para. 23).

⁷⁴ In order to connect with a carrier in a foreign country, a U.S. carrier must contract with Comsat or directly with INTELSAT for capacity from the United States to the INTELSAT satellite, and the frequency and bandwidth must "match" the connection from the INTELSAT satellite to the foreign country obtained by the foreign carrier. *See Notice*, 15 FCC Rcd at 10613 (para. 17).

can access only a particular satellite.⁷⁵

27. Sprint/WorldCom asserts that only 12 percent of its direct access orders have been filled, when measured on a capacity basis. Sprint/WorldCom maintains further that 46 percent of its orders have not been filled because of lack of capacity, and 43 percent of its direct access orders have not been filled due to the absence of a foreign capacity match.⁷⁶ Sprint/WorldCom notes that a carrier buying the U.S. half of an INTELSAT circuit must obtain a "match" from a foreign carrier buying the other half-circuit, and INTELSAT will not make capacity available until such a match is confirmed.⁷⁷ Sprint/WorldCom asserts that foreign carriers are often confused by this "matching" requirement, and often fear that they are risking the loss of scarce existing capacity.⁷⁸ According to Sprint/WorldCom, INTELSAT could eliminate the need to find foreign matches by treating the foreign half-circuit as a frequency change rather than a capacity match.⁷⁹ Sprint/WorldCom claims further that INTELSAT proposed the frequency change approach to WorldCom on January 3, 2000, but withdrew the offer three hours later. Sprint/WorldCom attributes this to pressure from Comsat.⁸⁰ Sprint/WorldCom explains further that the frequency change approach would facilitate direct access when (1) INTELSAT capacity is available and Comsat has not contracted for that capacity; (2) Comsat's contract is about to expire; or (3) Comsat has a standardized circuit contract with INTELSAT, which allows INTELSAT to move Comsat to a different circuit.⁸¹

28. Comsat asserts that this "frequency change" proposal would require Comsat to pay INTELSAT for the full term of its lease, even though it might be relocated to less valuable circuits or frequencies.⁸² Comsat and Lockheed Martin note that many direct access orders have been filled.⁸³

⁷⁵ Notice, 15 FCC Rcd at 10613-14 (para. 23).

⁷⁶ Specifically, Sprint/WorldCom claims that 138 of its 311 direct access orders remain pending. Of the 172 orders that have been processed, 26 have been filled, 72 have been denied for lack of capacity, and 74 have been denied because of a lack of a foreign match. When measured on a capacity basis, 12 percent have been filled, 46 percent unfilled due to lack of capacity, and 42 percent unfilled due to lack of a foreign match. Sprint/WorldCom Comments at 8-10.

⁷⁷ Sprint/WorldCom Comments at 10.

⁷⁸ Sprint/WorldCom Comments at 10.

⁷⁹ Sprint/WorldCom Comments at 10. A "frequency change" is when a Signatory or direct access user requests INTELSAT to reassign its service from one frequency to another on a particular satellite. WorldCom contemplated this approach as an alternative to terminating service and initiating a new service on another transponder or frequency band.

⁸⁰ Sprint/WorldCom Comments at 10 and Att. 3.

⁸¹ Sprint/WorldCom *Ex Parte* Statement at 3.

⁸² Comsat Response at 24-26.

⁸³ Comsat Response at 5; Lockheed Martin Response at 6.

Comsat accuses WorldCom of placing direct access orders for frequencies that it knew were already subject to Comsat contract, in order to generate a large number of service order denials and create a misleading picture of opportunities for direct access.⁸⁴ Comsat claims that INTELSAT sometimes denies Comsat's requests for capacity. Comsat claims further that, when measured on a capacity basis, INTELSAT has denied more Comsat requests for capacity than WorldCom requests for capacity.⁸⁵

29. The Commission staff requested that Comsat discuss the procedures available to a U.S. direct access user to match non-Comsat half-circuits with the half-circuits of its foreign correspondent. In particular, we asked Comsat whether this is possible where Comsat leases the entire transponder, and whether the foreign correspondent must obtain new capacity to match the U.S. carrier's non-Comsat capacity.⁸⁶ Comsat explains that the U.S. carrier could use "existing ordering procedures" to request a foreign correspondent to match the U.S. carrier's new capacity order. If the foreign correspondent agrees to match the new order, it must (1) advise INTELSAT that it wishes to cancel its existing matched service, (2) formally advise INTELSAT of its desire to match the new service, and (3) submit a service order to INTELSAT setting forth the new correspondent relationship between the U.S. carrier and the foreign correspondent.⁸⁷ Comsat also maintains that INTELSAT needs such joint service orders to manage its capacity supply and provide operational support.⁸⁸

30. We do not need to reach the issue of whether Comsat "pressured" INTELSAT into withdrawing its "frequency change" proposal, or whether it would be reasonable for Comsat to apply such pressure. We believe, however, that where U.S. direct access users are able to obtain non-Comsat capacity to operate with their foreign correspondents, they should not be denied direct access because of unnecessary procedural difficulties. INTELSAT clearly must manage its capacity supply and provide operational support. We direct the International Bureau to consult with INTELSAT to explore ways of resolving the type of procedural difficulties described by commenters in this proceeding.

E. Effect of INTELSAT Privatization

31. The *Notice* observed that INTELSAT is undergoing privatization.⁸⁹ Based on INTELSAT's statements of principles governing its privatization, we stated that we expect U.S. service providers seeking access to INTELSAT capacity to have the same distribution rights and opportunities as former

⁸⁴ Comsat Response at 8-9. *See also* Lockheed Martin Response at 6.

⁸⁵ Comsat claims its unfilled orders amount to about thirty-five 36 MHz-equivalent transponder units when measured on a capacity basis, while WorldCom's unfilled orders amount to only eight transponder units. Comsat Response at 9-10.

⁸⁶ Letter from Thomas S. Tycz, Chief, Satellite and Radiocommunication Division, to Lawrence W. Secret III, Counsel for Comsat Corporation (dated Aug. 10, 2000).

⁸⁷ *Comsat August 16 Letter* at 2-3.

⁸⁸ *Comsat August 16 Letter* at 3 n.3.

⁸⁹ *Notice*, 15 FCC Rcd at 10611 (para. 16).

INTELSAT signatories.⁹⁰ We also stated that U.S. users who choose not to become INTELSAT distributors should be able to take service directly from INTELSAT.⁹¹ The *Notice* asked for comment on these expectations, and how distribution arrangements that do or do not meet these expectations might affect opportunities for Level 3 direct access.⁹²

32. Cable & Wireless notes that INTELSAT has shortened the lead time allowed for GRs and FRRs, and argues that INTELSAT's post-privatization distribution will not limit INTELSAT's flexibility in negotiating other agreements with customers.⁹³ Similarly, Comsat states that INTELSAT's current distribution arrangements will cease to be effective after privatization, and that INTELSAT has committed to enter into new direct access service agreements on an independent, transparent, and non-discriminatory basis.⁹⁴ Sprint/WorldCom plans to comment in greater detail after INTELSAT has disclosed its proposed post-privatization corporate structure and rules of operation.⁹⁵

33. We are encouraged by INTELSAT's commitment to competition and transparency. We agree with Lockheed Martin that a privatized INTELSAT should be free to manage itself and make decisions based on its view of the market and under its fiduciary responsibilities to its shareholders.⁹⁶ In fact, we indicated in our *Notice* that post-privatization distribution arrangements should not limit INTELSAT's commercial flexibility to develop and provide services, and thereby diminish its competitive effectiveness.⁹⁷ However, unlike any of its competitors who make use of distribution agreements, INTELSAT is developing post-privatization distribution arrangements under its current intergovernmental structure. As part of the privatization process, INTELSAT Management and existing Signatories, who do not have fiduciary responsibilities either to INTELSAT or to the future private company, are drafting an agreement that will govern the sales and distribution arrangements for INTELSAT. In effect, post-privatization distribution arrangements are being developed by current and future customers as well as owners of the private company which are in a position to refuse to privatize should the post-privatization sales structure not meet with their approval. We have pointed out that U.S. carriers that are the global competitors to INTELSAT Signatories do not have an opportunity to participate in these negotiations.⁹⁸ Thus, we would be concerned if the post-privatization sales and distribution structure carries forward some of the same privileges or protections enjoyed by Signatories, including Comsat, from the pre-privatization structure.

⁹⁰ *Notice*, 15 FCC Rcd at 10611 (paras. 16-17).

⁹¹ *Notice*, 15 FCC Rcd at 10611 (para. 17).

⁹² *Notice*, 15 FCC Rcd at 10611 (para. 17).

⁹³ Cable & Wireless Comments at 12-14.

⁹⁴ Comsat Comments at 36-37. *See also* Lockheed Martin Response at 23.

⁹⁵ Sprint/WorldCom Comments at 15 n.41.

⁹⁶ Lockheed Martin Redacted Response at 23.

⁹⁷ *Notice*, 15 FCC Rcd at 10611 (para. 17).

⁹⁸ *Notice*, 15 FCC Rcd at 10611 n.27.

Based on these concerns, we will continue to pay close attention to the agreements that result from the ongoing distribution negotiations to ensure that the benefits of direct access are not diminished in the privatization process.⁹⁹

F. Conclusions as to "Sufficient Opportunity"

34. We conclude that U.S. users and providers of telecommunications services currently do not have sufficient opportunity to access INTELSAT capacity directly to meet their service or capacity requirements. This conclusion is based on our findings that (1) Comsat now controls through lease or reservation nearly 60 percent of INTELSAT capacity that can be accessed from the United States; (2) some of the remaining INTELSAT capacity that is accessible from the United States is used by foreign Signatories and is not necessarily available for U.S. use; (3) uncommitted capacity is spread over 13 U.S.-accessible satellites; and (4) the capacity that is available on these satellites is not necessarily useful to direct access users from a customer requirements standpoint. These findings are further supported by the fact that both Comsat and direct access users commenting in this proceeding have reported difficulty in obtaining capacity to satisfy customer needs. The difficulties primarily are due to capacity shortages caused by high demand, and by what appears to be procedural complications in "matching" capacity that is available. Given these circumstances, U.S. customers in the satellite services market are not able to enjoy the full benefits of competition that might otherwise be generated by direct access, and U.S. common carriers that must compete with current INTELSAT Signatories in the global telecommunications market will continue to be competitively disadvantaged in terms of INTELSAT rates and services.¹⁰⁰

35. The record in connection with future INTELSAT capacity is less clear. It appears that INTELSAT capacity that is accessible to the United States will increase and Comsat's overall share by 2003 will decrease. Nonetheless, Comsat's share will remain significant, and be subject to renewal rights under INTELSAT's procedures. These procedures essentially ensure Comsat and other Signatories the ability to continue to control INTELSAT capacity in the future. It appears that these procedures will also be continued in post-privatization distribution arrangements. Moreover, the additional capacity INTELSAT plans to introduce by the end of 2003 will be spread over several satellites, some of which may not be as useful as others to direct access customers from a customer requirements standpoint. On the other hand, the direct access users commenting in this proceeding have not been explicit as to their future needs and whether those needs will be satisfied by future capacity increases. As a result, we cannot make a determination as to whether in the near future they will have "sufficient opportunity" to directly access INTELSAT within the meaning of Section 641(b).

IV. ALTERNATIVES FOR APPROPRIATE ACTION

36. Section 641(b) directs the Commission to take "appropriate action" to facilitate direct access if sufficient opportunity for such access does not exist.¹⁰¹ We found above that users and service providers

⁹⁹ We also note that the final distribution agreements will be part of the review that the Commission will undertake as a part of our review of INTELSAT's overall privatization in the context of our licensing procedure.

¹⁰⁰ *Direct Access Order*, 14 FCC Rcd at 15720-27 (paras. 35-50).

¹⁰¹ Section 641(b) of the Satellite Act, as amended by the ORBIT Act, 47 U.S.C. § 765(b).

do not have sufficient opportunity for direct access. The *Notice* invited comment on a number of options for appropriate action if we found that there was not sufficient opportunity for direct access. We address those comments below.

A. Commercial Solution

37. In the *Notice*, we tentatively concluded that the Commission should rely initially on a "commercial solution" if it were to determine that there was insufficient opportunity for direct access.¹⁰² We explained that commercial negotiations between Comsat and direct access customers, if successful, would result in a faster resolution of satellite capacity allocation issues than a regulatory solution.¹⁰³ We also reasoned that a solution reached through commercial negotiations is more likely to address the specific needs of direct access customers.¹⁰⁴ Finally, we noted that a commercial solution would be consistent with the approach it adopted in the *Direct Access Order*.¹⁰⁵

38. ATC and Sprint/WorldCom assert that the commercial solution has already failed.¹⁰⁶ Comsat replies that there have been several instances where Comsat and direct access customers were able to reach agreements to provide for access to INTELSAT, so the commercial solution has worked.¹⁰⁷ Lockheed Martin claims that no commenter has cited a specific case where commercial negotiations failed.¹⁰⁸ Lockheed Martin also asserts that commercial negotiations have been working as intended to drive down the margin between the INTELSAT Utilization Charge and Comsat's rates.¹⁰⁹

39. Lockheed Martin argues that a regulatory solution would be appropriate only if Comsat is holding capacity that is unique to the needs of a user or service provider's requirements, Comsat has not negotiated in good faith, and Comsat is holding INTELSAT capacity for the purpose of extending its prior exclusive access rather than meeting current or anticipated service requests.¹¹⁰ Lockheed Martin contends that the commenters have not shown that they have a unique need to access INTELSAT to meet their

¹⁰² *Notice*, 15 FCC Rcd at 10615 (para. 25).

¹⁰³ *Notice*, 15 FCC Rcd at 10615 (para. 25).

¹⁰⁴ *Notice*, 15 FCC Rcd at 10615 (para. 25).

¹⁰⁵ *Notice*, 15 FCC Rcd at 10615 (para. 25). *See Direct Access Order*, 14 FCC Rcd at 15755 (para. 128).

¹⁰⁶ ATC Comments at 4; Sprint/WorldCom Reply at 9-10.

¹⁰⁷ Comsat Response at 15-16.

¹⁰⁸ Lockheed Martin Response at 12.

¹⁰⁹ Lockheed Martin Response at 22-23.

¹¹⁰ Lockheed Martin Comments at 12.

service or capacity requirements, nor that Comsat has not negotiated in good faith.¹¹¹

40. We will pursue a commercial solution as proposed in the *Notice* and the *Direct Access Order*.¹¹² At this time, it appears that commercial negotiations are more likely than a regulatory approach to result in a faster solution that addresses the specific needs of direct access customers. As a general matter, it is preferable to rely on market mechanisms because a regulatory approach could distort the market.¹¹³ Similarly, negotiated solutions between Comsat and direct access customers are more likely than government-imposed arrangements to achieve in the near future a balanced solution that will best benefit both Comsat and direct access customers, and so are more likely to further the public interest.

41. In this instance, we disagree with ATC and Sprint/WorldCom that any commercial solution is destined to fail. Comsat and Lockheed Martin note that several direct access orders have been filled.¹¹⁴ Moreover, Comsat also observes that it has renewed with INTELSAT only 26 of 56 Bulk Capacity leases involving 584.6 MHz of capacity, while relinquishing 30 leases involving 220.4 MHz.¹¹⁵ Thus, we have no basis, at this time, for concluding that Comsat is unwilling or unable to negotiate mutually beneficial solutions to provide for access to INTELSAT by direct access customers. Given the potential public interest benefits of a commercial solution, ATC's and Sprint/WorldCom's concerns are not sufficient to reject a commercial solution from the outset. As discussed further below, however, we may revisit this conclusion depending on the outcome of the negotiation period.

B. Guidelines for Negotiation

42. In supporting commercial solution, Cable & Wireless suggests guidelines for commercial negotiations based on Section 252 of the Communications Act, as amended by the Telecommunications Act of 1996 (1996 Act).¹¹⁶ Specifically, Cable & Wireless recommends (a) requiring Comsat to act in good

¹¹¹ Lockheed Martin Response at 18-19.

¹¹² *Notice*, 15 FCC Rcd at 10615 (para. 25); *Direct Access Order*, 14 FCC Rcd at 15755 (para. 128).

¹¹³ In the *Access Reform Order*, the Commission noted that competition was beginning to develop in the market for "access" services, services provided by local telephone companies to long distance telephone companies, to give long distance companies access to end users. The Commission adopted a "market-based" approach rather than a "prescriptive" approach to drive access rates closer to cost, because "[c]ompetitive markets are superior mechanisms for protecting consumers by ensuring that goods and services are provided to customers in the most efficient manner possible to protect consumers and the public interest." *See generally* Access Charge Reform, First Report and Order, CC Docket No. 96-262, 12 FCC Rcd 15982, 16094-96 (paras. 262-65) (1997) (*Access Reform Order*), *aff'd sub nom.* Southwestern Bell Telephone Co. v. FCC, 153 F.3d 523, 546-49 (8th Cir. 1998).

¹¹⁴ Comsat Comments at 3-5; Comsat Response at 5; Lockheed Martin Response at 6. Comsat filed an *ex parte* statement on August 23, 2000, showing that additional direct access orders were filled during the three-month period from May 1 to July 31, 2000. Comsat *ex parte* statement.

¹¹⁵ Comsat Response at 6.

¹¹⁶ Cable & Wireless Comments at 8-9, *citing* 47 U.S.C. § 252.

faith upon a request for and during negotiations for access to INTELSAT capacity; (b) specifying specific time frames to commence and finalize these negotiations, and (c) identifying circumstances in which the Commission would intervene in the negotiations.¹¹⁷ Cable & Wireless recommends requiring Comsat to start negotiations with 10 days of a written request from a carrier. Cable & Wireless also suggests giving Comsat and the carrier the right to request Commission intervention after 60 days.¹¹⁸ According to Cable & Wireless, the Commission should be able to review the record of the negotiations to determine whether the parties have negotiated in good faith. If Comsat has not negotiated in good faith, Cable & Wireless recommends requiring Comsat to make that capacity available on reasonable terms. If the carrier requesting capacity has not negotiated in good faith, Cable & Wireless states that the Commission could find that the carrier is not entitled to the capacity it seeks.¹¹⁹ Lockheed Martin advocates a commercial solution without any requirements or guidelines, because such guidelines could reduce incentives for either of the parties to reach a negotiated agreement.¹²⁰

43. We agree that adopting guidelines for commercial negotiations is likely to facilitate the negotiations. We decline to adopt detailed requirements as Cable & Wireless recommends, however. Rather, we will adopt general guidelines for negotiations on availability of capacity and for resolution of problems associated with "matching" with foreign correspondents' facilities. We require Comsat to enter into negotiations with direct access customers on options to make capacity available where it is clear there is insufficient capacity available that is not controlled by Comsat. Options raised in this proceeding should be part of those discussions. Comsat and direct access users must file reports with the Commission on or before March 13, 2001, on the progress of the negotiations. We emphasize that we are not mandating any particular result for these negotiations. Rather, we suggest these guidelines hoping that they will facilitate the discussions and assist the parties' efforts to reach mutually beneficial agreements.

44. We noted above that, according to Sprint/WorldCom, direct access opportunities are more limited than they would be otherwise because INTELSAT's internal "matching" procedures can be confusing to foreign correspondents, or place them at risk of losing INTELSAT capacity.¹²¹ We also directed the International Bureau to consult with INTELSAT to explore ways of revising INTELSAT's procedures to mitigate this confusion or risk without affecting INTELSAT's ability to manage its capacity supply and provide operational support.¹²² Those INTELSAT consultations could be important to the "matching" issue in the direct access negotiations. Accordingly, we direct the Bureau to discuss the results of those INTELSAT consultations with all parties involved in the direct access negotiations.

45. We disagree with Cable & Wireless that the Commission should intervene within 70 days of a

¹¹⁷ Cable & Wireless Comments at 8-9.

¹¹⁸ Cable & Wireless Comments at 8-9.

¹¹⁹ Cable & Wireless Comments at 9.

¹²⁰ Lockheed Martin Comments at 11; Lockheed Martin Response at 23-24.

¹²¹ See Section III.D., *supra*. See also Sprint/WorldCom Comments at 10.

¹²² Section III.D., *supra*.

request for direct access. We explained in the section above that negotiated agreements between Comsat and direct access customers are more likely than government-imposed arrangements to achieve a balanced solution that will best benefit both Comsat and direct access customers, and so are more likely to further the public interest. We do not want to intervene in the negotiations until we are certain that those negotiations cannot be successful.¹²³

46. We need not decide at this time what actions we will take if we find that Comsat or a direct access user has not negotiated in "good faith," as Cable & Wireless recommends. As we discuss further in the next section of this Order, we do not foreclose any regulatory option at this time. First, if a commercial solution is successful, then we will not need to adopt a regulatory solution at all. Second, if a commercial solution is not successful, then the reason or reasons why it is not successful may play a role in the regulatory solution we adopt, if any. Therefore, we are not in a position at this time to decide whether to adopt a request-by-request approach like the one advocated by Cable & Wireless, and to foreclose more broad-based regulatory approaches like the ones discussed in the *Notice*.¹²⁴ Deciding a course of action now if we find that either Comsat or a direct access customer does not negotiate in "good faith" would be tantamount to foreclosing more broad-based regulatory options.

C. Regulatory Solution as a "Backstop"

47. We adopt our proposal in the *Notice* and retain the option to adopt a regulatory solution if commercial solutions are unsuccessful.¹²⁵ If we find that a commercial solution does not "facilitate" direct access in a reasonable number of cases, that commercial solution by itself would not be considered "appropriate action" within the meaning of Section 641(b). We do not foreclose any regulatory option at this time. We will address issues raised in connection with any particular regulatory solution or solutions that may be appropriate when and if we decide it is necessary to adopt a regulatory solution at all. In particular, we need not reach arguments regarding the construction of Section 641(c) at this time,¹²⁶ and so we need not determine what actions on Comsat contracts are permitted by the ORBIT Act, if any. Furthermore, the *Direct Access Order* concluded that the Commission could require "portability" of INTELSAT space segment capacity if Comsat increases its control of that capacity to deny direct access

¹²³ We do not intend this six-month negotiation period to limit direct access users' ability to place new direct access orders with INTELSAT for capacity that is not held by Comsat under the INTELSAT direct access procedures currently in place. Rather, we intend this negotiation to be directed at INTELSAT capacity currently held by Comsat.

¹²⁴ *Notice*, 15 FCC Rcd at 10615-16 (paras. 24-27).

¹²⁵ *Notice*, 15 FCC Rcd at 10615 (para. 25). *See also Direct Access Order*, 14 FCC Rcd at 15755-56 (para. 128) (direct access users may petition the Commission for a regulatory solution in the event that commercial solutions were unsuccessful). Similarly, in the *Access Reform Order*, the Commission retained a regulatory "backstop" to its market-based approach to access reform. Specifically, the Commission required local telephone companies to file cost studies about three-and-a-half years after the *Access Reform Order* was adopted, so that the Commission could prescribe cost-based rates. *Access Reform Order*, 12 FCC Rcd at 16096-97 (paras. 267-68).

¹²⁶ *See, e.g.*, Comsat Comments at 30-32; Comsat Response at 17-20; Lockheed Martin Comments at 13-14; Lockheed Martin Response at 19.

users the benefits of direct access.¹²⁷ We note here that, independent of our Congressional mandate under the ORBIT Act, we can and will revisit the portability issue, as we explained in the *Direct Access Order*.

48. In addition, we see no reason to limit our options on regulatory solutions to short-term requirements. We disagree with Comsat and Lockheed Martin that any regulatory solution we may adopt in this proceeding cannot apply after INTELSAT is privatized.¹²⁸ Comsat's control of INTELSAT capacity may result at least in part from pre-privatization benefits, including its former monopoly over access to INTELSAT capacity in the United States. If Comsat retains a disproportionate amount of control over access to INTELSAT's space segment capacity after privatization, then competition in the provision of space segment capacity will be less vigorous than it would be otherwise. Such a market distortion could harm the interests of U.S. satellite service customers. The ORBIT Act effectively mandates direct access as a matter of law and policy in the United States,¹²⁹ and directs the Commission to "take such steps as necessary to prevent the circumvention of this section."¹³⁰ Although Comsat correctly observes that the ORBIT Act establishes separate definitions for "INTELSAT" and its "successor entity,"¹³¹ and that Section 641(b) refers only to "INTELSAT," nothing in Section 641(b) explicitly permits circumvention of this direct access policy, either before or after privatization. Depending on the final privatization agreement and the results of the negotiations we require in this proceeding, we may not need to resolve this possible tension in statutory construction. Accordingly, we do not address this issue further at this time.

V. OTHER ISSUES

49. The Commission also requested comment on parties' initial experiences in obtaining direct access to INTELSAT capacity.¹³² Sprint/WorldCom alleges that Comsat has access to information submitted to INTELSAT by direct access customers, and can use this information to exploit or interfere with direct access customers' business opportunities.¹³³ Sprint/WorldCom also maintains that Comsat's influence within INTELSAT causes INTELSAT to process direct access orders unnecessarily slowly,

¹²⁷ *Direct Access Order*, 14 FCC Rcd at 15755-56 (para. 128); *Notice*, 15 FCC Rcd at 10607-08 (paras. 7-8). In this context, portability would permit a customer of Comsat to obtain directly from INTELSAT the transponder capacity it was receiving through Comsat. *Notice*, 15 FCC Rcd at 10607-08 (para. 7).

¹²⁸ Comsat Comments at 34-36; Comsat Response at 30-31; Lockheed Martin Comments at 18. *But see* ATC Reply at 6; Sprint/WorldCom Reply at 4-7.

¹²⁹ Section 641(a) of the Satellite Act, as amended by the ORBIT Act, 47 U.S.C. § 765(a).

¹³⁰ Section 641(b) of the Satellite Act, as amended by the ORBIT Act, 47 U.S.C. § 765(b).

¹³¹ Comsat Comments at 35, Comsat Response at 30. *Compare* Section 681(a)(1) of the Satellite Act, as amended by the ORBIT Act, 47 U.S.C. § 769(a)(1), *with* Section 681(a)(7) of the Satellite Act, as amended by the ORBIT Act, 47 U.S.C. § 769(a)(7).

¹³² *Notice*, 15 FCC Rcd at 10614 (para. 21).

¹³³ Sprint/WorldCom Comments at 12.

sometimes forcing a customer to renew a contract with Comsat to avoid a lapse in service.¹³⁴ Sprint/WorldCom maintains further that Comsat's rate structure effectively requires long-term renewals because the mark-ups on short-term renewals are prohibitively expensive.¹³⁵ However, Comsat responds that it no longer has access to direct access customers' information.¹³⁶ It has revised its tariff so that direct access customers submit their information directly to INTELSAT.¹³⁷

50. Sprint/WorldCom alleges that Comsat has access to information on INTELSAT satellite deployment schedules and capacity availability that is not available to direct access customers.¹³⁸ Comsat claims that it makes relevant information publicly available, and that direct access users and Signatories receive the same general information regarding available capacity.¹³⁹ Comsat also notes that some U.S. direct access users have a controlling interest in foreign Signatories, and so can obtain information from INTELSAT through those Signatories.¹⁴⁰ Comsat's statements persuade us that direct access customers are not disadvantaged in obtaining direct access capacity by any lack of relevant information at this time. Therefore, we need not take further action at this time.

51. ATC asserts that Comsat's 5.58 percent surcharge makes U.S. providers of INTELSAT capacity uncompetitive.¹⁴¹ Lockheed Martin asserts that this issue is outside the scope of this proceeding.¹⁴² Sprint raised this issue in a petition for reconsideration of the *Direct Access Order*, but it is outside the scope of this proceeding.

52. ATC complains that Comsat plans to increase ATC's current contract rate by 10 percent as of the end of ATC's current contract.¹⁴³ This assertion, even if true, is not by itself relevant to determining whether there are sufficient opportunities for direct access.

¹³⁴ Sprint/WorldCom Comments at 11.

¹³⁵ Sprint/WorldCom Comments at 11, *citing Direct Access Order*, 14 FCC Rcd at 15807-10 (Table D).

¹³⁶ Comsat Comments at 3 n.4; Lockheed Martin Response at 10-11.

¹³⁷ *See* Comsat World Systems, Tariff F.C.C. No. 4, Transmittal No. 145, Section 2.2, 2nd revised page 6 (effective Feb. 15, 2000).

¹³⁸ Sprint/WorldCom Comments at 11-12; Sprint/WorldCom Reply at 8.

¹³⁹ Comsat Response at 11.

¹⁴⁰ Comsat Response at 11.

¹⁴¹ ATC Comments at 3-4.

¹⁴² Lockheed Martin Response at 21-22.

¹⁴³ ATC Comments at 3.

53. ATC suggests reimposing dominant carrier regulation on Comsat.¹⁴⁴ Lockheed Martin maintains that there is no basis for reimposing dominant carrier regulation, and that this would have no effect on "thin routes," where Comsat is already regulated as a dominant carrier.¹⁴⁵ We agree with Lockheed Martin that there is no support in the record in this proceeding for reimposing dominant carrier regulation on Comsat, and so this cannot constitute "appropriate action" within the meaning of Section 641(b).

54. As required by Section 603 of the Regulatory Flexibility Act ("RFA"),¹⁴⁶ an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *Notice*. The Commission then sought written public comment in that proceeding, including comments on the IRFA. No party filed comments in response to the IRFA. Further, this *Report and Order* promulgates no new rules and our action here does not affect the previous analysis in the *Notice*. The Commission certifies that there will be no significant effect on a substantial number of small entities.

VI. ORDERING CLAUSES

55. Accordingly, IT IS ORDERED, pursuant to Sections 102(c), 210(c)(2), 201(c)(11), and 641 of the Communications Satellite Act of 1962, as amended, 47 U.S.C. §§ 721(c), 741(c)(2), 741(c)(11), 765, and Sections 1, 2, 4(c), 201, 202, 214, 301, 303, 307, 308, and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(c), 201, 202, 214, 301, 303, 307, 308, and 309, that the requirements and policies set forth in this Report and Order ARE ADOPTED.

56. IT IS FURTHER ORDERED that Comsat Corporation SHALL FILE the report discussed in this Order on or before March 13, 2001.

57. IT IS FURTHER ORDERED that authority is delegated to the Chief, International Bureau, as specified herein, to effect the decisions set forth above.

58. IT IS FURTHER ORDERED that the Motion for Extension of Time filed by Comsat Corporation on July 24, 2000, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

¹⁴⁴ ATC Reply at 7.

¹⁴⁵ Lockheed Martin Response at 22.

¹⁴⁶ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) ("CWAAA"). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").

APPENDIX APleadingsComments

ATC Teleports, Inc. (ATC)
Cable & Wireless U.S.A., Inc. (Cable & Wireless)
Comsat Corporation (Comsat)
Lockheed Martin Corporation (Lockheed Martin)
Sprint Communications Company L.P. and WorldCom, Inc. (Sprint/WorldCom)

Replies

ATC (Confidential and Non-Confidential)
Cable & Wireless (Confidential and Non-Confidential)
Sprint/WorldCom (Confidential and Non-Confidential)

Responses to Replies

Comsat
Lockheed Martin (Confidential and Non-Confidential)

Letters and *Ex Parte* Statements

- Letter from Kenneth D. Katkin, Counsel for Comsat, to Steven Spaeth, Staff Attorney, International Bureau (dated July 13, 2000) (*Comsat July 13 Appendix A Letter*) (supplementing the data filed in the Appendix A attached to Comsat's Comments).
- Letter from Kenneth D. Katkin, Counsel for Comsat, to Steven Spaeth, Staff Attorney, International Bureau (dated July 13, 2000) (*Comsat July 13 Appendix B Letter*) (explaining the Appendix B attached to Comsat's Comments).
- Letter from Lawrence W. Secrest III, Counsel for Comsat, to Thomas S. Tycz, Chief, Satellite and Radiocommunication Division, International Bureau (dated Aug. 9, 2000) (*Comsat August 9 Letter*).
- Letter from Lawrence W. Secrest III, Counsel for Comsat, to Thomas S. Tycz, Chief, Satellite and Radiocommunication Division, International Bureau (dated Aug. 16, 2000) (*Comsat August 16 Letter*).
- Letter from Alfred M. Mamlet, Counsel for WorldCom, Inc., to Magalie Roman Salas, Secretary, FCC, (dated Aug. 21, 2000) (Sprint/WorldCom *ex parte* statement).
- Letter from Lawrence W. Secrest III, Counsel for Comsat, to Douglas Webbink, Chief Economist, International Bureau (dated Aug. 23, 2000) (Comsat *ex parte* statement).
- Letter from Lawrence W. Secrest III, Counsel for Comsat, to Magalie Roman Salas, Secretary, FCC, (dated Aug. 25, 2000) (*Comsat August 25 Letter*).

APPENDIX B

Satellites Included in Comsat Information Submission RequirementExisting
SatelliteLocation

IS-805	55.5° W.L.	(304.5° E.L.)
IS-706	53.0° W.L.	(307.0° E.L.)
IS-709	50.0° W.L.	(310.0° E.L.)
IS-601	34.5° W.L.	(325.5° E.L.)
IS-801	31.5° W.L.	(328.5° E.L.)
IS-511	29.5° W.L.	(330.5° E.L.)
IS-605	27.5° W.L.	(332.5° E.L.)
IS-603	24.5° W.L.	(335.5° E.L.)
IS-705	18.0° W.L.	(342.0° E.L.)
IS-707	1.0° W.L.	(359.0° E.L.)
IS-802	186.0° W.L.	(174.0° E.L.)
IS-702	183.0° W.L.	(177.0° E.L.)
IS-701	180.0° W.L.	(180.0° E.L.)

Planned
SatelliteLocationOperational Date¹⁴⁷

IS-ALPHA-1	50.0° W.L.	(310.0° E.L.)	May 31, 2003
IS-904	34.5° W.L.	(325.5° E.L.)	Feb. 28, 2002
IS-907	31.5° W.L.	(328.5° E.L.)	Feb. 28, 2003
IS-905	27.5° W.L.	(332.5° E.L.)	Aug. 31, 2002
IS-903	24.5° W.L.	(335.5° E.L.)	Nov. 30, 2001
IS-906	18.0° W.L.	(342.0° E.L.)	Nov. 30, 2002
IS-ALPHA-2	1.0° W.L.	(359.0° E.L.)	Nov. 30, 2003

¹⁴⁷ Operational dates were taken from Applications of INTELSAT LLC for Authority to Operate, and to Further Construct, Launch, and Operate C-Band and Ku-band Satellites That Form a Global Communications System in Geostationary Orbit, Memorandum Opinion, Order and Authorization, FCC 00-287 (rel. Aug. 8, 2000), at App. A.

