

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

In the Matter of	)	
	)	
	)	
New Skies Satellites, N.V. Request	)	File No: SAT-PDR-20001031-00146
For Unconditional Authority to Access	)	
The U.S. Market	)	
	)	

**MEMORANDUM OPINION AND ORDER**

Adopted: March 27, 2001

Released: March 29, 2001

By the Commission:

**I. INTRODUCTION**

1. New Skies Satellites N.V. (New Skies) has filed a Petition for Declaratory Ruling and Extension of Earth Station Licenses requesting the Commission to declare that: 1) New Skies has met the criteria for achieving independence from INTELSAT specified under Section 621 and 623 of the ORBIT Act<sup>1</sup> and required by the *New Skies Market Access Order*,<sup>2</sup> and 2) the use of space segment operated by New Skies will not harm competition in the telecommunications market of the United States, as contemplated in Section 601 of the ORBIT Act. New Skies asks the Commission to extend to a full term the licenses of all earth stations authorized to communicate with New Skies satellites and to add New Skies' satellites to the Permitted Space Station List. In addition, it asks us to waive our two-degree orbital spacing requirements for the four orbital locations outside the U.S. "domestic arc" where New Skies currently has operational satellites.

2. The New Skies petition was placed on public notice on November 14, 2000.<sup>3</sup> PanAmSat Corporation (PanAmSat), GE American Communications Inc. (GE Americom) and Loral Space and Communications Ltd. (Loral) filed partial oppositions to New Skies' petition. Lockheed Martin Global Telecommunication (LMGT) filed comments and five New Skies customers also filed letters in support of the petition. New Skies filed a Consolidated Reply to PanAmSat, GE Americom and Loral. PanAmSat and GE Americom responded to New Skies.

3. We find that New Skies has satisfied the requirements of the ORBIT Act. Its full access to the United States market under the conditions specified below will not harm competition in the U.S. telecommunications market and will be in the public interest. We grant, subject to conditions, an extended waiver of our two-degree orbital spacing requirements. The International Bureau is

<sup>1</sup> *Open-Market Reorganization for the Betterment of International Telecommunications Act* ("the ORBIT Act"). Pub.L. 106-180, 114 Stat. 48 (2000).

<sup>2</sup> *New Skies Satellites, N.V.*, Memorandum Opinion and Order, 14 FCC Rcd 13003 (1999) ("*New Skies Market Access Order*").

<sup>3</sup> Public Notice Report No. SAT-00059, November 14, 2000.

placing New Skies on the Permitted Space Station List in an order simultaneously released with this decision and is issuing modified earth station licenses consistent with this decision.

## II. BACKGROUND

4. New Skies is a Netherlands-based company created in 1998 as a spin-off by INTELSAT. In the 1999 *New Skies Market Access Order*, the Commission granted U.S. earth station operators limited, three-year authorizations to operate with New Skies in the U.S. market pending New Skies' fulfillment of certain actions to ensure its independence from INTELSAT. The Commission found that New Skies had not yet: 1) conducted an initial public offering (IPO) as anticipated by the INTELSAT Assembly of Parties decision approving New Skies' creation, 2) novated customer contracts inherited from INTELSAT,<sup>4</sup> or 3) terminated certain transitional support agreements with INTELSAT.<sup>5</sup> The Commission said that it would consider extension of the three-year earth station licenses granted to a normal, full "ten-year" license term if New Skies demonstrates that it has achieved independence from INTELSAT.<sup>6</sup> The Commission further said that any such request would be evaluated based on progress toward and the results of: 1) a substantial IPO and any additional plans to increase non-Signatory ownership; 2) termination of the remaining service agreements (with the exception of Telemetry Tracking and Command (TT&C)); and 3) novation of contracts and termination of leaseback arrangements.<sup>7</sup> Additionally, the Commission required New Skies to submit periodic reports as to its progress toward these goals.<sup>8</sup>

5. Our decision granting New Skies limited entry into the U.S. market was taken pursuant to our 1997 *DISCO II Order*, in which the Commission adopted regulations implementing our commitment under the World Trade Organization Basic Telecom Agreement (WTO Agreement) to open the United States' Fixed Satellite Service (FSS) and mobile satellite service markets to satellites licensed by World Trade Organization (WTO) countries.<sup>9</sup> In the *DISCO II Order*, the Commission adopted a presumption in favor of entry for non-U.S. satellites licensed by a WTO member. The Commission also stated that the presumption could be rebutted by a showing of potential competitive harm. In these cases, the Commission reserved the right to attach conditions to any grant of authority.<sup>10</sup> The Commission held that, in the exceptional case, in which an application would pose a very high risk to competition in the U.S. satellite market that could not be cured with conditions, it would deny the application.<sup>11</sup>

6. The Commission also recognized, however, that prospective affiliates of intergovernmental satellite organizations (IGOs) raised special competition concerns because of their unique institutional heritage. Thus, the Commission set forth specific criteria to apply in determining whether an application by an IGO affiliate to serve the U.S. market, with satellites authorized by a WTO country, raises the potential for competitive harm. Specifically, the Commission stated that

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<sup>4</sup> Novation is the substitution of a new obligation or contract for an old one by mutual agreement of all parties concerned. In this case it refers to the substitution of New Skies for INTELSAT in the customer contracts inherited by New Skies from INTELSAT.

<sup>5</sup> *New Skies Market Access Order*, 14 FCC Rcd at 13034-13035.

<sup>6</sup> *Id.* at 13035.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Amendment of the Commission's Regulatory Policies to Allow Non U.S. Licensed Space Stations to Provide Domestic and International Satellite Services in the United States*, Report and Order, 12 FCC Rcd 24094, 24112 (1997) ("*DISCO II Order*") on reconsideration, 15 FCC Rcd 7207 (1999).

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

<sup>11</sup> *Id.*

it would consider any potential anticompetitive or market-distorting consequences of continued relationships or connections between the IGO and its affiliate, particularly, the risk or likelihood of collusive behavior or cross-subsidization.<sup>12</sup>

7. The subsequently enacted ORBIT Act established legislative criteria for Commission review of applications to serve the U.S. market by privatized INTELSAT and Inmarsat, and by spin-offs such as New Skies. Under the ORBIT Act, we must determine whether authorizing New Skies services will harm competition in the U.S. telecommunications market.<sup>13</sup> In making this determination, the Act directs the Commission to use the licensing criteria set forth in the Act, which includes: 1) independence from INTELSAT through conduct of an IPO that achieves substantial dilution of the aggregate ownership of Signatories of INTELSAT; 2) termination of privileges and immunities; 3) incorporation in a country that is a Signatory to the WTO Agreement and has effective laws and regulations that secure competition in telecommunications services; 4) conversion to a stock corporation with a fiduciary board of directors; 5) limitations on interlocking officers, directors, or employees shared with any intergovernmental organization or any Signatory or former Signatory of INTELSAT; and 6) an arms-length relationship with INTELSAT.<sup>14</sup> The Act also directs the Commission to construe criteria in a manner consistent with the United States' WTO commitments.<sup>15</sup> If the Commission determines that authorizing New Skies will, in fact, harm competition, the ORBIT Act directs the Commission to deny or revoke New Skies' authority to serve the U.S. market.<sup>16</sup>

8. INTELSAT is currently in the process of privatizing all of its commercial operations. As a part of the privatization, there will remain a small intergovernmental organization (IGO) to supervise Intelsat LLC's commitment to continue to provide service to lifeline users. The Commission has authorized the future privatized company, Intelsat LLC, to become a U.S. licensee for existing and planned satellites providing service in the C-band and Ku-band.<sup>17</sup> The licenses granted were conditioned upon complying with applicable privatization criteria under the ORBIT Act.<sup>18</sup> In granting the licenses, the Commission waived application of certain technical rules for the satellites authorized, including our two-degree orbital spacing requirements.<sup>19</sup> As explained further below, New Skies seeks waivers similar to those the Commission granted to Intelsat LLC.

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<sup>12</sup> *Id.* We said that, "in determining whether an application to serve the U.S. market by an IGO affiliate raises the potential for competitive harm, we will consider any potential anticompetitive or market distorting consequences of continued relationships or connections between an IGO and its affiliate. For example, we will look at whether the affiliate is structured to prevent practices such as collusive behavior or cross-subsidization."

<sup>13</sup> Pub. L. 106-180, § 601(a)(1)

<sup>14</sup> *Id.* at §§ 621 and 623.

<sup>15</sup> *Id.* at § 601(c).

<sup>16</sup> *Id.* at § 601(a)(1).

<sup>17</sup> *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, 15 FCC Rcd 15460 (2000) ("*INTELSAT LLC Licensing Order*"; *recon. denied*, FCC 00-437 (released December 12, 2000)). For purposes of Intelsat LLC, the C-band encompasses the 3.420-4.200 GHz and 5.850-6.650 GHz frequency bands. The Ku-band encompasses the 10.950-11.200 GHz, 11.450-12.200 GHz, 12.500-12.750 GHz, and 13.750-14.500 GHz frequency bands. *Intelsat LLC Licensing Order*, 15 FCC Rcd at 15462 n.2.

<sup>18</sup> *Intelsat LLC Licensing Order*, 15 FCC Rcd at 15477, 15519.

<sup>19</sup> *Id.* at 15484-15508.

### III. PLEADINGS

9. New Skies seeks a declaration from the Commission confirming that it has achieved independence from INTELSAT under the criteria established in the *New Skies Market Access Order* and Sections 621 and 623 of the ORBIT Act. New Skies also requests that, based upon these findings and its recent market access precedents, the Commission take such actions as may be necessary to grant New Skies full access to the United States market on terms comparable to those enjoyed by other non-U.S. licensees.

10. No party in the proceeding contends that New Skies fails to satisfy the requirements of the ORBIT Act. LMGT states that New Skies has satisfied the ORBIT Act requirements and should be granted full entry into the U.S. market.<sup>20</sup> Five customers of New Skies state that New Skies offers needed additional competition and should be granted full entry into the United States market.<sup>21</sup> PanAmSat does, however, contend that New Skies should provide information concerning how its directors are selected and explain whether it has entered into any new agreements or arrangements such as capacity leases with INTELSAT and address whether any such agreements or arrangements were made at arms length.<sup>22</sup>

11. PanAmSat, GE Americom, and Loral oppose that portion of the New Skies petition requesting a waiver of our two-degree orbital spacing requirements for New Skies orbital locations where it has operational satellites. They contend that New Skies has failed to demonstrate good cause for such a waiver and should continue to be required to protect two-degree compliant U.S. licensees from harmful interference. PanAmSat and GE Americom also argue that New Skies has failed to demonstrate how circumstances have changed from the Commission's treatment of this issue in the *New Skies Market Access Order*,<sup>23</sup> and that New Skies' waiver request overlooks potential harm to other satellite operators.<sup>24</sup> PanAmSat further states that if the Commission grants New Skies' waiver request, New Skies should not be given any right or expectation with respect to new satellites or orbital locations.<sup>25</sup> New Skies responds that it has satisfied the Commission's waiver standard because the same factors upon which the Commission granted a waiver to Intelsat, LLC apply equally to New Skies,<sup>26</sup> and that there is no basis for disparate treatment between Intelsat LLC and New Skies.<sup>27</sup> LMGT supports grant of New Skies' requested waivers.<sup>28</sup>

### IV. DISCUSSION

#### A. ORBIT Act Analysis

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<sup>20</sup> LMGT Comments at 3-6 and 8.

<sup>21</sup> Letters to Secretary, FCC from Richard Kline, Transglobal Networks, Ltd., dated December 13, 2000; Dario Brandas Bestetti, Vant Communications, dated December 14, 2000; Naomi Dolinsky, U.S.A. Teleport, dated December 14, 2000; Keith Ramsay, Teleports New Zealand Limited, dated December 14, 2000; and Wilson Harada, Impsat, dated December 11, 2000.

<sup>22</sup> PanAmSat Partial Opposition at 2.

<sup>23</sup> PanAmSat Partial Opposition of 4-5; GE Americom Partial Opposition at 4.

<sup>24</sup> PanAmSat Partial Opposition at 7-9; GE Americom Partial Opposition at 6-8.

<sup>25</sup> PanAmSat Partial Opposition at 2.

<sup>26</sup> New Skies Consolidated Reply at 5-9.

<sup>27</sup> *Id.* at 9-11.

<sup>28</sup> LMGT Comments at 8.

12. The ORBIT Act amended the Communications Satellite Act of 1962<sup>29</sup> to promote a competitive market for satellite communications services through a fully privatized INTELSAT and Inmarsat. It establishes criteria for privatization of INTELSAT and Inmarsat as well as IGO spin-offs or “separated entities,” such as New Skies.<sup>30</sup> As applied to New Skies, the ORBIT Act requires a Commission determination that New Skies will not harm competition in the U.S. market before the Commission can authorize New Skies to provide services in the United States. Section 601(a) provides:

(a) LICENSING FOR SEPARATED ENTITIES.—

COMPETITION TEST.—The Commission may not issue a license or construction permit to any separated entity, or renew or permit the assignment or use of any such license or permit, or authorize the use by any entity subject to United States jurisdiction of any space segment owned, leased, or operated by any separated entity, unless the Commission determines that such issuance, renewal, assignment, or use will not harm competition in the telecommunications market of the United States. If the Commission does not make such a determination, it shall deny or revoke authority to use space segment owned, leased, or operated by the separated entity to provide services to, from, or within the United States.<sup>31</sup>

13. The ORBIT Act provides general privatization criteria applicable to New Skies, as well as INTELSAT and Inmarsat.<sup>32</sup> It also provides specific criteria applicable to New Skies.<sup>33</sup> The Act requires the Commission to apply this criteria in determining whether competitive harm would result from New Skies provision of service in the United States. Section 601(a)(2) provides:

(2) CRITERIA FOR COMPETITION TEST. – In making the determination required by paragraph (1), the Commission shall use the licensing criteria in sections 621 and 623, and shall not make such a determination unless the Commission determines that the privatization of any separated entity is consistent with such criteria.<sup>34</sup>

14. The ORBIT Act supercedes the requirements that the Commission placed on New Skies in the *New Skies Market Access Order*. As discussed below, however, New Skies’ fulfillment of the requirements imposed in that Order provides a basis for concluding that it has satisfied certain ORBIT Act criteria.

(1) Independence

15. The Act requires New Skies to be independent of INTELSAT and have a pro-competitive ownership structure.<sup>35</sup> Independence is to be achieved, in part, through an initial public offering to be conducted by July 1, 2000, unless the date is extended by the Commission to no later than July 31, 2001. The purpose of the IPO is to “substantially dilute the aggregate ownership” in New Skies

<sup>29</sup> Communications Satellite Act of 1962, 47 U.S.C. § 701 *et seq.*

<sup>30</sup> Pub. L. 106-180, §§ 621-624.

<sup>31</sup> Pub. L. 106-180, § 601(a).

<sup>32</sup> *Id.* § 621.

<sup>33</sup> *Id.* § 623.

<sup>34</sup> *Id.* § 601(a)(2).

<sup>35</sup> *Id.* § 623(1).

of Signatories or former Signatories of INTELSAT.<sup>36</sup> The Act requires the Commission to determine whether a public offering attains such substantial dilution taking into account the purposes and intent, privatization criteria, and other provisions in the Act, as well as market conditions.<sup>37</sup> The Act also prohibits INTELSAT from maintaining an ownership interest in New Skies. The Act provides in part:

“[New Skies] shall operate as [an] independent commercial entity, and have a pro-competitive ownership structure. [New Skies] shall conduct an initial public offering in accordance with paragraph (5) to achieve such independence. Such offering shall substantially dilute the aggregate ownership of [New Skies] by such Signatories or former Signatories. In determining whether a public offering attains such substantial dilution, the Commission shall take into account the purposes and intent, privatization criteria, and other provisions of this title, as well as market conditions.”<sup>38</sup>

16. On June 30, 2000, the Commission granted a request from New Skies for a six-month extension of the original July 1, 2000 IPO deadline to January 1, 2001.<sup>39</sup> On October 4, 2000, New Skies conducted an IPO of 28,500,000 shares (in the form of ordinary shares and American Depository Shares). The IPO amounted to over 22 percent of the issued and outstanding ordinary shares.<sup>40</sup> Following the IPO, New Skies underwriters exercised an over-allotment option to purchase additional shares in New Skies. As a result, including the over-allotment option, 30,120,000 shares have been sold in the IPO, representing 23 percent of New Skies’ total issued share capital.<sup>41</sup>

17. New Skies contends that its 23 percent IPO was substantial in view of the depressed market conditions at the time it was held, and compared to the IPOs of other satellite companies.<sup>42</sup> New Skies points out that an additional 6.3 percent of the company’s post-IPO shares are owned by non-Signatories, totaling a current 29.3 percent non-Signatory interest. This additional non-Signatory ownership existed prior to the IPO. Of the Signatory ownership, Comsat, a subsidiary of Lockheed Martin Corporation, a publicly traded U.S. company, holds 14.5 percent of outstanding New Skies shares.<sup>43</sup> No INTELSAT Signatory other than Comsat holds more than 4.4 percent post-IPO interest in New Skies. And 84 percent of New Skies non-public shareholders own less than 0.5 percent each of the outstanding shares.<sup>44</sup>

18. LMGT agrees that New Skies has achieved “substantial dilution” under the terms of the ORBIT Act. LMGT states that the issue of substantial dilution requires an individualized determination based on the company’s particular circumstances.<sup>45</sup> It contends that the market conditions that existed and the amount of dilution achieved in comparison with other companies

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<sup>36</sup> *Id.* §§ 621(2) and 623(1).

<sup>37</sup> *Id.* § 621(2).

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

<sup>39</sup> *New Skies Satellites N.V.*, Memorandum Opinion and Order, 15 FCC Rcd 11934 (2000).

<sup>40</sup> New Skies Petition at 6 and 9; Exhibit A, Declaration of Robert W. Ross, Chief Executive of New Skies Satellites, N.V., dated October 31, 2000 (Ross Declaration).

<sup>41</sup> Letter from William M. Wiltshire, Counsel for New Skies Satellites, N.V. to Secretary, FCC, dated November 14, 2000.

<sup>42</sup> New Skies Petition at 11-12.

<sup>43</sup> New Skies Petition at 9.

<sup>44</sup> *Id.*

<sup>45</sup> LMGT comments at 3.

past IPOs merits a Commission finding that New Skies achieved “substantial dilution.”<sup>46</sup> No other party to this proceeding commented on this issue.

19. We find that New Skies timely conducted its IPO within the extended period that the Commission authorized pursuant to the ORBIT Act. We also find that the IPO achieved “substantial dilution” within the meaning Section 621(2) of the Act. Our finding is based upon the size of the IPO in light of existing market conditions at the time that it was concluded. New Skies achieved 23 percent dilution of INTELSAT Signatory ownership under less-than-optimum market conditions for IPOs in general and for the technology sector in particular.<sup>47</sup> It was necessary, under these circumstances, for New Skies to price its IPO at the bottom (\$9) of the \$9 - \$11 IPO price range that it forecast in its filings with the Security and Exchange Commission (SEC). Nevertheless, New Skies has demonstrated that the 23 percent dilution achieved was, at that time, at the upper limit of available market demand based on the size of the offering, investor demand for New Skies securities and the prevailing market conditions at the time of the IPO.<sup>48</sup> New Skies’ investment banker also points out that PanAmSat sold 18.92 percent in 1995, SES Astra 14.93 percent in 1998, and JSAT 9.51 percent in 2000 in their initial public offerings.<sup>49</sup>

20. Under these circumstances, considering the 6.3 percent non-Signatory ownership that existed prior to the IPO, and the fact that 84 percent of New Skies non-public Signatory shareholders own less than 0.5 percent each of outstanding shares, we find that “substantial dilution” has been achieved. Taken together with our findings below that New Skies has satisfied other privatization criteria under the Act, we believe that the diversity of ownership achieved provides reasonable assurance that New Skies will operate as an independent commercial entity as required by the Act. In particular, we believe that a sufficient level of New Skies stock is now owned by individuals and companies other than INTELSAT Signatories, to give it a strong incentive to act in the interest of all rather than any particular shareholder. Additionally, we note that none of New Skies competitors, which commented on other issues in this proceeding, have alleged or provided information that New Skies’ pre-IPO ownership structure has resulted in the potential problems that the Commission identified as associated with Signatory ownership in our *New Skies Market Access Order*.<sup>50</sup> We conclude that New Skies has satisfied Sections 621(2) and 623(1).

(2) Prohibition on IGO Ownership

21. Section 621(2)(A) of the Act precludes an intergovernmental organization from having an ownership interest in New Skies.<sup>51</sup> Initially, INTELSAT had a 10 percent ownership in New Skies that was held in a non-voting trust on behalf of INTELSAT.<sup>52</sup> Subsequently, all but a tenth of one percent of these shares were distributed to individual Signatories.<sup>53</sup> The remaining shares are held

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<sup>46</sup> *Id.* at 3-4.

<sup>47</sup> New Skies Petition, Exhibit B, Letter to Chairman Kennard from Mathew Westerman, Managing Director, Goldman Sachs International, dated October 31, 2000 (Goldman Sachs International Letter).

<sup>48</sup> Goldman Sachs International Letter.

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

<sup>50</sup> *New Skies Market Access Order*, 14 FCC Rcd at 13017-13022, where we expressed concern that New Skies Signatory-owners might restrict market access to its competitors or give New Skies preferential treatment through collusive behavior.

<sup>51</sup> Pub L. 106-180, § 621(2)(A).

<sup>52</sup> *New Skies Market Access Order*, 14 FCC Rcd at 13007.

<sup>53</sup> New Skies Petition at 4, citing *New Skies Market Access Order*, 14 FCC Rcd at 13019; Letter to Donald Abelson, Chief, International Bureau from Andrew D’Uva, New Skies Satellite N.V., dated April 14, 2000.

in a non-voting trust on behalf of the remaining Signatories.<sup>54</sup> Because INTELSAT no longer holds any ownership interest in New Skies, New Skies therefore complies with this provision.

(3) Termination of Privileges and Immunities

22. Section 621(3) prohibits extension to New Skies of preferential treatment accorded to INTELSAT by national governments and the INTELSAT Agreement. The section provides:

(3) TERMINATION OF PRIVILEGES AND IMMUNITIES.—The preferential treatment of INTELSAT and Inmarsat shall not be extended to any successor entity or separated entity of INTELSAT or Inmarsat. Such preferential treatment includes—

(A) privileged or immune treatment by national governments;

(B) privileges or immunities or other competitive advantages of the type accorded INTELSAT and Inmarsat and their Signatories through the terms and operation of the INTELSAT Agreement and the associated Headquarters Agreement and the Inmarsat Convention; and

(C) preferential access to orbital locations. Access to new, or renewal of access to, orbital locations shall be subject to the legal or regulatory processes of a national government that applies due diligence requirements intended to prevent the warehousing of orbital locations.<sup>55</sup>

23. The Commission found in the *New Skies Market Access Order* that New Skies does not have privileges and immunities of the type currently accorded to INTELSAT.<sup>56</sup> New Skies operates in the U.S. market subject to the same laws that apply to U.S. satellite service providers.<sup>57</sup> There has been no change in New Skies' status in this regard. It has no immune treatment from the INTELSAT Agreement or the INTELSAT Headquarters Agreement. The Netherlands national government has not accorded it privileges and immunities. It is subject to regulatory authority of the Netherlands Government. As for access to orbital locations, the Netherlands regulatory authority, the Radiocommunications Agency (RDR), has informed the Commission that the authorizations issued to New Skies for operation of its satellites include due diligence requirements intended to prevent warehousing of orbital locations and spectrum resources.<sup>58</sup> We therefore find that New Skies meets the requirements set forth in Section 621(3) of the ORBIT Act.

(4) Conversion to Stock Corporations

24. The ORBIT Act requires that New Skies be a “national corporation or similarly accepted commercial structure, subject to the laws of the nation in which incorporated.”<sup>59</sup> New Skies was incorporated in the Royal Kingdom of The Netherlands on April 23, 1998.<sup>60</sup> It is organized as a limited liability company (N.V.) and is fully subject to the laws of the Netherlands.<sup>61</sup>

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<sup>54</sup> *Id.*

<sup>55</sup> Pub. L. 106-180, § 621(3).

<sup>56</sup> *New Skies Market Access Order*, 14 FCC Rcd at 13022-13024.

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

<sup>58</sup> Letter from C.G.H.M. Dijkmans, Radiocommunications Agency to Secretary, FCC, dated December 22, 2000.

<sup>59</sup> Pub. L. 106-180, § 621(5).

<sup>60</sup> *New Skies Market Access Order*, 14 FCC Rcd at 13006, *citing* New Skies Annual Report, 1998 at 28.

<sup>61</sup> New Skies Petition at 14; Ross Declaration at 2.



25. The Act also requires that New Skies “have a board of directors with a fiduciary obligation.”<sup>62</sup> Under Dutch law, the New Skies board of directors must have fiduciary duties to the company.<sup>63</sup>

26. Section 621(5)(B) of the Act requires that New Skies be listed for trading on one or more major stock exchanges with transparent and effective securities regulation.<sup>64</sup> New Skies, since its IPO, has listed shares on the New York Stock Exchange and the official segment of the Euronext Amsterdam N.V.’s stock market.<sup>65</sup> New Skies is subject to the regulation of the U.S. Securities and Exchange Commission and the Netherlands *Stichting Toezicht Effecteniorkeel* (Netherlands Securities Board).<sup>66</sup>

(5) Limitations On Interlocking Directors, Officers And Managers

27. The Act places limitations on interlocking directors, officers, employees and managers with any intergovernmental organization or any Signatory or former Signatory of INTELSAT. Section 621(5)(C) provides:

(C) A majority of the members of the board of directors of any successor entity or separated entity shall not be directors, employees, officers, or managers or otherwise serve as representatives of any signatory or former signatory. No member of the board of directors of any successor or separated entity shall be a director, employee, officer or manager of any intergovernmental organization remaining after the privatization.<sup>67</sup>

28. New Skies’ Articles of Association provide for a board of directors comprised of nine members.<sup>68</sup> New Skies states that none of the nine directors hold a similar position with any intergovernmental organization, and that no more than two of New Skies directors may be considered to be affiliated (as a director, officer, manager, employee or representative) with a Signatory or former Signatory.<sup>69</sup> New Skies identified in its petition two directors affiliated with Signatories of INTELSAT.<sup>70</sup> Since then, one has terminated his relationship with that company.<sup>71</sup> A review of the New Skies prospectus made public prior to the New Skies IPO confirms that none of the remaining seven directors have any of the affiliations proscribed by Section 621(5)(C) of the Act.<sup>72</sup>

29. The Act also places additional restrictions on New Skies’ officers, directors and managers. Section 621(5)(D) provides, in part, that New Skies shall:

(ii) have no officers or managers who (I) are officers or managers of any signatories or former signatories, or (II) have any direct financial interest in or

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<sup>62</sup> Pub. L. 106-180, § 621(D)(1)(I).

<sup>63</sup> New Skies Petition at 14, citing the Dutch Civil code, BW § 219.

<sup>64</sup> Pub. L. 106-180, § 621(5)(B).

<sup>65</sup> New Skies Petition at 14; Ross Declaration at 2.

<sup>66</sup> New Skies Petition at 14.

<sup>67</sup> Pub. L. 106-180, § 621(5)(C).

<sup>68</sup> New Skies Petition at 14, citing New Skies Articles of Association at Article 18.1.

<sup>69</sup> New Skies Petition at 14; Ross Declaration at 2.

<sup>70</sup> Ross Declaration at 2.

<sup>71</sup> New Skies Consolidated Reply at 3 fn. 9.

<sup>72</sup> Letter from William Wiltshire on behalf of New Skies to Secretary, Federal Communications Commission dated October 10, 2000, enclosing the Prospectus of New Skies Satellites, N.V., dated October 3, 2000, at 79-80.

financial relationship to any signatories or former signatories, except that such interest may be managed through a blind trust or similar mechanism;  
(iii) have no directors, officers, or managers who hold such positions in any intergovernmental organization; and  
(iv) in the case of a separated entity, have no officers or directors, who (I) are officers or managers of any intergovernmental organization, or (II) have any direct financial interest in or financial relationship to any international organization, except that such interest may be managed through a blind trust or similar mechanism.<sup>73</sup>

30. New Skies declares that none of its officers are officers with any Signatory or former Signatory, nor do they have any direct financial interest or financial relationship with a Signatory or former Signatories of INTELSAT.<sup>74</sup> New Skies further declares that no officer or director of the company is an officer or director of, or has any direct financial interest in or financial relationship with, any intergovernmental organization.<sup>75</sup> In addition, New Skies points out that the company has a Supervisory Board and a Managing Board. Under Dutch law applying to limited liability companies, the Managing Board holds the responsibility for managing the company.<sup>76</sup> New Skies states that, for purposes of satisfying ORBIT Act criteria, “directors” refers to members of the Supervisory Board and “officers” refers to members of the Managing Board.<sup>77</sup> We therefore find that New Skies’ officers, directors, and senior management satisfy the requirements of Section 621(5)(D)(ii)-(iv).

31. In addition, the Act specifically precludes New Skies officers, directors and employees from being officers, directors or employees of INTELSAT.<sup>78</sup> New Skies declares that none of its officers, directors, or employees hold such positions with INTELSAT.<sup>79</sup>

32. Finally, we do not agree with PanAmSat that additional information is required of New Skies beyond what it has presented on the record to demonstrate its independence from INTELSAT as required by the ORBIT Act. PanAmSat contends that New Skies should provide additional information about nominating and approving directors.<sup>80</sup> New Skies responds that, its board of directors is selected using the standard method – by a majority vote of its shareholders at the annual shareholder meeting -- and that the directors serve for a one-year term until the next annual shareholder meeting.<sup>81</sup> It also states that no Signatory or limited group of Signatories has the right to appoint any member of the board.<sup>82</sup> PanAmSat responds that New Skies does not address whether shareholder agreements govern how votes are conducted.<sup>83</sup> It raises the concern that board members are “beholden to” the INTELSAT Signatories since they hold a majority of shares.<sup>84</sup>

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<sup>73</sup> Pub. L. 106-180, § 621(5)(D) (ii)-(iii) and (iv).

<sup>74</sup> New Skies Petition, Ross Declaration at 2-3.

<sup>75</sup> *Id.*

<sup>76</sup> Letter to Secretary, FCC, from Andrew R. D’Uva, Vice President and Associate General Counsel, New Skies Satellites N.V., dated February 14, 2001.

<sup>77</sup> *Id.*

<sup>78</sup> Pub. L. 106-180, § 642(2).

<sup>79</sup> New Skies Petition, Ross Declaration at 3.

<sup>80</sup> PanAmSat Partial Opposition at 3-4.

<sup>81</sup> New Skies Consolidated Reply at 4.

<sup>82</sup> *Id.*

<sup>83</sup> PanAmSat Response at 1 fn. 1.

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

33. PanAmSat's concerns are misplaced. First, we have found above that New Skies has sufficient diversity of ownership to provide reasonable assurance that it will operate as an independent commercial entity. Second, New Skies has demonstrated, as required by the ORBIT Act, that the fiduciary obligations of the board members flow to the company and not individual investors or Signatories. Third, only one board member now has any connections with an INTELSAT Signatory. Fourth, the New Skies pre-IPO prospectus report does not show any special arrangements with INTELSAT Signatory-investors that govern how votes are conducted.<sup>85</sup> Fifth, New Skies states that it is unaware of any agreements among its shareholders that affect their voting rights with respect to New Skies.<sup>86</sup> Finally, there is no allegation before us or information provided that would lead us to conclude that concerns that the Commission expressed in our *New Skies Market Access Order* about potential New Skies collusion with INTELSAT or its Signatories to deny competitors market access or set prices have materialized.<sup>87</sup>

#### (6) Arms-Length Relationship

34. The ORBIT Act requires that "any transactions or other relationship between or among [New Skies and] INTELSAT or Inmarsat shall be conducted on an arms-length basis."<sup>88</sup> We find that New Skies maintains an arms-length relationship with INTELSAT, with the exception of certain inherited assigned and leaseback customer contracts. Our concerns with these contracts should be resolved upon INTELSAT's privatization.

35. As discussed above, New Skies has a corporate structure separate from INTELSAT. It also has a sales and marketing network that is independent of INTELSAT.<sup>89</sup> And, it has developed its own payload operations center and has put into place its own technical infrastructure to conduct TT&C operations.<sup>90</sup> New Skies states that it conducts its limited, remaining commercial arrangements with INTELSAT on an arms-length basis and has had no commercial relationship with Inmarsat.<sup>91</sup> It says that the transitional service agreements with INTELSAT that were of concern to the Commission and all K-TV related support contracts have now been terminated.<sup>92</sup> New Skies indicates that, while 65 out of 103 assigned customer contracts and 20 out of 49 leaseback contracts remain, it has made and continues its best efforts to negotiate the novation of these agreements.<sup>93</sup>

36. In the *New Skies Market Access Order* the Commission identified two areas – transitional support contracts and assigned customer contracts and leaseback arrangements<sup>94</sup> – that impinged

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<sup>85</sup> New Skies N.V. Prospectus, dated October 3, 2000.

<sup>86</sup> D'Uva February 14, 2001 letter.

<sup>87</sup> *New Skies Market Access Order*, 14 FCC Rcd at 13023-24.

<sup>88</sup> Pub. L. 106-180, § 621(5)(E).

<sup>89</sup> New Skies Petition at 3.

<sup>90</sup> *Id.* at 18.

<sup>91</sup> New Skies Petition at 15.

<sup>92</sup> *Id.* at 18. INTELSAT had transferred to New Skies the contract for the K-TV satellite under construction when New Skies was created. New Skies chose to terminate that contract in 1999 and thereafter all K-TV related contracts with INTELSAT.

<sup>93</sup> Ross Declaration at 3-4; Letter from Andrew D'Uva, Vice President and Associate General Counsel, New Skies N.V. to Donald Abelson, Chief, International Bureau, dated January 29, 2001 (D'Uva January 29 letter).

<sup>94</sup> For purposes of this proceeding, leaseback arrangements are certain arrangements governed by the Transponder Lease Agreement between INTELSAT and New Skies that established the terms by which INTELSAT leases capacity from New Skies for use by Signatories. The leaseback arrangements were

upon a finding that New Skies was independent of INTELSAT. The first area involved agreements by which INTELSAT provided New Skies with certain support services that it could not immediately provide for itself as a start-up company.<sup>95</sup> In particular, the Commission found that the Satellite Communications contract, which encompassed maintenance and activation of satellite carriers gave INTELSAT direct contact with New Skies customers, which is normally not appropriate under an arms-length relationship.<sup>96</sup> New Skies now performs this function for its satellites without INTELSAT involvement. The concerns the Commission expressed in our *New Skies Market Access Order* with respect to support service contracts are satisfied. As a result the question of support service contracts does not raise a concern with respect to New Skies' maintaining an arms-length relationship under the ORBIT Act.

37. The second area involved "temporary" assigned contracts and leaseback arrangements approved by the INTELSAT Assembly of Parties for INTELSAT customers (primarily INTELSAT Signatories) who chose not to novate their contracts to New Skies upon transfer of INTELSAT satellites to New Skies.<sup>97</sup>

38. Customer contracts were assigned by INTELSAT to New Skies where the customers, who are INTELSAT's Signatories, did not want to lose their investment share in INTELSAT that would result from novation of the contracts with New Skies.<sup>98</sup> Ownership in INTELSAT is determined by overall usage of the system by a Signatory. Assignment allowed the Signatories to maintain their investment share in INTELSAT associated with New Skies services involved because INTELSAT remained liable for performance under the contracts. We conclude that these assigned contracts no longer should present a concern. With the impending privatization of INTELSAT on July 18, 2001, there will be no reason to continue assignment of these contracts. Former Signatories will then receive shares in the privatized INTELSAT commensurate with a final investment share calculation prior to privatization. We therefore anticipate that the remaining 65 assigned contracts will be novated to New Skies upon privatization of INTELSAT. We require New Skies to report on the progress toward this end within 30 days of the release of this decision.

39. The remaining 20 leaseback contracts present a more complicated situation. The leaseback arrangements were entered into because some national authorities were unable to grant New Skies landing rights prior to INTELSAT's transfer of assets to New Skies or, in some instances, could not extend New Skies customers the same tax-exempt status that they had enjoyed in obtaining service from INTELSAT as an intergovernmental organization.<sup>99</sup> Leasebacks assured continuity of service and tax-exempt treatment by continuing direct customer relationships with INTELSAT for services over New Skies. It is unclear, however, how the leasebacks will be treated upon INTELSAT's privatization. While any country may decide to grant tax exempt status to New Skies' customers, we would be concerned if, upon INTELSAT's privatization, the residual intergovernmental organization (ITSO) created to oversee the privatized company's continued service to lifeline users is made a party to these leaseback arrangements as an artificial means of maintaining the customers' tax exempt status.<sup>100</sup> Continuation of leaseback contracts through ITSO may limit competition by giving customers a tax incentive that is based on the tax

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intended to be temporary measures that allow the customer to continue to have direct legal relationships with INTELSAT while INTELSAT maintains a leasing relationship with New Skies.

<sup>95</sup> *New Skies Market Access Order*, 14 FCC Rcd at 13025-13030.

<sup>96</sup> *Id.* at 13028-13029.

<sup>97</sup> *Id.* at 13031-13034.

<sup>98</sup> *New Skies Market Access Order*, 14 FCC Rcd at 13033.

<sup>99</sup> *New Skies Market Access Order*, 14 FCC Rcd at 13031; New Skies N.V. Prospectus, dated October 3, 2000, at 60.

<sup>100</sup> *See Intelsat LLC Licensing Order*, 15 FCC Rcd at 15472-74.

immunities of the remaining intergovernmental organization to stay with New Skies rather than switch to a competitor. We understand that the customers may extend these leasebacks into the future in certain situations. These customers would have no incentive to consider obtaining service from competitors if it meant a loss of tax exempt status. Thus, if a significant number of leaseback agreements remain in effect for a significant amount of time, it will raise concerns as to whether New Skies is compliant with the “arms-length” requirements under the ORBIT Act.

40. On the other hand, as the Commission recognized in our *New Skies Market Access Order*, New Skies cannot unilaterally novate the leaseback arrangements.<sup>101</sup> Novation is a matter of negotiation among the parties concerned. New Skies, nevertheless, has already made significant progress in novating the leaseback contracts. Leaseback contracts now appear to be limited to four countries.<sup>102</sup> Furthermore, if the remaining contracts are novated before INTELSAT is privatized, we will no longer have any concerns regarding an arms-length relationship between New Skies and INTELSAT. We conclude that New Skies has made sufficient progress based on a good faith effort in novating its leaseback contracts that we need not delay the removal of the three-year limitation any further. Additionally, we anticipate that both New Skies and INTELSAT will seek a resolution that is consistent with requirements of the Act prior to INTELSAT’s privatization. We require New Skies to report in writing on the progress toward this end within 30 days of release of this Order. If any leaseback contracts remain in effect at that time, and they appear likely to distort competition significantly, we will determine whether any actions, if any, would be appropriate under the ORBIT Act.

#### (7) Regulatory Treatment

41. The ORBIT Act requires that “separated entities” created after its enactment “apply through the appropriate national licensing authorities for international frequency assignments and associated orbital registrations for all satellites.”<sup>103</sup> New Skies is not subject to this requirement because it was created prior to enactment of the ORBIT Act. Nevertheless, as noted above, New Skies is subject to the authority of the RDR. The RDR has authorized New Skies to operate its satellites, submits and maintains satellite network filings with the International Telecommunication Union (ITU) on behalf of New Skies, and engages in international coordination for those filings with other administrations.

#### (8) Competition Oversight

42. The ORBIT Act requires that New Skies be subject to a jurisdiction that: (1) has effective laws and regulations that secure competition in telecommunications services; (2) is a Signatory to the WTO Basic Telecommunications Services Agreement; and (3) has a schedule of WTO commitments that include non-discriminatory market access to its satellite market.<sup>104</sup> Under its 1998 Telecommunications Act, the Netherlands established an independent telecommunications regulatory authority, the OPTA, to transition from a former monopoly to a competitive market. The Commission have previously found, in authorizing facilities-based and resale international services in the United States by Netherlands companies, that the Netherlands has effective competitive safeguards to protect U.S. carriers from anti-competitive practices, and a regulatory

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<sup>101</sup> *New Skies Market Access Order*, 14 FCC Rcd at 13033.

<sup>102</sup> D’Uva January 29 letter.

<sup>103</sup> Pub. L. 106-180, § 621(6).

<sup>104</sup> Pub. L. 106-180, § 621(7).

environment and legal requirement to enforce pro-competitive safeguards.<sup>105</sup> The Netherlands, as a member of the European Union, is a Signatory to the WTO Basic Telecommunications Services Agreement. It has committed to grant non-discriminatory market access to its satellite market.<sup>106</sup> We therefore find that New Skies' location in the Netherlands satisfies ORBIT Act requirements.

(9) Spectrum Assignments

43. The ORBIT Act proscribes further transfer of frequency assignments between INTELSAT and New Skies after the initial transfer that occurred on November 30, 1998.<sup>107</sup> INTELSAT has not transferred to New Skies any additional spectrum since the initial transfer.<sup>108</sup>

(10) Re-affiliation

44. The ORBIT Act prohibits for 11 years after INTELSAT privatization "any merger or ownership or management ties or exclusive arrangements" between privatized INTELSAT and New Skies.<sup>109</sup> The INTELSAT privatization plans do not contemplate a merger with New Skies.

(11) Exclusive Arrangements

45. The ORBIT Act specifically provides for restrictions against exclusive arrangements for the provision of satellite services between the United States and other countries. Section 648 provides:

- (a) IN GENERAL.—No satellite operator shall acquire or enjoy the exclusive right of handling telecommunications to or from the United States, its territories or possessions, and any other country or territory by reason of any concession, contract, understanding, or working arrangement to which the satellite operator or any persons or companies controlling or controlled by the operator are parties.
- (b) EXCEPTION.—In enforcing the provisions of this section, the Commission—
  - (1) shall not require the termination of existing satellite telecommunications services under contract with, or tariff commitment to, such satellite operator; but
  - (2) may require the termination of new services only to the country that has provided the exclusive right to handle telecommunications, if the Commission determines the public interest, convenience, and necessity so requires.<sup>110</sup>

Nothing in the record before us indicates that New Skies has exclusive arrangements precluded by the Act. As the Commission did in licensing Intelsat LLC, we condition the earth station authorizations we grant in this Order on New Skies' compliance with this restriction.<sup>111</sup>

<sup>105</sup> *KPN US Inc.*, Order, Authorization, and Certificate, 13 FCC Rcd 2345 (Int'l Bur. 1998); *Unisource USA, Inc.*, Order, Authorization, and Certificate, 13 FCC Rcd 2514 (Int'l Bur. 1998).

<sup>106</sup> Fourth Protocol to the GATS, April 30, 1996, 36 I.L.M. 366 (1997)(Agreement on Basic Telecommunications containing specific commitments).

<sup>107</sup> Pub. L. 106-180, § 623(3).

<sup>108</sup> *New Skies Market Access Order*, 14 FCC Rcd at 13066.

<sup>109</sup> Pub. L. 106-180, § 623(4).

<sup>110</sup> Pub. L. 106-180, § 648.

<sup>111</sup> *Intelsat LLC Licensing Order*, 15 FCC Rcd at 15479-80.

## (12) Conclusions

46. In view of the above, we find that New Skies satisfies the requirements of the ORBIT Act. New Skies has been privatized in a manner consistent with the criteria of Sections 621 and 623 of the ORBIT Act. New Skies has conducted an IPO on a timely basis that has resulted in substantial dilution of INTELSAT Signatory ownership. New Skies is a national stock corporation with a fiduciary board of directors and complies with the Act's restrictions against having interlocking directors, officers, managers and employees with any intergovernmental organization or Signatory or former Signatory of INTELSAT. New Skies does not have privileges and immunities and is subject to the legal and regulatory processes of the Netherlands. The Netherlands has effective laws and regulations to protect competition and is a member of the European Union. It also is a Signatory to the WTO Basic Telecommunications Services Agreement and has committed under the Agreement to non-discriminatory access to its satellite market. We find that New Skies maintains an arms length relationship with INTELSAT, except for the remaining assigned customer contracts and leaseback arrangements, which we expect to be changed by the time INTELSAT completes its privatization in a few months. New Skies has terminated the transitional support contracts that the Commission found to raise competitive concerns. INTELSAT has not transferred additional frequency assignments to New Skies since New Skies was created in 1998. The Netherlands RDR is responsible for making New Skies spectrum and orbital filings with the ITU and coordinating with other administrations. It has imposed due diligence requirements on New Skies to prevent warehousing of orbital locations.

47. Having found that New Skies has satisfied the privatization criteria of the ORBIT Act, and has fulfilled the conditions imposed in the *New Skies Market Access Order* for achieving independence from INTELSAT, we conclude that New Skies' entry into the U.S. market will not harm competition in that market. Accordingly, we direct the International Bureau to modify each of the earth station licenses listed in Attachment A to the *New Skies Market Access Order* and subsequent earth station licensees for operation with New Skies' satellites by removing the limitation prohibiting these earth stations from communicating with one or more New Skies satellites after August 6, 2002.<sup>112</sup> U.S. earth station licenses granted or modified in the *New Skies Market Access Order*, and U.S. earth station licenses authorizing communications with New Skies satellites issued subsequent to the *New Skies Market Access Order*, shall be authorized to communicate with New Skies satellites for a full ten-year term consistent with the original date the license was granted. We also conclude that, because New Skies has achieved independence from INTELSAT, it no longer needs to file the quarterly reports required by the *New Skies Market Access Order*.<sup>113</sup>

48. New Skies requests that, if we conclude that it has satisfied the privatization criteria of the ORBIT Act and achieved independence from INTELSAT, we implement this conclusion by adding its satellites to the Permitted Space Station List. New Skies maintains that placing its satellites on the Permitted List would be more "efficient" than modifying each earth station license addressed in the *New Skies Market Access Order*.<sup>114</sup> The International Bureau will soon act upon New Skies' pending request to place its satellites on the Permitted List. New Skies, however, misunderstands the effect of placing a satellite on the Permitted List. Adding a non-U.S.-licensed satellite to the Permitted List has the same effect as adding that satellite as a "point of

<sup>112</sup> *New Skies Market Access Order*, 14 FCC Rcd at 13034-35.

<sup>113</sup> *New Skies Market Access Order*, 14 FCC Rcd at 13035-36.

<sup>114</sup> New Skies Petition at 20-21.

communication”<sup>115</sup> to all ALSAT earth station licenses.<sup>116</sup> In the *DISCO II First Reconsideration Order*, the Commission explicitly stated that the Permitted List does not affect any condition placed on any U.S. earth station license other than expanding its points of communication.<sup>117</sup> Thus, while New Skies satellites will be added to the Permitted List for the appropriate frequency bands in the International Bureau proceeding, we still need to modify the licenses of earth stations authorized to communicate with New Skies satellites on a case-by-case basis to reflect this Order.

## B. Request For Waiver

49. The Commission instituted in 1983 its two-degree spacing policy for assignment of orbital locations for domestic FSS space stations.<sup>118</sup> It extended the policy in 1985 to international FSS space stations that it licensed.<sup>119</sup> The two-degree orbital spacing policy promotes spectrum efficiency and maximizes opportunities for new entry.<sup>120</sup> In its 1997 *DISCO II Order*, the Commission decided, in light of the commitments made by the United States in the WTO, that technical requirements imposed on U.S. licensees must be applied to foreign-licensed systems seeking to service the United States in order to avoid unacceptable interference to U.S. systems and resulting service disruptions.<sup>121</sup> This process of seeking to fairly apply U.S. technical requirements to licensees that are not within our jurisdiction has been complex, requiring ongoing efforts to evolve our regulatory structure to meet the needs of the maturing international satellite community.

50. We therefore require U.S. earth stations seeking authority to operate with foreign satellites to demonstrate that those satellites' operations comply with the technical requirements of Part 25 applicable to U.S.-licensed satellites.<sup>122</sup> If an earth station applicant cannot make this demonstration, we require it to operate with the non-compliant foreign satellite on a non-harmful interference basis relative to future satellite networks serving the United States that are two-degree compliant.

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<sup>115</sup> Points of communication are all the satellites listed in an earth station license with which that station is authorized to communicate.

<sup>116</sup> Originally, “ALSAT” was an abbreviation for “all U.S.-licensed satellites.” The *DISCO II First Reconsideration Order* expanded “ALSAT” to include non-U.S.-licensed satellites that have completed the *DISCO II* analysis, one we have been requested to place those satellites on the Permitted List. See *DISCO II First Reconsideration Order*, 15 FCC Rcd at 7216 (para. 20).

<sup>117</sup> *DISCO II First Reconsideration Order*, 15 FCC Rcd at 7213 n.31.

<sup>118</sup> *Space Stations in the Domestic Fixed-Satellite Service and Related Revisions of Part 25 of the Rules and Regulations*, Report and Order, FCC 83-184, 48 FR 40233, 54 RR 2d (P&F) 577 (1983) (“*Two-degree Spacing decision*”).

<sup>119</sup> *Establishment of Satellite Systems Providing International Communications*, Report and Order, 101 FCC 2d 1046, 1048, 1167-1169 (1985) (“*Separate Systems decision*”). In 1996, the Commission adopted its *DISCO I decision*, allowing both domestic and international U.S.-licensed satellites to provide both domestic and international services. The result was that all U.S.-authorized FSS satellites, domestic and international, would be under a single regulatory regime – including two-degree spacing requirements. See *Amendment to the Commission’s Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems*, Report and Order, 11 FCC Rcd 2429 (1996) (“*DISCO I decision*”).

<sup>120</sup> *Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service*, Order and Authorizations, 11 FCC Rcd 13788, 13790 (para. 6) (Int’l Bur. 1996). Prior to the Commission’s adoption of the two-degree spacing policy, satellites in the geostationary satellite orbit were usually spaced three or four degrees apart. By adopting rules that enabled satellite operators to place their space stations two degrees apart, the Commission was able to accommodate more geostationary satellites.

<sup>121</sup> *DISCO II Order*, 12 FCC Rcd at 24161-24162.

<sup>122</sup> 47 C.F.R. § 25.137; *DISCO II Order*, 12 FCC Rcd at 24175.



51. In the *New Skies Market Access Order*, the Commission determined that the five New Skies satellites currently in operation do not meet several of the Part 25 technical requirements.<sup>123</sup> While NSS-K operates only in the Ku-band, and meets all applicable technical requirements for that band, the rest of New Skies' satellites operate in both the C- and Ku-bands. Specifically, none of the New Skies satellites meet the Commission's polarization requirements for the C-band.<sup>124</sup> In addition, New Skies' satellites typically do not meet the Commission's FM/TV frequency plan requirement, applicable to satellites operating in the conventional C-band.<sup>125</sup> Also, with the exception of NSS-K, none of the New Skies satellites operate on permitted C-band tracking, telemetry, and telecommand frequencies.<sup>126</sup> Further, NSS-513 does not comply with rules governing saturation flux density, polarization isolation, and stationkeeping in the C-band.<sup>127</sup> Nevertheless, based on a number of findings, including that there are no U.S. or foreign-licensed satellites serving the United States in the vicinity of the New Skies satellites that have not already been coordinated with the New Skies satellites prior to their transfer, the Commission waived these two-degree spacing requirements.<sup>128</sup>

52. The *New Skies Market Access Order* also required New Skies to either reach coordination agreements or operate its satellites on a non-harmful interference basis relative to U.S.-licensed satellites that comply with our two-degree spacing rules.<sup>129</sup> The Commission stated:

In the future, should the Commission authorize access to the U.S. market by a satellite that is two-degree spacing compliant, and is located as close as two-degrees from a New Skies satellite, New Skies would be expected to coordinate, in good faith, with the licensee of this satellite. If a coordination agreement is not reached, New Skies' operation must be on a non-interference basis relative to U.S. services being provided by the compliant satellite.<sup>130</sup>

For purposes of this Order, we refer to this requirement as the “non-harmful interference condition.”

#### (1) Waiver Standard and Comments

53. New Skies now requests that we grant a further waiver of the two-degree spacing policy for its four orbital locations outside the U.S. “domestic arc.” New Skies asks that the Commission grant a waiver for its existing non-CONUS orbital locations<sup>131</sup> (57° E.L., 183° E.L., 319.5° E.L., and 338.5° E.L.) and for its operating satellites at those locations and for an almost fully constructed

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<sup>123</sup> *New Skies Market Access Order*, 14 FCC Rcd at 13037-38 (paras. 75-76).

<sup>124</sup> *New Skies Market Access Order*, 14 FCC Rcd at 13037 (para. 76), citing Sections 25.210(a)(1) and (3) of the Commission's rules, 47 C.F.R. §§ 25.210(a)(1), (3).

<sup>125</sup> *New Skies Market Access Order*, 14 FCC Rcd at 13037 (para. 76), citing Section 25.211(a) of the Commission's rules, 47 C.F.R. § 25.211(a).

<sup>126</sup> *New Skies Market Access Order*, 14 FCC Rcd at 13037 (para. 76), citing Section 25.202(g) of the Commission's rules, 47 C.F.R. § 25.202(g).

<sup>127</sup> *New Skies Market Access Order*, 14 FCC Rcd at 13037-38 (para. 76), citing Sections 25.210(c), (i), and (j)(1) of the Commission's rules, 47 C.F.R. §§ 25.210(c), (i), (j)(1).

<sup>128</sup> *New Skies Market Access Order*, 14 FCC Rcd at 13038 (para. 77).

<sup>129</sup> *New Skies Market Access Order*, 14 FCC Rcd at 13038 (paras. 78-79).

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

<sup>131</sup> A non-CONUS orbital location is one that is unable to access all the area of the continental United States.

satellite to be launched in 2001.<sup>132</sup> Specifically, New Skies requests that we waive the requirement imposed in the *New Skies Market Access Order* that it provide service in the United States on a non-harmful interference basis relative to two-degree compliant satellite systems.<sup>133</sup> New Skies observes all its orbital locations are outside the traditional U.S. "domestic arc," and are non-CONUS orbital locations.<sup>134</sup> New Skies also asserts that the waiver it requests is similar to the waiver we granted to Intelsat LLC.

54. Under our rules, the Commission may grant a waiver where good cause is shown.<sup>135</sup> Good cause is demonstrated where special circumstances warrant a deviation from the general rule, such deviation serves the public interest, and a waiver would be consistent with the principles underlying the rule.<sup>136</sup> In reviewing the Commission's waiver rule, the United States Court of Appeals has stated that granting a waiver may be appropriate if: (1) special circumstances support a finding that strict adherence would not be in the public interest; and (2) a grant would not undermine the underlying policy objectives of the rule in question.<sup>137</sup> The Court further stated, that although "an agency may discharge its responsibilities by promulgating rules of general application which, in the overall perspective, establish the 'public interest' for a broad range of situations, [this] does not relieve it of an obligation to seek out the 'public interest' in particular, individualized cases."<sup>138</sup>

55. New Skies contends that a waiver is justified based on the same factors identified by the Commission in waiving the two-degree spacing policy for Intelsat LLC.<sup>139</sup> New Skies argues that the "special circumstances" that were considerations in granting Intelsat LLC's waiver are also present here because it inherited the satellites from INTELSAT. New Skies also states that the satellite now currently under construction is of necessity based on INTELSAT's technical design that is incompatible with two-degree spacing requirements.<sup>140</sup> New Skies maintains that granting it a waiver will not undermine the underlying policy objectives of the two-degree spacing rule, because, as with Intelsat LLC, its satellites are located outside of the traditional U.S. domestic arc where two-degree spacing is applied most effectively; there is limited prospect for creating additional orbital locations without relocating satellites; there would be no increase in interference

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<sup>132</sup> New Skies Petition at 20-24 and Consolidated Reply at 3-4; as clarified in Letter from William M. Wiltshire, Counsel for New Skies Satellites, N.V. to Secretary, FCC, dated January 22, 2001 (Wiltshire January 22 letter).

<sup>133</sup> New Skies Petition at 21.

<sup>134</sup> New Skies Petition at 22-23; Wiltshire January 22 letter at 1.

<sup>135</sup> 47 C.F.R. § 1.3 ("Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown"). *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969) ("*WAIT Radio*"). While we address New Skies' request as a petition for waiver, we could have treated it as a request to modify the licenses issued in the *New Skies Market Access Order*. A license modification request, pursuant to Section 316 of the Communications Act, may carry a less strict standard depending on the circumstances. In this case, we believe the action we take is also justified under the public interest standard for a license modification.

<sup>136</sup> *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1166 (D.C. Cir. 1990) (*Northeast Cellular*); *WAIT Radio*, 418 F. 2d at 1157. See also *Comsat Corporation, Petition for Partial Relief from the Current Regulatory Treatment of Comsat World Systems' Switched Voice, Private Line, and Video and Audio Services*, Order, 11 FCC Rcd 9622, 9625 (para. 10) (1996); *Petition of General Communications, Inc. for a Partial Waiver of the Bush Earth Station Policy*, Memorandum Opinion and Order, 11 FCC Rcd 2535, 2536 (para. 4) (Int'l Bur. 1996); *Dominion Video Satellite, Inc.*, Order and Authorization, 14 FCC Rcd 8182, 8185 (para. 5) (Int'l Bur., 1999) (*Dominion Video*).

<sup>137</sup> *WAIT Radio*, 418 F.2d at 1157.

<sup>138</sup> *Id.*

<sup>139</sup> New Skies Petition at 21-24; Consolidated Reply at 5-8.

<sup>140</sup> New Skies Petition at 23; Consolidated Reply at 7; Wiltshire January 22 letter.

concerns; and, complying with the two-degree spacing rule would result in substantial customer costs.<sup>141</sup> Additionally, New Skies states that it will design all future satellites at additional orbital locations serving the U.S. market to be two-degree spacing compliant.<sup>142</sup>

56. PanAmSat, GE Americom, and Loral contend that New Skies has failed to meet the standard for a waiver. They contend that: (1) New Skies fails to demonstrate how circumstances have changed since issuance of the *New Skies Market Access Order*;<sup>143</sup> (2) the Commission's issuance of a waiver to Intelsat LLC did not overrule its policy conditioning non-compliant satellites on operating on a non-harmful interference basis;<sup>144</sup> (3) New Skies fails to distinguish Commission decisions on conditioning other non-compliant foreign systems;<sup>145</sup> (4) granting New Skies a waiver based on the *Intelsat LLC Licensing Order* would undermine the two-degree spacing policy;<sup>146</sup> (5) it is irrelevant that New Skies would incur costs in complying with the Commission's two-degree spacing, or that its satellites are located outside the U.S. domestic arc and have been coordinated;<sup>147</sup> (6) New Skies has failed to show how it has been harmed during the period following our *New Skies Market Access Order* by the condition that it operate on a non-harmful interference basis with compliant satellites;<sup>148</sup> and (7) compliant satellite operators could be harmed by grant of a waiver to New Skies based on the *Intelsat LLC Licensing Order*, in terms of costs associated with designing and coordinating satellites adjacent to non-compliant satellites.<sup>149</sup> Additionally, GE Americom contends that, if the Commission wishes to revisit its two-degree spacing requirements, it should do so through a rulemaking and not selective application of them.<sup>150</sup> PanAmSat states that, if the Commission grants New Skies' waiver request, it should be careful not to suggest that New Skies will have any right or expectation with respect to new satellites or orbital locations.<sup>151</sup>

57. New Skies responds that changed circumstance is not a requirement for considering a waiver, rather the test is a demonstration of good cause.<sup>152</sup> It maintains that, in any event, the intervening Commission action in granting the Intelsat LLC waiver justifies revisiting the *New Skies Market Access Order*.<sup>153</sup> New Skies points out that decisions involved applications of U.S. earth station licensees to access New Skies satellites, that the Commission imposed technical conditions on its own motion, and that the Commission now has an opportunity to consider an actual request for a full waiver based on the record in this proceeding.<sup>154</sup> Additionally, New Skies contends that it does not have to wait until it is harmed to request a waiver and that the harm to Intelsat LLC foreseen by the Commission is the type feared by New Skies.<sup>155</sup> And, it argues that it suffers from a competitive disadvantage in the U.S. market as a result of the conditions currently imposed on it.<sup>156</sup>

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<sup>141</sup> New Skies Petition at 22-24 citing *Intelsat LLC Licensing Order*; Consolidated Reply at 6-7.

<sup>142</sup> New Skies Petition at 22.

<sup>143</sup> PanAmSat Partial Opposition at 4-5; GE Americom Partial Opposition at 4.

<sup>144</sup> PanAmSat Partial Opposition at 5-6; GE Americom Partial Opposition at 4.

<sup>145</sup> Loral Partial Opposition at 5.

<sup>146</sup> PanAmSat Partial Opposition at 6-7; GE Americom Partial Opposition at 7.

<sup>147</sup> PanAmSat Partial Opposition at 7-10; GE Americom Partial Opposition at 6.

<sup>148</sup> GE Americom Partial Opposition at 6; Loral Partial Opposition at 6.

<sup>149</sup> PanAmSat Partial Opposition at 9; GE Americom Partial Opposition at 8; Loral Partial Opposition at 2.

<sup>150</sup> GE Americom Partial Opposition at 7-8.

<sup>151</sup> PanAmSat Partial Opposition at 2 and 10-11.

<sup>152</sup> New Skies Consolidated Reply at 11-12.

<sup>153</sup> *Id.* at 12.

<sup>154</sup> *Id.* at 12-13.

<sup>155</sup> *Id.* at 13-14.

<sup>156</sup> *Id.* at 15.

58. PanAmSat and GE Americom emphasize that, unlike Intelsat LLC, New Skies will not be subject to direct Commission oversight as a U.S. licensee should future interference problems develop.<sup>157</sup> They argue that New Skies must be treated like other foreign satellite operators serving the United States whose satellites are not two-degree compliant and therefore are subject to non-harmful interference operation with two-degree orbit compliant satellites.<sup>158</sup> Not to do so, they maintain, will undermine well established Commission policy and disserve the public interest.<sup>159</sup>

## (2) Scope

59. The issue before us is whether to waive the condition currently imposed by our *New Skies Market Access Order* that operation by U.S. earth stations licensed to communicate with New Skies satellites shall reach coordination agreements or shall not cause harmful interference to future authorized U.S. services provided over U.S. licensed satellites or non-U.S. satellites that are compliant with the two-degree spacing rules.<sup>160</sup> In considering this issue, we will not, as New Skies initially requested in its petition, consider grant of a permanent waiver for each orbital location from which it currently provides service to the United States. We will consider any waiver only in the context of a per satellite basis applying the traditional waiver standard. This was the approach taken by the Commission in the Intelsat LLC decision last year.

60. The *New Skies Market Access Order* addressed only the five satellites in operation at that time. No earth station operators requested authority to communicate with NSS-7. Implicit in New Skies' pleadings is a request to provide service to the United States with NSS-7.<sup>161</sup> Accordingly, we have treated this as a petition for declaratory ruling to place NSS-7 on the Permitted Space Station List. The Satellite and Radiocommunication Division of the International Bureau (Division) has reviewed New Skies' request, and the technical information New Skies submitted regarding NSS-7. Concurrently with this Order, the Division is adopting an Order placing NSS-7 on the Permitted List, thereby authorizing U.S.-licensed earth stations to communicate with NSS-7.<sup>162</sup> In this Order, we consider New Skies' request to waive the non-harmful interference condition placed on currently operating New Skies satellites, imposed in the *New Skies Market Access Order*. The factors supporting New Skies' waiver request are also relevant to determining whether to apply the non-harmful interference condition to NSS-7. Accordingly, we address the NSS-7 non-harmful interference condition issue in this Order. For the reasons set forth below, we need not apply the non-harmful interference condition to NSS-7.

61. Although the *New Skies Market Access Order* treated the satellites in question on a satellite by satellite basis, we believe that it is appropriate at this time to consider the satellites by frequency bands as well. NSS-K operates only in the Ku-band, and meets all the Commission's technical requirements applicable to operations in that band, and the non-harmful interference condition therefore does not apply to NSS-K. Similarly, because NSS-803 and NSS-806 meet all the Commission's Ku-band technical requirements, waivers of the Commission's technical rules are

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<sup>157</sup> PanAmSat Response at 2 and 3-4; GE Americom at 4.

<sup>158</sup> PanAmSat at 5; GE Americom at 4.

<sup>159</sup> PanAmSat at 5-6; GE Americom at 6-8.

<sup>160</sup> *New Skies Market Access Order*, 14 FCC Rcd at 13040.

<sup>161</sup> See Wiltshire January 22 Letter at 2 (explaining that it designed NSS-7 to enable it to continue to provide service to U.S. customers).

<sup>162</sup> *New Skies Satellites N. V.*, Petition for Declaratory Ruling, , Order, DA 01-513 (Int'l Bur., Sat. and Rad. Div., released concurrently with this Order).

necessary only for these two satellites' C-band operations. Consequently, since no technical waivers are necessary for NSS-K, NSS-803, and NSS-806, when operating in the Ku-band, we determine that the non-harmful interference condition does not apply in these situations. However, because NSS-513 does not meet the Commission's two-degree spacing requirements for either the C-band or the Ku-band, the non-harmful interference condition applies to this satellite in both bands.<sup>163</sup>

62. In addition, none of the earth station authorizations affected by this Order currently communicate with NSS-703 located at 57° E.L.<sup>164</sup> Accordingly, we need not determine at this time whether New Skies has demonstrated good cause for a waiver of the non-harmful interference condition with respect to this satellite and conclude that New Skies' request to extend the license term to ten years is moot with respect to NSS-703.<sup>165</sup> In the event that a U.S.-licensed earth station capable of communicating with NSS-703 requests authority to do so, we will act upon such applications at that time based on the precedents established in this Order.

### (3) Special Circumstances

63. New Skies argues that the Commission's findings in the *Intelsat LLC Licensing Order* are applicable to the New Skies satellites and should be applied in the same way. In the *Intelsat* proceeding, the Commission granted Intelsat LLC licenses to: (1) operate 17 existing C-band and Ku-band satellites presently owned and operated by INTELSAT; (2) construct, launch and operate 10 satellites planned by INTELSAT for operation in these bands; and (3) relocate certain currently operating satellites to different orbital locations upon launch of planned satellites.<sup>166</sup> The Commission also waived certain technical rules in connection with the operation of these satellites, including our two-degree spacing requirement.<sup>167</sup> In waiving the two-degree spacing requirement for the satellites authorized, the Commission did not impose the condition that Intelsat LLC operate on a non-harmful interference basis with two-degree compliant satellites based on the circumstances concerning other administrations' satellites currently operating adjacent to INTELSAT satellites.<sup>168</sup> The licenses issued will be effective upon the successful privatization of INTELSAT, now scheduled for July 18, 2001.

64. The Commission's action with respect to Intelsat LLC entailed the authorization of an already operating satellite system owned and operated by an intergovernmental organization that had never been subject to a national licensing regime.<sup>169</sup> The Commission noted the historical and policy

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<sup>163</sup> NSS-513 does not meet the requirements of Sections 25.202(g), 25.210(a)(1), 25.210(a)(3), 25.210(c), 25.210(i), 25.210(j)(1), and 25.211(a) of the Commission's rules, 47 C.F.R. §§ 25.202(g), 25.210(a)(1), 25.210(a)(3), 25.210(c), 25.210(i), 25.210(j)(1), 25.211(a).

<sup>164</sup> It is unlikely that any U.S. earth stations could access NSS-703 at 57° E.L. because the satellite is below the horizon at Guam, the closest U.S. soil to the 57° E.L. orbital position. It is conceivable, however, that a U.S.-registered oil drilling or research platform could seek access to NSS-703 if it were operating within the satellite's service area.

<sup>165</sup> In the *New Skies Market Access Order*, the Commission granted 136 earth station license applications and modification applications. Only one of those 136 applications, filed by Communications Satellite Systems, Inc. requested authority to communicate with NSS-703 at 57° E.L. Subsequently, this earth station operator informed us that, in practice, it does not communicate with NSS-703. Letter from Dori Schmitz, General Manager, Satellite Communications Systems, Inc., to Steven Spaeth, Attorney-Advisor, FCC, dated February 20, 2001. It therefore does not need this authority.

<sup>166</sup> *Intelsat LLC Licensing Order*, 15 FCC Rcd at 15517-18.

<sup>167</sup> *Id.* at 15518 and 15493-98.

<sup>168</sup> *Id.* at 15497.

<sup>169</sup> *Id.* at 15486-89.

reasons why the design and technical parameters of the INTELSAT system were different from U.S.-authorized systems.<sup>170</sup> INTELSAT was established largely with the support and participation of the U.S. government in order to carry out the U.S. policy goals of the Satellite Act.<sup>171</sup> The creation, development, implementation, and operation of the INTELSAT system was subject to U.S. government oversight, including Commission authorization of Comsat participation in the procurement of satellites and provision of services.<sup>172</sup> The Commission concluded that this “particular individualized” situation surrounding creation of the INTELSAT global system – including the fact that the basic design characteristics of INTELSAT satellites predated the adoption of most of the U.S. technical rules – supported a finding of special circumstances sufficient to warrant the waiver of some of our technical rules.<sup>173</sup>

65. New Skies was created as a first step toward complete privatization of INTELSAT. It was intended to be a separate, spin-off company free from the institutional and organizational constraints that INTELSAT was experiencing as an intergovernmental organization in responding to competition from private companies, but not having the attributes of an intergovernmental organization that gave INTELSAT advantages over its competitors.<sup>174</sup> In international negotiations, the United States supported New Skies' creation as a step toward full privatization.<sup>175</sup> New Skies thus inherited operating satellites and associated frequency assignments and orbital locations from INTELSAT with existing customers on those satellites and contractual commitments to continue services.<sup>176</sup> Having been part of the INTELSAT global system, the satellites transferred to New Skies had the same basic design and technical parameters. INTELSAT's use of the satellites orbital locations transferred to New Skies had not been subject to technical rules applied by either this Commission or any regulatory authority from another administration. Thus, having been designed and developed based on the same historical considerations and for the same policy objectives that the Commission found to be special circumstances with respect to Intelsat LLC, we find that the same special circumstances also apply to New Skies' currently operating satellites.

66. We also find these special circumstances apply to the NSS-7 satellite currently under construction to be launched in the near future. New Skies states that it needed to begin construction immediately of a new hybrid C-band and Ku-band satellite to replace the old satellites NSS-513 (in inclined orbit) located at 183° E.L. and NSS-K located at 338.5° E.L.<sup>177</sup> The NSS-803 will be relocated to 183° E.L. to replace NSS-513 and the NSS-7 will be located at 338.5° E.L. (21.5° W.L.). New Skies states that it had no option but to design NSS-7 in the manner that would allow it to continue to serve a large existing customer base that already accessed the inherited satellite at that location.<sup>178</sup> We agree that NSS-7 should receive the same considerations as the currently operating satellites that New Skies inherited from INTELSAT. Treating NSS-7 in this manner is consistent with our treatment of INTELSAT planned satellites in our *Intelsat LLC Licensing Order*. There the Commission found special circumstances with respect to satellites being developed by INTELSAT to continue to provide continued service to INTELSAT's customer base.<sup>179</sup>

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<sup>170</sup> *Id.* at 15486.

<sup>171</sup> *Id.* at 15486-89.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *New Skies Market Access Order*, 14 FCC Rcd at 13006 and 13012.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 13004.

<sup>177</sup> Wiltshire January 22 letter at 2.

<sup>178</sup> Wiltshire January 22 letter at 2.

<sup>179</sup> *Intelsat LLC Licensing Order*, 15 FCC Rcd 15490-92.

67. We disagree with PanAmSat, GE Americom and Loral that this limited finding of special circumstances in any way creates a precedent by which other foreign satellite operators can claim a basis for a waiver. Our finding of special circumstances applies only to satellites constructed by INTELSAT and to NSS-7. No other foreign satellite operator can claim its satellites have such origin. We do not anticipate INTELSAT heritage considerations to apply to future New Skies satellites regardless of the orbital location. In our *Intelsat LLC Licensing Order*, the Commission anticipated that Intelsat LLC would transition over time toward a system that complies with the technical rules upon which other U.S. systems operate.<sup>180</sup> The Commission also indicated that it planned to review our technical rules to consider whether the changes are needed, particularly in light of our actions licensing Intelsat LLC.<sup>181</sup> The Commission said that this review could present an opportunity to effect changes in our rules to accommodate differently designed satellite systems and to assure more flexibility for U.S. licensees to develop future systems to compete with each other and foreign competitors.<sup>182</sup> New Skies will have the opportunity to participate in that proceeding.

#### (4) Underlying Principles

68. In granting Intelsat LLC a waiver of our two-degree spacing policy, the Commission concluded that: (1) two-degree spacing normally can be applied most effectively among U.S. satellites such as those located in the traditional U.S. “domestic arc”; (2) INTELSAT existing and planned satellites are located outside the traditional U.S. domestic arc; (3) the prospect of creating additional orbital locations by applying two-degree spacing to Intelsat LLC is limited; and (4) waiver of the two-degree spacing rule would not materially undermine our ability to maintain a reasonable level of efficiency – that is, maximizing the number of satellites in the geostationary satellite orbital arc without unduly increasing interference.<sup>183</sup> The Commission also found that a waiver would not increase interference with respect to currently operational and planned INTELSAT satellites at the relevant orbital locations, including subsequent reassignments of certain INTELSAT satellites.<sup>184</sup> In addition, requiring Intelsat LLC to comply with the two-degree spacing requirement would entail customer costs and service disruptions associated with repointing or replacement of antennas operating with each satellite.<sup>185</sup>

69. The Commission also determined that Intelsat LLC would not be required to operate on a non-harmful interference basis with future two-degree compliant satellites. The Commission noted that this policy had not previously been applied to INTELSAT satellites providing service in the United States, and that the potential for service disruptions to U.S. customers resulting from its applications would outweigh any benefits.<sup>186</sup> The Commission concluded that any concern about harmful interference from the satellites that it licensed in that proceeding was misplaced.<sup>187</sup>

70. We are able to draw similar conclusions in this proceeding with respect to each of the currently operating New Skies satellites that are being authorized to serve the United States:

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<sup>180</sup> *Id.* at 15493.

<sup>181</sup> *Intelsat LLC Licensing Reconsideration Order*, at ¶ 25.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Intelsat LLC Licensing Order*, 15 FCC Rcd at 15494-95.

<sup>186</sup> *Id.* at 15497-98; *Intelsat LLC Licensing Reconsideration Order* at ¶ 35-36.

<sup>187</sup> *Intelsat LLC Licensing Reconsideration Order* at ¶ 35.

- (1) NSS-513 at 183° E.L.: NSS-513 is fully coordinated with U.S. licensed satellites. There is little likelihood that a two-degree compliant satellite would be located nearby. Two-degree spacing at this location would require re-coordination of U.S. and non-U.S. satellites requiring agreement of several administrations.
- (2) NSS-803 at 338.5° E.L.: NSS-803 is fully coordinated with U.S. licensed satellites. There is little likelihood of a two-degree compliant satellite located nearby. Two-degree spacing could be achieved only by movement of an INTELSAT and a non-U.S. satellite, requiring international re-coordination agreements among other administrations.
- (3) NSS-806 at 319.5° E.L.: NSS-806 is coordinated with U.S. licensed satellites. As with other NSS orbital locations, two-degree spacing could only be achieved by movement of U.S. and non-U.S. satellites – an unlikely possibility given the necessary international coordination.
- (4) NSS-7 has not been coordinated with U.S. licensed satellites. But, because NSS-7 will be located at 338.5° E.L., achieving two-degree spacing is unlikely for the same reasons discussed above.

71. The fact that New Skies' operating satellites are fully coordinated and have been providing services to the United States for a number of years, either as New Skies satellites, or formerly as INTELSAT satellites, supports a conclusion that continued operation is not likely to result in harmful interference. As for NSS-7, we will require that New Skies complete full coordination with U.S. licensees before any waiver with respect to NSS-7 is effective. Additionally, as discussed above, all of New Skies' satellites are located outside the U.S. "domestic arc" at locations where two-degree spacing of satellites cannot be achieved without relocation of other satellites not under Commission jurisdiction. Such relocation, if obtainable, would entail added costs and service disruptions to customers as a result of earth station re-pointing.<sup>188</sup> In fact, U.S. licensed satellites outside the domestic arc often operate with earth stations that are not two-degree compliant.<sup>189</sup> However, all U.S.-licensed satellite operators, both within and outside the "domestic arc," must coordinate their operations using non-two-degree compliant earth stations with other potentially affected satellite systems on an individual, earth-station-by-earth-station basis. As a result, we can conclude that granting New Skies the requested waiver will not result in loss of opportunities for new entry – another purpose of our two-degree spacing policy.

72. Finally, we find that the argument of PanAmSat, GE Americom and Loral that U.S. licensees will incur added costs if we grant New Skies a waiver is misplaced. New Skies is seeking waiver

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<sup>188</sup> See D'Uva February 14 letter.

<sup>189</sup> For example, the PanAmSat operational satellites PAS-2R and PAS-8B at 317° E.L. (2.5° from the NSS-806 at 319.5° E.L.) are the U.S. licensed satellites most closely spaced with any of the New Skies satellites subject of this Order. Coordination of the NSS-806, NSS-K, NSS-803, and NSS-513 with U.S. licensed satellites was effected prior to the transfer of these satellites from INTELSAT to New Skies. As we noted in the *Intelsat LLC Licensing Order*, the size of the smallest earth station antennas in either of the two satellite networks being coordinated is the most significant factor leading to a need for spacing greater than two degrees. *Intelsat LLC Licensing Order*, 15 FCC Rcd at 15496-97. Whereas we do not routinely license antennas with diameters smaller than 4.5 meters in diameter operating in the C-band or 1.2 meters in diameter operating in the Ku-band for services on U.S. territory, we do not control the size of antennas that may access either U.S. or non-U.S. licensed satellites from foreign points. This is a factor in satellite coordination, especially outside the U.S. domestic arc. The re-coordination that would be required if closer spacing were desired would still need to address earth station antenna size considerations.



of the non-harmful interference condition currently imposed upon operation of earth stations that access its satellites in the United States and its territories. Those are satellites that have served the U.S. for a number of years and a replacement satellite that will continue services to New Skies customers. Nothing in this Order affects any coordination agreement between New Skies and any other satellite operator. Moreover, the effective date of any waivers must be conditioned on New Skies' continued compliance with its coordination agreements. Grant of the requested waiver will therefore not affect the current operating satellites of PanAmSat, GE Americom or Loral. We therefore find no basis on the record to conclude that a waiver limited to the satellites identified above would directly result in U.S. licensees incurring future design and coordination costs with respect to any U.S.-licensed satellite currently in operation.

73. We recognize that there is a possibility of adjacent satellite systems incurring some additional costs as a result of the elimination of the non-harmful interference condition that we adopt in this Order, at the time that the current U.S.-licensed satellites are replaced. There is no information in the record to quantify these costs, and so we cannot conclude that these costs negate the factors supporting the waiver of the non-harmful interference condition. Furthermore, as explained further below, waiver of the non-harmful interference condition can only take effect if New Skies chooses to undertake certain commitments comparable to those undertaken by U.S. licensees to prevent interference problems. Those commitments should alleviate concerns about the possibility of added costs to future replacement satellites.

(5) Commitment from New Skies

74. The analysis thus far has found that New Skies is in the same technical position that Intelsat LLC was in when the Commission granted it waivers of our two-degree spacing policy. Notwithstanding our findings above, there is one more factor to be weighed to assure that our two-degree spacing policy is not undermined. The Commission noted in the *Intelsat LLC Licensing Order* that considering such a waiver request from a non-U.S. licensee would require us also to weigh the lack of direct jurisdiction over the satellites involved.<sup>190</sup> Furthermore, in the *DISCO II Order*, the Commission determined that spectrum availability and technical requirements would be considerations in allowing non-U.S. licensed satellites to serve the United States pursuant to WTO commitments.<sup>191</sup> The Commission also explained that it would consider spectrum availability as a factor in determining whether allowing a non-U.S.-licensed satellite to serve the U.S. market is in the public interest.<sup>192</sup> In particular, we noted that there could be cases in which granting an earth station operator authority to communicate with a non-U.S.-licensed satellite would create harmful interference problems, or create a heavy burden on U.S.-licensed satellite systems by requiring them to alter their operations significantly.<sup>193</sup> In those cases, we stated that we would impose technical constraints on the foreign system's operations in the United States, or where such measures would be insufficient to remedy the technical problem, deny the request.<sup>194</sup>

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<sup>190</sup> *Intelsat LLC Licensing Order*, 15 FCC Rcd at 15489-90.

<sup>191</sup> In the World Trade Organization Agreement on Basic Telecommunications Services, the U.S. committed to allow service providers from WTO member countries to provide a broad range of basic telecommunications services, including satellite services, in the United States. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 2 (GATT Secretariat 1994), 33 I.L.M. 1125 (1994). The *DISCO II Order* revised FCC rules so that they are consistent with U.S. obligations with respect to satellite services.

<sup>192</sup> *DISCO II*, 12 FCC Rcd at 24158.

<sup>193</sup> *DISCO II*, 12 FCC Rcd at 24159.

<sup>194</sup> *DISCO II*, 12 FCC Rcd at 24159.

75. Our concern with New Skies' status as a non-U.S. licensed system is two-fold. First, while Intelsat LLC, as a U.S. licensee, will participate in a relatively informal coordination process with other U.S. licensees, any coordination with New Skies, which is not a U.S. licensee, will take place pursuant to the more formal, potentially more protracted procedures between the United States and the Netherlands Administrations.<sup>195</sup> Second, as a U.S. licensee, Intelsat LLC will no longer maintain its ITU filing date "priorities" for its satellites vis-à-vis U.S.-licensed satellites. As part of the informal negotiation process, Intelsat LLC will be expected to coordinate with U.S. licensees in good faith notwithstanding ITU filing date priorities. New Skies, however, as a non-U.S. licensee, may assert its ITU priorities as part of the ITU coordination process. As a result, it will have an advantage over U.S. licensees that must comply with the Commission's two-degree spacing policy. Simply lifting the non-harmful interference condition that we place on earth stations that wish to access any non-U.S. licensees that are not two-degree compliant would give New Skies a discriminatory advantage compared to U.S. licensees and would therefore undermine our legitimate domestic policy objectives aimed at preventing interference and subsequent harm to the public interest.

76. Our current policy of requiring earth stations accessing non-two-degree compliant foreign licensees to not interfere with U.S. systems allows us to treat foreign space stations in a non-discriminatory manner, taking into account the fact that the ITU filing process and coordinating requirements leave the establishment of guidelines for national spectrum management policies to the ITU Member States. We could grant New Skies' request to waive the non-harmful interference condition only if New Skies committed to placing itself in a position that is no better than U.S. operators in coordination negotiations. New Skies might therefore have to commit not to claim priorities against U.S. licensees, in the unlikely event that the Commission authorize a U.S. satellite that is providing services that are two-degree compliant that requires coordination with a non-compliant New Skies satellite.

77. U.S. licensees are required to respect our two-degree requirement. There is no coordination requirement between U.S. licensees when the services are provided over two-degree compliant satellites and routinely-licensed earth stations ("compliant services"). We license non-compliant services only when they protect or are coordinated with compliant U.S.-services over U.S.-licensed or non-U.S. licensed satellites serving the U.S. market. Coordination between two non-compliant services over U.S.-licensed satellites is accomplished between the operators on an equal basis regardless of which one is or was implemented first or which satellite may have an earlier filing at the ITU. One way in which a similar approach could be achieved for U.S. services over New Skies satellites would be if the following conditions were met: (1) U.S. services over New Skies satellites protect compliant U.S. services over current and future U.S.-licensed or non-U.S. licensed satellites spaced two degrees or more from New Skies satellites, and (2) New Skies coordinates its U.S. services with non-compliant U.S. services over current and future U.S.-licensed or non-U.S. licensed satellites serving the U.S. market spaced two degrees or more from New Skies satellites on an equal basis.

78. Thus, we could waive the non-harmful interference condition currently placed on New Skies' satellites if New Skies undertakes the following commitments with respect to U.S. services over satellite networks filed by the Netherlands at the ITU for the satellites subject of this Order: (1) two-degree-compliant U.S. services over current and future U.S.-licensed or non-U.S.-licensed satellites serving the U.S. market spaced two degrees or more from the New Skies satellites are assumed to be fully coordinated, and (2) non-compliant U.S. services over current or future U.S.-licensed or non-U.S.-licensed satellites serving the U.S. market spaced two degrees or more from

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<sup>195</sup> *Intelsat LLC Licensing Order*, 15 FCC Rcd at 15489-90.

the New Skies satellites will be coordinated on an equal basis irrespective of the relative dates of receipt of the coordination at the ITU. In this way, New Skies would not be subject to the non-harmful interference conditions but New Skies will not have any unfair advantages in coordination over U.S. licensees or be able to undermine the Commission's legitimate domestic policies preventing interference by virtue of resulting from being subject to a foreign licensing administration. Because the Netherlands is the sovereign administration responsible for New Skies, any such commitment by New Skies would also need the concurrence of the Netherlands Administration. We recognize that the Netherlands Administration is under no obligation under ITU procedures to give its concurrence. However, we cannot grant a waiver unless the above conditions are fulfilled.

(6) Conclusion

79. We find that a waiver of the non-harmful interference condition we placed on operations with New Skies satellites is only warranted if New Skies acts on a comparable basis in coordinations with other U.S. licensees. We conclude that New Skies faces many of the same special circumstances that we found warranted granting a waiver to Intelsat LLC. In addition, because New Skies acquired its satellites from INTELSAT, and those satellites are based on the same design as the satellites considered in the *Intelsat LLC Licensing Order*, there is precedent for finding that a waiver would not undermine the Commission's rules. However, a problem arises in that New Skies, as a foreign licensee, might have certain fundamental advantages in coordinations with U.S. licensees that other U.S. licensees would not. Specifically, New Skies is not required to protect two-degree compliant satellites and retains any ITU filing date priority with regard to U.S. licensees. We therefore find that granting New Skies a waiver will not undermine the Commission's rules provided that New Skies takes on commitments regarding coordinations similar to those assumed by U.S. licensees.

80. Consequently, we conclude, for the reasons discussed above, that if New Skies is willing to put itself in a comparable position to U.S. licensees with regard to coordination, there is good cause for a waiver of the non-harmful interference condition with respect to NSS-513, and the C-band operations of NSS-803, and NSS-806. We further conclude that this waiver is limited to these currently operating satellites authorized to service the United States from the following orbital locations: (1) 183° E.L. (NSS 513); (2) 338.5° E.L. (NSS 803); and (3) 319.5° E.L. (NSS 806); and to the New Skies NSS-7 satellite currently under construction to be located at 338.5° E.L. The waiver also covers the relocation of NSS-803 at 183° E.L. upon the launch of NSS-7. The waiver would not extend to any future New Skies satellites other than NSS-7 that may be located at these orbital locations. The record before us provides no basis for assuming that New Skies will not be able to replace its satellites with satellites that meet the Commission's two-degree spacing technical requirements.

## V. ORDERING CLAUSES

81. Accordingly, IT IS ORDERED, pursuant to Section 5(d) of the Administrative Procedure Act, 5 U.S.C. § 554(e), and Section 1.2 of the Commission's Rules and Regulations, 47 C.F.R. § 1.2, that New Skies Satellites N.V.'s Petition for Declaratory Ruling is GRANTED, and, it is determined that: (1) New Skies' privatization is consistent with the criteria specified in Sections 621 and 623 of the Open-Market Reorganization for the Betterment of International Telecommunications Act (the "ORBIT Act"), Pub. L. 106-180, §§ 621 and 623; and (2) the use of space segment operated by New Skies for services to, from, or within the United States will not

harm competition in the telecommunications market of the United States as contemplated by Section 601(a) of the ORBIT Act, Pub. L. 106-180, § 601;

82. IT IS FURTHER ORDERED, pursuant to Section 316(a)(1) of the Communications Act of 1934, 5 U.S.C. § 316(a)(1), that U.S. earth stations licensed to operate with New Skies satellites shall be modified to extend the terms of the licenses to full ten year terms for the provision of Fixed Satellite Services (FSS), excluding FSS direct-to-home services. The individual license terms shall be consistent with the original date the license was granted;

83. IT IS FURTHER ORDERED, pursuant to Section 316(a)(1) of the Communications Act of 1934, 47 U.S.C. § 316(a)(1), that U.S. earth stations licensed to operate with New Skies satellites are modified to remove the non-harmful interference condition adopted in the *New Skies Market Access Order* for C-band operations with respect to New Skies satellites: (1) NSS-513 at 183° E.L.; (2) NSS-803 at 338.5° E.L.; (3) NSS-806 at 319.5° E.L.; and (4) NSS-803 at 183° E.L. (at such time as that satellite replaces NSS-513 at that location) and for Ku-band operations on NSS-513 at 183° E.L. This waiver shall take effect only if New Skies undertakes the following commitments with respect to U.S. services over satellite networks filed by the Netherlands at the ITU for the satellites subject of this Order: (1) compliant U.S. services over U.S.-licensed or non-U.S.-licensed satellites serving the U.S. market spaced two degrees or more from the satellites of the Netherlands are assumed to be fully coordinated, and (2) non-compliant U.S. services over U.S.-licensed or non-U.S.-licensed satellites serving the U.S. market spaced two degrees or more from the satellites of the Netherlands will be coordinated on an equal basis irrespective of the relative dates of receipt of the coordination requests at the ITU for the relevant satellite networks. In addition, the termination of this condition would not take effect until the Commission has received the concurrence of the Netherlands Administration;

84. IT IS FURTHER ORDERED, pursuant to Section 316(a)(1) of the Communications Act of 1934, 47 U.S.C. § 316(a)(1), that U.S. earth stations licensed in the future to operate with NSS-7, to be located at 338.5° E.L. will not be required to do so on a non-harmful interference basis, provided that New Skies initiates and completes the advance publication, international coordination, and notification process of this space station in accordance with the International Telecommunication Union (ITU) Radio Regulations, in addition to meeting the conditions placed on the waiver granted to New Skies in this Order with respect to NSS-513, NSS-803, and NSS-806;

85. IT IS FURTHER ORDERED that the conditions imposed in the *New Skies Market Access Order*, 14 FCC Rcd 13003, 13040 (1999) at paragraphs 90, 91 and 92 are TERMINATED subject to the conditions set forth in this Order above;

86. IT IS FURTHER ORDERED that access to New Skies satellites by U.S.-licensed earth station operators shall be in compliance with satellite coordination agreements reached between the United States and INTELSAT and transferred to New Skies regarding operations of NSS 513, NSS-803, NSS K and NSS-806;

87. IT IS FURTHER ORDERED that New Skies shall report to the Commission within 30 days of release of this Order progress on novating current assigned contracts and leaseback arrangements in anticipation of INTELSAT's privatization, and report on the results of negotiations 15 days following the date of INTELSAT's privatization;

88. IT IS FURTHER ORDERED that the reporting requirements imposed in paragraph 87 of the *New Skies Market Access Order*, 14 FCC Rcd at 13039-40 are TERMINATED;

89. IT IS FURTHER ORDERED that, subject to Section 648 of the ORBIT Act, New Skies shall not acquire or enjoy the exclusive right of handling telecommunications to or from the United States, its territories or possessions, and any other country or territory, by reason of any concession, contract, understanding or working arrangement to which the satellite operator or any persons or companies controlling or controlled by the operator or parties;

90. IT IS FURTHER ORDERED that the partial oppositions filed by PanAmSat Corporation, GE American Communications, Inc. and Loral Space and Communications Ltd. are GRANTED to the extent that we limit the non-harmful interference condition granted to New Skies to the satellites specified above to be operated at the identified orbital locations and specific frequency assignments and are DENIED in all other respects;

91. IT IS FURTHER ORDERED that New Skies Satellites, N.V. petition for waiver is DISMISSED AS MOOT without prejudice, with respect to NSS-703 at 57° E.L.

92. IT IS FURTHER ORDERED that this authorization is effective upon adoption. Petitions for Reconsideration, pursuant to Section 1.106 of the Commission's Rules, may be filed within 30 days of the public notice of this Order. 47 C.F.R. § 1.106. This grant is also subject to Section 1.110 of the Commission's Rules. 47 C.F.R. § 1.110.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary